

**Trade Challenges of LDC Graduation: Evidence from Bangladesh's Garment and
Pharmaceutical Industries**

by

Md Rezaul Karim

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Abstract

This thesis examines the impact of graduation on least-developed countries (LDCs) export through two case studies on the clothing and pharmaceutical industries of Bangladesh.

The special and differential treatment (SDT) provisions, as gradually developed in the world trade system, aim to support developing countries, especially LDCs, in their efforts to use trade as a tool for development. But there are concerns regarding the effectiveness of SDT measures in promoting trade and development in LDCs, as well as the potential disruptions resulting from the withdrawal of those benefits upon graduation.

The research has used a qualitative methodology that combines the more traditional analysis of legal materials and secondary sources with in-depth interviews to complement the findings. The case study approach is utilised to understand the issues comprehensively and investigate the effectiveness of SDT provisions and the impact of their withdrawal.

Findings show that the selected Bangladeshi industries obtained significant advantages from LDC-specific SDT measures. Accordingly, withdrawing such benefits risks substantially impacting the performance of the sectors.

Since a record number of LDCs are currently in the graduation phases, these findings may help graduating LDCs, their trade partners and the WTO to create a well-designed graduation support system to avoid disruptions in development and ensure sustainable graduation.

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List of Acronyms

A

ACP-EU: African, Caribbean, and Pacific-European Union Partnership
AfT: Aid for Trade
AGOA: The Africa Growth and Opportunity Act (USA)
API: Active Pharmaceutical Ingredients
APTA: Asia-Pacific Trade Agreement
ASTP: Australian System of Tariff Preferences
ASYCUDA: Automated System for Customs Data
ATC: Agreement on Textiles and Clothing
ATPA: Asia Pacific Trade Agreement

B

BE: Bioequivalence
BIT: Bilateral Investment Treaty
BWF: Bonded Warehouse Facilities

C

CDP: UN Committee for Development Policy
CEPA: Comprehensive Economic Cooperation Agreement
CGPT: Canadian General Preferential Tariff
CMT: Cut, Make, Trim.
CPTPP: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CROs: Contract Research Organisations
CTD: WTO Committee on Trade and Development
CTH—Change in Tariff Heading.

D

D8: Group of Eight Developing Countries
DCs: Developing Countries
DCO: Drugs (Control) Ordinance
DCTS: Developing Countries Trading Scheme (UK)
DDA: Doha Development Agenda
DFQF-Duty-Free Quota-Free
DFTP—Duty-Free Tariff Preference
DPoA: Doha Programme of Action 2022
DSB: Dispute Settlement Body (WTO)
DSU: Dispute Settlement Understanding (WTO)
DTIS: Diagnostic Trade Integration Studies

E

EBA: Everything But Arms (EU)
EDF: Export Development Fund (Bangladesh)
EIF: The Enhanced Integrated Framework

EPZ: Export Processing Zones
EU: European Union
EVI-Economic & Environmental Vulnerability Index

F

FDI: Foreign Direct Investment
FFAF: Trade Facilitation Agreement Facility
FTA: Free Trade Agreement
FY: Financial Year

G

GATS: General Agreement on Trade and Services
GATT: General Agreement on Tariffs and Trade
GDP: Gross Domestic Product
GNI: Gross National Income
GSP: Generalised Scheme of Preferences
GVC: Global Value Chain

H

HAI-Human Assets Index
HDI: Human Development Index
HS: Harmonised System

I

IDA: International Development Association
iGRAD: Sustainable Graduation Support Facility
ISDS: Investor-State Dispute Settlement
IP: Intellectual Property
IPoA: Istanbul Programme of Action 2011
IPR: Intellectual Property Right
ISM: International Support Measures
ITO: International Trade Organization

J

JBCCI: Japan-Bangladesh Chamber of Commerce and Industries
JETRO: Japan External Trade Organization

K

KORUS: United States-Korea Free Trade Agreement

L

L/C: Letters of Credit
LIC: Low-Income Countries
LMIC: Low and middle-income countries
LPI: Logistics Performance Index
LTA: Long-Term Arrangement, 1962

M

MFA: Multifibre Arrangement 1974

MFN: Most-Favoured-Nation

MNC: Multi-National Companies

MTS: Multilateral Trading System

N

NDP: National Drug Policy

O

ODA: Official Development Assistance

ODC: Other Developing Countries

ODM: Original Design Manufacturing

OECD DAC: OECD Development Assistance Committee

OECD: Organization for Economic Cooperation and Development

OEM: Original Equipment Manufacturing

OHRLS: The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States

P

PTA: Preferential Trade Agreements; Preferential Trade Arrangements

R

R&D: Research and Development

RC–Regional Cumulation

RMG: Ready-Made Garments

RoO: Rules of Origin

RTA: Regional Trade Agreements

S

SAARC: South Asian Association for Regional Cooperation

SAFTA: The South Asian Free Trade Area

SCM: Subsidies and Countervailing Measures

SDG: Sustainable Development Goals

SDT: Special and Differential Treatment

SEZ: Special Economic Zone

SME: Small and Medium-sized Enterprises

SPS: Sanitary and Phytosanitary Measures

STA: Short-Term Arrangement, 1961

STS: Smooth Transition Strategies

T

TBT: Technical Barriers to Trade

TFA: Trade Facilitation Agreement

TRIMS: The Agreement on Trade-Related Investment Measures

TRIPS: Trade-Related Aspects of Intellectual Property Rights

U

UN: United Nations

UNCDP: United Nations Committee on Development Policy

UNCTAD: The United Nations Conference on Trade and Development

UNGA: United Nations General Assembly

US: United States

USD: United States Dollar

USITC: The United States International Trade Commission

UTPP: Unilateral Trade Preference Programme

V

VA–Value Addition

W

WIPO: World Intellectual Property

WTO: World Trade Organization

Part I:
An Analysis of Special and Differential Treatment (SDT) and LDC Graduation

CHAPTER 1: INTRODUCTION TO THE THESIS

1.1 Prologue

This thesis examines the graduation of least developed countries (LDC) and its impact on their export based on two case studies from Bangladesh.

The integration of the global economy, particularly through international trade, has benefitted countries remarkably. However, the fact remains that international trade has not significantly improved the development challenges faced by many developing countries (DCs). Increasingly, the difficulty has been ensuring that international trade supports development and lifts these countries from poverty.¹ Even though this has formed the core of debates on the reform of the current global trade governance system, there is still dissatisfaction with how the multilateral trading system (MTS) handles development concerns and the broader issues of sustainable development.²

The World Trade Organization (WTO)'s principle for special and differential treatment (SDT) for developing and least developed countries is the system's response to their dissatisfaction³ with efforts to improve the trading prospects of DCs and ensure that the least-developed among them receive a proportional share in world trade growth.⁴ SDT recognises unequal playing fields between developed and developing countries due to their vastly different economic, financial, and technological development stages and their vastly different capacities in assuming multilateral commitments and obligations.⁵ The development debate in the MTS has evolved gradually. The decolonisation and subsequent pluralisation of international politics in the 1960s and 1970s allowed for the incorporation of developmental concerns in multilateral trade negotiations.⁶ International organizations increased their efforts to involve low-income countries in the international development and trade mechanisms and support their developmental needs.

In recognition of the severe challenges certain countries face in their development processes due to structural, historical, and other factors, the United Nations (UN) established the LDC

¹ Carlos Gradín and others (eds), *Inequality in the Developing World* (Oxford University Press 2021).

² Marco Bronckers, 'Trade Conflicts: Whither the WTO?' (2020) 47 *Legal Issues of Economic Integration*; Bernard M Hoekman, 'Urgent and Important: Improving WTO Performance by Revisiting Working Practices' (2019) 53 *Journal of World Trade*.

³ Thirukodikaval N Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future* (Routledge 2019); Regis Y Simo, 'Developing Countries and Special and Differential Treatment' in K Kugler and F Sucker (eds), *International Economic Law: (Southern) African Perspectives and Priorities* (Juta 2021).

⁴ WTO, 'Doha Ministerial Declaration, Adopted on 14 November 2001' WT/MIN(01)/DEC/1 20 November 2001; Vineet Hegde and Jan Wouters, 'Special and Differential Treatment Under the World Trade Organization: A Legal Typology' (2021) 24 *Journal of International Economic Law* 551.

⁵ WTO, 'Note by the Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions' WT/COMTD/W/77, 25 October 2000 3.

⁶ Nicolas Lamp, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 *Journal of International Economic Law* 743.

category in 1971. LDCs are at a heightened risk of continued poverty and underdevelopment.⁷ The international community recognised that the LDCs required special support to pursue their development objectives and accelerate their growth. So, international support measures (ISM) provide LDCs with more preferential treatment compared to other developed countries (ODCs) to assist them in escaping the trap of underdevelopment, overcoming their predominant development challenges, and embarking on a path of sustainable growth and development. They receive ISMs in trade, development cooperation, and participation in the UN and other international processes. Trade-related ISMs for LDCs include preferential market access for goods and services, special treatment in the WTO, and bilateral trade agreements.

The SDT provisions are intended to facilitate the integration of these countries with the MTS and provide them with the flexibility to pursue trade policies appropriate for them. SDT has been pivotal to the General Agreement on Tariffs and Trade (GATT) and WTO's efforts to integrate them into the MTS. The central theme is that countries with lower levels of development should be granted greater flexibility (or 'policy space') to protect their domestic markets and promote growth through greater access to export markets in developed countries.⁸ The emergence of preferential trading schemes for DCs, such as the generalised system of preferences (GSPs), permitted unilateral market opening for DCs within the GATT and its successor WTO. However, the issue of effectiveness and adequacy in SDT provisions sparked significant controversy, and their implementation and enforcement in the dispute resolution process have fallen short of expectations.⁹

There are also concerns that the development challenges faced by DCs were not given sufficient priority when designing multilateral trade rules.¹⁰ Though DCs have taken commitments beyond their implementation capacity in multilateral trade negotiations,¹¹ their needs and priorities are not adequately addressed by the MTS.

For instance, even though tariffs on industrial products are close to zero in most developed countries, agricultural and textile products that are of export interest to DCs are subject to high tariffs.¹² If tariffs on these products were generally low, preferential market access provisions would not have been necessary for them. From the perspective of DCs, trade liberalisation—the WTO's primary instrument for delivering development – has not necessarily

⁷ They share common structural issues, including low income, high susceptibility to external shocks, and inadequate human capital, which restrict their productive capacities, trade performance, and overall prospects for development.

⁸ Amrita Narlikar, *Poverty Narratives and Power Paradoxes in International Trade Negotiations and Beyond* (Cambridge University Press 2020); JP Singh, *Sweet Talk: Paternalism and Collective Action in North-South Trade Relations* (Stanford University Press 2017).

⁹ Nandang Sutrisno, 'Substantive Justice Formulated, Implemented, and Enforced as Formal and Procedural Justice: A Lesson from WTO Special and Differential Treatment Provisions for Developing Countries' (2009) 13 J. Gender Race & Just. 671; Nicolas Imboden, 'Special and Differential Treatment: A New Approach May Be Required | International Centre for Trade and Sustainable Development' (2017) 6(8) Bridges Africa, ICTSD; IMF Staff, 'Global Trade Liberalization and the Developing Countries' (International Monetary Fund 2001).

¹⁰ Brokers (n 2); Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002); Mehdi Shafaeddin, 'How Did Developed Countries Industrialize' [1998] The history of trade and industrial policy: the cases of Great Britain and the USA. Hoekman (n 2).

¹¹ Michael Joseph Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries' (2001) 24 The World Economy 1097.

¹² UNCTAD, 'Key Statistics and Trends in Trade Policy 2022' (2023).

resulted in sustained economic growth or enhanced prosperity for their people.¹³ This is mainly because multilateral trade liberalization precisely evaded sectors where DCs are expected to be the most competitive.¹⁴

The Uruguay round shifted from development exemptions¹⁵ and invented transition periods and technical assistance as SDT measures to help DCs prepare for full compliance with the WTO agreements. For instance, the TRIPS agreement, which introduced a common set of minimum standards for protecting IPR globally for all countries regardless of their technological or socioeconomic development status, includes transition periods and technical assistance as tools for implementation support with varying durations for each country group.¹⁶ However, DCs are highly critical of the TRIPS agreement. The dominant view in DCs is that the TRIPS Agreement is detrimental to their interests and is primarily intended to protect the interests of developed countries.¹⁷

Developed countries, however, have insisted on the trade-distorting effects of SDT and have proposed differentiation in the developing country category to support those who need it most.¹⁸ Furthermore, it is argued that DCs can benefit more from integration into trade regimes based on reciprocity than the current SDT regime.¹⁹ Concerns exist regarding the effectiveness of SDT measures in assisting DCs to integrate into and benefit from the global trade system. Since the inception of GATT/ WTO about seventy-five years ago, abundant

¹³ Yameogo and Omojolaibi argue that although trade liberalisation may provide growth opportunities, the evidence reveals that the gain does not automatically translate into poverty reduction. In many developing nations, high trade and income growth rates cannot explain the pervasiveness of poverty. Contrary to the predictions of orthodox theory, trade liberalisation has had little effect on reducing global poverty (it may have even increased it), and it has almost certainly worsened the income distribution between rich and poor countries, as well as between skilled and unskilled labour within countries. Claire Emilienne Wati Yameogo and Joseph Ayoola Omojolaibi, 'Trade Liberalisation, Economic Growth and Poverty Level in Sub-Saharan Africa (SSA)' (2021) 34 Economic Research-Ekonomiska Istraživanja 754; Sèna Kimm Gnanon, 'Multilateral Trade Liberalization and Economic Growth' (2018) 33 Journal of Economic Integration 1261.

¹⁴ Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Bloomsbury Publishing 2010) 3. Developed countries maintain a high level of protection for sectors such as agriculture and textiles that are of interest to DCs.

¹⁵ These are provisions in WTO agreements allowing DCs to deviate from specific rules and obligations to support economic development and address specific needs and challenges.

¹⁶ LDCs are exempted from the implementation of most TRIPS provisions until 2034. Decision of the Council for TRIPS, 'Extension of the Transition Period under Article 66.1 for Least-Developed Country Members' (WTO 2021) IP/C/88.

¹⁷ Jagdish Bhagwati, 'Afterword: The Question of Linkage' (2002) 96 American Journal of International Law 126; Peter M Gerhart, 'The Tragedy of TRIPS', *The Regulation of Services and Intellectual Property* (Routledge 2017); K Yu Peter, 'The International Enclosure Movement' (2007) 82 Indiana Law Journal 827; Donald P Harris, 'Carrying a Good Joke Too Far: TRIPS and Treaties of Adhesion' (2006) 27 University of Pennsylvania Journal of International Law 681; Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003). Bhagwati stated that the TRIPS Agreement 'facilitates, even enforces with the aid of trade sanctions, ... a payment by the poor countries (which consume intellectual property) to the rich countries (which produce it)'. Peter finds that TRIPS requires 'poor countries to develop a rich-country intellectual property system.' Gerhart, Donald, and Susan contend that TRIPS contain 'grossly unjust terms' achieved through 'economic coercion and asymmetrical power'.

¹⁸ James Bacchus and Inu Manak, 'The Development Dimension: What to Do about Differential Treatment in Trade' [2020] Cato Institute.

¹⁹ Çağlar Özden and Eric Reinhardt, 'Unilateral Preference Programs: The Evidence' [2005] Economic Development 189; Çağlar Özden and Eric Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000' (2005) 78 Journal of Development Economics 1.

evidence indicates that DCs have not significantly benefited.²⁰ The global trade share of most developing countries and LDC is either stagnant or declining.²¹ A report from the WTO secretariat confirms the trend of continuous marginalisation of LDCs' trade share, which has decreased from 1% in 2013 to 0.91 % in 2020.²² Critics maintain that the SDT regime has lost effectiveness due to its failure to produce the desired economic outcome.²³ It seems unlikely that the SDT debate will be settled anytime soon.

Despite increased international support, the development of LDCs continues to be fragile. Most LDCs have not met the goals and objectives established by the LDC programmes of action since 1981.²⁴ Many LDCs have stagnated or fallen behind due to sluggish economic growth, and the income gap between LDCs and other nations has widened, worsening their economic precariousness.²⁵ Nonetheless, a few LDCs have displayed a solid performance in particular sectors, which has helped to set their economies on the growth path and sustain it for a considerable period.²⁶ Here comes the point of graduation, a desirable juncture in the development trajectory at which an LDC is eligible to be removed from the LDC list.²⁷ Graduation results in the loss of LDC-specific support that has contributed to its growth up to this point.

LDC graduation is a moment of uncertainty because it does not mean that the country's vulnerabilities have vanished overnight, and it no longer requires support. On the contrary, graduating LDCs continue to 'face a multitude of challenges, including poverty and inequalities, in particular ... inadequate structural transformation and productive capacity, and vulnerability to economic and climatic shocks.'²⁸ They are also 'concerned by the simultaneous loss of least developed country-specific support measures compounded by the

²⁰ WTO, 'Participation of Developing Countries in World Trade: Recent Developments, and Trade of Least-Developed Countries' WTO Secretariat Report WT/CoM.TD/W/65 of 15 February 2000; Yilmaz Akyuz, *Developing Countries and World Trade: Performance and Prospects* (1st edition, Zed Books 2003); WTO, 'The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad' Note by the Secretariat, CTD, WTO WT/COMTD/W/93 (5 October 2001), 2, paras 7 and 24–25, 82.) paras 7 and 24–25, 82; Aurelie Walker, 'The WTO Has Failed Developing Nations | Aurelie Walker' (*The Guardian*, 14 November 2011) <<http://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries>> accessed 28 January 2021.

²¹ A few advanced DCs, including China and India, mainly propel the ever-growing trade share of DCs in global trade.

²² WTO, 'Boosting Trade Opportunities for Least-Developed Countries: Progress over the Past Ten Years and Current Priorities' (2022) 5.

²³ Edwini Kwame Kessie, 'Developing Countries and the World Trade Organization: What Has Changed?' (1999) 22 *World Competition: Law and Economics Review* 83, 92; Patrick Low, 'Developing Countries in the Multilateral Trading System: The Insights of Robert E. Hudec' (2003) 37 *Journal of World Trade* 801, 803.

²⁴ The UN has adopted five international Programmes of Action for the LDCs. In 2022, the fifth UN Conference on the LDCs (LDC5) approved the most recent Doha Programme of Actions (DPoA).

²⁵ WTO, 'Boosting Trade Opportunities for Least-Developed Countries: Progress over the Past Ten Years and Current Priorities' (n 22).

²⁶ WTO and EIF, *Trade Impacts of LDC Graduation: Insights from Country-Specific Market Access Analyses* (World Trade Organization 2020).

²⁷ It also indicates that the graduating LDCs have made significant development gains and no longer require the ISMs provided exclusively to LDCs.

²⁸ UN General Assembly, 'Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031' (UN 2022) A/CONF.219/2022/3 para 273.

negative social and economic impacts of the COVID-19 crisis'²⁹ and the current global economic predicament.

So, the UN has pointed out that 'graduation is only a waypoint, not an endpoint. Much more remains to be done.'³⁰ Successive UN General Assembly resolutions have insisted on smooth graduations from the LDC list so that graduation becomes permanent and irreversible and invites development and trading partners to consider extending to the graduated country trade preferences that were previously made available because of LDC status or phasing out their reduction to avoid an abrupt reduction.

However, graduation is still an evolving process, and therefore, the graduating LDCs have limited support, and their closest trading partners have yet to offer substantial support for sustainable graduation.

A major objective of this thesis is to investigate the role of SDT in promoting trade and development in the LDCs and analyse the effects of the withdrawal of the LDC-specific ISM on the graduating LDCs. In doing so, the thesis makes a case for an increased focus on the graduation process within the MTS to ensure better trade outcomes for graduating LDCs and prevent any disruption in their development efforts. The thesis also offers insights on how LDC trading partners can collaborate to support LDCs in achieving sustainable and irreversible graduation, thereby continuing their journey towards development.

1.2 Research Questions

A significant objective of the MTS has been to design trade rules and adjust trade liberalisation commitments among members with diverse priorities, needs, and levels of development.³¹

The primary research question of this study is whether SDT provisions within the MTS adequately support the development needs of LDCs, especially those graduating from the LDC category. The study seeks to devise an approach that balances between the rights and the obligations of DCs, particularly those leaving the LDC group, in a fair and conducive way to their development.

To address this broad question, the following three sub-questions will be examined:

- A. Do the rules of SDT, as developed from the GATT to the WTO, achieve the goals of fostering economic development? This sub-question examines the effectiveness of SDT measures with the following two specific focuses:
 - Is SDT the right tool to address development objectives?
 - Is SDT effective in addressing the development needs of developing countries, particularly LDCs?

²⁹ *ibid.*

³⁰ UN Website, 'Frequently Asked Questions on Graduation | LDC Portal - International Support Measures for Least Developed Countries' <<https://www.un.org/ldcportal/content/frequently-asked-questions-graduation>> accessed 7 November 2022.

³¹ Patrick Low, 'Special and Differential Treatment and Developing Country Status: Can the Two Be Separated?' in Bernard M Hoekman, Xinquan Tu and Dong Wang (eds), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe* (CEPR Press 2021).

- B. Is the current global trade regime capable of adequately supporting the development needs of graduated LDCs? This sub-question evaluates whether the MTS, especially SDT provisions, is adequately developed to assist LDCs undergoing graduation by exploring the following two specific issues:
 - Is it properly equipped to provide such support?
 - How can the trade regime better support sustainable graduation?
- C. How will Bangladesh's specific sectors be affected by LDC graduation? It will examine how graduation could affect two key Bangladeshi industries that currently benefit from LDC-specific trade policies. Specifically, it will explore these additional questions:
 - How will the clothing industry of Bangladesh be affected?
 - How will the pharmaceutical industry of Bangladesh be affected?
 - How can Bangladesh overcome graduation challenges?

The study will assess the effectiveness of SDT provisions in achieving development goals and the implications of graduation-prompted removal of these SDT measures, using Bangladesh, an LDC undergoing the graduation process, as a case study.³² This research aims to provide new perspectives on the SDT debate and the impacts of LDC graduation on trade and development.

1.3 Contextual Background

Numerous studies have examined the effects of SDT on developing countries as a group. A few of them specifically target LDCs. There is now a wealth of literature on the development, background, and other factual aspect of SDT.³³ However, withdrawing LDC-specific SDT benefits due to graduation has rarely been the subject of research. Moreover, the current research lacks consistency in its findings and fails to thoroughly investigate critical issues addressed in this thesis.

³² I interview trade experts, and regulators in relevant sectors to understand the issues thoroughly and find and develop reasoning.

³³ Kiichiro Fukasaku, 'Special and Differential Treatment for Developing Countries: Does It Help Those Who Help Themselves'; Murray Gibbs, 'Special and Differential Treatment in the Context of Globalization', *Note presented to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi* (1998); Mary E Footer, 'Developing Country Practice in the Matter of Wto Dispute Settlement' (2001) 35 *Journal of World Trade*; Amin Alavi, 'On the (Non-) Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' (2007) 41 *Journal of World Trade*; William A Kerr, 'Special and Differential Treatment: A Mechanism to Promote Development?' (2005) 6 *Estey Journal of International Law and Trade Policy* 84; William A Kerr, 'Strategic Devaluation, Trade and Political Convenience' (2012) 13 *Estey Journal of International Law and Trade Policy* 1; Denise Prévost, 'Operationalising special and Differential Treatment of Developing Countries under the SPS Agreement' (2005) 30 *South African Yearbook of International Law* 82; Francis Mangeni, *Strengthening Special and Differential Treatment in the WTO Agreements: Some Reflections on the Stakes for African Countries* (International Centre for Trade and Sustainable Development 2003); Peter Lichtenbaum, 'Special Treatment vs. Equal Participation: Striking a Balance in the Doha Negotiations' (2001) 17 *Am. U. Int'l L. Rev.* 1003. Joseph M Senona, 'Negotiating Special and Differential Treatment from Doha to Post-Hong Kong: Can Poor People Still Benefit?' (2008) 42 *Journal of World Trade*.

It would be an understatement to say that opinions about SDT have varied.³⁴ Kishore observes that the inclusion of SDT provisions in the multilateral system indicates that SDT was viewed as a solution to the problems of DCs. However, he argues that the persistence of developing-country trade problems after so many years demonstrates the ineffectiveness of SDT.³⁵ Jackson has called it aspirational in its goal of facilitating development in DCs,³⁶ Moon talked about a real threat to integration in the WTO and their sustainable economic development,³⁷ and Kerr defined it as 'simply a polite term for protectionism'³⁸ that is 'antipathetic to the promotion of economic development.' Michalopoulos refers to them as best efforts that can be violated with impunity,³⁹ Bhala characterises them with Homilies, Mortifications, Mercies, and Almsgiving,⁴⁰ and Christie considers them as a mere 'pyrrhic victory for developing countries' due to their failure to achieve the purported goal of facilitating economic development.⁴¹ Some studies have demonstrated that SDT has failed to address the actual agents of adjustment and development, as well as the real challenges facing LDCs⁴² resulting in negligible or even negative development gains.⁴³ Regarding the long-term desirability of unilateral trade preferences, the literature suggests that they may lead to specialisation in sectors where the beneficiary country has no inherent comparative advantage⁴⁴, reduce the incentive to liberalise trade⁴⁵, and result in substantial losses when revoked.⁴⁶

Subedi pointed out that the WTO has been unable to make substantial progress regarding the 'elaboration and implementation' of SDT⁴⁷ primarily due to, as Kleen and Page insisted, the non-binding character and the lack of a monitoring framework for implementing SDT.⁴⁸

Michael Finger, the former chief economist of the World Bank, was the most critical of SDT, criticising its multilateral trade implementation as 'heartfelt but ill-defined and ultimately

³⁴ Omphemetse S Sibanda, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries' (2015) 50 *Foreign Trade Review* 31.

³⁵ Pallavi Kishore, 'Special and Differential Treatment in the Multilateral Trading System' (2014) 13 *Chinese Journal of International Law* 363, 391.

³⁶ JH Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, Cambridge) 319

³⁷ Gillian Moon, 'Trade and Equality: A Relationship to Discover' (1 September 2009) <<https://papers.ssrn.com/abstract=1480043>> accessed 28 December 2022.

³⁸ Kerr, 'Special and Differential Treatment: A Mechanism to Promote Development?' (n 33) 88.

³⁹ Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization' [2000] World Bank.

⁴⁰ Raj Bhala, *Trade, Development, and Social Justice* (Carolina Academic Press 2003).

⁴¹ Andrew Christie, 'Special and Differential Treatment in the GATT: A Pyrrhic Victory for Developing Countries' (2009) 10 *Estey Centre Journal of International Law and Trade Policy* 1.

⁴² 'Modern Economic Theory and Development' in GM Meier and Joseph Stiglitz (eds), *Frontiers of Development Economics: The Future in Perspective* (Oxford University Press 2001).

⁴³ Fukasaku (n 33).

⁴⁴ Bernard Hoekman and Caglar Ozden, 'Trade Preferences and Differential Treatment of Developing Countries: A Selective Survey' (The World Bank 2005) 3566.

⁴⁵ Caglar Ozden and Eric Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976-2000' (2005) 78 *Journal of Development Economics* 1.

⁴⁶ Shushanik Hakobyan, 'GSP Expiration and Declining Exports from Developing Countries' (2020) 53 *Canadian Journal of Economics/Revue canadienne d'économie* 1132.

⁴⁷ 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 *Netherlands International Law Review* 273, 209.

⁴⁸ Peter Kleen and Sheila Page, 'Special and Differential Treatment of Developing Countries in the World Trade Organization' [2005] *Global Development Studies*, Sweden.

fruitless'⁴⁹. Finger's criticism was fuelled by the Doha Round's failure to revise SDT's modalities. Moon argued that SDT had failed to eliminate trade-related disparities between the developed and developing countries because the system of preferences had been manipulated and abused by wealthy nations for their own political or strategic advantage.⁵⁰ For example, the Africa Growth and Opportunity Act (AGOA) is a typical unilateral trade preference programme (UTPP) that aims to facilitate access to the US market for certain African countries. However, there is 'little or no evidence of AGOA induced gains' for LDCs.⁵¹ In addition to the objective eligibility requirements for AGOA based on the development needs of individual countries, the USA also employs political and non-objective criteria that serve its economic interests and foreign policy or national security objectives.⁵² Even though LDCs may benefit from imports, similar arrangements under the guise of SDT expose DCs to bilateral opportunism.⁵³

Low argues that the challenge lies in designing SDT provisions that benefit members who need 'breathing space and/or support' to participate in the WTO and derive greater benefits. The objective of SDT should be to facilitate beneficial participation in international trade, as opposed to exempting countries in ways that hinder participation.⁵⁴ Hoekman, Michalopoulos, and Winters argue that differentiation among WTO members and more development-friendly measures that would benefit all DCs are required to make these measures effective. These measures include a binding commitment by industrial countries to eliminate export subsidies and nontariff barriers (tariff quotas) and to reduce most-favoured-nation tariffs on labour-intensive products of export interest to DCs.⁵⁵

However, research on withdrawing LDC-specific SDT benefits due to graduation has been scarce. Only a few recent works have focused on this field. Bekkers and Cariola find that graduation of LDCs will have a 'moderate but non-negligible' impact on market access. As LDC schemes are barely utilised, the impact will be minimal in most countries. However, specific country-industry pairings are anticipated to experience a substantial impact (e.g., the clothing sector in Bangladesh).⁵⁶ Razzaque, Akib and Rahman argued that Bangladesh is the largest beneficiary of LDC-specific trade preferences. Almost three-quarters of exports benefit from DFQF market access in its major export destinations, including the EU, Bangladesh's largest

⁴⁹ J Michael Finger, 'Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round' (2008) 31 *World Economy* 887, 902.

⁵⁰ Gillian Moon, 'Trade and Equality: A Relationship to Discover' (2009) 12 *Journal of International Economic Law* 617.

⁵¹ Niall Condon and Matthew Stern, 'The Effectiveness of African Growth and Opportunity Act (AGOA) in Increasing Trade from Least Developed Countries' [2011] London: EPPI Centre, Social Science Research Unit, Institute of Education, University of London 3.

⁵² Mueller, 'The Effect of the African Growth and Opportunity Act (AGOA) on Trade.' (2008) Paper prepared for the 2008 Annual Meeting of the International Studies Association, San Francisco, March 2008.

⁵³ Shamim Shakur, Allan N Rae and Srikanta Chatterjee, 'Special and Differential Treatment in Multilateral Trade Negotiations' (2005) Paper presented at the 46th Annual Conference of New Zealand Association of Economists, Christchurch, 29 June-1 July 2005.

⁵⁴ Low (n 31). 97

⁵⁵ Bernard M Hoekman, Constantine Michalopoulos and L Alan Winters, *More Favorable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization* (World Bank Publications 2003).

⁵⁶ Eddy Bekkers and Gianmarco Cariola, 'The Impact of LDC Graduation on Trade: A Quantitative Assessment' (World Trade Organization (WTO), Economic Research and Statistics Division 2022) ERSD-2022-5 24.

export market, Australia, Canada, China, India, Japan, and South Korea. Consequently, the loss of preferential access may pose a significant challenge for Bangladesh.⁵⁷ Razzaque and Rahman concluded that the loss of preferences would unquestionably have a significant negative impact on the export competitiveness of Bangladeshi apparel products.⁵⁸ Similarly, the policy space of Bangladesh is likely to diminish because of the expiration of the graduation-induced TRIPS pharmaceutical exemption. Therefore, there is a need for a renewed policy focus on assisting the pharmaceutical industry to adapt to any sudden policy changes resulting from the impending graduation of LDCs.⁵⁹

Mustafizur Rahman and others trace the role of government policy in fostering Bangladesh's pharmaceuticals industry and investigate if such policies were permissible under WTO rules and recent trade and investment agreements. Due to its LDC status, Bangladesh has not been required to adhere to such regulations; however, in the upcoming years, this may change. Many of Bangladesh's policies would not have been permitted under the WTO and would be restricted by regional and bilateral trade and investment agreements. As Bangladesh graduates from LDC status, it will face obstacles in developing its domestic pharmaceutical industry.⁶⁰

Islam, Kaplan, Wirtz, and Gallagher investigate the impact of the implementation of TRIPS provisions on the price of insulin in Bangladesh, as well as welfare and poverty. They find that LDC graduation will cause insulin prices to rise, which could significantly reduce the welfare of diabetic households in Bangladesh and increase their poverty level.⁶¹ Gay and Gallagher find that Bangladesh utilised WTO flexibilities to establish a thriving pharmaceuticals industry that provides access to essential medicines to millions of Bangladeshis and citizens of other developing and least developed countries. However, the pharmaceutical industry may face a threat if it is required to comply entirely with WTO regulations upon graduation. Given the severe impact of COVID-19 on Bangladesh's economic growth and health, they emphasise the need for Bangladesh to maintain its WTO flexibilities so that the sector can continue contributing to economic growth and health care.⁶²

⁵⁷ Mohammad Razzaque, Hamim Akib and Jillur Rahman, 'Bangladesh's Graduation from the Group of LDCs: Potential Implications and Issues for the Private Sector' in Mohammad Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020).

⁵⁸ Mohammad Razzaque and Jillur Rahman, 'LDC Graduation and Bangladesh's Apparel Exports to the EU: Policy Options for Adapting to Competitiveness Challenges' in Mohammad Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020) 125.

⁵⁹ Mohammad Abdur Razzaque, Rabiul Islam Rabi and Hamim Akib, 'Bangladesh's Pharmaceutical Exports: Trends, Market Prospects, and Policies' in Mohammad A Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation*.

⁶⁰ Mustafizur Rahman and others, 'Policy Space for Building Production Capabilities in the Pharmaceuticals Sector in Low-and Middle-Income Countries: Evidence from Bangladesh' [2022] *Journal of Globalization and Development*. Page?

⁶¹ Md Deen Islam and others, 'The Social Costs of Graduating from Least Developed Country Status: Analyzing the Impact of Increased Protection on Insulin Prices in Bangladesh' GEGI Working Paper 038, 05/2020 Global Development Policy Center, Boston University.

⁶² Daniel Gay and Kevin Gallagher, 'The Need to Extend the WTO TRIPS Pharmaceuticals Transition Period for LDCs in the COVID-19 Era: Evidence from Bangladesh | Department of Economic and Social Affairs' (2020) CDP Policy Review No. 10.

Rahman and Bhattacharya argued that Bangladesh is graduating when the WTO is at a crossroads, and the organisation has never faced such an existential threat since its inception. Moreover, the Doha Development Agenda (DDA) has been belied. Mega-regional trading agreements (mega-RTAs) are establishing rules beyond WTO disciplines, and rising protectionism has cast doubt on the WTO's founding principles. This evolving WTO scenario will have significant implications for the interests and priorities of Bangladesh and other graduating LDCs within the WTO.⁶³ Razzaque also pointed out that the emerging geoeconomic order, which puts global trade and investment architecture under pressure, brings new challenges for Bangladesh, which is set to graduate from the LDC group.⁶⁴ The Covid-19 pandemic has exacerbated the challenges. As many challenges require coordinated global solutions, domestic efforts only will be inadequate. Going forward, Bangladesh must lead various global platforms pursuing LDC interests.⁶⁵

Bhattacharya and Khan argued that leaving the LDC category is the beginning of a new journey, the success of which depends on the quality of the transition process.⁶⁶ Therein lies the significance of a smooth and sustainable graduation. Saleh and Faruque argued that despite the obstacles, Bangladesh should embrace graduation with vigour and commitment, as a 'calculated comprehensive action plan can turn all the anxieties of graduation into a state of bliss'.⁶⁷ To be able to graduate with momentum, Rahman and Bari suggest that the country must explore policy initiatives in the areas of strengthening market access, competitive capacities, and structural transformation of the economy to address a range of challenges, such as the loss of DFQF benefits and the consequent decline in export revenues.⁶⁸ Palit emphasises the imperatives of concluding free trade agreements (FTA) with major trade partners.⁶⁹ Moazzem and Ahmed propose that the LDC-specific international support measures (ISMs) should be extended for the graduating LDCs, such as Bangladesh, to allow sufficient time to prepare for sustainable graduation.⁷⁰

⁶³ Mustafizur Rahman and Debapriya Bhattacharya, 'Graduating LDCs in an Evolving WTO : Options and Strategies' (Friedrich-Ebert-Stiftung and Centre for Policy Dialogue 2019).

⁶⁴ Mohammad A Razzaque, 'Geo-Economics, Globalization and the Covid-19 Pandemic: Trade and Development Perspectives from Bangladesh' in Amitendu Palit (ed), *Globalisation Impacts: Countries, Institutions and COVID19* (Springer Nature 2022).

⁶⁵ Towfiqul Islam Khan and Muntaseer Kamal, 'Pursuing a Graduation Strategy within the Global and Regional Environment: What Are the Pitfalls for Bangladesh?' in Debapriya Bhattacharya (ed), *Bangladesh's Graduation from the Least Developed Countries Group* (Routledge 2018).

⁶⁶ Debapriya Bhattacharya and Sarah Sabin Khan, 'The LDC Paradigm, Graduation and Bangladesh: Concepts, Comparison and Policy' in Debapriya Bhattacharya (ed), *Bangladesh's Graduation from the Least Developed Countries Group* (Routledge 2018).

⁶⁷ Md Abu Saleh and Muhammad Omar Faruque, 'LDC Graduation and WTO Challenges' in Mohammad Shahabuddin (ed), *Bangladesh and International Law* (Routledge 2021) 201.

⁶⁸ Mustafizur Rahman and Estiaque Bari, 'Pathways to Bangladesh's Sustainable LDC Graduation: Prospects, Challenges and Strategies' in Debapriya Bhattacharya (ed), *Bangladesh's Graduation from the Least Developed Countries Group* (Routledge 2018).

⁶⁹ Amitendu Palit, 'Bangladesh's Future Export Challenges and the Need for a FTA Strategy' by Amitendu Palit' in S Narayan and Sreeradha Datta (eds), *Bangladesh at 50: Development and Challenges* (Orient Blackswan 2020).

⁷⁰ Khondaker Golam Moazzem and Tamim Ahmed, 'Implications of COVID-19 for Bangladesh's Graduation from the LDC Status' (CPD Working Paper-140 2021).

1.4 Significance and Contribution of the Research

The concept of LDC graduation, which emerged in 1991, has been largely overlooked in academic studies and international trade policy discussions. Only six small economies with a minimal share of global trade have successfully graduated from the LDC category, resulting in limited interest and neglect in this area of research. However, with the renewed focus on achieving the Istanbul Programme of Action (IPoA) goal of graduating half of the LDCs by 2021, and the increasing number of countries undergoing the graduation process, the topic has garnered some attention.⁷¹ Nevertheless, due to the relatively low significance of LDCs in global trade, the issue of withdrawing LDC-specific benefits has not been extensively researched, creating a unique opportunity to explore this understudied area.

This study aims to examine the significance and contribution of SDT, particularly unilateral market access and TRIPS exemptions, and their impact on the growth and expansion of two critical sectors in Bangladesh: the ready-made garment (RMG) sector and the pharmaceutical industry. Both industries hold a distinctive position among LDCs, and the benefits of SDT policies have played a role in their growth. However, there is a lack of comprehensive research that highlights the overall impact of SDT measures on their success, as well as the potential threats posed by the loss of these benefits upon graduation.

This study makes an original contribution to the existing body of knowledge by addressing a timely topic and utilizing a practical approach through multiple case studies. The findings could help shape improved support mechanisms within the Multilateral Trading System (MTS) to facilitate smooth transitions and continued progress towards development for graduating LDCs.

The originality of this thesis lies in its in-depth doctrinal analysis of the existing legal framework concerning the impact of LDC graduation on the RMG and pharmaceutical industries of Bangladesh. It specifically examines the relevant WTO provisions, including the General Agreement on Tariffs and Trade (GATT), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). By critically exploring the development dimensions in conjunction with the WTO legal framework, as well as examining how LDC graduation affects market access, trade preferences, intellectual property rights, and subsidies for the two industries, this research offers new insights into the understanding of the legal complexities and potential obstacles these industries encounter during and after graduation.

To complement the legal analysis, the thesis incorporates comprehensive case studies that provide empirical evidence and practical insights. These case studies involve interviews with relevant stakeholders and capture the perspectives and experiences of those directly involved in the sectors. The RMG case study primarily delves into the challenges faced by the industry

⁷¹ WTO Secretariat published a report assessing the trade impacts of graduation in 2020. UN bodies are also offering increasing focus on the issue. WTO, 'Graduating from Status of Least-Developed Country (LDC)' (WTO Website) <<https://tinyurl.com/WTOwebsite>> accessed 25 June 2023; Xiangchen Zhang and Rabab Fatima, 'A Path to Prosperity: Harnessing Trade to Deliver for LDCs' (WTO blogs) <https://www.wto.org/english/blogs_e/ddg_xiangchen_zhang_e/blog_xz_20mar23_e.htm> accessed 25 June 2023.

due to the loss of duty-free quota-free (DFQF) market access, impacting its export capabilities. The pharmaceutical case study mainly examines the complexities faced by the pharmaceutical industry in adhering to the TRIPS Agreement and SCM Agreement's subsidy rules. By investigating these industry-specific challenges, the case studies contribute to a better understanding of the multifaceted implications of LDC graduation.

The originality of this research is further enriched by the researcher's extensive experience working for the government of Bangladesh. By drawing on this insider perspective, the researcher gains a deeper understanding of the practical implications and complexities of trade policy formulation and implementation of those policies in particular industries. This government experience enhances the credibility and depth of the analysis, providing a comprehensive view of the challenges and opportunities encountered by Bangladesh's two industries as they navigate the intricacies of LDC graduation.

The original contribution of this research is thus derived from the combination of doctrinal analysis, case studies, and government experience. This unique approach provides valuable insights into the legal, practical, and industry-specific challenges that the RMG and pharmaceutical industries of Bangladesh will encounter after graduating from LDC status. The research findings have the potential to inform policy and decision-making processes, both in academic and practical contexts, by addressing the specific needs and concerns of graduated LDCs within the global trade regime.

1.5 Research Methodology

a. Research Approach:

The research has used a qualitative methodology that combines the more traditional analysis of legal materials and secondary sources with in-depth interviews to complement the findings. This provides the study with a more thorough understanding of the research questions, allowing it to explore nuanced issues surrounding LDC graduation and trade in the Bangladesh context. I adopt a triangulation-based methodology⁷² to address the research question. It facilitates the collection of data from multiple sources, including primary data from interviews alongside secondary data from existing records and reports, enabling analysis and comparison of the data to identify patterns, inconsistencies, or areas of overlap.

Data is gathered through original empirical and library-based research. In addition, a case study approach is utilised to conceptualise and propose generalisations regarding the SDT principle and LDC graduations, relevant practices, and effective elements. Finally, triangulation is used to gain an in-depth and comprehensive understanding of the issues, to investigate and develop the hypotheses, and to check and cross-reference the validity of the findings gathered from various sources. The footnotes, bibliography, and appendices provide complete documentation of the sources.

The library-based research is carried out using readily available primary and secondary sources. The primary sources are official documents, international trade agreements, declarations, case laws, working reports, trade policy reviews, legislative texts, and official

⁷² Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8 *The Qualitative Report* 597, 603. She insisted that 'triangulation strengthens a study by combining 'several kinds of methods or data' and improves 'the validity and reliability of research or evaluation of findings.'

communications. In secondary sources, I have consulted books and articles on the intersection of the SDT provisions, LDC graduation, and developed and developing country trade preferences. I have also relied on information found on the websites of international and intergovernmental organisations, government agencies, and trade associations. In addition, newspaper and magazine articles, newsletters, periodicals, and trade-related blogs are consulted when necessary to confirm or validate information or an argument.

The conceptual foundation of the research project is established through library research that identified the key issues pertinent to the study and the research gaps in the existing literature where key issues and potential approaches were not thoroughly explored or developed. The facts and arguments drawn from those sources have been complemented and expanded upon by empirical research. Thus, library-based research has laid the groundwork for empirical investigation, which has been utilised to build upon it.

I have conducted semi-structured in-depth interviews and discussions using carefully crafted and individualised question sets for two groups of participants (trade experts and government officials) for the original empirical research. The interviewees were identified using their prominence and relevance to the research topic. However, the research encountered challenges in terms of participant availability and expertise in the specific research area. One significant challenge was the reluctance of businesspersons to agree to interviews due to their busy schedules and concerns about my previous government experience. Additionally, I encountered difficulties in finding individuals who possessed the necessary knowledge and expertise to provide valuable insights for my research.⁷³

Despite these challenges, I was able to conduct interviews with eight individuals who held prominent positions in top research organizations and were actively involved in advising the government on LDC graduation. Government employees interviewed were directly engaged in policy formulation related to graduation. While the sample size may be smaller than initially anticipated, these interviews provided valuable perspectives and insights into the impact of LDC graduation on specific industries.

To address the limitations in data collection, I supplemented the interviews with other research methods. These included extensive literature reviews, analysis of available data and reports, and examination of expert and industry interviews published in various media sources. I also engaged with additional sources such as industry associations, government officials, and experts in related fields to gather additional insights and perspectives. By employing these complementary methods, I aimed to enhance the overall validity and reliability of my research findings.

b. Case Studies:

The thesis uses a case study methodology to address its research questions and obtain a thorough and comprehensive understanding of a complex issue within its relevant context.

⁷³ It is important to note that Bangladesh, like many other developing countries, faces challenges in terms of research capacity and has limited research infrastructure and expertise specifically focused on the issue of LDC graduation and its impact on industries.

The chapters on the two case studies begin with a brief literature review of the national and international operations of the two sectors before delving into the graduation-induced changes that the sectors must address in the coming years.

The two case studies focus on Bangladesh, which is in the final stages of its graduation process. It is one of the few LDCs that has effectively utilised LDC-specific benefits to pursue its development goals. Two sectors in Bangladesh that directly involve the use of LDC-specific SDT provisions have been selected to understand the benefits of SDT and the impacts of their withdrawal from an LDC.

- i. Bangladesh has experienced steady growth in its RMG export levels from the beginning of its garment export business in the late 1970s, and it has emerged as a significant exporter globally. As a result, RMG is currently, by far, Bangladesh's most important industry sector, with exports valued at over USD 46.99 billion and accounting for over 84% of the country's export income in 2022-2023.⁷⁴ Over the years, the Bangladeshi RMG industry has used the LDC-specific market access facility provided through the DFQF schemes by different countries.⁷⁵ Because of long-standing global textile protectionism, trade preferences have excellent value for the industry. The sector is set to experience a tariff increase in almost all its main export destinations after the LDC graduation of Bangladesh. Therefore, it offers a solid basis for investigating how LDC graduation affects exports from an LDC.
- ii. As an LDC, Bangladesh is exempt from implementing specific provisions in many WTO agreements, including the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (SCM). By effectively leveraging this policy space, Bangladesh has implemented several domestic policies that have allowed the country to increase its pharmaceutical production, advance public health, and control drug pricing. As a result, unlike many other developing and least developed countries, Bangladesh today boasts a robust pharmaceutical industry, exports to over 100 countries, including the United States, and meets over 98% of local demand. As Bangladesh prepares to graduate, the rules that have helped grow its pharmaceutical industry will transform.

Thus, Bangladesh's RMG industry and pharmaceutical sector have utilised the LDC-specific trade assistance. The case study method is used to examine the positive effects of SDT on the growth and expansion of Bangladesh's RMG and pharmaceutical industries, as well as how these two industries will experience a regime shift in international trade because of Bangladesh's imminent graduation from the LDC category. Moreover, as a Bangladeshi national, I am keenly interested in how these issues will develop following Bangladesh's graduation.

Accessing and examining the official documents (relative to LDC graduation) held by the Ministry of Commerce, Ministry of Finance, and Bangladesh's Permanent Mission to the WTO

⁷⁴ EPB Data 2023

⁷⁵ Mustafizur Rahman, 'Trade Benefits for Least Developed Countries: The Bangladesh Case Market Access Initiatives, Limitations and Policy Recommendations' (United Nations, Department of Economics and Social Affairs 2014) CDP Background Papers: 18, ST/ESA/2014/CDP/18.

yielded additional facts and insights utilised in the case studies.⁷⁶ These methods have been applied to the case studies because, as a Bangladeshi national, I have the legal right to inspect public documents and inquire about public welfare issues.

1.6 General Applicability of Thesis Findings

While this is a country-specific study, the findings are very relevant for other LDCs and provide valuable insights into how SDTs and their withdrawal affect LDCs. But there are also specific insights that may not be relevant to all LDCs.

The thesis examines the impact of graduation on LDCs and the potential disruptions resulting from the withdrawal of SDT provisions. While other LDCs may face similar challenges upon graduation, the specific impact will vary depending on factors such as utilizations of preferences and WTO exemptions, fall-back tariff rates, and the existence of free trade agreements with main trade partners.

Case studies on the RMG and pharmaceutical industries in Bangladesh provide valuable insights into the sectors that may be affected. Many other LDCs have significant export-oriented clothing sectors, making the findings highly relevant. However, the challenges specific to the pharmaceutical industry may not apply to most LDCs as they lack a vibrant pharmaceutical industry. Nonetheless, any industries in LDCs that benefit from their LDC status will be affected, making the findings generally applicable to those sectors.

The thesis also emphasizes the importance of a smooth graduation support system to assist graduating LDCs during the transition period. This is crucial for other LDCs as well, as they will encounter similar challenges during and after their graduation. The findings of the study can provide valuable insights for other LDCs in overcoming the challenges of graduation.

Therefore, the thesis findings can be broadly applied to other LDCs regarding the impact of graduation, the establishment of a smooth support system, and the active engagement of LDCs in the design of specific support measures. These insights can help other LDCs navigate the challenges of graduation and promote their trade and development goals.

1.7 Outline of the Thesis

The thesis has two parts. Part I furnishes the groundwork of the study by answering crucial general questions regarding the goals and effectiveness of SDT rules, as well as the preparedness of the world trade regime to help graduating LDCs for a smooth transition. These analyses are addressed in research questions A and B. Part II employs the insights gained from Part I to analyse the specific cases of Bangladesh trade, as addressed by research question C. The research findings are presented in the concluding chapter.

Part I will begin with a preliminary analysis of LDC graduation and relate it to the concept of development and developing countries in the GATT and WTO, as well as the gradual introduction of special rules for them. To test the effectiveness of these global trade rules for LDCs, this thesis will focus on critically analysing specific SDTs relevant to Bangladesh trade:

⁷⁶ For instance, the documents on preparation by the government for a smooth graduation, impact assessment of graduation, etc.

first unilateral trade preferences to accessing crucial markets, and then exemptions and transition periods in enforcing intellectual property rules. These studies lead to a deeper level of analysis of the effectiveness of SDT vis-à-vis development needs and the inner balance of the international trade regulatory framework. Then it will explore the trade implications of LDC graduation.

The analysis of the first part will pave the way for the second part, which will focus on the specific cases of Bangladesh, which has a relatively higher SDT utilisation rate among LDCs. So, it provides a persuasive justification for testing an LDC's usage of SDT provisions and the impact of graduation on such use. To achieve that objective, I investigate the beneficial effects of SDT provisions and the potential repercussions of the upcoming graduation on Bangladesh's top two exporting sectors: ready-made garments and pharmaceuticals. Scrutinising these two sectors will offer valuable insights into answering the research questions.

There are ten chapters in the thesis. The introduction, in chapter 1 introduces the topic, research question, and significance of the study. It describes the current state of literature and its potential for originality. In addition, it explains the rationale behind selecting the graduating LDC and specific LDC sectors for case studies. The introduction also describes the study's research methodology, approach, and design. This chapter concludes with an overview of each chapter of the thesis.

A detailed conceptual analysis of LDC graduation, focusing on its potential implications for LDCs, is presented in Chapter 2. This chapter analyses the factors that led to the establishment of the LDC group, the process of LDC graduation, and the reasons why graduation could disrupt the fragile development process of the LDCs.

Chapter 3 examines the long-standing relationship between trade and development and how and why trade can be a crucial instrument for achieving the development goals of DCs. It also attempts to define development and developing countries to comprehend the current debate on developing country status in the WTO and to find a solution that may allow the WTO to move forward without getting bogged down in unnecessary disagreement.

Chapter 4 analyses how the MTS has addressed the needs of DCs. It presents a theoretical and historical analysis of development in international trade law, demonstrating how development issues have been progressively integrated into its institutions, particularly the GATT and subsequently WTO through Part IV of the GATT, non-reciprocity, the Enabling Clause, and the reference to sustainable development in the Marrakesh Agreement establishing the WTO. It also investigates how the technical approach to trade regulation and development has led to ad hoc or limited exemptions from general disciplines under the GATT/WTO regime, often constraining developing countries' ability to shape and implement their development policies.⁷⁷ The chapter questions whether the SDT principle has benefited DCs, their legal status in the trading system, and how it could be enhanced to better serve DCs and the trading system as a whole.

⁷⁷ Sonia E Rolland, 'The Trade and Development Relationship during the GATT Years and the Genesis of the WTO' in Sonia E Rolland (ed), *Development at the World Trade Organization* (Oxford University Press 2012).

Chapter 5 investigates the different unilateral trade preference programmes (UTPP) offered to DCs to enhance their exports, promote industrialisation, and reduce market access barriers. The scope, level of control, and utilisation rates of these preference schemes vary significantly among countries. Although UTPPs are popular in DCs and expected to stimulate trade, their effectiveness has long been a topic of intense debate. The empirical literature on the subject reveals surprisingly diverse outcomes. It examines empirical analyses to assess the impact of preference programmes, determine whether they have increased trade volume and export diversification, identify factors that impact the efficiency of the programmes, and suggest measures to improve their usefulness.

Chapter 6 scrutinises the TRIPS agreement, a transformative global agreement substantially strengthening intellectual property (IP) rights protection, particularly in DCs with weaker protections. This involved integrating IP rights (IPR) into the global trade regime, expanding, and reinforcing IPR mechanisms, and aligning them with developed countries' norms. This chapter contributes to the ongoing debate on IPR in the trade regime by re-evaluating its role in DCs. Upon graduation, LDCs such as Bangladesh are required to implement the TRIPS agreement, which has significant implications for their pharmaceutical industry, export business, and citizens' access to medicine. The chapter also examines the role of transition period and technical assistance as SDT mechanisms in implementing TRIPS.

Chapter 7 relates the development paradigms of the MTS to the graduation of LDCs by analysing how graduation may affect the LDCs' objective of promoting development through trade. It highlights the infancy of the graduation process and investigates how much importance the MTS has accorded to ensuring a smooth graduation process. It also describes the importance of an incentive-based, sustainable graduation mechanism that can support dozens of LDCs currently in the graduation process.

Chapter 8 presents a case study on the effectiveness of LDC-specific trade measures and the impact of Bangladesh's graduation from LDC status. Bangladesh's ready-made garment (RMG) industry is the country's most significant economic sector, with apparel exports accounting for 84% of total export revenues and approximately 10% of the gross domestic product in 2022-2023.⁷⁸ The industry has significantly utilised UTPPs, leading to increased competitiveness, long-term predictability for suppliers, and substantial investments in technology and human capital. However, the industry will lose these advantages once Bangladesh graduates from LDC status. This case study examines the structure of the global and Bangladeshi apparel industries, the factors driving the rapid growth of the industry in Bangladesh, the potential trade consequences of graduation for the industry, and potential mitigation strategies that Bangladesh can adopt to address these implications.

Chapter 9 presents another case study on the impact of graduation on Bangladesh's pharmaceutical industry. Unlike many other DCs, Bangladesh's thriving pharmaceutical industry exports to over 100 countries, including major developed markets, and meets over 98% of domestic demand.⁷⁹ This sector has used LDC exemptions from implementing several WTO agreements, including the TRIPS and the Subsidies and Countervailing Measures (SCM) Agreement. However, as Bangladesh approaches graduation, it must align its policy

⁷⁸ EPB and World Bank data

⁷⁹ BIDA, 'Pharmaceuticals and API Industries' (Bangladesh Investment Development Authority 2020).

framework with the WTO agreements by phasing out the flexibilities. This case study scrutinises the structure of global and Bangladeshi pharmaceutical industries, the drivers behind the industry's rapid growth in Bangladesh, the possible consequences of LDC graduation for the industry, and potential mitigation strategies that Bangladesh can adopt.

The thesis is concluded in Chapter 10. It provides a concise summary of the key research findings to answer the research questions, the potential limitations of the study, and the areas that will require further research.

CHAPTER 2: LDCS AND THEIR GRADUATION: PROCESS AND CONCERNS

2.1 Introduction

This chapter focuses on LDC graduation, and the challenges associated with it. LDCs are vulnerable to economic and environmental shocks due to weak productive capacities resulting from limited access to technologies, weak institutions, inadequate infrastructure, and a lack of human capabilities. The LDC category was established to assist these countries' rapid development by providing them with various ISMs, such as trade preferences and policy space under special provisions in WTO agreements. However, despite these measures, only a few LDCs have made sufficient progress to be considered for graduation.

Graduation from the LDC category occurs when an LDC meets specific predetermined development criteria. However, once a country graduates, it loses access to the LDC-specific benefits that may have helped bring the country to the required level of development for graduation. Consequently, LDCs are highly concerned about the potential effects of graduation on their trade and economic development.

This chapter examines the justification for the LDC category, the benefits of LDC status, the graduation procedure, and the challenges associated with LDC graduation.

2.2 The LDC Category and Benefits of LDC Status

2.2.1 Establishment of the LDC Category

The United Nations established the LDCs category in 1971 as a subgroup of developing countries.¹ Long before that, there were attempts to particularly identify the least developed among the developing countries to address their vulnerabilities. The concept of LDCs as a country category was first introduced at the first plenary of UNCTAD (UNCTAD I) in February 1964, which unanimously adopted a recommendation that:

Industrialised countries and regional and international organisations should endeavour to increase the flow of the technical assistance needed to accelerate the growth of developing countries, particularly of the least developed, to achieve maximum efficiency in the use of external resources.²

It also adopted a general principle that the adoption of international development policies

shall take into account the individual characteristics and different stages of development of the developing countries, special attention being paid to the less developed among them,

to ensure sustained growth and equitable opportunity for each developing country.³

¹ UNGA Resolution 2768 (XXVI) of 18 November 1971

² United Nations, 'Final Act and Report of the United Nations Conference on Trade and Development (Geneva, 1964), Annex A.IV.1, Para-4, United Nations Publication, Sales No. 64.II.B.11'.

³ *ibid* general principle fifteen.

Even before the first UNCTAD session, the GATT's Working Party on Preferences considered differentiating within the larger developing countries group, highlighting the least developed to whom preferential treatment should be granted.⁴

A General Assembly resolution in December 1969 formally recognised the need to 'alleviate the problems of the least developed among the developing countries with a view to enabling them to draw full benefits from the Second United Nations Development Decade'.⁵ The General Assembly proclaimed the Second United Nations Development Decade in October 1970 and adopted the International Development Strategy for the Decade⁶, which included a section on special measures favouring the least developed among the developing countries. In November 1970, it passed another resolution affirming the 'urgency of identifying the least developed among the developing countries' to enable them to benefit from the measures taken in their favour and inviting international organs to 'accord high priority' to this issue.⁷

In 1971, The UN Committee for Development Planning (UNCDP)⁸ proposed three criteria for identifying LDCs: a GDP per capita of \$100 or less, a manufacturing share of GDP of 10% or less, and an adult literacy rate of 20% or less.⁹ Though UNCTAD-led studies considered multiple criteria and proposed a broader definition of the concept of LDC¹⁰, UNCDP opted for simplicity in methodology, with some exceptions for the outliers. Consequently, 25 countries were listed as 'least developed' in 1971, forming the original LDC list.¹¹ In December 1971, the UN General Assembly institutionalised the LDC category by approving 'the list of the hardcore least developed countries' prepared by the UNCDP.¹²

The UN General Assembly (UNGA) decides on the inclusion into and graduation from the list of LDCs based on a recommendation from the UNCDP,¹³ which conducts a triennial review of the list and recommends countries for inclusion or graduation.

⁴ Melvin M Fagen, 'Letter from Melvin M. Fagen, Director of the Commission Affairs and Trade Development Division of the Economic Commission for Europe, to Raúl Prebisch, Secretary General of UNCTAD (25 February 1964) Collected from Archives Unit of the UN Library in Geneva in July 2011'. Fagen wrote that '... Uganda suggested differential and two-tiered preferences designed so that the least-developed of the less-developed countries would receive the greatest preferences.' However, that proposal would contradict those of India, Brazil, the Arab Republic of the United Arab Emirates, and other less-developed nations.

⁵ UN General Assembly, 'Special Measures to Be Taken in Favour of the Least Developed among the Developing Countries Resolution' A/RES/2564(XXIV), 3 December 1969.

⁶ UN General Assembly, 'International Development Strategy for the Second United Nations Development Decade' A/RES/25/2626 (24 October 1970) <<http://www.un-documents.net/a25r2626.htm>> accessed 5 November 2022.

⁷ UN General Assembly, 'Identification of the Least Developed among the Developing Countries.' A/RES/2768(XXVI) (18 November 1971).

⁸ It was later renamed the UN Committee for Development Policy.

⁹ UN Committee on Development Planning, 'Report on the Seventh Session (22 March-1 April 1971)' Official Records: Fifty-First Session, Supplement No. 7, E/5044.

¹⁰ MC Smouts, "La Notion de PMA: Une Genèse Difficile", in: Les Pays Les plus Pauvres: Quelle Coopération Pour Quel Développement?, Institut Français Des Relations Internationales (IFRI), Paris' 52.

¹¹ UN Committee on Development Planning (n 9) para 66.

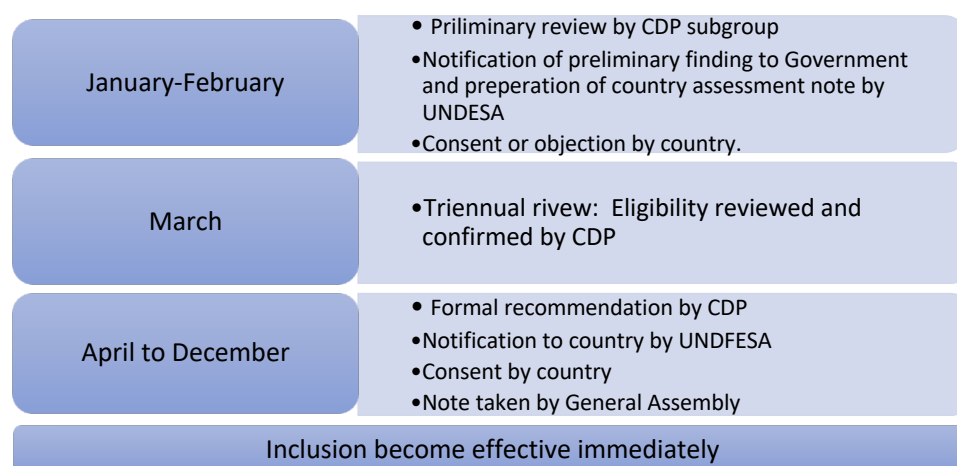
¹² UN General Assembly, 'Identification of the least developed among the developing countries.' A/RES/2724(XXV), (15 December 1970) <<https://digitallibrary.un.org/record/201877>> accessed 5 November 2022.

¹³ UNCDP is a subsidiary advisory body of the Economic and Social Council (ECOSOC).

2.2.2 Inclusion of a Country into LDC Group

Currently, the inclusion procedure is relatively simple and designed to finish in a year.¹⁴ Inclusion is not automatic or mandatory and requires consent from the government of the eligible country.¹⁵ The process has three consecutive steps: preliminary review by the CDP sub-group, triennial review by the CDP, and acceptance and endorsement of the inclusion decision by the UN General Assembly.¹⁶

Figure 1: The one-year LDC inclusion process and timeline



2.2.3 Drivers of LDC Categorisation

By the first UNCTAD in June 1964, countries were organised into three negotiating groups, upholding the Three Worlds taxonomy of the time: industrialised countries with a market economy (i.e., First World), countries with planned economies (i.e., Second World), and developing countries (i.e., Third World).¹⁷

Before establishing the LDC category, the concept of a homogenous Third World (the failed version of the ideal industrialised First World) was prevalent.¹⁸ This image provided the most

¹⁴ Figure 7 summarises the LDC inclusion process that happens in the year of the triennial review. Adapted from UNDESA <<https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-inclusion.html>> accessed 10 March 2021

¹⁵ Committee for Development Policy, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (UN 2018) 10. Zimbabwe, Ghana and Papua New Guinea each declined to be included in the LDC categories on one or more occasions.

¹⁶ *ibid* 11. If CDP recommends inclusion, ECOSOC endorses it and sends it to General Assembly.

Subsequently, the government notifies the Secretary-General of its acceptance of the recommendation. Then the General Assembly takes note of the recommendation by December, and the country immediately becomes an LDC. Ten countries have been included in the LDC category through this procedure so far. As of 2020, South Sudan was the last country to be included in the list in 2012.

¹⁷ UN Committee for Development Planning (1970), 'Report on the Sixth Session (5-15 January 1970)' Economic and Social Council, Official Records: Forty-Ninth Session, Supplement No. 7, E/4776. The G77 was a coalition of developing nations, including newly independent states and others not allied with the two Cold War adversaries.

¹⁸ Leslie Wolf-Phillips, 'Why "Third World"?: Origin, Definition and Usage' (1987) 9 *Third World Quarterly* 1311; E Sottas, 'The Least Developed Countries. Introduction to the LDCs and to the Substantial New Programme of Action for Them' (UNCTAD 1985). Given the Cold War context, the Third World concept fit within the First (capitalist West) and Second (communist/socialist East) Worlds. The Third World was a middle ground between the First World capitalist and Second World communist countries. Third-world countries

robust assumptions regarding the world's poorest countries, which required (industrialisation-centred) development intervention through 'the right mix of advice, investment, aid, and liberal reform'.¹⁹ This was associated with the assumption of homogeneity and the mechanical view of economics and development.

In the 1960s and 1970s, when the LDC concept was first debated, the number and volume of Third World countries calling for a New International Economic Order²⁰ increased. During this time, previously colonised DCs gained independence and control over their development. In addition, they won the most votes at the United Nations, making it more challenging for hegemonic powers to control the organisation. Many newly independent nations pursued development, believing that wealthy countries owed them compensation for colonial exploitation. The First and Second World were competing for influence over DCs to gain access to their resources and markets. The economic and political world order structure during the Cold War contributed significantly to the 1971 UN decision to establish the LDC category officially.²¹

A global debate on trade preferences sparked the idea to refine the list of DCs and create a new sub-category, 'least developed' countries.²² Officially, the issue was raised for the first time in 1964, during the first UNCTAD.²³ This demonstrates that the initiative was taken to recognise the development disadvantages of the poorest countries and the need to support them and facilitate development through trade with developed countries. The 1971 UNCDP report also recommended that the listed LDCs receive technical assistance, financial assistance, international trade, and regional cooperation.²⁴ In contrast to the criteria for

became 'nonaligned countries', putting politics at the forefront of that categorisation. Wolf-Phillips and Sottas used the terms 'Fourth World' and 'Third World of the Third World' to refer to the 'least developed and chronically poor countries' to distinguish them from more well-off Third World countries.

¹⁹ Mark T Berger, 'The End of the Third World?' (1994) 15 *Third World Quarterly* 257, 270; Anthony Payne, *The Global Politics of Unequal Development* (Bloomsbury Publishing 2017); Arturo Escobar, 'Power and Visibility: Development and the Invention and Management of the Third World' (1988) 3 *Cultural Anthropology* 428; James Ferguson, *The Anti-Politics Machine: "Development," Depoliticisation, and Bureaucratic Power in Lesotho* (University of Minnesota Press 1994).

²⁰ In 1974, third-world countries presented NIEO as a set of demands. It proposed reorganising the international economic system to benefit DCs through greater control over their resources, industrialisation, additional development assistance and debt relief.

²¹ Patrick Guillaumont, *Caught in a Trap: Identifying the Least Developed Countries* (Economica 2009) 19. The establishment of UNCTAD in 1964, the United Nations Development Programme (UNDP) in 1965 and the United Nations Industrial Development Organization (UNIDO) in 1967, as well as the adoption of the Declaration on the Establishment of a New International Economic Order (1974) by the United Nations, the establishment of the International Development Association (1960) by the World Bank, and the integration of Part IV into the GATT (1965) (paving the way for the GSP) were also significant developments in the pursuit of that economic development objectives. In this context, the First and Second UN Development Decades were proclaimed in 1961 and 1971, respectively, providing a particular impetus to the international dialogue on development.

²² Djalita Fialho, 'Aiming High, Falling Short: The Least Developed Country (LDC) Category at 40' [2011] *Proceedings of the German Development Economics Conference, Berlin 2011*, No. 27, ZBW 13.

²³ Guy de Lacharrière, 'Identification et Statut Des Pays «moins Développés»' (1971) 17 *Annuaire français de droit international* 461, 464.

²⁴ UNCDP, 'Report of the Seventh Session (22 March -1 April 1971)' ECOSOC Official Records, Fifty-first Session, Supplement No. 7, E/4990 paras 21–22.

identifying LDCs, there was less clarity regarding the specifics of the special privileges and their delivery method.²⁵

Establishing a new LDC category favoured the interests of the developed countries. It reduced the number of recipients of development aid and made it easier for them to direct the aid where it mattered most to them. Though it de-homogenised the Third World by creating a subgroup, the remaining 'worlds' remained untouched, indicating that the international order remained largely intact.²⁶ The ODCs opposed the idea of slicing up the developing countries group from the beginning,²⁷ fearing it would permit the industrialist countries to shift development support to the LDCs.²⁸ After unsuccessful attempts to have the UN General Assembly declare the list and identification criteria to be provisional,²⁹ they ensured that it would not compromise their interests significantly.³⁰ The UNCDP felt compelled to recognise that

granting special privileges to the least developed countries may appear to discriminate against other developing countries. However, given the particular conditions of the least developed countries and their consequently limited capacity to benefit fully from the general measures for all developing countries, failure to accord them these temporary but essential advantages would be tantamount to discriminating against them.³¹

Using a historical account of the category's creation and an international political economy analysis, Fialho argues that the initial procedure for identifying LDCs was 'manipulated' to produce a shorter list of small, economically, and politically insignificant countries. Contrary to the official narrative of the LDC, this list served both the interests of donors (by undermining efforts to rationalise international assistance) and non-LDC developing countries (by creating positive discrimination within the group, identifying the most disadvantaged among them).³² Thus, from the donors' perspective, politics and strategic interests were the

²⁵ Fialho (n 22) 20. These crucial details - the reason for the group's formation - were left vague, likely due to donors' reluctance to agree to anything too specific or powerful developing countries' reluctance to accept the LDC concept out of fear of discrimination.

²⁶ The developed countries pushed for strict criteria and a short list of LDCs. However, France advocated for a more flexible solution allowing its former colonies in Africa and the Indian Ocean to be included on the LDC list.

²⁷ Fagen (n 4); Fialho (n 22) 22. India, Brazil, the United Arab Emirates and other less developed countries opposed a Ugandan proposal in the GATT's Working Party on Preferences in 1964 for greater preferential treatment for the least developed nations. At the G77 Ministerial Meeting held in Lima, Peru, in November 1971, the UN decision to institutionalise the LDC category was met with significant opposition.

²⁸ TG Weiss, 'Transcript of Interview of Jack I. Stone' (2002) 12 New York 1, 52.

²⁹ Lacharrière (n 23) 472; Smouts (n 10) 52. Having reluctantly accepted the classification, more advanced DCs were more enthusiastic about the other studies conducted by UNCTAD, which proposed a broader definition of the concept of LDC and would have allowed more DCs to be included in the category. However, interest varies across DCs too.

³⁰ Weiss (n 28) 57.

³¹ UNCDP (n 24) para 21.

³² Fialho (n 22) 1. By endorsing a narrative emphasising the altruistic priority of assistance to LDCs (without a legally binding obligation to implement it), donors appeased critics of the status quo (without relinquishing actual power). As a result of this manipulation, donors have been asked to make significantly less development-promoting efforts, which has had a negligible impact on the ODCs' interests.

LDC categorisation's primary (undisclosed) drivers. Different, but the identical argument applies to ODCs too.³³

2.2.4 Rationale for the LDC Category

Though different interests of different countries drove the LDC group's formation, the category was created with an obvious rationale. It sought to identify nations facing significant structural barriers to economic growth, which could perpetuate poverty in the long term. These barriers, including low levels of human and economic development, limited productivity, and a lack of diversity in production and exports, required immediate international attention.³⁴ Moreover, this underdevelopment often resulted from their recent independence from colonial rule and geographical factors.

In 1968, UNCTAD II unanimously adopted a resolution on 'special measures to be taken in favour of the least developed among the developing countries aimed at expanding their trade and improving their economic and social development,' which strengthened both the concept of the LDCs and the connection to international support measures.³⁵ The UNCTAD resolutions that established the original list of LDCs stated that LDCs

cannot always be expected to benefit fully or automatically from such general measures adopted in favour of all developing countries. Some special supplementary measures are therefore called for to remove the handicaps which limit the ability of the least developed countries to derive significant advantages from development initiatives.³⁶

These issues have historically been associated with the notion that LDCs are caught in an 'underdevelopment trap' due to interlocking vicious spirals, the most notable of which are the poverty trap and primary commodity dependence.³⁷ The concept of 'traps' does not imply that problems are 'insurmountable or predetermined'.³⁸ Instead, it implies the need for precise actions to develop sustainably.³⁹ There comes the relevance of LDC-specific development interventions or ISM. By offering LDCs more favourable treatment than ODCs, these measures were designed to assist LDCs in escaping the underdevelopment trap, overcoming their key development challenges, and embarking on a path of sustainable

³³ Djalita Fialho, 'Altruism but Not Quite: The Genesis of the Least Developed Country (Ldc) Category' (2012)

³³ Third World Quarterly 751; Weiss (n 28) 57. Jack Stone recalls, for instance, that 'the Indians ... were watching very carefully as to who were included in the group. They were happy to keep it small'.

³⁴ This view's conceptual roots that form a key rationale for the LDC category may be traced back to the seminal work of development economists such as Rosenstein-Rodan, Nurkse and Hirschmann. Albert O Hirschman, 'The Strategy of Economic Development.' (1958); Paul N Rosenstein-Rodan, 'Problems of Industrialisation of Eastern and South-Eastern Europe' (1943) 53 The economic journal 202; Nurkse Ragnar, 'Problems of Capital Formation in Underdeveloped Countries (1953)' in Erik Reinert, Jan Kregel and Rainer Kattel (eds), *Ragnar Nurkse: Trade and Development* (Anthem Press 2009).

³⁵ United Nations, 'Proceedings of the United Nations Conference on Trade and Development Second Session New Delhi, 1 February - 29 March 1968' Volume I Report and Annexes, Agenda 15, Page-54.

³⁶ UNCTAD (n 24) para 43.

³⁷ Guillaumont, *Caught in a Trap* (n 21).

³⁸ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (UNCTAD 2016) UNCTAD/LDC/2016/Corr1 UNCTAD/LDC/2016/Corr.1 18.

³⁹ Alice Sindzingre, 'The Impact of the 2008–2009 Crisis on Commodity-dependent Low-income African Countries: Confirming the Relevance of the Concept of Poverty Trap?' (2012) 24 Journal of International Development 989.

growth and development. However, before developing LDC-specific ISMs, it was essential to design a well-defined category of LDCs and a corresponding set of criteria for this classification.

Unfortunately, the progress gained in the last five decades to enable LDCs to achieve development has been insufficient. Low production capacity, inadequate economic diversification, dependency on natural resources, and high trade costs remain significant obstacles to sustainable economic development.⁴⁰ The disparity between LDCs and other developing countries in areas requiring immediate attention has also widened in recent decades. As noted by UNCTAD,

The 2030 Agenda for Sustainable Development and Sustainable Development Goals have the avowed aim of 'leaving no one behind'. The LDCs are the epitome of those left behind in the global economy, both economically and in human development.⁴¹

Establishing the LDC category was a crucial step in recognising the unique circumstances of the world's poorest countries and the need to accord them preferential treatment. Nevertheless, weak operationalisation has prevented adherence to its guiding principles, as evidenced by the minimal number of graduation cases.⁴² Existing development interventions for the LDCs are contested, as is their effectiveness. Thus, the primary rationale for the group's formation is facing a justification crisis.

2.2.5 Current State of the LDCs

From the initial 25 countries recognised as LDCs in 1971, the number has progressively increased, peaking at 51 in 2003. There are 46 LDCs, roughly double the initial list;⁴³ Thirty-three are in Africa, 9 in Asia, 1 in the Caribbean, and 3 in the Pacific.⁴⁴ The UN defined LDCs as 'low-income countries' that face 'severe structural impediments to sustainable development' due to higher economic and environmental vulnerability and low human assets levels.⁴⁵ From the beginning, LDCs are recognised as 'caught in a trap' of underdevelopment.⁴⁶ The economic growth of the LDCs has been notably sluggish, and many have stagnated or even declined. As a result, the income disparity between LDCs and other country groups has widened, and the economic vulnerability of LDCs has increased.⁴⁷ Widespread poverty and lack of productive capacity continue to constrain efforts to improve the quality of life of their people.

⁴⁰ UNCTAD, *The Least Developed Countries Report 2020: Productive Capacities for the New Decade* (United Nations Publications 2021) V.

⁴¹ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (n 38) 32.

⁴² The corollary to this is the definition of a point at which a country has achieved a sufficient level of development to escape the traps of underdevelopment and no longer requires the special treatment associated with LDC designation - a point at which it is eligible to graduate from LDC status.

⁴³ The number has come down due to the graduation of several LDCs from the category.

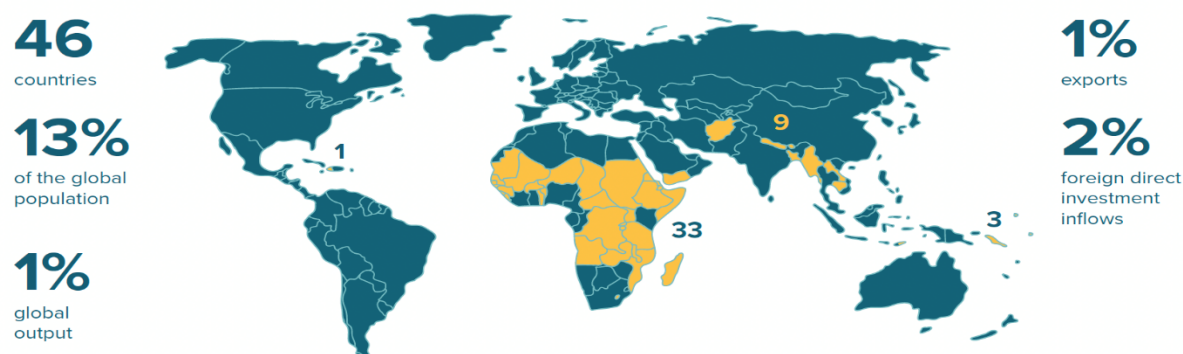
⁴⁴ UNCTAD, 'Map of the Least Developed Countries' <<https://unctad.org/topic/least-developed-countries/map>> accessed 13 March 2021.

⁴⁵ Least Developed Countries (LDCs), United Nations< <https://www.un.org/development/desa/dpad/least-developed-country-category.html>>accessed 6 March 2021

⁴⁶ Guillaumont, *Caught in a Trap* (n 21).

⁴⁷ UNCTAD, 'The Least Developed Countries Need a New Generation of International Support Measures to Face the Development Challenges of the 2020s' UNCTAD Policy Brief No.97, February 2022.

Figure 2: LDCs in the world map⁴⁸



With over 1 billion people living in the world's poorest countries, LDCs account for approximately 13.6% of the global population but only about 1% of world trade and around 1.3% of global gross domestic product (GDP).⁴⁹ Over 50 per cent of the world's extremely poor live in these countries.⁵⁰ In 2018, their real GDP per capita was just 1.7 per cent of that of developed countries and about 16.7 per cent of that of other developing countries.⁵¹

If all LDCs were grouped as a country, they would have an economy comparable to that of the Netherlands (about \$912 billion as opposed to the total LDC group GDP of 1.01 billion in 2020)⁵² and the third largest population in the world. The group is heterogeneous in size, geography, people, per capita income, and trade capacity, among other characteristics. It ranges from Tuvalu, with a population of approximately 10,000, to Bangladesh, with about 170 million population. It also includes Burundi, which has a per capita income of less than \$250, and, until recently, Equatorial Guinea, which had an average income of more than \$9,667 in the year of graduation in 2017.⁵³

2.2.6 Export Profile of LDCs

The LDC export profile remains characterised by a concentration on specific products and markets. As a result, although LDC exports have increased significantly from about 83 billion in 2005 to about 180.6 billion in 2020, their share of global exports has only increased from about 0.8% to about 0.91% during the same period (Figure-3).⁵⁴

⁴⁸ UNDP, 'Graduation of African Least Developed Countries (LDCs): Emerging Issues in a New Development Landscape' (2021).

⁴⁹ WTO, 'World Trade Statistical Review 2021'; UNCTAD, 'UN Recognition of the Least Developed Countries' (UNCTAD) <<https://unctad.org/topic/least-developed-countries/recognition#:~:text=Six%20countries%20have%20so%20far,2017%2C%20and%20Vanuatu%20in%202020.>> accessed 1 June 2022. World Bank data.

⁵⁰ UNCTAD, 'The Least Developed Countries Report 2020: Productive Capacities for the New Decade' (2020). Extremely poor are those who live on less than \$1.9 a day.

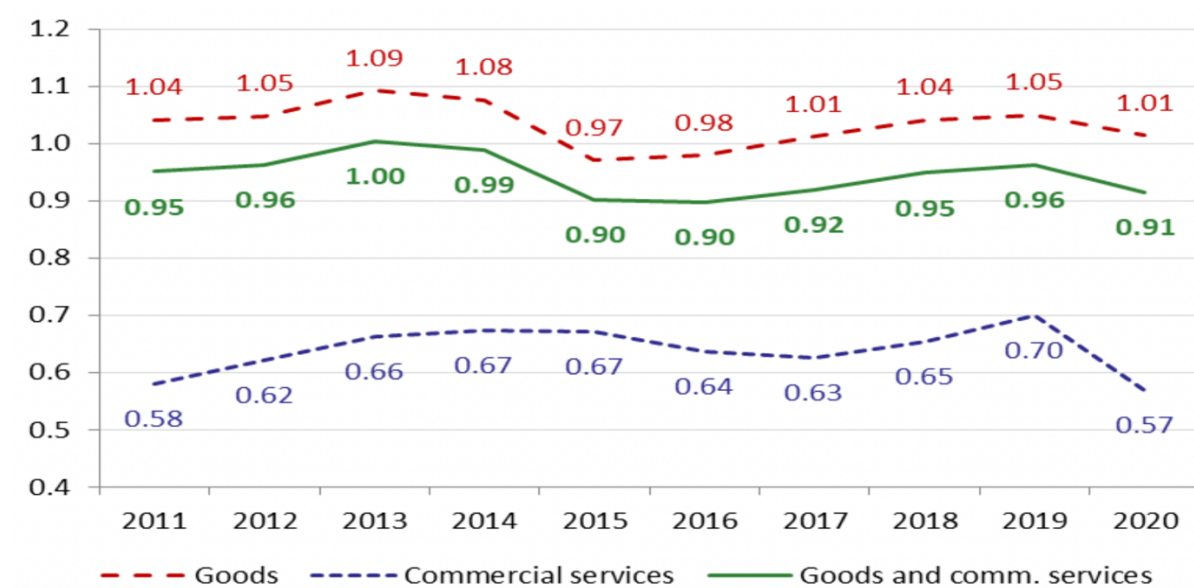
⁵¹ UNCTAD, 'Selected Sustainable Development Trends in the Least Developed Countries 2018' (2018) UNCTAD/ALDC/2018/1.

⁵² World Bank data

⁵³ World Bank data

⁵⁴ UNCTAD, 'The Least Developed Countries Report 2022 - The Low-Carbon Transition and Its Daunting Implications for Structural Transformation' UNCTAD/LDC/2022, 3 November 2022 71.

Figure 3: Shares of LDCs in world exports, 2011-2020⁵⁵



A few LDCs account for most of the group's exports. In 2011, the top ten LDC exporters accounted for more than 80% of LDC merchandise exports; by 2020, this proportion decreased to 73%.⁵⁶ Similarly, LDCs depend on a small number of export markets, with the top ten accounting for 87 per cent of their merchandise exports (Figure-4). The leading markets are China (25%), the European Union (20%), United Arab Emirates (12%) and the United States (10%).⁵⁷ The European Union and the United States are the two largest export markets for manufactured goods. At the same time, China is important for primary commodities such as agricultural produce, fuels, and mining products.⁵⁸ In terms of sectors, LDCs continue to rely heavily on the export of a few products.

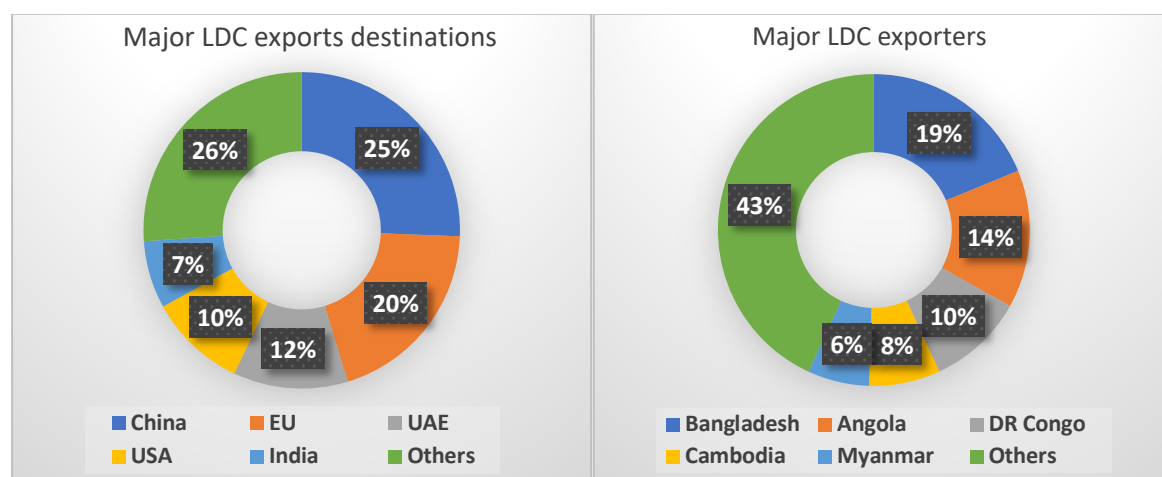
⁵⁵ Subcommittee on Least Developed Countries, 'Note by the Secretariat: Market Access for Products and Services of Export Interest to Least Developed Countries' (WTO) WT/COMTD/LDC/W/69, 27 October 2021.

⁵⁶ WTO, 'Boosting Trade Opportunities for Least-Developed Countries: Progress over the Past Ten Years and Current Priorities' (2022) 5.

⁵⁷ WTO, 'Market Access for Products and Services of Export Interest to Least Developed Countries: Note by the Secretariat' WT/COMTD/LDC/W/70, 18 October 2022 15.

⁵⁸ Subcommittee on Least Developed Countries (n 55) 15.

Figure 4: Major LDC exporters and export destinations⁵⁹



While average tariffs in high-income nations are in the single digits, tariff peaks remain in sectors where LDCs have a comparative advantage: agricultural products, apparel, footwear, and other light manufacturers. In addition, importing countries frequently exclude these items from UTPPs.⁶⁰ Their limited export base is dominated by low-value-added activities, with a greater concentration on primary products than manufactured goods. Manufactured goods exports increased from 17.9% of LDC exports in 2008 to 37.1% by 2020; they were primarily labour- and resource-intensive, with high-skill and technology-intensive exports at less than 5%.⁶¹ In 2020, LDC merchandise exports comprised 48% of primary products, compared to 42% of manufactured goods dominated by apparel.⁶² LDCs' export of services reflects their lower level of service supply capacity. Most LDCs heavily rely on tourism, which accounts for more than half of their commercial service exports.⁶³

The LDCs' share of global exports of goods and services has been hovering around 1% for many years. (Figure 2) In addition to a limited export base, sensitivity to price fluctuations in primary commodities, and an ever-growing trade deficit, LDCs face various other obstacles. The uncertainty caused by the COVID-19 pandemic, the Ukraine crisis, and the global economic slowdown have made LDCs exports' position in international trade even less significant.

2.3 Benefits of LDC status

ISMs for LDCs have been progressively developed in the context of international agreements and organisations and by individual countries and other institutions. They mainly focus on the following three areas: international trade, development cooperation and participation in international institutions.

⁵⁹ WTO, 'Market Access for Products and Services of Export Interest to Least Developed Countries: Note by the Secretariat' (n 57).

⁶⁰ Kimberly Ann Elliott, 'Trade Preferences for the Least Developed Countries: Opportunities Not Panaceas' (International Centre for Trade and Sustainable Development (ICTSD) 2015) 2.

⁶¹ UNCTAD, 'The Least Developed Countries Report 2022 - The Low-Carbon Transition and Its Daunting Implications for Structural Transformation' (n 54) 71.

⁶² Subcommittee on Least Developed Countries (n 55) 13.

⁶³ WTO and EIF, *Trade Impacts of LDC Graduation* (World Trade Organization 2020) 51–53.

2.3.1 Trade-related Support

LDC-specific trade-related support is provided to integrate LDCs into the MTS and enable them to participate actively in global markets. Such supports include⁶⁴:

- a. **Special treatment regarding WTO obligations:** LDC WTO Members receive SDT for implementing WTO for (a) increased market access, (b) protection of LDC interests, (c) greater flexibility for LDCs in trade rules and disciplines, (d) extension of longer transitional periods to LDCs, and (e) provision of technical assistance.⁶⁵ However, some of these provisions have expired or are no longer effective.
- b. **Preferential market access:** LDCs are offered DFQF market access by most developed countries and a growing list of advanced developing countries.⁶⁶ Though, because of the most-favoured-nation (MFN) principle, the WTO has established rules that make these preferences legal,⁶⁷ LDCs do not need to be WTO members to gain preferential market access.⁶⁸
- c. **Special treatment under certain regional agreements:** In addition to preferential tariffs and rules of origin, certain regional trade agreements also include special provisions for LDCs, such as more extended implementation periods and special considerations in the event of a dispute. Such RTAs include the South Asian Free Trade Area (SAFTA)⁶⁹, Asia Pacific Trade Agreement (APTA)⁷⁰, Pacific Agreement on Closer Economic Relations (PACER) Plus⁷¹, Preferential Tariff Arrangement-Group of Eight Developing Countries (D8)⁷², and ASEAN/ASEAN+1.⁷³
- d. **Technical assistance and capacity-building:** LDCs can access various trade-related technical assistance and capacity-building mechanisms. In particular, a Trade Facilitation Agreement Facility (TFAF) supports developing and least developed countries in realising the full potential of the Trade Facilitation Agreement (TFA). Such organisations or arrangements include the WTO, the Enhanced Integrated Framework, the Advisory Centre for WTO Law, the Standards and Trade Development Facility, and the International Trade Center (ITC).

⁶⁴ Trade-related supports for LDCs are explored in detail in Chapter 7.

⁶⁵ Committee for Development Policy, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (UN 2008) 17. LDCs that are not WTO members receive assistance with the accession process.

⁶⁶ The WTO database on preferential trade arrangements has information regarding each member that provides or benefits from unilateral preferential trade schemes. In addition, information on reciprocal preferential trade agreements between two or more parties can be found in the WTO Regional Trade Agreements Database.

⁶⁷ The enabling clause (described later in the thesis) has covered the legal protection for the unilateral trade preferences offered to the LDCs. Accordingly, the 'services waiver' for LDCs adopted by WTO Members in 2011 permits WTO Members to grant LDC services or service suppliers preferential treatment that would otherwise be inconsistent with GATS Article II (most favoured nation treatment).

⁶⁸ WTO and EIF (n 63). However, due to numerous factors, LDCs do not benefit significantly from the exemptions.

⁶⁹ LDC members are Afghanistan, Bangladesh, Bhutan, Maldives, and Nepal.

⁷⁰ Bangladesh and Lao PDR are members.

⁷¹ Kiribati, Solomon Islands, and Tuvalu are members.

⁷² Bangladesh is a member.

⁷³ Lao PDR, Cambodia, and Myanmar are members.

2.3.2 Development Co-operation

Developed countries commit to providing 0.15 to 0.20 per cent of their gross national income (GNI) as official development assistance (ODA) to LDCs, as part of their commitment to provide 0.7 per cent of GNI in ODA to developing countries. Members of the OECD Development Assistance Committee (DAC) contribute significantly to ODA by increasing the percentage of grants, reducing interest rates, or lengthening the repayment period of loans.⁷⁴

However, international commitments to ODA are seldom met, and their implementation is continuously declining. For instance, in 2017, OECD countries only provided 0.09 per cent of their GNI in ODA to LDCs.⁷⁵

Tied aid is also a significant issue for aid-recipient countries.⁷⁶ OECD DAC members adopted a Recommendation in 2001 to untie ODA to LDCs⁷⁷, which was reaffirmed in the 2005 Paris Declaration on Aid Effectiveness.⁷⁸ Significant progress has been made since then, with the share of untied ODA standing at 88% in OECD DAC countries as of 2016.⁷⁹

2.3.3 Support for Participation in International Fora

There are some measures to support LDCs' involvement in United Nations processes and other international fora. They include caps and discounts on their contribution to the UN budgets, advocacy for LDCs within the United Nations and with other partners, support for travel to international conferences, diplomatic training, etc.

2.4 LDC Graduation

2.4.1 What is LDC Graduation?

LDC graduation is the incidence of an LDC leaving the group. In 1979, Frank was the first to highlight the concept of graduation, referring to 'the phasing out and ultimate elimination for the more economically advanced LDCs of the differential treatment in trade' to align them 'with the generally applicable rules of the international trading system.'⁸⁰ The concept evolved gradually. Countries are now eligible to leave the category if they meet the graduation thresholds of the three defined criteria.

'In principle, graduation marks the point at which an LDC has escaped sufficiently from the vicious circles' of underdevelopment 'to enable it to operate in, and benefit from,

⁷⁴ OECD, 'Recommendation on Terms and Conditions of Aid' (1978) DAC(78)7-DAC/M(78)1(Prov). The commitment is made and assessed under the Recommendations on Terms and Conditions of Aid. The recommendation requires OECD DAC countries to provide, on average, 90% of a given donor's annual commitment in grant element in the ODA to LDCs instead of 86% for the DCs.

⁷⁵ OECD, 'Development Co-Operation Report 2018: Joining Forces to Leave No One Behind' 229. However, they met the target by providing 90% of ODA disbursement to LDCs in grants in 2017.

⁷⁶ OECD defined tied aid as 'official grants or loans that limit procurement to companies in the donor country or in a small group of countries' and that 'often prevents recipient countries from receiving good value for money for services, goods, or works.'

⁷⁷ OECD, 'DAC Recommendation on Untying ODA to the Least Developed Countries (LDCs) and Non-LDC Highly Indebted Poor Countries' (2001).

⁷⁸ OECD, 'Paris Declaration on Aid Effectiveness' (OECD Publishing 2005)

<<https://dx.doi.org/10.1787/9789264098084-en>> accessed 1 January 2021. The Declaration reiterated the Recommendation on untying aid and envisaged monitoring its progress

⁷⁹ OECD, '2018 Report on the DAC Untying Recommendation' DCD/DAC(2018)12/REV2, 13 June 2018.

⁸⁰ Isaiah Frank, 'The "Graduation" Issue for LDCs' (1979) 13 Journal of World Trade Law 289.

international markets on an equal footing with ODCs—that is, to make a transition from reliance primarily on exceptional international support to a greater degree of reliance on international markets.⁸¹ Thus, international trade efficiency plays a crucial role in the successful graduation of LDCs.

Due to their chronic poverty and structural impediments, LDCs were not expected to experience significant economic growth. As a result, the UN Committee for Development Policy (CDP), which established the criteria for inclusion and removal of countries from the LDC list, did not consider graduation for these countries for the first 20 years of the category's creation. It was only in 1991, when Botswana became the first LDC to graduate from the list, that the CDP created graduation rules. Since then, the list of LDCs undergoes regular triennial reviews.

Though the views of a country are taken into consideration, the graduation of a country does not depend on the consent of its government,⁸² and there is no provision for 'voluntary graduation'.⁸³ The LDC graduation process is also distinct from other graduation procedures, such as those employed by the IDA of the World Bank⁸⁴ and OECD-DAC.⁸⁵ However, graduation is not an automatic process. In addition to the set criteria as well as the opinion of the government, the CDP considers a UN impact assessment, a UNCTAD vulnerability profile, a range of supplementary indicators, and other relevant information and documents. During the triennial review of 2021, for instance, the CDP assessed the impact of COVID on LDCs when recommending graduation.

2.4.2 LDC Inclusion and Graduation Criteria

Countries can enter or exit the LDC category if they meet the defined thresholds of the three criteria below, updated before each review.

- a. Gross national income (GNI) per capita: It reflects the income status and the overall level of resources available to a country.⁸⁶ The threshold is calculated at the three-year average of GNI per capita. For the 2021 CDP review, this criterion was \$ 1,018 for inclusion and \$ 1,222 for graduation (20 per cent above the inclusion level).⁸⁷

⁸¹ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (n 38) 27.

⁸² Committee for Development Policy (n 15) 12.

⁸³ Alassane Drabo and Patrick Guillaumont, 'Graduation from the Category of Least Developed Countries: Rationale, Achievement and Prospects' (HAL 2018) 3.

⁸⁴ Eligibility for International Development Authority (IDA) assistance is determined by a country's relative poverty, defined as a GNI per capita below a threshold amount (\$1,255 in fiscal year 2023). Forty-six countries have graduated from IDA since its inception, and nine have re-entered ('reverse graduated').

⁸⁵ The OECD-Development Assistance Committee (DAC) recipient list, updated every three years, includes all low- and middle-income countries according to the World Bank's GNI per capita, excluding the EU and the G8 members. Countries that have exceeded the high-income threshold for three consecutive years are graduated from the list.

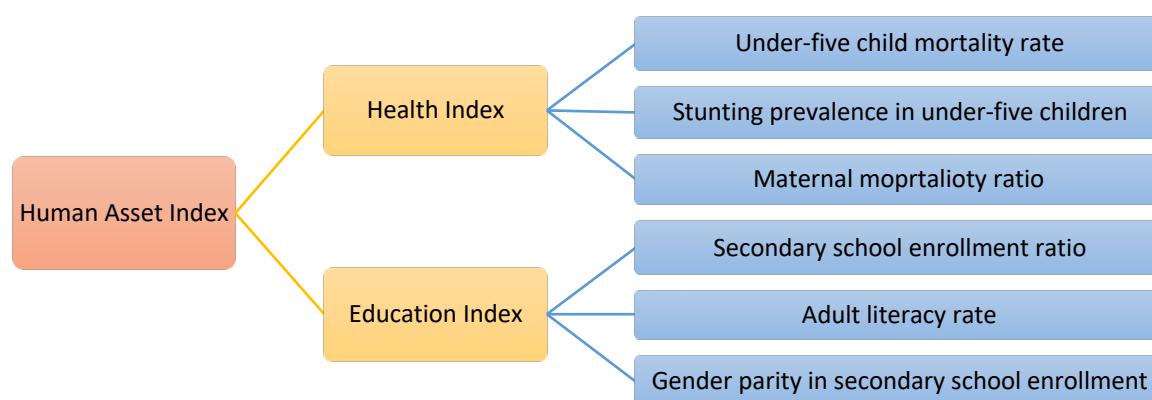
⁸⁶ GNI is calculated using the World Bank Atlas method, while GNI per capita is calculated by dividing GNI in USD by the annual population of a country.

⁸⁷ UNDESA, 'LDC Identification Criteria & Indicators' (4 March 2010)

<<https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html/>> accessed 10 March 2021.

- b. Human Assets Index (HAI): It measures the human capital level of the country. Lower level means huge 'structural impediments to sustainable development'.⁸⁸ As Figure 5 shows, HAI has two subindexes with three indicators, each carrying an equal weight of 1/6.

Figure 5: Indicators of Human Assets Index (HAI) for LDC status⁸⁹



- c. Economic and Environmental Vulnerability Index (EVI): This index measures the structural vulnerability of a country to economic and environmental shocks where a higher EVI suggests 'major structural impediments to sustainable development'.⁹⁰ The EVI comprises two economic and environmental subindexes with four indicators, each carrying an equal weight of 1/8. (Figure-6)

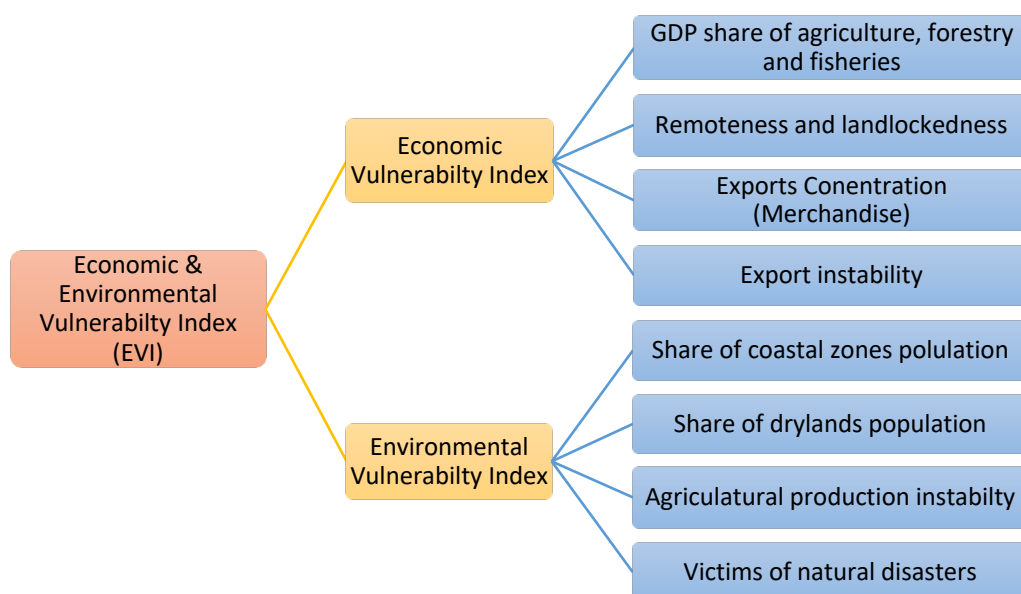
Figure 6: Indicators of Economic and Environmental Vulnerability Index (EVI) for LDC status⁹¹

⁸⁸ CDP reviews have used absolute thresholds for the HAI since 2015. For example, the graduation threshold (66 and above) has been set at 10 per cent higher than the inclusion threshold (60 and below).

⁸⁹ Adapted from UNDESA, UNDESA (n 87).

⁹⁰ *ibid.* Similar to HAI, EVI is also determined by absolute thresholds since 2015. The graduation threshold (32 and below) has been set at 10 per cent below the inclusion threshold (36 and above).

⁹¹ Adapted from UNDESA, *ibid.*



2.4.3 LDC Graduation Process

As opposed to inclusion, graduation is a long and complex process. As shown in Figure 7, it involves two consecutive CDP reviews and vulnerability and impact assessments due to graduation. Once graduation is recommended, the CDP monitors the country's development progress for three to five years. The graduating country then develops a transition strategy and establishes a consultation mechanism with development partners to receive support during the graduation process.⁹²

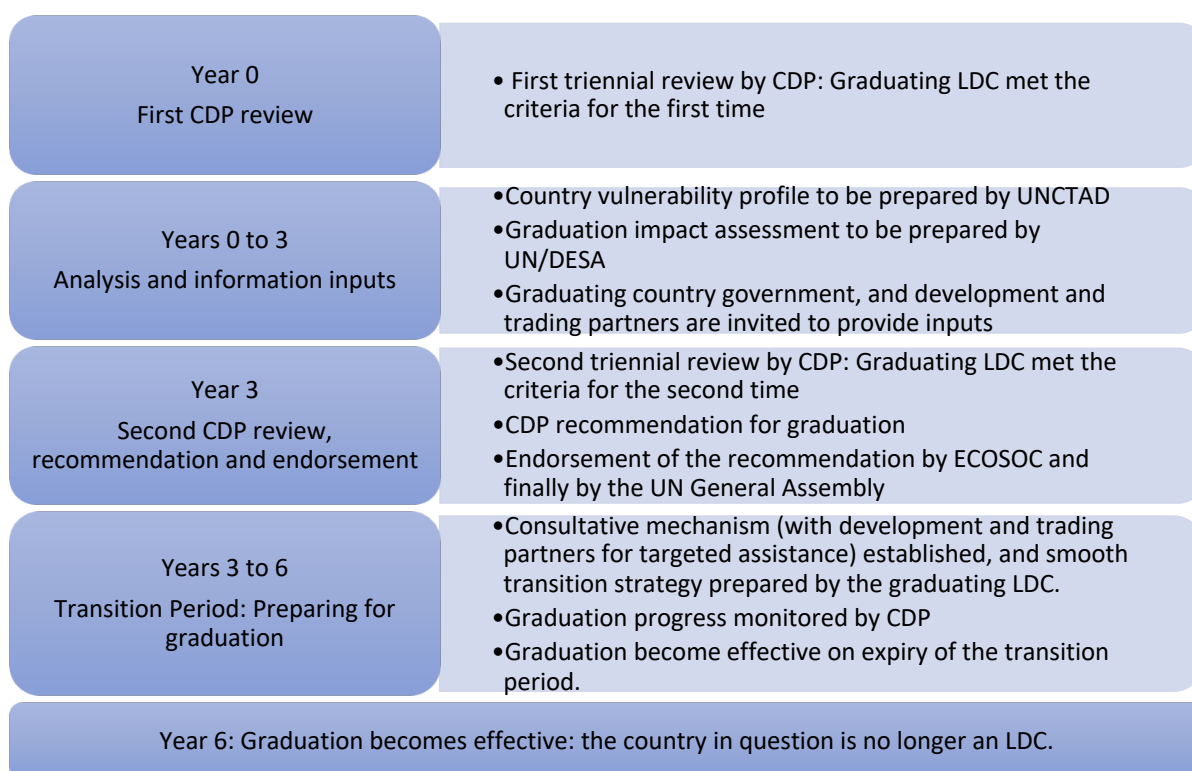
Though a standard process should take six years, graduation in practice needs longer times. As the eligibility criteria should not be applied mechanically, CDP has elected to postpone graduation if there are concerns about the sustainability of the development progress of the graduating LDCs.⁹³

Figure 7: LDC graduation process and timeline⁹⁴

⁹² The LDC may report its development on these to CDP.

⁹³ Committee for Development Policy (n 15) 17.

⁹⁴ Adapted from UNDESA <<https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-graduation.html>> accessed 10 March 2021



To maintain an asymmetry between the criteria for inclusion and graduation, the graduation thresholds are set higher than the inclusion thresholds (Table-1). This is done to ensure the sustainability of graduation and prevent countries from falling back into the LDC category after leaving it due to short-term fluctuations.⁹⁵

Table 1: Asymmetry between the processes of inclusion and graduation⁹⁶

Criteria	Inclusion	Graduation
Number of criteria (to be met)	3	2 (one, in case of income-only graduation)
Eligibility	Determined once	Determined twice over two consecutive triennial reviews
Population Threshold	Not more than 75 million	Not relevant
Country Approval	Necessary	Not necessary
Timing of effectiveness	Immediately effective	Preparatory period (3-5 years)

2.4.4 Impact of the Covid-Pandemic on the LDC Graduation Process

According to the UNCDP's 2021 panel review, LDCs have faced unprecedented socioeconomic crises due to COVID-19. While many have managed to mitigate the immediate health crisis, they have been severely affected by the economic downturn. Limited fiscal resources, high levels of debt, and reduced external financing have constrained the ability of many LDCs to respond effectively.⁹⁷ Post-pandemic economic uncertainties and growing inequalities pose

⁹⁵ Patrick Guillaumont, 'The Rationale of the Least Developed Countries Category over Half a Century in Brief' [2021] FERDI Notes brèves/Policy briefs 3.

⁹⁶ Adapted from Committee for Development Policy (n 15) 7.

⁹⁷ UN ECOSOC, 'Committee for Development Policy Report on the Twenty-Third Session (22–26 February 2021)' (UN) E/2021/33.

challenges to LDCs in achieving development goals, with some countries facing potential delays in their graduation process.⁹⁸

Based on a review of the literature and additional analysis, it is evident that the COVID-19 pandemic is expected to have a clear negative impact on nine out of the 15 indicators used to LDCs. Table-2 provides a concise summary of the main connections between the pandemic and all LDC indicators.⁹⁹

Amid the ongoing health and socioeconomic crises in 2021, the UNCDP concluded its last triennial review of LDC list and recommended the graduation of Bangladesh, the Lao PDR, and Nepal.¹⁰⁰ However, due to the pandemic, the UNCDP allowed an extended preparatory period of 5 years instead of the usual 3 for a smooth transition emphasizing careful monitoring and analysis of the pandemic's impacts, as well as specific support dedicated to facilitating the transition process.¹⁰¹

Table 2: Linkages between the Covid-19 pandemic and the LDC graduation indicators¹⁰²

Indexes	Indicators	Pandemic impacts
Gross National Income (GNI) per capita	GNI per capita	Lockdown measures and reduced demand have caused a decline in GNI. This has led to pressure on balance of payments, changes in exchange rates, and potential impacts on inflation. The pandemic has also affected mortality rates and fertility rates, potentially altering population numbers. Long-term consequences include increased poverty, reduced education, and uncertain effects on future growth rates and GNI per capita in LDCs.
Human Assets Index (HAI)	Under-5 mortality rate	Low direct impact on child mortality, but significant indirect effects due to reduced access to healthcare, social services, nutritious food, and potential increase in poverty.
	Maternal mortality ratio	Indirect impacts due to limited access to health and social services
	Stunting prevalence	Indirect impact due to rise in poverty and limited access to nutritious food; long term impact
	Gross secondary school enrolment	Increased poverty, school closures, limited access to remote learning, and higher dropout rates impact education, with completion rates and learning outcomes being more affected than enrollment.
	Gender parity index for gross secondary school enrolment	Girls' enrollment may decline more than boys' due to factors like early marriages.

⁹⁸ *ibid.*

⁹⁹ While a single indicator measures the income criterion, the Human Assets Index (HAI) comprises six indicators, and the Economic Vulnerability Index (EVI) includes eight indicators.

¹⁰⁰ It is important to note that the LDC criteria scores for the triennial review in 2021 were based on data up to 2019 and do not account for any COVID-19-related effects. These effects will be most apparent in the subsequent triennial review in 2024 and beyond. The EVI indicators use 20 years of data, which means that any possible short- and long-term impacts on export and agricultural instability could lead to elevated EVI scores for many years. The HAI indicators use the latest available data, which means that short-term impacts may not be visible in the 2024 review. However, the estimation techniques used for the health indicators and time lags in data collection and production suggest that both short- and long-term impacts may be visible in 2024 and beyond.

¹⁰¹ UN ECOSOC (n 26).

¹⁰² Adjusted from UNCDP (n 20).

	Adult literacy rate	Limited access to education could may literacy rates among young people, potentially hindering future progress while not immediately decreasing current levels.
Economic Vulnerability Index (EVI)	Share of agriculture, forestry and fisheries in GDP	Agricultural production is expected to decline less, or not at all, compared to other sectors like mining, manufacturing, and hospitality services, potentially leading to an increased share of the agricultural sector.
	Remoteness and landlockedness	The pandemic's impact on trade may result in changes to geographic trade patterns and remoteness scores, but the direction of change is uncertain.
	Export concentration	The pandemic may impact export products and concentration, but the direction of change is uncertain.
	Export instability	Increase due to 2020 export decline and export rebound in 2021/22.
	Share of population in low elevated coastal zones	Zero impact
	Share of population in drylands	Zero impact
	Agricultural instability	Negative impacts as access to agricultural inputs and value chains affected
	Victims of disasters	Epidemiological disasters not included in current graduation indicator.

Concerns have been raised about the sustainability of recovery post-pandemic, leading to discussions about the need for further extensions even by the UN officials.¹⁰³ The UNCDP will assess the adequacy of the five-year preparatory period during its 2024 triennial review and make any necessary recommendations, including the possibility of a further extension. This provision aims to provide reassurance to graduating LDCs that their development process will not be disrupted or reversed due to graduation.¹⁰⁴

Moreover, the UNCDP has recognised the need to refine the LDC graduation criteria recognising the pandemic shocks. The criteria were refined by the UNCDP in 2020 after a multi-year comprehensive review simplifying the structure of the three criteria and increasing the recognition of gender inequities, malnutrition, and environmental vulnerabilities.¹⁰⁵ The UNCDP also introduced process improvements to reduce information deficits and uncertainties during the graduation process. The UNDESA and UNCTAD will now consolidate 'impact assessments' and 'vulnerability profiles' into a single 'graduation assessment.'¹⁰⁶ The UNCDP has also recommended actions to enhance the effectiveness of monitoring graduation¹⁰⁷, emphasizing the importance of constant monitoring, early warning systems, resilience building, and prompt response policies at national and global levels for managing the transition out of the LDC category.¹⁰⁸

¹⁰³ Star Business Report, 'UN High-Ups for Postponing LDC Graduation of Bangladesh' (*The Daily Star*, 23 June 2020) <<https://www.thedailystar.net/business/news/un-high-ups-postponing-ldc-graduation-bangladesh-1919021>> accessed 31 December 2023.

¹⁰⁴ United Nations, 'Implementation, Effectiveness and Added Value of Smooth Transition Measures and Graduation Support: Report of the Secretary-General' (UN 2021) A/76/271 pt II.

¹⁰⁵ Official Records of the Economic and Social Council, 2020, Supplement No. 13 (E/2020/33)

¹⁰⁶ This assessment will be enhanced by inputs from other United Nations entities, including country teams, and will consider elements for a smooth transition strategy.

¹⁰⁷ The monitoring system is so far characterised by low participation by the graduating and graduated LDCs as well as vital trade and development aid partners.

¹⁰⁸ United Nations, 'Implementation, Effectiveness and Added Value of Smooth Transition Measures and Graduation Support: Report of the Secretary-General' (n 33) pt III.

2.4.5 Rationale and consequences of graduation

Graduation is the expected and natural consequence of development for a country on the LDC list. The original purpose of the list was to identify countries with severe structural barriers to development, provide them with enhanced development assistance, and eventually graduate them from the list. Graduation is the goal of inclusion on the list; it is a sign of development progress, but it is not the endpoint of its development journey.

As a critical development milestone, graduation can be considered a defining moment in a country's history. A graduated LDC may have enhanced access to foreign investment¹⁰⁹, greater credibility and reputation in the international community, and greater ownership of the development agenda,¹¹⁰ and a more resilient human capital and economic structure to withstand shocks.¹¹¹ LDC governments can use graduation as a benchmark of development progress. However, graduated LDCs lose access to various ISMs in trade, development, and other areas, which may hinder their efforts to further develop and integrate into the global economy.¹¹² Therefore, policy approaches to graduation should consider preparing the graduating LDCs for challenges beyond graduation and avoiding pitfalls unique to early-stage development.¹¹³

2.4.6 Legal Framework of LDC Graduation

A 1991 UN General Assembly resolution that approved a CDP report framing the criteria for exiting the LDC list laid the foundation for graduation.¹¹⁴ It also decided on a three-year transitional period for a 'smooth transition' of the graduating LDCs to avoid 'disruption to their development plans, programmes and projects' and invited the Governments, international organisations, and other concerned parties to take appropriate steps to ensure that. After that, several resolutions were adopted by the UNGA, highlighting different aspects of the graduation process and the necessary development support to ensure sustainable graduation and avoid fallback (Table-3).

These resolutions also request UN systems to provide different supports to graduating and graduated countries, urge trade partners to extend access to LDC-specific GSP schemes for a period following graduation, request WTO members to maintain access to LDC-specific SDT for a period after graduation, and invite LDCs and development partners to integrate graduation support into their national development and aid strategies.¹¹⁵

¹⁰⁹ International investors seek markets that are stable and growing. However, it is difficult to quantify as credit rating agencies do not consider graduation when analysing sovereign bonds but instead employs subsidiary indicators.

¹¹⁰ They have more freedom to determine their economic and national policy priorities without being constrained by the conditions attached to LDC support measures.

¹¹¹ Gradjet, 'Questions Frequently Asked about LDC Graduation' (*Gradjet*) <<https://www.gradjet.org/faq-on-ldc-graduation/>> accessed 25 February 2023.

¹¹² Trade consequences of graduations are analysed in detail in Chapter 7.

¹¹³ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (n 38) 27.

¹¹⁴ UNGA Resolution 46/206 of 20 December 1991 approved the recommendations in the CDP Report of the twenty-seventh Session (New York, 22-26 April 1991).

¹¹⁵ UN General Assembly, 'Smooth Transition Strategy for Countries Graduating from the List of Least Developed Countries' A/RES/59/209, Resolution adopted by the General Assembly on 21 December 2012; UN General Assembly, 'Implementing the Smooth Transition Strategy for Countries Graduating from the List of

Table 3: Legal framework of LDC graduation

Instruments	Description
UNGA resolution 59/209	Regulates the graduation process and the roles of the decision-making actors (the CDP, the Economic and Social Council (ECOSOC), and the General Assembly) in this process.
UNGA resolutions 59/209, 65/286, 67/221	- Reiterates the importance of ensuring that a country's graduation from the LDC status does not jeopardise the country's development progress. - Recognises that LDC-specific support should be phased out gradually and predictably and that LDC preferential market access should be extended to graduated countries for several years.
UNGA resolutions 68/224, 69/231, 73/242	Request that all relevant UN organisations, led by the Office of the High Representative for Least Developed Countries, Landlocked Developing Countries, and Small Island Developing States (OHRLLS), provide the required support to graduating LDCs in the development of their graduation and transition strategies.
UNGA resolutions 59/209, 67/221, WTO, LDC Ministerial Declaration 2017	- Urges development and trading partners to consider extending or phasing out graduated country trade preferences previously made available due to LDC status. - Urges all WTO members to consider granting a graduated country special and differential treatment and exemptions for a period appropriate to the development.
UNGA resolution 67/221,	Invites development partners to consider LDC indicators (GNI per capita, HAI, and EVI) as part of their criteria for allocating ODA to make the allocation of ODA more stable and predictable.
UNGA resolutions 59/209, 73/242	- Recommend that graduating countries establish a consultative mechanism in collaboration with bilateral and multilateral development and trading partners to prepare a transition strategy and to identify associated actions. - Invites the LDCs and development partners to incorporate the graduation and smooth transition strategies into their respective national development and aid strategies (including capacity-building and technical assistance) to diversify sources of financing. - Invites all development partners to strengthen their support for graduation and smooth transition to minimise disruptions to the development trajectory of graduating and recently graduated countries.
Istanbul Programme of Action 2011, and	Urged the international community to provide extended international support measures to graduating and graduated LDCs to make graduation sustainable and irreversible.

Least Developed Countries' A/RES/65/286, Resolution adopted by the General Assembly on 29 June 2011; United Nations, 'Resolution Adopted by the General Assembly on 21 December 2012 on Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/221; UN General Assembly, 'Follow-up to the Fourth United Nations Conference on the Least Developed Countries' A/RES/68/224, Resolution adopted by the General Assembly on 20 December 2013; UN General Assembly, 'Follow-up to the Fourth United Nations Conference on the Least Developed Countries' A/RES/69/231, Resolution adopted by the General Assembly on 19 December 2014; UN General Assembly, 'Follow-up to the Fourth United Nations Conference on the Least Developed Countries' A/RES/73/242, Resolution adopted by the General Assembly on 20 December 2018.

In connection with these resolutions, a WTO Ministerial Declaration requested ‘development and trading partners to extend to the graduated country’ LDC-specific trade preferences or to reduce ‘them in a phased manner to avoid their abrupt reduction.’ It also invited ‘all WTO Members to extend to a graduated country the existing special and differential treatment related to the implementation of the WTO agreements available to LDCs for a period appropriate to the development situation of that country.’¹¹⁶

The Istanbul Programme of Action (IPoA) aims to assist LDCs in developing and graduating rapidly, with an ambitious goal of enabling 50% of LDCs to graduate by 2020. Despite the apparent failure of this goal, the graduation process is now gaining momentum, with the Political Declaration of the IPoA Midterm Review in 2016 reflecting an agreement to make more concerted and ambitious efforts to help LDCs meet graduation criteria and graduate with momentum.¹¹⁷

The Doha Programme of Action (DpoA) 2022 expresses concern about the IPoA’s failure to meet its goals and targets. It aims to support LDCs and ‘graduating countries in achieving at least 7 per cent GDP growth per annum’ to ensure ‘sustainable and irreversible graduation with momentum.’¹¹⁸ Reiterating conviction that no graduating LDC ‘should have its development progress disrupted or reversed’, it invited development and trading partners to ensure ‘extension of international support measures to graduating and graduated’ LDCs.¹¹⁹ Irreversible.¹²⁰

2.5 Concerns with LDC Graduation

2.5.1 Low Records of Graduation

Despite almost five decades of international support, the challenges faced by LDCs remain pervasive and restrictive.¹²¹ Although graduation has gained momentum, it remains a slow process due to the persistent growth deficit of LDCs.¹²² Their weak institutions and divided societies have made them more vulnerable to the negative impacts of poor trade

¹¹⁶ WTO, ‘LDC Ministerial Declaration, LDC Trade Ministers’ Meeting Buenos Aires, Argentina, 9 December 2017’ WT/MIN(17)/40 para 3.3.

¹¹⁷ In order to graduate with momentum, a country must not only meet the criteria for leaving the LDC category but also have a robust and diversified economy that can sustain its development after graduation. UNGA resolution on Political Declaration of the Comprehensive High-level Midterm Review of the Implementation of the Istanbul Programme of Action for the Least Developed Countries for the Decade 2011-2020, A/70/L.56 of 13 July 2016.

¹¹⁸ UN General Assembly, ‘Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031’ (UN 2022) A/CONF.219/2022/3 paras 12, 236, 235.

¹¹⁹ *ibid* 165.

¹²⁰ *ibid* 57/63.

¹²¹ The UN established the category in 1971 to bring them into the focus and help them develop at a speed so they can leave the list quickly. The international community and the LDCs want to avoid any country staying stuck in the category for a long. Nevertheless, for the next 20 years of the group's establishment, LDC showed little sign of reaching that milestone, so no option for graduation was introduced. As a result, LDC status was only considered for inclusion into the category.

¹²² William Easterly, ‘The Lost Decades: Developing Countries’ Stagnation in Spite of Policy Reform 1980-1998’ (2001) 6 *Journal of Economic Growth* 135. The 1980s and 1990s have been dubbed the ‘lost decades’ for DCs, particularly LDCs, when their median per capita income growth tumbled to zero.

performance, exacerbating their challenges.¹²³ Graduation has only gained momentum over the past decade, particularly since the adoption of the IPoA,¹²⁴ and lowering of graduation threshold.¹²⁵ Twenty-six of the total 46 LDCs are currently in various stages of graduation.¹²⁶

2.5.2 Fear-driven instead of Incentive-driven Graduation

Contemporary narratives tend to focus on the potential losses that LDCs may encounter upon graduation, rather than highlighting the opportunities and benefits of this transition. The lack of incentives for LDCs to graduate is likely a contributing factor, with the only tangible advantage being a reputational one.

Rather than preparing graduating countries for future challenges and supporting them in becoming middle-income economies, the transition to non-LDC status primarily involves withdrawing or reducing ISMs. However, a well-defined and well-planned post-graduation support mechanism could help ensure that development progress is not compromised. This could be achieved through a time-bound incentive mechanism that motivates LDCs to overcome obstacles and maximize their growth potential. LDC governments have repeatedly expressed their concerns about the lack of effective, systemic, and legally binding post-graduation support, emphasizing the need for such mechanisms to be established.

The LDC Ministerial Declaration in 2022 stressed the significance of providing "specific support measures to recently graduated countries for making graduation sustainable and irreversible" so that the development progress of graduated LDCs is not 'disrupted or reversed'. It also urged

'development and trading partners to consider extending to the graduated country trade preferences previously made available as a result of least developed country status or reducing them in a phased manner to avoid their abrupt reduction.'¹²⁷

Even when eligible, the unwillingness of LDCs to graduate justifies their concern regarding systemic support for graduating countries. Several countries that previously met the criteria remain LDCs or only graduated after a period. For instance, Samoa graduated 23 years after first meeting the requirements, while the Maldives and Cabo Verde took 14 and 13 years,

¹²³ Dani Rodrik, 'Where Did All the Growth Go? External Shocks, Social Conflict and Growth Collapses' (CEPR Discussion Papers 1998) 1789 <<https://ideas.repec.org/p/cpr/ceprdp/1789.html>> accessed 15 March 2021.

¹²⁴ United Nations, 'Programme of Action for the Least Developed Countries for the Decade 2011-2020' (Fourth United Nations Conference on the Least Developed Countries, Istanbul, Turkey 9-13 May 2011) A/CONF.219/3/Rev.1. It outlines an ambitious vision of graduating half of the LDCs by 2020.

¹²⁵ UNCTAD lowered the graduation bar by fixing the HAI and EVI scores at their 2012 levels, whereas they were previously moving averages reflecting overall progress. Mustafizur Rahman and Debapriya Bhattacharya, 'Sustainable Graduation: International Support Measures for Graduating LDCs' [2020] International Trade Working Paper 2020/10, Commonwealth Secretariat 8.

¹²⁶ Communication from Chad on behalf of the LDC group, 'A Smooth Transition Package in Favour of Members Graduating from the LDC Category' (WTO) WT/GC/W/829, 18 October 2021. Among the 46 LDCs, 26 are on the path to graduation. Nineteen are WTO members. Four LDCs are in the process of joining the WTO: Comoros, Bhutan, Sao Tome and Principe, and Timor-Leste.

¹²⁷ United Nations, Ministerial Declaration of the Least Developed Countries New York, 22 September 2022 paras 34, 35.

respectively.¹²⁸ The legitimate graduation concerns must be addressed if the IPoA and DPoA graduation targets are to be met.¹²⁹

2.5.3 Risk of Unsustainable Graduation

As graduation is a new concept, its procedure still needs to be fully developed, and trade and development partners are still deliberating on the most effective support mechanisms. The UN is also still exploring 'different ways of supporting graduating and recently graduated countries are currently being studied.'¹³⁰

According to UNCTAD, graduation is challenging because many countries that meet the criteria still need to develop their productive capacities or make sufficient structural transformation progress.¹³¹ Most countries that have graduated are still susceptible to exogenous shocks and require international measures to manage them.¹³² LDCs that rely on LDC-specific market access but face an abrupt withdrawal of benefits have a legitimate concern about unsustainable graduation. This issue has been highlighted in the UNGA resolutions on graduation.

2.5.4 Post-pandemic Global Economic and Trade Uncertainties

The global economic downturn caused by the covid pandemic has been unprecedented since the Great Depression.¹³³ The subsequent effects of the Ukraine crisis have exacerbated the global economic slowdown. The combination of high global inflation and sluggish economic growth is causing a global economic crisis that has increased financial and political volatility, divestment from sustainable development and complex global supply chain reconfiguration.¹³⁴ Rising trade costs put the progress towards pandemic recovery at risk and obstruct sustainable development. Moreover, the impact of the crisis on developing and least developed countries is particularly alarming, according to UNCTAD.¹³⁵

¹²⁸ Vanuatu, Tuvalu, and Kiribati all have a delayed graduation schedule, partly due to the Asia-Pacific Tsunami. In other instances, however, the reluctance to graduate is policy-driven. Angola and Equatorial Guinea, among others, have remained LDCs even though they met the income-only criteria for graduation in the 1990s.

¹²⁹ IPoA aimed to graduate half of the LDCs by 2020 but failed. As a result, DPoA sets a target to enable 15 additional LDCs to meet the criteria for graduation by 2031.

¹³⁰ UN Website, 'Frequently Asked Questions on Graduation | LDC Portal - International Support Measures for Least Developed Countries' <<https://www.un.org/ldcportal/content/frequently-asked-questions-graduation>> accessed 7 November 2022.

¹³¹ UNCTAD, 'Strategy for Graduation with Momentum: Bridging Pre-Graduation and Post-Graduation Development Processes in the Least Developed Countries' UNCTAD Policy Brief No.99, April 2022.

¹³² Patrick Guillaumont, 'Graduation of the Least Developed Countries, as a Step Towards Sustainable Development' (FERDI) 6.

¹³³ Gita Gopinath, 'The Great Lockdown: Worst Economic Downturn Since the Great Depression' (*IMF Blog*) <<https://www.imf.org/en/Blogs/Articles/2020/04/14/blog-weo-the-great-lockdown-worst-economic-downturn-since-the-great-depression>> accessed 10 November 2022; World Bank, 'Global Economic Prospects: The Global Economy: On Track for Strong but Uneven Growth as COVID-19 Still Weighs' (*World Bank*) <<https://www.worldbank.org/en/news/feature/2021/06/08/the-global-economy-on-track-for-strong-but-uneven-growth-as-covid-19-still-weighs>> accessed 12 November 2022. In 2021, the global economy was poised to stage a robust post-recession recovery; however, the rebound was anticipated to be uneven across countries, as major economies were expected to experience substantial growth while many developing economies lagged.

¹³⁴ World Bank, 'Global Economic Prospects: Stagflation Risk Rises Amid Sharp Slowdown in Growth' June 2022.

¹³⁵ UNCTAD, 'The Impact on Trade and Development of the War in Ukraine: UNCTAD Rapid Assessment' (2022).

For example, the study focuses on Bangladesh, which has experienced significant setbacks, reversing the steady economic progress achieved by the country in the previous decade. The Pandemic has pushed more than 32 million people under the poverty line.¹³⁶ About 51% of the urban poor population in Bangladesh in 2022 belongs to the 'new poor' category created by the pandemic.¹³⁷ In the decade before the COVID-19 pandemic, Bangladesh's economy expanded at an average annual rate of 7%, marginally below the growth rate of China.¹³⁸ However, as the impacts of COVID-19 continue unfolding, Bangladesh had to downgrade its economic growth projection to 5.2 per cent for 2020, markedly below its pre-pandemic forecast of 7.5 per cent.¹³⁹

Bangladesh's progress is currently being severely challenged by the effects of the pandemic and Russia's invasion of Ukraine, resulting in a cost-of-living crisis, depleted foreign currency reserves, and emerging balance-of-payments risks.¹⁴⁰ To preserve reserves, the government has imposed restrictions on certain imports, causing disruptions in the inflow of essential raw materials for export-focused industries. These challenges have exposed Bangladesh to familiar economic difficulties like global fuel and food price inflation, as well as capital outflows triggered by global interest rate hikes.¹⁴¹

Moreover, the threat of rising protectionism endangers multilateralism and open trade, putting LDCs' access to trade preferences and SDT at risk.¹⁴² LDCs' industrialisation strategy, based on light manufacturing goods like clothing, heavily relies on DFQF market access and SDT at the WTO. However, export-driven industrialisation has become more complex over time, despite LDCs adopting the same path to economic development as East and Southeast Asia in the 1970s and 1980s.¹⁴³

¹³⁶ Hussain Zillur Rahman and others, 'Recovery with Distress: Unpacking COVID-19 Impact on Livelihoods and Poverty in Bangladesh' (WIDER Working Paper 2022). The study was undertaken jointly by the Power and Participation Research Centre (PPRC), Bangladesh along with the BRAC Institute for Governance and Development (BIGD), Bangladesh and published within the UNU-WIDER project Transforming Informal Work and Livelihoods.

¹³⁷ According to a survey conducted by the Bangladesh Institute of Development Studies (BIDS). 'Covid Created 51% New Poor in Cities: BIDS' [2023] *The Business Post* <<https://businesspostbd.com/front/2023-05-18/covid-created-51-new-poor-in-cities-bids-2023-05-18>> accessed 26 December 2023.

¹³⁸ World Bank data. Bangladesh was progressing well towards its twin goals of graduating from the UN's Least Developed Country list by November 2026 and achieving upper-middle income status by 2031.

¹³⁹ BBS Data. Worryingly, Bangladesh's real GDP growth slowed to 6.0% in Fiscal Year 2023, down from 7.1% in 2022.

¹⁴⁰ 'Bangladesh's Economic Miracle Is in Jeopardy' [2023] *The Economist* <<https://www.economist.com/asia/2023/03/01/bangladeshs-economic-miracle-is-in-jeopardy>> accessed 21 December 2023.

¹⁴¹ *ibid*

¹⁴² Mohammad A Razzaque, 'Geo-Economics, Globalization and the Covid-19 Pandemic: Trade and Development Perspectives from Bangladesh' in Amitendu Palit (ed), *Globalisation Impacts: Countries, Institutions and COVID19* (Springer Nature 2022).

¹⁴³ UNCTAD, 'Trade and Development Report, 2016: Structural Transformation for Inclusive and Sustained Growth' (2016). Today, the global economy is more open, governed by more complex multilateral trade rules, and crowded with numerous countries pursuing growth by exporting their goods to the same markets. International trade is now dominated by global value chains (GVCs) and multinational corporations with complex governance structures.

LDCs are using export-led industrialisation to build momentum for graduation at a time when the global economy is fragile because of geopolitical tensions, increased competition, complex technologies, and trade wars.¹⁴⁴

2.6 Conclusion

The LDC list was created to provide special assistance to the most underprivileged nations, promoting sustainable growth and breaking the cycle of underdevelopment through trade, developmental cooperation, and global engagement. Regrettably, many LDCs have been constrained by limited export bases, dependence on low-value-added activities, and vulnerability to an unstable global economy, raising concerns about the effectiveness of ISMs provided over the last five decades.

The absence of a suitable support framework for graduates has posed a significant obstacle to the graduation process. With one-third of LDCs presently undergoing graduation, it is increasingly important to evaluate and improve existing support mechanisms. UNGA resolutions have highlighted the significance of diversified graduation support, such as extending LDC-specific trade and developmental benefits. Establishing incentives for LDCs to graduate and avoiding disruptions to their developmental progress are crucial for achieving a smooth, sustainable, and irreversible transition. This requires international collaboration and joint efforts to assist LDCs in overcoming their most pressing challenges to growth and development.

Subsequent chapters will explore in-depth the interconnection between trade and development, in addition to the developmental support accessible to LDCs within the trade regime.

¹⁴⁴ Taffere Tesfachew, 'Support for Post-Graduation Soft-Landing of LDCs: Implications in the Context of the WTO' (CUTS International 2018) 15.

CHAPTER 3: DEVELOPMENT AND DEVELOPING COUNTRY: LINKING TRADE WITH DEVELOPMENT

3.1 Introduction

Development is a hard-to-define multidimensional term that may mean different things to different people.

After World War II, development was presented as a prosperity vision for newly independent and postcolonial underdeveloped countries to grow and catch up with advanced Western states.¹ In the 1960s, various challenges and restrictions emerged, casting doubt on the effectiveness and complexity of the development strategy. Despite the deep-seated distinction between developed and developing countries in our language and thinking, the recent rapid economic growth of many DCs has blurred this distinction.

The traditional developed-developing country dichotomy has become increasingly contentious, especially at the WTO, where there is no standard for classifying countries based on their level of development. Additionally, the organisation has been accused of prioritising the agendas of developed countries.² As a result, there is a growing call for structural reforms in the WTO to address its development deficits and ensure equitable and balanced trade rules and differential treatment for DCs.

This chapter explores the concepts of development and developing countries. It examines the evolution of development within the trading system, how countries are categorised as developing, the relationship between trade and development, and how the debate over developing country status has burdened the WTO's ability to fulfil its development obligations. Finally, we argue that the classification debate is a distraction for the WTO, as the concept of 'developing country status' is not just a WTO issue but a political and diplomatic identity factor with significant global implications.

3.2 Development

3.2.1 The Development Agenda

Although disparities between countries and regions have always existed, economic growth, industrialisation, and the expansion of social and political opportunities have only recently become captured by the term 'development.' 'Development' is frequently used in international law discussions, but its meaning is murky and has evolved. This brief analysis seeks to comprehend the forces that have shaped normative, regulatory, and institutional changes in the relationship between trade and development. The idea of development was and still primarily is a Western idea, resulting partly from the colonial enterprise, despite being supported by many thinkers from DCs today.³

¹ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 2011).

² Faizel Ismail, 'Mainstreaming Development in the World Trade Organization' (2005) 39 *Journal of World Trade*.

³ Sonia E Rolland, *Development at the WTO* (Oxford University Press 2012) 12. A significant portion of Western development scholarship emphasises social justice and fairness in international trade relations. In contrast, there is limited research on moral, political, and ideological theories of development from developing nations.

The perception at the root of the idea of development was that the Western industrialised nations were supposed to be the unquestionable models for the nations of Asia, Africa, and Latin America and that these countries must catch up or perhaps even become like them.⁴ With this ambition 'for the economic development of underdeveloped countries', a group of experts convened by the United Nations produced a very influential document that called for a total restructuring of the 'underdeveloped' societies as 'rapid economic progress is impossible without painful adjustments.'⁵ Development became the conceptual vehicle to successfully persuade the newly founded nations - from India to Ghana, Egypt to Indonesia – to accept and internalise the image that the North had of the South as their self-image.⁶

Many argued that development was presented as an excellent dream for progress but used as a tool for domination of the 'Third World' by the West through discourses and practices analogous to their colonialist and imperialist historical counterparts.⁷ The 'new deal' offering technical and financial assistance was tied to the US-led campaign to thwart communist influence in underdeveloped regions during the Cold War.⁸ So the rush by Western economists to fashion tools for analysing the problems of 'underdevelopment' was 'Colonial Economics out of Political Expediency.'⁹ They began to utilise models that followed the path directed by the Western policymakers and reflected less on the realities of Third World politics than the internal biases of the Western democracies.¹⁰ In the 1950s, steady attempts were visible to apply the blueprint for institutional reform reflecting the American way of life worldwide.¹¹ In the late 1960s, it became clear that the growth policies were not working.¹² In subsequent decades, the preeminence of development economics experienced rapid erosion. Development studies were seemingly reaching an 'impasse' signaling, as suggested by Colin Leys, the end of the golden age of development theories.¹³

⁴ Escobar (n 1).

⁵ This sounds audacious by today's standards. Nevertheless, it goes on that 'Ancient philosophies have to be scrapped; old social institutions have to disintegrate; ... Very few communities are willing to pay the full price of economic progress.' UN Department of Social and Economic Affairs, 'Measures for the Economic Development of Underdeveloped Countries' (1951) 15, 1

⁶ Wolfgang Sachs, 'Development: A Guide to the Ruins' (*New Internationalist*, 05 June 1992) <<https://newint.org/features/1992/06/05/keynote>> accessed 15 December 2022. With colonialism falling apart, the US needed a new vision of global order that would include the pervasive influence of the West and present the world as a homogeneous entity to be led by the strongest nation on earth.

⁷ Escobar (n 1) 9.

⁸ Joseph Morgan Hodge, 'Writing the History of Development (Part 1: The First Wave)' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 429. For the major capitalist countries, the lack of social progress in the former colonies was associated with the danger that those colonies may slip into the communist dominion, thereby restricting access to the source of raw materials and markets for industrial products.

⁹ Dudley Seers, "The Birth, Life and Death of Development Economics," 10(4) *Development and Change* (1979) 707, 708

¹⁰ Robert A Packenham, 'Liberal America and the Third World', *Liberal America and the Third World* (Princeton University Press 2015); Irene L Gendzier, *Managing Political Change: Social Scientists and the Third World: Social Scientists And The Third World* (Routledge 2019); Gunnar Myrdal and Jagdish Bhagwati, 'Need for Reforms in Underdeveloped Countries', *The World Economic Order* (Springer 1981) 503. The use of theories traditionally applied to analyse the developed countries was an approach not only peculiar to the undeveloped countries but also largely responsible for their underdevelopment.

¹¹ Sachs (n 6).

¹² Hodge (n 8).

¹³ Colin Leys, *The Rise and Fall of Development Theory* James Currey (Oxford 1996) 25.

Development strategies so far followed by many countries in the 20th century bestowed a significant role on the governments. During the 1970s, it all reversed with the rise of market fundamentalism¹⁴ and the Washington Consensus.¹⁵ 'By the early 1990s, an almost fully liberal order had been created' across the Western world at the behest of the IMF and World Bank.¹⁶ The success of the neoliberal frameworks effectively marked the collapse of the postwar development theories.¹⁷ However, the prescriptions of the Washington Consensus failed to work as promised, and disillusionment with the Washington Consensus grew throughout the developing world.¹⁸ Stiglitz has emphasised the need for a new global governance system because the current 'international rules of the game are often unfair, and the international institutions are undemocratic and have pushed an ideology that has resulted in policies ill-suited to many developing countries.'¹⁹

3.2.2 Two Development Approaches

In practice, the evolving synthesis of development economics and rights-based approaches has shaped our conception of the essence of development.

At one end of the spectrum, development has been primarily equated with gross domestic product (GDP) growth: a macroeconomic viewpoint that has fuelled many of the Washington Consensus and associated international organisations. The WTO has inherited a development perspective closely resembling a macroeconomic-centric approach.

By contrast, at the opposite end of the spectrum, development has primarily been viewed as a matter of human rights, including access to food, education, healthcare, and other necessities, as well as gender and mortality issues. This conception of development is theoretically associated with a discourse of rights, entitlements, and a connection between development and social-political rights instead of being restricted to an economic issue.

¹⁴ 'Market fundamentalism' is the view that markets solve most if not all, economic problems by themselves.

¹⁵ Fidel Aroche Reyes and Oscar Ugarteche Galarza, 'The Death of Development Theory: From Friedrich von Hayek to the Washington Consensus' (2018) 41 *Journal of Post Keynesian Economics* 509. The Washington Consensus was a broad economic policy the USA and international financial institutions promoted in the 1980s and 1990s. These policies emphasise free market principles such as trade liberalisation, deregulation, privatisation of state-owned enterprises and fiscal austerity.

¹⁶ Eric Helleiner, 'From Bretton Woods to Global Finance: A World Turned Upside Down,' in Richard Stubbs and Geoffrey R. D. Underhill (eds), *Political Economy and the Changing Global Order* (McClelland and Stewart 1994) 163, 170

¹⁷ Critical writing on post-development includes Wolfgang Sachs, 'Development: A Guide to the Ruins' (*New Internationalist*, 5 June 1992); Escobar (n 1). Gustavo Esteva and Madhu Suri Prakash, 'Beyond Development, What?,' 8 *Development in Practice* 3 (August 1998): 280; Claude Alvares, *Science, Development and Violence: The Revolt against Modernity* (OUP 1992); Ashis Nandy (ed), *Science, Hegemony and Violence: A Requiem for Modernity* (OUP 1988); Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (Zed Books 2008). Scholars who may be identified as a critique of the third worlds underdevelopment problems such as Wolfgang Sachs, Gustavo Esteva, Ashis Nandy, Gilbert Rist, Claude Alvares, and Arturo Escobar among others consider this crisis as a reflection of development's bankruptcy as a concept.

¹⁸ Narcís Serra, Shari Spiegel and Joseph E Stiglitz, 'Introduction: From the Washington Consensus Towards a New Global Governance' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008).

¹⁹ Joseph E Stiglitz, '14 The Future of Global Governance' in Narcís Serra and Joseph E Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press 2008) 310 <<https://doi.org/10.1093/acprof:oso/9780199534081.003.0014>> accessed 17 December 2022.

3.2.2.1 Economic Approaches to Development

Development came into being with its focus on economic growth. Nevertheless, the term 'economic development' was hardly used before the 1940s.²⁰ In the following decades, most economists used the term to mean growth in per capita real income in underdeveloped countries. However, at the same time, a few also included changes in values and institutions that can support sustainable growth and human well-being.²¹ Traditional economic approaches refer to development as a sustained increase in an economy's real income over a long period²² and link it to planned production and employment structure alteration focusing on rapid industrialisation instead of agriculture.

So, until recently, development was seen as purely an economic phenomenon measured on a single scale of GNP per capita, the most used indicator of standards of living or levels of development across countries.²³ Though hotly disputed, 'economic development' still tends to be measured on a single scale of GNP per capita, the most used indicator of living standards or development levels across countries.²⁴ There are various theories associated with economic approaches, including classical theories of development,²⁵ classical leftist theories,²⁶ structuralism,²⁷ Washington consensus,²⁸ and globalisation.²⁹ In the last two decades of the 20th century, development theory and practice were dominated by the 'Washington consensus,' a 'Ten Commandments'-like paradigm initiated by Western financial institutions such as the IMF and the World Bank. The key tenets are trade liberalisation, deregulation, privatisation, financial liberalisation, and debt-crisis management. It was also called 'market fundamentalism' because it advocated reducing government economic activity

²⁰ Arndt (n 15) 457

²¹ Bert F Hoselitz, *The Progress of Underdeveloped Areas* (University of Chicago Press, 1952) Amartya Sen, for instance, has emphasised the significance of capabilities such as education, health, and political participation in fostering development. Douglass North has similarly emphasised the role of institutions, such as property rights and the rule of law, in fostering economic growth. Amartya Sen, *Development as Freedom* (OUP 1999); Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990).

²² Gerald M Meier, Robert E. Baldwin, *Economic Development: Theory, History, Policy* (Wiley 1957)

²³ Prof Michael Todaro and Stephen C Smith, *Economic Development* (Pearson 2011) 14.

²⁴ Jonathan E Sanford and Anjula Sandhu, *Developing countries: definitions, concepts and comparisons* (Novinka Books, 2003) 5

²⁵ As preached by Adam Smith, classical development economists favoured laissez-faire economics and minimal government intervention as allowing people to pursue their interests would promote economic growth and prosperity.

²⁶ Left-leaning development economists, in contrast to classical and liberal development economists, regarded underdevelopment as a characteristic of a single global political-economic system. As developed and developing countries play different roles within a single socioeconomic system, development requires transforming the global economic system and not merely imitating or repeating previous development efforts.

²⁷ Non-Marxist structuralists advocated for policies that would liberate developing nations from their dependence on international trade, such as import substitution industrialisation, which replaces imports with locally produced goods to promote domestic industries and reduce the balance of payment deficits.

²⁸ Kalu Christopher Ulua and Metu Amaka Gertrude, 'Washington Consensus, Inclusive Growth, and Poverty Reduction' in Walter Leal Filho and others (eds), *No Poverty* (Springer International Publishing 2020).

²⁹ Recent approaches to economic development, based mainly on globalisation studies from the late 1990s, emphasise not only the role of the state in promoting domestic industries and redistributing public resources but also the role of private actors as intermediaries and primary forces of development. By engaging in free trade and importing capital goods from technological leaders, developing nations can close the technological gap between themselves and developed nations, thereby fostering economic growth.

through privatisation and fiscal austerity. Yet, despite these development policy principles, poverty reduction and economic stabilisation in DCs have made little progress.³⁰

In recent years, policymakers and academics have recognised the limitations of a narrow focus on economic growth³¹ and have shifted their attention to this broader view of development. The UN Sustainable Development Goals (SDGs), for instance, include a variety of social, economic, and environmental targets that aim to promote sustainable development in all countries, not just low-income ones.

3.2.2.2 Human Rights Approaches to Development

The objectives of development rights and human rights are frequently identical, as development focuses on meeting basic needs, which are human rights.³² According to the 1966 International Covenant on Economic, Social, and Cultural Rights, every person has the right to 'freely pursue their economic, social, and cultural development.'³³ Several countries experienced significantly high growth rates of per capita income during the 1960s and 1970s with no significant impact on the life of a larger portion of the population. So, during the 1970s, increasing attempts became visible to refocus the economic development of an economy to 'redistribution of wealth' by reducing poverty, inequality, and unemployment.³⁴

Soon development began to be perceived as a multidimensional process involving significant changes in social structures, popular attitudes, and national institutions.³⁵ Nobel laureate economist Amartya Sen described the development as freedom from economic poverty, social deprivation, political tyranny or cultural authoritarianism by 'capability to function'.³⁶ Through Amartya Sen's work, the UNDP defines human development as expanding the richness of human life rather than the richness of the economy and focusing on increasing individual capacities to choose.³⁷ Thus, the UN Declaration on the Right to Development 2011

³⁰ Christopher Uluu and Amaka Gertrude (n 28).

³¹ In April 2023, Jake Sullivan, the US national security adviser, made a public address announcing the demise of the 'Washington consensus.' He suggested that a new consensus, which is not as reliant on neoliberalism, should take its place. The White House, 'Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution' (*The White House*, 27 April 2023) <<https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/>> accessed 16 May 2023.

³² Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005). These socioeconomic human rights include access to food, water, shelter, medical care, education, etc.

³³ International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; 993 UNTS 3 (1976) art 1(1).

³⁴ Dudley Seers, 'The meaning of development', paper presented at the Eleventh World Conference of the Society for International Development, New Delhi (1969) 3 Dudley Seers posed the basic questions very succinctly on the meaning of development: 'The questions to ask about a country's development are therefore: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt this has been a period of development for the country concerned.'

³⁵ Todaro and Smith (n 23).¹⁵ Because development is not merely a question of economics or even one of the quantitative measurements of incomes, employment, and inequality.

³⁶ Amartya Sen, *Development as Freedom* (OUP 1999) 14

³⁷ UNDP, 'Human Development Report 2021-22: Uncertain Times, Unsettled Lives: Shaping Our Future in a Transforming World' (2022). the UNDP has promoted 'human development' as greater access to basic human

recognised that the right to economic, social, cultural, and political development is an inalienable human right.³⁸ However, the legal and political effects of the 'right to development' on international trade relations are still uncertain.³⁹ In general, the WTO has not grasped the concept of reframing development as a human rights issue inextricable from the increasingly complex network of human rights.⁴⁰

Increasingly development is being addressed as sustainable development that requires an increased awareness of the environmental, social, and economic limitations we face as a society to meet 'the needs of the present, without compromising the ability of future generations to meet their own needs'.⁴¹

3.3 Developing Country

3.3.1 Country Classification based on Development is a Contentious Issue

Development is a multidimensional process, countries are very heterogeneous, and their development priorities are widely varied; development taxonomy remains a highly complex issue, and there is no 'generally accepted' criterion for classifying countries based on their development.⁴² Therefore, various international organisations have resorted to categorising countries by their objectives and operations. Some of the challenges and limitations of country classification include the following:

- Lack of consensus on the criteria and indicators that should be used to measure and compare countries' performance, development, and potential.
- Diversity and complexity of country circumstances, challenges, and opportunities, which simple or static categories cannot capture, and
- Influence and bias of political, ideological, or institutional interests may affect countries' classification and treatment.⁴³

Classifications can have diverse implications depending on how and by whom they are used. For example, they may affect the allocation and distribution of development resources across countries. They can also create opportunities or impediments for governments to advocate for their interests or needs. For instance, the classification of countries is a hotly contested issue within the WTO, as it can have significant implications for trade policy, such as access to

needs, knowledge, and economic growth measured as achievement through a long and healthy life, education, and a decent standard of living.

³⁸ United Nations, *United Nations Declaration on the Right to Development* (UN 2011).

³⁹ The rights-based approach to development often contradicts the Ricardian belief that development can be achieved through trade in sectors with comparative advantage.

⁴⁰ Rolland (n 3) 28.

⁴¹ Gro Harlem Brundtland, 'Report of the World Commission on Environment and Development: Our Common Future.' (UN 1987) United Nations General Assembly document A/42/427. UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' A/Res/70/1, 21 October 2015. The term 'sustainable development' was coined by the United Nations World Commission on Environment and Development (Brundtland Commission). As with other rights-based approaches to development, sustainable development acknowledges that all individuals, present and future, have an inherent right to a healthy and habitable environment.

⁴² Lynge Nielsen, 'Classifications of Countries Based on Their Level of Development: How It Is Done and How It Could Be Done' [2011] IMF Working Papers-11/31.

⁴³ Dan Harris, Mick Moore and Hubert Schmitz, 'Country Classifications for a Changing World' (2009) 2009 IDS Working Papers 01.

special treatment and exemptions from trade agreements.⁴⁴ They can also affect how countries are viewed and evaluated by others. Moreover, when there is overlap or a lack of clarity between different classifications, they can lead to confusion or inconsistency.⁴⁵

3.3.2 The 'Developing Country' Label: Masking Economic Disparities

It is difficult to pinpoint exactly when or who first introduced the idea of 'developing' or 'developed' country groupings. However, the concept of a world only with a few 'evolved' nations has a long history. For example, it can be found in Kant's *Perpetual Peace* (1795) reference to 'civilised' and 'savage' peoples.⁴⁶ Even the Berlin Conference of 1885 and the Permanent Court of International Justice (PCIJ) of 1922 used the word 'civilised' in the same tone.⁴⁷ Nineteenth-century scholars such as Marx and Schumpeter began to use the word 'development' in a socioeconomic context instead of a legal or political context. Finally, the word was briefly alluded to in the League of Nations' Charter of 1920.⁴⁸ Yet, only in the 1940s did it acquire the adjective 'underdeveloped', which began to be used in categorising countries. Over the years, the word 'developing' was getting much adherence over 'underdeveloped' as a euphemism for the absence of 'economic development'⁴⁹ and due to its '-ing' suffix that signals a dynamic scenario where all developing countries would eventually aspire to be 'developed'.⁵⁰

The term 'developing countries' attained greater significance during the Cold War to refer to the existence of a newly formed loose group of poor countries along with the capitalist First World and the communist Second World. The Third World 'developing countries' appeared as the polar opposite on every count: poor, weakly capitalist, inadequately coordinated over policy issues, the little international influence; highly diverse politically, economically, and culturally and most importantly, deficient in 'development'.⁵¹

⁴⁴ Developing country status entitles the declared developing country to certain exemptions, longer implementation timelines for commitments, and other flexibilities under WTO agreements to facilitating integration into the global trading system. Brooke Ringel, 'Developing Country Status Up for Debate at WTO' (*Trade and Manufacturing Monitor*, 18 October 2019) <<https://www.ustrademonitor.com/2019/10/developing-country-status-up-for-debate-at-wto/>> accessed 03 March 2023.

⁴⁵ Harris, Moore and Schmitz (n 43); Djalita Fialho and Peter van bergeijk, 'The Proliferation of Developing Country Classifications' (2016) 53 *The Journal of Development Studies* 1.

⁴⁶ Liliana Obregón, 'The Civilised and the Uncivilised' in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (OUP 2014); James Sloan, 'Civilised nations'. in Rüdiger Wolfrum (ed) *The Max-Planck Encyclopedia of Public International Law*. (OUP 2012); The 'civilised' refers to 'the old Christian states of Western Europe', as said by the 'father' of modern International Law, Oppenheim; Robert Jennings & Arthur Watts, *Oppenheim's International Law. Volume 1, Peace*, 9th Edition (OUP 1997) 87-88

⁴⁷ Article 38(2) of PCIJ states 'the general principles of law recognised by *civilised nations*' (emphasis added) as one of its legal sources – a wording borrowed *ipsis litteris* by the International Court of Justice, and that remains to this day.

⁴⁸ Rist (n 17) 73.

⁴⁹ Henry Mintzberg, 'Developing leaders? developing countries?' (2006) 16(1) *Development in Practice* 4

⁵⁰ Déborah BL Farias, 'Outlook for the "Developing Country" Category: A Paradox of Demise and Continuity' (2019) 40 *Third World Quarterly* 668.

⁵¹ Harris, Moore and Schmitz (n 43) 10. In an empirical sense, most countries did seem to fall into one of three main groups – the First, Second or Third Worlds – as defined by internal characteristics, politico-economic system, and external relationship patterns.

3.3.3 The Developed/Developing Countries Dichotomy

Countries are classified based on several factors, including income level, level of development, national performance, geographic location, political system, and economic system. A widely used approach to categorising countries based on their economic development level is to divide them into developed and developing categories.

Labelling a country as 'developed' or 'developing' has long been central to global governance, development, trade policy, and geopolitics debates. Though there is no specific yardstick for classifying a country into a developed or developing⁵², this dichotomous distinction became deeply embedded in language and thought in the 1950s and 1960s for a few practical reasons.⁵³ However, the authenticity of this formulation remains questionable⁵⁴ as the dichotomy is too restrictive and fails to capture the diversity in development levels across countries.⁵⁵

Despite losing significance, the dichotomy still predominates due to statistics indicating a significant disparity between rich and poor countries' average incomes and living conditions.⁵⁶ Another important reason was its active embracement by the government of countries within each category. The use of the dichotomy by the international community in international business is still far more common.⁵⁷ The groupings were convenient, usable for political and diplomatic purposes and consistent with the 'development' and the geopolitical and security concerns of the Western developed countries.⁵⁸ Many consider OECD membership the primary criterion for developed country status.⁵⁹

⁵² Nielsen (n 42).3

⁵³ Harris, Moore and Schmitz (n 43) 9. The developed/developing dichotomy has long been a common approach and includes many other similar terminologies such as North/South, developed/underdeveloped, First World/Third World, developed/undeveloped, industrialised/developing, advanced/backward, rich/poor, and pioneers/late-comers; Nielsen (n 42). 4

⁵⁴ Communication from the United States to the WTO, 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance' (14 February 2019) WT/GC/W/757/Rev.1. It is due to the difficulties in articulating what constitutes development and answering basic definitional questions, such as whether the threshold for evaluating development is absolute or relative.

⁵⁵ Nielsen (n 42) 3.

⁵⁶ S Seshanna and S Decornez 'Income Polarization and Inequality Across Countries: An Empirical Study', (2003) 25(4) Journal of Policy Modeling 335. Studies find an increasing global polarisation suggesting that the rich-poor distinction is not only present but also becoming increasingly pronounced over time. Moreover, the division is not just due to the wealth gap; the richer 'North' enjoys political and economic stability while the poor 'South' suffers from widespread poverty, political instability, and vulnerability to severe economic fluctuations.

⁵⁷ DFID, 'White Paper on international development, Eliminating World Poverty: Making Governance Work for the Poor.' (HMSO, 2006). For example, a recent UK government's White Paper on international development makes 27 references to 'poor countries', as opposed to 'rich countries' using the terms interchangeably with the dichotomy; Even the United Nations started using the terms 'developed' and 'developing' countries in 1996, though purely for statistical convenience, without any judgment as to the development process of any particular country. UNStats< <https://unstats.un.org/unsd/methodology/m49/#fn4>>accessed 09 September 2019

⁵⁸ Nielsen (n 42) 9. The governments of the Third World, many of them liberated only in the early and mid-1960s, were also willing for their countries to have a different label that identifies them as both disadvantaged and a new and creative force.

⁵⁹ Nielsen (n 42). Convention on the Organisation for Economic Co-operation and Development<<http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm>>accessed 15 September 2021. It is in consideration of its preamble that states that 'economically more advanced nations should cooperate in assisting to the best of their ability the countries in process of economic development.'

Though this simple pairing of countries offered reduced complexity, the effectiveness of this approach has been severely corroded by two concurrent phenomena: maximisation of within-group variance (among 'developing' countries) and minimisation of between-groups variance.

The 'developing' group has been much more heterogeneous than its 'developed' counterpart.⁶⁰ The group has been increasingly dissimilar. Rate of development, per capita income, geographical hegemony, trade relations, and so many other disparities make it incongruous and inappropriate to group China, Brazil, South Korea or India with Nepal, Tanzania or Haiti.⁶¹ If the category is used to identify countries based on similar attributes, where people experience similar lives, 'its use seems increasingly inappropriate.'⁶²

Characteristics defining the categorisation of the 'developed' and 'developing' countries are becoming fade at a significant rate. As the engine of world economic growth has shifted from traditional developed economies to developing and emerging ones, the share of aggregate economies of the developing world to that of the developed countries moved from less than half in 1990 to about a quarter larger in 2018.⁶³ Though China and India have played a significant role in the shift, the economies of many other DCs are also experiencing spectacular growth.⁶⁴

The average per capita is one of the significant areas where high-income developed countries are still far ahead of the developing world. However, unpalatably, 5 out of the ten wealthiest countries as measured by GDP (PPP) per capita in 2018—Qatar, Singapore, Brunei, UAE, and Kuwait—currently claim developing-country status.⁶⁵ Along with them, the claim of the status by countries like Mexico, South Korea, and Turkey — members of the OECD and G20— is simply blurring the boundaries.

⁶⁰ Since the 1950s, international organisations have increasingly divided it into different sub-categories such as Land-Locked Developing Countries (LLDCs, 1957), Least Developed Countries (LDCs, 1971), Small Island Developing Countries (SIDS, 1994), Heavily Indebted Poor Countries (HIPC, 1996), and Low-Income Countries Under Stress (LICUS, 2001).

⁶¹ Farias (n 50) 16. Ravi Kanbur and Andy Sumner, 'Poor Countries or Poor People? Development Assistance and the New Geography of Global Poverty' (2012) 24 *Journal of International Development* 686; Todd J Moss and Benjamin Leo, 'IDA at 65: Heading toward Retirement or a Fragile Lease on Life?' [2011] Center for Global Development Working Paper.

⁶² Tariq Khokhar and Umar Serajuddin, 'Should We Continue to Use the Term "Developing World"' (2015) 16 *World Bank Blogs* <<https://blogs.worldbank.org/opendata/should-we-continue-use-term-developing-world>> accessed 8 May 2023.

⁶³ World Bank Data <<https://data.worldbank.org/indicator/ny.gdp.mktpp.cd>> accessed 15 September 2019

⁶⁴ The rise of the oil-exporting Middle Eastern economies in the 1970s, along with the Asian Tigers (Singapore, Hong Kong, Taiwan, and South Korea), first brought significant challenges to the relevance of this country groupings.

⁶⁵ World Economic Outlook Database, April 2019, International Monetary Fund. Accessed on 16 September 2019

In erosion of the traditional donor-recipient relationship and as a signal for new economic world order,⁶⁶ many 'developing' countries such as China, Brazil, India, Saudi Arabia, and South Africa have emerged as 'emerging donors.'⁶⁷

Another critical factor is the emergence of countries with characteristics, e.g. low income with geopolitical influence or economic specialisation formerly associated only with the 'developed' countries.⁶⁸ The global economy is transforming rapidly, with new players emerging and traditional economic powerhouses losing ground.

Therefore, the developed-developing country dichotomy is becoming increasingly obsolete and fails to capture the twenty-first century's complex and ever-changing economic realities.

As the dichotomy's dominance diminishes, finer categorisations and rankings of countries based on a single indicator have proliferated. They are used for operational and analytical reasons and help identify countries in international agreements and direct benefits to those it deserves.⁶⁹

3.3.4 Are New, Appropriate Classifications Possible?

Different international organizations classify countries based on their operational and analytical purposes. The contemporary development agenda commonly employs three classification types: income and relevant factors (e.g., low-income, and high-income countries), national performance rankings (e.g., World Bank ease of doing business ranking), and analytical classifications (e.g., emerging economies, etc.).

Despite the challenges of creating a simple alternative in an increasingly differentiated world, the developed-developing country dichotomy remains prevalent because of its entrenched status in policy discourse, academic circles, and colloquial language. This terminology is also present in many international agreements, making change difficult.⁷⁰ The locked-in benefits of being classified as a developing country, such as SDT in WTO, reinforce the dichotomy.

⁶⁶ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) Foreign Affairs 22; G John Ikenberry, 'The Rise of China and the Future of the West-Can the Liberal System Survive' (2008) 87 Foreign Affairs 23; Gregory Chin & Ramesh Thakur, 'Will China change the rules of global order?' (2010) 33(4) The Washington Quarterly 119

⁶⁷ Peter Kragelund, 'The return of non-DAC donors to Africa: New Prospects for African Development?' 26(5) Development Policy Review 555; Sven Grimm, John Humphrey, Erik Lundsgaarde and Sarah-Lea John de Sousa, 'European development co-operation to 2020: Challenges by new actors in international development' (2009) EDC 2020 Working Paper 4 <<http://www.edc2020.eu/69.0.html>> accessed 13 September 2019; Clemens Six, 'The Rise of Postcolonial States as Donors: a challenge to the development paradigm?' (2009) 30(6) Third World Quarterly 1103; Gregory Chin & Fahimul Quadir, 'Introduction: rising states, rising donors and the global aid regime' (2012) 25(4) Cambridge Review of International Affairs 493

⁶⁸ Hubert Schmitz and Dirk Messner, 'Poor and Powerful -the Rise of China and India and the Implications for Europe' German Development Institute (2008). While China has already become a global power, countries like India, Brazil, Indonesia, and South Africa increasingly exert considerable regional influence. The collapse of the Soviet also contributed to blurring the distinction in various ways. In the short term, it increased the number of countries that are neither 'developing' nor 'developed'. As a result, Geopolitics is no longer shaped by the 'developed' or 'developing' label.

⁶⁹ Gianni Vaggi, 'The rich and the poor: A note on countries' classification' (2017) 70(279) PSL Quarterly Review 59, 60

⁷⁰ For instance, the 2030 Agenda for Sustainable Development refers to a 'developing country' as a unit more than 50 times and imposes differentiated responsibilities for the 'developed' and 'developing' countries.

Given the diverse attempts to classify countries from different perspectives, any new classification will likely face challenges in gaining acceptance. It is crucial to consider who the alternatives are for, as different governments may have varying perspectives and concerns, leading to different preferences for classifications.

3.4 Trade and Development

3.4.1 The Early Linking of Development to International Trade

It is widely acknowledged that international trade is crucial for development. The definition of development, as understood in international trade, has continuously evolved.⁷¹ Economists have, since Adam Smith, established a connection between increased trade flows and the 'wealth of nations,' with a broad consensus surrounding the concept of trade as the engine of economic growth.⁷² The relationship between industrialization and development is longstanding, as demonstrated by terms such as 'industrial revolution' and 'industrialised countries.' The standard economic theory proposes that countries can improve their efficiency by specialising in goods they can produce more efficiently than other countries. This specialisation is based on a country's comparative advantage, determined by its abundant resources. Countries with abundant unskilled labour and limited land will primarily produce and export essential manufactured goods while importing capital equipment and primary inputs, which are relatively scarce resources.⁷³ This win-win logic yields the 'deepest and most beautiful result in all of economics,' even for underdeveloped countries.⁷⁴

However, even Adam Smith insisted that a universal system of free international trade was more of a utopian ideal than a policy blueprint and that the costs of adjusting to it required 'slow gradations, and with a good deal of reserve and circumspection.'⁷⁵ 'A vast academic industry has sprung up' that employs sophisticated models and statistical techniques to prove a link between trade liberalisation and rapid economic growth, poverty reduction, and improved social welfare.⁷⁶

However, actual international trade is shaped not only by factor endowments but also by economic structure, firm size, technological capacity, and political power. This creates a more uncertain trading environment than standard trade models allow. This implies that trade policy will be poorly designed if it focuses on a single optimal outcome rather than making tangible gains from evolving trading relations with partners of varying economic power and sophistication.⁷⁷

⁷¹ Sheila Page, 'The Evolution of Special and Differential Treatment (SDT) in the Multilateral Trading System' (Overseas Development Institute 2004) 6.

⁷² G Vaggi and P Groenewegen, *A Concise History of Economic Thought: From Mercantilism to Monetarism* (2014th edition, Palgrave Macmillan 2014).

⁷³ For instance, the theory of David Ricardo states how trade can increase economic prosperity in addition to the gains from specialisation based on comparative advantage. The Heckscher-Ohlin Model emphasises the export of goods requiring factors of production that a country has in abundance and the import of goods that it cannot produce as efficiently.

⁷⁴ Ronald Findlay, 'Comparative Advantage' in John Eatwell, Murray Milgate and Peter Newman (eds), *The World of Economics* (Palgrave Macmillan UK 1991) 99.

⁷⁵ Cited in M Panic, *National Management of International Economy* (Palgrave Macmillan 1988) 124.

⁷⁶ UNCTAD, 'From Development to Differentiation: Just How Much Has the World Changed?' UNCTAD Research Paper No. 33 (UNCTAD/SER.RP/2019/5), 28 Jun 2019 4.

⁷⁷ RE Gomory and William J Baumol, *Global Trade and Conflicting National Interests* (MIT Press 2001).

A post-war generation of development economists recognised that trade could contribute to polarised development outcomes between developed and underdeveloped countries by favouring industrial producers over primary producers.⁷⁸ Industrialisation began to be viewed as the primary means of increasing incomes, and diversification as a means of expanding options.⁷⁹

Gomory and Baumol assert that the modern trading system differs from the 18th-century free-trade model, with a 'win-win' outcome being one of many potential outcomes. The interaction between international market forces and national capabilities can benefit some while harming others.⁸⁰ Such possibilities prompted DCs to insist on the development deficits of the trading system, establish UNCTAD in 1964, and bolster their position by promoting non-reciprocal and preferential treatment, as adopted by the UN General Assembly in the Charter of Economic Rights and Duties of States in 1974.⁸¹

Chapter 4 of this thesis explores how development then has played a central role in the evolution of the trading system over the past seven decades.

3.4.2 Development at the MTS

The debate at the WTO concerning the relationship between trade and development has its roots in the evolution of international regulation since the nineteenth century. Nevertheless, it continues to be both contentious and crucial. The Preamble to the GATT of 1947 clearly outlines its development-related objectives. The representatives of governments at the GATT recognised, among other things, that 'their relations in the field of trade and economic endeavour should be conducted to raise standards of living ensuring full employment.' In its Preamble, the subsequent WTO Agreement reaffirmed these GATT objectives and the need 'to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.' It also states a 'need for positive efforts designed to ensure that developing countries, especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.' To introduce WTO, its website states that 'the overall objective of the WTO is to help its members use trade as a means to raise living standards, create jobs and improve people's lives.'⁸²

⁷⁸ Raúl Prebisch, 'The Economic Development of Latin America and Its Principal Problems' (United Nations Economic Commission for Latin America 1950) *Economic Bulletin for Latin America* 7(1); Raúl Prebisch, 'Commercial Policy in the Underdeveloped Countries' (1959) 49 *The American Economic Review* 251. Hans W Singer, 'US Foreign Investment in Underdeveloped Areas: The Distribution of Gains between Investing and Borrowing Countries' (1950) 40 *The American Economic Review* 473; Prebisch, 'The Economic Development of Latin America and Its Principal Problems' 1–22. Prebisch and Singer highlighted the disadvantages of primary products because of fluctuating demand, market characteristics, and price volatility.

⁷⁹ William Arthur Lewis, 'Economic Development with Unlimited Supplies of Labour' [1954] *Manchester School of Economic and Social Studies* 139.

⁸⁰ Gomory and Baumol (n 77).

⁸¹ Michael Joseph Finger, 'Implementation and Imbalance: Dealing with Hangover from the Uruguay Round' (2007) 23 *Oxford Review of Economic Policy* 440.

⁸² WTO website, 'Understanding the WTO - Who We Are'

<https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 15 December 2022.

For WTO member states, objectives such as ‘raising living standards’ and ‘ensuring full employment’ imply that the organisation has a development objective.⁸³ If, as stated in the Preamble of the WTO, DCs are expected to gain a share of international trade growth and international trade is conducted to raise living standards, then the WTO owes these aims to its developing country members. However, despite, or perhaps because of, the MTS’s adoption of this obligation, some scholars have repeatedly emphasised that ‘the WTO is not a development organisation.’⁸⁴ While reiterating this view, former WTO Director-General Pascal Lamy notes that the WTO has a role in engineering development. So, he said that ‘trade and development are increasingly perceived as being inextricably linked to each other.’ ‘even though WTO is not a developmental organisation,... it has an important role to play in engineering growth and development.’

It is noted that development is a comprehensive process that cannot be achieved solely through trade.⁸⁵ Nevertheless, poverty resulting from a lack of development is real and is not (and will not be) an abstract problem. On the contrary, it is one of the most pressing problems of our time that requires global action.⁸⁶ The only lasting solution to poverty is economic development or simply development that provides residents with adequate resources and raises their standard of living above subsistence. Economic development is transitioning from an economy based on low-income primary products to an economy based on high-income modern industries.

Certain developing economies, such as South Korea, Taiwan, Hongkong, Singapore, and China, have achieved substantial economic development and overcome poverty. International trade has been a crucial driver of thriving economic growth for these economies.⁸⁷ These countries have adopted an ‘outward development strategy,’ driven by aggressive export promotion policies that use export as the development engine by creating demand for products that would otherwise remain unconsumed in their relatively small domestic markets. China is replicating their success recently.⁸⁸ Every country is unique in many ways. However, they should have equal opportunities to pursue economic growth through trade.

⁸³ Elimma C Ezeani, *The WTO and Its Development Obligation: Prospects for Global Trade* (Anthem Press 2011) 15.

⁸⁴ Ismail (n 2); Valérie Engammare and Jean-Pierre Lehmann, ‘Does the Multilateral Trading System Promote the Interests of the Poor?’ [2004] *From Cancun to Sao Paulo: The Role of Civil Society in the International Trading System*.

⁸⁵ Issues as diverse as sovereign debt and monetary stability, on the one hand, and good governance and human rights, on the other, illustrate the complexity of development.

⁸⁶ Poverty in DCs is not only a problem in those countries but also has global consequences. It generates moral obligations and economic and security concerns that require global attention. For instance, terrorism has been an international concern. Poverty remains a major contributor to the problem. Despite significant funding for ‘fighting’ terrorism, the economic and social causes of terrorism have received much less attention and effort.

⁸⁷ These four economies (South Korea, Taiwan, Hong Kong and Singapore) have rapidly industrialised since the 1960s. By the mid-1990s, all had attained high-income status with the World Bank. Three decades ago, they were poor and dependent on low-value primary products. Lee presented exciting case studies on those economies. Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge University Press 2016).

⁸⁸ *ibid* 16.

Even if WTO is not a developmental organisation, it is 'a trade organisation with development obligation' as stated in the Preamble of GATT and WTO.⁸⁹ It has an obligation to create space for developing and least developed countries to pursue their development objectives through increased participation in international trade. The initiation of the Doha Development round of trade negotiations in 2001 was explicitly based on the realisation that 'international trade can play a major role in the promotion of economic development and the alleviation of poverty.'⁹⁰ Since the demise of the DDA, development has again been marginalised in the WTO.⁹¹

In most cases, the development debate at the WTO has sought to improve in the following areas:

- Developed countries' inequitable trade and economic policies cause enormous market distortions. The protectionist policies of developed countries in agriculture and their negative development impact have been widely criticised⁹², prompting former World Bank President James Wolfenson to comment that these protectionist policies are 'crippling Africa's chance to export its way out of poverty.'⁹³
- The efforts of DCs to preserve the possibility of protecting their domestic markets from unrestricted liberalisation.
- Beyond equity and protectionism, the debate shifts to development policies and 'policy space' that describe the range of domestic economic and industrial policies that should be compatible with WTO disciplines. The more these disciplines limit policy options, the less 'policy space' a country has to control its economic trajectory.

The DCs have pursued reforming the SDT provisions to achieve their goals in the first two areas. However, the third problem goes deeper and calls for structural and organisational changes within the WTO. Ismail expressed concern that 'the debate about development in the WTO is often assumed to be about increasing the effectiveness' of SDT for DCs. However, this 'perception of the development dimension is misconceived' as it 'relegates the debate about development to the margin of the WTO.'⁹⁴ SDT provisions are not designed to address

⁸⁹ Ezeani (n 83) 16.

⁹⁰ WTO, 'Doha WTO 4th Ministerial Declaration' (2001) WT/MIN(01)/DEC/1 para 2.

⁹¹ Lee (n 87).

⁹² UNDP UNEP FAO, *Multi-Billion-Dollar Opportunity: Repurposing Agricultural Support to Transform Food Systems* (2021); Kevin Watkins, *Rigged Rules and Double Standards: Trade, Globalisation, and the Fight Against Poverty* (Oxfam 2004); Stefan Tangerman, 'How to Forge a Compromise in the Agriculture Negotiations?' [2004] Presentation to the European University Institute, Florence, July 2-4. The UN report finds that nearly all farm subsidies harm people and the planet and need immediate reform.

⁹³ Nicholas D Kristof, 'Opinion | Farm Subsidies That Kill' *The New York Times* (5 July 2002)

<<https://www.nytimes.com/2002/07/05/opinion/farm-subsidies-that-kill.html>> accessed 16 December 2022.

Watkins (n 92). Trade restrictions in developed countries are especially harmful to DCs because they target the goods that the poor produce, such as labour-intensive agricultural and manufactured goods. There are numerous compelling reasons for industrialised countries to assume responsibility for addressing these challenges. Among these reasons is the impact of OECD agriculture protection, which is estimated to cause DCs an annual loss of \$100 billion. This equals twice the annual development aid received by DCs (\$50 billion) as estimated in 2001.

⁹⁴ Ismail (n 2) 12. In these views, Ismail argued that development is regarded as an afterthought, a 'nice to do' or, at most, an 'optional extra'.

all the development concerns of DCs.⁹⁵ Ismail argued that SDT is crucial to the development dimension. Still, issues that form the core of development objectives include increasing equity in the trading regime, building the greater capacity of DCs to benefit from trade, more balanced trade rules, and inclusive and transparent WTO decision-making.⁹⁶ The advancement of the development dimension within the WTO is of systemic importance to all developed and developing countries that seek to build and advance a multilateral rules-based system.

To date, the WTO legal regime has lacked an integrated or systematic legal framework to accommodate the needs of DCs. Instead, exceptions to the general rules and disciplines provide DCs with flexibility (SDT). However, this piecemeal and ad hoc strategy is currently revealing its shortcomings. In the past decade, multilateral negotiations have failed, and the WTO has been experiencing an existential crisis in recent years. Today, a reassessment of the legal implications of development issues within the organisation is required to ensure the continued legitimacy of the MTS. Rolland argued that if the multilateral regime is to remain relevant, a conceptual framework for trade and development must emerge, which could evolve from exceptions to a more coherent system of rules fully integrated into the WTO legal regime, which would better meet the needs of DCs.⁹⁷

3.4.3 Trade as a tool for development

‘The winds and waters of commerce carry opportunities that help nations grow and bring citizens of the world closer together. Put simply, increased trade spells more jobs, higher earnings, better products, less inflation, and cooperation over confrontation. The freer the flow of world trade, the stronger the tides for economic progress and peace among nations.’⁹⁸

As a driver of economic growth, trade has been a catalyst for development for centuries. Trade can increase a country's access to a greater variety of goods, services, technologies, and knowledge. It could reduce global poverty by boosting economic growth, creating jobs, lowering prices, expanding consumer options, and assisting countries in acquiring new technologies. In a world that is becoming more interconnected and interdependent, trade is a significant component of the global economy.

Openness and trade liberalisation are essential for economic growth and prosperity in the national policy cocktail. They have been crucial to the growth of industrial countries since the middle of the 20th century and successful economic development since the 1970s. However, gains from trade liberalisation are not distributed uniformly across countries, and DCs may

⁹⁵ SDT measures have failed to address the fundamental issues in the trading system, which include: inequity in the trading system (where developed countries have continued to distort global trade to protect their markets and stifle the development prospects of DCs), unbalanced rules (where the costs to DCs of implementing these rules have been far greater than the benefits, with the benefits mainly accruing to the developed countries) and lack of capacity of many DCs to participate in the trading system (which is compounded by the lack of responsibility of developed countries by pursuing unfair trade rules (e.g., cotton subsidies) and the relatively high cost of adjustment experienced by many DCs. *ibid* 11–12.

⁹⁶ *ibid* 14.

⁹⁷ Rolland (n 3).

⁹⁸ Excerpts from US President Ronald Reagan's radio address to the nation on international trade on 6 August 1983 <<https://www.reaganlibrary.gov/archives/speech/radio-address-nation-international-trade>> accessed 12 October 2022

face obstacles in gaining benefits for various reasons.⁹⁹ So, concerns exist regarding the effectiveness of these policies for DCs, as trade liberalisation can also harm their economies by forcing them to compete in the same market as advanced economies, thereby jeopardising well-established local industries and causing the failure of new businesses.

Despite significant differences in policies and interests between developed and developing countries, there are substantial areas of convergence. The MTS must be built around these systemic concerns, values, and interests. The development dimension of the MTS is also the convergence of the needs and interests of developing nations with the broader systemic interests of developed nations.¹⁰⁰ Upon review of 88 developing country proposals on SDT involving market access, flexible rules, capacity building, and governance, Ismail has identified four critical components of the MTS's development: fair trade, capacity building, balanced rules, and good governance.¹⁰¹ The success of trade as a development tool depends on adequately addressing the following factors.

3.4.3.1 Trade Fairness

Gains from trade are not equally distributed, and the developed countries primarily receive those.¹⁰² This is partially due to their economic strength, development level, and unfair economic and trade policies. DCs have long advocated for 'equity-based, outcome-related fairness' instead of the 'legitimacy-based, process-related fairness' prevalent in the MTS.¹⁰³ Trade policies practised by developed countries determine the course of the world trade regime. By removing distortions in global markets caused by domestic trade policy and increasing the coherence of international economic policy, developed countries can contribute to the growth and economic prosperity of both developed and developing countries.¹⁰⁴

⁹⁹ Marco Sanfilippo and Asha Sundaram, 'Trade Liberalisation in Developing Countries: The Importance of Roads' (*Africa at LSE*, 2 May 2018) <<https://blogs.lse.ac.uk/africaatlse/2018/05/02/trade-liberalisation-in-developing-countries-the-importance-of-roads/>> accessed 25 October 2022. The study on Ethiopia by Sanfilippo and Sundaram shows that trade liberalisation can increase firms' productivity in DCs, but only if those firms have access to good roads.

¹⁰⁰ Ismail (n 2) 17.

¹⁰¹ *ibid.*

¹⁰² World Bank, 'Global Economic Prospects 2004 : Realising the Development Promise of the Doha Agenda' (World Bank 2004).

¹⁰³ Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO' (2006) 29 *The World Economy* 1005, 1027; Johann Jakob Häußermann, 'Fairness in International Trade Policy: Equality and Differential Treatment in Theory and Practice' [2017] FU Berlin.

¹⁰⁴ The United States has one of the lowest average applied tariffs in the world, at just 1.4% on foreign goods, and nearly 70% of all imports entering the country are not subject to tariffs. Notwithstanding, a Pew Research Center analysis of USITC data reveals that nearly all Bangladeshi imports were subject to US duty. The tariffs were equivalent to 15.2% of that country's shipments to the US – the highest average rate among the 232 countries and territories in the ITC database. Although the Ricardian concept of comparative advantage and free trade is a free-market principle that enables everyone to benefit from globalisation, developed countries have not adopted it in their trade policies. Several Uruguay Round agreements exhibited this incoherence. Drew Desilver, 'US Tariffs Vary a Lot, but the Highest Duties Tend to Be on Imported Clothing' (*Pew Research Center*) <<https://www.pewresearch.org/fact-tank/2018/03/28/u-s-tariffs-vary-a-lot-but-the-highest-duties-tend-to-be-on-imported-clothing/>> accessed 20 December 2022; USTR (United States Trade Representative), 'Trans-Pacific Partnership: Leveling the Playing Field' (2015) <<https://ustr.gov/sites/default/files/USTR-Tariff-Information-by-Sector-6115.pdf>> accessed 1 December 2022.

For instance, developed countries maintained high tariffs, tariff escalation, and tariff peaks on labour-intensive industrial products, in which most DCs possessed a comparative advantage. The Agriculture Agreement reflected the double standards of developed countries, which demanded that DCs open their markets while retaining enormous subsidies and high tariffs that depressed global prices, thereby undermining the development potential of DCs.¹⁰⁵ Similarly, the TRIPs Agreement failed to balance the potential benefits of increased research and the high costs of decreased competition and monopoly power granted to pharmaceutical countries by patent rights.¹⁰⁶ If the developed countries continue to distort global trade, protect their markets, and stifle the development prospects of DCs, inequity will only increase in the trading system. Thus, a development-friendly trade regime would require developed countries to commit to eliminating export subsidies, decoupling agricultural support, and significantly reducing or eliminating tariffs on export-oriented products of interest to DCs, thereby creating growth and development opportunities for DCs.¹⁰⁷

The implementation of agreements by DCs following the Uruguay Round has demonstrated that limiting recognition of different capacities and levels of development to uniform transition periods and non-binding offers of technical assistance is insufficient. Therefore, permitting greater differentiation among DCs is crucial when determining the applicability of WTO rules.¹⁰⁸

3.4.3.2 Capacity-building

Developing nations primarily face domestic obstacles when attempting to expand their international trade, which hinders their ability to use trade for development effectively. Moreover, it is now widely acknowledged that increased market access alone will not stimulate export-driven growth in many DCs, especially the most disadvantaged, because a lack of infrastructure constraints their export capacity, absence of appropriate national trade policy frameworks, inadequate human and institutional resources, low research and innovation capacity, limited access to capital, and a poor investment environment.¹⁰⁹ Unbalanced rules further constrain the capacity of DCs. The costs to DCs of adjusting and implementing these rules have been significantly higher than the benefits, with the benefits accruing primarily to developed countries.¹¹⁰ The MTS must recognise these development challenges to integrate DCs into the global economy effectively. However, it must also address the difficulties of many DCs to participate in the trading system, which is exacerbated by the lack of responsibility of the developed countries for the negative development impact of unfair trade rules (e.g., agricultural subsidies) and by the high cost of adjustment for many DCs (e.g., through preference erosion).

¹⁰⁵ Ismail (n 2) 15. Tangerman (n 92); Raj Bhala, 'World Agriculture Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the DOHA Round' (2003) 79 North Dakota Law Review 691.

¹⁰⁶ Faizel Ismail, 'The Doha Declaration on Trips and Public Health and the Negotiations in the Wto on Paragraph 6' (2003) 6 The Journal of World Intellectual Property 393.

¹⁰⁷ World Bank (n 102) 205.

¹⁰⁸ *ibid* 207.

¹⁰⁹ Inadequate fiscal bases and pressing health, education, and welfare issues limit their ability to intervene in developing these capabilities. Moreover, these governments are unwilling to reduce tariffs due to trade liberalisation's high adjustment costs and fiscal impact.

¹¹⁰ For instance, while it is increasingly recognised that the increased flow of goods across international borders requires regulation to protect human health, physical safety, and the environment, there has also been widespread criticism of the unilateral imposition of these standards on the global trading system, which frequently reflect the standards and interests of the more developed nations that initiate them. Ismail (n 2) 16.

Long associated with institution building or technical assistance focusing on a single institution or a few individuals, capacity building is now synonymous with constructing systems or networks across institutions and individuals, frequently across borders, to accomplish shared objectives.¹¹¹

Trade-related international institutions and many developed nations are committed to assisting DCs in integrating into the global economy through their assistance programmes. Nonetheless, the increasing marginalisation of the LDCs, the growing complexity of the MTS, and the competing demands of regional and bilateral trade initiatives demand a more ambitious response. As a result, new forms of trade-related development cooperation may be required for the equitable integration of DCs into the global economy. Therefore, it is crucial to identify the fundamental principles and processes that influence the design and delivery of trade capacity-building activities and to assist in situating trade capacity-building within the context of comprehensive approaches to development and poverty reduction.

In contrast to tariff reforms, reforms in regulatory discipline and administrative rules requiring institutional changes and localisation may necessitate substantial resources to establish or strengthen implementing institutions. Trade-related policy and public investment priorities are difficult to identify for low-income countries. Not the WTO agenda, but a national development strategy outlining these priorities should guide technical and financial assistance. The World Bank's diagnostic trade-integration studies for several LDCs demonstrate the need for action beyond WTO agreements, particularly in logistics and trade facilitation. Additional development assistance could help low-income countries address these priorities, thereby assisting them in adjusting and adapting to a reduction in trade preferences.¹¹²

3.4.3.3 Strengthening the Trading System for Development

A more potent, better-governed WTO could greatly benefit DCs. Although the WTO's decision-making process is more democratic than that of Bretton Woods institutions, WTO decision-making in practice is opaque and dominated by large and powerful countries (primarily the United States and the European Union). As stronger developing country alliances and negotiating groups provide a counterbalance to EU and US power and an opportunity for shared leadership, the WTO must develop a more inclusive and democratic decision-making system, thereby enhancing the legitimacy and sustainability of its decisions and global trade governance.¹¹³ It must also address the unbalanced rules in which the costs to DCs of implementing these rules have been significantly greater than their benefits, with the majority of benefits accruing to developed countries.

Hoekman identifies two significant prerequisites for greater coherence in international and national policymaking to enhance the global trading architecture.

¹¹¹ OECD Policy Brief, 'Trade and Development in the New Global Context - The Capacity Dimension' (OECD 2001).

¹¹² World Bank (n 102) 207.

¹¹³ Ismail (n 2) 19–20.

First, as trade policy is a vital part of development strategies, the WTO has an essential role in rendering trade a more powerful tool for growth. Members of the WTO can prioritise pursuing a 'traditional' market access agenda for all products, goods and services without excluding agriculture¹¹⁴ and labour-intensive industries like apparel. Multilateral trade rules must consider the relative costs and benefits of these rules for developing and developed countries, with appropriate levels of flexibility incorporated into the agreement. As the interests and norms of developing and developed countries may not ultimately converge, new standards should be negotiated, and their impact on development must be made transparent. Moreover, a greater emphasis should be placed on ensuring that multilateral rules support the development of low-income countries with institutional constraints and capacities.

Second, "development-friendly" market access and WTO rules are not panacea. They are of limited value to low-income countries if actions do not accompany them to enhance their capacity to trade: domestic policy issues requiring national effort to improve the investment climate, strengthen domestic regulation, etc. Such actions could benefit from mobilising additional financial and technical assistance ('aid for trade') outside the WTO through the appropriate existing institutions for development cooperation.¹¹⁵

Thus, the international trade architecture can be made more conducive to development through three types of action: (i) enhancing market access for goods and services produced by DCs; (ii) ensuring that WTO rules of the game remain development-friendly; and (iii) international initiatives to help countries address national trade and other capacity constraints.¹¹⁶

3.4.4 Devastating Impact of Covid-Pandemic on LDC Trade and Development

The COVID-19 pandemic had a significant negative impact on the global economy, with a contraction of 4.9% in 2020. While the economy recovered well in 2021 with 6.1% growth, the continued negative effects of the pandemic and the war in Ukraine reduced global growth in 2022 to 3.1% and a projected 2.3% in 2023.¹¹⁷ But, the LDCs bore the brunt of these global crises. LDCs as a group were projected to experience a decline in economic output in 2020, with an expected GDP growth rate of -1.3%.¹¹⁸ Their average economic growth in the 2020–2022 period of 2.5 per cent¹¹⁹ fell way short of the 7 per cent annual target under Sustainable

¹¹⁴ Jean-Christophe Bureau, Sebastien Jean and Alan Matthews, 'The Consequences of Agricultural Trade Liberalization for Developing Countries: Distinguishing between Genuine Benefits and False Hopes' (2006) 5 World Trade Review 225; Food and Agriculture Organization, *Trade Reforms and Food Security: Conceptualising the Linkages* (Food & Agriculture Organi 2005). The impacts of trade liberalisation on developing and LDC countries are complex. Most of the benefits of liberalisation will accrue to the wealthier developing nations. On the other hand, liberalisation may have overall negative consequences for net food importers, such as LDCs and SIDS, as well as cotton importers (North Africa, Bangladesh). Arguments for agricultural liberalisation may be based on the current system's inefficiency, which results in massive deadweight losses and transfers to wealthy OECD farmers. Even a tiny portion of these subsidies would reduce poverty in the developing world.

¹¹⁵ Bernard Hoekman, 'Strengthening the Global Trade Architecture for Development' (World Bank 2002).

¹¹⁶ *ibid* 26.

¹¹⁷ World Economic Situation and Prospects 2022 (United Nations publication, 2022)

¹¹⁸ United Nations, 'World Economic Situation and Prospects 2021.' (UN 2021). Out of the 46 LDCs that had data available, 37 were expected to undergo economic contractions. The range of GDP growth projections varied significantly, ranging from -8.5% for Kiribati to 1.5% for Tanzania.

¹¹⁹ World Economic Situation and Prospects 2023 (United Nations publication, 2023)

Development Goal 8,¹²⁰ leading to an exacerbation of global inequalities. Their economic growth was significantly impacted primarily due to their susceptibility to external factors.¹²¹

The pandemic struck the 46 LDCs at a time when they were already grappling with numerous challenges, such as geopolitical fragmentation, a pervasive climate crisis, high inflation, rising debt, poverty, and hunger. These difficulties were intensified by the pandemic, which brought about unprecedented social and economic crises, thereby increasing the challenges for these countries. Deprivation has also increased in other dimensions such as education, potentially with an increase in child labour, and sanitation. These nations are the least equipped to handle such crises.¹²²

Moreover, the LDCs faced a significant decline in their exports of goods and services in 2020. The LDC services exports decreased by 35%, while their exports of goods fell by 12%. This decline was steeper than the global average, causing LDCs' world share to reduce from 0.96% in 2019 to 0.91% in 2020.¹²³ The persistently high levels of inflation in many developing countries and LDCs serve as an extra obstacle to eliminating poverty. As a result of the central banks' efforts to control inflation by increasing interest rates, economic growth has been negatively affected.¹²⁴

The COVID-19 pandemic pushed back development gains by years in the most vulnerable countries, resulting in increased gaps between them and the rest of the world. The combination of COVID-19, climate change, and debt has led to a decline in GDP growth and a rise in poverty, food and nutrition insecurity, and inequality.

After nearly 25 years of consistent poverty reduction, the pandemic has reversed the global trend of poverty reduction, impacting the poor and vulnerable groups significantly. According to the Sustainable Development Goals Report 2020, extreme poverty was projected to rise globally for the first time since 1998, from 8.4% in 2018 to 8.8% in 2020.¹²⁵ In LDCs, where aggregate poverty incidence stubbornly remained at 37% in 2019, it is expected to increase by 2.4 percentage points.¹²⁶ As a result, the pandemic will make it exceedingly challenging, if not impossible, for LDCs to achieve SDG1 of eradicating extreme poverty by 2030.

¹²⁰ Goal 8 is about promoting inclusive and sustainable economic growth for all.

¹²¹ Factors such as a decline in external demand, reduced commodity prices, and a sharp downturn in tourism activities contribute to their vulnerability. The implementation of lockdown measures and other preventative actions has further burdened their economies.

¹²² United Nations, 'Report of the Fifth United Nations Conference on Least Developed Countries New York, 17 March 2022 Doha, 5–9 March 2023' (2023) para 5,6.

¹²³ WTO Sub-Committee on Least Developed Countries, 'Market Access for Products and Services of Export Interest to Least Developed Countries Note by the Secretariat' (WTO 2021) WT/CMTD/LDC/W/69.

¹²⁴ IMF, 'World Economic Outlook, A Rock Recovery' (IMF 2023).

¹²⁵ United Nations, 'Phase II: COVID-19 Crisis through a Migration Lens. Migration and Development Brief, No. 33. Washington D.C.' (UN 2020). The contraction of global GDP growth and the increase in income inequality will not only push a large portion of the population back into extreme poverty but also deepen the destitution of those already in it.

¹²⁶ United Nations Entity for Gender Equality and the Empowerment of Women, 'From Insight to Action: Gender Equality in the Wake of Covid-19' (2020).

The pandemic has also led to structural changes in the LDC economies, resulting in a slowdown in growth.¹²⁷ While larger companies have experienced a rebound as the pandemic subsides, many others have faced bankruptcy or encountered difficulties in obtaining affordable credit.¹²⁸ As a result, the restoration of pre-crisis supply levels has been hindered. Unfortunately, this situation has dire consequences for the workers employed in these businesses.¹²⁹

It is anticipated that its effects will impact the progress of the LDCs towards inclusive sustainable development for many years. Therefore, a 2021 UN report emphasizes the need for a globally coordinated response that surpasses recovery efforts, aiming to ensure that the most vulnerable countries can recover from the setback and build resilience to cope with future disasters.¹³⁰

3.5 The ‘Developing Country’ Debate in WTO

DCs played an important role in drafting the ITO charter that placed development at the centre of the MTS. After the ITO’s demise, development has evolved in the GATT in different rounds and phases.¹³¹ However, the recent development debate has been dominated by the differentiation issue at the WTO.

3.5.1 Which Countries are ‘Developing’?

There is no comprehensive definition of a developing country nor criteria for distinguishing among the countries claiming the status in the WTO. In Article XVIII, the drafters of GATT 1947, which is now GATT 1994, came close to providing a definition. Recognising the need to facilitate the ‘progressive development’ of the economies of some contracting parties, Article XVIII, paragraph 4(a) stipulates that ‘a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, ...’¹³² Annex I clarifies that the terms ‘low standards of living’ and ‘early stage of development’ used in the article should be interpreted broadly. Still, Article XVIII cannot be considered a precise, legally binding definition of ‘developing country’ because the criteria are ‘too elusive to implement’.¹³³

¹²⁷ The impacts have been diverse due to variations in direct impacts and vulnerabilities among different LDCs.

¹²⁸ UNCDP, ‘Comprehensive Study on the Impact of COVID-19 on the Least Developed Country Category’ (2021) 10.

¹²⁹ United Nations, ‘Socioeconomic Impact of COVID-19 in Myanmar. United Nations in Myanmar: Monthly Digest, No. 4’ (UN 2020). UNCDP (n 20). Workers in LDCs experience significant declines in working hours and income losses due to the vulnerability of their businesses and employment to shocks like the pandemic. For example, in Myanmar, it is estimated that 37% of pre-crisis employment, equivalent to 7.3 million jobs, could be disrupted in 2020, resulting in unpaid leave, reduced earnings, reduced working hours, or job loss. The pandemic had a more pronounced effect on LDC labour markets due to the prevalence of the informal sector and limited social protection coverage.

¹³⁰ UN-OHRLS, ‘State of the Least Developed Countries 2021. Building Back Better in Response to COVID-19’ (United Nations 2021).

¹³¹ The issue of how DCs become ‘special’ in the WTO has been elaborated in Chapter 4.

¹³² Article XVIII, GATT 1994

¹³³ Fan Cui, ‘Who Are the Developing Countries in the WTO?’ (2008) 1 *The Law And Development Review* 124, 134.

The application of Ceylon (now Sri Lanka) to invoke Article XVIII was an early instance of identifying a "developing country" based on which Ceylon was granted specific releases under Article XVIII. In this case, the Panel used the GNP per capita for Ceylon and the proportion of manufacturing, mining, and construction to determine the existence of "low living standards" and "early stages of development," respectively.¹³⁴ The Panel might have been influenced by the widespread use of socioeconomic indicators to classify countries according to their level of economic development.

Some WTO Members propose categorising WTO developing country members and granting them different SDTs; the issue arises in the *EC-Tariff Preferences* case. However, the EU claims it is committed to the principle of SDT for DCs 'based on their individual needs and vulnerability.'¹³⁵ As GSP is defined as 'the generalised, non-reciprocal, non-discriminatory system of preferences' in Resolution 21 (ii) adopted at the UNCTAD II conference, the Panel determined that the term 'non-discriminatory' requires that 'identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations.'¹³⁶ The Panel also interpreted 'developing countries' in Paragraph 2(a) of the Enabling Clause to refer to all DCs. The Appellate Body, however, reversed the Panel's conclusion that 'developing countries' referred to all developing countries and clarified that the Enabling Clause only applies to 'similarly situated' developing countries.¹³⁷ Thus, differentiation among DCs based on objective criteria is allowed, and different DCs may receive SDT based on their needs. This 'similarly situated' approach to classifying DCs is found in The SCM Agreement, which divides DCs into four categories: LDCs, Annex 7 countries with GDP per capita below \$1,000, countries that are 'transitioning from central planning to free enterprise'¹³⁸ and other developing countries. Each category receives unique transitions and treatments.

Developed and developing country relationship was much debated in the 1950s and 1960s, but there was no agreement on the definition of the developing country status in the GATT. Attempts made afterwards did not produce any results. As the WTO website states, 'there are no WTO definitions of "developed" and "developing" countries. Members announce whether they are "developed" or "developing" countries.'¹³⁹

Regarding the institutionalisation of this differentiation, two aspects are particularly noteworthy: first, the present differentiation is the status quo of the Cold War concept of

¹³⁴ GATT Panel Report, 'Ceylon-Article XVIII Applications' GATT Doc. L/71 (26 November 1957). The panel report did not explain why it used GNP per capita instead of GDP per capita or other national income indicators or included mining in certain industries' GNP shares. The choice seems arbitrary but was justified because GATT Article XVIII did not address these issues.

¹³⁵ European Commission, 'Trade and Development. Different Needs, Different Responsibilities: What Is the EU Asking from Developing Countries?' <<https://www.europeansources.info/record/trade-and-development-different-needs-different-responsibilities-what-is-the-eu-asking-from-developing-countries-hong-kong-14-december-2005/>> accessed 3 November 2022.

¹³⁶ *WTO Panel Report, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* WTO doc., WT/DS246/R (1 December 2003), para 7.161.

¹³⁷ *WTO Appellate Body Report, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries* WTO doc. WT/DS246/AB/R (7 April 2004).

¹³⁸ Article 29, SCM Agreement

¹³⁹ WTO, 'Who Are the Developing Countries in the WTO?' <https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm> accessed 3 November 2022.

three 'worlds': the 'First World' of capitalist industrialised countries, the 'Second World' of communist industrialised countries, and the 'Third World' of underdeveloped, non-industrialised countries. Second, WTO members can self-declare their status and maintain their claims to special rights. Most manifestations of SDT consider DCs as a homogenous group. For instance, the Agreement on Agriculture provides DCs with a 10% de minimis exemption for domestic support, whereas developed countries receive a 5% exemption. The TRIPS also has different implementation transition periods for developed and developing country members.

The self-declaration makes no distinction between DCs according to their needs or stages.¹⁴⁰ It is essential to note that other members can contest a member's decision to utilise provisions available to 'developing countries.' So, there is a vast and long-standing disagreement about which countries should be considered 'developing countries.'

A recent proposal by the United States¹⁴¹ to redefine developing country status and its outright rejection by several DCs, including China and India¹⁴², has brought the issue back to the fore and revealed its complexities. The US claims that a lack of discipline within the WTO has led to unpredictable and illogical outcomes, such as the world's wealthiest, fastest-developing, and most trade-distorting countries classifying themselves alongside the WTO's least-developed members to avoid making additional commitments. The United States considers the developing country status claims of certain advanced countries, including China, India, Singapore, Israel, Mexico, Turkey, Chile, Indonesia, South Africa, South Korea, the United Arab Emirates, and Qatar, to be unreasonable.¹⁴³

In response to the US memorandum, 52 DCs, including India and China, submitted a statement to the General Council of the WTO defending their status as 'developing countries.'¹⁴⁴ In another similar communication, India, China, South Africa, Venezuela, Laos, Bolivia, Kenya and Cuba claims that, despite impressive progress achieved by some developing Members, 'they have not come anywhere near catching up with the developed Members, rather 'the gap...appears to have widened over time, instead of getting reduced.' Therefore, it maintained that 'self-declaration of developing Member status, a fundamental rule in the WTO, has proven to be the most appropriate classification approach to the WTO'.¹⁴⁵

¹⁴⁰ Ibid, 11. However, the UN adopted the definition of LDCs as a subcategory of developing countries in 1971

¹⁴¹ WTO, 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance.' (WTO 14 February 2019) Communication from the United States WT/GC/W/757/Rev.1.

¹⁴² Communication From China, India, South Africa, The Bolivarian Republic Of Venezuela, Lao People's Democratic Republic, the Plurinational State Of Bolivia, Kenya and Cuba to WTO, 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness' (26 February 2019) WT/GC/W/765/Rev.1; D. Ravi Kanth, 'India rallies 51 nations to reject US memo on special treatment' *Livemint* (Delhi 17 October 2019) <<https://www.livemint.com/companies/news/india-rallies-51-nations-to-reject-us-memo-on-special-treatment-11571335050665.html>> accessed 18 October 2019

¹⁴³ The USA proposed that countries that are members of G20/OECD, those classified as high-income countries by the World Bank, or those with a 0.5% share in world merchandise trade should not be termed as DCs for SDT benefits in trade negotiations.

¹⁴⁴ It argued that 'developing countries must be allowed to make their own assessments regarding their own developing country status.'

¹⁴⁵ WTO, 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness'' (WTO 26 February 2019) Communication from China,

A 2019 UNCTAD report presents empirical evidence of the widening structural, infrastructure, employment, and digital gaps between developed and developing countries. It finds that the number of people living below the poverty line has increased, with 64% of the world's poor residing in South Asia and Sub-Saharan Africa. The human development index (HDI) trends also confirm the widening gap between developing and developed countries, including large developing countries like China and India.¹⁴⁶

However, some real differentiations occur as the developed countries design their market access preference per their conditionalities. Moreover, all DCs do not take advantage of all the SDT benefits available to them, and some do not resort to them at all. Despite the differentiation in practice, the debate over self-selection has been more of a hindrance than a help in solving development challenges and finding an appropriate balance of rights and obligations among members.¹⁴⁷ It has placed an unprecedented strain on the trading system.¹⁴⁸ The gravity of the situation has prompted many governments and other stakeholders to call for immediate reforms in the WTO. The seriousness with which reform efforts are undertaken will be vital in determining WTO's effectiveness and relevance as the central global body of international trade for many years.¹⁴⁹ However, the present economic and political realities made reaching an agreement on a formal definition of developing countries extremely remote and next to impossible.¹⁵⁰

3.5.2 The Identity Puzzle and the way forward

Does this designation significantly benefit self-declared DCs like China, Singapore, and South Korea? For example, while Uruguay Round commitments require DCs to reduce their average tariffs from 42.1% to 31.4%, China has agreed to reduce them to 9.5%.¹⁵¹ These reductions are comparable to those of developed countries rather than DCs. Moreover, China's commitments far exceeded those of developed countries on specific issues.¹⁵² For example, China committed to eliminating all export subsidies on agricultural products on its accession, a requirement developed countries could only accept 14 years later.¹⁵³ So, China received

India, South Africa, The Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya and Cuba WT/GC/W/765/Rev.1. It also argued that the recent attempts 'to selectively employ certain economic and trade data to deny the persistence of the divide between developing and developed Members' are 'profoundly disingenuous'.

¹⁴⁶ UNCTAD (n 76).

¹⁴⁷ Ibid, 11

¹⁴⁸ Silvana Schimanski, 'Reshaping the WTO: The Context of the Diagnostic Phase' in Charles Pennaforte (ed), *The World System in transition: a panoramic view* (Universidade Federal de Pelotas 2022) 73.

¹⁴⁹ Patrick Low, Hamid Mamdouh and Evan Rogerson, 'Balancing Rights and Obligations in the WTO – A Shared Responsibility' (IDEAS Centre, Government Offices of Sweden 2019) 4

¹⁵⁰ Ibid, 11. The stalemate has been intensified by the shift of the economic centre of gravity in recent years away from the Western states towards Asia and other regions. Nevertheless, many DCs would probably support the initiative. However, those at the upper spectrum are more likely to resist in the apprehension of losing access to SDT and undertaking greater liability.

¹⁵¹ In addition, China lowered agricultural tariffs to 15.1 per cent, compared to the DCs requirement of 37.9 per cent.

¹⁵² Henry Gao and Weihuan Zhou, 'Myth busted: China's status as a developing country gives it few benefits in the World Trade Organisation' *The Conversation* (Melbourne 6 October 2019)<
<https://theconversation.com/myth-busted-chinas-status-as-a-developing-country-gives-it-few-benefits-in-the-world-trade-organisation-124602>>accessed 13 October 2019

¹⁵³ It also agreed to eliminate all export taxes, still allowed by WTO rules and widely used by many governments.

little 'special' treatment usually accorded to a developing country.¹⁵⁴ Singapore does not take advantage of the flexibilities provided by SDT in negotiating agreements.¹⁵⁵ South Korea accepts all obligations applicable to a developed economy, excluding certain nationally sensitive areas, such as agriculture and fisheries.¹⁵⁶ Brazil has already decided to give up any benefits from SDT.¹⁵⁷ Already, there are the winds of change.

Countries like India and China present some peculiar problems. They have enough diplomatic and economic muscle to flex over international economic and trade relations. However, with a per capita income of around \$2000, India is still poor and home to the world's largest number of poor people.¹⁵⁸ China, categorised as an 'upper middle income' country by World Bank, is still home to 30 million poor people.¹⁵⁹ Ironically, China and India became powerful even before they could become rich.¹⁶⁰ While many of these advanced economies are accepting greater responsibilities in the WTO, at the same time, they are not willing to shun their 'developing country' tag.

Despite increasing disconnection between the indicators that separate 'developing' from 'developed' countries, the 'developing' identity is far from disappearing. It is because the developing country status is not merely a WTO issue; instead, it extends far beyond the WTO. This identity bears essential diplomatic and political significance for them. The self-identification of a country as a developing country is integral to its domestic and foreign policy objectives, signalling its international standing, sense of belonging, and natural peers, thereby establishing a solid foundation based on its widespread recognition.¹⁶¹

Should the WTO prioritise finding ways to fix the multidimensional 'developing country status', or should it seek the most effective solutions to the current crisis? Why should the WTO strike at the 'identity' of its largest member group? Is it sensible for the WTO to wade into this quagmire of idiosyncrasies and risk becoming mired in an impasse? Whether countries should be allowed to self-declare their 'developing' status raises a more fundamental issue: Can the WTO, primarily a trade-rule-making organisation with trade

¹⁵⁴ *ibid*

¹⁵⁵ CNA, 'Singapore does not take advantage of WTO special provisions for developing nations in negotiating agreements: MTI' *CNA*(Singapore 27 July 2019)<<https://www.channelnewsasia.com/news/singapore/singapore-developing-country-status-wto-special-provisions-mt-11759206>> accessed 13 October 2019

¹⁵⁶ Wendy Cutler and Kevin Doyle, 'China's developing country status in the WTO: time for an upgrade?' *East Asia Forum* (Canberra 21 January 2019)<<https://www.eastasiaforum.org/2019/01/21/chinas-developing-country-status-in-the-wto-time-for-an-upgrade/>>accessed 13 October 2019

¹⁵⁷ 'Brazil Agrees to Forgo WTO Special Treatment' *Bloomberg Law* (New York 20 March 2019)<<https://news.bloomberglaw.com/international-trade/brazil-agrees-to-forgo-wto-special-treatment>>accessed 16 October 2019

¹⁵⁸ Roy Katayama and Divyanshi Wadhwa, 'Half of the world's poor live in just 5 countries' (World Bank Blog 9 January 2019)< <http://blogs.worldbank.org/opendata/half-world-s-poor-live-just-5-countries>>accessed 13 October 2019

¹⁵⁹ As per World Bank, there are still a staggering 372.8 million people below the 'upper middle income' international poverty line of \$5.50 a day in China; The World Bank, 'The World Bank in China: Overview'<<https://www.worldbank.org/en/country/china/overview>>accessed 18 October 2019; Wendy Cutler and Kevin Doyle, 'China's developing country status in the WTO: time for an upgrade?' (EastAsiaForum, 21 January 2019)< <https://www.eastasiaforum.org/2019/01/21/chinas-developing-country-status-in-the-wto-time-for-an-upgrade/>>accessed 13 October 2019

¹⁶⁰ Schmitz and Messner (n 68).

¹⁶¹ Farias (n 50) 30–31.

delegates, define and measure development?¹⁶² The most important consideration for the WTO is to find a way to make its rule more broad-based and effective, not to fix its members' international, political, and diplomatic identities - a contentious issue that almost all other international organisations avoid on purpose. The current structure of the WTO provides a solution to this problem. The next chapter analyses potential WTO solutions to the SDT impasse. The WTO should concentrate on resolving existing issues rather than creating new ones.

3.6 Conclusion

While the WTO is not a development organisation, it does have development objectives, and development has been integral to the evolution of the trading system. As the majority of the organisation's membership comprises DCs, trade must play a more significant role in achieving their development objectives. Due to unbalanced trade rules and practices, the WTO has been criticised for prioritising developed countries' interests and facing challenges in achieving development objectives. While the SDT benefits of DCs receive considerable attention, the underlying structural inequity hindering the development goals of DCs receives less attention. The prolonged debate over the differentiation of DCs has hindered the WTO's operations and advancement by delaying necessary reforms and worsening relationships among its members. Therefore, reforming the WTO to respond to the needs of its members and avoiding unnecessary debates over the 'developing country' status will benefit all parties involved, including the organisation and its members.

Given the crucial role of development in shaping the MTS, the next chapter will examine how the system has addressed the development needs of its developing country members.

¹⁶² UNCTAD (n 76) 31. The WTO is not a development agency, unlike the UN. In addition, being classified as a 'developing member' by the WTO has no bearing on resource transfer or lending facilities.

CHAPTER 4: SPECIAL AND DIFFERENTIAL TREATMENT IN THE GATT/WTO: A DEVELOPMENT RESPONSE

4.1 Introduction

Although the GATT aimed to be a universal MTS, its design primarily reflected the practices and ideologies of developed countries, catering to their needs.¹ In the early years, DCs participated in the system under the principle of non-discrimination; however, they soon demanded that the system address their unique needs and challenges in trading relations. In response, developed countries agreed to adopt the concept of non-reciprocity or less than reciprocity to accommodate DCs in the system without requiring fundamental concessions. The concept of SDT emerged over various rounds and negotiation stages before being codified in the Tokyo Round through the Enabling Clause.

The SDT principle has played a crucial role in facilitating the integration of DCs into the MTS. However, its effectiveness and impact on the trade of DCs have been heavily debated. While a few countries have benefited from it, most could not take advantage of its purported benefits due to its voluntary and ambiguous nature, as well as the complex conditions attached to it. As a result, DCs have persistently called for strengthening and making the principle more operational and precise. Given its failure to deliver desired results, the question remains whether SDT will ever be capable of fulfilling its intended function.

This chapter seeks to critically examine the emergence and evolution of the SDT concept, considering its development dimension, legal status, and potential for enhancing effectiveness.

4.2 SDT Provisions in WTO

‘There is nothing more unequal, than the equal treatment of unequal people.’² The principle of SDT indicates recognition by the international community that playing fields between developed and developing countries are not level.³ As

‘developing countries are at very different stages of economic, financial and technological developments and therefore have entirely different capacities as compared to developed countries in taking on multilateral commitments and obligations’,

¹ Rorden Wilkinson and James Scott, ‘Developing Country Participation in the GATT: A Reassessment’ (2008) 7 World Trade Review 473, 479; Robert Gilpin and Jean M Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2001); Joanne Gowa, ‘Explaining the GATT/WTO: Origins and Effects’ in Lisa L Martin (ed), *The Oxford Handbook of the Political Economy of International Trade* (Oxford University Press 2015).

² Thomas Jefferson, the third President of the USA (1743 - 1826).

³ Compared with large firms in developed countries, many of whom are usually multinationals with long experience in international trade and investment, even the larger firms from DCs are severely handicapped due to, among others, infrastructural deficits, missing or incomplete markets, lack of regulatory supports, lack of access to skills, lack of integration with the small and medium-sized firms and much higher costs of capital.

SDT provisions are conceived to provide them with flexibilities that allow them to pursue appropriate policies to support their development needs.⁴ As defined by the WTO Secretariat, SDT provisions are some special provisions in the WTO Agreements that give DCs special rights and allow Developed countries to treat DCs more favourably than other Members.⁵

The SDT provisions were categorized into six types by the WTO Secretariat in 2001⁶ outlining measures that aimed to increase the trade opportunities of DC Members,⁷ safeguard the interests of DC Members,⁸ provide flexibility in commitments and policy instruments,⁹ transitional time-periods,¹⁰ technical assistance,¹¹ and provisions regarding LDC Members.¹² That classification fails to account for the diversity and complexity of such provisions across WTO sectors and agreements, with variations in their mandatory or optional nature, specificity, enforceability, and sectoral or cross-cutting application. Moreover, there is a lack of consistency and coherence regarding their legal status, scope, content, and application. To address this issue, Hoekman, Michalopoulos, and Winters have identified three primary types of SDT arrangements in the trade regime:¹³ GSP programs, exemptions and waivers, and

⁴ WTO, 'Proposal for a Framework Agreement on Special and Differential Treatment' Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe WT/GC/W/442, 19 September 2001 1.

⁵ WTO, 'Special and Differential Treatment Provisions'

<https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm> accessed 23 January 2021.

⁶ WTO, 'Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat' (WTO 2018) Committee on Trade and Development WT/COMTD/W/239.

⁷ For instance, the 1979 'Enabling Clause' permits developed countries to grant preferential tariff treatment to DCs. GATT, 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903)' GATT BISD 26th Supplement 203 (1979). Similarly, as per Article XXXVII of GATT 1994, the developed countries committed to accord high priority to reducing and eliminating barriers to products of export interest to DCs.

⁸ For example, Article 15 of the Anti-Dumping Agreement (Implementation of Article VI of the GATT) requires particular regard by the developed countries to the unique situation of DCs in case of considering the application of anti-dumping measures. Similarly, under Article 12.2 of the TBT Agreement, Members must consider DCs' exceptional development, financial and trade needs in implementing the Agreement.

⁹ For instance, LDCs and developing countries with a GNP per capita of less than \$1000 per year are exempted from the prohibition on export subsidies. Article 27 of Agreement on Subsidies and Countervailing Measures. Similarly, under Article 12.4 of the TBT Agreement, DCs are not expected to use international standards as a basis for their technical regulations, standards or test methods that are inappropriate for their development, financial and trade needs.

¹⁰ Some WTO agreements have special provisions providing transitional periods for DCs. For example, the Agreement on Agriculture (Article 15.2) and the TRIPS agreement (Article 65.4) provide up to 10 years of transition to DCs for compliance with the agreements.

¹¹ Most WTO agreements include provisions for supporting DCs with technical assistance to enhance their trading capacity. For instance, The TFA allows DCs to link the fulfilment of their self-designated obligations on the condition of receiving essential assistance. (Category C provisions under Article 14.1 of the TFA. Similarly, Article 9 of the SPS Agreement requires that the developing country members should be provided with technology that may come in the form of advice, credits, donations, grants, or investments in technical expertise, training, research, and infrastructure.

¹² SDT provisions allowing flexibility to DCs also apply to the LDCs. However, many agreements included special considerations only available to the LDCs. For instance, Article 13.3 of the TFA requires LDCs to undertake commitments to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities.

¹³ Bernard M Hoekman, Constantine Michalopoulos and L Alan Winters, *More Favorable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization* (World Bank Publications 2003) 5; Bernard Hoekman, 'Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 *Journal of International Economic Law* 405, 405,407.

technical assistance promises made by developed countries to help DCs implement trade obligations. GSP programs provide non-reciprocal, preferential market access for DCs covered by the Enabling Clause, while exemptions and waivers offer transitional and time-bound relief from specific rules and disciplines applicable to DCs. Technical assistance promises involve developed countries providing technical assistance to DCs to facilitate trade obligation implementation.

Again, these groupings do not reflect the rights and obligations of countries created by these provisions. So, Michalopoulos proposed a new classification consisting of two broad categories:¹⁴

- a. Obligations of developed countries and international institutions to take specific actions including providing preferential market access,¹⁵ and technical assistance,¹⁶ and, implementing WTO agreements in a manner favourable to DCs.¹⁷
- b. Rights of DCs to assume differential commitments and obligations including longer transition time,¹⁸ and policy flexibility. For instance, Article XXXVI of GATT states that 'the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties.'¹⁹

Traditionally, SDT provisions were included in the GATT/WTO to increase the development relevance of the trading system.²⁰ They are designed to achieve two broad objectives:²¹ enhancement of market access conditions for DCs²² and exemptions from specific multilateral trade disciplines, offering them some flexibility in using various trade and trade-related measures. They aim to ensure that the beneficiaries are not 'deprived of the essential tools

¹⁴ Constantine Michalopoulos, 'Trade and Development in GATT and the WTO' in Constantine Michalopoulos (ed), *Emerging Powers in the WTO: Developing Countries and Trade in the 21st Century* (Palgrave Macmillan UK 2014) 37.

¹⁵ Developed countries offer preferential export access through GSP programmes in recognition of DCs' supply-side capacity constraints.

¹⁶ Developed countries promise to help DCs build capacity to better integrate into the MTS.

¹⁷ Michalopoulos (n 14) 39. In many instances, WTO agreements have urged developed countries to consider the interest of DCs in implementing the agreements. Most of them are expressed in broad 'best efforts' terms. For example, Article 12 of the TBT Agreement requires that 'Members shall give particular attention to the provisions...concerning developing country Member's rights and obligations.'

¹⁸ For instance, the TRIPS Agreement provides transition time to all members irrespective of their development status. However, developing and least developed countries are granted longer transition periods.

¹⁹ The enabling clause recognises the principle of non-reciprocity. These exemptions allow flexibility to DCs in progressively opening their markets. Thus, many DCs have not bound their manufactured product tariffs to the extent of the developed countries.

²⁰ Robert E Hudec, *Developing Countries in the GATT Legal System* (First published by Gower Publishing Company in 1987, reissued by Cambridge University Press 2011); Joel P Trachtman and Chantal Thomas, *Developing Countries in the WTO Legal System* (Oxford University Press 2009). Hudec's book is widely regarded as a classic and one of the most influential works on the role of DCs in the trading system.

²¹ T Ademola Oyejide, 'Special and Differential Treatment' in Bernard M Hoekman, Aaditya Mattoo and Philip English (eds), *Development, Trade, and the WTO: A Handbook* (World Bank Publications 2002) 504–505.

²² In practice, enhanced market access for DCs is implemented through trade preference programmes (GSP schemes) run by developed countries and some advanced DCs.

for strengthening their export supply capacity' necessary 'to take full advantage of the offer of preferential access to industrial country markets.'²³

4.3 Evolution of Development and SDT in the Trading System

Chronologically, as suggested by Keck and Low, the evolution of SDT in the GATT/WTO may be distinguished into four phases considering the significant events and engagement tendencies of the DCs in the MTS.²⁴ This part will focus on the evolution of the principle in tandem with historical implications.

4.3.1 The First Phase: From Beginning to Tokyo Round

From the beginning to the start of the Tokyo Round in 1973, the first phase was dominated by the conditions of access for DC exports to developed country markets.

a. SDT in the Early Negotiations: ITO Charter and the GATT

The design of post-World War II international trade mechanism, based on the idea of one set of rules for all countries, was laid down in a series of international negotiations conducted from 1946 to 1948 that ultimately produced the never-ratified Charter of the International Trade Organization (ITO) and the purportedly provisional General Agreement on Tariffs and Trade (GATT).²⁵ The early negotiations centred around two contending approaches to political economy.²⁶ The first approach reflected David Ricardo's theory of comparative advantage, as advocated by developed countries. Ricardo's theory was contradicted by the second approach, primarily advocated by the Argentine economist Raul Prebisch²⁷ and favoured import substitution.²⁸ The active participation of the DCs in early negotiations is evident in

²³ Oyejide (n 21) 505. The substantial exemptions from several WTO disciplines enable the beneficiary DCs to regulate access to their markets through strategic maintenance of trade barriers and other policy options. However, they still can access the tariff reduction benefits achieved in multilateral trade negotiations, in line with the most-favoured-nation (MFN) principle, but without reciprocity.

²⁴ Alexander Keck and Patrick Low, 'Special and Differential Treatment in the WTO: Why, When and How?' (World Trade Organization (WTO), Economic Research and Statistics Division 2004) WTO Staff Working Paper ERSD-2004-03.

²⁵ Hudec (n 20) 28.

²⁶ Rogerio De Souza Farias, Raphael Cunha and Norma Breda dos Santos, 'Generalised System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 *Journal of World Trade* 637.

²⁷ Prebisch was recognised as a progressive and innovative policy activist and a leading theorist of developmentalism that called for the rapid industrialisation of peripheral economies through import substitution and the development of primary industries. His theory of declining terms of trade for primary products, which argued that rapid industrialisation backed by robust state action was necessary to overcome underdevelopment, went on to highly influence the works of the Economic Commission of Latin America. Later, he served as Secretary-General of the UNCTAD from 1964 – 1969.

²⁸ Raúl Prebisch, 'The Economic Development of Latin America and Its Principal Problems' (United Nations Economic Commission for Latin America 1950) *Economic Bulletin for Latin America* 7(1). Import substitution focuses on protecting and incubating infant domestic industries to fully develop sectors so that domestic goods can compete with imported goods. This approach caters to the idea that the less developed countries experience detrimental terms of trade with the developed economies, so they should adjust their trade pattern with a restriction on the amount of imported industrial products, diversification of their national production and promotion of export of the industrial product.

the number of submissions during the ITO negotiations.²⁹ Many of the amendments were negotiated and accepted. Thus, the 1948 Havana Charter, which would eventually lead to the establishment of ITO, strongly emphasised development and recognised the principle that 'economic development' could be a justification for using trade measures otherwise prohibited by the Charter. It contained a chapter on Economic Development and Reconstruction (Articles 8-15) and another on Inter-governmental Commodity Agreements (Articles 55-70).³⁰ However, the Charter was rejected by US Congress and never became law.³¹ The trade policy rules negotiated and embodied in the Charter largely survived in a separate agreement, the General Agreement on Tariffs and Trade (GATT), which resulted from 1947 negotiations by the same individuals.³²

b. The GATT Early Years

The rules of the GATT, originally intended to serve as a trade agreement to implement an early round of tariff reductions before the ITO Charter came into operation, were drawn from the Charter draft minus the 'development dimension'.³³ The Preamble of GATT underlined the necessity of substantially reducing discrimination and concluding agreements based on reciprocity and mutual gain. Though about half of the original twenty-three signatories were DCs³⁴, GATT did not particularly recognise any differential treatment for the DCs.³⁵ It had promised to create trade conditions that would promote growing exports for everyone, but evidence showed that DCs' exports were declining.³⁶

c. The Haberler Report

The decision of a meeting of GATT ministers in 1957 cited three significant problems, including 'the failure of the trade of less developed countries to develop as rapidly as that of developed

²⁹ Ann Capling, *Australia and the Global Trade System: From Havana to Seattle* (Cambridge University Press 2001); John Howard Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill 1969); Clair Wilcox, *A Charter for World Trade* (Macmillan Co 1949) 47. India, Cuba, Brazil, China, Lebanon, Argentina and Chile were the notable contributors to the Conference, but Australia—a developing country at that time, led the discontent. Of the more than 800 amendments to the proposed Charter reflecting demands for commodity price control, quantitative restrictions for balance of payments and longer deadlines for commitments, Clair Wilcox, the vice-chairman of the United States delegation, described that 'as many as two hundred that would have destroyed the very foundations of the enterprise' as proposed by the developed countries.

³⁰ Hudec (n 20) 31. However, as they had begun, the GATT-ITO negotiations ended with no basic consensus on the trade-policy rules that should apply to DCs.

³¹ With the demise of the ITO Charter, the more extensive legal privileges accorded to DCs in that document also vanished in thin air.

³² 55 UNTS 194, The General Agreement was concluded on 30 October 1947; Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Texts, Materials and Commentary* (Hart Publishing 2012) 58.

³³ Hudec (n 20) 32.

³⁴ Brazil, Burma (Myanmar), Ceylon (Sri Lanka), Chile, Cuba, China, India, Lebanon, Pakistan, Southern Rhodesia (Zimbabwe) and Syria were original signatory DCs.

³⁵ WTO, 'Developing Countries and the Multilateral Trading System: Past and Present', Background Document, High Level Symposium on Trade and Development' (Development Division, WTO 1999) 11; Hudec (n 20) 41. In other words, DCs participated as equals in trade negotiations. They were expected to negotiate meaningful tariff concessions as a payment for the legal right to benefit from the tariff concessions of other GATT members. As a result, the 'by-the-book' approach was taken towards different aspects of rule compliance by DCs. However, the DCs were not in a position to compete with their industrialised counterparts because of their fragile economies.

³⁶ Hudec (n 20) 52; Anthony N Cole, 'Labor Standards and the Generalised System of Preferences: The European Labor Incentives' (2003) 25 Michigan Journal of International Law 179, 184. Throughout this period, DCs tried to attract the attention of the developed countries to the uniqueness of their development problems and challenges and the need to be treated differently in international trade.

countries' and called for a study of these problems by a group of expert economists.³⁷ This decision led to the Haberler Report of 1958.³⁸ The report concluded that the DCs were lagging in trade growth, blamed the developed countries' trade policy practises and GATT exceptions for the decline, and urged the developed countries to open their markets.³⁹ In response, the GATT adopted a declaration in 1961 on the 'Promotion of Trade of Less Developed Countries,' that called for preferential market access for DCs not covered by the preferential tariff systems. This was the first mention in the GATT of what would later constitute the GSP for DCs.⁴⁰

d. The Kennedy Round (1964-67)

In part, because they felt the GATT was not adequately addressing their trade and development concerns, DCs successfully lobbied for establishing UNCTAD in 1964 by enshrining the Prebisch-Singer theory of development.⁴² The birth of UNCTAD, the Cold War, and the growing number of newly independent states following decolonisation significantly enhanced the bargaining power of DCs, leading to the 1965 decision to establish Part IV of the GATT.⁴¹ Part IV consisted of three 'best endeavour' clauses:

- Art. XXXVI introduces the principle of non-reciprocity, which means 'the developed contracting parties do not expect reciprocity for their commitments in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.'
- Art. XXXVII recommended various actions that developed countries should undertake to help DCs, including a call to reduce tariff peaks and escalation.
- Art. XXXVIII was meant to provide the institutional vehicle to implement the other two provisions, which led to establishment of a Committee on Trade and Development in 1964.

³⁷ BISD, 6th Supplement (1958) 18

³⁸ GATT, 'Trends in International Trade' Report by a Panel of Experts' (1958). It was to inquire on (a) the failure of less developed countries' trade to develop as quickly as that of industrialised nations, (b) excessive short-term fluctuations in the prices of primary products, and (c) the widespread use of agricultural protection. This was the first time the GATT looked at issues facing DCs. The report titled 'Trends in International Trade' and prepared by a panel of distinguished economists led by Gottfried Haberler of Harvard concluded that DCs' views that current commercial rules and conventions were unfavourable were justified. The report validated many DCs' views on raw material exports. Many of the issues it raised were incorporated into the UNCTAD I preparatory process (1964)

³⁹ Craig N Murphy, 'What the Third World Wants: An Interpretation of the Development and Meaning of the New International Economic Order Ideology' in Paul F Diehl (ed), *The Politics of Global Governance: International Organizations in an Interdependent World* (2nd Revised edition, Lynne Rienner Publishers Inc 2001) 261, 266. In response to Haberler, GATT Contracting Parties established three committees to develop a 'Co-ordinated Programme of Action Directed towards an Expansion of International Trade'. Committee III was tasked to investigate whether the developed countries were indeed responsible for the lack of trade growth of the DCs. When this committee also confirmed its findings to be affirmative and recommended the abolition of trade barriers and tariffs on products of interest to DCs, including primary commodities, the GATT contracting parties finally agreed to deal with the problem. However, these recommendations were never implemented to a significant degree.

⁴⁰ Constantine Michalopoulos, 'Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries' [2000] World Bank Policy Research Working Paper 2388 5.

⁴¹ The number of DCs began to proliferate during this period. In 1960, Among 37 Contracting parties, only 16 were DCs. By 1970 the figures rose to 52 as opposed to 25 developed countries.

Though Part IV was never intended to have legal force and added nothing to the existing legal relationship between developed countries and DCs,⁴² it had great significance as an agreed-upon principle on trade and development. It provided a solid basis for future DC claims for SDT.⁴³

e. Establishment of the GSP Scheme

In 1968, DCs became successful in establishing a GSP under the auspices of UNCTAD.⁴⁴ Resolution 21(ii) at UNCTAD II in 1968 called for establishing a 'generalised, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries.' It was established voluntarily, and there was no obligation to maintain it under GATT.⁴⁵ By 1969, almost all the OECD members had submitted their individual GSP proposals to the UNCTAD. The final step in creating the GSP system occurred in 1971 when a 10-year waiver from the MFN clause was negotiated within GATT. This enabled the establishment of 'generalised, non-reciprocal and non-discriminatory preferences beneficial to the developing countries.'⁴⁶ As always, adopting a GSP involved no legal obligation and could be withdrawn anytime.⁴⁷

4.3.2 The Second Phase: The Tokyo Round (1973-1979) and the Enabling Clause

This phase afforded DCs better flexibility in non-engagement, meaning they gained little from the system. The code approach adopted at this Round left most DCs outside the progress achieved in this phase.⁴⁸ The Declaration launching the Tokyo round acknowledged the 'importance of maintaining and improving the Generalised System of Preference'.⁴⁹ Before this, GSP was not a GATT law but an MFN exception for a decade. Then, in response to the demands of the DCs, led by Brazil, negotiations later dubbed 'Framework Negotiation' were initiated.⁵⁰ They led to the establishment a new framework to define and codify the legal

⁴² Keck and Low (n 24) 4.

⁴³ WTO, 'Developing Countries and the Multilateral Trading System: Past and Present', Background Document, High Level Symposium on Trade and Development' (n 35) 14; Hudec (n 20) 66.

⁴⁴ Delsie M Gandia, *The EEC'S Generalised Scheme of Preferences and the Yaounde and Other Agreements: Benefits in Trade and Development for Less Developed Countries* (Allanheld, Osmun 1981) 38. Establishing a system of preferences for DCs exports in developed countries' markets was an essential topic on the Agenda over the 1960s and 1970s. Then, in a breakthrough, Australia offered to start its own GSP scheme and received a waiver of the most favoured nation (MFN) principle in 1966, making it the first country to institute a GSP scheme.

⁴⁵ Rolf J Langhammer and Andre Sapir, *Economic Impact of Generalized Tariff Preferences* (Gower Pub Co 1988) 10–11. They agreed that some form of GSP was desirable, but lack of consensus on the details blocked the initial attempts to arrange a single global GSP. So, it was decided that each willing nation should introduce its own GSP.

⁴⁶ GATT, 'Generalised System of Preferences; Decision of 25 June 1971' (1971) L/3545, WT/COMTD/W/77/Rev.1. After the waiver, the EEC became the first entity to create a scheme, the USA was the 23rd and most recent. The US GSP was initiated on 1 January 1976.

⁴⁷ Cole (n 36) 192. Thus, the GSP-adopting developed countries historically were free to manipulate their GSP programs at any time and for any reason

⁴⁸ However, codifying the enabling clause brought a sense of relief for the DCs in the end. The Tokyo Round negotiations (1973-1979) achieved agreements known as 'codes' on anti-dumping measures, government procurement, technical barriers to trade, and other non-tariff measures.

⁴⁹ 'The Tokyo Declaration (14 September 1973)'

<http://www.cvce.eu/obj/the_tokyo_declaration_14_september_1973-en-641c04eb-2900-4ac3-b07d-1a0467477cdc.html> accessed 25 January 2021; Gilbert R Winham, *International Trade and the Tokyo Round Negotiation* (Princeton University Press 1986) 414.

⁵⁰ De Souza Farias, Cunha and Breda dos Santos (n 26) 651. Brazil presented a far-reaching proposal suggesting that 'GATT should provide a standing legal basis for GSP, that is, that GSP should be integrated into the

rights and obligations of DCs in the GATT. The 1979 decision, popularly known as the Enabling Clause, transformed the 10-year waivers of GSP into a permanent arrangement and established the principle of differential and more favourable treatment, reciprocity, and fuller participation of DCs.⁵¹ The clause provided for:

- preferential access of DCs to developed countries markets on a non-reciprocal, non-discriminatory basis;
- more favourable treatment for DCs in non-tariff barriers issues;
- establishment of preferential trade regimes between DCs, and
- special treatment of LDCs in the context of specific measures for DCs.

Most importantly, the provisions of the clause continued to be permissive and discretionary and did not create any new legally binding obligations for developed country Members.⁵² As a counterbalance to the Enabling Clause, the contracting parties also agreed to the 'graduation' principle, which foresees that DCs will gradually lose these preferences as they develop and gives developed countries a formal basis to phase out non-reciprocal preference over time.⁵³

4.3.3 The Third Phase: The Uruguay Round (1979-1995)

This phase has experienced a significant policy change as DCs started to engage more proactively with the negotiation procedure and shoulder much greater responsibility within the system than ever before.⁵⁴ In sharp distinction to the code approach of the TR, the single undertaking of the UR meant that all WTO members had to accept all agreements.⁵⁵

The mere acceptance of the 'single undertaking' principle demonstrated that the SDT concept was inherently weakened. Nevertheless, DCs accepted 'a dilution of special and differential treatment in exchange for better market access and strengthened rules.'⁵⁶ However, the

General Agreement permanently and backed by sanctions to assure its effectiveness'. However, the developed countries did not support the Brazilian proposal; instead, they were eager to push forward the 'graduation' issue-the stage when a DC loses access to preferences.

⁵¹ GATT, 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903)' (n 7).

⁵² Michalopoulos (n 40) 8. It only combines the critical elements of preferential market access, non-reciprocity, and flexibility in implementing rules and commitments. It may be called a summation, rather than an extension, of the efforts made since 1954 to address the concerns of DCs under the GATT.

⁵³ GATT, BISD 6th Supplement 205, Geneva (1980)

⁵⁴ Michalopoulos (n 40) 14. This was due to rapid economic growth in many DCs, greater emphasis worldwide on the role of the market and government non-intervention and the desire to fix a non-functioning GATT. This Round also saw an evolution of DC attitudes regarding SDT provisions. Without formally giving up on the principle of non-reciprocity, DCs shunned their past practices and participated more actively in the exchange of reciprocal liberalisation in goods and services.

⁵⁵ Michalopoulos (n 40); Keck and Low (n 24) 6. DCs, by participating in the Uruguay Round Agreements in Services, Trade-Related Intellectual Property Rights (TRIPS) and Trade-Related Investment Measures (TRIMS), accepted commitments in areas where they had previously enjoyed complete freedom. The same is true for the previous plurilateral agreements (subsidies, Technical Barriers to Trade (TBT), Customs Valuation, Sanitary and Phytosanitary Measures (SPS) turned into general agreements, albeit within a framework of specific SDT provisions. Moreover, many DCs remarkably increased their tariff bindings, particularly in agriculture.

⁵⁶ Kessie Edwini and Yvonne Apea, 'The Participation of African Countries in the Multilateral Trading System' in Abdulqawi A Yusuf (ed), *African Yearbook of International Law*, vol 12 (2004) (Martinus Nijhoff Publishers

Round brought about a fundamental shift in the focus of the SDT 'from the problems of development to the problems of implementation.'⁵⁷ Considering the institutional strength required to implement the commitments, new elements of SDT were introduced in the form of transitional times and technical assistance for capacity building.⁵⁸ Except for the minimal benefits through the transition period and technical assistance, the same policies were made applicable to all countries, irrespective of their level of development.⁵⁹

4.3.4 The Fourth Phase: The WTO Regime

The preamble to the Marrakesh Agreement 1994 establishing the WTO reiterated and expanded this concept of SDT, recognising the 'need for positive efforts designed to ensure that' DCs and LDCs 'secure a share in the growth in international trade commensurate with the needs of their economic development.'⁶⁰ Article XXXVI:4 of GATT 1994 recognises the 'continued dependence' of many low-income countries on the export of 'a limited range of primary products' and requires the Members to 'accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest' to DC Members.⁶¹

This phase began with a significant challenge for DCs as they prepared to assume their new Uruguay Round obligations, many of which do not align with their national interests or development priorities.⁶² The 'Implementation' debate began promptly and became significant in Seattle, Doha and beyond discussions.

2005) 24. The DCs understood that they could not achieve improved market access for products of their export interest without providing reciprocal concessions.

⁵⁷ Communication from Chad on Behalf of the LDC Group, 'Proposal Submitted to the WTO Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS): Extension of the Transition Period under TRIPS Article 66.1 for Least Developed Country Members' (2020) IP/C/W/66 of 1 October 2020 2.

⁵⁸ Michalopoulos (n 40) 14. There are additional references to the LDCs, which benefit from longer transition periods for certain agreements, such as TRIPS.

⁵⁹ *ibid*; Communication from Chad on Behalf of the LDC Group (n 57). It effectively meant that the level of development practically ceased to connect with the level of rights and obligations in the trading system. Moreover, most SDT provisions are exhortatory in nature, and very few of them are specific and relate to a particular aspect of developed or developing country policies.

⁶⁰ 'Marrakesh Agreement Establishing the World Trade Organization' (1994).

⁶¹ Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5 World Trade Review 445, 453. However, the unfortunate reality is that many of the products of particular export interest to the LDCs and other DCs also happen to be particularly sensitive for developed countries, mainly due to domestic opposition.

⁶² John Jackson, 'Perceptions about the WTO Trade Institutions' (2002) 1 World Trade Review 101, 107; Keck and Low (n 24) 6; Peter Gallagher and Andrew Stoler, 'Critical Mass as an Alternative Framework for Multilateral Trade Negotiations' (2009) 15 Global Governance 375; Bernard M Hoekman and Petros C Mavroidis, 'WTO "à La Carte" or "Menu Du Jour"? Assessing the Case for More Plurilateral Agreements' (2015) 26 European Journal of International Law 319. In contrast to the GATT's à la carte approach, the single undertaking principle was perceived by many as less pragmatic and quite problematic, leaving negotiators with the impression that they were not given sufficient opportunity to participate in the Uruguay Round negotiations.

Initiated in 2001, the DDA prioritised the needs and interests of DCs.⁶³ Paragraph 44 of the Doha Ministerial Declaration⁶⁴ calls for a review of all SDT provisions 'with a view to strengthening them and making them more precise, effective and operational'.⁶⁵ Following the requirements of paragraph 44, the Trade Negotiations Committee decided to convene Special Sessions of the Committee on Trade and Development (CTD), which led to the adoption of provisions relating to duty-free quota-free (DFQF) market access for LDCs at the Hong Kong Ministerial and the SDT Monitoring Mechanism at the Bali Ministerial Conference.⁶⁶ But as DDA negotiations, scheduled to be concluded within three years, were suspended by WTO in 2006 and remain 'dead and buried',⁶⁷ the future of development dimensions and SDT provisions in the WTO looks bleak and uncertain.

4.3.5 Refocusing, Marginalisation and Fragmentation of SDT

Pre-and post-Uruguay Round SDT provisions differ significantly regarding focus. The pre-Uruguay provisions were crafted to provide market access for DCs in developed countries markets on a preferential and non-reciprocal basis. The latter group of provisions supports DCs in implementing WTO rules by offering extra time and technical assistance to improve their capacity and integration into the trading system.⁶⁸

The SDT has been characterised by increasing marginalisation and fragmentation in the WTO era. Weinhardt and Schofer analysed the inclusion of SDT provisions in WTO agreements and

⁶³ Just after the adoption of the Millennium Development Goals (MDGs) by the UN, DDA was aimed at making the trading system more sensitive to the challenges faced by the DCs and making trade a powerful vehicle to alleviate poverty worldwide. Accordingly, paragraph 50 of the Doha Declaration specifically recognising the 'principle' of SDT, stated that 'the negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in Part IV of the GATT 1994; the [Enabling Clause]; the Uruguay Round Decision on Measures in Favour of Least Developed Countries; and all other relevant WTO provisions.'

⁶⁴ WTO, 'Doha Ministerial Declaration, Adopted on 14 November 2001' WT/MIN(01)/DEC/1 20 November 2001.

⁶⁵ Moreover, the Declaration endorses the SDT work programme contained in the Doha Implementation Decision, which instructed the Committee on Trade and Development to 'identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions'. Doha WTO Ministerial Conference, 'Implementation-Related Issues and Concerns – Decision of 14 November 2001' WT/MIN (01) 17 (20 November 2001) s 12(1)(i).

⁶⁶ WTO, 'Special and Differential Treatment Provisions' (n 5); WTO, 'Monitoring Mechanism on Special and Differential Treatment: Ministerial Decision of 7 December 2013' (2013) WT/MIN(13)/45, WT/L/920. The monitoring mechanism is a 'transparency' exercise that is supposed to oversee the implementation of SDT provisions. It will analyse and review all aspects of the implementation of SDT provisions and may make recommendations to the relevant WTO body for improving their implementation. However, the mechanism does not remove the need to complete the CTD special sessions mandate to review all SDT provisions to make them more precise, effective and operational.

⁶⁷ Antoine Martin and Bryan Mercurio, 'Doha Dead and Buried in Nairobi: Lessons for the WTO' (2017) 16 *Journal of International Trade Law and Policy* 49; Roderick Abbott, 'How to Revive Doha with Some Chance of Success' (2009) European Centre for International Political Economy (ECIPE) Policy Briefs/No 04/2009; David Kleimann and Joe Guinan, 'The Doha Round: An Obituary' [2011] European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Policy Brief No.1/2011; Petros C Mavroidis, 'Doha, Dohalf or Dohaha-The WTO Licks Its Wounds' (2011) 3 *Trade L. & Dev.* 367; Susan C Schwab, 'After Doha: Why the Negotiations Are Doomed and What We Should Do About It' (2011) 90 *Foreign Affairs* 104.

⁶⁸ John Whalley, 'Special and Differential Treatment in the Millennium Round' [1999] CSGR Working paper No. 30/99.

decisions during two distinct periods, 1995-2008 and 2009-2019. They noticed an increase in the marginalisation of SDT provisions and the fragmentation of beneficiary groups.⁶⁹ The WTO agreements and decisions were notable for their extensive coverage of SDT provisions, as 73% of Ministerial decisions and agreements contained SDT provisions. However, during the second decade of the WTO, from 2009 to 2019, the SDT principle becomes less central to trade policymaking. This is evidenced by the markedly declining relative number of SDT-inclusive decisions and agreements: SDT provisions were included in only about 40% of legislation. Additionally, the total number of documents containing explicit SDT clauses declines from 27 in the first period to 19 in the second.⁷⁰ In the 2010s, LDCs have become the primary beneficiaries of new SDT provisions, with 'LDC-only' legislation accounting for over 60% of all SDT-inclusive publications, up from 15% in the initial period.⁷¹ This means that if WTO decisions and agreements contain differential treatment provisions, they are increasingly limited to LDCs.⁷² The shift toward LDCs diminishes the number of recipients and, consequently, the cost.⁷³

4.4 Impact of SDT on National Treatment and MFN Treatment

The WTO has established a framework that aims to promote fair trade among its member countries. Two of the core principles of this framework are the National Treatment and Most-Favoured-Nation (MFN) Treatment. However, the WTO also recognizes the need for SDT for developing and least-developed countries.

MFN Treatment is a foundational principle of the WTO, widely acknowledged as essential for upholding the integrity of the multilateral trading system (MTS). MFN treatment requires a WTO member to extend the same advantages given to one nation to all other WTO members.⁷⁴ National treatment obliges WTO members to treat foreign and domestic products equally once the foreign product enters the market.⁷⁵ National Treatment and MFN Treatment are relative standards that aim to ensure non-discrimination among WTO members. However, these principles may not always be sufficient to address the unique challenges faced by developing and least-developed countries. This is where SDT comes into play.

⁶⁹ Clara Weinhardt and Till Schöfer, 'Differential Treatment for Developing Countries in the WTO: The Unmaking of the North-South Distinction in a Multipolar World' (2022) 43 *Third World Quarterly* 74.

⁷⁰ *ibid* 83.

⁷¹ *ibid* 84-85.

⁷² In contrast to developing country membership, LDC membership is based on UN-approved criteria, not self-declaration.

⁷³ WTO, 'World Trade Report 2022' (2022); WTO, 'Boosting Trade Opportunities for Least-Developed Countries: Progress over the Past Ten Years and Current Priorities' (2022) 5. Since the establishment of the WTO, the export share of DCs has increased from approximately 20% in 1995 to 44% in 2020, so granting SDT to all developing country members would be costly and have significant trade-distorting effects. In contrast, LDC export share has stagnated below 1% of global exports for decades. This partially explains the unwillingness of developed country members to grant SDT to all developing country members.

⁷⁴ Article I, GATT 1994

⁷⁵ Article III, GATT 1994

SDT operates as an exception to these principles. It is designed to allow DCs to deviate from the core principle of MFN treatment obligation.⁷⁶ It allows the deviation through certain measures to enhance their trading opportunities and facilitate the integration of these countries into the global trading system, while also mandating that all WTO members protect their trade interests.

The impact of SDT on National Treatment and MFN Treatment is significant. It acknowledges the economic disparities between developed and developing countries and provides the latter with the flexibility needed to grow their economies through trade.

However, the understanding of SDT has evolved. It has moved from the protection of infant industries to DCs' inability to commit to the level of full reciprocity.⁷⁷ This evolution reflects the changing dynamics of international trade and the need to balance the principles of National Treatment and MFN Treatment with the realities of economic disparity among countries.

While SDT provides certain benefits, it also presents challenges in terms of ensuring fair competition and preventing misuse of these provisions. Balancing the needs of DCs to promote fair and equitable trade is a challenging task. It requires a nuanced understanding of the interplay between SDT, National Treatment, and MFN Treatment, and a willingness to adapt and reform these principles as needed.⁷⁸ The complexity of applying these principles to the benefit of DCs was laid bare in the WTO dispute of *EU-Tariff Preferences*.⁷⁹

India lodged a complaint against the European Communities' (EC) tariff preferences for developing countries combating drug production and trafficking under the General System of Preferences (GSP) scheme. India contended that these preferences violated Article I:1 of the GATT 1994 by not providing equal treatment to all developing countries. India argued that these preferences created undue difficulties for its exports to the EC, thereby nullifying or impairing the benefits India should receive under the Most-Favoured-Nation (MFN) provisions. This pits India's interests against those of the other 12 DCs enjoying the preferences.

The WTO panel found that the EC's preferences were inconsistent with Article I:1 of the GATT 1994 due to the lack of identical treatment for all developing countries. The Appellate Body upheld the panel's findings.⁸⁰ This case highlights several key difficulties in applying the principles of SDT, National Treatment, and MFN Treatment:

- Determining Eligibility for SDT: The absence of clear eligibility criteria for SDT can lead to its misuse and sub-optimal outcomes.

⁷⁶ Aniekan Ukpe and Sangeeta Khorana, 'Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development' (2021) 20 *Journal of International Trade Law and Policy* 83.

⁷⁷ Vineet Hegde and Jan Wouters, 'Special and Differential Treatment Under the World Trade Organization: A Legal Typology' (2021) 24 *Journal of International Economic Law* 551.

⁷⁸ The DDA mandated the WTO Committee on Trade and Development to review and strengthen the SDT provisions to better benefit developing and least-developed countries, but that objective was not realised.

⁷⁹ *EC-Tariff Preferences* [2003] DS246

⁸⁰ The subheading 'Evolution of SDT through Dispute Settlement' on the next page of this chapter broadly discusses the Panel and Appellate Body's findings.

- **Balancing National Interests with WTO Obligations:** Countries may face challenges in reconciling their domestic policy objectives with their obligations under WTO law.
- **Ensuring Fair Competition:** SDT provisions must be designed and implemented in a way that does not distort competition or create undue trade barriers.

Moreover, both the Appellate Body and the panel's findings indicate that the language of the Enabling Clause is ambiguous and insufficient on its own to resolve the dispute, raising further concerns about the effectiveness of SDT provisions.⁸¹

The issues relating to ambiguity, insufficiency, and ineffectiveness of SDT are discussed in detail in the later part of this chapter.

4.5 Evolution of SDT through Dispute Settlement

Though the reports of Panels and the Appellate Body (AB) are not binding precedents for other disputes, even on the same questions, persuasive reasoning in an earlier decision is likely to be repeated and followed in subsequent disputes.⁸² DCs who want to benefit from the dispute settlement system face considerable burdens regarding human resources, financial constraints, time, and political repercussions.⁸³ Only a few DCs, such as Brazil and India, have extensive experience in WTO dispute settlement. Yet, despite these difficulties, DCs have been the complainants in over one-third of all disputes and respondents in roughly two-fifths of cases. In contrast, LDCs have never been complainants or respondents in any WTO dispute.⁸⁴ WTO agreements contain many SDT provisions relating to dispute settlement to support them.⁸⁵

As DCs have very different developmental needs and priorities, what are the criteria to distinguish between them? In *EC–Tariff Preferences*, India, a beneficiary of the general GSP of the European Communities, questioned whether the EC could grant additional GSP to only a subset of DCs. There was a rare dissenting opinion in the Panel in this controversial dispute. The AB reversed the key aspects of the majority panel's reasoning but upheld the result.

The Enabling Clause allows developed country Members to provide 'preferential tariff treatment' based on 'generalised, non-reciprocal and non-discriminatory preferences'.⁸⁶

⁸¹ Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5 World Trade Review 445.

⁸² WTO, 'Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm> accessed 26 January 2021.

⁸³ Bernard M Hoekman and Petros C Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23 The World Economy 527, 532, 535.

⁸⁴ WTO, 'Developing Countries in WTO Dispute Settlement' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm> accessed 26 January 2021.

⁸⁵ Some notable provisions include the inclusion of at least one panellist from a DC Member (DSU Art.8.10), the obligation of the Dispute Settlement Body (DSB) to take into account, when a DC Member is a complainant, 'not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned'(DSU Art.21.8), and particular consideration to 'special situation of [LDCs]' at all stages in disputes involving LDC Members(DSU Art.24.1).

⁸⁶ Footnote 3 to paragraph 2(a) of the Enabling Clause

Focusing on the term ‘non-discriminatory’, the majority Panel held that the drug arrangements were inconsistent with the MFN obligation in Article I of GATT 1994 and not justified by the Enabling Clause as it was not provided to ‘to *all* developing countries without differentiation’ or only to the LDCs.⁸⁷ The AB upheld the Panel’s findings.⁸⁸ It put forward the reasoning that ‘preference-granting countries must make available identical tariff preferences to all *similarly-situated beneficiaries*’⁸⁹, and that additional preferences granted in consideration of particular ‘development, financial [or] trade need’ must also be ‘made available to all beneficiaries that share that need’.⁹⁰ So, distinguishing between DCs was permissible based on objective criteria, which refers to measurable and verifiable factors such as economic indicators like Gross National Income (GNI) per capita and Human Development Index (HDI).

The Panel in *EC – Tariff Preferences* also examined the relationship between Article I of GATT 1994 and the Enabling Clause. The majority of the Panel found that the Enabling Clause was an exception to Article I, based on its non-binding nature and the use of the word ‘[n]otwithstanding’ in paragraph 1 of the Enabling Clause.⁹¹ The anonymous dissenter held that it is not an exception to the MFN rule in Article I; rather, it ‘is the applicable WTO rule regarding tariff preferences for developing countries.’⁹² With brief reasoning on the word ‘notwithstanding’ in paragraph 1, the Appellate Body confirmed the view of the majority Panel that the Enabling Clause is an exception to the MFN principle embodied in Article I:1⁹³, which means the clause will get priority in case of any contradiction. After reviewing the history of SDT in the GATT/WTO, the AB concluded that as ‘an integral part of the GATT 1994’, the clause enjoys a ‘special status’ and, unlike other WTO exceptions, it actually encourages Members to provide preferences within its terms.⁹⁴ It added that ‘the characterisation of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive ‘differential and more favourable treatment.’⁹⁵

In several disputes, Panels and the AB, because of applicable SDT provisions, have accorded some leeway to DCs in procedural matters. For instance, the Panel in the *US–Offset Act (Byrd Amendment)* addressed an SDT provision in the Anti-Dumping Agreement, even though the complainants (including several DCs) failed to mention it in their requests for the establishment of a Panel.⁹⁶ Similarly, the Panel in *India – Quantitative Restrictions* referred

⁸⁷ *EC–Tariff Preferences* [2003] Panel Report DS246 [7.144] [7.177]. (original emphasis)

⁸⁸ *EC–Tariff Preferences* [2003] Appellate Body Report DS246 [187]–[188]. The AB pointed out that the EC set out ‘no criteria or standards to provide a basis distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries.’

⁸⁹ *ibid* 154. (emphasis added)

⁹⁰ *ibid* [165].

⁹¹ *EC–Tariff Preferences* (n 79) [7.39].

⁹² *ibid* [9.2].

⁹³ *EC–Tariff Preferences* (n 80) [90].

⁹⁴ *ibid* [107], [111], [114].

⁹⁵ *ibid* [98].

⁹⁶ *US – Offset Act (Byrd Amendment)* [2002] Panel Report DS217 [7.87]. The Panel have done that relying on Article 12.11 of DSU, which requires Panels to ‘explicitly indicate the form in which account has been taken of relevant [SDT provisions] that ...have been raised by’ a DC Member party to the dispute.

explicitly to the 'principle' of SDT and granted India additional ten days to prepare its submission.⁹⁷

Several WTO Agreements require developed countries to consider the unique situation of DCs before imposing any measures affecting their trade interests. Some of such provisions are worded with legal force (e.g., Article 9.1 of Safeguards Agreement⁹⁸), while some are not (e.g., Article 15 of the Anti-dumping Agreement⁹⁹). In the *Line Pipe* case, the Panel and the Appellate Body found that the United States had acted inconsistently with Article 9.1 of the Safeguards Agreement by not exempting the required amount of Korea's exports from the application of its safeguard measure.¹⁰⁰ However, in *EC-Bed Linen*, the Panel held that: 'Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country.'¹⁰¹ The same conclusion was reached in the earlier GATT case of *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, where the Panel held that the EC had not breached its obligations under this Article as 'its wording contained no operative language delineating the extent of the obligation.'¹⁰²

As one might think, WTO disputes are not always between a developed country Member on one side and a DC Member on the other. The *EC—Tariff Preferences* pitted the interests of one DC (India) against those of 12 others while 17 others were third parties at the Panel stage¹⁰³ supporting different sides of the dispute. Some disputes like the *Dominican Republic – Import*

⁹⁷ In response to Article 12.11 of the DSU, the Panel stated that Article XVIII:B of GATT 1994 'embodies' the 'principle of special and differential treatment' and indicated that the Panel report 'reflects our consideration of relevant provisions on special and differential treatment.' *India — Quantitative Restrictions [1999] Panel Report DS90 [5.157]*. The Panel also referred to Article 21.2 of the DSU, which requires 'particular attention' to be paid to 'matters affecting the interests of developing country Members', suggesting that the 'principle of special and differential treatment' is applicable in determining the 'reasonable period of time' for India to implement its WTO obligations by bringing its inconsistent measures into conformity with the WTO agreements.^[7.6]

⁹⁸ Among the legally enforceable provisions, Article 9.1 of the Safeguards Agreement provides such a benefit to DCs 'as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that DC Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.'

⁹⁹ Among the provisions that may not be legally enforceable is Article 15 of the Anti-Dumping Agreement, which states: 'It is recognised that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping duties. Possibilities of constructive remedies provided by this Agreement shall be explored before applying anti-dumping duties....'

¹⁰⁰ *US — Line Pipe* [2001] Panel Report DS202; *US — Line Pipe* [2002] Appellate Body Report DS202.

¹⁰¹ *EC — Bed Linen* [2000] Panel Report WT/DS141/R [6.233]. The Panel held that a duty to consider something cannot be equated with a duty to accept it. The Panel also referred to the Panel Report in *EC — Cotton Yarn* that interpreted, in the same way, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found that: "if the application of anti-dumping measures 'would affect the essential interests of developing countries', the obligation that then arose was to explore the 'possibilities' of 'constructive remedies'. *It was clear from the words '[p]ossibilities' and 'explored' that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.*" *EC — Cotton Yarn*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added by the EC — Cotton Yarn Panel).

¹⁰² *EC — Cotton Yarn* [1995] Panel Report ADP/137 [582–584].

¹⁰³ Most were third participants also in the appeal.

and *Sale of Cigarettes* (involving a complaint by Honduras) and *Korea – Certain Paper* (involving a complaint by Indonesia) had DCs both as complainant and respondent.¹⁰⁴

4.6 'Reverse SDT' for Developed Countries

Though the US and other developed countries have always maintained that market distortions do not 'help' in the long run, their conduct belied this message from the beginning. Instead, they have used their economic power to negotiate 'reverse SDT' for themselves. Hoekman, Michalopoulos and Winters defined the 'reverse SDT' as 'special opt-outs and exemptions that benefit interest groups in industrialised countries at the expense of developing countries.'¹⁰⁵

One of the most significant objections of DCs was that the MTS was primarily designed to benefit developed countries and was not truly geared toward achieving genuine equality.¹⁰⁶ This was reflected from the beginning in the negotiating position of the developed countries, particularly the USA, which ultimately resulted in the inclusion of many exceptions in the ITO Charter and GATT for their benefit.¹⁰⁷ The right to use export subsidies and the right to use quantitative import restrictions on agricultural imports, the right of Britain and France to retain tariff preferences with colonies and ex-colonies and the right to use discriminatory restrictions in coping with balance-of-payments difficulties¹⁰⁸ all belied their message of non-discrimination.¹⁰⁹ Agriculture and textiles present an ongoing and significantly brighter case for such special preferences.¹¹⁰ Before the Uruguay Round, these two sectors, which are highly protected in industrialised nations, were excluded from trade liberalisation. However, developed countries did not make significant reductions in these sectors during UR negotiations.¹¹¹ It is argued that these 'reverse' SDTs have proven even more operational and impactful than the SDT provided to DCs.¹¹² Hudec maintained that this contradiction had been a constant in the GATT's legal history and is as accurate today as it was in 1947.¹¹³

¹⁰⁴ WTO Tribunals are judicial tribunals which follow a judicial process and therefore have certain incidental powers that involve the exercise of inherent jurisdiction too. However, the frequent collision of DC interest and different levels of development in different DCs make it challenging to apply SDT with additional flexibility without any textual guidance. For details, Andrew D Mitchell, 'Due Process in WTO Disputes' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press 2005) 157–160; Andrew D Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (2006) 5 *World Trade Review* 445, 463–464.

¹⁰⁵ Hoekman, Michalopoulos and Winters (n 13) 7.

¹⁰⁶ Langhammer and Sapir (n 45) 5.

¹⁰⁷ Hudec (n 20) 34.

¹⁰⁸ For instance, Article XIV GATT ('Exceptions to the Rule of Non-discrimination') allows quantitative restrictions for balance of payment purposes in an undetermined post-war transition period, deviating from Article XII; *ibid*.

¹⁰⁹ *ibid*.

¹¹⁰ Countries have utilised high tariff rates on agricultural products to protect domestic agriculture from foreign competition. In 2020, the average applied global tariff on agriculture was approximately 10%. Similarly, the average applied tariff rate for apparel products worldwide remained at 17.0% in 2018 – nearly twice as high as the 8.8% applied to all goods during the same period.

¹¹¹ Hence Article 20 of the Agreement on Agriculture on the continuation of the reform process; Aileen Kwa and Peter Lunenburg, 'Why the US Proposals on Development Will Affect All Developing Countries and Undermine WTO' (2019) South Centre Policy Brief No.58 4.

¹¹² Kwa and Lunenburg (n 103).

¹¹³ Hudec (n 20) 34.

Hoekman, Michalopoulos and Winters pointed out that the continued protection of developed country industries through reverse SDT means 'products produced by poor people are subject to higher tariffs than products produced by the non-poor.' As such, reversing these protections through an MFN-based liberalisation in these areas will bring sizable advantages to DCs.¹¹⁴ Aileen Kwa and Peter Lunenborg made the following non-exhaustive list of 'reverse' SDT enjoyed by the developed countries.¹¹⁵

- a) The Aggregate Measurement of Support (AMS) entitlements in agriculture permit massive amounts of product-specific subsidies, including for exported goods.
- b) The Green Box (Annex 2 of the Agreement on Agriculture) on agriculture subsidies permits unlimited subsidies for developed countries farm programmes.¹¹⁶
- c) The Special Safeguard Provision (SSG) is available to developed countries, but not most DCs.
- d) Tariff peaks and tariff escalations.
- e) The types of subsidies developed countries use under the SCM Agreement offer more flexible treatment than the subsidies DCs would tend to use.
- f) The General Agreement on Trade and Services (GATS), in which concessions went much further in Mode 3 (commercial presence) than in Mode 4 (movement of natural persons), and sectoral rules, such as on telecommunications, in which DCs had significant interests.
- g) The Nairobi Decision on Export Competition, which mandated the immediate elimination of export subsidies, granted some developed countries flexibility.¹¹⁷

4.7 SDT for LDCs

The LDC group is the only clearly defined subset of DCs in the 1979 GATT Enabling Clause. LDCs enjoy exceptional treatment under the S&D provisions. Article 2(d) of the Enabling Clause calls for '[s]pecial treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.' For example, several WTO agreements, including TRIPS, grant LDCs an extended transition period to implement their obligations. Para 45 of the 'July package' (2004)¹¹⁸ stipulated that LDCs would have full access to all SDT provisions and were not required to undertake reduction commitments.

The 1996 Singapore Ministerial Declaration¹¹⁹ launched the idea of special trade preferences for LDCs, including provisions for autonomous duty-free market access. The 2005 Hong Kong (China) Ministerial Declaration introduced duty-free and quota-free (DFQF) market access for at least 97 per cent of products originating in the LDCs.¹²⁰ The decision also committed developing WTO members, for the first time, to accord DFQF treatment to LDC products. The

¹¹⁴ Hoekman, Michalopoulos and Winters (n 13) 7.

¹¹⁵ Kwa and Lunenborg (n 103) 4–5.

¹¹⁶ Currently, the US provides about \$119 billion in the Green Box (88 per cent of total domestic support), and the EU doles out 61 billion Euros (81 per cent of total domestic support).

¹¹⁷ Footnote 4, WT/MIN(15)/45, 19 December 2015).

¹¹⁸ The General Council's post-Cancún decision' agreed on 01 August 2004

¹¹⁹ WTO, 'Singapore Ministerial Declaration' WT/MIN(96)/DEC 18 December 1996.

¹²⁰ WTO, 'Hong Kong Ministerial Declaration, Adopted on 18 December 2005' WT/MIN(05)/DEC, 22 December 2005 n Annex F.

2013 Bali Ministerial Declaration¹²¹ and the 2015 Nairobi Ministerial Declaration¹²² established guidelines for preference-granting countries to simplify their rules of origin to promote preference utilisation and facilitate market access. Following these decisions, preference-granting developed and developing countries have made significant progress in granting DFQF market access to LDCs. There are 13 national GSP schemes currently in operation.¹²³ Among them, the EU's Everything But Arms (EBA) scheme is the most generous and grants full DFQF access to EU Single Market for all products (except arms and armaments) originating from the LDCs.¹²⁴

However, the flexibility allowing preference-providing countries to provide DFQF treatment to only 97 per cent of LDC exports has significantly weakened the decision as the 'excluded' 3 per cent could contain almost all the tariff lines of export interest to an LDC and could nullify the application of DFQF provisions altogether.¹²⁵ The subsequent WTO Ministerial Conferences reaffirmed the commitments for complete implementation of the DFQF market access and urged members that did not implement the commitments to do so immediately.¹²⁶ The DFQF access and liberal rules of origin to the LDC exports are also vital.¹²⁷ Adoption of identical liberal rules of origin would do much to reduce transaction costs associated with utilising preferences.¹²⁸

Experience has shown that such preferential schemes can have a significant positive effect on recipients. However, much depends on the supply-side capacity, their ability to put the rents generated to good use, the ancillary documentary requirements imposed by preference-granting countries, the range of products covered by the schemes and predictability and security in the initiatives and trade-related supply-side constraints.¹²⁹ Though almost all WTO agreements have SDT provisions particularly favouring the LDCs, no LDC could realise the full potential of the various preferential market access schemes due to these shortcomings, a fact that calls for an urgent need to address these concerns with priority.¹³⁰

¹²¹ WTO, 'The Bali Ministerial Declaration' WT/MIN(13)/DEC, 11 December 2013.

¹²² WTO, 'Nairobi Ministerial Declaration' WT/MIN(15)/DEC, 13 December 2015.

¹²³ UNCTAD, 'Generalised System of Preferences' <<https://unctad.org/topic/trade-agreements/generalized-system-of-preferences>> accessed 26 January 2021. developed countries provide DFQF market access to LDC products under their general or individual GSP schemes. Some DCs also provide DFQF market access to LDC products.

¹²⁴ European Commission, 'Everything but Arms (EBA)' <<https://trade.ec.europa.eu/access-to-markets/en/content/everything-arms-eba>> accessed 26 January 2021.

¹²⁵ Mustafizur Rahman, 'Trade Benefits for Least Developed Countries: The Bangladesh Case Market Access Initiatives, Limitations and Policy Recommendations' (United Nations, Department of Economics and Social Affairs 2014) CDP Background Papers: 18, ST/ESA/2014/CDP/18 23.

¹²⁶ UNCTAD, *Handbook on Duty-Free and Quota-Free Market Access and Rules of Origin for Least Developed Countries [Part I: Quad Countries]* (2018) 2.

¹²⁷ Paul Brenton, 'The Value of Trade Preferences: The Economic Impact of Everything But Arms' [2003] World Bank, International Trade Department; Aaditya Mattoo, Devesh Roy and Arvind Subramanian, *The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?* (The World Bank 2002).

¹²⁸ Hoekman, Michalopoulos and Winters (n 13) 11; Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (Oxford University Press 2001) 166. However, the issue has never been subject to GATT/WTO rules, despite some attempts made in the 1960s and 1970s.

¹²⁹ Hoekman, Michalopoulos and Winters (n 13) 6.

¹³⁰ Chapter 7 analysed the trade benefits of LDCs and their impacts in detail.

4.8 SDT in FTAs and RTAs

SDT provisions are generally included in Free Trade Agreements (FTAs) and Regional Trade Agreements (RTAs) to address the inherent disadvantages faced by LDCs in global trade and promote their development.

These provisions aim to level the playing field by granting certain benefits to LDCs. This includes granting longer implementation periods for trade commitments, allowing for reduced tariff cuts on specific goods, providing technical assistance to enhance trade capacity, offering special safeguard measures to protect industries from increased imports, and ensuring preferential market access to goods from developing countries.

For instance, under the Regional Comprehensive Economic Partnership (RCEP), ASEAN LDCs have been granted a 12-year transition period to adopt a negative list approach. This approach reduces uncertainty in service sector liberalization and increases regional trade and investment in service sectors. Cambodia, which met the graduation criteria for the first time in 2021 and could graduate as early as 2027, is one of the countries that will benefit from this transition period. The transition period is critical for these countries to address domestic constraints and leverage new FTAs to further integrate into mature and profitable regional value chains.¹³¹

However, the inclusion of SDT provisions in FTAs and RTAs can generate tensions among participating parties, as they may be seen as discriminatory and undermine the predictability of a trading system. Furthermore, critics argue that SDT provisions may be ineffective in promoting development and could potentially distort the trading system.¹³²

4.9 How Developing Countries Became 'Special'

James Scott argued that a comprehensive understanding of developing countries' attitudes towards the international trade regime requires a multifaceted approach that considers the specific details of negotiations and the broader economic and political contexts in which these negotiations took place.¹³³ During crucial episodes in the history of the MTS, the DCs did not seek 'to be excepted from the obligations in the GATT's code of behavior',¹³⁴ but instead sought to shape those obligations themselves—in a manner that was at odds with the preferences of the developed countries.¹³⁵ Nicholas Lamp presented a detailed analysis of the three formative episodes in the history of the world trade regimes:¹³⁶ the debate on

¹³¹ UNCTAD, ADB, 'A New Trade Policy and Aid for Trade Support Programme for Cambodia after LDC Graduation' (2023) ADB/UNCTAD research and policy dialogue workshop; UNCTAD, ADB, 'What Trade Policy and Aid for Trade Support for Cambodia after LDC Graduation?' (2023) National Research and Policy Dialogue Workshop.

¹³² Sharmin Tania and others, 'Reimagining the Special and Differential Treatment Provisions in the WTO's Dispute Settlement Understanding' [2023] Asian Journal of International Law 1.

¹³³ James Scott, 'Developing Countries in the ITO and GATT Negotiations' (2009) University of Manchester, BWPI Working Paper No. 95/2009 6.

¹³⁴ Hudec (n 20) 4.

¹³⁵ Nicolas Lamp, 'How Some Countries Became "Special": Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking' (2015) 18 Journal of International Economic Law 743.

¹³⁶ *ibid* 744–745.

quantitative restrictions at the early negotiations of GATT and ITO Charter;¹³⁷ the emergence of the principle of less-than-full reciprocity in tariff negotiations in the late 1950s and 1960s;¹³⁸ and the resistance of the DCs to the Agreement on TRIPS in the Uruguay Round.¹³⁹ In all these instances, the negotiating position of the DCs brought up a fundamental challenge to the preferences of the developed countries. They allowed the so-called 'special' treatment for the DCs to buy their acquiescence to something, not in their interest and to accommodate DCs in the system without compromising anything fundamental on their (developed countries) part.¹⁴⁰

The weight and over-powering dominance of the economies of the developed countries in world trade were sufficient to ensure that their interests would dominate GATT proceedings, and GATT principles indeed echo the constitutional theory and practice of the Western developed countries.¹⁴¹ Moreover, as Hudec pointed out, most of the fundamental elements of GATT's policy were in place by the early 1960s when the GATT's DCs membership was still a minority and could offer little resistance to the formation of the trading system that favours the ideologies of the developed countries. Later cold war competition and rising of different DC blocs in the 1960s confront the developed countries, particularly the USA, with a choice-to risk losing the participation of many DCs or compromise on their trade agenda. 'The United States chose to compromise', leading to the emergence of special treatment for the DCs.¹⁴² However, that compromise later proved to be costly for the DCs. Srinivasan called it the reception of 'a permanent status of inferiority under the "special and differential" treatment clause.'¹⁴³ On the same note, Collier described SDT as a tool for marginalisation as the DCs 'were marginalised, or chose to marginalise themselves, through the formula of "Special and Differential Treatment"'.¹⁴⁴

The term 'special' is problematic as it may indicate that the country receiving such treatments is getting 'an unfair advantage'. Particularly problematic is that the developed countries took advantage of so many 'reverse SDT' benefits without being deemed 'special', whereas when developing countries receive similar benefits, they are labelled 'special'. Since the necessary

¹³⁷ DCs' proposal to treat quantitative restriction was the direct opposite of the US vision to abolish all volume-based trade restrictions to restore private enterprise's role in international commerce in the US. Details in Clair Wilcox, 'The American Trade Program. What Do We Have at Stake?' (1947) Address delivered before the World Trade Conference in Chicago on 17 February 1947, US Department of State Publication 2758, Commercial Policy Series 100 11–12.

¹³⁸ The Programme for the Expansion of International Trade, launched in response to the Haberler report, focuses on eliminating trade barriers to the exports of DCs and challenges the idea that trade barriers could only be reduced on reciprocity.

¹³⁹ The DC's resistance to commitments on the 'new issues' put to the test a central component of the developed countries' trade agenda.

¹⁴⁰ Lamp (n 125) 745.

¹⁴¹ James Mayall, 'The Western Alliance, GATT and East-West Trade' in David A Baldwin and Helen V Milner (eds), *East-West Trade and the Atlantic Alliance* (Palgrave Macmillan UK 1990) 22.

¹⁴² Hudec (n 20) 29, 31–35. Hudec argues that 'the power to govern usually brings with it...a duty to take care of the disadvantaged members of the group being governed.' Hudec calls the early preferences offered to the DCs the 'welfare concession' as it is 'very difficult to convene an enterprise involving rich and poor without having some welfare dimension to the work.'

¹⁴³ TN Srinivasan, *Developing Countries and the Multilateral Trading System: From GATT to the Uruguay Round and the Future* (Westview Press 1998) 27.

¹⁴⁴ Paul Collier, 'Why the WTO Is Deadlocked: And What Can Be Done About It' (2006) 29 *The World Economy* 1423, 1425.

condition of special access for a wheelchair or Braille writing for a blind person is not 'special treatment', why should the additional policy spaces offered by SDT provisions in response to the particular developmental needs of the developing countries be referred to as 'special treatment'?¹⁴⁵ Chang explained that a poor friend could not be said to be 'less than reciprocal' only if he cannot buy costly foods for his friends as long as he treats his rich friends often generously within his means.¹⁴⁶ Compared to a large tariff cut by developed countries, even a tiny one may be burdensome for a developing country due to the impact on their weaker adjustment capabilities, unstable job markets and sheer dependence on the tariff for government revenue. Therefore, claiming they receive 'special treatment' is unjustifiable if they make proportionately smaller cuts.¹⁴⁷

4.10 Theoretical Premises and Contradictions of STD

4.10.1 The Conceptual Premises

The concept of SDT has undergone changes across trade rounds due to the expansion of developing countries' membership in the MTS and the shifting perspectives on the relationship between trade and development. The theoretical foundation of SDT is based on several principles, the most fundamental being that DCs are at 'very different stages of economic, financial and technological developments and therefore [had] entirely different capacities as compared to developed countries.'¹⁴⁸ Their needs and priorities differ, so trade policies that maximise growth in DCs may differ from those practised in the developed countries.¹⁴⁹ Notably, small or low-income economies may lack institutional development to manage the full range of WTO rules and resources or markets to overcome natural trade obstacles, making a case for preferential access to markets.¹⁵⁰

Moreover, trade is not a zero-sum game, and the developed countries themselves provide an outstanding example of the success of non-reciprocity in international trade in the Golden Age of 1950-73 when the farsighted economic policies of the US seeking long-term objectives rather than short-term gains were spectacularly successful in helping build up most of Europe and Japan.¹⁵¹ The concept originated partly from the rhetoric of postcolonialism, which

¹⁴⁵ Ha-Joon Chang, 'Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies' (2006) 41 *Economic and Political Weekly* 627, 631. The developed countries widely used much more policy options in their corresponding stages of development.

¹⁴⁶ *ibid.*

¹⁴⁷ This is not the case always, though. For example, per the Indian government calculation presented in Khor and Yen, Japan's average industrial tariff cut was about 70 per cent as opposed to 80 per cent by Brazil and 82 per cent by Indonesia, computed according to the US formula. *ibid*; Martin Khor and Goh Chien Yen, *The WTO Negotiations on Non-Agricultural Market Access: A Development Perspective* (Third World Network 2006).

¹⁴⁸ WTO, 'Proposal for a Framework Agreement on Special and Differential Treatment.' (2001) Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda and Zimbabwe WT/GC/W/442.

¹⁴⁹ Michalopoulos (n 40) 15. DCs are intrinsically disadvantaged in their participation in international trade, so any multilateral arrangement involving the developed countries and the DCs must consider this inherent weakness in specifying their rights and responsibilities. Historically, the concept was based on the understanding that DCs faced conditions distinct from those of developed countries and that these conditions require that DCs be treated differently in the WTO.

¹⁵⁰ Bernard Hoekman and others, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries: Objectives, Instruments and Options for the WTO' [2003] Paper presented at DFID Special and Differential Treatment Seminar in March 2003, London.

¹⁵¹ Ajit Singh, 'Elements for a New Paradigm on Special and Differential Treatment: Special and Differential Treatment, the Multilateral Trading System and Economic Development in the 21st Century' (2003) Prepared

contends that colonial oppression was primarily responsible for the unequal position of DCs.¹⁵²

The principle of SDT emerged and encapsulated the entirety of the MTS's responses to development concerns.¹⁵³ Therefore, the two most frequently highlighted purposes of SDT are to promote development in DCs and to facilitate their integration into the MTS. SDTs aims to address the complex development challenges,¹⁵⁴ and the unequal distribution of wealth among participants,¹⁵⁵ and to reconcile competing demands for trade liberalisation and equitable socioeconomic development.¹⁵⁶ Development and integration may also be considered part of the same objective as they heavily depend on each other's achievement.¹⁵⁷ Additionally, SDT has a presentational appearance as well. Consistent with the stated objective of promoting development, it allows the MTS to regain the public legitimacy it has lost over the years.

4.10.2 The Theoretical Contradictions

Even 50 years after the establishment of the MTS, the interpretation, extent, and substance of SDT provisions remain highly disputed, with significant challenges in their implementation. One of the primary reasons for this is the contradiction between the principle of SDT and another fundamental principle of international economic law: non-discrimination, which forms the foundation of the MTS.¹⁵⁸ While SDT provisions call for non-reciprocity or less than full reciprocity, reciprocity is considered the cornerstone of GATT.

Nonetheless, the concept of reciprocity is fundamentally contradictory to classical trade theory, which emphasises the benefits of unilateral trade liberalisation over the protectionist base case and recognises the marginal role of reciprocity in any of its various forms.¹⁵⁹ The mercantilist fixation with the theory was that higher trade barriers were better than lower trade barriers, and 'reductions in our own trade barriers hurt us by permitting more imports; they must be paid for, therefore, by reductions in your trade barriers, which will help us by

for the joint ICTSD-GP International Dialogue 'Making Special and Differential Treatment More Effective and Responsive to Development Needs', held on 6-7 May 2003 in Chavannes-de-bogis, Switzerland 29.

¹⁵² Frank J Garcia, 'Trade and Inequality: Economic Justice and the Developing World' (1999) 21 Michigan Journal of International Law 975; Asoke Mukerji, 'Developing Countries and the WTO; Issues of Implementation' (2000) 34 Journal of World Trade.

¹⁵³ Amar Breckenridge, 'Developing an Issues-Based Approach to Special and Differential Treatment' (Inter-American Development Bank 2002) 2197. Breckenridge noted that WTO's development dimension is not reducible to SDT, but SDT questions have dominated development discourse.

¹⁵⁴ Whalley (n 68).

¹⁵⁵ Peter Lichtenbaum, "'Special Treatment' vs 'Equal Participation': Striking a Balance in the DOHA Negotiations' (2002) 17 American University International Law Review. (noting that SDT has traditionally been the WTO's approach to addressing the unequal distribution of wealth among members)

¹⁵⁶ Mukerji (n 142).

¹⁵⁷ Sheila Page, 'The Evolution of Special and Differential Treatment in the Multilateral Trading System', *Workshop, International Centre for Trade and Sustainable Development, Geneva* (2004) 4.

¹⁵⁸ The original GATT's preamble underlined the significance of eradicating discriminatory treatment in international trade and of 'reciprocal and mutually advantageous arrangements' to reduce tariffs substantially. Accordingly, the GATT Article 1 (Most Favoured Nation clause) and Article 3 (National Treatment clause) are firmly anchored in the principle of non-discrimination.

¹⁵⁹ Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edition, Routledge 2005) 7-8.

increasing our exports.’¹⁶⁰ This position cannot be a justification simply for the WTO, which advocates for maximum liberalisation of world trade.¹⁶¹

Confusion is also caused by unresolved ambiguities underpinning the MTS, which collectively create ongoing tensions that it must constantly seek to manage. In this respect, Peter M. Gerhart recognises three ambiguities:¹⁶² ambiguity as to whether the MTS is a rule-based or outcome-based system,¹⁶³ uncertainty as to whether reciprocity in the MTS refers to equal opportunity or equal benefits,¹⁶⁴ and the ambiguity is seen in the MTS's reverence for clarity and commitment to flexibility.¹⁶⁵ These inherent ambiguities have profound implications for SDT implementation within the WTO. For instance, the ambiguity as to whether the MTS is a rule-based or outcome-based system raises questions about the extent of flexibility that WTO members have in implementing SDT. They also reflect the ongoing tensions and difficulties of the WTO in balancing its member countries' varying demands and interests. While each ambiguity reflects a distinct facet of this tension, they highlight the need for active engagement and international cooperation to ensure that the MTS remains effective and relevant in shifting political and economic realities.

4.11 Legal Status of SDT

The legal status of SDT has been the centre of much attention from academics and WTO member countries.¹⁶⁶ DCs have always insisted that SDT provisions be legally enforceable, whereas developed countries generally hold the opposite view. Consequently, DCs sought enhanced operationalisation, efficiency, and enforcement of SDT provisions.¹⁶⁷ Developed

¹⁶⁰ Hudec (n 20) 34. Trade negotiators view import liberalisation as ‘concessions’ from a mercantilist perspective. Therefore, the reciprocity argument has been viewed for a long time as a political or mercantilist viewpoint that is not rooted in orthodox economics.

¹⁶¹ *ibid.* While some might try to rationalise the insistence on reciprocity in non-mercantilist terms – ‘the gains from trade are maximised this way’, or even ‘we need it for political reasons back home’ – most AC governments behaved otherwise from the very early negotiations.

¹⁶² Peter M Gerhart, ‘Slow Transformations: The WTO as a Distributive Organization’ (2001) 17 *The American University International Law Review* 1045.

¹⁶³ *ibid* 1055-57. One vision of the WTO (the rule-based image) is that the WTO is designed to allow members to set rules for the global market, regardless of how those rules determine winners and losers. However, WTO members are not interested in rules but rather in outcomes; the majority adhere to them as they provide benefits. A rules-based system can provide clarity and predictability. However, it may be rigid and ignore country-specific circumstances, whereas an outcome-based system is more flexible but more difficult to measure and enforce.

¹⁶⁴ *ibid* 1060. This ambiguity illustrates the tension between the desire for fairness and the need to balance the diverse interests of various countries. In addition, Gerhart finds the idea of reciprocity confusing because there is no external monitor to verify if it has been satisfied.

¹⁶⁵ *ibid* 1063. Although the WTO is a rule-based system, almost every requirement has at least one exemption, typically several. Transparent and predictable rules promote trade, but they may not meet the varying needs of different countries. Flexibility may be required to promote development and address the unique challenges of DCs, but it may also generate uncertainty and reduce predictability.

¹⁶⁶ Frank J Garcia, ‘Beyond Special and Differential Treatment’ (2004) 27 *Boston College International and Comparative Law Review* 291; Mitchell, ‘A Legal Principle of Special and Differential Treatment for WTO Disputes’ (n 61); Edwini Kessie, ‘The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements’ in Petros C Mavroidis (ed), *WTO Law and Developing Countries* (Cambridge University Press 2007).

¹⁶⁷ According to paragraph 44 of the Doha Ministerial Declaration, ‘all [SDT] provisions shall be reviewed to strengthen and make them more precise, effective, and operational.’ However, considering the impasse at Doha, scepticism has increased regarding the viability of a negotiated outcome that meets the requirements of developing country members. Martin and Mercurio (n 67); Mavroidis (n 67); Sungjoon Cho, ‘The Demise of

countries, conversely, argue that SDT provisions are voluntary and altruistic commitments, do not represent justiciable rights, and that it is improper to coerce them to provide preferential treatment to DCs.¹⁶⁸ The philosophical differences between developed and developing countries regarding the nature and function of SDT have contributed to the lack of progress on the SDT issue during DDA negotiations. The recent intensification of debate over the differentiation of developing countries in the WTO has taken this topic to a new height.¹⁶⁹ The question of the legal status of SDT provisions in WTO agreements persists and obscures their objectives and operations. As a result, the WTO Secretariat has created a typology that categorises SDT provisions based on their purpose and intended effect. However, the typology is not based on the legal nature of these provisions.¹⁷⁰ Therefore, the pressing question remains: is SDT a treaty-enshrined right, as developing members claim? The issue may be analysed from the following three perspectives to find an answer.

4.11.1 Legal Nature of the SDT Provisions

Most SDT provisions are couched in languages that are hortatory in nature and do not entail binding obligations. In terms of the language used and the problem of enforceability, Garcia classified the SDT provisions into four categories:¹⁷¹

- a. **Discretionary provisions** use permissive language and do not create or intend to create any obligation whatsoever. A typical example is paragraph 1 of the Enabling Clause, which states that ‘contracting parties may accord differential and more favourable treatment to developing countries.’ This clause operates GSP schemes by developed and advanced developing countries.
- b. **‘Best endeavour’** clauses are common in WTO Agreements. They employ ornamental wording that may, at best, create ‘moral’ obligations for the developed countries by committing them to ‘try their best.’ For instance, GATT Article XXXVII.1 commits the developed countries to accord ‘to the fullest extent possible...high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties’. In fact, agricultural and textile

Development in the Doha Round Negotiations, 45 Tex’ (2010) 573 Texas International Law Journal 578; Robert Wolfe, ‘First Diagnose, Then Treat: What Ails the Doha Round?’ (2015) 14 World Trade Review 7; Uche Ewelukwa Ofodile, ‘The “New” Development Agenda: Challenges to Operationalizing Special and Differential Treatment’, *Proceedings of the ASIL Annual Meeting* (Cambridge University Press 2009).

¹⁶⁸ Kessie (n 156) 15.

¹⁶⁹ In 2019, the United States asserted that certain advanced developing country members are abusing the system and that there is no reason for them to receive special treatment at WTO. On the other hand, DCs continue to argue that SDT is a treaty-enshrined, unconditional right that must be utilised in ongoing and future negotiations. WTO, ‘An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance.’ (WTO 14 February 2019) Communication from the United States WT/GC/W/757/Rev.1; WTO, ‘The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness’ (WTO 26 February 2019) Communication from China, India, South Africa, The Bolivarian Republic of Venezuela, Lao People’s Democratic Republic, Plurinational State of Bolivia, Kenya and Cuba WT/GC/W/765/Rev.1.

¹⁷⁰ WTO, ‘Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat’ (2021) WT/COMTD/W/258.

¹⁷¹ Garcia (n 156) 310–311.

products are the particular products of export interest to DCs, and these two categories face significantly higher tariffs than most other sectors worldwide.¹⁷²

- c. **'Fake mandatory' provisions** are de facto nonbinding provisions. This is a subset of 'best endeavour' provisions that are couched in words of a mandatory nature but fall short of making any legally binding effects due to their overall structure. For instance, under Article 10.1 of the SPS Agreement, developed countries '*shall take into account* of the special needs of developing country Members' in preparing and applying SPS measures.¹⁷³ Here, classically binding 'shall' is followed by undefined and open to subjective interpretation 'take into account' that finally does not create any binding obligation.¹⁷⁴
- d. **Mandatory provisions** are only framed in languages that create specific and enforceable legal obligations.¹⁷⁵

Garcia finds that most SDT provisions are discretionary, best endeavour or fake mandatory.¹⁷⁶ However, classifying SDT provisions according to their legal nature is not easy due to their frequent overlap. A clause may, for instance, be mandatory in one context but discretionary in another. In addition, the precise words used in the Agreement and their interpretation by the WTO dispute settlement body may affect the legal status of these clauses. Nonetheless, most provisions' absence of legal obligations is their distinguishing feature. Garcia contends that SDT is an expression of political will rather than a legal obligation. Therefore, SDT is not legally binding, and it is up to each member state to decide whether or not to grant SDT to other members.¹⁷⁷ Even where SDT is a legal obligation, its scope and extent are not precisely defined. Therefore, the legal status of SDT is ambiguous and subject to interpretation. So, Kishore concluded that the SDT provisions are 'non-binding, unambiguous, unstructured, and lack connectivity with each other.'¹⁷⁸

4.11.2 Incoherence of the SDT Principle

¹⁷² Emanuel Ornelas, 'Special and Differential Treatment for Developing Countries Reconsidered' (*VoxEU.org*, 14 May 2016) <<https://voxeu.org/article/special-and-differential-treatment-developing-countries-reconsidered>> accessed 9 February 2021; Similarly, the Doha Implementation Decision 'urges' Members to 'exercise restraint' prior to challenging rural development or food security measures. However, what is the meaning of the phrase 'exercise restraint'? What criteria must be fulfilled, and what procedure must be followed before we can say that 'restraint' is 'exercised'? Without clarification, such provisions offer little to developing countries. On the contrary, they exhort Members to some vague level of care or attention. Doha WTO Ministerial Conference (n 66).

¹⁷³ Emphasis added.

¹⁷⁴ Similarly, under the Doha Implementation Decision, Member 'will exercise particular consideration' before taking anti-dumping measures against textile exports previously covered by quota from DCs. The force of mandatory 'will' is diluted by discretionary 'particular consideration' that makes no binding effect. Doha WTO Ministerial Conference (n 65).

¹⁷⁵ For instance, DCs got eight years to end export subsidies under Article 27.2.b of the SCM Agreement. This is straightforward and legally binding.

¹⁷⁶ Garcia (n 156) 312; Pallavi Kishore, 'Special and Differential Treatment in the Multilateral Trading System' (2014) 13 *Chinese Journal of International Law* 363. They are mostly vague and open-ended, reflecting the lack of consensus regarding their specific application.

¹⁷⁷ Garcia (n 156).

¹⁷⁸ Kishore (n 166) 363.

Mitchell observed that various SDT provisions in the WTO Agreement are not coherent enough to form a principle that may generally guide the interpretation of the covered agreements.¹⁷⁹ The principle is 'a basic tenet of the international economic legal order'¹⁸⁰, but it is also considered, mostly by developed countries, as a 'significant source of discrimination in the world trading system.'¹⁸¹ The conflict between SDT and non-discrimination requires some balancing to ensure that SDT goals do not outweigh non-discrimination objectives.

Numerous SDT provisions are distinguished by their effectiveness being contingent on government action or inaction, as opposed to legally binding commitments.¹⁸² This essentially voluntary nature of many SDT clauses designed to assist DCs is evident from their wording.¹⁸³ Olivares characterises the non-mandatory nature of most SDT provisions as a 'birth defect'.¹⁸⁴ This 'birth defect' reveals a significant point: SDT is merely a stopgap measure, a suboptimal solution. The MFN rule, which embodies the non-discrimination principle, would be universally applicable,¹⁸⁵ and some deviations from MFN are permitted until this becomes feasible. SDT is an exception¹⁸⁶ or 'deviation from the general rule of quid pro quo or reciprocity for the developing countries'¹⁸⁷ and is only in effect for a limited time.¹⁸⁸ One could argue that the rule dictates the focus and priority of the trading mechanism. However, it is also possible to argue that the exception supersedes the rule. This dilemma casts doubt on SDT's status as 'an independent interpretative principle.'¹⁸⁹

¹⁷⁹ Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (n 61). This incoherence and primarily hortatory language have undermined the provisions' legal status.

¹⁸⁰ Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for Political Conditionality in US Trade Policy' (2003) 4 *Chicago Journal of International Law* 385, 390.

¹⁸¹ Peter Sutherland and others, 'Report of the Consultative Board to the Director-General Supachai Panitchpakdi: The Future of the WTO: Addressing Institutional Challenges in the New Millennium' (WTO 2004) 23.

¹⁸² Article XXXVII:3 of GATT 1947, for instance, requires developed countries to 'give active consideration to the adoption of other measures designed to provide greater scope for the development of imports from less-developed contracting parties....'

¹⁸³ Keck and Low (n 24) 7.

¹⁸⁴ Gustavo Olivares, 'The Case for Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs' (2001) 35 *Journal of World Trade* 551.

¹⁸⁵ Bernard Hoekman and Susan Prowse, *Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade* (The World Bank 2005).

¹⁸⁶ WTO General Council, 'Preparations for the Fourth Session of the Ministerial Conference: Proposal for a Framework Agreement on Special and Differential Treatment' WT/GC/W/442 (31 July 2001); *EC-Tariff Preferences* (n 80) para 90; Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (n 61) 22. Though DCs identify SDT as 'a fundamental building block of the multilateral trading system' that should not be viewed as 'an exception to the general rules' but rather as 'an integral and inherent objective of the multilateral trading system,' the Appellate Body in *EC – Tariff Preferences* referred to the Enabling Clause as 'an integral part of the GATT 1994' but then held that the Enabling Clause was an exception to the MFN principle in Article I:1. Thus the SDT principle is an exception to non-discrimination, the basic building block of the MTS.

¹⁸⁷ WTO, 'Communication from Cuba, India, Pakistan, et. al., 'Preparations for the Fourth Session of the Ministerial Conference, Proposal for a Framework Agreement on Special and Differential Treatment, the World Trade Organization General Council' (2001) WT/GC/W/442 para 6.

¹⁸⁸ Gene M Grossman and others, 'A Preference for Development: The Law and Economics of GSP' in George A Bermann and Petros C Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007); Keck and Low (n 24); Hoekman and Prowse (n 175). GSP donors typically exclude beneficiaries once they reach a certain level of development, and the value of preferences is gradually diminishing as MFN tariffs decline following WTO agreements. Most WTO agreements contain transitional periods for DCs.

¹⁸⁹ Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (n 61) 22.

Another problematic aspect of the principle is that its applicability is limited by the enormous diversity of the needs of DCs at various stages of development.¹⁹⁰ An incoherent SDT principle may guide in interpreting WTO agreements but often cannot resolve questions where developing country interests are put one against the other. Moreover, it cannot guide WTO tribunals in exercising inherent jurisdiction over the procedural and substantive concerns of DC Members.¹⁹¹

4.11.3 Legal Rights and Duties in SDT Provisions

To determine the true legal nature of the SDT provisions, it is essential to analyse the legal obligations and rights of WTO members arising from the SDT provisions. Accordingly, Hegde and Wouters, in a comprehensive article-by-article analysis of the WTO Agreements, have identified 227 obligations and commitments (both legal and non-legal) that are embedded in 153 SDT provisions.¹⁹² They find that 86 per cent (195 out of 227) of the provisions lay down legal obligations in the form of legal duties (115), rights (41) and privileges (39). Moreover, 25 of these obligations have already expired. Therefore, they have identified them as developed and developing countries' legal rights and obligations.

- a. **Duties of developed countries:** Developed countries bear 57 out of 115 duties that include obligations to consider the needs of developing and least developed countries, provide them access to international trade, and refrain from taking measures that adversely affect developmental interests. Most importantly, developed country Members have 98 obligations out of 227 SDT provisions. Fifty-one are obligations of means, while only 47 are obligations of result.¹⁹³ So, just 21 per cent (47 out of 227) of the SDT provisions creates legally binding obligations for the developed Member to provide differential treatment to the developing and LDC Members.¹⁹⁴
- b. **The privilege of developed countries:** The privilege provisions require developed countries to act, but abstention does not create liability. They include the privilege to provide technical assistance, permit temporary derogation, refrain from adopting specific measures against developing members, prioritise developmental needs, and exempt developing Members from reciprocity requirements.
- c. **Duties of developing countries** (16) and LDC Members (9) mainly consist of notification obligations.

¹⁹⁰ SDT does not provide a clear and defensible way to differentiate between DCs at various stages of development. In reality, this eligibility debate diverts attention from the primary objectives of SDT, which are to support DCs in their efforts to develop and better integrate into the global trade system. Peter Kleen and Sheila Page, 'Special and Differential Treatment of Developing Countries in the World Trade Organization' [2005] Global Development Studies, Sweden.

¹⁹¹ Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes' (n 61) 26.

¹⁹² Vineet Hegde and Jan Wouters, 'Special and Differential Treatment under the World Trade Organization: A Legal Typology' [2020] Working Paper No. 227, Luven Centre for Global Governance Studies 36.

¹⁹³ Obligations of result decide a specific result but leave open the means through which results are to be achieved. This category of obligations provides for differential treatment to developing and least developed countries. On the other hand, obligations of means do not set a specific objective but require the beneficiaries to consult with developed Members for the specific treatment under the provisions.

¹⁹⁴ Hegde and Wouters (n 182) 48. These provisions require them to produce an outcome of differential treatment. For instance, Article 9.1 of the Safeguards Agreement reduces the obligations of developing members when safeguards are implemented. This provision is more than a best-endeavour clause; it offers developing members a special concrete treatment.

- d. **Rights of developing countries:** The 41 rights of the developing countries (35) and LDCs (6) include reduced commitments, transition periods, exemptions, presumptions and temporary derogations.¹⁹⁵

In addition, there are 32 provisions relating to recognising the goals of SDT and establishing general principles (such as those in different preambles) that apply to all Members but do not create obligations.¹⁹⁶ Although developing country members want all SDT 'provisions in various WTO agreements' to be 'fully operationalised or implemented',¹⁹⁷ only 21% (47) of SDT provisions result legally in differential treatment. The remaining provisions do not have the desired effect on developing members.¹⁹⁸ So, DCs have their reasons to allege that SDT provisions 'lack precision, effectiveness, operationality and enforceability'¹⁹⁹ and they are just hollow commitments that never deliver.²⁰⁰

4.12 Have the SDT Provisions Benefitted Developing Countries?

Keck and Low opined that 'few would challenge the proposition that the WTO system of rights and obligations would be inequitable if it did not allow for differentiation among members.'²⁰¹ Nevertheless, there is wide disagreement on how this inequality may be mitigated. SDT has been the primary tool to address this inequality in WTO.

Commentators questioned the effectiveness of the SDT measures in assisting DCs to integrate and derive benefits from the global trade system.²⁰² Finger described the attempt to operationalise the current format of SDT as 'heartfelt but ill-defined and ultimately fruitless.'²⁰³

There is ample literature showing that DCs have not benefitted much from the GATT/WTO since its inception about seven decades ago.²⁰⁴ The primary beneficiaries, if any, are East Asian and some Latin American countries.²⁰⁵ The trade share of most DCs and LDCs in world

¹⁹⁵ *ibid* 51.

¹⁹⁶ The rights that effectively ensure preferential treatment for developing members are categorised as obligations of result.

¹⁹⁷ WTO, 'Proposal for a Framework Agreement on Special and Differential Treatment.' (n 138) para 12.

¹⁹⁸ Hegde and Wouters (n 182) 28.

¹⁹⁹ WTO, 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness'' (n 159) 2.

²⁰⁰ Garcia (n 156) 312.

²⁰¹ Keck and Low (n 24) 8.

²⁰² Michael Davenport, Adrian Hewitt and Antonique Koning, *Europe's Preferred Partners? The Lome Countries in World Trade* (Overseas Development Institute 1995) 54.

²⁰³ J Michael Finger, 'Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round' (2008) 31 *World Economy* 887, 902.

²⁰⁴ WTO, 'Participation of Developing Countries in World Trade: Recent Developments, and Trade of Least-Developed Countries' WTO Secretariat Report WT/CoM.TD/W/65 of 15 February 2000; Yilmaz Akyuz, *Developing Countries and World Trade: Performance and Prospects* (1st edition, Zed Books 2003); WTO, 'The Generalised System of Preferences: A Preliminary Analysis of the GSP Schemes in the Quad' Note by the Secretariat, CTD, WTO WT/COMTD/W/93 (5 October 2001), 2, paras 7 and 24–25, 82.; Aurelie Walker, 'The WTO Has Failed Developing Nations | Aurelie Walker' (*The Guardian*, 14 November 2011) <<http://www.theguardian.com/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries>> accessed 28 January 2021; Kessie (n 157) 12.

²⁰⁵ WTO, 'Participation of Developing Countries in World Trade: Recent Developments, and Trade of Least-Developed Countries' (n 194).

trade is either stagnant or declining.²⁰⁶ A WTO secretariat report also confirms the trend of continuous marginalisation of 48 LDCs' trade share, which practically declined from 1% in 2013 to 0.94% in 2018 of global trade.²⁰⁷ So, critics claim that due to their failure to produce the expected economic outcome, the SDT regime has lost its legitimacy.²⁰⁸

Some argue that trade liberalisation will be more beneficial than SDT²⁰⁹ as negotiating reciprocal commitment in areas of interest may be more valuable than receiving non-reciprocal benefits in general. Avoiding mutual commitments also foreclose many advantages which could come out by way of the autonomous liberalisation²¹⁰ or lesser domestic pressure on market opening.²¹¹ However, there are concerns regarding the ability of LDCs to offer meaningful reciprocity to their trade partners, while also promoting their own development. Others, however, have found the root causes of failure in the specific formulations of the SDT rules.²¹² They argue that there is nothing inherently wrong with the SDT and that the preferential schemes are not producing expected results due to specific reasons such as 'restrictive, complex and varying rules of origins', 'exclusion of sensitive products which are of export interest to DCs, a mismatch between exports of beneficiaries and coverage of preferences, and non-economic conditionalities.'²¹³

Unsurprisingly, the DCs argue that SDT provisions must be redesigned to make them more effective.²¹⁴ Cornia and Scognamillo showed that SDT benefits are yet to trigger broad-based development.²¹⁵ Cortez found that the SDT benefits offered to the LDCs are insufficient for several reasons: access to these is contingent upon institutional capacity and complementary local policies (often absent in LDCs), SDT benefits are non-responsive to the individual needs

²⁰⁶ A few advanced DCs, including China and India, propel the growing trade share of DCs.

²⁰⁷ EIF, 'EIF Annual Report 2018: A Decade of Making Trade Work for the Least Developed Countries' (2018) 50; UNCTAD, 'Key Statistics and Trends in International Trade 2017' (2017) UNCTAD/DITC/TAB/2017/6 7.

²⁰⁸ Edwini Kwame Kessie, 'Developing Countries and the World Trade Organization: What Has Changed?' (1999) 22 *World Competition: Law and Economics Review* 83, 92; Patrick Low, 'Developing Countries in the Multilateral Trading System: The Insights of Robert E. Hudec' (2003) 37 *Journal of World Trade* 801, 803.

²⁰⁹ Aart Kraay and David Dollar, *Trade, Growth, and Poverty* (The World Bank 2001); Bryan Mercurio, 'Growth and Development: Economic and Legal Conditions' (2007) 30 *UNSWLJ* 437.

²¹⁰ Hoekman (n 13) 409; Michael Hart and Bill Dymond, 'Special and Differential Treatment and the Doha "Development" Round' (2003) 37 *Journal of World Trade* 395.

²¹¹ Hudec (n 20) 160–163; Keck and Low (n 24) 9.

²¹² Francis Mangeni, *Strengthening Special and Differential Treatment in the WTO Agreements: Some Reflections on the Stakes for African Countries* (International Centre for Trade and Sustainable Development 2003); John H Jackson, William J Davey and Alan O Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic* (Subsequent edition, West Group 2002) 1176; The Warwick Commission, 'The Multilateral Trade Regime: Which Way Forward?' (The University of Warwick 2007) 39–40.

²¹³ Bonapas Onguglo, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System' in MR Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (The Brookings Institution Press 1999) 119.

²¹⁴ Nicolas Imboden, 'Special and Differential Treatment: A New Approach May Be Required | International Centre for Trade and Sustainable Development' (2017) 6(8) *Bridges Africa*, ICTSD; Andrew D Mitchell and Tania Voon, 'Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?' (Social Science Research Network 2009) SSRN Scholarly Paper ID 2614868. Given that views of the developed and developing countries differ vastly on the issue and that the Doha Agenda is now considered as the 'thing of the past', it is not hard to foresee the difficulties that lie ahead of achieving that Doha mandate of reviewing all SDT provisions to make them operational.

²¹⁵ Giovanni Andrea Cornia and Antonio Scognamillo, 'Clusters of Least Developed Countries, Their Evolution between 1993 and 2013, and Policies to Expand Their Productive Capacity' (2016) 33 CDP background paper.

of the LDCs, and SDT benefits are too vaguely defined to provide tangible benefits.²¹⁶ Sutrisno identified several factors that contributed to the ineffectiveness of the provisions, including the failure of developed countries to safeguard the exports interest of DCs and offer meaningful market access, lack of actual policy flexibility for DCs in complying with WTO rules, the inadequacy of the transition periods; and the insufficiency of the technical assistance programmes.²¹⁷

Thus, the benefits of SDT measures have been limited for most beneficiary LDCs, but an overhaul of the SDT provisions could yield much more meaningful results.

4.13 How to Make SDT More Effective?

How to balance the rights and responsibilities of members of multilateral trade based on their levels of development and institutional capacities is as old as the trading system. The question is not whether SDT is justified; instead, it is how to implement it so that those with the greatest need receive differentiated treatment that generates long-term trade gains. As most SDT provisions are merely hortatory in nature,²¹⁸ WTO members are obligated to 'review' all SDT provisions 'with a view to strengthening them and making them more precise and operational' under paragraph 44 of the 2001 Doha Ministerial Declaration.²¹⁹ Nevertheless, decades of SDT negotiations have yielded little progress rather than considerably hardening members' positions. So, is there any way to resolve this impasse?

4.13.1 Differentiation among Developing Countries?

Academics and researchers have recommended differentiation between DCs, insisting that meaningful SDT can only be achieved if it responds more effectively to differing needs among DCs. Except for a hint in GATT Article XVIII:1 that refers to those 'economies which can only support low standards of living and [which] are in the early stages of development', the WTO does not establish criteria to determine whether a Member is a developing country. It is the choice of an individual country to self-declare its status as a DC.²²⁰ Differentiation means WTO Members cease to be able to self-select their DC status and are categorised as per some negotiated criteria. A few streams of thinking may be identified.

²¹⁶ Ana Luiza Cortez, 'Beyond Market Access: Trade-Related Measures for the Least Developed Countries. What Strategy?' (2011) UNDESA Working paper 109.

²¹⁷ Nandang Sutrisno, 'Substantive Justice Formulated, Implemented, and Enforced as Formal and Procedural Justice: A Lesson from WTO Special and Differential Treatment Provisions for Developing Countries' (2009) 13 J. Gender Race & Just. 671.

²¹⁸ Hegde and Wouters (n 182). They determined that a mere 21% of the SDT provisions are legally binding, while 79% comprise soft law/best endeavour clauses and political commitments.

²¹⁹ The DCs have consistently maintained that the SDT is 'a treaty-embedded and non-negotiable right for all developing Members' and any 'attempts to water down these principles would be a recipe for intractable deadlock at the WTO.' WTO Submissions, 'Strengthening the WTO to Promote Development and Inclusivity Communication from the African Group, Cuba and India' WT/GC/W/778/Rev.3, 4 December 2020; WTO Submissions, 'Statement on Special and Differential Treatment to Promote Development, Co-Sponsored by the African Group, the Plurinational State of Bolivia, Cambodia, China, Cuba, India, Lao People's Democratic Republic, Oman, Pakistan and the Bolivarian Republic of Venezuela,' WT/GC/202/Rev.1, 14 October 2019.

²²⁰ Some might determine DC Members by subtracting LDCs and OECD member countries from the number of WTO members. Kishore (n 166) 365.

Christopher Stevens proposed total flexibility for all countries whose non-compliance does not cause harm to other countries.²²¹ This includes the LDCs and other small economies. Hoekman, Michalopoulos and Winters contend that there may be an "LDC+" group of small and poor DCs determined by the size and per capita criteria which need SDT across all WTO agreements.²²² Keck and Low suggested that focusing on measures rather than country status would obviate this difficulty. This approach consists of identifying measurable criteria that define access to SDT on a provision-specific basis. The fast-track procedures for extending transition periods under Article 27.4 of the SCM Agreement may be an example where Members may continue using certain kinds of export subsidies for a certain period on meeting some specific economic criteria.²²³

A standard critique of the above approaches is their strong emphasis on creating new country groupings, which will have spillover effects on the negotiations. For example, a recent OECD calibration exercise on differentiation was abandoned halfway because whatever statistical approach is used; some DCs would always be grouped with developed countries and others with LDCs.²²⁴

The issue of country classification has gained attention recently following a US memorandum circulated at the WTO in 2019 claiming that failure to update country classification has 'severely damaged the negotiating arm of the WTO.'²²⁵ Similar concerns were raised in a 2018 EU concept paper on WTO modernisation.²²⁶ In response to the US memorandum, a group of DCs, including India and China, has submitted a series of statements to the General Council of the WTO defending their status as 'developing countries.'²²⁷

A recent UNCTAD research paper analysing empirical evidence of the widening gaps between the developed and the DCs over the last 25 years found that while some gaps have closed, many others have widened. It concluded that 'there is no ground for changing the terms on which special and differential treatment (SDT) has been agreed for developing countries.'²²⁸ At

²²¹ Christopher Stevens, 'The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO' (2002) DS Working paper 163 Institution of Development Studies, Sussex.

²²² Hoekman, Michalopoulos and Winters (n 13).

²²³ Keck and Low (n 24) 26. The SCM eligibility criteria- countries with merchandise export trade not greater than 0.10 per cent of world trade or total Gross National Income at or below \$20 billion in the year 2000- effectively filter out countries who could influence global market prices and trigger subsidy competition.

²²⁴ *ibid* 25.

²²⁵ WTO, 'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance.' (n 159) para 1.8.

²²⁶ European Commission, 'WTO Modernisation: Introduction to Future EU Proposals – Concept Paper' (2018) 2. The paper lamented that 'the system remains blocked by an antiquated approach to flexibilities which allows over 2/3 of the membership including the world's largest and most dynamic economies to claim special treatment.'

²²⁷ WTO, 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness' (n 159); WTO Submissions, 'Statement on Special and Differential Treatment to Promote Development, Co-Sponsored by the African Group, the Plurinational State of Bolivia, Cambodia, China, Cuba, India, Lao People's Democratic Republic, Oman, Pakistan and the Bolivarian Republic of Venezuela,' (n 209).

²²⁸ UNCTAD, 'From Development to Differentiation: Just How Much Has the World Changed?' UNCTAD Research Paper No. 33 (UNCTAD/SER.RP/2019/5), 28 Jun 2019. It also found that trends in the human development index (HDI) and absolute income confirm the widening gaps even between some advanced DCs like China or India and the developed countries. Moreover, the number of people living below the poverty line has increased, with 64 per cent of the world's poor living in South Asia and Sub-Saharan Africa.

a time when weaponising international trade is becoming increasingly a standard rather than an exception,²²⁹ and when the WTO itself is going through an existential crisis,²³⁰ attempts to reach a consensus on developing country status would become a byzantine negotiating exercise with little likelihood of any breakthrough. Concentrating on these polarised and unresolved differentiation debates would suffocate the SDT mechanism, diminishing its effectiveness.

4.13.2 Encouraging Autonomous ‘Graduation’ or Relinquishment

Schöfer and Weinhardt observed the WTO actions of India, China, and Brazil and concluded that institutional change associated with graduation from developing-country status might be gradual. While all three defend their developing country status as WTO members, their use of special rights reveals significant variations. Brazil's flexible, consensus-based approach to breaking the impasse has allowed it to accommodate the demands of established powers, whereas India clings to developing-country privileges and resists change. China's position combines resistance and accommodation.²³¹ Even though there are subtle changes that will affect the operation of SDT in the long run, it is improbable that a majority of WTO members will abandon their status as developing countries and renounce their rights to SDT anytime soon.²³² Instead, the WTO could encourage the self-graduation or self-revocation of SDT benefits.

Brazil, Chinese Taipei, Costa Rica, the Republic of Korea, and Singapore have all agreed to forgo SDT privileges in existing WTO agreements and future negotiations. Other WTO members could be encouraged to follow suit. Such a strategy may only be feasible for a subset of economically advanced developing country members, such as those aspiring to join or integrate with the OECD.²³³ As an alternative to SDT relinquishment, encouraging advanced WTO members to demonstrate targeted, agreement-specific flexibility may be more realistic or appealing.²³⁴ An example of such an approach would be for China to renounce SDT flexibilities in implementing a WTO agreement on harmful fisheries subsidies, a policy stance it has suggested in ongoing negotiations due to its large share of global fisheries catches.²³⁵

²²⁹ William Alan Reinsch, ‘Weaponizing Trade’ (Center for Strategic and International Studies) <<https://www.csis.org/analysis/weaponizing-trade>> accessed 25 November 2022.

²³⁰ Sarah Anne Aarup, ‘“All Talk and No Walk”: America Ain’t Back at the WTO’ (*POLITICO*, 23 November 2021) <<https://www.politico.eu/article/united-states-world-trade-organization-joe-biden/>> accessed 14 December 2022.

²³¹ Till Schöfer and Clara Weinhardt, ‘Developing-Country Status at the WTO: The Divergent Strategies of Brazil, India and China’ (2022) 98 *International Affairs* 1937.

²³² Patrick Low, Hamid Mamdouh and Evan Rogerson, ‘Balancing Rights and Obligations in the WTO—A Shared Responsibility’ (2018) 27 *Government Offices of Sweden* 11. Low, Mamdouh, and Rogerson have concluded that ‘trying to work on agreed definitions of national development status would be a forlorn, result-free effort.’

²³³ Pierre Sauvé, ‘Special and Differential Treatment as If It Could Be Reformed’ (2022) 56 *Journal of World Trade* 891.

²³⁴ WTO members with a large share of trade in negotiated product categories or whose policies have measurable effects on international markets should have greater obligations. Such an approach would also address the challenge of within-country sectoral differences in endowments, competitiveness, institutional sophistication, and regulatory preparedness.

²³⁵ Sauvé (n 223) 892. At the 11th Ministerial Conference in December 2017, 71 WTO members agreed to begin this exploratory exercise on e-commerce, investment facilitation for development, services domestic regulation, and micro, small, and medium-sized enterprises (MSMEs). In addition, 76 WTO members announced their

4.13.3 Following up on the TFA Model

There have been extensive discussions regarding the possibility that a country-specific, sector- and activity-based approach to differentiation could produce satisfactory outcomes.²³⁶ Wang et al. and Prowse proposed the much-speculated concept of an agreement-specific focus involving exemption periods and a tailor-made capacity-building programme.²³⁷ The Director-General of WTO in 2019 has also suggested that 'the best way forward is to have a trade-facilitation-agreement-type model where countries may set their own benchmarks.'²³⁸

In this regard, the TFA tridimensional implementation architecture may serve as a guide for effective SDT measures.²³⁹ The TFA divides its provisions into three distinct categories: some provisions are to be implemented immediately upon the Agreement's entry into force (Category A); others provide developing and least developed countries with longer transition periods to implement specific treaty provisions (Category B); and a third category can be complied with contingent on the receipt of assessed technical assistance needs (Category C). The Trade Facilitation Agreement Facility (TFAF) supports developing countries, and LDC Members assess their specific needs and identify possible development partners to help them meet those needs through various activities.²⁴⁰ This solution appeared to accommodate conflicting priorities.²⁴¹

intention to begin negotiations in January 2019 to seek 'a high-standard outcome that builds on existing WTO agreements and frameworks'. The more advanced ASEAN and Pacific Alliance members could do the same in ongoing Joint Statement Initiatives (JSI) negotiations on investment facilitation for development (IFD) or e-commerce, as WTO issues are broadly aligned with WTO+ commitments and obligations many of these countries have already assumed.

²³⁶ Low, Mamdouh and Rogerson (n161) 11

²³⁷ Zhen Kun Wang and L Alan Winters, 'Putting "Humpty" Together Again: Including Developing Countries in a Consensus for the WTO' (Centre for Economic Policy Research London 2000) Policy Paper 4; Susan Prowse, 'The Role of International and National Agencies in Trade-Related Capacity Building' (2002) 25 *The World Economy* 1235.

²³⁸ Asit Ranjan Mishra, 'WTO, Members Differ on Resolution of Impasse over Special Treatment' (*mint*, 15 May 2019) <<https://www.livemint.com/politics/policy/wto-members-differ-on-resolution-of-impasse-over-special-treatment-1557859400279.html>> accessed 31 January 2021.

²³⁹ Antonia Eliason, 'The Trade Facilitation Agreement: A New Hope for the World Trade Organization' (2015) 14 *World Trade Review* 643.

²⁴⁰ It can be costly to implement multilateral obligations and domestic reforms. Adapting to new market conditions may require significant investments in regulatory institutions, inter-agency processes, and flanking policies that have adverse distributional effects on specific industries or worker categories. These cannot be achieved overnight in environments with limited resources and lax regulation. Nevertheless, unlike other WTO agreements, TFA does not reduce commitments or permit member states to implement obligations differently than developed countries. Instead, it assures DCs of sufficient support and time to meet their obligations through technical assistance and longer implementation periods.

²⁴¹ Nine DCs have notified their immediate preparedness to go by all commitments, while 30 others, including China and Brazil, have agreed to readily implement more than two-thirds of the obligations. TFA's impressive track record of successful implementation demonstrates the effectiveness of ex-ante needs assessments coupled with providing aid for trade aimed at specific implementation bottlenecks to enhance overall development outcomes. Anabel González, 'Bridging the Divide between Developed and Developing Countries in WTO Negotiations, (March 2019), Petersen Institute for Economic Development' <<https://www.piie.com/blogs/trade-investment-policy-watch/bridging-divide-between-developed-and-developing-countries-wto>> accessed 16 October 2019

Consequently, adopting a TFA-style agreement-specific perspective and tailoring SDT to the needs of individual countries requires an assessment of the costs and capacity of countries to implement WTO agreements through 'audits', during which the country is exempt from the rules and a tailored programme of technical assistance and capacity-building is implemented by a variety of relevant donors. In addition, clear deadlines for temporarily authorised exemptions or phase-in periods can ensure predictability, encourage necessary reforms, and prevent undue delays in achieving full treaty compliance.²⁴² The TFA approach may have successfully evolved from established practices in the SPS and TBT Agreements. Both Agreements recognise the technical and financial constraints of DCs. Easing these limitations enables them to meet compliance challenges, serve more export markets, and participate in the international standard-setting process.²⁴³

TFA may provide the impetus needed to move forward and maximise the potential of cooperation and trade when consensus on other criteria is difficult to achieve. Several conclusions can be drawn from SDT-related activities implemented in the TFA, TBT, and SPS Agreements. Some of these may also apply to the pursuit of efficiency in other contexts. First, as public policy imperatives limit flexibility, SDT measures must focus on inclusive actions without requiring exemptions that significantly alter outcomes. Second, SDT can benefit from mandatory and well-targeted technical assistance without compromising the integrity of the rules. Third, technical assistance is most likely effective when interagency coordination is fostered, and the best available expertise is utilised.²⁴⁴

However, the TFA approach is not without its challenges. The potential benefits of the TFA for all countries explain why WTO members agreed to an individualised SDT approach that permitted DCs to self-identify whether they require transition periods and technical assistance to implement the Agreement. If implementation costs could be covered, DCs would be expected to retain few incentives to use exemptions to delay the proposed trade facilitation measures. However, it is debatable how far this logic can be extended to other areas of WTO negotiations where exemptions or implementation flexibilities are regarded as essential tools for preserving policy space.²⁴⁵

4.14 Conclusion

Admittedly, both developed and developing countries participated as equals in the early years of GATT. The SDT provisions have advanced through the collective efforts of all Members across various negotiation rounds. The integration of DCs into the MTS primarily designed for developed countries was a compromise reached through these negotiations.

²⁴² Sauv   (n 223) 894.

²⁴³ For instance, the Standards and Trade Development Facility (STDF) was established in 2004 and backed by the WTO, FAO, WHO, OIE, and World Bank, is a model SPS capacity-building initiative. It identifies and disseminates best practices for SPS capacity-building and funds projects that promote international SPS compliance. In these cases, lowering standards would compromise the rights of members to protect public policy objectives. The inability to compromise on fundamentals has prompted parties with different capabilities and priorities to innovate and concentrate on other means to guarantee full participation in public policy. Though there are many shortcomings, the assistance of WTO members and other international bodies and organisations has been crucial to developing international standards.

²⁴⁴ Low, Mamdouh and Rogerson (n 222) 17–18.

²⁴⁵ Weinhardt and Sch  fer (n 69) 87.

While several DCs have experienced notable gains due to the SDT principle, the majority have not seen substantial benefits in their trade. The lack of clarity in the provisions and the complex associated conditions have made utilising this concept challenging. Critics argue that the principle is ineffective, ornamental, and non-functional, as evidenced by the limited impact on many DCs.

The DDA brought development to the forefront, offering hope for a revival of the SDT doctrine. Amidst increasing demands to strengthen and refine the SDT to unlock its potential for development, the DDA deadlock has cast doubt on the doctrine's future. The ongoing debate surrounding differentiation among DCs presents yet another challenge for the embattled principle to remain relevant and functional. Moving forward, addressing these challenges will be crucial to ensuring a more equitable and effective global trading system.

The next chapter examines the impact of UTPPs, the most visible forms of SDT, on the trade of DCs, particularly the LDCs.

CHAPTER 5: WELFARE IMPACTS OF UNILATERAL TRADE PREFERENCES

5.1 Introduction

In 1964, the UNCTAD proposed that developed countries grant unilateral trade preferences to DCs as a means to boost their exports, stimulate industrialisation through investment, and mitigate barriers they face when accessing developed country markets.¹ Since then, developed countries have implemented various UTPPs with these shared goals in mind, and numerous developing countries have joined, offering similar programs.

However, these preference programs provided by different countries exhibit notable distinctions in scope, regulatory frameworks, and utilisation rates. Furthermore, they are perceived differently by diverse groups of countries. This leads to several critical questions: Do these programs facilitate economic growth in DCs or perpetuate dependency? Are the schemes effectively designed, or do they inadvertently hinder outcomes? Obtaining convincing answers to these questions is a challenge, both theoretically and empirically.

Despite their widespread popularity in DCs and the expectation that UTPPs should increase trade, their effectiveness remains a highly debated topic. Empirical studies reveal strikingly varied results, and the generosity of UTPPs is often diminished by complex conditionalities and burdensome compliance requirements.

This chapter aims to review existing empirical analyses, examine the impact of UTPPs on trade volume, investment, and diversification of beneficiary exports, explore factors that influence their efficiency, and identify measures that could enhance their overall usefulness.

5.2 Unilateral Trade Preferences

Unilateral trade preferences are one-sided, non-reciprocal trade arrangements granted by most developed countries (grantors) to developing countries (beneficiaries) to encourage export and economic growth.² They are also known as UTPPs or GSP programmes.

Beneficiaries play little or no role in determining or modifying unilateral GSP schemes.³ These schemes provide beneficiaries a duty-free entry (zero tariffs) or a substantially lower duty rate than the regular MFN rate. The reduction or elimination of MFN tariffs increases the price competitiveness of beneficiary exports relative to similar MFN-dutied products. In addition, the origin requirement ensures that only goods produced in a beneficiary country are eligible for preferential treatment. As a result, LDCs receive more preferential treatment for particular products and deeper tariff reductions than developing countries.

¹ Constantine Michalopoulos, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization' (World Bank 2000) WPS 2388 16.

² An increasing number of DCs are also offering unilateral trade preferences to LDCs.

³ Several non-reciprocal preferential schemes are negotiated and agreed upon by the preference-granting and -receiving countries. For instance, the four Lomé Conventions between the EU and ACP. Nevertheless, as recipients of preferences, beneficiary DCs are often in a weaker negotiating position when determining the cooperation instruments.

The concept was adopted by the second session of UNCTAD (UNCTAD II) held in New Delhi in 1968. The UNCTAD Resolution 21(II) has spelt out the following three basic principles for the preference programmes:

- a. generality (a common scheme for all grantors and beneficiaries)
- b. non-reciprocity (beneficiaries are not required to make any concessions in exchange); and
- c. non-discrimination (all DCs must be covered and treated equally under the schemes).⁴

However, during the five decades of GSP implementation, the pursuit of generalised, non-reciprocal and non-discriminatory preferences has not been entirely observed, and divergence from them has increased. As opposed to uniformity, GSP schemes vary considerably in terms of product coverage, tariff reductions, safeguards, and rules of origin. Moreover, instead of non-reciprocity, certain preference-granting nations attach eligibility requirements to non-reciprocity, and others have indirectly withdrawn preferences, which implies concessions or conformity to a behaviour pattern. Finally, a 'positive' differentiation among beneficiaries permits special measures for LDCs warranted by their economic and development situations.

5.2.1 Different GSP Programmes

a. GSP for Developing Countries and LDCs:

Australia was the first to introduce a UTPP in 1966. However, GSP officially started in 1971 with Japan, Norway, and the European Community joining as GSP grantors. Now 43 countries offer preference schemes to more than 200 states and territories.⁵ Most developed countries and a good number of developing countries have preference schemes. Different schemes offer different tariff rates and conditionalities for different country groups and products. In addition, schemes offered by all major grantors have significantly evolved.⁶

Regarding beneficial impact, GSP programmes offered by the EU and the USA are the biggest UTPPs in the world. The EU GSP has three sub-schemes: standard GSP, GSP+ and EBA (Everything But Arms). The standard GSP offers a partial or total removal of tariffs on two-thirds of tariff lines to low and lower-middle-income developing countries. GSP+ is a special incentive arrangement that reduces the GSP tariffs to 0% for vulnerable countries that implement 27 international conventions relating to human rights, labour rights, good governance, and environmental protection.⁷ EBA automatically applies to all LDCs with DFQF access for all products except arms and ammunition.⁸ There are substantial differences

⁴ UNCTAD, 'Handbook On Duty-Free and Quota-Free Market Access and Rules of Origin For Least Developed Countries Part I: QUAD Countries' (2017) UNCTAD/ALDC/2017/3 11. UNCTAD, Proceedings of the Conference of 1968, Report and Annexes (TD/97)

⁵ World Trade Organization. Members and Observers<https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>accessed 11 January 2020; a complete list of UTPP programmes notified to the WTO can be found at <http://ptadb.wto.org/ptaList.aspx>

⁶ For a vivid detail of the evolution of EU preference schemes, see Maria Persson and Fredrik Wilhelmsson, 'EU Trade Preferences and Export Diversification' (2016) 39(1) The World Economy 16.

⁷ This requirement to implement international conventions is unique to the EU GSP programmes. However, the UK later implemented similar conditions.

⁸ European Commission, 'Generalised Scheme of Preferences' (22 September 2021) <https://policy.trade.ec.europa.eu/development-and-sustainability/generalised-scheme-preferences_en> accessed 9 December 2022.

between the three schemes, both in the number of tariff lines equal to zero and in the levels of tariffs applied. In 2016, the EU imported worth about 62.7 billion euros received preferences.⁹

Initiated in 1976, US GSP offers duty-free access for about 4,800 manufactured, semi-manufactured, primary industrial and agricultural products from 131 designated beneficiary countries and territories, including 44 LDCs. Not all LDCs or developing countries are granted access to these benefits.¹⁰ The US also provides preferences through different regional sub-schemes such as The African Growth and Opportunity Act (AGOA)¹¹ and the Caribbean Basin Trade Partnership Act.¹² In 2017, only \$21.2 billion (about 10 per cent) worth of goods entered the USA duty-free under GSP as opposed to \$215 billion in total imports from all GSP countries to the US.¹³

Japan provides DFQF access to all LDC products, including textile and clothing items.¹⁴ Canada has a unique scheme for LDCs with broader coverage from 1983 through the Least Developed Country Tariff (LDCT).¹⁵ Other important schemes include GSP programmes of Australia, New Zealand, Russia, and Norway, among others. Moreover, emerging countries, such as China, India, Brazil, Chile, South Korea, Turkey, and Thailand, mainly provide preferential treatment to LDCs.¹⁶

b. DFQF market access for LDCs:

Many developed and developing countries provide LDCs with DFQF market access as part of their GSP programmes. DFQF refers to duty-free and quota-free access to foreign markets for

⁹ European Commission, 'Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP): Final Report' (2018)

¹⁰ Preferences cease to apply to countries that have 'graduated' with sufficient high income at the discretion of the USA. A competitive need limitation (CNL) is applied to prevent benefits to countries already competitive in producing an item. Graduation rules are also applied in other developed countries. For example, the EU standard GSP and GSP+ are subject to income and product graduation. Details in Christopher Stevens, Kate Bird, Jodie Keane, Jane Kennan, Dirk Willem te Velde and Kate Higgins, 'The poverty impact of the proposed graduation threshold in the Generalised System of Preferences (GSP) trade scheme' (2011)<

https://www.researchgate.net/publication/266330931_The_Poverty_Impact_of_the_Proposed_Graduation_Threshold_in_the_Generalised_System_of_Preferences_GSP_Trade_Scheme>accessed 24 December 2019

¹¹ AGOA is intended to provide meaningful opportunities to sub-Saharan African countries.

¹² UNCTAD, Generalized System of Preferences: Handbook on the Scheme of United States of America<https://unctad.org/en/PublicationsLibrary/itcdtsbmisc58rev3_en.pdf>accessed 24 December 2020. Products like oil, specific textile, apparel, and leather items are marked sensitive and excluded under US GSP. Apparel products may be exported duty-free but not quota-free.

¹³ USTR, 'GSP by the

Numbers'<<https://ustr.gov/sites/default/files/gsp/GSP%20by%20the%20numbers%20February%202018.pdf>>accessed 11 January 2020

¹⁴ Starting in 1971, Japan now provides duty-free and reduced-duty preference under its GSP scheme to 137 DCs and 14 territories. Most industrial products enjoy duty-free benefits. Ministry of Foreign Affairs of Japan, 'Generalised System of Preferences: Explanatory Notes for Japan's Scheme'<<https://www.mofa.go.jp/policy/economy/gsp/explain.html>>accessed 7 January 2020

¹⁵ Canada has been implementing the General Preferential Tariff – its designation for the GSP scheme – since 1974, with a ten-year review cycle, and grants tariff preferences for selected agricultural and industrial products. Caribbean countries and territories are also provided with unique benefits through the Caribbean scheme.

¹⁶ WTO, List of PTAs<<http://ptadb.wto.org/ptaList.aspx>>accessed 24 December 2019

the majority (and sometimes all) products of LDC origin. In 2000, UN members adopted the Millennium Declaration, which urged developed nations to grant LDCs DFQF market access for all products. As a result, developed and developing countries 'in a position to do so' agreed in the Sixth WTO Ministerial Conference held in December 2005 in Hong Kong to provide duty-free and quota-free (DFQF) market access for all LDC products by 2008.¹⁷ However, countries 'facing difficulties' are permitted to exempt 3 per cent of tariff lines on the condition of building the list of eligible products until total coverage is reached.¹⁸ This DFQF market access is accompanied by simple and transparent rules of origin to facilitate LDC exports.

Preference benefits offered by different countries under different schemes vary widely.¹⁹ There are also schemes such as the EU GSP+ programme that 'reward' DCs for complying with additional eligibility criteria.²⁰

5.2.2 Legal Foundation of GSP Programmes

Without WTO involvement, the GSP programmes are unilaterally promulgated and implemented by the grantors. They are also free to attach prerequisites to the programmes' access to beneficiaries.²¹ However, these programmes violate the WTO's most-favoured-nation (MFN) principle, prohibiting countries from discriminating between trading partners or granting special preferences. Therefore, trade preferences were inconsistent with general GATT/WTO rules and would require a deviation from the MFN provision. The legal status and foundation of unilateral preference programmes are based on the following provisions, which have evolved.

The Enabling Clause of 1979 is the primary legal basis for unilateral trade preferences, which covers GSP schemes of most developed countries for developing and least developed countries. UNCTAD II, held in 1968, stipulates that the following considerations will govern the legal status of GSP programmes:

- '(a) The tariff preferences are temporary in nature;
 - (b) Their grant does not constitute a binding commitment and, in particular, it does not in any way prevent: (i) Their subsequent withdrawal in whole or in part; or (ii) The subsequent reduction of tariffs on a most-favoured-nation basis ...;
 - (c) Their grant is conditional upon the necessary waiver or waivers in respect of existing international obligations, in particular the General Agreement on Tariffs and Trade.'
- ²²

¹⁷ UNCTAD, 'Duty-Free and Quota-Free Market Access for LDC' <<https://unctad.org/en/Pages/DITC/GSP/GSP-Preferential-Market-Access.aspx>> accessed 20 December 2020

¹⁸ World Trade Organization, Ministerial Declaration, Annex F, 18 December 2005, WT/MIN(05)/DEC.

¹⁹ Generally, preference is granted to designated 'non-sensitive' products. Though most programmes admit eligible products duty-free, some offer only tariff reductions. For example, the Australian preference scheme provides duty-free entry on 98.2 per cent of developing country exports while maintaining a 5 per cent tariff on selected products of 99 tariff lines. Generalised System of Preference: Handbook on the GSP scheme of Australia (UNCTAD 2018) 6

²⁰ Generalised Scheme of Preferences (GSP) <https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm> accessed 12 December 2020

²¹ However, such conditions must be based on objective criteria for similarly situated beneficiaries, as held by the Appellate Body in EC–Tariff Preferences.

²² UNCTAD, TD/B/330, Agreed conclusions of the Special Committee on Preferences, 6

Following the agreed conclusions, the contracting parties decided on 25 June 1971 to suspend the provisions of GATT article I for ten years to permit developed contracting parties to accord preferential tariff treatment to products originating in DCs.²³ To permanently incorporate the GSP preferences into the general body of GATT law, the Contracting Parties adopted the 1979 Enabling Clause²⁴ as a supplementary rule, which permits them to deviate from the MFN clause indefinitely to promote developing countries' economic development.

Through adopting a special waiver in 1999, developing country WTO members were permitted to grant LDCs preferential market access. The original 10-year waiver has been extended multiple times, most recently until 2029.²⁵ The DFQF market access decisions adopted at the WTO Sixth Ministerial Conference in 2005 committed to providing long-lasting DFQF market access for all products originating from LDCs.²⁶ Later, the Bali Ministerial Conference in 2013 adopted guidelines to help LDCs qualify for preferential market access, addressing the need for clear and straightforward rules of origin.²⁷

Adopted by the UNGA in 2015, the Sustainable Development Goals (SDGs) also set a target (target 17.12) to 'realise timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions.'

5.3 Purposes of Unilateral Trade Preferences

The unilateral GSP schemes have been a significant aspect of international cooperation for development. The concept emerged from the larger principle of SDT for DCs. The reciprocity-based trade instruments ignored unequal economic realities among trade partners, particularly between developed and developing countries, in terms of stages of development, factor endowments, market size, efficiency, financial power, technological capacity, and production structure diversification. GSP programmes are integral to the SDT mechanism to correct imbalances in international economic relations.²⁸

Unilateral trade preference is one of the two major policy options, the other being development aid, whereby advanced countries have sought to assist DCs. GSPs have two components: an access component, whereby beneficiaries are granted access to the grantor

²³ GATT, L/3545, 28 June 1971

²⁴ Decision adopted on 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. Resolution 21(II), adopted at the UNCTAD II Conference in 1968, established a Special Committee on preferences to allow all concerned countries to participate in the necessary consultations. Adopted in 1970, the report and agreed conclusions of the Special Committee established, among other things, the legal nature of the commitments assumed by the preference-granting countries. Paragraph 2 of Part IX of the agreed conclusions determined the legal status of GSP schemes.

²⁵ WTO, 'Preferential Tariff Treatment for Least-Developed Countries Decision on Waiver, Adopted on 15 June 1991' WT/L/304; subsequent extensions in 2009 and 2019: WT/L/759, and WT/L/1069.

²⁶ The ministerial decision on duty-free and quota-free market access for LDCs, adopted at the Ninth Ministerial Conference held in Bali, Indonesia, in 2013, and a specific decision regarding cotton market access made at the Tenth Ministerial Conference held in Nairobi, Kenya, in 2015, included additional commitments.

²⁷ At the Nairobi Ministerial Conference in 2015, further guidance was adopted on streamlining documentary requirements, utilizing non-originating materials, allowing inputs from multiple sources (cumulation), and determining substantial transformation.

²⁸ Bonapas Onguglo, 'Developing Countries and Unilateral Trade Preferences in the New International Trading System' in MR Mendoza, Patrick Low and Barbara Kotschwar (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (The Brookings Institution Press 1999).

markets, and a 'right to protect' component, whereby beneficiaries are exempted from the requirement of offering reciprocal market access.²⁹

Resolution 21(ii), adopted at the UNCTAD II Conference in New Delhi in 1968, stated that-

'... the objectives of the generalised, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be:

- to increase their export earnings.
- to promote their industrialisation, and
- to accelerate their rates of economic growth.'

The other objectives of unilateral preference include-

- integrating the developing country economies with the world trading system,
- increasing their productive capacity,
- providing time and opportunities to attract foreign direct investment (FDI), and
- promoting diversification of their economy.

For quite some time, preference has been considered a better alternative to economic aid, as reflected in the slogan 'trade rather than aid'.³⁰ Preference offers a persuasive agreement for politicians both in developed and developing countries.³¹ Trade preferences may have fewer political or fiscal costs for developed nations. Revenue forgone in terms of preference is invisible and not accounted for in the budget, while aid expenditure is very transparently presented as a spending area and can potentially draw political outcry.³² Trade as aid is also considered a better development approach compared to project funding, which is often associated with rent-seeking and limited benefits.³³ Trade preferences can also be viewed as advancing global welfare, reducing poverty and inequality, fostering peace and stability, and advancing their economic and strategic interests.

Ultimately, preferences contribute to the bigger goal of integrating those underdeveloped economies into mainstream global trade. The world's most backward countries are not potentially connected with global trade. The total share of LDC exports in 2000 reduced to less than 1 per cent of global exports, one-third of what it was in 1970.³⁴ There are a variety

²⁹ Benjamin Chris Zissimos, 'The GATT/WTO's Special and Differential Treatment of Developing Countries' (University of Exeter Business School 2017) <<https://blogs.exeter.ac.uk/insted/2017/07/31/the-gattwtos-special-and-differential-treatment-of-developing-countries/>> accessed 15 January 2020.

³⁰ Stefan Tangermann, 'The Future of Preferential Trade Arrangements for Developing Countries and the Current Round of WTO Negotiations on Agriculture' (FAO 2002).

³¹ *ibid.* So, the slogan of trade as an alternative to aid has helped to convince developed countries to open their market for the exports of DCs who aspire to achieve sustained economic progress through increased economic activities.

³² *ibid*

³³ William R Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (Revised edition, MIT Press 2002).

³⁴ By 2014, it has recovered minimally, with a share of 1.2 per cent. Many of these countries can mainly export only one or a few products, leaving them vulnerable to external shocks. Kimberly Ann Elliott, 'Trade Preferences for the Least Developed Countries: Opportunities Not Panaceas' (2015) TheE15Initiative, ICTSD and WEF, Geneva<<http://e15initiative.org/wp-content/uploads/2015/09/E15-Finance-and-Development-Elliott-FINAL.pdf>>accessed 20 December 2020

of causes for this sad state, but the trade policies of developed countries are also to blame.³⁵ Trade preference is a modest method for remedying that. Today, one could argue that trade preference would help more farms in DCs become competitive exporters.³⁶

5.4 Effectiveness of Trade Preferences

Theoretically, GSPs have hard economic advantages such as better access to developed markets, increased export volumes and prices, more jobs, and faster economic growth. However, they also have soft benefits such as technology transfer, new business alliances, and a more outward-oriented attitude toward the economy.³⁷ Empirically, different studies produced mixed results on the effectiveness of preference programmes. How can we then understand if they actually have any impact?

Persson and Wilhelmsson suggest that measuring the effectiveness of preference would require the construction of a convincing counterfactual. For example, how would the trade of a beneficiary have evolved without the preferences?³⁸ Persson argued that the trade flows of many DCs are disappointing, but it is possible that the situation 'would have been even worse without preference.'³⁹ In that case, GSPs should not bear all the brunt.

In practice, the impact of UTPPs is mainly assessed by measuring their utilisation rate and trade impact. However, the use of these measures also has its limitations. The increasingly complex web of trade preference programmes and the existence of many variables that influence their implementation offer insurmountable challenges to any attempt to measure preference impacts on any given product, category, or country.

This chapter examines each effectiveness variable separately, starting with preference utilisation.

5.4.1 Preference Utilisation

Preference utilisation is a useful analytical tool to determine if exporters can use the preference benefits. Preferences will be beneficial only if firms can use them. The actual value of preferences is the tariff margins, the difference between the MFN tariff rates and the rates applicable to the beneficiary exports.⁴⁰ 'Preference utilisation' is defined by the WTO as 'the extent to which imports, which are eligible for trade preferences, are actually being imported under these preferences.'⁴¹ The existing literature has focused mainly on calculating utility

³⁵ *ibid*

³⁶ Maria Persson, 'Trade Preferences from a Policy Perspective' (2013) Working Papers 2013:3, Lund University, Department of Economics. 5.

³⁷ Tangermann (n 31) ch 4.

³⁸ Maria Persson and Fredrik Wilhelmsson, 'Assessing the Effects of EU Trade Preferences for Developing Countries' (Lund University, Department of Economics 2006) Working Paper 2006:4.

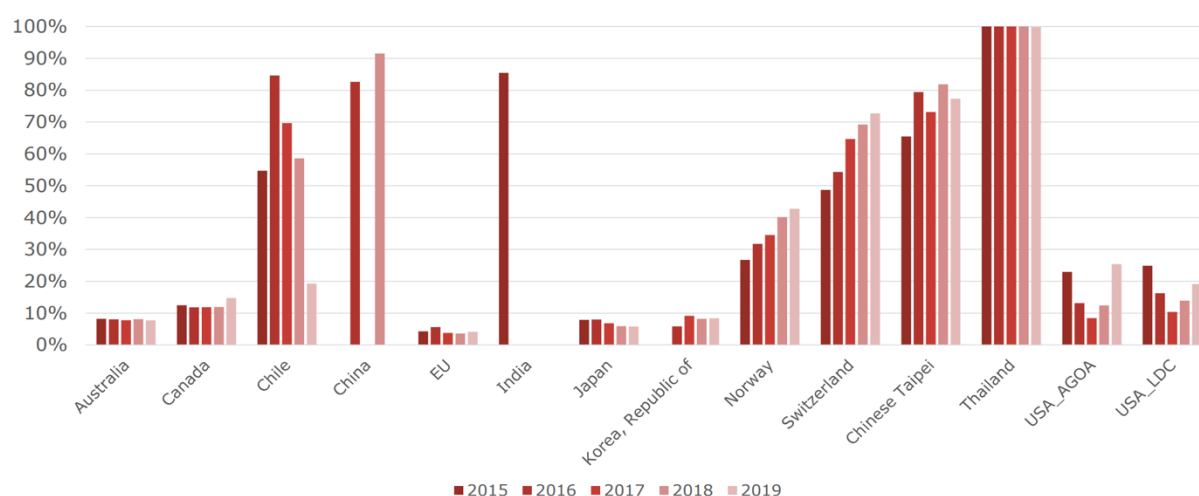
³⁹ Maria Persson, 'From Trade Preferences to Trade Facilitation: Taking Stock of the Issues' (2012) 6 *Economics - The Open-Access, Open-Assessment E-Journal* (2007-2020) 1, 16.

⁴⁰ That is why tariff lines on which the MFN rate is zero cannot offer preference and are not calculated for measuring utilisation rates. Methodologies to calculate preference utilisation are discussed in detail in WTO Secretariat, Committee on Rules of Origin, 'Modalities for the Calculation of "Preference Utilization": Note by the Secretariat (2016) (G/RO/W/161); WTO Secretariat, 'Utilisation rates under preferential trade arrangements for least developed countries under the LDC duty scheme' (2018) (G/RO/W/190)

⁴¹ WTO Secretariat, 'Utilisation rates under preferential trade arrangements for least developed countries under the LDC duty scheme' (2016) G/RO/W/168/Rev.1

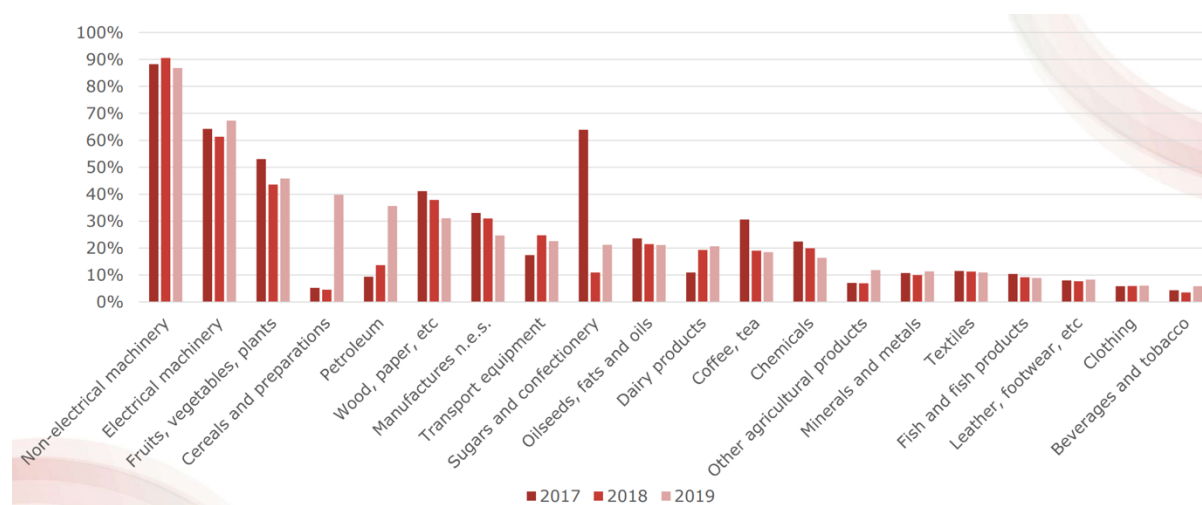
and utilisation ratio indicators to estimate preference impact on trade volume.⁴² Results tend to concur that preference programmes ‘are not used to their fullest extent’.⁴³ (Figure 8)

*Figure 8: Preference underutilisation across UTPPs for LDCs (%)*⁴⁴



Preference underutilization is spread unevenly across sectors, schemes, providers and beneficiaries. Figure 9 shows how different sectors has utilized preference benefits.

*Figure 9: Underutilisation of preference across sectors*⁴⁵



Not all countries benefit equally from preferences, and the rate can be low for individual countries and products. For example, the classic early work by Sapir on the EU GSP

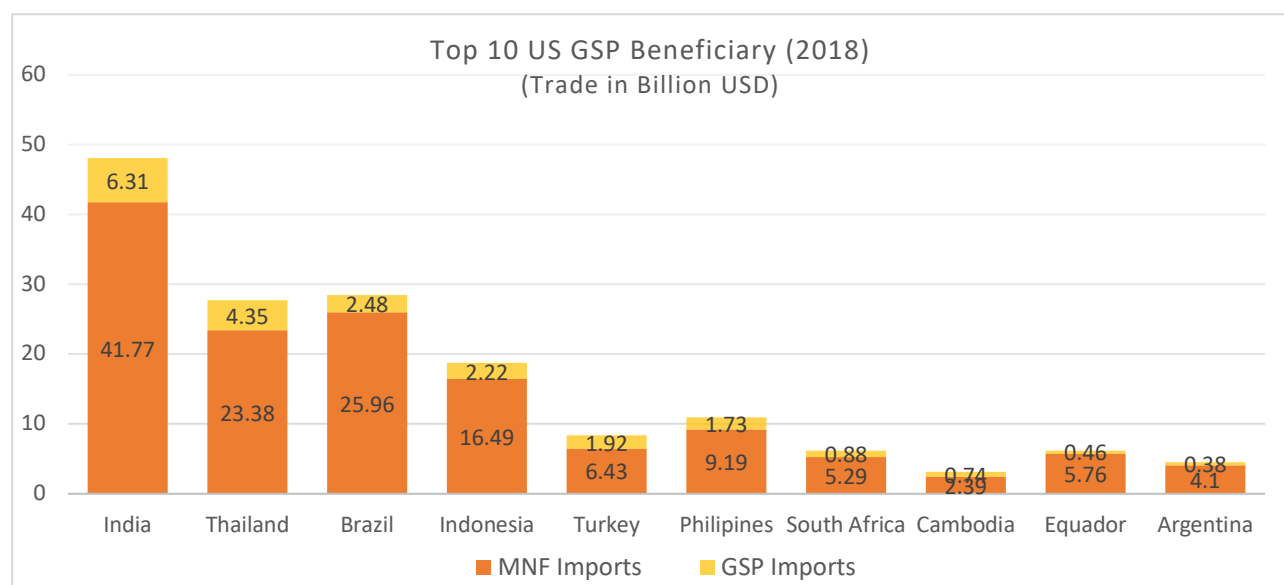
⁴² Utility ratios are the value of imports receiving preferences divided by total dutiable imports.

⁴³ Congressional Research Service, 'Generalised System of Preferences (GSP): Overview and Issues for Congress' (Nov 2019) RL33663, page 27; Alexander Keck and Andreas Lendle, 'New Evidence on Preference Utilization' (WTO Economic Research and Statistics Division 2012) ERSD-2012-12.

⁴⁴ Darlan F Martí, 'What Drives the Utilization of Trade Preferences? Lessons from the Work of the WTO Committee on Rules of Origin' (2021) Presentation by Secretary of the WTO Committee on Rules of Origin <https://www.wto.org/english/tratop_e/roi_e/overview_marti19may21.pdf> accessed 12 April 2023.

⁴⁵ ibid

programme noted that ‘among the developing countries there have been different degrees



of benefit from the GSP.’⁴⁶

Figure 10: Top US GSP Beneficiaries

The actual usage of US GSP is highly concentrated, and among more than 120 countries, only 25 countries grabbed 95 per cent of preference exports in 2011.⁴⁷ As evident from Figure 10, the top beneficiaries of the preference schemes are mostly advanced DCs. This raises the question of whether these programmes are appropriately designed to target the proper countries, particularly LDCs with limited export capacity. However, because the US GSP covers fewer products of export interest to DCs and has other complex conditions, its utilisation rate is typically lower than other developed country GSP programmes.

However, most of the studies undertaken so far involve an analysis of the EU or US market, as data from other preference grantors are not always readily available.

For instance, Candau et al. analysed EU preference utilisation for 2001, while Bureau et al. assessed 2002 data of US and EU markets for agricultural products. Both studies found the utilisation rate to be relatively high, more than 80%.⁴⁸ Brenton and Ikezuki concentrate on US

⁴⁶ Andre Sapir, ‘Trade Benefits under the EEC Generalized System of Preferences’ (1981) 15 European Economic Review 339. 352

⁴⁷ US Government Accountability Office (GAO), International Trade: US Trade Preference Programs Provide Important Benefits, but a More Integrated Approach Would Better Ensure Programs Meet Shared Goals, GAO-08-443, March 2008, p. 35. CRS calculations find the top 25 taking 97.3% of all GSP exports for 2011. Data Source: CRS calculation based on the International Trade Commission Trade Dataweb. Turkey (as of May 2019) and India (as of June 2019) are suspended from the GSP beneficiary list.

⁴⁸ Fabien Candau, Lionel Fontagne and Sébastien Jean, ‘The Utilisation Rate of Preferences in the EU’ (Purdue University, Center for Global Trade Analysis, Global Trade Analysis Project 2004) Conference papers 331286. Jean-Christophe Bureau, Raja Chakir and Jacques Gallezot, ‘The Utilisation of Trade Preferences for Developing Countries in the Agri-Food Sector’ (2007) 58 Journal of Agricultural Economics 175.

AGOA beneficiaries' exports and find that utilisation rates are high overall. However, they remain low (less than 50 per cent) for several countries, particularly for apparel products.⁴⁹

More recent (2014) evidence demonstrates higher utilisation of preferences particularly in the Quad countries (the United States, Japan, Europe, and Canada). Figure 11 shows a generally high utilisation rate of preference in all Quad schemes except in the US GSP, where a noticeably lower product coverage rate may have substantially pulled down the utilisation rate.⁵⁰

Figure 11: Preference utilisation by LDCs in Quad countries

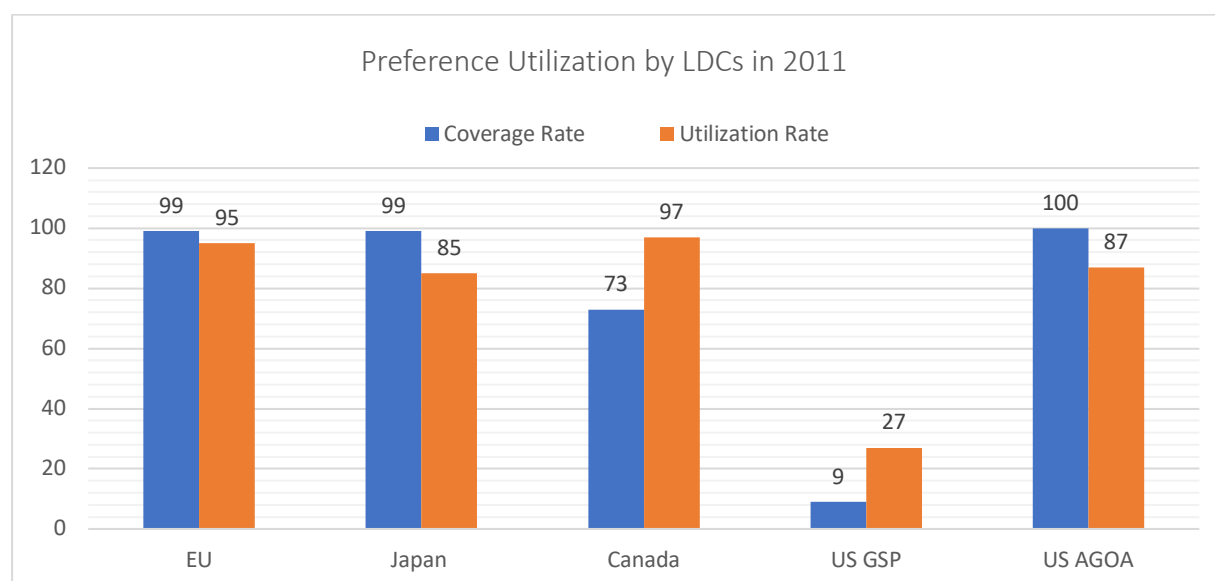


Figure 12 shows that the trends remained similar for textile export data of LDCs to different destinations in 2016.⁵¹ However, structural factors such as direct consignment obligations contribute to the underutilisation of preferences in countries such as Switzerland,⁵² in addition to a lack of awareness and compliance with preferential origin requirements. LDC firms also need time to adapt to relatively new GSP programmes, such as the Indian or Chinese GSP.

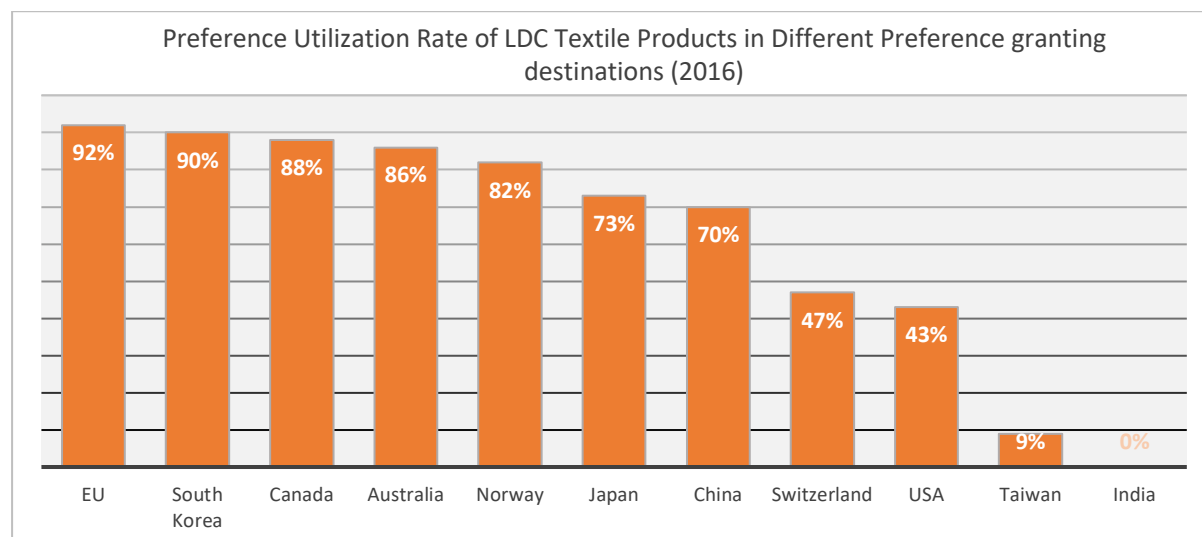
⁴⁹ Paul Brenton and Takako Ikezuki, 'The Initial and Potential Impact of Preferential Access to the U.S. Market under the African Growth and Opportunity Act' [2004] World Bank Policy Research Working Paper Series-3262.

⁵⁰ Taisuke Ito, 'UNCTAD database on GSP utilisation: Some relevant figures from LDC trade' (2014) <https://unctad.org/meetings/en/Presentation/aldc2014_12_ito_en.pdf> accessed 27 December 2019)

⁵¹ Source: WTO Integrated Database and PTA database (<http://ptadb.wto.org>). These data are submitted to the WTO Secretariat by WTO members granting preference to LDCs per the requirements of the Transparency Mechanism for Preferential Trade Arrangements (WT/L/806) established in 2010.

⁵² WTO, 'Committee on Rules of Origin: Minutes of the Meeting of 5 March 2020' G/RO/M/74 para 3.33.

Figure 12: Preference utilisation by LDC textile products



Unutilised preference is still a significant concern, indicating that other barriers may impede firms from claiming preferential treatment. For instance, about 80% of all LDCs' exports of 'sugar and confectionery products' and nearly 50% of all 'fruits, vegetables, plants' and 'chemicals' do not avail of the preference benefits despite being eligible for it.⁵³ As per a WTO note, LDCs in 2016 paid tariffs on more than \$7 billion of trade that could have benefitted from preference.⁵⁴ In addition to origin criteria, structural reasons such as direct consignment obligations, certification requirements, and other non-origin-related factors may have contributed to the underutilisation.⁵⁵

However, it must be noted that using the utilisation rate as a tool has many limitations and cannot always reflect the right picture. The rate may be low for reasons not connected to the design of preference schemes, such as an operator (importer, exporter or producer) might be unaware of the availability of preference or may opt to pay MFN duties as the preferential margin is meagre. Trade could also occur on tariff lines for which the MFN tariff rate is zero or may be covered by more than one non-reciprocal scheme (such as a GSPs for LDCs) or reciprocal scheme (FTAs).⁵⁶ A higher preference utilisation could also conceal significant

⁵³ WTO Secretariat, 'Utilisation rates under preferential trade arrangements for least developed countries under the LDC duty scheme' (2018) G/RO/W/190)

⁵⁴ *ibid*

⁵⁵ WTO, 'Utilisation of Trade Preferences by Least Developed Countries: 2015-2019 Patterns and Trends Note by the Secretariat' G/RO/W/204 para 5.2.

⁵⁶ In addition to UTPP, certain WTO members have FTAs with LDCs. For instance, ASEAN LDCs such as Cambodia, Lao PDR, and Myanmar have FTA with Australia, India, Japan, Korea, and New Zealand. Therefore, calculating utilisation rates for a single scheme may lead to inaccurate conclusions.

differences at the tariff line level. Even a 100 per cent rate could mean a very small or a vast trade effect depending on the system's design.⁵⁷

5.4.2 Impact of Trade Preferences

Traditionally, preferences have been viewed as a method to fulfil the development obligations of the trading system.⁵⁸ However, one of the significant long-standing policy debates over the efficacy of trade preference is whether it positively affects the recipient countries. There are widespread expectations that UTPPs should increase trade. Trade theory presumes positive effects of preferences for recipient's exports, but empirical research reveals surprisingly divergent outcomes.

Literature tends to support the conclusion that UTPPs benefit some recipients in some sectors but generally do not significantly impact developing countries' trade.⁵⁹ For instance, Whalley concludes that preferences 'had only a marginal effect on country economic performance, especially through GSP. And in the more rapidly growing economies, such as Korea, Taiwan, Turkey, and others, there is little evidence that preferential treatment has played much of a role in their strong performance.'⁶⁰ Literature mainly focuses on attempts to measure the impact of UTPPs by an intensive margin or volume of trade. However, a few studies tried to emphasise the impacts on the extensive margin (diversification) as a secondary objective.

5.4.2.1 Impacts on Trade Volume

Econometric evidence on the impact of trade preference is still scarce, and the findings point to mostly unstable but somewhat positive impacts of preference programs. Since tariffs and other conditionalities vary widely across schemes and their influence is spread out over time, empirically evaluating preference impacts on trade performance is challenging. So, studies trying to underscore the impact of all preference programs at a time are rare. The few that have dealt with the issue have limited or particular GSP schemes or something else as their primary focus. Let us now review the major studies on the topic.

⁵⁷ Persson (n 37).7

⁵⁸ Robert E Hudec, *Developing Countries in the GATT Legal System* (First published by Gower Publishing Company in 1987, reissued by Cambridge University Press 2011). Robert Hudec, *Developing Countries in the GATT Legal System* (1987); J Michael Finger, 'Development Economics and the GATT' in Jaime De Melo and Andre Sapir (eds), *Trade Theory and Economic Reform: North, south and east. Essays in honor of Béla Balassa*. (Cambridge, Mass: Basil Blackwell 1991). Bernard Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2005) 8 *Journal of International Economic Law* 405.

⁵⁹ RE Baldwin and T Murray, 'MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP' (1977) 87 *The Economic Journal* 30. Aaditya Mattoo, Devesh Roy and Arvind Subramanian, 'The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?' (2002) IMF Working Paper, WP/02/158. André Sapir and Lars Lundberg, 'The U.S. Generalized System of Preferences and Its Impacts' in AO Krueger and Robert E Baldwin (eds), *The Structure and Evolution of Recent US Trade Policy* (National Bureau of Economic Research, Inc 1984). Gene M Grossman, 'Import Competition from Developed and Developing Countries' (1982) 64 *The Review of Economics and Statistics* 271. Drusilla K Brown, 'Trade and Welfare Effects of the European Schemes of the Generalized System of Preferences' (1989) 37 *Economic Development and Cultural Change* 757.

⁶⁰ John Whalley, 'Non-Discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries' (1990) 100 *Economic Journal* 1318.

A seminal and controversial study by Rose found that GSP programmes significantly impact trade volume, as much as a 100 per cent increase.⁶¹ Analyses by Tomz et al. and Chang and Lee reached similar conclusions.⁶² One estimate by Hoekman, Ng, and Olarreaga suggests DFQF entry for peak-tariff products.⁶³ in the Quad markets (the United States, Japan, Europe, and Canada) would increase LDC export by 11%, though it would not be that expensive for developed countries.⁶⁴ Ianchovichina, Mattoo, and Olarreaga reached a similar estimate for 37 sub-Saharan African countries where export is expected to be gained by 14 per cent.⁶⁵ An EU study undertaken to evaluate the impact of EU preferences concluded that there has been evidence of an increase in exports of beneficiaries to the EU throughout the period 2011-2016. The result has been more evident for 49 EBA countries (LDCs).⁶⁶ A study by Romalis finds GSP's positive impact on GDP growth and the recipient country's export growth.⁶⁷

On the other hand, Hakobyan investigates the effects of the suspension of GSP programmes to understand their impact on beneficiaries.⁶⁸ Analysing data from 2010 to 2012, she noticed an almost 3% decline in export volumes from the affected country-product combinations, with greater effects on products with a higher MFN tariff rate.⁶⁹ From a slightly different angle, Alborno et al., who examine the permanent suspension of US GSP for several Argentine products in 1997 using farm-level data, conclude that the suspension had a significant negative impact on the exporters of the affected products.⁷⁰

However, Subramanian and Wei's research reveals that GSP only promotes aggregate imports, and when the effects are disaggregated by sector, the most liberalised sectors experience the most substantial adverse effects.⁷¹ More critically, Eicher and Henn (2011), who analysed GSP data for importer, exporter, and country-pair fixed effects since 1980, observed a negative effect of GSP.⁷² Ito assesses the effects of Japan's DFQF access for LDCs.

⁶¹ Andrew K Rose, 'Do We Really Know That the WTO Increases Trade?' (2004) 94 *The American Economic Review* 98. In addition, the study concluded that the WTO did not affect the trade patterns of its members.

⁶² Pao-Li Chang and Myoung-jae Lee, 'The WTO Trade Effect' (2011) 85 *Journal of International Economics* 53. Michael Tomz, Judith L Goldstein and Douglas Rivers, 'Do We Really Know That the WTO Increases Trade? Comment' (2007) 97 *American Economic Review* 2005.

⁶³ Tariffs of 15 per cent or more were considered in the study. As a result, most LDC exports, including textile and agricultural products, are still in the tariff-peak boundaries globally.

⁶⁴ Bernard Hoekman, Francis Ng and Marcelo Olarreaga, 'Eliminating Excessive Tariffs on Exports of Least Developed Countries' (2002) 16 *The World Bank Economic Review* 1.

⁶⁵ Elena Ianchovichina, Aaditya Mattoo and Marcelo Olarreaga, 'Unrestricted Market Access for Sub-Saharan Africa: How Much Is It Worth and Who Pays?' (2001) 10 *Journal of African Economies* 410.

⁶⁶ European Commission, 'Generalised Scheme of Preferences' (n 8).

⁶⁷ John Romalis, 'Would Rich Country Trade Preferences Help Poor Countries Grow: Evidence from the Generalised System of Preferences' (University of Chicago mimeograph 2003).

⁶⁸ She strived to determine if the 2011 expiration of US GSP for ten months, during which the US Congress did not immediately renew the programme, harmed DC exports.

⁶⁹ Shushanik Hakobyan, 'GSP Expiration and Declining Exports from Developing Countries' (2020) 53 *Canadian Journal of Economics/Revue canadienne d'économie* 1132.

⁷⁰ Facundo Alborno, Irene Brambilla and Emanuel Ornelas, 'The Impact of the Generalized System of Preferences on Firms' Exports' (Mimeo 2016).

⁷¹ Arvind Subramanian and Shang-Jin Wei, 'The WTO Promotes Trade, Strongly but Unevenly' (2007) 72 *Journal of International Economics* 151.

⁷² Theo S Eicher and Christian Henn, 'In Search of WTO Trade Effects: Preferential Trade Agreements Promote Trade Strongly, but Unevenly' (2011) 83 *Journal of International Economics* 137. The research included a study of the time-varying importer, time-varying exporter, and country-pair fixed effects.

Surprisingly, she concludes that LDCs generally did not benefit from the scheme, possibly because preference was granted on tariff lines that were not imported into Japan.⁷³

In one of the most comprehensive recent studies encompassing all programmes and trade data of 184 countries from 1953 to 2006, Herz and Wagner identified the adverse effects of GSPs that may reduce DC's exports by 4%. They argue that preference may increase exports in the short term but reduce exports from DCs over the long term. Additionally, preferences eventually have distorted effects when complex RoOs force DCs to switch to the MFN tariff.⁷⁴

Sharma, Boys, and Grant reconcile the findings of Hertz and Wagner with the beneficiaries' aspirations. They noted that preference programmes had been limited to manufactured or semi-manufactured goods since their inception. However, as the preference margins for agricultural products from DCs are more significant, preference programmes positively impact agricultural exports (but not necessarily for their non-agricultural exports).⁷⁵

Most studies above focus on aggregate trade flow, with occasional attention to heterogeneity. Consequently, there may be questions about whether they accurately reflect the casual impacts of GSPs. Very few studies concentrate on disaggregated within variation. Frazer and Van Biesebroeck's (2010) analysis of AGOA using data from 1988 to 2006 is most likely the first study in which the primary estimate includes country-product, country-year, and product-year fixed effects. They find that the preference substantially impacts US imports from AGOA countries and that cumulative impacts increase over time, likely due to beneficiary capacity building and continuous learning.⁷⁶

More recently, A major EU study conducted by Thelle, Jeppesen, Lund and Van Biesebroeck adopted the same methodology with a vast dataset of more than 12 million observations of exports from 137 DCs to the EU since 1973. Again, the preference programs were found to have benefitted low- and middle-income countries more.⁷⁷ However, when disaggregated by programme, studies find that not all programmes positively affect beneficiary exports. For example, the average impact of EU EBA is found to be 75 per cent more than that of GSP or GSP+. The impact on different countries also varies significantly, with the impact on

⁷³ Tadashi Ito and Takahide Aoyagi, 'Did the Least Developed Countries Benefit from Duty-Free Quota-Free Access to the Japanese Market?' (2019) 49 *Japan and the World Economy* 32.

⁷⁴ Bernhard Herz and Marco Wagner, 'The Dark Side of the Generalized System of Preferences' (2011) 19 *Review of International Economics* 763.

⁷⁵ Anupa Sharma, Kathryn Boys and Jason Grant, 'The Bright Side of the Generalized System of (Trade) Preferences: Lessons from Agricultural Trade' (2019) 44 *Journal of Agricultural and Resource Economics* 32.

⁷⁶ Garth Frazer and Johannes Van Biesebroeck, 'Trade Growth under the African Growth and Opportunity Act' (2010) 92 *The Review of Economics and Statistics* 128. With AGOA benefits, DC's exports increase by an average of 13% cumulatively, with increases of 14.6%, 42%, 8%, 16.5%, and 73.5% for manufactured goods, apparel, agricultural goods, minerals, and petroleum, respectively. It was also determined that AGOA increased the export probability of covered products by 1%.

⁷⁷ European Commission, 'Assessment of Economic Benefits Generated by the EU Trade Regimes towards Developing Countries' (2015). It found robust evidence that EU preference programmes had significantly increased developing country exports to the EU. The average increase in the export of a product covered by the preference was up to 5 per cent, which increased to 10 per cent in the case of LDCs. In addition, the preference programs were found to have benefitted the low- and middle-income countries more (on average 8 per cent). However, they had a negligible impact on the likelihood of a covered product being included in the export basket.

LDCs being twice that of developing nations.⁷⁸ The CARIS study on EU preference programmes assessed welfare gains for individual schemes, concluding that ordinary GSP has considerably smaller gains than the other two schemes.⁷⁹

A few studies compare the impact of EU and US preferential trade policies that generally show that EU reference schemes are more supportive in generating exports than the USA.⁸⁰

A comprehensive study involving trade data from 177 countries from 1960 to 2008, undertaken by Gil-Pareja, Llorca-Vivero and Martínez-Serrano of the University of Valencia, Spain, found significantly different results for different grantors' schemes. For example, though the US AGOA, EU EBA, ACP–EU, and GSP schemes of EU, US, Canada, Switzerland, Norway, and Turkey are found to have positive impacts, the US CBI (Caribbean Basin Initiative) and ATPA programmes, as well as the GSP programmes of Japan, Australia, and Russia, were found to have no effect. The uneven impact of these programmes was attributed to a combination of varying degrees of preference, country, and product coverage, as well as varying degrees of flexibility in rules of origin.⁸¹ In a similar study in 2016, Klasen, Martínez-Zarzoso, Nowak-Lehmann & Bruckner found similar impact variance in different GSP schemes. They also find preference is significantly more beneficial for LDCs than non-LDC low-income DCs.⁸²

The methodology adopted in the studies plays a vital role. Cipollina, Laborde and Salvatici emphasised that 'the results of different studies critically depend on how the advantage provided by the preferences measure is measured.'⁸³ Recognising the complexity of

⁷⁸ *ibid*

⁷⁹ Michael Gasiorok and Others, 'Mid-Term Evaluation of the EU's Generalised System of Preferences' (Purdue University, Center for Global Trade Analysis, Global Trade Analysis Project 2010) Report by CARIS, University of Sussex. 9; It found that Bangladesh and Cambodia benefit most among LDCs while Ecuador and Costa Rica are the biggest gainers in GSP+ beneficiaries.

⁸⁰ Lars Nilsson, 'Comparative Effects of EU and US Trade Policies on Developing Country Exports' [2007] The European Union and Developing Countries: Trade, Aid, and Growth in an Integrating World 49. Maria Cipollina, David Laborde and Luca Salvatici, 'Do Preferential Trade Policies (Actually) Increase Exports? A Comparison between EU and US Trade Policies' [2010] European Trade Study Group, Lausanne. Jon Haveman and Howard Shatz, 'Developed Country Trade Barriers and the Least Developed Countries: The Economic Results of Freeing Trade' (2003) Working Paper No. 2003.7, Public Policy Institute of California. Y Bourdet and L Nilsson, 'Trade Preferences and Developing Countries' Exports: A Comparative Study of the EU and US GSP Schemes' (1997) mimeo, Lund University, Lund; Joseph Francois, Bernard Hoekman and Miriam Manchin, 'Preference Erosion and Multilateral Trade Liberalization' (2006) 20 The World Bank Economic Review 197. OECD, *Preferential Trading Arrangements in Agricultural and Food Markets: The Case of the European Union and the United States* (OECD Publishing 2005).

⁸¹ Salvador Gil-Pareja, Rafael Llorca-Vivero and José Antonio Martínez-Serrano, 'Do Nonreciprocal Preferential Trade Agreements Increase Beneficiaries' Exports?' (2014) 107 *Journal of Development Economics* 291.

⁸² Stephan Klasen and others, 'Trade Preferences for Least Developed Countries. Are They Effective? Preliminary Econometric Evidence' (2016) UN CDP Policy Review No. 4. They analysed data from 192 countries for 1973 to 2009 to evaluate impact of unilateral preferences differentiated by beneficiary groups, by schemes and by preference grantors. They found that preference increased LDC exports by about 30 per cent, but only a subset of LDCs could benefit. However, the impact was very different across grantors. For example, though the EU, Canada, and Australian preference schemes significantly and positively impacted LDC trade, all other preference-grantors (US, Japan, Norway, New Zealand, Russia, and Turkey) did not make many differences.

⁸³ Maria Cipollina, David Laborde and Luca Salvatici, 'Do Preferential Trade Policies (Actually) Increase Exports? An Analysis of EU Trade Policies' (Agricultural and Applied Economics Association) Selected Paper

measuring the impacts of UTPPs, Hoekman and Ozden pointed out that ‘most studies have severe shortcomings as they fail to take into account that (a) preference rules are often determined at the very disaggregated product level, (b) the elasticity estimates at this level of aggregation are generally absent, and (c) finding the right controls to include in regressions are difficult.’⁸⁴

In essence, there is divergence in the result of studies regarding the impacts of UTPPs on the trade volume of beneficiaries. However, most studies found positive effects, though not identical across schemes, sectors, or beneficiaries. Goods with high preference margins are benefitted more.

5.4.2.2 Impacts on Export Diversification

UTPPs often face criticism for incentivising DCs to lock in a few exportable products with access to preference.⁸⁵ Though schemes tend to support countries or sectors to grow, a critical question remains whether they could help countries exploit a comparative advantage in the trade or artificially induce otherwise uncompetitive industries. In an early contribution, Yannopoulos suggested that the preference programmes introduced around 1970 led to increased export diversification.⁸⁶

An OECD study finds instances, particularly in emerging economies such as Brazil or India, where preferences build on the comparative advantage of existing or nascent industries to gain a foothold and expand their international reach in specific markets.⁸⁷ For instance, the flower sectors of Colombia and Ecuador, the top two flower exporters to the USA, have hugely benefitted from the US ATPA programme.⁸⁸ The 2015 EU study on economic benefits assessment of preferences also found the likelihood of exporting a product to have been boosted by up to 1/12th as a response to the complete removal of the tariff.

In addition, an IFN study conducted in 2013 on EU preferences found a significant positive impact of the EBA and GSP+ schemes on the export diversification of the beneficiaries.⁸⁹ However, EU schemes have different impacts, with EBA registering the most. Again, the positive impact of diversification falls as the income levels of the beneficiaries grow.⁹⁰ Gamberoni looks at EU data from 1994 to 2005 and finds that traditional GSPs encourage diversification. However, more stable preferential schemes have the opposite effect and lead

for Annual Meeting, August 4-6, 2013, Washington, DC 150177, Agricultural and Applied Economics Association.

⁸⁴ Bernard Hoekman and Caglar Ozden, ‘Trade Preferences and Differential Treatment of Developing Countries : A Selective Survey’ (The World Bank 2005) 3566 13.

⁸⁵ European Commission, ‘Generalised Scheme of Preferences’ (n 8).

⁸⁶ George N Yannopoulos, ‘Patterns of Response to EC Tariff Preferences: An Empirical Investigation of Selected Non-ACP Associates’ (1986) 25 JCMS: Journal of Common Market Studies 15.

⁸⁷ OECD, *Globalisation and Emerging Economies: Brazil, Russia, India, Indonesia, China and South Africa* (OECD Publishing 2009).

⁸⁸ Society of American Florists, *Flower Industry Overview* < <https://aboutflowers.com/about-the-flower-industry/flower-industry-overview/> > accessed 04 January 2020

⁸⁹ Persson and Wilhelmsson (n 6). 25

⁹⁰ European Commission, ‘Assessment of Economic Benefits Generated by the EU Trade Regimes towards Developing Countries’ (n 78) 98.

to more exports of agricultural products.⁹¹ Whereas, a CARIS study on EU preference schemes has found little evidence to support the proposal that the regimes have led to a diversification of exports into new products.⁹²

In short, most studies found some positive impacts of UTPPs on exports diversifications, though impacts vary across schemes, sectors and beneficiaries.

5.4.2.3 Other Impacts

The general perception is that preferences may make a recipient country a more attractive location for foreign direct investment (FDI). For instance, inward FDI flows to Bangladesh in 2015 (USD 3,380 million) have increased by more than 167 per cent compared to 2011 (USD 1,161 million). This increase is believed to be facilitated by various incentives for foreign investors, including the country's access to the EU EBA programme, where its apparel industry is one of the biggest beneficiaries.⁹³ The trends are similar for other preference recipients, such as Ethiopia and Pakistan.⁹⁴ Rarely do studies attempt to establish a link between preference programmes and FDI flows in beneficiary countries. Moreover, country-level data on the stock of inward FDI over a longer period is not available for most DCs.⁹⁵

A CARIS evaluation report estimates that UTPPs have a significant impact on FDI. Their findings indicate that the difference in FDI flows between recipients and non-recipients is greater than 200 per cent. However, they employed data with limited coverage and relatively high variability.⁹⁶ On the other hand, Thelle, Jeppesen, Lund, and Van Biesebroeck's study on EU programmes found no evidence of an increase in FDI due to preferences. However, they maintained that the absence of a clear pattern could be attributable to the poor quality of the data, as FDI data are significantly less comprehensive than trade data.⁹⁷

To conclude, though varying across schemes, sectors and beneficiaries, most studies found positive impacts of preference programmes on the trade volume, diversification and FDI inflows in beneficiary countries.

5.4.3 Why are Preferences not so Effective?

As evidenced by the various studies presented in the preceding paragraphs, the effectiveness of trade preference programmes is variable, and multiple studies have reached different conclusions. Although they have greatly assisted a few beneficiaries in a few sectors, they

⁹¹ Elisa Gamberoni, 'Do Unilateral Trade Preferences Help Export Diversification? An Investigation of the Impact of European Unilateral Trade Preferences on the Extensive and Intensive Margin of Trade' (HEI Working Paper 2007) 17/2007.

⁹² Gasiorek and Others (n 80).

⁹³ World Bank, 'World Development Indicators' <<http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=BD>> accessed 09 January 2020

⁹⁴ World Bank data <<https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=PK>> accessed 02 December 2019; World Bank, 'World Development Indicators' <<https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=ET>> accessed 02 December 2019

⁹⁵ *ibid*, 54

⁹⁶ Gasiorek and Others (n 80). 106

⁹⁷ European Commission, 'Assessment of Economic Benefits Generated by the EU Trade Regimes towards Developing Countries' (n 78) 16.

produced limited positive results overall. They are also not very effective regarding trade diversification and attracting FDI. Therefore, why are they not as effective as expected?

An individual scheme's success is contingent upon various factors and conditions attached to the scheme. Countries often struggle to fully capitalize on preferences due to a range of factors, including stringent rules of origin requirements, uncertainties and costs related to political conditionality, and exclusions of certain products.⁹⁸

Restrictive and complicated Rules of Origin (RoO), which determine the economic nationality of export products, pose concerns due to their substantial costs and potential for discrimination. If firms face technical or financial challenges in meeting these rules, preferences that appear beneficial on paper may offer little practical value.⁹⁹ Such RoO incur two types of costs: administrative costs and production costs associated with strict sourcing restrictions. In addition, a lack of standardisation of RoO across various UTPPs results in different requirements for otherwise identical preference programmes, which may incur additional expenses for traders.¹⁰⁰ Recent studies have put the cost to an equivalent import tariff of up to 8%.¹⁰¹

Preferences are often unutilised for the strict local content requirements. Moreover, with a constant increase in the importance of the global value chain, exporters may be forced to import inputs from the lowest-cost foreign source to finally export the finished goods at the MFN rate rather than availing of the preference.¹⁰² So, firms that can comply with RoO mainly produce primary and other simple products.¹⁰³ On assessing imports from 68 countries under the US GSP from 1997 to 2008, Hakobyan found that producers of about 40 per cent of GSP-

⁹⁸ Richard Newfarmer and others, 'Global Economic Prospects and the Developing Countries 2002: Making Trade Work for the World's Poor' (The World Bank 2002) Report Number 23590; Paul Brenton, 'Integrating the Least Developed Countries into the World Trading System: The Current Impact of European Union Preferences under "Everything but Arms"' (2003) 37 *Journal of World Trade* 623.

⁹⁹ WTO, Committee on Rules of Origin, 'Utilisation Rates Under Preferential Trade Arrangements for Least Developed Countries Under the LDC Duty Scheme' Note by the Secretariat. 10 October 2018 (G/RO/W/179) Rules of Origin (RoO) prevent trade deflection by ensuring that products from non-eligible countries are not redirected through a beneficiary country to avoid tariffs. RoO criteria, such as origin requirements, direct consignment rule, and documentary evidence, vary across preferential schemes, and operators must provide proof of product origin to access preferences. However, lower utilization of preferences may indicate that these compliance requirements were too demanding for operators to consistently meet.

¹⁰⁰ Persson (n 37).

¹⁰¹ José Anson and others, 'Rules of Origin in North-South Preferential Trading Arrangements with an Application to NAFTA' (2005) 13 *Review of International Economics* 501. Jan Herin, Rules of Origin and Differences between Tariff Levels in EFTA and the EC (EFTA Dpt des affaires économiques 1986) n A seminal paper by Herin was the first to conclude that RoO compliance costs were equivalent to an import tariff between 3% and 5%.; Joseph Francois, Bernard Hoekman and Miriam Manchin, 'Preference Erosion and Multilateral Trade Liberalization' (2006) 20 *The World Bank Economic Review* 197, n Francois, Hoekman, and Manchin estimated the average cost of compliance to be 4%. Cost widely varies across products and countries. Olivier Cadot and others, 'Product-Specific Rules of Origin in EU and US Preferential Trading Arrangements: An Assessment' (2006) 5 *World Trade Review* 199. Céline Carrere and Jaime MELO De, 'Are Different Rules of Origin Equally Costly? Estimates from NAFTA' (CEPR 2004) Working Papers-4437.

¹⁰² Olivier Cadot and Jaime de Melo, 'Why OECD Countries Should Reform Rules of Origin' (2008) 23 *The World Bank Research Observer* 77. Restrictive RoO can lead to resource waste, as it severely limits the use of intermediates that are not domestically produced. Small market producers may find it impossible to use the preference as buying intermediates domestically may not be possible.

¹⁰³ Shushanik Hakobyan, 'Accounting for Underutilization of Trade Preference Programs: The US Generalized System of Preferences' (2015) 48 *Canadian Journal of Economics* 408. 433

eligible imports did not claim preference.¹⁰⁴ Thus, numerous studies have concluded that higher administrative costs and stringent restrictions on local content severely limit preference utilisation.¹⁰⁵ On the other hand, liberal RoO may offer greater support for the exporters.¹⁰⁶

Preference uncertainties, with the possibility of preferences being revoked or altered by revising schemes, deter firms from investing in production units due to the lack of assurance regarding long-term benefits.¹⁰⁷ Therefore, Bartels and Haberli propose adopting objective and transparent criteria for excluding any country or its products from preference schemes and developing an obligatory form for the existing voluntary schemes utilising GATT Article II.¹⁰⁸ However, due to its inherent nature, preference will still be uncertain for many other reasons, such as changes in the number of beneficiaries, signing of FTA between the grantor and several other beneficiary countries, changes in MFN tariffs, etc.¹⁰⁹

The existing literature identified preference margin¹¹⁰ as one of the prime suspects of underutilisation.¹¹¹ Studies showed that the higher the preference margin, the higher the probability of preference utilisation.¹¹² Furthermore, 'a large number of products of interest for developing countries are not eligible for preferential treatment.'¹¹³ Programmes often exclude precisely those products in which developing countries have a comparative advantage and 'graduate' an exporting country out of the preference for a product when it begins to achieve success.¹¹⁴ Moreover, avoiding unjustified discrimination among recipients

¹⁰⁴ *ibid.*

¹⁰⁵ Elisa Gamberoni concludes that complicated RoO, compliance cost and other non-tariff barriers preclude the recipient countries from asking about preferences. Other studies concur that preference utilisation is suboptimal mainly due to constraints of rules of origin and high compliance costs. Gamberoni (n61); Keck and Lendle (n 44). Mattoo, Roy and Subramanian (n 60). UNCTAD and WTO, 'The Post-Uruguay Round Tariff Environment for Developing Country Exports: Tariff Peaks and Tariff Escalation: UNCTAD/WTO Joint Study' (UN, 2000). Brenton (n 99).

¹⁰⁶ Mattoo, Roy and Subramanian (n 60). They showed that even temporary relaxation of origin rules under US AGOA (relaxation of triple transformation rules in this case) had supported an export boom in countries such as Lesotho.

¹⁰⁷ OECD (n 88). 13; OECD surveys of importers suggest that it takes a long time for an export flow to emerge and even longer to establish investment flows that produce locally with satisfactory quality.

¹⁰⁸ Lorand Bartels and Christian Häberli, 'Binding Tariff Preferences for Developing Countries Under Article II GATT' (2010) 13 *Journal of International Economic Law* 969. Bartels and Haberli argued that there was no formal reason why a WTO Member could not include preferential tariffs in its schedule under Article II:1, as Article II:1(c) permits the scheduling of historical preferences, indicating that nothing in the GATT's design prohibits the scheduling of tariff preferences. However, there are currently no scheduled historical preferences, though some historical preferences continue to be applied unilaterally.

¹⁰⁹ Antonio Postigo, 'Explaining Utilisation of Free Trade Agreements by Sectoral Interests and Binding of Unilateral Concessions' (2013) 148 *International Development* 1, Postigo offers suggestive evidence that preference underutilisation could be a sign of insecurity.; Mark S Manger and Kenneth C Shadlen, 'Political Trade Dependence and North-South Trade Agreements' (2014) 58 *International studies quarterly* 79, Using data from 1990 to 2010, Manger and Shadlen show that preference-receiving countries are more likely to seek and form FTAs with the preference-grantors such as the USA and EU, as FTA offers more stability than GSP.

¹¹⁰ It captures the benefits accrued to exporters in the form of unpaid duties. In simple cases, it is the difference between the MFN and preferential rates. Major donors, including the EU and the USA, offer a vast range of preferential trade regimes to different sets of countries, so the calculation of the margin is complicated.

¹¹¹ Hakobyan (n 105). 409

¹¹² OECD (n 88).

¹¹³ OECD (n 88). 13

¹¹⁴ Arvind Panagariya, 'EU Preferential Trade Policies and Developing Countries' (2002) 25 *The World Economy* 1415. For example, despite apparel being the primary export of LDC Bangladesh, accounting for over

without compromising the effectiveness of the UTPPs remains a big challenge.¹¹⁵ Many pointed to the benefits of focusing preference programs exclusively on the poorest DCs.¹¹⁶

Again, the grantors are free to set norms that go beyond the standard rules of the trade regime, and the beneficiaries have no say in the process.¹¹⁷ Complying with the comprehensive conditionalities can be demanding, and preference suspension is a common and frequent occurrence. Conditionalities leading to suspension often include requirements that may be unrelated to trade and advance the donors' political agenda rather than responding to the recipients' needs.¹¹⁸ For example, preferences for Pakistan were suspended and later restored by the USA in return for cooperation with the 'fight' against terrorism.¹¹⁹ GSP access for Argentina was partially suspended due to investment disputes.¹²⁰ There are numerous such instances.¹²¹ Though unilateral preference should not expect reciprocity, India's termination from GSP in 2019 follows its failure to assure that US goods will be

85% of its total export value, its apparel products did not have access to the US GSP scheme. The USA suspended GSP for Bangladesh in 2013. The suspension has been in place until now. GSP-DFQF-USA<http://www.bangladeshcustoms.gov.bd/trade_info/gsp_dfqf_usa>accessed 30 December 2019

¹¹⁵ Alice Adami, Brian McGarry, Pamela Ugaz, 'A Comparative Analysis of Generalised Systems of Preferences: Challenges, Constraints and Opportunities for Improvement' Memorandum to The European Parliament, Committee on International Trade (2016) The Graduate Institute, Geneva. 9. Coverage of countries within a scheme matters for an individual beneficiary country when the recipient group or any country of substantial economic size can influence export prices. Unlike in the seventies at the dawn of GSP schemes, DCs no longer form a homogeneous group and now include states significantly at different economic development levels. Some schemes also contain competitive needs limits, whereby a country is prohibited from exporting too much of a product using the preference.

¹¹⁶ Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (Oxford University Press 2007) 168–169.

¹¹⁷ There are two types of conditionalities: negative conditionality, where failure to comply with set norms such as labour standards may result in a withdrawal of preference, and positive conditionality, where countries are rewarded with additional benefits for compliance with conditions, for instance, regarding environmental or human rights standards. For detailed analyses of the impacts of conditionalities, such as labour standards: Weifeng Zhou and Ludo Cuyvers, 'Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP' (2011) 45 *Journal of World Trade*. 63-85 Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507. For details on legal debates on conditionalities: Lorand Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10 *Journal of International Economic Law* 869. Umut Turksen, 'The WTO Law and the EC's GSP+ Arrangement' (2009) 43 *Journal of World Trade* 927.

¹¹⁸ Persson (n 37). 14

¹¹⁹ UNCTAD, *Generalized System of Preferences: Handbook on the Scheme of the United States of America*, (2003)

¹²⁰ Reuters< Obama says to suspend trade benefits for Argentina> <https://www.reuters.com/article/us-usa-argentina-trade/obama-says-to-suspend-trade-benefits-for-argentina-idUSBRE82P0QX20120326>> accessed 31 December 2019

¹²¹ For instance, the USA suspended Argentina in 1997. It partially suspended Ukraine in 2017 from GSP benefits due to concerns over intellectual property rights (in areas unrelated to those where the preferences were granted). The Gambia and Swaziland lost their AGOA benefits in 2015 for human rights abuse. Similarly, Myanmar lost EU GSP in 1997 for the use of forced labour, while Sri Lanka lost access to EU GSP+ in 2010 due to human rights concerns.; US Department of State, 'Monitoring and Enforcing Trade Laws and Agreements'< https://1997-2001.state.gov/issues/economic/fsustr_000501_tradelaws.html>accessed 31 December 2019; Office of the United States Trade Representative, 'Trump Administration Enforces Trade Preference Program Eligibility'< <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/trump-administration-enforces>>accessed 31 December 2019; United States Trade Representative, 'Trump Administration Enforces Trade Preference Program Eligibility'< <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/trump-administration-enforces>>accessed 31 December 2019; BBC News, 'EU to withdraw Sri Lanka trade concessions deal'< <https://www.bbc.co.uk/news/10514634>>accessed 01 January 2020; Zhou and Cuyvers (n114)

provided 'equitable and reasonable access to its markets.'¹²² After all, granting and removing preference eligibility has been a political decision.¹²³ Conceived initially as unilateral and autonomous, GSPs have been effectively turned into reciprocal contractual preferences attached with numerous strings.¹²⁴

Other than these, the production structure of the recipient countries and the market structure of the grantors are also vital for preference utilization. Hakybian identified the underdeveloped production structure of DCs as one of the prime factors for preference underutilisation.¹²⁵ Removing tariff barriers will not be sufficient to resolve productivity issues.

While exporters with preferential access are expected to benefit from a price increase equivalent to the tariff amount, importing firms in the granting countries often retain a significant portion of the tariff rent. According to calculations by Ozden and Sharma, Caribbean exporters, for example, only capture approximately two-thirds of the preference margin in the US market.¹²⁶ The remainder is taken by US importer firms. Olarreaga and Ozden estimated that the share of rents captured by exporters in African countries under AGOA were even lower.¹²⁷ Moreover, there are GSP opponents in the grantor countries including manufacturers of competing products and some labour groups that may be potentially affected by preferences. They play a significant role in offering and continuity of preferences to specific products, sectors, or countries.¹²⁸ Conversely, countries already enjoying

¹²² Proclamation to Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974<<https://www.whitehouse.gov/presidential-actions/proclamation-modify-list-beneficiary-developing-countries-trade-act-1974-2/>>accessed 31 December 2019

¹²³ Gassebner and Mkrtchyan studied incidences of suspension of preferences by the USA to conclude that politically aligned beneficiaries are significantly less likely to have their benefits suspended. Martin Gassebner and Arevik Gnutzmann-Mkrtchyan, 'Politicized Trade: What Drives Withdrawal of Trade Preferences?' (2018) 167 *Economics Letters* 10. Çağlar Özden and Eric Reinhardt, 'The Perversity of Preferences: GSP and Developing Country Trade Policies, 1976–2000' (2005) 78 *Journal of Development Economics* 1.16; So, the rules for preference suspension are shrouded in uncertainty and lack of transparency that ultimately decreases the value of preferences by making it harder for countries to make effective use of them.

¹²⁴ Panagariya (n 118).1428

¹²⁵ Hakobyan (n 105). 409 Inadequate infrastructure, limited institutional capacity, and challenges faced by smaller firms restrict a country's trading capabilities, leading to a concentration of preference benefits among a few major developing countries. Additionally, lack of knowledge about specific preference arrangements, difficulties in submitting accurate documents, and complexities in tariff classifications contribute to underutilization of the schemes, resulting in increased costs, rejected imports, and missed opportunities that discourage importers. UNCTAD, 'Improving Market Access for Least Developed Countries' (2001) UNCTAD/DITC/TNCD/4.

¹²⁶ Çağlar Ozden and Gunjan Sharma, 'Price Effects of Preferential Market Access' (2006) 20 *World Bank Economic Review* 241.

¹²⁷ Marcelo Olarreaga and Çağlar Özden, 'AGOA and Apparel: Who Captures the Tariff Rent in the Presence of Preferential Market Access?' (2005) 28 *The World Economy* 63. Strict competition law enforcement in the donor country could help make the UTPPs more effective.

¹²⁸ Opposition from developed country agricultural and textile producers plays a significant role in determining the suspension or cancellation of GSP benefits for these industries. As an example, a US company manufacturing specific non-down sleeping bags petitioned for the removal of preference for similar products from Bangladesh under GSP, leading to the product's removal from GSP eligibility in 2012. Inside US Trade, 'Sleeping Bags Removed from GSP after USTR Administrative Review', 05 January 2012

preferential access seek to preserve their advantages by opposing the admission or extension of preferences to other countries.¹²⁹

5.5 Concerns with Unilateral Trade Preferences

Irrespective of the debate on utilisation and benefits, there are some unintended consequences of the preference schemes.¹³⁰ As discussed above, preference value is influenced by so many factors that it is far from certain if a given preference will have intended consequences for a particular recipient.

5.5.1 Trade Diversion

Trade diversion is a risk in discriminatory trading arrangements, where a grantor country imports from a beneficiary country instead of a more efficient non-beneficiary provider. This benefits preference-receiving countries but comes at the expense of donor countries and the rest of the world. While preferences aim to transfer resources from developed to underdeveloped countries, issues arise when preference programs differ among developing countries. This can lead to trade being diverted from non-recipient countries to recipient countries, even if the non-recipients are less developed.¹³¹ Country selectivity has long been a cause of concern. However, the WTO Dispute Settlement Body (DSB) filing and decisions in the *EC Tariff preference* dispute brought the issue into focus.¹³² Therefore, countries only having access to EU GSP may argue that their export prospects are hurt by preferences granted under GSP+ and EBA schemes.¹³³ Empirical studies by Borchert on various EU preference schemes and Baldwin and Murray on US GSP find evidence of substantial trade diversion between the beneficiary and non-beneficiary DCs.¹³⁴ Consequently, non-recipient DCs face challenges from preference programmes.

5.5.2 Obstruction to Trade Liberalisation

Johnson and Hudec argued long ago about the anti-liberalisation effects of preference programmes.¹³⁵ The GSP schemes are believed to reduce pressures for trade liberalisation within the beneficiary countries, thereby undermining the internal policy reform necessary for economic growth.¹³⁶ Özden and Reinhardt also claimed that GSPs 'have the perverse effect of delaying trade liberalisation by recipients'.¹³⁷ Bhagwati, Krishna, and Panagariya identified

¹²⁹ For example, some AGOA beneficiaries actively oppose proposals for DFQF access to the US for all LDC products, which may place their apparel industries in direct competition with some global players in the sector, eroding their preference value. Vivian C Jones, JF Hornbeck, and M Angeles Villarreal, 'Trade Preferences: Economic Issues and Policy Options' (2013), US Congressional Research Service, R41429, p.16

¹³⁰ Persson (n 37) 7.

¹³¹ *ibid* 17.

¹³² EC — Tariff Preferences (European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries) Panel Report-WT/DS246/R, 01 December 2003; AB Report-WT/DS246/AB/R, 07 April 2004. India's interests clashed with those of 12 other DCs in the dispute.

¹³³ Persson (n 37) 7.

¹³⁴ Ingo Borchert, 'Trade Diversion under Selective Preferential Market Access' (2009) 42 Canadian Journal of Economics 1390. Baldwin and Murray (n 60). 39

¹³⁵ Harry G Johnson, *Economic Policies Toward Less Developed Countries* (Washington, DC: Brookings 1967) Hudec noted that 'the non-reciprocity doctrine tends to remove the major incentive that [developing country] export industries have. . . for opposing protectionist trade policies at home.' Hudec (n 59). 148

¹³⁶ Panagariya (n 118).

¹³⁷ Özden and Reinhardt (n 133). 2

two GSP-related anti-liberalisation effects. First, as DCs have access to tariff reductions without reciprocity, many of them 'chose egregiously high levels of protection for many decades, with disastrous economic outcomes.' On the other hand, developed economies 'negotiated multilateral tariff reductions only on products of interest to themselves (ignoring, for instance, textiles and agriculture until recently).'¹³⁸ In addition to obstructing their trade liberalisation, Limão and Olarreaga argue that preference beneficiaries may impede multilateral trade negotiations, which would result in their preference erosion.¹³⁹

5.5.3 Investment Diversion

The effect on investment by preference schemes has two dimensions: impacts on the allocation of resources between the recipient and non-recipient countries or across sectors within a beneficiary country. Baccini and Dür find that preferential regimes result in substantial investment discrimination, particularly for market-seeking FDI, which increases the risk of FDI flows being diverted to recipient countries with less favourable production and trading characteristics.¹⁴⁰ Other DCs that are not on the preference list are the most vulnerable to such trade diversion. In the case of the allocation of resources within a country, firms could distort investment decisions in favour of sectors eligible for preferences rather than sectors with an underlying comparative advantage and long-term prospects.¹⁴¹ Given the uncertainty of preference schemes, these investments could waste resources if market access is eventually removed.¹⁴²

5.6 The Final Key Question: Is Preference still Necessary for Developing Countries?

The UTPPs shaped the relationship between developed and developing countries for decades. Now closer scrutiny into their distortive trade effects and not-so-satisfactory results led to a call for the closure of such programmes by some scholars.¹⁴³ In a World Bank study that used a dataset of 154 DCs from 1976 through 2000, Ozden and Reinhardt found that countries removed from the GSP adopted more liberal trade policies. So, they concluded that DCs would be better served by integration into reciprocity-based trade regimes than the current GSP-style special preferences.¹⁴⁴

According to Hart and Dymond, preference-receiving countries find it challenging to convince developed countries to open their markets to the products of their particular interest.¹⁴⁵ The

¹³⁸ Jagdish Bhagwati, Pravin Krishna and Arvind Panagariya, 'The World Trade System Today' in Jagdish N Bhagwati, Pravin Krihna and Arvind Panagariya (eds), *The World Trade System: Trends and Challenges* (The MIT Press 2016) 6.

¹³⁹ Nuno Limão and Marcelo Olarreaga, 'Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization' (2006) 20 *The World Bank Economic Review* 217. They also suggested that grantors may have an additional incentive to sustain such schemes if the continuation of the schemes can be viewed as a 'side payment' for cooperation from DCs on non-trade issues.

¹⁴⁰ Leonardo Baccini and Andreas Dür, 'Investment Discrimination and the Proliferation of Preferential Trade Agreements' (2015) 59 *Journal of Conflict Resolution* 617. Market-seeking FDI refers to an investment that results from companies trying to get better access to a foreign market.

¹⁴¹ Gene Grossman and Alan Sykes, 'A Preference for Development: The Law and Economics of GSP' (2005) 4 *World Trade Review* 41.

¹⁴² Persson (n 37) 17.

¹⁴³ e.g., Arvind Panagariya, 'Aid Through Trade: An Effective Option?' (University Library of Munich, Germany 2004) *International Trade* 0403006. Özden and Reinhardt (n 133). Herz and Wagner (n 75).

¹⁴⁴ Özden and Reinhardt (n 133).

¹⁴⁵ Trade agreements emphasise balanced concessions. So, DCs are hurt by higher protection in agriculture and textile sectors in developed country markets as they have not come to the table offering reciprocal concessions.

motto that drives the real-world mercantilist bargaining model is 'what you get is what you pay for.'¹⁴⁶ For unilateral preference, 'developing countries are not there to request the opening of the export markets that they are interested in. Rather, they wait for their donors to draw up their GSP list.'¹⁴⁷ As a result, DCs would be better off abandoning unilateral preferences.¹⁴⁸

However, these arguments fail to address the inequity of the trading system and the limited capacity of DCs to benefit from international trade.

Multiple studies have shown that the benefits of international trade are not shared equally, with developed nations reaping the lion's share.¹⁴⁹ This is partly due to the economic power and level of development of WTO members and developed countries' inequitable trade and economic policies.¹⁵⁰ By eliminating domestic trade policy-induced distortions on global markets and fostering greater coherence in global economic policy, developed countries may help developing nations integrate into the global economy.¹⁵¹

However, there are no indications that this will occur soon. Trade preferences are not the optimal approach. Not every developing country needs it. Preferences would not be necessary if developed countries did not impose a 30% tariff on agricultural exports from the poorest countries. For a developing country that cannot influence the outcome of multilateral negotiations¹⁵² and cannot enter into a free trade agreement to gain access to its desired markets¹⁵³, trade preferences are the second-best option.

Persson noted that though many commentators regard trade preferences as a failed policy – it is not necessarily the case as found in the empirical literature.¹⁵⁴ Recent econometric

Michael Hart and Bill Dymond, 'Special and Differential Treatment and the Doha "Development" Round' (2003) 37 *Journal of World Trade* 395. Panagariya (n 118).1430

¹⁴⁶ J Michael Finger, Ulrich Reincke and Adriana Castro, 'Market Access Bargaining in the Uruguay Round: Rigid or Relaxed Reciprocity?' (World Bank Publications 1999) Policy Research Working Paper No. 2258. 2. Toh and Low study the impact of US GSP withdrawal and find no adverse impact. Mun Heng Toh and Linda Low, *Economic Impact of the Withdrawal of the GSP on Singapore* (Inst of Southeast Asian Studies 1991). 35

¹⁴⁷ Petros C Mavroidis, *The Regulation of International Trade: Volume 1: GATT* (1st edition, MIT Press 2016).268

¹⁴⁸ Frieder Roessler, 'Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past' (1998) 19 *University of Pennsylvania Journal of International Law* 513.

¹⁴⁹ World Bank, 'Global Economic Prospects and the Developing Countries 2002: Making Trade Work for the World's Poor.' (World Bank 2002) WB-23590; World Bank, 'Global Economic Prospects 2004 : Realising the Development Promise of the Doha Agenda' (World Bank 2004). According to a World Bank report, industrialised countries impose higher tariffs on imports from DCs than from other industrial countries. In agriculture, industrial countries levy a 15% tariff on imports from other industrial countries, while DCs pay between 20% (Latin America) and 35% (Europe and Central Asia). Outside of agriculture, the gap is even wider. Tariffs on imports from industrial countries average 1%, while tariffs on imports from DCs range from 2.1% (Latin America) to 8.0%. (Southeast Asia)

¹⁵⁰ World Bank (n 163).

¹⁵¹ Literature suggests that the protectionist agricultural policies of developed nations are ineffective even at supporting domestic farmers and addressing market failure.

¹⁵² Though market access barriers, specifically tariffs, continue to impede the WTO's efforts to promote trade, there have been no multilateral negotiations in this area since 2008.

¹⁵³ Few DCs have the leverage to attract and negotiate an FTA with a developed country. In addition, an FTA has additional consequences, including non-trade conditions.

¹⁵⁴ Persson (n 37).

research found evidence of preference-supported export growth.¹⁵⁵ Preference programmes positively impact trade and investment through many different channels.¹⁵⁶ So, many have insisted on the brighter elements of the UTPPs and suggested actions for incremental improvement rather than complete elimination.¹⁵⁷ Page and Kleen summarised that some countries used preference to rapidly increase trade (e.g. Malaysia, Mexico in specific sectors), some used the economic rent gained from one product to develop another (Jamaica, Mauritius), some used them but did not benefit (maybe they were in the wrong product or at the wrong time) while others suffered as preferences encourage distorted production (e.g. bananas). Their sombre conclusion is: ‘They have sometimes helped, but they do not solve all development problems.’¹⁵⁸

The beneficial impact of the programmes in some specific countries merits recognition. Some donors, recognising the constraints beneficiaries face in availing of the benefits, are taking steps to ease origin requirements, reduce administrative burdens and offer it to those most in need.¹⁵⁹ In the complex world of global trade, no programme can be expected to offer a satisfactory outcome for everyone. Nevertheless, a constant effort to maximise benefit can undoubtedly serve the interest of the most. Moreover, if the appropriate measures follow the goodwill enshrined in the UTPPs, they could contribute to the development obligations of the trading system.¹⁶⁰

5.7 Development Aid and Aid for Trade: Welfare Impact

Foreign governments and international agencies provide development aid in the form of direct grants, programs, or training to support the long-term economic, environmental, social, and political development of DCs.¹⁶¹ Official Development Assistance (ODA), adopted as the ‘gold standard’ of foreign aid by the OECD DAC in 1969, remains the main source of financing for development aid, specifically targeting economic development and welfare in DCs.¹⁶²

¹⁵⁵ Zissimos (n 30).

¹⁵⁶ Gasiorrek and Others (n 80). 189

¹⁵⁷ Sharma, Boys and Grant (n 76). Gasiorrek and Others (n 80). UNCTAD, ‘Trade Preferences for LDCs: An Early Assessment of the Benefits and Possible Improvements.’ (2003) UNCTAD/ITCD/TSB 2003/8, United Nations, New York; European Commission, ‘Report on the Generalized Scheme of Preferences Covering the Period 2014–2015: Report from the Commission to the European Parliament and the Council.’ (2016) SWD(2016) 8 final, European Commission, Brussels, Belgium

¹⁵⁸ Peter Kleen and Sheila Page, ‘Special and Differential Treatment of Developing Countries in the World Trade Organization’ (ODI, London 2005).

¹⁵⁹ e.g., The EU gradually introduced the Registered Exporter System (REX) system since 2017 for GSP beneficiaries. It allows exporters to self-certify product origin, replacing the previous system reliant on governmental authorities issuing certificates of origin Form A and invoice declarations from economic operators under specific conditions. European Commission, ‘REX – Registered Exporter System’ <https://taxation-customs.ec.europa.eu/online-services/online-services-and-databases-customs/rex-registered-exporter-system_en> accessed 3 August 2023.

¹⁶⁰ Sharma, Boys and Grant (n 76) 53.

¹⁶¹ Camelia Minoiu and Sanjay G Reddy, ‘Development Aid and Economic Growth: A Positive Long-Run Relation’ (2010) 50 The Quarterly Review of Economics and Finance 27.

¹⁶² OECD, ‘Official Development Assistance (ODA)’ <<https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/official-development-assistance.htm>> accessed 4 January 2024. In addition to OECD countries. Non-OECD countries such as China, Saudi Arabia, India, Brazil, and Turkey are among those that have significant development aid programmes.

While development aid is often perceived as a temporary solution that can create dependency and rent-seeking, trade is considered superior in addressing development challenges due to its sustainable nature and long-term benefits.¹⁶³ By engaging in international trade, countries can capitalize on their comparative advantages, leading to increased productivity and economic growth. This fosters job creation, improves living standards, and reduces dependence on external financial assistance.¹⁶⁴ Trade also promotes self-reliance and autonomy by encouraging domestic reforms and policy improvements.¹⁶⁵ Furthermore, trade facilitates technology transfer and knowledge sharing, enabling developing countries to enhance their production processes and overcome local challenges.¹⁶⁶ Overall, prioritizing trade as a development strategy allows countries to achieve sustainable economic progress. The Aid for Trade (AfT) initiative focuses on aid to promote the trade capacity of DCs. Therefore, the AfT initiative has gained prominence in fostering trade-led development.

Trade-related development assistance (TRDA) initiatives are now coordinated under the AfT programme led by WTO and supported by other international organisations including OECD, IMF, and the World Bank.¹⁶⁷ AfT combines traditional trade-related technical assistance and trade-related infrastructure developments to help build the supply-side capacity and trade-related infrastructure and address barriers that hinder developing countries from effectively participating in international trade.¹⁶⁸ Launched in 2005 at the Hong Kong Ministerial Conference,¹⁶⁹ the initiative also aimed to bring donors' attention to the importance of providing higher financial resources for trade-related assistance in a coordinated way.¹⁷⁰

¹⁶³ Richard Ilorah, 'Trade, Aid and National Development in Africa' (2008) 25 *Development Southern Africa* 83. Joseph E Stiglitz and Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (OUP 2005). More on this issue on page 59 of this thesis.

¹⁶⁴ Ilorah (n 2).

¹⁶⁵ Bernard Hoekman, 'Aid for Trade: Why, What, and Where Are We?' in Aaditya Mattoo and Will Martin (eds), *Unfinished Business? The WTO's Doha Agenda* (World Bank 2011).

¹⁶⁶ Ilorah (n 2).

¹⁶⁷ WTO, 'Aid for Trade Review Opens with Call to Preserve Trading System as Driver for Development' (WTO, 3 July 2019) <https://www.wto.org/english/news_e/news19_e/gr19_03jul19_e.htm> accessed 16 December 2020. Other international organisations include UNCTAD, African Development Bank, Asian Development Bank, the European Bank for Reconstruction and Development, and International Trade Centre (ITC).

¹⁶⁸ WTO, 'Recommendations of the Task Force on Aid for Trade' (2006) WT/AFT/1 1. The 2006 WTO Task Force on Aid for Trade defined AfT in the following way: 'Aid for Trade is about assisting developing countries to increase exports of goods and services, to integrate into the multilateral trading system, and to benefit from liberalised trade and increased market access. Effective Aid for Trade will ... complement multilateral trade reforms and distribute the global benefits more equitably across and within developing countries.'

¹⁶⁹ WTO, 'Ministerial Declaration on Doha Work Programme. Adopted on 18 December 2005 at the Sixth Session of Trade Ministers Conference, Hong Kong', para 57 <https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm> accessed 16 December 2020. AfT was initiated with the stated objective to 'help developing countries, particularly least developed countries (LDCs), to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade.' AfT initiatives include technical and financial assistance to help build up human, institutional and physical capacity in developing countries in the negotiation, design, implementation and assessment of trade, and complementary policies.

¹⁷⁰ WTO, 'Recommendations of the Task Force on Aid for Trade' (n 15). A WTO Task Force established in 2006 for 'operationalizing' aid for trade recommended for increased focus on identifying the needs within recipient countries, responding to donors and acting as a bridge between donors and developing countries.

Moreover, aid for the trade is delivered through the existing channels. So, there is no such thing as an aid-for-trade fund.¹⁷¹ This initiative just tries to capture the interactions between donors and partner countries.¹⁷² Since the start of the AfT initiative in 2006, USD 409 billion in official development assistance and USD 346 billion in low concessional loans have been disbursed globally through it till 2019 by 60 donors that report their ODA to the OECD Creditor Reporting System (CRS).¹⁷³

There are several compelling reasons why AfT matters. Trade can be a powerful engine for economic growth and development. However, developing countries often cannot harness the power of trade, despite increased market access. Constraints vary widely across countries and sectors, but the list is often too long¹⁷⁴ and mostly relates to network infrastructure, competitiveness, export diversification, trade policy analysis, negotiation and implementation.¹⁷⁵ Trade-related assistance may help the developing countries to overcome these supply-side constraints 'to integrate into the multilateral trading system, and to benefit from liberalized trade and increased market access' so that the benefits of trade are distributed 'more equitably across and within developing countries'.¹⁷⁶

As opposed to the earlier series of multilateral trade negotiations, the Uruguay Round was a single undertaking which requires the developing countries to sign on to virtually all WTO Agreements.¹⁷⁷ All of these are associated with huge costs and technical expertise.¹⁷⁸ Developing countries face huge

¹⁷¹ Neither the WTO nor the OECD is involved with the disbursement of aid for trade. The case for a WTO-led AfT programme is that there are additional costs from a WTO settlement such as implementation, preference erosion, food prices, etc. So, it should have a role in shifting aid agencies' attention back to trade. Bernard Hoekman and Susan Prowse, *Economic Policy Responses to Preference Erosion: From Trade as Aid to Aid for Trade* (The World Bank 2005) 22.

¹⁷² It captures the interaction at the country level reported to the Creditor Reporting System (CRS) of OECD by the member countries, multilateral institutions, and some non-member countries. The CRS database covers about 90% of all official development assistance (ODA) but does not include a south-south partnership.

¹⁷³ OECD and WTO, *Aid for Trade at a Glance 2019: Economic Diversification and Empowerment* (OECD Publishing 2019) 52. Aid for trade comes as ODA and not as charity. In 2015, 69% of AfT flows were loans. Still, AfT has apparent success in terms of the amount of money disbursed through it. OECD, 'Frequently Asked Questions' <<https://www.oecd.org/aidfortrade/frequentlyaskedquestions/>> accessed 31 December 2020.

¹⁷⁴ Jean-Jacques Hallaert and Laura Munro, 'Binding Constraints to Trade Expansion: Aid for Trade Objectives and Diagnostics Tools' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1521409 <<https://papers.ssrn.com/abstract=1521409>> accessed 27 December 2020.

¹⁷⁵ OECD and WTO, *Aid for Trade at a Glance 2009 Maintaining Momentum: Maintaining Momentum* (OECD Publishing 2009).

¹⁷⁶ WTO, 'Recommendations of the Task Force on Aid for Trade' (n 15).

¹⁷⁷ They took on unprecedented obligations not only to reduce trade barriers, but to implement significant trade reforms in numerous areas (e.g., technical, sanitary, and phytosanitary standards, intellectual property law, import licensing procedures, customs valuation, etc.) Michael Joseph Finger and Philip Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge' (2000) 23 *The World Economy* 511, 1; Michael Joseph Finger and Julio Nogues, 'The Unbalanced Uruguay Round Outcome: The New Areas in Future WTO Negotiations' (2002) 25 *The World Economy* 321; Michael Joseph Finger, 'Implementation and Imbalance: Dealing with Hangover from the Uruguay Round' (2007) 23 *Oxford Review of Economic Policy* 440.

¹⁷⁸ WTO legal framework is notoriously complex and getting more so with time. WTO was born with legally binding Agreements and schedules running more than 26,000 pages in its official version that contains numerous obligations, few of which fit together neatly. The Agreements are lengthy and complicated because they are legal texts covering a wide range of activities. Focus, GATT Newsletter, 'Marrakesh Ministerial Meeting: The WTO Is Born' (WTO 1994) 107 Special Issue <<https://docs.wto.org/gattdocs/q/.%5CGG%5CGATTFOCUS%5C107.pdf>> accessed 21 December 2020.

challenges in dealing with these complexities.¹⁷⁹ Though some developing countries like India, Brazil, South Africa, and Thailand did become vibrant in their participation, for most other developing countries, the opposite is the reality.¹⁸⁰ A major objective of trade-related assistance is to help reduce barriers and institutional capacity-building to bridge the compliance and commitment gaps facing developing countries.

By the metric of resource mobilization, the AfT initiative has been a success.¹⁸¹ Then, does AfT help recipient countries in their international trade?¹⁸² Most studies deliver a positive answer to this question, showing a positive impact of AfT initiatives on the trade performance of the developing countries.¹⁸³

The WTO-OECD biennial AfT evaluation reports regularly report positive impacts of AfT on trade growth in the developing countries. The AfT report of 2019 listed findings of 17 empirical studies to claim that the AfT supports had helped developing countries to improve their trade performance.¹⁸⁴ However, it conceded that the impacts vary depending on the type of AfT intervention, the sector of intervention, the income level, and the location of the recipient country. Moreover, even the most well-designed AfT intervention 'is unlikely to

¹⁷⁹ For instance, implementing TRIPS in developing countries is no easy task. Simply copying a developed country model will not do as intellectual property needs and institutional capacities vary widely across countries. The most optimal manner requires research, trial-and-error experience, and a considerable range of reforms in national legislation, IPR administration and enforcement.

¹⁸⁰ Some developing, and least developed countries lack representation in Geneva, and many developing countries have a small delegation. So, they are almost absent from 'agenda-setting, deliberation, decision-making' which finally determines the outcomes. This allows the interests of the developed countries to be always prioritized while the pressing issues of them remain side-lined. Michel Kostecki, 'Technical Assistance Services in Trade-Policy: A Contribution to the Discussion on Capacity-Building in the WTO' [2001] Sustainable Development and Trade Issues, ICTSD Resource Paper No-2 7.

¹⁸¹ Donors have disbursed USD 409 billion in trade-related official development assistance in addition to the USD 346 billion in low concessional loans disbursed till 2018. OECD and WTO (n 20) 3. Average AfT commitments from 2006 to 2008 was \$29.3 billion per year, whereas it was \$57.7 billion in 2017. The share of AfT commitments in total Official Development Assistance (ODA) also increased from 20% to around 30% in the same period.

¹⁸² The AfT programmes have two elements: the 'hardware' or the tangible part that include economic infrastructure and building productive capacity, and the 'software' investment or the intangible part, such as support for trade policies, regulations and institutions, and trade-related structural adjustment. While lots of empirical studies have dealt with the impacts of hardware element of aid for trade on recipients' exports, few have analysed with the software parts, which are vague in nature and the most difficult to quantify.

¹⁸³ Paul Brenton and Erik von Uexkull, 'Product Specific Technical Assistance for Exports – Has It Been Effective?' (2009) 18 *The Journal of International Trade & Economic Development* 235. Massimiliano Calì and Dirk Willem te Velde, 'Does Aid for Trade Really Improve Trade Performance?' (2011) 39 *World Development* 725. Mariana Vijil and Laurent Wagner, 'Does Aid for Trade Enhance Export Performance? Investigating the Infrastructure Channel' (2012) 35 *The World Economy* 838. Matthias Helble, Catherine L Mann and John S Wilson, 'Aid-for-Trade Facilitation' (2012) 148 *Review of World Economics* 357. Olivia Durowah, 'The Role of Aid for Trade and Foreign Direct Investment in Poverty Reduction: A Panel Data Analysis of 91 Developing Countries' [2017] *Electronic Theses and Dissertations* <<https://openprairie.sdstate.edu/etd/1187>> accessed 19 Nov 2022. Matthias Busse, Ruth Hoekstra and Jens Königer, 'The Impact of Aid for Trade Facilitation on the Costs of Trading' (2012) 65 *Kyklos* 143. Hyun-Hoon Lee and John Ries, 'Aid for Trade and Greenfield Investment' (2016) 84 *World Development* 206. Martin Roy, 'The Contribution of Services Trade Policies to Connectivity in the Context of Aid for Trade' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3036946. Philipp Hühne, Birgit Meyer and Peter Nunnenkamp, 'Who Benefits from Aid for Trade? Comparing the Effects on Recipient versus Donor Exports' (2014) 50 *The Journal of Development Studies* 1275.

¹⁸⁴ OECD and WTO (n 20) 60–61.

bring about sustained gains for the poor without simultaneous policy and institutional reform.¹⁸⁵

However, the reality of the resource mobilization has been questioned.

The trade impact of many projects accounted under AfT was unclear. As the trade assistance is disbursed through the traditional channel, donors can self-brand many projects as AfT projects. Several recipients – including Benin, Botswana, Liberia, Myanmar and Nepal – reported that they did not receive any aid for trade, as they were expecting new and separate funding. To them, an infrastructure project remains an infrastructure project, not a trade aid.¹⁸⁶ Therefore, the 2009 WTO-OECD survey concluded that ‘much more effort is needed to clarify the scope and definition of aid for trade.’¹⁸⁷ One basic weakness is that the AfT monitoring system is based on self-reporting and self-assessment. No stakeholder has an incentive to report failures or setbacks.¹⁸⁸ The WTO-OECD monitoring reports acknowledged that the recipient countries do not recognize the aid flows reported by donors,¹⁸⁹ do not expect from AfT the same results as donors and feel the initiative is yet to deliver the trade impact they were expecting.¹⁹⁰ Gamberoni and Newfarmer note that not all developing countries and LDCs that could gain from the initiative are beneficiaries.¹⁹¹

The promise is abundant, but there is no formal WTO commitment to help countries meet the costs of implementing the agreements. ‘Implementation is a legally binding obligation; provision of assistance an unbound promise’ only.¹⁹² The assistance offered is far less generous than promised.¹⁹³

Moreover, a donor-driven aid project, even if not in conflict with the interest of the recipient country, has the potential to divert scarce resources from one sector to another that may have greater national priority. For instance, the implementation of core WTO obligations generally makes economic sense but that is certainly not a priority for a cash-strapped government.¹⁹⁴ Therefore, the WTO Task Force

¹⁸⁵ OECD and WTO (n 20).

¹⁸⁶ Joseph Stiglitz and Andrew Charlton, ‘Aid for Trade’ (2006) 61 *Aussenwirtschaft* 143, 7. Stiglitz and Charlton asked, ‘when you are building a road, how close does it have to be to the port to become an aid for trade project?’

¹⁸⁷ OECD and WTO (n 22) 39.

¹⁸⁸ J Melo and O Cadot, ‘Aid for Trade: Looking Ahead’ in J Melo and O Cadot (eds), *Aid for Trade: What Have We Learnt? Which Way Ahead?* (2014) 3. Donors like to proclaim their success; recipients fear that reporting may result in reallocation of resources and the WTO needs to show some accomplishment. Melo and Cadot term the evaluation system as a ‘beauty contest’ that allows ‘learning from success but not from failure.’

¹⁸⁹ OECD and WTO (n 22).

¹⁹⁰ WTO-OECD, ‘Aid for Trade at a Glance 2011: Showing Results’ <https://www.oecd-ilibrary.org/development/aid-for-trade-at-a-glance-2011_9789264117471-en> accessed 14 December 2020. UNECA Communiqué – Expert Group Meeting and Workshop on Aid for Trade (AfT) and Africa’s Trading Capacity: Supply, Demand and Performance. (2010) African countries in an AfT workshop organized by the UNECA in June 2010, African countries objected to the political conditionalities in aid for trade demanding that recipient countries should take the lead in evaluating the impact of the aid for trade (UNECA, 2010).

¹⁹¹ Elisa Gamberoni and Richard Newfarmer, ‘Aid for Trade: Do Those Countries That Need It, Get It?’ (2014) 37 *The World Economy* 542.

¹⁹² Finger, ‘Implementation and Imbalance’ (n 24) 440–441.

¹⁹³ Mark Langan and James Scott, ‘The False Promise of Aid for Trade’ (GDI, The University of Manchester 2011) 16011.

¹⁹⁴ There are two strands of discussions on AfT - one for building capacity to trade and the other for adjusting to WTO-related changes. The two have different goals and costs, with the second one being more closely related to

recommendations emphasize the need for a “country-driven” approach mainstreamed in national development strategies.¹⁹⁵ In practice, however, things are complicated and a project that looks ‘demand-driven’ can still very much be donor-driven. Developing countries also do not have the luxury to pick and choose among aid offers which are scarce and uncertain. So, the content and terms of aid are shaped by the interests of the providers rather than the recipients.¹⁹⁶ Failure to select technical assistance projects in response to the real needs may result in failed reforms which trigger loss of overall confidence in reforms. This finally may lead to deterioration of aid absorption capacity and resultantly more aid dependency.

There is also a political economy case for AfT. Insisting on the need for fairer trade structures between the developed and the developing countries, The South Centre expressed its ‘concern about the likely ‘use’ or ‘misuse’ of the AfT initiative to influence the negotiating positions of the DCs in the WTO.’¹⁹⁷ On the whims and influence of the major aid donors, it is pertinent to revisit a note of Browne on US aid, ‘influence is the quintessence of US aid... driven by motives that are at least as much commercial, geopolitical, and security-related, as they are developmental’.¹⁹⁸ This drive behind foreign aid only represents the trend practised by most donors. Though AfT talks about a moral economy approach that embeds pro-poor norms, Langan and Scott argue that the moral norms may have been overridden by geopolitical and/or commercial interests.¹⁹⁹ On the distribution of AfT funds, Cali concludes that ‘trade-related needs have not been the major drivers of aid allocation’²⁰⁰

There are also concerns regarding ‘tied trade aid’. Aids may often be ‘tied’ to ensure profit for the companies and consultants from the donor countries at the expense of the poor recipients.²⁰¹ Finger has been critical that the AfT agenda has served as ‘a bonanza for consultants, nothing for development’.²⁰²

WTO objectives. An analysis of the trade-offs in choices over how and what to implement is necessary to facilitate the development strategies of developing countries by avoiding distraction from other immediate priorities. Implementation of these newer WTO obligations may be beneficial to a developing country in the medium or long term, and it may also be beneficial to its trading partners but still may not be a national priority.

¹⁹⁵ WTO, ‘Recommendations of the Task Force on Aid for Trade’ (n 15).

¹⁹⁶ Sheila Page, ‘The Potential Impact of the Aid For Trade Initiative’ (United Nations Conference on Trade and Development 2007) 45 28. Thandika Mkandawire, ‘Incentives, Governance, and Capacity Development in Africa’ (2002) 30 *African Issues* 15, 18. Mkandawire, from his experience to serving as director of the UN Research Institute for Social Development, notes that donors in Africa have pressed for projects marked unfeasible by local experts, and they have switched positions without any explanation. He lamented that there is no way to differentiate between a good or a bad donor, as ‘there is ‘yet no agency rating donors or foreign investors as worthy partners in the national development process.’

¹⁹⁷ South Centre, ‘Elements of the Architecture for Aid for Trade’ (South Centre 2006) South Centre Analysis Series SC/AN/TDP/AFT/1 3.

¹⁹⁸ Stephen Browne, *Aid and Influence: Do Donors Help or Hinder?* (Taylor & Francis 2012) 100.

¹⁹⁹ Mark Langan and James Scott, ‘The Aid for Trade Charade’ (2014) 49 *Cooperation and Conflict* 143.

²⁰⁰ Massimiliano Cali, ‘Scale and Types of Funds for Aid for Trade’ [2007] ILEAP Negotiation Advisory 167.

²⁰¹ Tied aid often prevents recipient countries from receiving good value for money for services, goods, or works and can increase the costs of a development project by as much as 15 to 30 percent. Annamaria La Chimia, ‘Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law’ [2013] Hart Publishing 1; Josepa Miquel-Florensa, ‘Aid Effectiveness: A Comparison of Tied and Untied Aid’ [2007] York University, Canada. For details on initiatives to untie aid, see OECD, ‘Untied Aid’ <<https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/untied-aid.htm>> accessed 30 December 2020.

²⁰² Michael Joseph Finger, ‘Aid for Trade: Bonanza for Consultants, Nothing for Development’ (Centre for Trade and Development 2008). Michael Joseph Finger, ‘Aid for Trade: How We Got Here, and Where We

5.8 Conclusion

UTPPs represent a crucial element in the global trade system, purportedly aimed at fostering export-driven growth in developing nations. As such, these initiatives have played and continue to play a pivotal role in shaping trade relationships between developed and developing countries.

Debates on the effectiveness of the UTPPs are due to the scarcity of data and theoretical frameworks that inadequately align with empirical evidence. A preponderance of the literature suggests that these programs have had minimal welfare impact on recipient countries. Nevertheless, recent econometric analyses employing extensive, highly granular datasets have revealed positive trade effects resulting from preference programs.

Although preferential treatment provides beneficiaries with a competitive advantage, it is essential to recognize that export performance is contingent upon a multitude of factors. Potential avenues for improvement of effectiveness include streamlining rules of origin, minimizing compliance costs, and guaranteeing product coverage that aligns with recipients' interests. Furthermore, addressing supply-side capacity-building issues and leveraging aid for trade initiatives are of paramount importance. The genuine commitment of both grantors and beneficiaries to capitalize on available opportunities is crucial in translating theoretical advantages into tangible outcomes.

It is crucial to acknowledge that UTPPs are not universally effective, often giving rise to trade distortions and counteracting liberalization efforts. Nonetheless, they retain the potential to support countries that would otherwise struggle to benefit from international trade. In this context, Hoekman, Martin, and Braga's assertion that 'preferences are clearly important for some countries in some sectors, insignificant for most, and injurious for others'²⁰³ underscores the multifaceted nature of UTPPs and their varied implications for global trade.

The next chapter will focus on the other specific element of SDT under consideration in the study- policy space for developing countries and LDCs in the TRIPS agreement.

Might Go' in Dominique Njinkeu and Hugo Cameron (eds), *Aid for Trade and Development* (Cambridge University Press 2007); Dong-Jin Dan Kim, 'The Political Economy of Trade and Development in the Multilateral Trading System: The World Trade Organisation's Aid for Trade Agenda' (PhD Thesis University of Cambridge, University of Cambridge 2013). Kim claimed that different international organizations competed to secure their mandate over the agenda claiming to serve the poor but in fact seeking to expand and legitimize their bureaucratic reach.

²⁰³ Hoekman, Martin and Braga (n133) 20

CHAPTER 6: TRIPS AGREEMENT AND THE PROVISIONS OF THE TRANSITION PERIOD AND TECHNICAL ASSISTANCE

6.1 Introduction

This chapter delves into the analysis of intellectual property rights (IPRs) within the framework of the multilateral trading system (MTS), with an emphasis on the effectiveness of SDT mechanisms, such as transition periods and technical assistance, in the realm of IPRs.

The significance of IPRs in international trade has risen to prominence following the adoption of the TRIPS as a WTO agreement. TRIPS has profoundly integrated IPRs into the global trade regime 'by requiring incorporation of globally negotiated standards into each member country's domestic system'.¹ The IPR mechanism has now become more rigorous and expansive around the world.² and has converged significantly towards norms in developed countries.³ Despite such advancements, an ongoing effort exists to enhance enforcement, which may present costly and formidable challenges for developing world.⁴

This chapter aims to contribute to the ongoing discourse on reevaluating the role of IPRs in DCs. This issue is particularly pertinent given that Bangladesh, the subject of two case studies in Part II of this thesis, will be required to implement the TRIPS agreement upon its graduation from the LDC list. This development will bear significant implications for the country's burgeoning pharmaceutical industry, its medicine exports, and ultimately, the accessibility of medicine for its citizenry.

It will also critically examine the SDT mechanisms of the transitional period and technical assistance, as stipulated in the TRIPS agreement, evaluating their efficacy and potential in assisting beneficiary countries, particularly LDCs, in achieving their development objectives. The concluding sections will scrutinize the rationale for continued access to these mechanisms by LDCs for a specified period following graduation.⁵

¹ Ruth L Okediji, 'The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights' in Daniel Gervais (ed), *Intellectual Property, Trade and Development: Strategies to Optimise Development in a TRIPS-Plus Era* (OUP 2007) 356.

² Phillip McCalman, 'Who Enjoys "TRIPS" Abroad? An Empirical Analysis of Intellectual Property Rights in the Uruguay Round' (2005) 38 Canadian Journal of Economics 574, 575. For example, countries must provide patent protection for at least 20 years for almost all areas of technology and trade of patented products must be consistent with the proper exploitation of the patent.

³ Keith Eugene Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Peterson Institute 2012) 313.

⁴ Rod Falvey, 'Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century by Keith Maskus' (2013) 12 World Trade Review 737, 737.

⁵ The focus is on the relevance and efficiency of the tools for Bangladesh's pharmaceutical industry. In addition, this study aims to investigate the benefits of TRIPS exemptions and how they may be impacted when Bangladesh graduates from the LDCs category and must comply with TRIPS requirements.

6.2 The TRIPS Regime

The TRIPS is a comprehensive 73 Articles WTO agreement concluded at the Uruguay Round of negotiations and applicable to all WTO members establishing minimum international IPRs protection standards.⁶

The significance of the Agreement lies in the fact that it is the first international Agreement to cover all forms of IP and to bind Member countries to enact domestic legislation to implement its provisions.⁷ The protection standards apply to both the availability and enforcement of IP rights. It implies that Member countries cannot provide less protection than that provided by the Agreement, nor can they be compelled to provide 'more extensive' protection.⁸

Another important innovation is the use of WTO's DSU to resolve any dispute over compliance with the minimum standards. Thus, once a violation is established, and the losing party does not comply with the rulings and recommendations of the DSB, the affected Member may eventually be authorised to take cross-retaliatory measures against the non-compliant country, in some scenarios, even in any area covered by the WTO Agreement (for example, it may impose quotas to exports from a non-compliant country).⁹

Moreover, the Agreement requires Members to comply with their obligations under other existing IP treaties.¹⁰ Thus, TRIPS is not a stand-alone convention; instead, it is an integrative mechanism that provides 'convention-plus' protection for IPRs.¹¹

6.3 Inclusion of IPR in the WTO

Robust patent protection was deemed unnecessary only a few decades ago.¹² Most developed countries did not offer patent protection before they became developed. For many

⁶ Carlos M Correa and Abdulqawi A Yusuf, *Intellectual Property and International Trade: The TRIPS Agreement* (Kluwer Law International BV 2016).

⁷ Article 1.2, TRIPS Agreement. It defines 'intellectual property' as 'all categories of intellectual property', including copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits, and protection of undisclosed information.

⁸ Article 1.1, TRIPS Agreement

⁹ Carlos M Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Zed Books 2000) 2.

¹⁰ Article 2.2, TRIPS Agreement. The existing treaties include the Paris Convention for the Protection of Industrial Property 1967, the Berne Convention for the Protection of Literary and Artistic Works 1971, the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention) 1961, and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) 1989.

¹¹ Correa, *Intellectual Property Rights, the WTO and Developing Countries* (n 9) 2.

¹² Wolfgang E Siebeck, 'Introduction' in Wolfgang E Siebeck and others (eds), *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature* (World Bank Discussion Papers, WDP-112 1990) 1. While this is true for the IPR as a whole, the patent has been highlighted as the most significant IP at issue.

decades, economists doubted any benefits that DCs might extract from the protection of IPR.¹³ Additionally, there is a longstanding disparity in the cultural understanding of IP.¹⁴

Some DCs denounced the TRIPS system as a new form of colonial exploitation to promote Western corporate interest at their expense.¹⁵ Some authors even went overboard, suggesting that DCs abandon the patent system altogether.¹⁶ It is a fact that, before the adoption of TRIPS, the international governance of IPR was weak, both procedurally and substantively. A permissive international regime facilitated innumerable variations among nations that would not serve developed countries, particularly US business interests. Notably, the USA could not easily reform the WIPO systems as the DCs in the forum could easily outvote it. They thus decided to opt for aggressive bilateralism in trade relations. They first reshaped their trade laws through the amendment of the 'section 301-process' under the 1974 Trade Acts to empower United States Trade Representatives (USTR) to act against countries that failed to provide sufficient IPR protection. As a result, the Section 301 process became 'a potentially powerful weapon for a US industry aggrieved by foreign trade practices.'¹⁷ Under the constant threat of 301-process, many countries were forced to either strengthen their IPR laws or upgrade enforcement efforts.¹⁸ The 1970s and 1980s are marked by a significant push by the USA for stricter enforcement of a less flexible set of IPR regulations.¹⁹

¹³ Carlos Braga, 'The Developing Country Case For and Against Intellectual Property Protection' in Wolfgang E Siebeck and others (eds), *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature* (World Bank Discussion Papers, WDP-112 1990) 70; Edith Tilton Penrose, *The Economics of the International Patent System* (Johns Hopkins Press: Baltimore 1951) 233,220. Penrose epitomised the pre-1970s literature on the issue when she suggested that they 'should be exempt from any international patent arrangements' because 'countries in the early stages of industrialisation gain nothing from granting foreign patents since ... these countries receive nothing for the price they pay for the use of foreign inventions or for the monopoly they grant to foreign patentees.'

¹⁴ Ruth L Gana, 'Prospects for Developing Countries under the TRIPS Agreement' (1996) 29 *Vanderbilt Journal of Transnational Law* 735, 765; Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8, 12; Lyman Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968); William P Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilisation* (Stanford University Press 1995).

¹⁵ Judy Winegar Goans, 'Intellectual Property and Developing Countries: An Overview' (USAID 2003) Briefing Paper; Marci A Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective American Association of Law Schools' Intellectual Property Section's Symposium on Compliance with the TRIPS Agreement' (1996) 29 *Vanderbilt Journal of Transnational Law* 613; UNCTAD, 'Transfer of Technology. Policies Relating to Technology of the Countries of the Andean Pact: Their Foundations' (UNCTAD 1972) A study by Junta del Acuerdo de Cartagena; Braga (n 13). The literature revealed that DCs paid higher fees for technology transfers to their firms. This resulted in several developing nations enacting technology-transfer legislation in the 1970s, following Japan's early example. Such laws mandated government review of all technology-transfer contracts to ensure hidden payments did not result in excessively high royalty rates.

¹⁶ e.g. Douglas F Greer, 'The Case Against the Patent System In Less-Developed Countries' (1973) 8(2) *Journal of International Law and Economics* 223.

¹⁷ Peter Drahos, 'Global Property Rights in Information: The Story of TRIPS at the GATT' [2008] *Prometheus* 10; Bart S Fisher and Ralph G III Steinhart, 'Section 301 of the Trade Act of 1974: Protection for US Exporters of Goods, Services, and Capital' (1982) 14 *Law and Policy in International Business* 569, 599.

¹⁸ Y Kurt Chang, 'Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries' (1994) 15 *Northwestern Journal of International Law & Business* 206, 310.

¹⁹ Braga (n 13) 71; Ken Shadlen, 'Policy Space for Development in the WTO and Beyond: The Case of Intellectual Property Rights' (Tufts University, Global Development and Environment Institute 2005) Working Paper-15577 7.

Similarly, the EU's 1984 'New Commercial Policy Instrument' included trade sanctions for inadequate protection of IPR owned by EU firms.²⁰ In the height of US-EU dominance over the IPR debate in the mid-1980s, the US firmly pushed for the inclusion of IPR in the Uruguay Round negotiations and persuaded other developed countries, including the EU, to add weight behind the move.²¹ The issue was finally included in the agenda despite long and strong resistance from DCs.²²

The US 301 process proved a massive success in achieving its IPR objectives. As the negotiations proceeded, the message became more explicit. Ostry observed that 'given a choice between American sanctions or a negotiated multilateral arrangement', an agreement on TRIPS began to look better to the DCs.²³ Once a sufficient number of countries are effectively persuaded or forced to comply (as resistance may mean facing the 301 processes), the US TRIPS proposal could expect little resistance.²⁴ It became so effective that DCs were silenced long before the final stages of the TRIPS negotiations, which essentially became an IP triumvirate – counting the US, the EU and Japan.²⁵

The well-coordinated lobbying of a powerful coalition of private-sector industry associations, including the biotech, pharmaceutical, chemical, entertainment, software, and other industrial groups,²⁶ as well as their growing fear of losing out to the rising economies of Japan and China,²⁷ propelled IPR protection to the forefront of US foreign policy.²⁸ Enyart concluded that the US corporate bodies have effectively 'played simultaneously the role of patients, the diagnosticians and the prescribing physicians' in the run-up to forging a new global IP

²⁰For details on the role of lobbyists in shaping EU IPR policy, see Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPS Agreement* (Routledge 2002); Meir Pugatch, *The International Political Economy of Intellectual Property Rights* (Edward Elgar 2004).

²¹ Braga (n 13) 71.

²² Siebeck (n 12) 1. The DCs even successfully refused to negotiate on the issue during the first phase of negotiations until the 1988 Montreal mid-term review.

²³ Sylvia Ostry, 'The Uruguay Round North–South Grand Bargain: Implications for Future Negotiations' in Daniel LM Kennedy and James D Southwick (eds), *The Political Economy of International Trade Law* (1st edn, Cambridge University Press 2002) 286.

²⁴ Drahos (n 17) 11.

²⁵ *ibid.*

²⁶ Drahos (n 17); Matthews (n 20); Michael P Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institution Press 1998).

²⁷ Hanns Ullrich, 'GATT: Industrial Property Protection, Fair Trade and Development' in FK Beier and G Schriker (eds), *GATT or WIPO? New Ways in the International Protection of Intellectual Property* (Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law, Munich 1989).

²⁸ Jagdish N Bhagwati, 'The Diminished Giant Syndrome' (1993) 72 *Foreign Affairs* <<https://www.foreignaffairs.com/articles/1993-03-01/diminished-giant-syndrome>> accessed 18 September 2020; USTR, 'Task Force on Intellectual Property, Summary of Phase I, Recommendations of the Task Force on Intellectual Property to the Advisor' Committee for Trade Negotiations, Unpublished Report, (1985); USTR, 'Advisory Committee on Trade Negotiations' Task Force on Intellectual Property, Summary of Phase II, Recommendations of the Task Force, Unpublished Report' (1986); SK Sell, 'The Origins of a Trade-Based Approach to Intellectual Property Protection: The Role of Industry Associations' (1995) 17 (2) *Science Communication*. 1. The US Advisory Committee for Trade Negotiations (ACTN), chaired by the CEO of the pharmaceutical giant Pfizer from 1981 and a direct line of communications between the business sector and the federal policymakers, played an important part in developing 'an overall IP strategy' for the USA. It framed the IP problem in a way that instantly captured the attention of the US policymakers and advocated for a trade-based response as a solution to the problem.

regime.²⁹ They simultaneously played the 'nice guy, tough guy' part.³⁰ As a result, 'the IPR regime that the United States has pushed on the world was not the one its scientists and innovators advocated. It was the IPR regime that the drug and entertainment industries advocated.'³¹

Drahos termed the historical development of integrating the IPR with the trade regime a 'story of coercion' where 'the US used a sophisticated process of trade-related threats and retaliation to coerce some states into complying with its intellectual property objectives.'³² Consequently, TRIPS is regarded as the 'most contentious and anomalous component of the Uruguay Round' trade negotiations.³³

Though controversial, integrating IPR into the trade regime has contributed to the global harmonisation of IPR and legal enforcement of the harmonised set of standards, with violators facing legal penalties.³⁴

6.4 The 'Development Deficits' in the TRIPS Agreement

The IPR regime can be effective if it can strike a balance between the contrasting interests of right-holders and right-users. Unfortunately, the TRIPS Agreement is skewed in favour of the interests of IP right-holders and the countries where they reside (predominantly developed countries) at the expense of right-users and DCs, thus undermining their development efforts.³⁵

²⁹ James Enyart, 'A GATT Intellectual Property Code' (1990) 25(2) *Les Nouvelles* 54.

³⁰ Drahos (n 17) 9. The 'nice guy' part suggested evangelising work by IP experts in target countries, preferably under the aegis of programmes like USAID, while the 'tough guy' part would use dependency of problem countries on US markets, including the GSP offerings.

³¹ Giovanni Dosi and Joseph Stiglitz, 'The Role of Intellectual Property Rights in the Development Process, with Some Lessons from Developed Countries: An Introduction' (LEM Working Paper Series 2013) Working Paper 2013/23 3. They found that 'poorly designed IPR systems may not enhance welfare, both in the short run and in the long; and such systems may well impede innovation. In particular, the IPR regimes of the advanced developed countries are likely inappropriate for many DCs, and this is likely to be especially so in areas like health and agriculture.'

³² Drahos (n 17) 16; Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Dialogue' in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave Macmillan 2002) 174. The reality of 'standard-setting has been dominated by a few producers' with support from the developed countries set to gain the most while the DCs have little to influence the process.

³³ Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism- A Critique* (Zed Books 2000) 69. Professor Donald Shelby Chisum commented that instead of 'TRIPS' naming it 'TRAP' could be 'more descriptive'. 'Remarks of Professor Donald S. Chisum,' 22 *Vanderbilt Journal of Transnational Law* (1989). See sub-heading 4.3.3 for more on Uruguay Round.

³⁴ Shadlen (n 19) 7.

³⁵ A large body of literature focuses on the negative impacts of the TRIPS Agreement on DCs. For example, see Keith E Maskus, *Intellectual Property Rights in the Global Economy* (Illustrated edition, Peterson Inst Int Economics 2000); UNCTAD, *The TRIPS Agreement and Developing Countries* (UNCTAD 1996); Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press 2003); Gregory Shaffer, 'Recognising Public Goods in WTO Disputes Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Patent Protection' (2004) 7 *Journal of International Economic Law*; Ha-Joon Chang, 'Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues' (2001) 2 *Journal of Human Development* 287; Lord Sydney Templeman, 'Intellectual Property' (1998) 1 *Journal of International Economic Law* 603.

'Development deficits' are the shortcoming and restrictive provisions that fail to respond to the development needs of DCs. A growing body of studies, both from the developed and developing world, points to such development deficits triggered by the TRIPS.³⁶ In their seminal article, Birdsall, Rodrik and Subramanian termed the TRIPS as the 'most egregious example' of the mechanism developed countries used to impose burdensome obligations on DCs.³⁷ The United Kingdom Commission on Intellectual Property Rights and Development report point out the challenges posed by the TRIPS for development and developing countries.³⁸

The very structure and approach of the Agreement include several 'development deficits' that make it unbalanced against the interest of the DCs.

TRIPS operates in a manner quite different from other key WTO Agreements. For example, both the GATT and the GATS agreements contain 'general exceptions' that even cover the basic provisions of MFN and national treatment. However, TRIPS contains no 'general exceptions' and only 'limited exceptions' as a transitional period, which many developing and least developed countries could not use properly for various reasons.³⁹ Unlike other WTO agreements, TRIPS lacks substantive provisions relating to SDT. The TRIPS provisions meant to protect the benefit of the patent holders are strictly worded. However, the issues such as technology transfer, public health, and other socio-development objectives are couched in 'best endeavour language'. This dichotomy has effectively 'turned TRIPS into a lopsided agreement'.⁴⁰ Added to this, Article 72 has blocked the possibilities of any reservations to any TRIPS provisions, thereby denouncing technological, developmental, and cultural differences among the countries. This rare approach is *sui generis* amongst other WTO agreements and does not fit with the traditional multilateral paradigm of promoting free trade and encouraging competition.⁴¹

In contrast to the 'tragedy of commons,' which explains why common resources tend to be overused in the absence of rules for their use, Heller and Eisenberg's study demonstrates how the proliferation of IPR results in the 'tragedy of anticommons,' where scarce resources are underutilised because too many owners can block their use.⁴²

³⁶ e.g., Correa, *Intellectual Property Rights, the WTO and Developing Countries* (n 9); Carlos María Correa, *Implementing the TRIPS Agreement: General Context and Implications for Developing Countries* (Third World Network 1998); John Barton and others, 'Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights' (Commission on Intellectual Property Rights 2002); FM Abbott, 'Editorial. The Enduring Enigma of TRIPS: A Challenge for the World Economic System' (1998) 1 *Journal of International Economic Law* 497; Frederick M Abbott, 'The TRIPS Agreement: A Guide for the South' (Geneva: South Center 1997); Michael Joseph Finger, *The Doha Agenda and Development: A View from the Uruguay Round* (Asian Development Bank 2002) <<http://hdl.handle.net/11540/1970>> accessed 10 October 2020.

³⁷ Nancy Birdsall, Dani Rodrik and Arvind Subramanian, 'How to Help Poor Countries' [2005] *Foreign Affairs* <<https://www.foreignaffairs.com/articles/2005-07-01/how-help-poor-countries>> accessed 10 January 2021.

³⁸ Barton and others (n 36).

³⁹ This issue is detailed in the later part of this chapter.

⁴⁰ UNCTAD, 'Intellectual Property in the World Trade Organization: Turning It into Developing Countries' Real Property' (United Nations Publications 2010) UNCTAD/DITC/TNCD/2006/8 8.

⁴¹ *ibid* 7–10.

⁴² Michael A Heller and Rebecca S Eisenberg, 'Can Patents Deter Innovation? The Anticommons in Biomedical Research' (1998) 280 *Science* 698.

Two competing approaches can be identified in the contemporary debate on TRIPS. On the one hand, supporters argue that robust IPRs protection will encourage corporations in developed countries to invest in research and development (R&D) and collaborate with companies in DCs on joint projects, facilitating innovation and greater technology transfer.⁴³ On the other hand, critics of the Agreement contend that strengthening IPRs regimes can hamper knowledge dissemination and reduce technology transfer by restricting imitation and reverse engineering, thereby making it more difficult to close the North-South technological gap.⁴⁴

Falvey, Foster, and Memedovic determined that both claims were exaggerated.⁴⁵ Several factors may influence the effect of IPR protection on innovation, growth, and technology diffusion in DCs, and the outcomes will vary between poor and advanced DCs.⁴⁶ The administrative cost of developing a patent system and enforcing TRIPS and the potential for market power abuses suggest that poor countries may lose out on TRIPS.⁴⁷ More robust IPRs protection may impede or prolong the imitative stage of their development, which is necessary for developing innovative capacity in many industries. Nevertheless, the potential for TRIPS benefits is greater in advanced DCs. Existing firms engaging in imitation could be incentivised through stronger IPR protection to shift resources towards adaptive innovation, thereby boosting trade and FDI flows into those countries.⁴⁸

Implementing the TRIPS agreement involves different types of costs to be paid by the countries. A greater part of the costs is captured by 'the transfers of income between countries, with the majority of countries estimated to make net payments abroad, the United States being a major beneficiary.'⁴⁹

⁴³ Andrea Filippetti and Daniele Archibugi, 'The Globalization of Intellectual Property Rights' in Andrea Filippetti and Daniele Archibugi (eds), *The Handbook of Global Science, Technology, and Innovation* (John Wiley & Sons, Ltd 2015); Titus O Awokuse and Hong Yin, 'Does Stronger Intellectual Property Rights Protection Induce More Bilateral Trade? Evidence from China's Imports' (2010) 38 *World Development* 1094.

⁴⁴ Yongmin Chen and Thitima Puttitanun, 'Intellectual Property Rights and Innovation in Developing Countries' (2005) 78 *Journal of development economics* 474; Filippetti and Archibugi (n 43).

⁴⁵ Rodney E Falvey, Neil Foster and Olga Memedovic, *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence* (UNIDO Geneva 2006) 59.

⁴⁶ Emmanuel Hassan, Ohid Yaqub and Stephanie Diepeveen, *Intellectual Property and Developing Countries: A Review of the Literature* (Rand 2010); Siebeck (n 12). Historically, many developed and developing countries have benefited from international technology transfer through non-market-based channels, particularly reverse engineering and imitation, as a result of lax IPR regimes

⁴⁷ Since rights holders engage in monopoly pricing that distorts consumer choice, strengthening IPR protection can reduce welfare, especially in a country with little or no R&D that could otherwise free-ride on foreign innovations.

⁴⁸ Falvey, Foster and Memedovic (n 45) 59. They also find evidence that multinational corporations are more willing to transfer technology to nations with stronger intellectual property rights, particularly in industries where products are susceptible to imitation (chemicals, pharmaceuticals).

⁴⁹ McCalman (n 2) 574. Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2008) 119. Finger (n 36) 12. Regarding economic estimates, 'the implementation of TRIPS would lead developing countries to pay an estimated US\$40 billion in rents annually to the United States alone.' Put another way, only the value of 'TRIPS-patents are worth 13 times more to the US' than the tariff liberalisation commitments it secured through the Uruguay Round. On the contrary, for South Korea, 'the TRIPS obligation is 18 times as large as her gain.'

Other significant implementation costs include the accommodation of TRIPS standards in a country's legal, administrative and enforcement infrastructure,⁵⁰ and the rising cost of access to the IPR-protected technology (e.g., via royalty payments) has increased exponentially since TRIPS.⁵¹

Therefore, the requirement to enforce IPR protection on a level that routinely exceeds these countries 'financial and administrative capabilities' drives pessimism in DCs.⁵²

IPRs are supposed to protect and encourage innovation but limit the spread of technological advances and increase the prices of protected products. Empirical studies of IPRs mainly focus on these trade-offs,⁵³ but modelling trade-related IPRs is hugely challenging as these issues are complex and ever-evolving. As evident, the results of different empirical and theoretical studies are often conflicting and do not lead to any definitive conclusion.⁵⁴

Still, Hassan, Yaqub, and Diepeveen conclude that IPR and national economic development had a U-shaped relationship, indicating that 'weak protection may ease economic development' at the beginning when income is low.⁵⁵

Moreover, IPRs are primarily designed to benefit producers rather than consumers, so they tend to disadvantage DCs. Being the 'second-comers' in the world economy, they bear a disproportionate share of the IPR-related costs, both in terms of higher consumer prices of the protected goods and enforcement of IPR regulations.

In summary, the TRIPS-inspired IP system turns into a mechanism of, as Maskus concluded, 'new laws and regulations that seem imbalanced in favour of IPR owners, mostly foreign, and biased against access for developing countries.'⁵⁶ Similarly, Rachel's analysis, which investigates the potential positive implications of TRIPS for DCs, ultimately posits that 'on balance, the TRIPS Agreement may nonetheless be detrimental to developing states.'⁵⁷

⁵⁰ Many DCs had minimal IP laws. So, for many, these obligations mean creating a new legal and administrative framework, e.g., capacity building for managing patent application filings, processing, examination and awarding.

⁵¹ Travis J Lybbert, 'On Assessing the Cost of TRIPS Implementation' (2002) 1 World Trade Review 309, 310. The situation is exacerbated by the extreme profit motive and exploitative business practices that are difficult to contain due to the lack of appropriate competition rules and resources to enforce those rules in many DCs.

⁵² Anna Lanoszka, 'The Global Politics of Intellectual Property Rights and Pharmaceutical Drug Policies in Developing Countries' (2003) 24 International Political Science Review 181, 187.

⁵³ Gene Grossman and Edwin LC Lai, 'International Protection of Intellectual Property' (National Bureau of Economic Research, Inc 2002) NBER Working Papers 8704 <<http://www.nber.org/papers/w8704.pdf>> accessed 23 September 2020. Edwin Lai and Larry Qiu, 'The North's Intellectual Property Rights Standard for the South?' 59(1) Journal of International Economics 183. Shubham Chaudhuri, Pinelopi K Goldberg and Panle Jia, 'Estimating the Effects of Global Patent Protection in Pharmaceuticals: A Case Study of Quinolones in India' (2006) 96 American Economic Review 1477.

⁵⁴ Yongmin Chen and Thitima Puttitanun, 'Intellectual Property Rights and Innovation in Developing Countries' (2005) 78 Journal of Development Economics 474; Falvey, Foster and Memedovic (n 45).

⁵⁵ Hassan, Yaqub and Diepeveen (n 46) xviii. Literature suggests the existence of a nonlinear function (i.e., a U-shaped curve) between IPRs and economic development, which initially decreases as income rises and then increases.

⁵⁶ Maskus, *Private Rights and Public Problems* (n 3) 315.

⁵⁷ Rachel Brewster, 'The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property' (2011) 12 Chicago Journal of International Law 1, 4.

These 'development deficits' have enormous implications for the overall development goals of DCs. Although access to knowledge and technology is crucial to development, TRIPS can hinder DCs access to such resources. Moreover, they lay bare the rhetoric in the stated objective of the TRIPS to contribute 'to the transfer and dissemination of technology ... in a manner conducive to social and economic welfare'.⁵⁸ Such welfare requires that DCs have a broader right to pursue legitimate public policy objectives.

6.5 TRIPS Agreement and Pharmaceutical Patents

The pharmaceutical industry has been among the staunchest supporters of a robust IPR regime and played a significant role in adopting the TRIPS agreement.

Many studies reckon the disproportionately high importance of IPRs to the industry.⁵⁹ A famous 1986 study reported that 65 per cent of pharmaceutical innovations would not have been marketed, and 60 per cent would not have been developed without patent protection.⁶⁰ Development of a new pharmaceutical product requires substantial investment,⁶¹ and the industry is highly competitive;⁶² however, it is relatively simple to imitate pharmaceutical products.⁶³

Before TRIPS, there was no international law obliging patent protection for pharmaceuticals. As a result, DCs have historically followed the footsteps of some industrialised countries, which did not extend patent protection to pharmaceutical products until the late 1970s.⁶⁴ Some DCs, offering protection from the early years, moved back by scraping or weakening protection. Turkey did that in 1961, Brazil in 1968, India in 1972, the Andean Pact countries in 1974 and Mexico in 1976.⁶⁵

The trend substantially reversed after the TRIPS agreement due to primarily threat or imposition of trade retaliation for failure to comply with IPR obligations.

⁵⁸ Article 7 of The TRIPS Agreement.

⁵⁹ Edwin Mansfield, 'Patents and Innovation: An Empirical Study' (1986) 32 *Management Science* 173; Frederick M Scherer, *The Economic Effects of Compulsory Patent Licensing* (Monograph series in finance and economics, New York University, Graduate School of Business Administration 1977); CT Taylor and ZA Silberston, *The Economic Impact of the Patent System: A Study of the British Experience (Department of Applied Economics Monographs)* (Cambridge University Press 1973) 231. As the business is highly expensive and risky, IPR is considered particularly important for the industry.

⁶⁰ Mansfield (n 59). The chemical industry is a distant second with 30 per cent and 38 per cent, respectively. The study used a random sample of 100 manufacturing firms in 12 industrial sectors from 1981 to 1983.

⁶¹ JR Virts and JF Weston, 'Expectations and the Allocation of Research and Development Resources' [1981] *Drugs and health*. Enterprise Institute, Washington DC.

⁶² William S Comanor, 'The Political Economy of the Pharmaceutical Industry' (1986) 24 *Journal of Economic Literature* 1178.

⁶³ Edwin Mansfield, 'How Rapidly Does New Industrial Technology Leak Out?' (1985) 34 *The Journal of Industrial Economics* 217.

⁶⁴ Carlos Primo Braga, 'Pharmaceuticals and Chemicals; Information; The Audio, Video, and Publishing Industries' in Wolfgang E Siebeck and others (eds), *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature* (World Bank Discussion Papers, WDP-112 1990) 47. Though pharmaceutical products came under patent protection in 1949, developed countries like Japan offered protection only in 1976, Switzerland in 1977 and Italy and Sweden in 1978.

⁶⁵ *ibid.*

Developing nations typically avoid granting pharmaceutical patent protection to prevent potential shortages of essential medicines.⁶⁶ They are also concerned that such protection may result in higher prices for essential medicines and a loss of control over technologies deemed vital to their development.⁶⁷

It is also a conventional view that patents drive up the prices of vital drugs. However, drug pricing has been debated over the past few decades. A patent has long been considered one of the main obstacles that block access to affordable medicine.⁶⁸ New or speciality drugs are becoming prohibitively expensive, costing hundreds or even thousands of dollars a pill or packet. For instance, Gilead's blockbuster drug, Sovaldi, a cure for hepatitis C (HCV), was launched at \$1,000 per pill – a whopping total of \$84,000 per course of treatment.⁶⁹ So why should drugs cost so unimaginably high?

The defence of the industry boils down to the higher risk and cost of drug innovation.⁷⁰ However, the actual cost of drug innovation is hard to determine as many factors influence it.⁷¹ R&D is not the only cost that drives up medicine prices. For instance, a 2008 study by Gagnon and Lexchin concluded that contrary to the industry's claim, promotion outweighs research and development, and companies spend nearly twice as much on promotion as they do on R&D.⁷² Pharmaceutical companies are primarily viewed by their owners and executives

⁶⁶ C Twinomukunz, 'The International Patent System: A Third World Perspective' (1982) 22 *Indian Journal of International Law* 31; R Michael Gadbaw and J Richards Timothy, 'India' in R Michael Gadbaw and J Richards Timothy (eds), *Intellectual Property Rights: Global Consensus, Global Conflict?* (Westview Press 1988) 86; UNCTAD, 'Major Issues in Transfer of Technology to Developing Countries: A Case Study of the Pharmaceutical Industry.' (1975) TD/B/C6/4. As ethical considerations demand that there should be, in the words of Mahatma Gandhi, 'no profiteering from life and death'. So, UNCTAD recommended supplying drugs to DCs at a minimal cost.

⁶⁷ Stefan Kirchanski, 'Protection of US Patent Rights in Developing Countries: US Efforts to Enforce Pharmaceutical Patents in Thailand' (1994) 16 *Loyola of Los Angeles International and Comparative Law Review* 569, 572.

⁶⁸ A patent is a means granted to the producer company to compensate and profit from their inventions. Nevertheless, how to regulate the charging of higher prices than social interest warrants?

⁶⁹ John LaMattina, 'Gilead's CEO Admits To "Failures" In Setting Price of \$1,000-A-Pill Breakthrough' (*Forbes*, 8 December 2016) <<https://www.forbes.com/sites/johnlamattina/2016/12/08/gileads-ceo-apologetic-about-sovaldis-1000-per-pill-price-tag/#2c6ed44c1a97>> accessed 27 September 2020; Sarah Boseley, 'Why Do New Medicines Cost so Much, and What Can We Do about It?' *The Guardian* (9 April 2018) <<https://www.theguardian.com/news/2018/apr/09/why-do-new-medicines-cost-so-much-and-what-can-we-do-about-it>> accessed 27 September 2020. Similarly, Kadcyla, a new breast-cancer drug, was estimated to cost about \$115,000 per patient per year in the UK in 2015.

⁷⁰ Sanjaya Lall, 'Price Competition and the International Pharmaceutical Industry' in Sanjaya Lall (ed), *The Multinational Corporation: Nine Essays* (Palgrave Macmillan UK 1980) 9.

⁷¹ Joseph A DiMasi, Henry G Grabowski and Ronald W Hansen, 'Innovation in the Pharmaceutical Industry: New Estimates of R&D Costs' (2016) 47 *Journal of Health Economics* 20; Jerry Avorn, 'The \$2.6 Billion Pill--Methodologic and Policy Considerations' (2015) 372 *The New England Journal of Medicine* 1877; Vinay Prasad and Sham Mailankody, 'Research and Development Spending to Bring a Single Cancer Drug to Market and Revenues After Approval' (2017) 177 *JAMA internal medicine* 1569. An oft-cited industry-funded study found the average cost of bringing a new drug to market between USD 2.56 billion to USD 2.87 billion. However, it is a deeply contested figure. For example, an in-depth 2017 study by Prasad and Mailankody estimated that the 'cost to develop a cancer drug is \$648.0 million, a figure significantly lower than prior estimates.'

⁷² Marc-André Gagnon and Joel Lexchin, 'The Cost of Pushing Pills: A New Estimate of Pharmaceutical Promotion Expenditures in the United States' (2008) 5 *PLOS Medicine* e1.

as investments that must increase in value every quarter.⁷³ Profiteering may be such flagrant and rampant that we see real-world examples of raising the prices of older medicine or medicinal product by about 500 per cent⁷⁴ or even about 5,000 per cent.⁷⁵ No such comparison of price rise is possible for new medicines, but it is not difficult to appreciate the price-setting trend.

There is evidence that in the public's mind, 'medicines are a special case' tied to a 'moral right to affordable treatment' distinct from the view and pursuit of pharmaceutical companies.⁷⁶ Higher pricing of patented drugs for many conditions has prompted public debates that call for 'affordable and fair' drug pricing models.⁷⁷ Different campaign groups and organisations, like Nobel prize winner *Médecins Sans Frontières*, long campaigned for fairness with the motto that medicines 'shouldn't be a luxury'.⁷⁸

Though the TRIPS provides flexibility to countries to take measures to protect public health, the right to use these flexibilities by DCs was challenged by multinational pharmaceutical companies and the governments of developed countries that are home to such corporations.⁷⁹

To clarify the ambiguities between public health needs and the terms of TRIPS, WTO members adopted the Doha Declaration in 2001.

⁷³ Danya Glabau, 'Conflicting Assumptions: The Meaning of Price in the Pharmaceutical Economy' (2017) 26 *Science as Culture* 455, 455; John P Geyman, 'The Corporate Transformation of Medicine and Its Impact on Costs and Access to Care' (2003) 16 *The Journal of the American Board of Family Practice* 443.

⁷⁴ Pharmaceutical company Mylan bought the auto-injecting device EpiPen in 2007 when the device's list price was \$57 per pack. In 2009, it was \$100 for a pack of two. By 2016, the price of a two-pack EpiPen shot up to more than \$600 without insurance, a 500% rise (though the price may vary among pharmacies). Lydia Ramsey Pflanzner, 'The Price of an EpiPen Has Skyrocketed More than 500% since 2009 — and Senators Are Asking for Answers' (*Business Insider*, 22 August 2016) <<https://www.businessinsider.com/epipen-price-increases-about-500-percent-2016-8>> accessed 17 January 2021.

⁷⁵ Turing Pharmaceuticals, a start-up run by a former hedge fund manager, acquired Daraprim, a 62-year-old medication used by Aids patients, in 2015 and immediately raised the price to \$750 a tablet from \$13.50, an about 5,000 per cent rise. Drug pricing is a tricky business. For comparison, the exact drug cost just 43 pence (about \$0.66) in 2015 in the UK, where the National Health Service (NHS) is the primary buyer and has a more prominent role in price-setting and price-capping drugs so that price cannot creep too high. On the other hand, the buyers are private insurance companies in the US. So, it is a market where prices can go up and down, depending on people's willingness to pay. For more, 'US Pharmaceutical Company Defends 5,000% Price Increase' *BBC News* (22 September 2015) <<https://www.bbc.com/news/world-us-canada-34320413>> accessed 17 January 2021.

⁷⁶ Boseley (n 69).

⁷⁷ 'Medicines Pricing and Financing' (*World Health Organization*) <<https://www.who.int/teams/health-product-and-policy-standards/medicines-selection-ip-and-affordability/pricing-financing>> accessed 28 September 2020. A new medicine, protected under patent, typically comes to the market at a higher price tag. However, following the expiry of the patent, competition and generic products emerge that cut down the price rapidly, often by more than 90 per cent.

⁷⁸ 'Medicines Shouldn't Be a Luxury' (*Médecins Sans Frontières Access Campaign*) <<https://msfaccess.org/medicines-shouldnt-be-luxury>> accessed 28 September 2020.

⁷⁹ 39 pharmaceutical companies in 2001 challenged South African legislation in the court that sought to use TRIPS flexibilities to allow parallel importation for reducing the cost of essential medicine. In addition, the USA filed a complaint against Brazil regarding its local working provision on compulsory licensing. (Request for the Establishment of a Panel by the United States, Brazil—Measures Affecting Patent Protection, WT/DS199/3 (9 January 2001). These actions resonated with the global community and campaigners due to their inseparable connection with the HIV/AIDS pandemic.

6.6 TRIPS Flexibilities and Doha Declaration

The TRIPS agreement has some built-in flexibilities to allow Members to implement IP laws and policies that suit their national circumstances and capacities.⁸⁰ Article 1:1 of the Agreement provides that Members 'shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.' This discretion was included to strike the right balance between patent rights and public health concerns.⁸¹

However, the multinational pharmaceutical companies (MNCs) and the governments of some developed countries questioned the right to use such policy options both legally and politically. This led to intense debate when 39 pharmaceutical companies sued the South African government challenging its use of such flexibilities.⁸² Amid massive public protests and international campaigns, the companies were forced to withdraw the suits, but the developments led to the adoption of the Doha Declaration on Public Health in 2001.⁸³

The adoption of the Doha Declaration represents the culmination of the longstanding debate between developed and developing countries over the scope, interpretation and use of the flexibilities enshrined in the TRIPS agreement for improving access to essential medicines. It recognises the concerns about the effects of TRIPS on prices and fear of pressure from trading partners or industry in using TRIPS flexibilities to affirm that the agreement 'does not and should not prevent members from taking measures to protect public health.'⁸⁴

'Accordingly, ... the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.'⁸⁵ These clarifications set out the fundamental principle that WTO Members can not only implement TRIPS in a manner that supports their public health objectives but that they should make maximum use of the flexibilities.⁸⁶

The Doha Declaration lists TRIPS Flexibilities, which are measures that countries can take to ensure access to medicines. They fall into two categories: time-based flexibility (extended

⁸⁰ Germán Velásquez and Pascale Boulet, *Globalization and Access to Drugs: Implications of the WHO/TRIPS Agreement* (World Health Organization, Action Programme on Essential Drugs 1997).

⁸¹ The 52nd World Health Assembly held in 1999 urges the member states, in its resolution WHA 52.38 on the Revised Drug Strategy, to "ensure that the interests of public health be a priority in pharmaceutical and health policies".

⁸² South Africa resorted to compulsory licenses and parallel imports in line with the WHO interpretation.

⁸³ Sisule Musungu and Cecilia Oh, 'The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicines?' (Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH), World Health Organization (WHO) 2005) 10

<https://www.who.int/intellectualproperty/studies/TRIPS_flexibilities/en/> accessed 18 October 2020.

⁸⁴ 'Declaration on the TRIPS Agreement and Public Health' (2001) Doha WTO Ministerial 2001: TRIPS WT/MIN(01)/DEC/2 20 November 2001

<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 29 September 2020. In effect, the countries can now override medical patents on public health grounds within the limits of TRIPS flexibilities.

⁸⁵ WTO, 'Doha Ministerial Declaration on the TRIPS Agreement and Public Health.' (2001) DOHA WTO Ministerial 2001: TRIPS WT/MIN(01)/DEC/2 para 4

<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> accessed 28 November 2020.

⁸⁶ Carlos Maria Correa, 'Protection of Data Submitted for the Registration of Pharmaceuticals: Implementing the Standards of the TRIPS Agreement' (The South Centre 2002) 11–12.

transition period for developing and least developed countries under Articles 65 and 66) and substantive flexibilities, which have a greater impact on public health policymaking. Three legal documents shape these flexibilities: the TRIPS agreement, the Doha Declaration, and WTO decisions on these options.⁸⁷

Significant substantive flexibilities inbuilt into the TRIPS, as clarified by the Doha declaration, include compulsory licensing (Article-31),⁸⁸ government use (Article-31),⁸⁹ parallel imports (Article-6),⁹⁰ strict patentability criteria (Article-27),⁹¹ use of competition policy (Articles-8, 31(k), 40),⁹² and other general exceptions (Article-30).⁹³

The TRIPS flexibilities are available to all WTO members but provide much-needed policy options to DCs. However, the flexibilities are not self-executing, so countries willing to benefit from them must enact specific domestic legal regime to make full use of them.⁹⁴

Though developed countries have already employed flexibilities like compulsory licenses prior to implementing the TRIPS Agreement, several factors, such as limited understanding and awareness of options, inadequate legal expertise and frameworks, and pressure from both developed countries and the global pharmaceutical industry, have hindered the utilisation of such flexibilities by developing nations.⁹⁵ In addition, there has been a growing trend of

⁸⁷ Musungu and Oh (n 83) 5.

⁸⁸ When negotiations for a reasonable price or a voluntary licence to import or manufacture a patented product fail, it reaffirmed Members' rights to issue a compulsory licence with a royalty payment to the patent holder.

⁸⁹ This is a form of compulsory licence issued in many countries to obtain generic medicines for use in public hospitals via imports or domestic production. Musungu and Oh (n 83) 20; James Love, 'Compulsory Licensing: Models For State Practice In Developing Countries, Access to Medicine and Compliance with the WTO TRIPS Accord' (Prepared for the UNDP 2001); World Bank, 'HIV/AIDS Medicines and Related Supplies: Contemporary Context and Procurement: Technical Guide' (World Bank 2004) 89; Commission on Intellectual Property Rights (IPR Commission), 'Integrating Intellectual Property Rights and Development Policy' (IPR Commission, London 2002); UNDP, 'Human Development Report 2001: Making New Technologies Work for Human Development' (OUP 2001). The UK Patents Act 1977;

⁹⁰ It is the import and resale of a patented product from another country where the product has been legitimately on sale at a lower price. The Doha Declaration confirms that countries can use international exhaustion to allow parallel importing of patented products from any country where they are sold. Exhaustion regimes, which can be national or international, limit a patent holder's control over a sold product.

⁹¹ Article 27 makes it mandatory for Members to grant a patent to all inventions with 'novelty, inventiveness and industrial applicability' but leaves it to them to define the scope of patentability of any invention. A UN report recommended that countries should make full use of flexibility by applying rigorous definitions of invention and patentability to limit the scope of patentable subject matter, facilitate competition, and limit inappropriate exploitation of patent rights. United Nations, 'The United Nations Secretary-General's High-Level Panel on Access to Medicines Report: Promoting Innovation and Access to Health Technologies' (2016) 27 <<http://www.unsgaccessmeds.org/final-report>> accessed 21 November 2020. Commission on Intellectual Property Rights (IPR Commission) (n 89) 49.

⁹² TRIPS allows competition policy to prevent or remedy their holders' anti-competitive use of IPR rights. Possible measures may include the issue of compulsory licenses in response to anti-competitive conduct and control of anti-competitive licensing.

⁹³ All patent laws provide some exceptions to the exclusive rights of the patent holder. Top exceptions include use for experiments or research and early working exception.

⁹⁴ Musungu and Oh (n 83) 5.

⁹⁵ Martin Khor, 'Compulsory License and "Government Use" to Promote Access to Medicines: Some Examples' (Third World Network 2014) 6.

developed countries signing FTAs with DCs that contain provisions to remove or reduce TRIPS flexibilities.⁹⁶

6.7 The Transition Period in the TRIPS

6.7.1 Transition Period in the TRIPS Agreement

The transition period is now considered an essential component of SDT provisions.⁹⁷ There was no provision for a transition period under the GATT.⁹⁸ This is one of the latest tools of differential arrangement that came into being as an innovation of the Uruguay Round.⁹⁹

The transition period refers to the time necessary for a Member state 'to bring itself into full conformity with the obligations set out by an Agreement'.¹⁰⁰ Since TRIPS was a new and unprecedented WTO agreement that requires substantial adjustments to the internal legal systems of developing and least developed countries,¹⁰¹ the issue of transition periods attracted massive attention during the negotiation process.¹⁰²

Notably, unlike other WTO Agreements, the TRIPS operates very differently, and its architecture has no place for the typical structural elements of SDT. It follows the 'one-size-fits-all' principle¹⁰³ that specifies the same standards for all Member countries, irrespective of whether the country is the United Kingdom, China, Maldives, or Bangladesh.¹⁰⁴ The only

⁹⁶ Susan K Sell, 'TRIPS-Plus Free Trade Agreements and Access to Medicines' (2007) 28 *Liverpool Law Review* 41.

⁹⁷ Nora Neufeld, 'The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement' (WTO Staff Working Paper 2014) Working Paper ERSD-2014-06 8. The transition period provisions are included in most WTO agreements as an SDT tool. They exempt the eligible countries from the duty to implement the Agreement, wholly or partly, for the specified period. They are automatically effective, but the exemptions are almost always subject to certain conditions.

⁹⁸ UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) 706.

⁹⁹ Sheila Page, 'The Evolution of Special and Differential Treatment (SDT) in the Multilateral Trading System' (Overseas Development Institute 2004) 4. See sub-heading 4.3.3 for more on Uruguay Round.

¹⁰⁰ UNCTAD-ICTSD (n 98) 706. Though the transition period provisions are primarily designed to support developing and least developed countries to prepare for better compliance with their WTO obligations, it may be noted that developed countries may well be the beneficiaries of this tool as well. For example, the Agreement on Textiles and Clothing offered a 10-year transition period to developed countries for phasing out quotas. However, there are questions about whether this flexibility serves its primary purpose in helping DCs and its beneficial impact on their trade capacity building.

¹⁰¹ The TRIPS introduced a common set of minimum standards for protecting IPR, a standard similar to the level of protection provided in most developed countries, for all countries irrespective of their technological or socio-economic development status. Transition periods were, however, allowed as a tool of assistance for implementation with different lengths of time for different countries.

¹⁰² UNCTAD-ICTSD (n 98) 707. TRIPS is an unprecedented WTO agreement that primarily protects the interest of the developed countries but requires substantial internal adjustment in the legal system of the developing and least developed countries. Most DCs lack a comparable tradition for protecting intellectual property rights. About 14 DCs led by India, Brazil and Argentina resisted the move to include substantial IPR standards at the beginning of the Uruguay Round negotiations. When they ultimately gave in, the final negotiated text clarified that a transition period would be necessary for implementation.

¹⁰³ Rohan George, 'Does One Size Fit All? A Comparative Study to Determine an Alternative to International Patent Harmonization' [2009] Cornell Law School Inter-University Graduate Student Conference Papers. The existing approaches to follow the 'one-size-fits-all' policy for creating a global unified, robust IPR system fail to recognise key differences in various historical, economic, and social factors across different countries. So, such a unified approach 'is not merely lacking in benefits towards certain countries but may be detrimental towards them as well.'

¹⁰⁴ Unlike TRIPS, even the basic provisions of MFN and national treatment are subject to general exceptions in the GATT and the GATS agreements.

concessions available are transition periods and technical cooperation. The TRIPS Agreement includes three different sets of transition periods: for developed countries, developing countries and LDCs.

Transition periods for developed and developing countries in the TRIPS have expired, as have most transition periods stipulated by other WTO agreements.¹⁰⁵

6.7.1.1 Transition Period for Developed and Developing Countries

Article 65.1 of the Agreement provides a grace period of one year from the date of entry into force¹⁰⁶ for all members, both developed and developing countries, to bring their legislation and practices into conformity. DCs are allowed an additional period of four years until 1 January 2000¹⁰⁷ under Art 65.2 and Art.65.3 to implement the Agreement's provisions other than the basic principles.¹⁰⁸ DCs that did not provide patent protection for pharmaceutical products and agricultural chemicals until 1 January 1995 could have delayed up to 1 January 2005 under Article 65.4 to introduce the protection.¹⁰⁹

6.7.1.2 Transition Period for LDCs

a. General transition period

Article 66.1 of the Agreement provides for an initial 10-year transition period for LDCs, which could be extended further by a TRIPS Council decision based on a sufficiently motivated request by any LDC.

This provision provides a significant policy space to LDCs by an extendable transition period during which they are not required to implement the Agreement (except for Articles 3, 4 and 5, which contain provisions on national treatment and the MFN treatment obligations). This flexibility was offered in recognition of the 'special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base.'¹¹⁰

Article 66.1 states that the 'Council of TRIPS *shall*, upon duly motivated request ... *accord* extensions of this period'.¹¹¹ As the Article contains mandatory wording, the TRIPS Council lacks the discretion to deny a request for an extension of the transition period. It also lacks the legal authority to impose new conditions on LDCs. Accordingly, article 66.1 imposes no

¹⁰⁵ WTO, 'Note by the Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions' WT/COMTD/W/77, 25 October 2000 5. Other than TRIPS, Agreements on Agriculture; SPS Agreement, TBT Agreement, Trade-related investment measures (TRIMs), Customs Valuation Agreement, Implementation of Article VII of GATT 1994; Import Licensing Procedures; Subsidies and Countervailing Measures; and Safeguards contain one or more provisions on transition periods. Like TRIPS, some agreements differentiate between developing and least-developed countries, affecting the transition period length and attached conditions.

¹⁰⁶ The Agreement entered into force on 1 January 1995.

¹⁰⁷ 'Intellectual Property (TRIPS) - Fact Sheet - TRIPS and Pharmaceutical Patents: Developing Countries' Transition Periods' (WTO) <https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm04_e.htm> accessed 9 August 2020.

¹⁰⁸ Articles 3, 4, and 5 deal with the general principles of national treatment, most favoured nation (MFN), and maintenance of investment policy reviews.

¹⁰⁹ The issue was only settled at the very end of the negotiation. Developing countries hoped to gain in textiles and agriculture instead of what they might lose in new areas of TRIPS and Services. In fact, transitional periods for both Textile Agreements and patent protection under TRIPS for DCs expired on 1 January 2005.

¹¹⁰ Article 66.1, TRIPS Agreement

¹¹¹ Emphasis added

restrictions on the length and scope of the transition period and does not require LDCs to meet any additional conditions to benefit from the transition period. However, the TRIPS Council has extended the transition time for varied durations and scope, and the extensions' conditions have been negotiated so far.¹¹² The Article 66.1 transition period has been extended thrice (2005, 2013 and 2021). The most recent extension granted to LDCs in July 2021 is valid until 1 July 2034 or until they cease to be LDCs, whichever comes first.¹¹³

b. Special transition period for pharmaceuticals

LDCs also benefit from a specific transition period accorded under Paragraph 7 of the Doha Declaration on the TRIPS Agreement and Public Health, which reflects the decision on the exemption of LDCs from the implementation of Sections 5 and 7 of Part II of the TRIPS Agreement concerning pharmaceutical products. This pharmaceutical products-specific exemption has been extended twice, in 2002 and 2015.¹¹⁴ This transition period is available to LDCs until 1 January 2033 or until graduation, whichever occurs first. This transition period includes exemption from the obligation to protect patents and undisclosed information,¹¹⁵ along with a waiver for Articles 70.8 (mailbox requirements) and 70.9 (exclusive marketing rights).¹¹⁶

6.7.2 Effectiveness of TRIPS Transition Period

6.7.2.1 Are they helpful?

The most important provision for the transition period is Article 65.4, which provides an extra five years for implementing product patents in pharmaceuticals and agricultural chemicals. However, its scope is curtailed by Articles 70.8 and 70.9, which require acceptance of product patent applications from the very first day of the Agreement entering into force, and the grant of exclusive marketing rights if a few conditions are met.

Watal argues that they effectively override and nullify the transition arrangements granted in Article 65.4.¹¹⁷ Thus, just several countries have fully availed themselves of the transition period¹¹⁸ while most DCs updated domestic legislation immediately, 'as the effect of patents

¹¹² Nirmalya Syam, 'Need for Extension of the LDC Transition Period Under Article 66.1 of the TRIPS Agreement Until Graduation and Beyond' (South Centre) Policy Brief No-88/March 2021.

¹¹³ The decision of the Council for TRIPS, 'Extension of the Transition Period under Article 66.1 for Least-Developed Country Members' (WTO 2021) IP/C/88.

¹¹⁴ The decision of the Council for TRIPS, 'Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products' (2015) IP/C/73 of 6 November 2015; Decision of the Council for TRIPS, 'Extension of the Transition Period under Article 66.1 for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products' (2002) IP/C/25 of 1 July 2002.

¹¹⁵ The decision of the Council for TRIPS (n 135).

¹¹⁶ The decision of General Council, 'Least Developed Country Members – Obligations under Article 70.8 and Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products' WT/L/971, 02/12/2015. Mailbox refers to the TRIPS Agreement requirement that WTO members who do not provide pharmaceutical patent protection establish a method for filing patent applications for these products. They must also implement a system for granting 'exclusive marketing rights' for products for which patent applications have been submitted.

¹¹⁷ Jayashree Watal, 'Introducing Product Patents in the Indian Pharmaceutical Sector' (1996) 20 World Competition 5. Developing countries were allowed no time, not even a day, to decide on these sensitive issues.

¹¹⁸ One notable exception was India, which opted to implement the interim provisions in Articles 70.8 and 70.9. Jayashree Watal, 'Implementing the TRIPS Agreement: Policy Options Open to India' (1997) 32 Economic and Political Weekly 2461.

and exclusive marketing rights is practically the same.¹¹⁹ The TRIPS-plus standards in several bilateral or regional FTAs compelled even the leading DCs, including Brazil, Thailand, Chile, and Argentina, to cut or forfeit the transition period.¹²⁰

Like many WTO flexibility, transition periods may provide vital policy space to adapt and upgrade the new regimes. However, only a few DCs could fully use the transition period. For instance, Using the transition period, India has produced low-cost generic drugs, including the vital lifesaving HIV/AIDs retroviral and supplied them to low-income countries at a fraction of the cost of patented medicines.¹²¹ However, not many other countries replicated this success.

A transition period is much more necessary for LDCs due to economic, financial, and administrative constraints and a lower capacity for adaptation and implementation.¹²² As LDCs are still enjoying access to the transition period, the grace period is expected to encourage their growth and development of pharmaceutical products. However, LDCs face many binding constraints in enhancing production capacity and expanding trade IPR is only a tiny part.

Effective use of the transition period by LDCs to enhance development objectives is rare. A few LDCs, such as Bangladesh, Ethiopia, Tanzania and Uganda, have made significant gains in the domestic production of pharmaceuticals. Uganda, Rwanda, and Cambodia used their TRIPS extended transition periods to build on legislation and the subsequent manufacturing of HIV medicines.¹²³ The Bangladesh pharmaceutical industry's use of the grace period is a good example. In contrast to other LDCs, Bangladesh's pharmaceutical industry is growing fast,¹²⁴ and its production has reached a level of scale, sophistication, and export orientation, serving 97% of its domestic market and exporting to 131 other countries.¹²⁵

6.7.2.2 Use of Transition Period by Pharmaceutical Industry: The Case of India

India is known as the 'pharmacy of the world' because it delivers cost-effective, high-quality generic drugs globally.¹²⁶ Patent protection in India's pharmaceutical industry furnishes an exciting experiment for other DCs. The industry had strong product and process patent

¹¹⁹ Jayashree Watal, 'The TRIPS Agreement and Developing Countries: Strong, Weak, or Balanced Protection' (1998) 1 Journal of World Intellectual Property 281, 287.

¹²⁰ UNCTAD, 'Intellectual Property in the World Trade Organization: Turning It into Developing Countries' Real Property' (n 40) 60.

¹²¹ UNAIDS Technical Brief, 'Implementation of TRIPS and Access to Medicines for HIV after January 2016: Strategies and Options for Least Developed Countries' (UNAIDS 2011) <https://www.unaids.org/en/resources/documents/2011/20111122_JC2258_techbrief_TRIPS-access-medicines-LDC> accessed 30 September 2020.

¹²² The transition period helps conserve the autonomy of LDCs to pursue proper development, innovation, and technological promotion policies that suits their local needs and priorities. Therefore, LDCs are provided with the most prolonged transition period currently in effect.

¹²³ UNAIDS Technical Brief (n 121).

¹²⁴ Bangladesh Bureau of Statistics data. The industry has experienced an average of 8.3% growth between 2014 and 2018.

¹²⁵ UN Comtrade data. The industry is the biggest white-collar employer in the country. It has diversified the country's limited export basket and helped expand access to essential medicines in Bangladesh and other LDCs.

¹²⁶ Pratik, 'The Indian Pharmaceutical Industry: The "Pharmacy of the World"? - Thoughts from the Centre' (Deloitte, 20 March 2020) <<https://blogs.deloitte.co.uk/health/2020/03/the-indian-pharmaceutical-industry-the-pharmacy-of-the-world.html>> accessed 5 January 2021; 'Pharmaceutical Industry in India: Invest in Pharma Sector' <<https://www.investindia.gov.in/sector/pharmaceuticals>> accessed 5 January 2021.

protection under the colonial-era Patents and Designs Act of 1911.¹²⁷ Then the Patents and Designs Act of 1970 brought about a few fundamental changes, such as offering patents only for processes and not for products and reducing the term of a patent to a maximum of seven years. In addition, adopting only process patents as opposed to product patents facilitated reverse engineering and the development of alternative processes for pharmaceutical products patented elsewhere.¹²⁸ Though it had some implications on FDI, the local firms, supported by publicly funded research,¹²⁹ were quick to catch up and began to produce generic versions of newly invented drugs patented elsewhere between one to six years.¹³⁰

With the liberalisation of the Indian economy in the 1990s, the Patent Act of 1970 was amended in 1999, 2002, and 2005 to ensure compliance with the TRIPS, incorporating 20-year product and process patent terms and different TRIPS flexibilities.¹³¹

Now the industry has upgraded in the global value chain (GVC) by embracing state-of-the-art technologies, leveraging their scale and long experience, and focusing on the more developed and profitable markets.¹³²

6.7.2.3 Can LDCs Replicate the Indian Experience?

The Indian experience has three vital lessons for LDCs that would like to use the transition period to develop a generic pharmaceutical industry,¹³³ notably: refraining from offering product patents in pharmaceuticals,¹³⁴ enhancing technological capability to develop generic versions of newly discovered drugs and developing a knowledge partnership between public-funded research and private firms.

Local production of pharmaceutical products has received intense attention in international, regional, and national forums since the 1970s.¹³⁵ The current COVID-19 pandemic catapulted the issue to the forefront again. As the LDCs are exempted from enforcing pharmaceutical patents till 2033, can they use the period to achieve a firm footing for the local production of vital medicines?

¹²⁷ The Act provided 16 years of protection which was extendable by 10 years.

¹²⁸ Pablo Challu, 'The Consequences of Pharmaceutical Product Patenting' (1991) 15 *World Competition* 65; Ha-Joon Chang, *Globalisation, Economic Development & the Role of the State* (Zed Books 2003). However, was it fair for India to deny product patent protection while enjoying the fruits of such protection in developed countries? This question has no easy answer as it touches on many issues, including public health considerations in the poorest part of the world. However, this was nothing new. Both Challu and Chang showed that many developed countries such as Italy, Japan, Germany, and Switzerland only allowed pharmaceutical product patents only in the 1970s, while Spain and Canada refrained from doing so until the 1990s.

¹²⁹ Biswajit Dhar, C Niranjana Rao and Veena Gupta, 'A Case Study of the Pharmaceutical Industry in India' [2002] UNCTAD.

¹³⁰ *ibid* 20.

¹³¹ It also included provisions for protecting and continuing the generic medicine productions on fulfilment of certain conditions.

¹³² Atsuko Kamiike, 'The TRIPS Agreement and the Pharmaceutical Industry in India' (2020) 32 *Journal of Interdisciplinary Economics* 95.

¹³³ Developing countries passed their transition period long ago; it may now only be instructive for the LDCs.

¹³⁴ Now both product and process patents are obligatory under Article 27 of TRIPS.

¹³⁵ The issue was discussed in 1978 by WHO as mentioned in the WHO Report of the International Conference on Primary Health Care (Para. 93) and in Resolution WHA 31.32 (1978)

It is noted that the pharmaceutical industry is a technology-intensive, science-based industry that requires higher skills, cutting-edge technologies, and significant investments. Since LDCs are severely constrained in capital supply, human resources, and institutional capacity, establishing and expanding the pharmaceutical industry in LDCs is difficult. Still, several low-income countries, including Bangladesh, Ethiopia, Uganda, Kenya, Cameroon, and Tanzania, have made significant strides in locally producing pharmaceuticals and generic versions of patent-protected drugs.¹³⁶

However, they face numerous constraints in establishing viable local production facilities that meet quality standards.

The UNCTAD concluded that the transition period could be a significant selling point for the LDCs to attract large investments, but it will not be sufficient to entice generic companies to invest in local pharmaceutical production.¹³⁷

In addition, several events currently shaping the global pharmaceutical industry offer the LDCs an unprecedented opportunity to grow rapidly in the sector,¹³⁸ in particular, the expiry of the patents of a series of blockbuster drugs in the coming years, offering possibilities for generic producers in DCs. The originator multinational pharmaceutical companies are more likely to partner with profitable generic manufacturers as part of their business strategy. Moreover, DCs (e.g., India, China, and Brazil) that thrived on generic medicine industries are now required to patent their products to comply with TRIPS. Consequently, they are moving up the value chain to produce primarily for developed-country markets, leaving growth opportunities for LDC companies that can still legally produce on-patent drugs.¹³⁹

To ensure that firms in LDCs can maximise these opportunities, LDCs must strengthen their productive capacities with policy support and publicly funded research initiatives and develop a regulatory framework that integrates TRIPS flexibilities and public-health objectives.¹⁴⁰

With the right policy environment, low standards of patent protection have helped countries like India and Brazil develop and expand their pharmaceutical industries. There is a real possibility that LDCs with a moderate pharmaceutical foundation may benefit in the same way.

¹³⁶ UNCTAD, 'Local Production of Pharmaceuticals and Related Technology Transfer in Developing Countries: A Series of Case Studies by the UNCTAD Secretariat' (UNCTAD 2011) UNCTAD/DIAE/PCB/2011/.

¹³⁷ UNCTAD, 'Investment in Pharmaceutical Production in the Least Developed Countries: A Guide for Policy Makers and Investment Promotion Agencies.' (UNCTAD 2011) 40–42. Nevertheless, it would provide the LDCs with the necessary policy space to take measures that would have been prohibited under TRIPS to promote the expansion of industrial capacity.

¹³⁸ UNCTAD, 'Local Production of Pharmaceuticals and Related Technology Transfer in Developing Countries' (n 136).

¹³⁹ *ibid.*

¹⁴⁰ UNCTAD, 'Investment in Pharmaceutical Production in the Least Developed Countries: A Guide for Policy Makers and Investment Promotion Agencies.' (n 137) 40–42; Gana (n 14) 746.

6.8 Technical Assistance in the TRIPS

6.8.1 Technical Assistance and Technology Transfer in TRIPS Agreement

Technical assistance is an essential element of SDT offered to developing and least developed countries.¹⁴¹

Though not specifically defined by WTO,¹⁴² most WTO agreements have included provisions for trade-related technical assistance (TRTA) in one or the other forms.¹⁴³ Ministers at WTO's 4th Ministerial Conference in Doha declared 'technical cooperation and capacity building' as 'core elements of the development dimension of the multilateral trading system'.¹⁴⁴

The TRIPS sets a global minimum standard for IPR protection and requires adaptation of that standard in national legislation, which calls for substantial IPR-related capacity building. Article 67 did not expressly prescribe technical assistance but technical cooperation, which reflects the complex nature and the multi-stakeholder regime involved. Technical cooperation activities are not explicitly defined in the TRIPS Agreement, and cooperation under this provision is not mandatory.¹⁴⁵

However, developed countries have a duty to provide to DCs 'on request and on mutually agreed terms and conditions, technical and financial cooperation' in three areas: preparation of domestic laws, their enforcement, and the establishment of regulatory bodies, including the training of personnel.¹⁴⁶

Another pertinent provision for LDCs is Article 66.2, which states that 'developed country Members shall provide incentives to enterprises and institutions in their territories to

¹⁴¹ Multilateral trade liberalisation allows DCs greater access to the developed country markets. However, access is not enough for them to take full advantage of the opportunities provided through international trade. Capacity constraints prevent them from turning trade opportunities into trade flows and expanding them over time to achieve growth. Therefore, building the capacity to trade and effective domestic policy reform is vital to benefit from trade liberalisation.

¹⁴² The Twelfth International Congress of the International Institute approved a working definition: 'Technical assistance consists in the transmission of learning, knowledge, and techniques or material and human resources to help those who receive it to solve specific problems more suitably in keeping with their needs.' Twelfth International Congress, Vienna: International Institute of Administrative Sciences, 'Technical Assistance in Public Administration: Lessons of Experience and Possible Improvements' (July 1962) 12, quoted in Sidney C Sufirin, 'Technical Assistance—Theory and Guidelines (Syracuse University Press 1966) 44.

¹⁴³ Most WTO agreements and instruments, such as the TBT Agreement, the SPS Agreement, the Customs Valuation Agreement, the Pre-shipment Inspection Agreement, the GATS, the Trade Facilitation Agreement, the Dispute Settlement Understanding, the Trade Policy Review Mechanism, and the Government Procurement Agreement, contain substantive provisions on technical assistance. Only a few WTO agreements, such as the Agreement on Trade-Related Investment Measures (TRIMs), Agreement on Safeguards, and Agreement on Subsidies and Countervailing Measures, do not have specific technical assistance provisions. The technical assistance provisions of TRIPS agreements are analysed here due to their pertinence to this research.

¹⁴⁴ WTO, 'WTO Ministerial Declaration, WT/MIN(01)/DEC1, 20 November 2001' para 38. However, there are controversies about who provides TRTA with what priorities and who gets them under what conditions. In addition, the effectiveness of different TRTA activities and their actual impact on DCs' trade capacity and volume remain under question.

¹⁴⁵ BN Pandey and Prabhat Kumar Saha, 'Technical Cooperation under Trips Agreement: Flexibilities and Options for Developing Countries' (2011) 53 Journal of the Indian Law Institute 652, 656.

¹⁴⁶ Keith E Maskus, 'Using the International Trading System to Foster Technology Transfer for Economic Development' [2005] Michigan State Law Review 219; UNCTAD-ICTSD (n 98) 730. During negotiations, the parties are free to determine the nature and scope of the cooperation.

promote and encourage technology transfer to least-developed country Members to enable them to create a sound and viable technological base.'

However, most importantly, Article 66.2 establishes a mandatory legal requirement; it does not merely make a recommendation.¹⁴⁷ Though developed country governments are not required to carry out technology transfer themselves, they are obligated to provide incentives to their 'enterprises and institutions' to encourage technology flows to LDCs. It also reflects the stated objectives of the Agreement that the protection and enforcement of IPR should 'contribute to the promotion of technological innovation and the transfer and dissemination of technology.'¹⁴⁸

6.8.2 Effectiveness of Technical Assistance and technology transfer

6.8.2.1 Effectiveness of Technical Cooperation

In designing their IPR regime, Members may 'adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development,'¹⁴⁹ and 'to prevent the abuse of intellectual property rights by right holders'.¹⁵⁰

Technical assistance is provided on a multilateral and bilateral basis under Articles 67 and 62.2 of the TRIPS Agreement. Such assistance is supposed to facilitate the exploration of TRIPS flexibilities and enhance their development objectives.

As many developing and least developed countries lack intellectual property experience and expertise, their need for technical assistance is obvious. However, there are questions as to whether the technical assistance provided by WIPO is always tailored to the needs of beneficiary DCs.¹⁵¹ Assistance providers often face criticism for prioritising the interests of IP holders over broader development concerns in their advice.¹⁵²

a. Multilateral technical cooperation

Under the WIPO-WTO Agreement,¹⁵³ the WIPO carried out extensive activities mostly in response to requests from developing country WIPO members. These activities included legislative advice, human resource development, institution building, modernisation of the intellectual property system, and enforcement. Unlike other UN agencies, WIPO is primarily self-funded, receiving 95% of its revenue from the private sector through fees paid by patent

¹⁴⁷ Carlos Correa, 'Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?' in Keith E Maskus and Jerome H Reichman (eds), *International public goods and transfer of technology under a globalised intellectual property regime* (Cambridge University Press 2005) 263. In addition, the 2001 WTO Doha Decision on Implementation-Related Issues and Concerns and the 2001 Declaration on the TRIPS Agreement and Public Health reaffirm the mandatory nature of the obligation.

¹⁴⁸ Article 7, TRIPS Agreement

¹⁴⁹ Article 8, TRIPS Agreement

¹⁵⁰ Article 9, TRIPS Agreement

¹⁵¹ Maskus, 'Using the International Trading System to Foster Technology Transfer for Economic Development' (n 146).

¹⁵² Sisule Musungu, 'ICTSD-UNCTAD Dialogue, 2nd Bellagio Series on Development and Intellectual Property', 18-21 September 2003.

¹⁵³ The WIPO-WTO Agreement of 1995 stipulated cooperation between WIPO and WTO in providing legal-technical assistance to DCs regarding the TRIPS Agreement.

applicants.¹⁵⁴ As a result, it advocates for a more robust IPR regime in developing nations.¹⁵⁵ Recently, the technical cooperation activities of the WIPO have been criticised for not being tailored to the needs of beneficiaries and for being unlikely to assist them in utilising TRIPS flexibilities.¹⁵⁶

b. Bilateral Technical cooperation

Most bilateral technical cooperation initiatives fall under Article 67, which restricts the quantity and quality of such assistance.¹⁵⁷ Assistance under Article 67 'shall include' IP protection and enforcement, but developed countries are not required to assist DCs in enforcing their domestic competition laws or use TRIPS flexibilities to prevent IPR abuses. Thus, these developed country activities emphasise the protection and enforcement of IPR rather than assisting DCs in achieving their development goals through the optimal use of IPR.¹⁵⁸ An examination of the developed countries' submission to the TRIPS council demonstrates their emphasis on protection, reflecting their political and economic considerations.¹⁵⁹ As a result, in contrast to facilitation, technical cooperation may restrict the ability of DCs to implement TRIPS optimally.¹⁶⁰

6.8.2.2 Effectiveness of Technology Transfer to LDCs

The WTO website notes the widely accepted proposition that 'developing countries, in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights.'¹⁶¹ Article 66.2 of the TRIPS agreement requires developed country members to provide incentives to enterprises and institutions in their territory to promote and encourage technology transfer to LDC members so that they may establish a sound and viable technological base.¹⁶² LDCs have long demanded that this requirement be effective.¹⁶³

¹⁵⁴ WIPO Press Release, 'WIPO Financial Situation Strong, Member States to Decide Use of Available Reserves', 24 July 2007, PR/2007/503. WIPO is a multilateral organisation with a mandate to support intellectual property protection.

¹⁵⁵ DN Matthews, 'TRIPS Flexibilities and Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements' [2005] *European Intellectual Property Review*.

¹⁵⁶ Musungu (n 152).

¹⁵⁷ Article 67 risks perpetuating a culture of dependency by requiring DCs to request assistance from developed country members and agree to terms and conditions.

¹⁵⁸ Matthews (n 20).

¹⁵⁹ *ibid.* Analysis of US, Japanese, and EU submissions to the TRIPS Council regarding article 67 supports the notion that bilateral technical cooperation tends to emphasise IPR protection and enforcement objectives. Moreover, solid private-sector involvement with government agencies of developed countries indicates that advice provided to DCs is linked to private business interests.

¹⁶⁰ Maskus, 'Using the International Trading System to Foster Technology Transfer for Economic Development' (n 146).

¹⁶¹ WTO, 'TRIPS Issues - Technology Transfer' (*WTO*)

<https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm> accessed 7 May 2022.

¹⁶² Suerie Moon, 'Does TRIPS Art. 66.2 Encourage Technology Transfer to LDCs' [2008] An analysis of country submissions to the TRIPS council (1999-2007). UNCTAD-ICTSD Policy Brief 2. In the development community, it is widely acknowledged that LDCs have ownership, leadership, and primary responsibility for their development, and indeed, Article 66.2 aims to support LDCs members in establishing a sound and viable technological base.

¹⁶³ At the 2001 Doha Ministerial Conference, ministers agreed that the TRIPS Council would establish 'a mechanism for ensuring the monitoring and full implementation of the obligations.' In February 2003, the TRIPS Council adopted a decision establishing this mechanism, outlining the information developed countries must provide by the end of the year regarding how their incentives function in practice. Currently, this decision is being implemented. Formal documents containing Council submissions and discussions can be found online.

Watal and Caminero have analysed the implementation of Art.66.2 based on the reports submitted by developed country members from 2003 to 2016 and have found the absence of a common understanding of fundamental concepts such as ‘technology transfer’ and ‘incentives’ used in the text of Art.66.2.¹⁶⁴

The reports do not paint a clear picture of the steps taken to incentivise the promotion of technology transfer to LDCs to provide them with a solid and viable technological foundation.¹⁶⁵ Most programmes and activities reported do not target technology transfer and do not even target LDCs.¹⁶⁶ This is also because ‘TRIPS is relatively clear on country obligations regarding IP protection, but remarkably vague on what would comprise satisfactory compliance with article 66.2.’¹⁶⁷

6.9 Can Developing Countries Make Effective Use of IPRs?

Protecting IPRs may be one way to encourage technological development and innovation. However, IPR protection has high costs, including for public health, agriculture and food security, biodiversity and traditional knowledge, access to educational, technical, and scientific information, and, more generally, possible costs arising from the resulting monopoly on knowledge.¹⁶⁸ Building an enforcement mechanism requires substantial additional costs. These costs (and resulting benefits) of IPR vary considerably between developed and developing countries. The ‘development deficits’ in the TRIPS Agreement may have substantial implications for DCs.¹⁶⁹ For some DCs, IPR protection to comply with the TRIPS ‘may not generate any positive implications.’¹⁷⁰

History reveals that countries have strategically and cautiously managed their IP systems to cater to their developmental needs. As a result, developed countries used weaker IP systems in their early stages of building industrial and technological capacity. For example, major industrial economies such as Switzerland, Italy, Japan, and Switzerland provided patent protection for pharmaceuticals only after their per capita income had risen to about \$20,000.¹⁷¹ Successful East Asian economies followed suit to benefit from reverse engineering and imitations.

¹⁶⁴ Jayashree Watal and Leticia Caminero, ‘Least-Developed Countries, Transfer of Technology and the TRIPS Agreement’, *Intellectual Property and Development: Understanding the Interfaces* (Springer 2019) 22.

¹⁶⁵ Communication from Australia; Canada; Chile; the European Union; Japan; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and the United States of America, “‘Intellectual Property and Innovation: Summary on the 2019 Theme – Public Private Collaborations in Innovation’” IP/C/W/661 para. 2, 24 January 2020.

¹⁶⁶ Moon (n 162) 8. The country reports do not contain sufficient information to determine whether these activities resulted in additional incentives for technology transfer beyond the usual foreign aid objectives.

¹⁶⁷ *ibid* 7.

¹⁶⁸ UNCTAD, ‘Intellectual Property in the World Trade Organization: Turning It into Developing Countries’ Real Property’ (n 40) 1.

¹⁶⁹ *ibid* 7; Abbott (n 36); Correa, *Intellectual Property Rights, the WTO and Developing Countries* (n 9).

¹⁷⁰ UNCTAD, ‘Intellectual Property in the World Trade Organization: Turning It into Developing Countries’ Real Property’ (n 40) 1.

¹⁷¹ Birdsall, Rodrik and Subramanian (n 37). Switzerland, the world’s second-largest exporter of packaged medicine in 2018, did not allow patents on medicines until the late 1970s.<https://oec.world/en/visualize/tree_map/hs92/export/show/all/63004/2018/>accessed 15 January 2021

LDCs and ODCs must learn from history and evaluate policy options for protecting IPRs based on sound cost-and-benefit analysis in light of their development needs.¹⁷² Even the ‘minimum standards’ of IPRs prescribed by the TRIPS mirror those prevalent in developed countries such as the United States or Germany and are relatively high for DCs.¹⁷³

The primary challenge is to identify the optimum level of IPR protection that complies with international obligations but does not hurt domestic innovation and development.¹⁷⁴ As the 2004 São Paulo Consensus put it, ‘it is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space.’¹⁷⁵

Though it is difficult for many DCs to comply and use TRIPS in their favour, there are ways in which they could shape their implementation to minimise cost.

This is in line with Article 1, which provides Members complete freedom ‘to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.’ Given the appropriate actions and political will, they may reduce the development deficit of TRIPS. A UNCTAD study suggested some ideas for doing that.¹⁷⁶

a. Operationalising Specific TRIPS Provisions

These provisions are enshrined in articles 7 and 8 as the objectives and principles of the Agreement. Article 7 stated the objectives of TRIPS that it ‘should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the *mutual advantage of producers and users* of technological knowledge and in a manner *conducive to social and economic welfare*, and to the *balance of rights and obligations*.’¹⁷⁷

Article 8 lays down the guiding principle in making or amending domestic law where countries may adopt measures necessary ‘to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development.’ It also allows measures ‘to *prevent the abuse of intellectual property rights* by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.’¹⁷⁸

¹⁷² Historical examples show that strong IPR protection followed, not preceded, technological development in present-day developed countries. For instance, the USA refrained from providing copyright protection to foreigners until 1891 as it was a net importer of copyrighted material. It even refused to recognise copyrights on materials printed outside its boundary until 1988. For more, see Ha-Joon Chang, *Bad Samaritans: The Guilty Secrets of Rich Nations and the Threat to Global Prosperity* (Random House 2008); Carlos María Correa, *Designing Intellectual Property Policies in Developing Countries* (Third World Network 2010).

¹⁷³ UNCTAD, ‘Intellectual Property in the World Trade Organization: Turning It into Developing Countries’ Real Property’ (n 40) 7.

¹⁷⁴ Because their hands are tied by the provisions of the TRIPS and infringement of which may result in retaliation.

¹⁷⁵ UNCTAD, The São Paulo Consensus: United Nations Conference on Trade and Development, 11th session, São Paulo, 13-18 June 2004 [TD/410] 3.

¹⁷⁶ UNCTAD, ‘Intellectual Property in the World Trade Organization: Turning It into Developing Countries’ Real Property’ (n 40) 27.

¹⁷⁷ Emphasis added.

¹⁷⁸ Emphasis added. However, the scope of Article 8 is restricted by the clause that all such measures must be ‘consistent with the provisions of this agreement.’

There are issues with Article 7 and Article 8, which are weakly worded 'best endeavour language'. However, the Doha Declaration has unlocked their potential by adopting that 'each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.'¹⁷⁹

b. Use of TRIPS flexibilities

The Doha declaration reconfirms the right of DCs to use a host of mechanisms or flexibilities already available in the TRIPS agreement. Integrating these flexibilities into domestic law and strategically utilising them may help meet their public health needs. For instance, Article 27 includes options to strictly define the patentability of any inventions, including denying patentability of new uses for lack of novelty, innovative steps, or industrial applicability.¹⁸⁰ IPRs can potentially restrain competition in relevant markets, and developed countries extensively use the competition rules to control anti-competitive practices.¹⁸¹ As most DCs lack experience in this highly technical area and lack comprehensive competition legislation, there is an obvious need for international cooperation and technical assistance.

c. Focusing on domestic research and planning

Specific domestic research and strategic planning can assist DCs in utilising their remaining development options to achieve domestic policy objectives.¹⁸² It is admitted that most DCs lack such capacities in research and planning.

6.10 Do LDC Graduates Need Additional Time to Implement TRIPS?

For the implementation of the TRIPS, LDCs have access to a general transition period that has been extended until 2034 and a special transition period that has been extended until 2033. However, as a record number of LDCs are now in the graduation process, they will lose access to the transition period benefits upon graduation. So, LDCs have requested a period of exemptions following their graduation.¹⁸³

However, is there any rationale behind continuing the exemptions beyond graduation?

The particular needs of LDCs and unique challenges in technological catch-up as latecomers to technological development are universally recognised. Graduation does not remove those challenges. IPRs cannot be effective as an incentive mechanism without a sound and viable

¹⁷⁹ WTO, 'Doha Ministerial Declaration on the TRIPS Agreement and Public Health.' (n 85) para 5; UNCTAD, 'Intellectual Property in the World Trade Organization: Turning It into Developing Countries' Real Property' (n 40) 29. It also shows how the provisions of the Agreement may evolve in the future and what the DCs should do to prioritise their development needs in the process.

¹⁸⁰ Carlos Correa, 'Integrating Public Health Concerns into Patent Legislation in Developing Countries' [2000] South Centre 23. Similarly, Article 30 provides Members to incorporate exceptions to patent rights, such as in the case of scientific research or experimental use.

¹⁸¹ UNCTAD, 'Competition Policy and the Exercise of Intellectual Property Rights.' (2002) TD/B/COM.2/CLP/22/Rev.1. Members are allowed to exercise such controls under articles 8, 31 and 40 to control practices which unreasonably restrain trade or adversely affect the international transfer of technology. However, DCs have rarely used the provisions.

¹⁸² Sufficient policy space is vital for development. Unfortunately, it is admitted that the TRIPS has curtailed that space to a great extent.

¹⁸³ WTO General Council, 'Trade Related Challenges of the Least Developed Countries and Way Forward : Proposal for a WTO Smooth Transition Package in Favour of Countries Graduated from the LDC Category - Communication from Djibouti on Behalf of the LDC Group - Revision' (2022) WT/GC/W/807/Rev.1.

technological base, sufficient firm-level qualified personnel, innovation-oriented entrepreneurs, and a significant market.¹⁸⁴

In addition, mere access to new technology is inadequate in the absence of sufficient absorptive capacity – the ability to assimilate and adopt technological know-how. In such a context, a robust IP system may stifle their catch-up efforts, thereby impeding the development of a sound technological base.¹⁸⁵

Moreover, technological catching up is not an easy task. Literature shows that technology contains much tacit knowledge that cannot be easily transferred.¹⁸⁶ In addition, pre-graduation capacity constraints of LDCs continue post-graduation.

The presently developed countries have taken opportunities for ample policy space to ‘copy’ and ‘imitate’ technologies in their development journey before adopting the TRIPS Agreement.¹⁸⁷

Therefore, LDCs require maximum policy flexibility in IPR protection and enforcement on a long-term basis to achieve a solid technological and production base for pharmaceutical products and overall industrialisation. Unfortunately, developed countries have done little to fulfil their obligation regarding technical cooperation and technology transfer to LDCs, so they can establish a solid technological foundation to implement their TRIPS obligations.¹⁸⁸

It is not fair to deny them what they are entitled to under TRIPS but to compel them to implement measures for which they are woefully underprepared. Therefore, an additional period of exemption beyond graduation is vital for a long-term plan of action for the growth of the pharmaceutical industry in the LDCs.

6.11 Conclusion

The TRIPS Agreement has been a contentious issue even before its adoption, particularly in its potential impacts on DCs. Developed countries pushed for integrating IPRs into the WTO to achieve uniformity in global IP regimes and reap the benefits of its dispute mechanism system. But implementation falters as TRIPS reflect ‘little awareness of development problems and little appreciation of the capacities’ of the developing countries and the LDCs.¹⁸⁹

¹⁸⁴ Correa, *Designing Intellectual Property Policies in Developing Countries* (n 172) 3.

¹⁸⁵ UNCTAD, ‘The Least Developed Countries Report 2007: Knowledge, Technological Learning and Innovation for Development’ (United Nations Publications 2007) 103.

¹⁸⁶ David S Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (2nd edition, Cambridge University Press 2003). Landes documents the complications that took decades for the European countries to assimilate British technologies, even though the technology was relatively straightforward then.

¹⁸⁷ Ha-Joon Chang notes that in the early years of their development, ‘all of today’s rich countries blithely violated other people’s patents, trademarks and copyrights. For example, the Swiss ‘borrowed’ German chemical inventions, while the Germans ‘borrowed’ English trademarks and the Americans ‘borrowed’ British copyrighted materials – all without paying what would today be considered ‘just’ compensation.’ Chang, *Bad Samaritans* (n 172) 134.

¹⁸⁸ Moon (n 184); ‘Intellectual Property and Innovation: Summary on the 2019 Theme – Public Private Collaborations in Innovation’ (n 187).

¹⁸⁹ Michael Joseph Finger and Philip Schuler, ‘Implementation of Uruguay Round Commitments: The Development Challenge’ (2000) 23 *The World Economy* 511, 511.

It has also hindered the ability of DCs to pursue their development objectives due to their limited capacity and lack of technology transfer from developed countries.

Despite these challenges, DCs might still use TRIPS to advance their development objectives through the strategic use of TRIPS flexibilities, such as strict definitions for patentability, competition laws, and compulsory licencing, to improve their access to essential medicines, reduce costs, and limit IPR abuse. However, this remains a daunting task for most developing and least developed countries.

LDCs lacking an adequate production and technological base are the least prepared to implement TRIPS. Therefore, the difficulties faced by graduating LDCs merit special consideration. Moreover, any additional time to comply with the Agreement could help them better prepare. Consequently, addressing the development deficiencies of the TRIPS and ensuring that it serves the distinct needs of DCs remain crucial challenges for the WTO.

This chapter, therefore, recommends that developed countries fulfil their obligation to transfer technology to DCs and provide adequate technical assistance to enhance their capacity to implement and benefit from an IPR regime. In addition, as stated in the Doha Declaration on public health, the WTO regime must encourage the interpretation of TRIPS provisions considering development needs and objectives.

CHAPTER 7: TRADE IMPLICATIONS OF LDC GRADUATION

7.1 Introduction

After analysing the regulation of trade preferences and TRIPS's transition periods and technical assistance, this chapter focuses on graduation.

LDCs receive special market access for exports to major markets, flexibility in implementing WTO agreements, and trade-related technical assistance, facilitating their participation in international trade. Though the effectiveness of these supports is debatable, specific sectors in several LDCs have received benefits that have contributed to their development.

Graduation marks the end of benefits that have assisted LDCs in their development efforts to reach the stage. LDCs that have utilised these trade-related ISMs to a considerable degree may experience a significant impact on their trade performance.

Concerns regarding graduation are intensified because the graduation support mechanism is still in its infancy and, in most cases, in the negotiation phase. Moreover, given the economic challenges of graduation, LDCs require substantial support to ensure sustainable development during and after the transition process.

This chapter examines the existing trade benefits for LDCs, the potential trade impact of losing these benefits after graduation, and the absence of meaningful support mechanisms to ensure a smooth transition. Finally, it makes a case for establishing a comprehensive graduation support system to help LDCs sustain economic growth during this crucial development phase. Such support can boost confidence, facilitate continued trade growth, and encourage more LDCs to graduate.

7.2 Trade Benefits for the LDCs

This section will outline and analyse the various SDT provisions that benefit LDCs. Specifically, the objective is to examine various flexibilities in the trading system designed to facilitate the development and integration of LDCs into the global trading system.

7.2.1 LDC-specific Flexibilities in the WTO

Since the creation of the LDC category in 1971, this group has always received special consideration in the evolution of the MTS due to their unique vulnerabilities.¹ The first important decision was made in 1979 when the parties to the GATT adopted the Enabling Clause² allowing developed country members to treat developing and least developed countries differently and more favourably. This paved the way for special treatment of LDCs under the GSP scheme of developed countries, acknowledging for the first time the special needs of LDCs.

¹ Shishir Priyadarshi, 'Promoting Increased Participation of LDCs in Global Trade—A Critical Account of the Measures Taken at the WTO' (2021) 13 Trade Law & Development 176, 180.

² GATT, 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903)' GATT BISD 26th Supplement 203 (1979).

During the creation of the WTO in 1995, LDC-specific special treatment has been embedded across different disciplines including in the Agreement on Agriculture, the Agreement on Subsidies and Countervailing Measures (SCM), and the TRIPS.³ The WTO covered agreements recognise that international trade should contribute to the economic growth of all members, including LDCs, and therefore include provisions aimed at expanding trade opportunities for LDCs and granting them greater flexibility in implementing WTO rules.

WTO members have continued to make significant decisions in favour of LDCs to expand their trading opportunities and give them more space to pursue their development objectives.

In 2005, the WTO Ministerial Conference in Hong Kong adopted several decisions for LDCs, including the DFQF market access for LDC products, which requires developed countries to grant DFQF market access to 97% of LDC-origin products and encourages developing countries to do the same.⁴ Increasing efforts have been made to consolidate market access opportunities for LDCs. As part of the liberalisation of Rules of Origin (RoO) conditions, the LDC package adopted at the 2013 Ministerial Conference in Bali included the first multilateral guidelines on preferential RoO applicable to imports from LDCs. In addition, the 2015 Nairobi Ministerial Conference approved specific recommendations based on these guidelines. There have also been significant advancements in the services trade. In 2011, at the Geneva Ministerial Conference, Members adopted the LDC services waiver, a decision to extend preferential treatment to LDC services and service suppliers.⁵ In 2013 and 2015, Ministers at the Bali and Nairobi Ministerial conferences adopted resolutions to operationalise the waiver, which is valid until 2030.⁶

The major LDC-specific SDT provisions in WTO Agreements and the SDT decisions regarding the transition period and trade preferences adopted by the WTO are shown in Tables 4 and 5.

Table 4: Currently available major LDC-specific SDT provisions under WTO⁷

Agreement	SDT provisions	Description
TRIPS	Art.66(1)	Exemption on implementation of TRIPS other than Articles 3, 4 and 5, extended until 1 July 2034, or until a country ceases to be an LDC, whichever date is earlier.
	Art.66(2)	Developed countries to provide Transfer of Technologies (ToT) incentives favouring LDCs.
	Art.31bis	Waiver from notification requirements for issuing compulsory licenses for exports of pharmaceuticals to LDCs or other countries with insufficient manufacturing capacities.
SCM Agreement	Article 27.2(a)	LDCs are exempted from the prohibition of export subsidies.
DSU	Article 24	Special procedures for WTO good offices, conciliation, and mediation to settle disputes.

³ Important provisions of the WTO agreements favouring LDCs are listed in Table 1.

⁴ WTO, ‘Ministerial Declaration of 18 December 2005, Hong Kong’ (WTO 2005) WT/MIN(05)/DEC.

⁵ WTO, ‘Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, Decision of 17 December 2011’ WT/L/847.

⁶ WTO, Ministerial Declaration of 19 December 2011, WT/L/847

⁷ WTO and EIF, *Trade Impacts of LDC Graduation* (WTO 2020). DSU-Dispute Settlement Understanding.

TFA	Article 17	Early warning mechanism: extension of implementation dates for categories B and C provisions
	Article 19	Shifting between categories B and C, a longer implementation timeframe
	Article 20 (2,3)	Longer grace period from dispute settlement

Table 5: Currently available important LDC-specific SDT decisions regarding transition period and trade preferences under WTO⁸

Decision	Description
Enabling Clause ⁹	Allows WTO Members to grant specific treatment to LDCs.
LDC waiver ¹⁰	Permits DCs to grant trade preferences to LDCs until 30 June 2029.
Ministerial decisions on DFQF market access and rules of origin ¹¹	Provision of DFQF market access for LDCs and more flexible rules of origin.
General TRIPS exemptions ¹²	The third extension of the transition period permitted LDCs to delay until 1 July 2034 the implementation of TRIPS provisions other than the core non-discrimination provisions (Articles 3, 4, and 5).
TRIPS exemptions for pharmaceutical products ¹³	The transition period for implementing Sections 5 and 7 of Part II of the TRIPS Agreement and applying mailbox requirements and exclusive marketing rights for pharmaceuticals has been extended until 1 January 2033.
LDC services waiver ¹⁴	The decisions extend the LDC Services Waiver until 2030.
Ministerial decisions on cotton ¹⁵	DFQF market access for cotton and related products produced and exported by LDCs.
Ministerial Decision on agricultural export subsidy ¹⁶	Flexibilities under Article 9.4 of the Agreement on Agriculture concerning export subsidies have been extended until 2030.

7.2.2 Trade Preferences for Goods

7.2.2.1 DFQF Market Access

Due to historical, political, and economic factors, international trade policies discriminate against exports from underdeveloped countries.¹⁷

⁸ *ibid.*

⁹ GATT (n 2).

¹⁰ Preferential Tariff Treatment for Least-Developed Countries – Decision on Waiver (WT/L/304, WT/L/759, and G/C/W/764)

¹¹ Decision in Favour of LDC. Annex F Hong Kong Ministerial Decision, Duty-Free and Quota-Free Market Access for LDCs, Bali and Nairobi Ministerial Decisions on Rules of Origin for LDCs (WT/L/919, WT/MIN(15)/47 and WT/L/917)

¹² Decision of the Council for TRIPS, ‘Extension of the Transition Period under Article 66.1 for Least-Developed Country Members’ (WTO 2021) IP/C/88.

¹³ Decision of the Council for TRIPS, ‘Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products’ (2015) IP/C/73 of 6 November 2015; Decision of General Council, ‘Least Developed Country Members – Obligations under Article 70.8 and Article 70.9 of the TRIPS Agreement with Respect to Pharmaceutical Products’ WT/L/971, 02/12/2015.

¹⁴ LDC modalities & services waiver (TN/S/13, WT/L/847, WT/MIN(15)/48 - WT/L/982, WT/MIN(13)/43 - WT/L/918)

¹⁵ Cotton Ministerial Decision WT/MIN(15)/46 - WT/L/981

¹⁶ WTO, ‘Export Competition Ministerial Decision of 19 December 2015’ WT/MIN(15)/45-WT/L/980.

¹⁷ Kim Elliott, ‘Open Markets for the Poorest Countries: Trade Preferences That Work’ [2010] Washington: Center for Global Development iv.

As a result of seven decades of trade negotiations, average tariffs in most developed countries are in the single digits. However, tariffs are still high in sectors where poor countries have a comparative advantage, such as agriculture and labour-intensive products. In the UN Millennium Declaration of 2000, developed countries promised DFQF market access to all LDC exports. Members reaffirmed the commitment at the 2005 WTO Ministerial in Hong Kong and urged developing countries 'capable of doing so' to expand market access for LDCs with greater implementation flexibility.

DFQF schemes seek to improve market access for LDCs. However, these schemes deviate from the WTO's most favoured nation (MFN) principle in Article I of the GATT, which prohibits WTO Members from discriminating among their trading partners. The Enabling Clause, adopted in 1979 to provide non-reciprocal preferences to developing and least developed countries under GSP schemes, permits this deviation for developed country members.¹⁸ For developing country members, the legal coverage is provided by a 1999 Waiver and its subsequent extensions, the most recent of which runs until 30 June 2029.¹⁹ WTO members have committed to providing DFQF market access for products from LDCs under the decision contained in Annex F of the 2005 Hong Kong Ministerial Declaration.²⁰ Developed country members (and developing country members in a position to do so) must provide DFQF market access for at least 97% of LDC-origin products. In addition, a decision at the 2013 WTO Ministerial Conference in Bali required members to increase their DFQF coverage for LDC products.²¹ Theoretically, this market access would allow LDC products to enter duty-free. Nonetheless, the value of the additional benefits conferred by this remains questionable.

DFQF schemes are most significant to LDCs when they:

- cover export products where LDCs have a current or potential comparative advantage;
- offer 'true' preferential market access, compared to what other DCs receive through GSP or MFN; and
- have simple rules of origin.²²

Most developed countries have implemented DFQF market access schemes for LDC products with varying product coverage and conditions. The USA is a notable exception. It offers nearly total duty-free access to several low-income African countries but is the only developed country that refuses to implement this initiative for all LDCs.²³ Several developing country

¹⁸ GATT (n 2).

¹⁹ WTO, 'Preferential Tariff Treatment for Least-Developed Countries Decision on Waiver, Adopted on 15 June 1991' WT/L/304; WTO, 'Preferential Tariff Treatment for Least Developed Countries Decision on Extension of Waiver, Adopted on 16 October 2019' WT/L/1069.

²⁰ WTO, 'DFQF' (n 4).

²¹ WTO, 'Duty-Free and Quota-Free (DFQF) Market Access for Least-Developed Countries, Ministerial Decision of 7 December 2013' WT/MIN(13)/44-WT/L/919.

²² Pedro J Martinez Edo and Adam Heal, 'Duty-Free, Quota-Free Trade for Asia-Pacific Least Developed Countries: Overview and Update' [2013] Policy Brief, Asia Pacific Research and Training Network 6.

²³ Kimberly Ann Elliott, 'Trade Preferences for the Least Developed Countries: Opportunities Not Panaceas' (International Centre for Trade and Sustainable Development (ICTSD) 2015) 1. Consequently, LDCs such as Bangladesh and Cambodia, which export primarily clothing, are subject to an average US tariff of over 15%, higher than any other exporting country and five times the average applied tariff of 3%. In 2013, the US collected over \$800 million in tariffs on imports from Bangladesh, two-thirds more than imports from the much wealthier UK. Imports from Cambodia were taxed \$460 million, roughly the same as imports from France.

members have also significantly expanded their DFQF coverage for LDC products over the past decade, as shown in Table 6.

Table 6: Major DFQF schemes for LDCs²⁴

Market	Scheme	Entry into force	Tariff line coverage	Notable exceptions
EU	GSP – Everything But Arms (EBA) initiative	5 March 2001	99.8%	Arms and ammunition
Canada	GSP Least Developed Country Tariff Programme (LDCT)	1 January 2000	98.6%	dairy, meat, cereal products
Australia	Duty-free, quota-free entry (DFQF) for LDCs	1 July 2003	100%	-
Japan	GSP – Enhanced duty and quota-free market access	1 April 2007	97.9%	fish and crustaceans, footwear, cereal products, sugar
USA	GSP for Least Developed Beneficiary Developing Countries (LDBDC)	31 July 2013	82.4%	apparel and clothing, cotton, footwear, dairy
	African Growth and Opportunity Act (AGOA)	18 May 2000.	97.5%	
China	Duty-free treatment for LDCs	1 July 2010	96.6%	chemicals, machinery
India	Duty-Free Tariff Preference Scheme (DFTP)	13 August 2008	94.1%	plastics, coffee and tea, alcoholic beverages
Turkey	GSP	31 December 2005	81.7%	iron and steel products, fish and crustaceans
Thailand	DFQF scheme for the LDCs	9 April 2015	74.7%	apparel and clothing, machinery
Norway	GSP – DFQF market access	1 July 2002	100%	-
New Zealand	GSP – Tariff Treatment for LDCs	1 July 2001	100%	-
Russia	GSP of Customs Union between Belarus, Kazakhstan and Russia	1 January 2010	37.1%	machinery, chemicals, iron and steel products

7.2.2.2 Preferential Rules of Origin

Origin rules determine the national origin of a product. Frequently cited as a significant barrier to preferential market access, RoO specifies the amount of local content or processing required for an exported product to qualify for preferential tariffs.²⁵ In most cases, RoO criteria require a substantial transformation of goods, including changes in tariff classification, ad valorem percentage requirements, and other manufacturing and processing conditions.²⁶

LDCs benefit from more flexible and liberal origin rules. In terms of clothing export in the EU, for example, LDCs are only required to perform a single stage of transformation from fabric to clothing under the EBA scheme. In contrast, DCs must undertake a two-stage transformation from fibres to fabric to clothing under the standard GSP scheme. Similarly,

²⁴ Committee for Development Policy, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (UN 2018) 30.

²⁵ Catherine Barber, Balachandiran Gowthaman and Jonathan Rose, ‘Stitched Up: How Rich Country Protectionism in Textiles and Clothing Trade Prevents Poverty Alleviation’ (Oxfam International 2004).

²⁶ WTO, ‘Technical Information on Rules of Origin’

<https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm> accessed 26 May 2022.

Canada significantly lowered the threshold of local value content requirements. As a result, the one-stage process or single transformation rule for apparel in the EU or the lower threshold of local value content in Canada has significantly facilitated the export of apparel from LDCs to the EU and Canada.²⁷

Stringent RoO can limit the eligibility and use of preferences.²⁸ Recognising the technical capacities and development levels of LDCs, the 2013 Bali Ministerial Conference adopted guidelines on preferential RoO, emphasising simple, transparent, and low compliance costs to facilitate market access. At the Nairobi Ministerial Conference in 2015, WTO members provided more specific guidelines on preferential RoO, including directives on issues such as substantial transformation, cumulation²⁹, and documentation requirements.³⁰

The WTO's Committee on Rules of Origin annually reviews the progress in establishing preferential rules of origin for LDCs. Following the decisions in Bali and Nairobi,³¹ WTO members have made progress toward making the RoO simple and transparent. In addition, several regional trade agreements, of which several LDCs have been members, also provide more favourable rules of origin, which may be available even after graduation.

7.2.3 Trade Preferences for Services

A 2011 WTO decision provides preferential market access to LDC services and suppliers called the 'services waiver'.³² To facilitate implementation, the Bali Ministerial Conference in 2013 operationalised the waiver.³³ But little has been achieved in terms of implementation³⁴ and the desired impacts of the services waiver have not yet been realised, according to a study conducted by the WTO and EIF in 2020.³⁵

7.2.4 Trade Capacity-Building Support

A dedicated LDC Unit assists LDCs by providing technical advice regarding their WTO participation. In addition, the Committee on Trade and Development under the unit examines

²⁷ Tobias Sytsma, 'Rules of Origin and Trade Preference Utilization among Least Developed Countries' (2021) 39 Contemporary Economic Policy 701.

²⁸ In some instances, the verification process can be so cumbersome that LDC firms may instead choose to export under the MFN regime, or they may be unable to export at all.

²⁹ Cumulation provides producers with flexibility in sourcing inputs and components, allowing them to use inputs and components from suppliers in other partner countries and still qualify for preferential tariffs.

³⁰ WTO, 'Preferential Rules of Origin for Least-Developed Countries, Ministerial Decision of 7 December 2013' WT/MIN(13)/42-WT/L/917 11.

³¹ *ibid*; WTO, 'Preferential Rules of Origin for Least Developed Countries Ministerial Decision of 19 December 2015' WT/MIN(15)/47, WT/L/917/Add.1.

³² WTO, 'LDC Services Waiver' (n 5). The decision permits WTO members to grant LDC services or service suppliers preferential treatment that would otherwise be inconsistent with GATS Article II (treatment of most favoured nations). As part of the Nairobi Package 2015, the waiver period was extended to 2030 (WT/MIN(15)/48).

³³ WTO, 'Operationalisation of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries' Ministerial Decision of 7 December 2013, WT/MIN(13)/43 WT/L/918. The decision establishes several measures to encourage WTO members to utilise the waiver, including the notification by more than 50 developed and developing countries of the sectors and modes of supply in which they intend to provide preferential treatment to LDC services and service suppliers.

³⁴ Priyadarshi (n 1). Even though the notifications under the decision cover top service sectors such as business services and tourism, they do not necessarily correspond to greater preferential treatment and opportunities provided by these sectors are not exclusive to LDCs.

³⁵ WTO and EIF (n 7).

systemic issues of interest to LDCs in the WTO and reviews their market access conditions annually to track LDC trade trends.

The Aid-for-Trade (AfT) Initiative, launched at the Sixth Ministerial Conference in Hong Kong in December 2005³⁶, has been instrumental in mobilising support to address trade-related constraints in the LDCs and integrating trade issues into the development planning of both beneficiary and donor countries.³⁷ AfT disbursements to LDCs totalled \$13.9 billion in 2019, with 60 per cent allocated to economic infrastructure (energy, transport, and communications) and 40 per cent to building productive capacity in diverse sectors. However, with time, loans have replaced grants as the primary funding source, with grants to LDCs falling from 68% in 2006-08 to 40% in 2019.³⁸

The EIF, a partnership between LDCs, donors, and international organisations within the WTO system³⁹, assists LDCs in identifying trade barriers and opportunities for trade growth, including future AfT interventions, through Diagnostic Trade Integration Studies (DTIS).⁴⁰ It also supports projects aimed at enhancing their export potential.

7.2.5 Do LDCs Benefit from Trade-related Special Treatment?

LDC-specific GSP schemes that provide DFQF market access and relatively simple RoO should benefit LDC exports.

LDC exports with high preference margins have responded to programmes with comprehensive product coverage and reasonable rules of origin. For example, Figure 4 depicts an increase in Bangladeshi and Cambodian clothing imports immediately after Canada, Japan, and South Korea implemented their respective DFQF programmes in 2003, 2007, and 2010 respectively.⁴¹

³⁶ WTO, 'DFQF' (n 4). The Aid for Trade initiative was launched in 2005 at the Hong Kong Ministerial Conference. The stated objective was to 'help developing countries, particularly least developed countries (LDCs), to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade.' The initiative also aimed to bring donors' attention to the importance of providing higher financial resources for trade-related assistance in a coordinated way.

³⁷ The biennial Global Reviews of Aid-for-Trade provide a forum for the trade and development communities to discuss Aid-for-Trade and assess its impact on LDC trade. Every two years, a joint WTO-OECD monitoring exercise titled 'Aid for Trade Global Review' is undertaken 'to strengthen the monitoring and evaluation of Aid for Trade to provide a strong incentive to both donors and recipients for advancing the Aid for Trade agenda.' Recent Reviews have covered various essential topics for LDCs, such as global value chains (2013), trade costs (2015), connectivity (2017), and economic diversification and empowerment (2019).

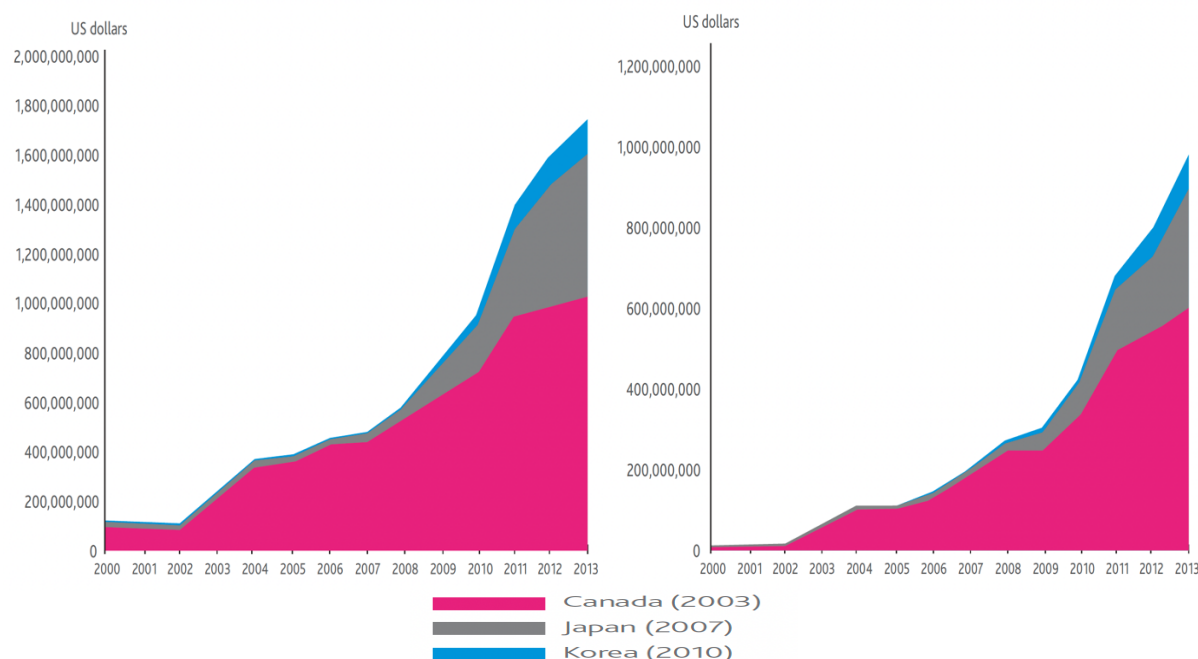
³⁸ Priyadarshi (n 1) 190. Aid activity database, OECD-DAC CRS. Chapter 5 of this thesis elaborated on the welfare impact of development aid and aid for trade.

³⁹ It is the only LDC-specific AfT Programme designed to assist LDCs in strengthening their institutional capacity to mainstream trade into their national development plans and coordinate aid for trade delivery.

⁴⁰ EIF coordinates vital country-specific trade analysis through DTIS. This evidence-based work assists countries in identifying priorities in their trade agendas, uncovers barriers to trade integration, and provides guidance on key action areas.

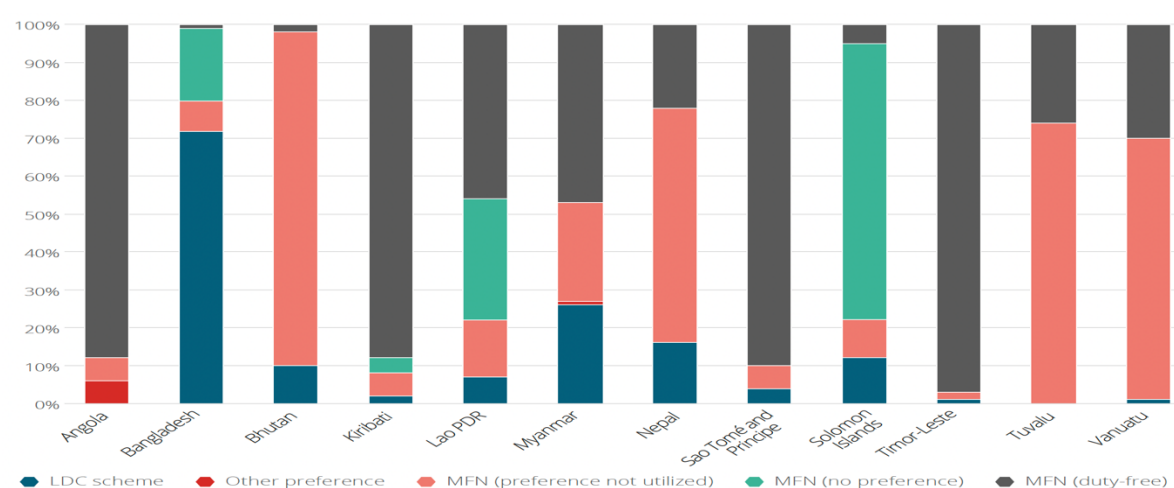
⁴¹ Elliott (n 23) 2. Similarly, when the EU phased in DFQF rice imports from LDCs in 2009, the positive impacts on Cambodian rice exports were immediate.

Figure 13: Bangladeshi and Cambodian apparel exports to Canada, Japan, and South Korea (left-Bangladesh, right-Cambodia)⁴²



However, the utilisation of preferences varies across countries, sectors, and individual firms due to various factors. For instance, among the currently graduating LDCs, Bangladesh has used LDC-specific preferences in 71% of its exports. However, for Angola, Kiribati, Sao Tomé and Príncipe, Timor-Leste, Tuvalu, and Vanuatu, the rate is below 5%.⁴³

Figure 14: Breakdown of exports from graduating LDCs by types of duty⁴⁴



⁴² *ibid.* DFQF market access year in parentheses.

⁴³ WTO and EIF (n 7) 47. Bhutan, Nepal, and the Solomon Islands have 10% to 20%, Lao PDR has 5% to 10%, and Angola, Kiribati, Sao Tomé and Príncipe, Timor-Leste, Tuvalu, and Vanuatu have less than 5%.

⁴⁴ WTO Integrated Database. Charts taken from- *ibid* 50. The figure is based on the 2015-2016 import records from the European Union and 11 specific countries including Australia, Canada, China, and the USA.

Similarly, they differ significantly across industries. So, in 2020, 96.90 per cent of Bangladesh's apparel and textile exports to the EU market use preferential treatment. However, the rate is only 25.77 per cent for machinery and electrical equipment, for which Bangladesh does not have a comparative advantage.⁴⁵ Preferential treatment is not that much necessary for some countries. For example, petroleum products that enter MFN duty-free in major markets account for approximately 90% of Angola's export receipts.⁴⁶ However, preferences should have resulted in value for many others, but they did not.

Even though significant decisions, such as DFQF market access and concrete guidelines on preferential rules of origin accompanying DFQF schemes, have been made, the desired effect of increasing the share of LDC trade in total world trade has not yet been realised for a variety of reasons.

The GSP programmes could assist LDC exports more effectively. For instance, the US GSP excludes apparel products, even though they are among the most vital exports for many LDCs.⁴⁷ Moreover, Many LDCs lack a robust manufacturing base for products (e.g., apparel) in which preference is significant.⁴⁸ The exports of LDCs are concentrated on primary products such as fuels and minerals, for which the preference margin is typically small or negligible. Despite significant progress in improving RoO conditions for LDCs, the industrial capacity of LDCs, a lack of understanding of origin requirements, and administrative procedures to ensure compliance with such requirements remain obstacles.⁴⁹ In addition, as MFN tariffs decline and regional agreements provide better tariffs, the LDC preferences are becoming less valuable.⁵⁰

Similarly, most LDCs have been unable to maximise the benefits of the flexible provisions in various WTO agreements.⁵¹ For example, under the TRIPS Agreement, LDCs have a general exemption until 1 July 2034 and another exemption for pharmaceutical products until 1 January 2033.⁵² LDCs rarely benefit from such exemptions.⁵³ Without adequate technical assistance to build human and technical capacity, exemptions are unlikely to produce the desired results for LDCs.⁵⁴

⁴⁵ UNCTAD database on GSP utilisation

⁴⁶ OECD data

⁴⁷ Subcommittee on Least Developed Countries, 'Note by the Secretariat: Market Access for Products and Services of Export Interest to Least Developed Countries' (WTO) WT/COMTD/LDC/W/69, 27 October 2021.

⁴⁸ Therefore, most African LDCs cannot take advantage of lucrative preferential access to the EU market for apparel. As a result, Lesotho and Madagascar are the only African LDCs that qualify as manufacturing exporters. The remaining 31 African LDCs export primary commodities and non-fuel minerals.

⁴⁹ Priyadarshi (n 1) 185. For instance, insufficient 'hard' infrastructure, such as transportation facilities, or 'soft' infrastructure, such as public and private institutions, contributed to lower utilisation rates in African countries than in South Asian countries. Further improvement in RoO requirements may not be optimal in such cases. Therefore, additional trade reforms addressing the structural barriers of LDCs are required.

⁵⁰ *ibid* 183.

⁵¹ *ibid* 181.

⁵² (n 13); Decision of the Council for TRIPS (n 12).

⁵³ Few LDCs have pharmaceutical manufacturing capabilities. This is true for other sectors too. For instance, unlike developing countries, LDCs have the flexibility to provide export subsidies for their non-agricultural products (Article 27 of the SCM Agreement). However, only a few LDCs utilise it due to their limited capacity to offer export incentives.

⁵⁴ Kevin Kennedy, 'The 2005 TRIPS Extension for the Least-Developed Countries: A Failure of the Single Undertaking Approach' (2006) 40 *International Lawyer* (ABA) 683.

LDC service exports represent a negligible portion of global exports and are concentrated in a few sectors. After over a decade and two operationalisation decisions, the LDC services waiver has yielded few tangible results. Services of interest to LDCs are still severely restricted.⁵⁵ LDCs cannot maximise the available services exemption due to supply-side limitations, such as a lack of interagency coordination, stable physical and digital infrastructure, and financial resources, which impede the development of the services sector and limit the use of the waiver.⁵⁶

The effectiveness of capacity-building programmes also varies across beneficiaries and projects.⁵⁷ Most studies found a positive impact of AfT initiatives on the trade performance of DCs.⁵⁸ However, the trade impact of many AfT projects is unclear. As the trade assistance is disbursed through the traditional channel, donors can self-brand many projects as AfT projects.⁵⁹ A donor-driven instead of a country-driven approach can also severely limit the outcome of an AfT project.⁶⁰ Cadot et al. conclude that aid invested in hard infrastructure (like ports and roads) and soft infrastructure (like customs) can promote trade by reducing costs.

⁵⁵ Priyadarshi (n 1) 187. LDC services trade is restricted to Mode 2, which includes tourism. Other modes of LDC interest, especially Mode 4, which allows the movement of natural persons, are severely restricted and do not allow LDCs to leverage their cheap labour. Major concerns for LDCs include a lack of clarity regarding how preferences will operate and the absence of preferences that extend beyond traditional market access, such as visas, work permits, residence permits, and the recognition of professional qualifications.

⁵⁶ Miguel Rodriguez Mendoza and others, 'The LDC Services Waiver—Operationalized?'

⁵⁷ OECD and WTO, *Aid for Trade at a Glance 2019: Economic Diversification and Empowerment* (OECD Publishing 2019) 60–61. The WTO-OECD biennial AfT evaluation reports of 2019 concluded that the impacts vary depending on the type of AfT intervention, the sector of intervention, the income level, and the location of the recipient country.

⁵⁸ Paul Brenton and Erik von Uexkull, 'Product Specific Technical Assistance for Exports – Has It Been Effective?' (2009) 18 *The Journal of International Trade & Economic Development* 235; Massimiliano Cali and Dirk Willem te Velde, 'Does Aid for Trade Really Improve Trade Performance?' (2011) 39 *World Development* 725; Mariana Vijil and Laurent Wagner, 'Does Aid for Trade Enhance Export Performance? Investigating the Infrastructure Channel' (2012) 35 *The World Economy* 838; Matthias Helble, Catherine L Mann and John S Wilson, 'Aid-for-Trade Facilitation' (2012) 148 *Review of World Economics* 357; Xavier Cirera and L Alan Winters, 'Aid for Trade and Structural Transformation in Sub-Saharan Africa' (Commonwealth 2015) No. 2015/01 <<https://doi.org/10.14217/5js6b1lp69ms-en>> accessed 26 December 2020; Olivia Durowah, 'The Role of Aid for Trade and Foreign Direct Investment in Poverty Reduction: A Panel Data Analysis of 91 Developing Countries' [2017] *Electronic Theses and Dissertations* <<https://openprairie.sdstate.edu/etd/1187>>; Matthias Busse, Ruth Hoekstra and Jens Königer, 'The Impact of Aid for Trade Facilitation on the Costs of Trading' (2012) 65 *Kyklos* 143.

⁵⁹ Joseph Stiglitz and Andrew Charlton, 'Aid for Trade' (2006) 61 *Aussenwirtschaft* 143, 7. In a self-reporting and self-assessment-based evaluation system, no stakeholder has the incentive to report failures or setbacks. Several recipients – including Benin, Botswana, Liberia, Myanmar and Nepal – reported that they did not receive any aid for trade, as they were expecting new and separate funding. To them, an infrastructure project remains an infrastructure project, not a trade aid. So, the 2009 WTO-OECD survey concluded that 'much more effort is needed to clarify the scope and definition of aid for trade.'

⁶⁰ WTO, 'Recommendations of the Task Force on Aid for Trade' (2006) WT/AFT/1 1; South Centre, 'Elements of the Architecture for Aid for Trade' (South Centre 2006) South Centre Analysis Series SC/AN/TDP/AFT/1 3. Even if not conflicting with the recipient country's interest, a donor-driven project can divert scarce resources from one sector to another that may not have national priority. The South Centre also expresses concern about the likely 'use' or 'misuse' of the AfT initiative to lure LDCs to accept 'bad deals' or to influence their negotiating positions in the WTO.'

However, failure to implement complementary reform may eat into the benefits of those investments.⁶¹

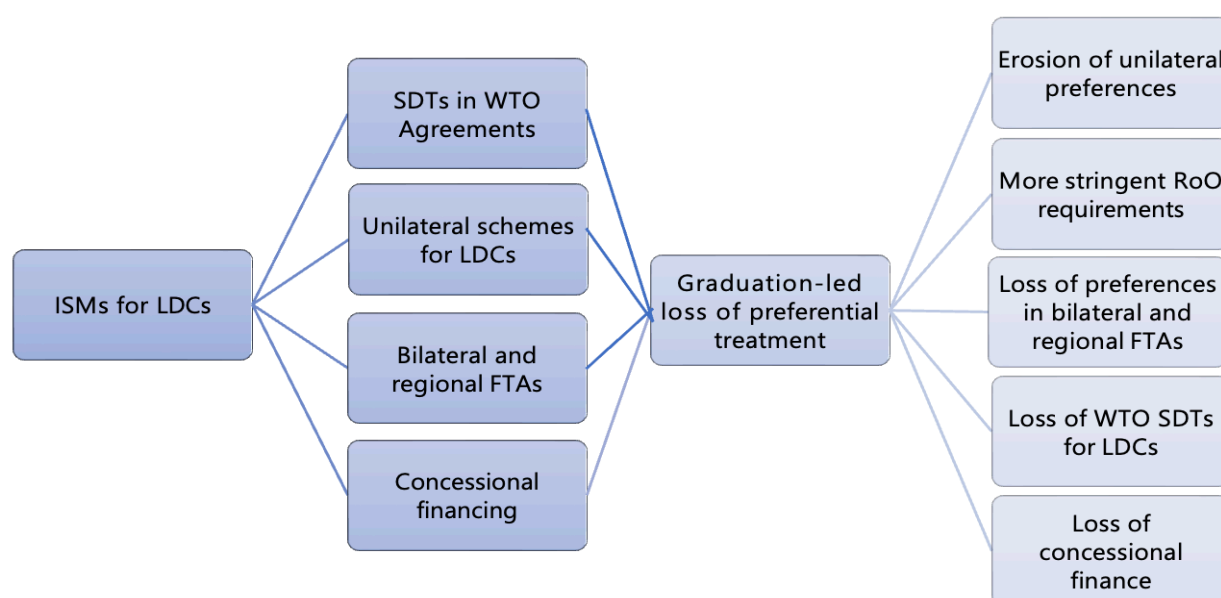
The theoretical aspects of the effectiveness of trade preferences are discussed in detail in Chapter 5.

7.3 Trade Impact of Graduation

After assessing LDC-specific trade flexibilities and their effect on increasing trade in LDCs, this section focuses explicitly on the impact of graduation on these flexibilities and LDC trade.

Trade preferences are one of the essential ISMs for LDCs because they help them increase their participation in international trade and diversify their exports. Therefore, the most apparent trade-related effect of graduation is the loss of preferential market access under LDC-specific schemes.⁶²

Figure 15: Impact of LDC graduation on trade preferences



7.3.1 Impact on Market Access for Goods

7.3.1.1 Loss of DFQF treatment

Graduation leads to the withdrawal of LDC-specific preferences such as DFQF market access. For example, a 2020 WTO report found that around 88% of exports from currently graduating LDCs are shipped to the leading preference-granting markets, while only 12% of exports go to

⁶¹ Olivier Cadot and others, 'Evaluating Aid for Trade: A Survey of Recent Studies' (2014) 37 The World Economy 516; OECD and WTO (n 57). OECD and WTO evaluation report 2019 concluded that even the most well-designed AfT intervention 'is unlikely to bring about sustained gains for the poor without simultaneous policy and institutional reform.'

⁶² WTO, 'Special and differential treatment provisions in WTO Agreements and Decisions – Note by the Secretariat' 22 September 2016 (WT/COMTD/W/219) In international trade, they will lose the LDC-specific SDT benefits but still benefit from the SDT provisions that are generally applicable to ODCs.

markets that provide no LDC-specific preferences.⁶³ According to UNCTAD,⁶⁴ the impact of losing preferential market access on a graduating LDC's exports depends on three main factors:

- (a) the coverage and structure of preferential schemes for which the LDC is currently eligible but will lose eligibility after graduation.⁶⁵
- (b) the product composition of LDC exports and their distribution across markets.⁶⁶
- (c) the fallback tariffs to which the country's exports will be subjected after graduation.⁶⁷

The resulting tariff increase is determined by whether a graduated LDC has access to alternative preferences or must pay MFN tariffs. Alternative preferences may come under non-reciprocal PTAs, reciprocal RTAs, or negotiated special trade agreements. In developed country markets, graduates will generally become beneficiaries of standard GSP schemes.⁶⁸ But, in developing country markets, they will lose preference unless there are any other alternative arrangements.⁶⁹ However, standard GSP schemes' duty-free coverage and tariff benefits are significantly lower than those of LDC schemes. Loss of DFQF access may result in tariff peaks in major markets affecting sectors that are commercially important for LDCs, notably agricultural and apparel products. In the case of the European Union, a graduated LDC may be eligible to utilise the GSP+ scheme if it can implement 27 international conventions and meet specific other requirements.

A longer sensitive list applicable to non-LDC developing countries maintained by the destination countries is another concern for graduated LDCs.⁷⁰ Hence, heavy reliance on a single product or a few preferential markets could increase the vulnerability of exports from graduated LDCs.⁷¹

⁶³ WTO and EIF, *Trade Impacts of LDC Graduation: Insights from Country-Specific Market Access Analyses* (World Trade Organization 2020) 35.

⁶⁴ UNCTAD, *The Least Developed Countries Report 2016: The Path to Graduation and Beyond: Making the Most of the Process* (United Nations 2016) 133.

⁶⁵ Sam Laird, 'A Review of Trade Preference Schemes for the World's Poorest Countries' [2012] ICTSD; International Trade Centre, *Market Access, Transparency and Fairness in Global Trade*: (International Trade Centre, 2010) 50; Shushanik Hakobyan, 'Accounting for Underutilization of Trade Preference Programs: The US Generalized System of Preferences' (2015) 48 *Canadian Journal of Economics* 408; Alexander Keck and Andreas Lendle, 'New Evidence on Preference Utilisation' (World Trade Organization (WTO), Economic Research and Statistics Division 2012) ERS-2012-12. Utilisation and hence the effectiveness of the schemes are hugely affected by preference margins and cost of compliance with rules of origin requirements.

⁶⁶ WTO, 'Market Access for Products and Services of Export Interest to Least-Developed Countries, Note by the Secretariat' (2011) WTO document WT/COMTD/LDC/W/48/Rev.1; Laird (n 65). Given the concentration of most LDC exports on a few primary commodities and low-skilled labour-intensive manufacturing, especially in the agriculture and textile sectors, which are frequently subject to tariff peaks, incomplete preference coverage may have massive implications.

⁶⁷ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (UNCTAD 2016) UNCTAD/LDC/2016/Corr1 UNCTAD/LDC/2016/Corr.1 133.

⁶⁸ WTO and EIF (n 7) ch 4. The GSP schemes of the European Union, Canada, Australia, Japan, Norway, Switzerland, Turkey, the Russian Federation, New Zealand, and the United States cover developing and least-developed countries. LDCs following graduation can utilise the schemes designed for developing countries (provided their exports qualify for preferences under these schemes).

⁶⁹ CDP (62) 32

⁷⁰ Mustafizur Rahman and Debapriya Bhattacharya, 'Sustainable Graduation: International Support Measures for Graduating LDCs' [2020] International Trade Working Paper 2020/10, Commonwealth Secretariat 16. A country cannot benefit from GSPs when it may find its significant products under the sensitive list.

⁷¹ WTO and EIF (n 63) 41.

LDCs will continue to benefit from RTA preferences. A small number of RTAs accord LDC members preferential treatment.⁷² As tariff concessions to LDCs under these RTAs result from reciprocal negotiations based on less-than-full reciprocity modalities, they may continue after graduation. Nevertheless, additional LDC-specific RTA provisions may be significantly affected by graduation.⁷³ Table-7 shows the graduation-induced preference erosions in the case of GSP schemes, RTAs and bilateral-non-reciprocal schemes.

Table 7: Graduating LDCs and preference erosion

SDT	Example	Depth of preference erosion	Graduating LDCs likely to be most affected
Unilateral preferential market access	The EU Everything but Arms (EBA) initiative	Significant, particularly for products where MFN and standard GSP tariffs are high (e.g., T-shirts: MFN 12.0%, GSP 9.6%)	Bangladesh, Myanmar, and Nepal
Regional trading arrangements (RTAs)	SAFTA (include 3 LDCs: Bangladesh, Nepal, and Bhutan) and Asian-FTA (include 2 LDCs: Lao PDR and Myanmar)	Significant when LDC status is the basis for preference, as in SAFTA. Not so when all members are treated equally, as in the ASEAN-FTA, or when member countries have bilateral FTAs, as Nepal and Bhutan do with India.	Bangladesh
Bilateral non-reciprocal scheme	Unilateral GSP programmes such as those operated by China, India, Japan, and others	Significant, for products where exports from beneficiaries as well as GSP and MFN tariffs are high (e.g., frozen fish exports to China: MFN 7.6%, GSP 7.0%)	Angola, Myanmar, Vanuatu and Tuvalu

Exports with high tariffs for non-LDCs, such as agriculture, textiles, and apparel, would suffer the most. Conversely, low tariffs on energy, mining, and wood products (regardless of LDC status) mean that the loss of preferential market access would not impact exports in these categories. Thus, the potential impact of losing preferential market access varies significantly across LDCs, depending on export patterns and fallback tariffs. Most importantly, all the factors that shape graduation impacts are 'context-specific' and country-specific.⁷⁴

A UNCTAD analysis conducted in 2016 found a significant economic impact of the loss of preferences due to graduation. The loss of LDC-specific market access to the G20 countries may be equivalent to a 3 to 4 per cent reduction in merchandise export revenues.⁷⁵ A 2020 WTO report estimated that LDC graduates would be burdened with a trade-weighted average tariff increase of 4.2% in the various preference-providing markets.⁷⁶ However, not all countries will be similarly affected as expected. Table-8 provides a breakdown of this impact.

⁷² Graduating LDC Lao PDR, for instance, will continue to receive preferential treatment under the ASEAN Free Trade Area and the RTAs signed by ASEAN with Australia, China, India, Japan, the Republic of Korea, and New Zealand. Under SAFTA, India offers nearly all products to Bangladesh, Bhutan, and Nepal duty-free (except tobacco and alcohol).

⁷³ In most of these RTAs, for example, tariff concessions by LDCs have longer implementation periods. Therefore, graduation would necessitate that graduating LDCs accelerate the implementation of tariff concessions. In addition, several RTAs also have special provisions for LDCs in terms of origin rules.

⁷⁴ UNCTAD, *The Least Developed Countries Report 2016* (n 64) 134.

⁷⁵ *ibid* 135. To address the issue of preference margin offsetting, the calculation was based on two hypothetical scenarios: in one, only the target country graduates, and in the other, all LDCs graduate.

⁷⁶ A trade-weighted average tariff increase is the difference between the LDC duty rate and the

Table 8: Tariff implications of graduation on currently graduating LDCs⁷⁷

LDC	Major exports affected	Percentage/total reductions in exports (in thousand USD)
Angola	Crude petroleum oils (HS 2709), accounting for 86 per cent of Angola's exports, enter most markets MFN duty-free. On the other hand, diamonds (HS 7102), the second most exported product, will face a 10% tariff rise in India, but no increase in other major markets, i.e., the EU and USA.	-0.07% -25,976
Bangladesh	Clothing and textile products account for 85% and 6% of Bangladesh's merchandise exports, respectively. When switching from EBA to GSP preferences, Bangladesh will face a tariff increase of about 10% in the EU, its primary market. Similarly, the tariff increase in Canada will be between 16 and 18 per cent for ten export products. It will be around 8 to 11 per cent in Japan, with footwear being an outlier (28 per cent). However, there will be no change in the USA as it currently offers no such preference to Bangladesh.	-14.28% -4,844,572
Bhutan	Bhutan's exports are heavily concentrated in India, governed entirely by their bilateral RTA. Ferro-alloys and carbides (HS 7202), electricity (HS 2716), and iron and non-alloy steel (HS 7207) would all see tariff increases of 8%, 15%, and 10%, respectively. Due to Bhutan's current export structure, it will only face limited tariff increases. Exports to the EU and other preferential markets are limited, with little to no trade.	-0.26% -4,251
Loa PDR	Lao PDR should see limited tariff increases. There will be no tariff increases for China, its leading trading partner. It will continue to have preferential market access in Thailand and Japan under ASEAN FTA and ASEAN–Japan RTA. However, clothing products will face a tariff rise of 10% in the EU and 18% in Canada.	-1.45% -66,313
Nepal	Only 16% of Nepalese exports use LDC-specific preferences. Nepal benefits from a bilateral RTA with its primary export market, India. However, it is expected to face tariff increases of up to 10% on several textile and clothing products in the EU.	-2.48% -20,139
Sao Tomé and Príncipe	90% of the country's exports do not use preference because they enter MFN duty-free markets. Chocolate (HS 1806) exports to the EU will face a 3% tariff increase. Tariffs on chocolate and other cocoa-containing food preparations will rise by 19%, 10%, and 14%, respectively, in Japan, Thailand, and Switzerland.	-0.09% -14
Solomon Islands	More than two-thirds of its exports pay MFN tariffs because they are not eligible for preference. It has no preferences in China, its biggest market. In contrast, preference utilisation is high in the EU, Switzerland, and the US. Wood in the rough (HS 4403) will see a 5% tariff increase in India. Aluminium ores (HS 2606) will see a 3% tariff increase in India, while prepared or preserved fish (HS 1604) will face a 13% and 4% increase in the EU and USA, respectively.	-4.16% -34,399

Exports still facing tariff peaks in the preference-providing countries benefit most from the schemes. LDCs mainly exporting textile products and agricultural commodities would be the worst hit.⁷⁸ So, some LDCs may see only a marginal increase in tariff rates⁷⁹ while LDCs like

next best alternative rate. WTO and EIF (n 63) 7.

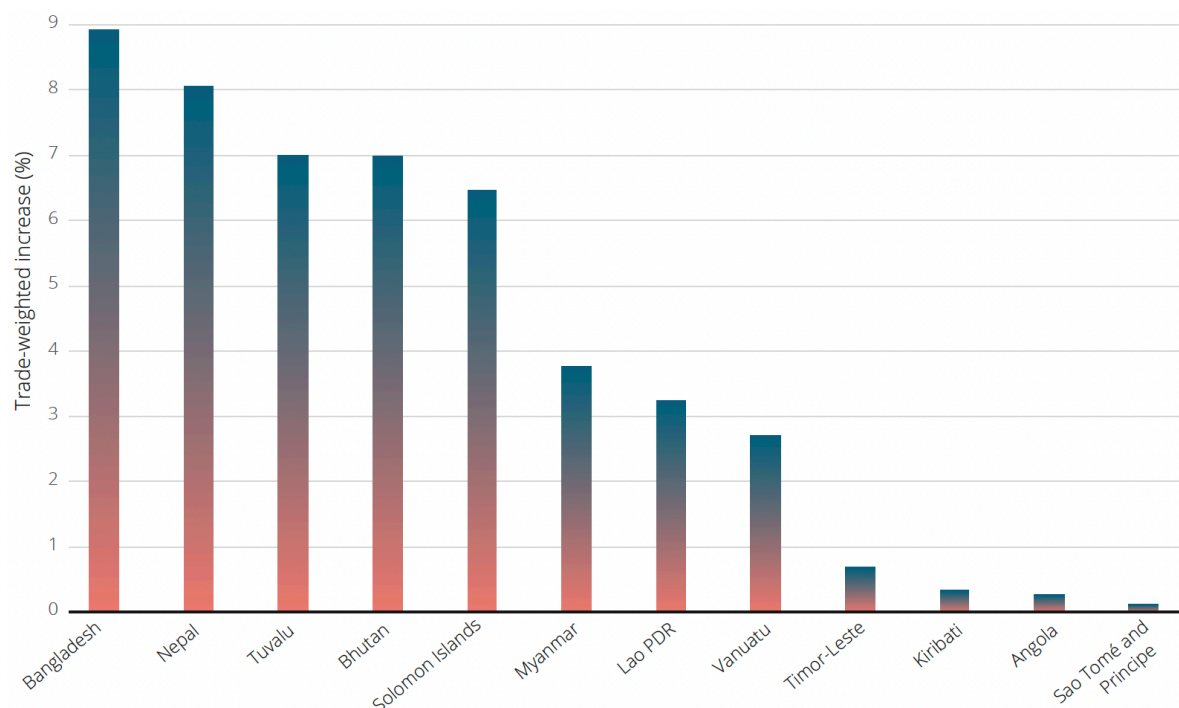
⁷⁷ WTO and EIF (n 63).

⁷⁸ UNCTAD, *The Least Developed Countries Report 2016* (n 64) 135. The first step in analysing the effect of graduation on market access and trade is calculating the increase in tariffs that LDCs will face after losing access to LDC-specific schemes. Tariff increases are calculated by subtracting the best available tariff rate after graduation from the current tariff rate under LDC-specific preferences.

⁷⁹ The exports of Angola, Kiribati, Sao Tomé and Príncipe and Timor-Leste will face a below 0.5 per cent increase.

Bangladesh and Nepal face mounting tariff obstacles. (8.9% and 8.1% tariff increase, respectively).⁸⁰ Figures 16 and 17 illustrate the tariff impacts clearly.

Figure 16: Projections regarding the impact of graduation on tariff⁸¹



These differences are due to several factors, including export concentration and preference utilisation.⁸² Again, not all exports from LDCs depend on preferences, and the average percentage of preference-dependent exports remains low. The WTO study on trade impacts of graduation found significant differences across the graduating LDCs in this respect.⁸³ Thus, the impact on trade will vary significantly between LDCs. For instance, high preference utilisation and higher fallback tariffs after graduation result in substantial trade loss for Bangladesh, accounting for approximately 97 per cent of all trade loss by the seven LDCs currently graduating. (Table-7).

In terms of trade-weighted tariff increase in the destination markets, the impact will be the highest in Canada (14.2%), followed by New Zealand (8.1%) European Union (7.9%). These

⁸⁰ WTO and EIF (n 63) 7.

⁸¹ WTO Integrated Database. Full utilization of preferences is assumed in the calculation. The chart is taken from- WTO and EIF (n 7) 48.

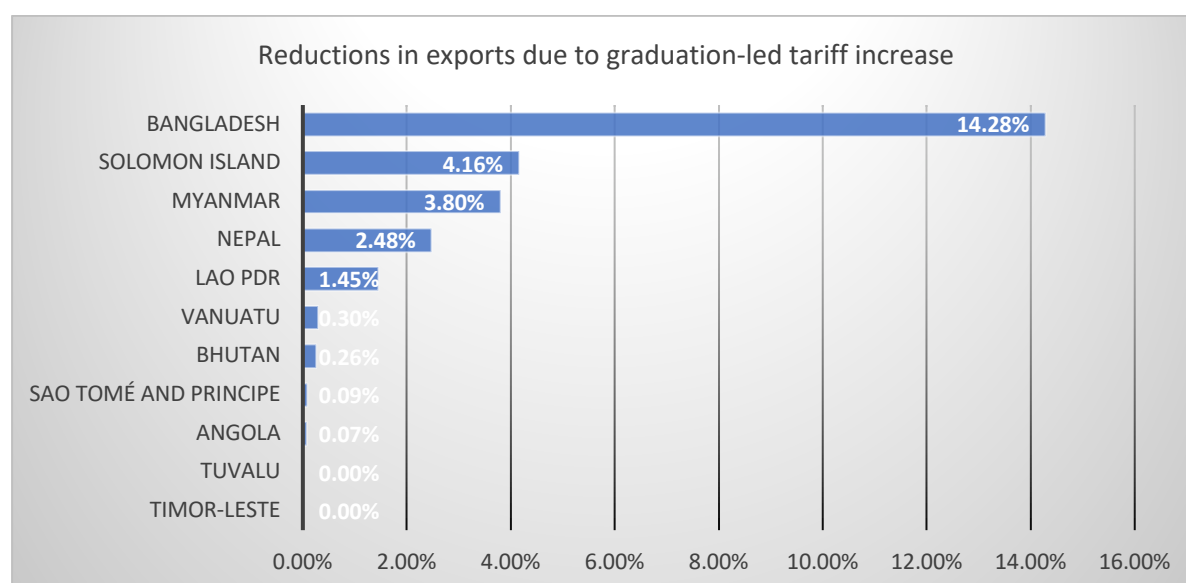
⁸² For example, 71% of Bangladeshi exports (mainly clothing) benefit from LDC-specific preferences. On the other hand, Exports of Angola, Kiribati, Sao Tomé and Príncipe, and Timor-Leste are concentrated on primary products (petroleum for Angola and Timor-Leste, fish for Kiribati, and cocoa for Sao Tomé and Príncipe) that enter the preference-granting markets MFN duty-free.

⁸³ WTO and EIF (n 63) 50. Calculated from disaggregated import data for 2015–2016 of top preference-granting countries: Australia, Canada, Chile, China, European Union, India, Japan, Republic of Korea, Norway, Switzerland, Thailand and the United States. Share of exports using LCD-specific preferences is below 5% for Angola, Kiribati, Sao Tomé and Príncipe, Timor-Leste, Tuvalu and Vanuatu, between 5% and 10% for Lao PDR and between 10% and 20% for Nepal, Bhutan and the Solomon Islands, and 26% for Myanmar. As an exception, the share is astonishingly high only for Bangladesh- 71%.

high increases also reflect higher tariffs for clothing exports of a few graduating LDCs, particularly Bangladesh, to these markets (Figure-17).⁸⁴ The UNCTAD found that the Asian LDCs would experience a significant adverse impact in trade because of graduation due to their greater reliance on high-tariffed apparel and textile as opposed to the African LDCs, which mainly relies on the export of primary commodities that faces lower tariff worldwide.⁸⁵

In essence, the loss of DFQF market access will significantly impact graduating LDCs. However, the effects vary significantly across LDCs regarding their preference utilisation and main export sectors.

Figure 17: Graduation-led exports loss for selected graduating LDCs⁸⁶



7.3.1.2 Loss of preferential RoO

Compliance with RoO is a significant issue for preferential entry into developed markets. Graduated LDCs will cease to benefit from the LDC-specific, more flexible and liberal rules of origin. For instance, a graduate must undertake a much tougher 'double stage transformation' (e.g., yarn to fabric to clothing) for clothing under the EU standard GSP instead of the LDC-specific 'single stage transformation' (e.g., fabric to clothing) allowed under the EBA scheme.⁸⁷ This change in origin rules will make compliance costly and even bar exports of many otherwise exportable products.

According to a WTO study, graduation will result in significant changes to origin requirements, but the effects of these changes will vary by product, firm, country, and scheme.⁸⁸ The EU and Japan's shift from a single transformation requirement to a double transformation

⁸⁴ ibid 35. Trade-weighted averages are calculated assuming full utilisation of the preferences granted.

⁸⁵ UNCTAD, *The Least Developed Countries Report 2016* (n 64) 136.

⁸⁶ WTO and EIF (n 7) 49.

⁸⁷ WTO and EIF (n 63); UNCTAD, 'GSP Handbook on the Scheme of Canada' (2021)

UNCTAD/ITCD/TSB/Misc.66/Rev.2. 6, Japan follows almost similar provisions. In Canada, the local content requirement will increase from 20% (allowed under the LDC scheme) to a minimum of 60%, as required under its's GSP scheme.

⁸⁸ WTO and EIF (n 7).

requirement for clothing, or Canada's increase from 25% to 60% local content requirement, could be significant for the graduating LDCs.⁸⁹ To maintain eligibility, firms in graduating LDCs may be required to use more local content, further process it, or source it from other beneficiary countries, requiring them to modify their supply chains and incurring additional costs and complexities.⁹⁰

7.3.2 Impact on Market Access for Services

LDCs also enjoy preferential market access for services under the LDC Services Waiver adopted by WTO Trade Ministers in 2011 and operationalised in 2013. However, the Waiver specifies that preferential treatment will end upon graduation, and there are currently no transitional provisions for service waivers. Moreover, the preference margin of measures notified by various preference-providing countries under the Waiver indicates that the withdrawal of preferential treatment will have little effect on graduating LDCs, as most measures reflect members' applied MFN regime.⁹¹

7.3.3 Impact on Policy Space

The São Paulo Consensus 2004 defines 'policy space' as 'the scope for domestic policies, especially in the areas of trade, investment and industrial development', which might be 'framed by international disciplines, commitments and global market considerations.' Therefore, striking an 'appropriate balance between national policy space and international disciplines and commitments' is essential.⁹²

SDT provisions facilitate the compliance of LDCs and ODCs with WTO rules, given their limited capacities, by offering wider policy space, longer transition time, greater implementation flexibility, and consideration of their technical assistance needs. However, WTO Members are required to prioritise the protection of the interests of LDCs and the development of their trade capacities.⁹³ Notably, many provisions offering temporary measures have already expired. Table 3 lists the major SDT provisions currently available to LDCs under WTO law.

These WTO provisions and decisions provide the LDCs with the flexibility and policy space they need to pursue their goals through actions that would otherwise violate WTO rules. For example, LDCs have a general exemption from implementing the provisions of the TRIPS

⁸⁹ *ibid* 40. Similarly, in Australia's LDC scheme, at least 25% of allowable costs must originate from LDCs, whereas the GSP increases this requirement to at least 50 per cent of factory costs.

⁹⁰ *ibid*. Most often, origin criteria include regional value content (RVC) requirements, requirements that a transformation will result in a change in a tariff chapter (CC), heading (CTH), or sub-heading (CTSH), or specific manufacturing requirements such as single-stage or double-stage transformation.

⁹¹ *ibid* 53.

⁹² UNCTAD, 'São Paulo Consensus : United Nations Conference on Trade and Development, 11th Session, São Paulo, 13-18 June 2004' (UN, 2004) TD/410 para 8.

⁹³ The following six Agreements and related Decisions contain most of the SDT provisions that are exclusive to LDCs: the Agreement on Trade-Related Aspects of Intellectual Property Rights, the Agreement on Subsidies and Countervailing Measures, the Agreement on Agriculture, the Agreement on Trade-Related Investment Measures, the Trade Facilitation Agreement, and the General Agreement on Trade in Services (GATS). Furthermore, in the context of enhancing their trade capacity and protecting their interests, four other Agreements also contain SDT provisions for LDCs: the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Import Licensing Procedures, and the Agreement on the Rules and Procedures Governing the Settlement of Disputes. Additionally, the Trade Policy Review Mechanism and the Understanding on the Balance-of-Payments Provisions of the GATT 1994 mention special considerations for LDCs.

agreement – other than those containing the core non-discrimination principle,⁹⁴ and another specific exemption from implementing pharmaceutical patents.⁹⁵ These transition periods provide the LDCs with much-needed policy space to pursue their development objectives, promote local pharmaceutical productions and ensure access to medicine for their people, and build reasonable and balanced IP systems, including by utilising WTO and other international organisations' technical assistance. Similarly, the SCM Agreement exempts LDCs from export subsidy prohibitions that otherwise apply to all members.⁹⁶ Graduation means termination of these LDC-specific benefits under the TRIPS and the SCM Agreement.⁹⁷ The loss of these flexibilities would limit a graduate's capacity to promote its domestic industries and expand its export potential through policy support. (Figure-18)

Figure 18: Trade-related impact of graduation: domestic and global



7.3.4 Impacts from Loss of other Benefits

a. Concessional finance to LDCs:

LDCs' dependence on ODA from bilateral donors and multilateral agencies is a formidable challenge. Some donors and institutions provide LDCs with priority or concessional terms, and there are several LDC-specific processes.⁹⁸ In general, ODA to LDCs remains significantly

⁹⁴ Art.66(1) of the TRIPS Agreement

⁹⁵ Decisions of the Council for TRIPS (n 13).

⁹⁶ Art. 27.2(a) of SCM Agreement

⁹⁷ Members of developing countries listed in Annex VII(b) are also exempt from this prohibition until their per capita GNI reaches \$1,000 in constant 1990 dollars. Since LDCs are not listed in Annex VII(b), a graduated LDC will lose the benefit even if its per capita income is below the threshold.

⁹⁸ The 2030 Agenda for Sustainable Development, the IPoA for the Decade 2011–2020, and the Addis Ababa Action Agenda reaffirmed the developed countries' long-standing commitment to providing 0.15 to 0.20 per cent of their gross national income (GNI) in ODA to LDCs. This is in tandem with a commitment to provide developing countries with ODA equal to 0.7% of their GNI.

below long-standing international commitments.⁹⁹ In 2019, only 5 of the 29 DAC countries met the 0.15-0.20% of GNI ODA commitment to LDCs.¹⁰⁰ Only a few countries and international organisations¹⁰¹ offer specific grants and concessional loans to LDCs.¹⁰² However, most development aid is unrelated to LDC status as most organisations do not use the status as a criterion for resource allocation, and some do not even consider LDC status.¹⁰³ Thus 'graduation per se is unlikely to directly affect most ODA.'¹⁰⁴

b. Analysis, and advocacy services

Graduation will terminate or phase out various analysis, advocacy, and information services offered to LDCs by several international organisations,¹⁰⁵ including the UN system services.¹⁰⁶

c. Other indirect impacts

In addition to its direct benefits, preferential trade access has additional indirect benefits. For instance, preferential access to major export markets can attract FDI, particularly in buyer-

⁹⁹ UNCTAD, 'Least Developed Countries Report 2019: The Present and Future of External Development Finance – Old Dependence, New Challenges' (2019) UNCTAD/LDC/2019.iv. For the LDC group, the ODA to GNI decreased from 0.13% in 2003 to 0.07% in 2017. However, if donors had honoured their commitments in 2017, LDCs would have received about \$58 billion more.

¹⁰⁰ Committee for Development Policy, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (UN 2021) 43; OECD, 'Statistics on Resource Flows to Developing Countries' <<https://www.oecd.org/dac/financing-sustainable-development/development-finance-data/statistics-on-resource-flows-to-developing-countries.htm>> accessed 26 September 2022.

¹⁰¹ Moreover, several multilateral and regional development organisations, including the UN system, allocate specific resources for development in LDCs.

¹⁰² Asian Development Bank, 'Classification and Graduation of Developing Member Countries' Operations Manual Section A1, Policies and Procedures, issued on 23 April 2019; Japan International Cooperation Agency (JICA), 'Terms and Conditions of ODA Loans' <https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/standard/index.html> accessed 20 March 2021. ADB provides concessional finance to LDCs lacking creditworthiness and blended finance to those with adequate creditworthiness. For low-income LDCs, it offers a 0.01% interest rate and a 40-year repayment period, including a 10-year grace period irrespective of sectors and fields of ODA. Japan has the most favourable terms for ODAs to LDCs. Germany and South Korea also offer such grants and concessional loans with favourable terms.

¹⁰³ Committee for Development Policy (n 100) 45. Multilateral organisations base their aid decisions primarily on a country's income level and creditworthiness. In contrast, bilateral donors frequently consider broader criteria, such as regional interests, country needs, governance, and human rights. For instance, the World Bank International Development Association (IDA) offers concessional financing to all countries with a per capita income below a certain threshold (1,185 USD in the fiscal year 2022). The various lending instruments of the International Monetary Fund (IMF) are tailored to different types of balance of payments requirements and each Member's unique circumstances. Similarly, the OECD reviews the list of countries that qualify for official development assistance every three years.

¹⁰⁴ WTO and EIF (n 7) 57.

¹⁰⁵ For instance, the WTO Sub-Committee on Least Developed Countries of the Committee on Trade and Development addresses issues of interest to LDCs and produces an annual note on 'Market access for products and services of export interest to least developed countries.'

¹⁰⁶ The UNDESA provides analysis, data and information on support measures and capacity-building for LDCs. CDP, a subsidiary of UNDESA, oversee the inclusion and graduation of LDCs. It also maintains a platform named Gradjet that helps government officials in LDCs understand the graduation process and plot a course of action to graduate successfully; The UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS) monitors the implementation of programmes of action for LDCs and assists them in mobilising resources and other forms of support; UNCTAD publishes an annual 'Least Developed Countries Report' that analysed issues of interest to LDCs.; ESCAP produces an annual Asia-Pacific Countries with Special Needs Development Report, covering LDCs, landlocked developing countries and small island developing States.; The United Nations University World Institute for Development Economics Research (UNU-WIDER) provides research and data on LDCs.

driven global value chains.¹⁰⁷ Loss of preferences after graduation (combined with the uncertainty of a smooth transition system) may reduce the attractiveness of a country for FDI in specific sectors.¹⁰⁸

Thus, graduation will result in losing several types of LDC-specific SDT, significantly impacting the LDC trade. Table-9 outlines the graduation-induced loss of different SDT benefits.

Table 9: Overview of selected SDT for LDCs versus graduated LDCs

SDT	LDCs	Graduated LDCs
Preferential market access to goods	DFQF market access to different developed and developing countries	GSP schemes of developed members designed for DCs
Preferential treatment in services	Preferences in developed and developing countries under the LDC Services Waiver until 2030	No preference
TRIPS transition period (general)	Exemption until 1 July 2034 (except the core non-discrimination principles)	No exemption
TRIPS transition period (pharmaceutical)	Exemption until 1 January 2033	No exemption
Flexibility under the SCM Agreement	LDCs have the flexibility to use export subsidies	No such flexibility, except for certain selected DCs
Technical Assistance (TA) provided by WTO	Specific capacity-building courses for LDCs	No significant change due to graduation
TA provided by the EIF	EIF assists LDCs in using trade as an engine for growth and sustainable development	Possibility of up to five-year extension for graduated LDCs

7.4 Smooth Graduation Support

7.4.1 Legal Foundation for Smooth Graduation Support

Different resolutions of the UN General Assembly and the Programme of Actions for the LDCs have progressively established the legal framework for a smooth graduation support mechanism to assist graduating and graduated LDCs maintain their growth momentum.

Resolution 59/209, adopted in 2004, was the first in a series of UN General Assembly resolutions on LDC graduation. It identifies the responsibilities of various UN entities in preparing and implementing a graduation strategy by the graduating country. Moreover, it invites development and trading partners to consider extending to the graduated country trade preferences previously made available because of LDC status or phasing out their reduction to avoid an abrupt reduction.¹⁰⁹ Consequently, the IPoA for the LDCs¹¹⁰ adopted in

¹⁰⁷ UNCTAD and UNIDO, 'Economic Development in Africa Report 2011: Fostering Industrial Development in Africa in the New Global Environment' (2011). FDI is the inflow of money and technology, knowledge, skills, and expertise, all contributing significantly to a country's economic development and international trade performance.

¹⁰⁸ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (n 67) 137.

¹⁰⁹ UN General Assembly, 'Smooth Transition Strategy for Countries Graduating from the List of Least Developed Countries' A/RES/59/209, Resolution adopted by the General Assembly on 21 December 2012.

¹¹⁰ UN-OHRLLS, 'Programme of Action for the Least Developed Countries for the Decade 2011-2020' (UN 2011) Adopted by the IV UN Conference on the LDCs (Istanbul, 9-13 May 2011), A/CONF.219/7.

2011 called for establishing an ad-hoc working group to further study and strengthen the smooth transition process with an overarching goal of enabling half of the LDCs to meet the criteria for graduation by 2020.¹¹¹

The 2012 UN resolution on a smooth transition for countries graduating from the list of LDCs (67/221) clarifies several aspects of the smooth transition process, including the required actions by graduating countries and their development and trading partners, as well as the nature of UN support provided in the process. It also invited trading partners that have not yet established procedures for extending or phasing out preferential market access to clarify their position on the extension of LDC-specific preferences, the length of the extension, and the details of the gradual phase-out.¹¹² In 2022, the Doha Programme of Action (DPoA) reiterated the commitment that the development and trading partners extend or reduce LDC-specific trade preferences to the graduated country. In addition, it noted the LDC group's proposals to the WTO regarding the smooth transition of countries graduating from the LDC category and its intention to examine these issues further.¹¹³

7.4.2 Current Smooth Graduation Support

Currently, graduation is characterised by the absence of a robust support mechanism. Even most UN development system entities lack specific graduation support mechanisms for LDCs.¹¹⁴ Graduation supports presently available are limited, time-bound and primarily advisory.¹¹⁵

a. Extended LDC-specific trade preferences

Most preference-providing countries have no formal rules for extending trade preferences beyond graduation. Only the EU and Turkey have a 'smooth transition clause' that automatically extends benefits for three years. No other GSP programme includes similar clauses. In the past, some graduates have been granted additional periods, not as a matter of policy but as a result of negotiations with individual LDCs.¹¹⁶ Australia, for instance, extended DFQF access to Maldives, Samoa, and Equatorial Guinea for some time after graduation. China additionally granted Samoa a three-year extension. In other cases, preferences are removed immediately after

¹¹¹ *ibid.*

¹¹² United Nations, 'Resolution Adopted by the General Assembly on 21 December 2012 on Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/221.

¹¹³ UN General Assembly, 'Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031' (UN 2022) A/CONF.219/2022/3.

¹¹⁴ Economic and Social Council Official Records, 2017, Supplement No. 13, CDP Report on the 19th Session (E/2017/33) 4 So, they may not always be able to support a smooth transition of graduating and graduated countries.

¹¹⁵ Daria Shatskova, 'Daniel Gay: The Long and Winding Road to LDC Graduation' (*Trade 4 Dev News*, 27 July 2018) <<https://trade4devnews.enhancedif.org/en/qa/daniel-gay-long-and-winding-road-ldc-graduation>> accessed 3 June 2022. Gay noted that other than the reputational benefits, there is a lack of positive incentives for graduation. As a result, rather than new unique benefits for recent LDC graduates, countries will only experience a slower loss of support.

¹¹⁶ CDP (62) 33 These are the most substantial support systems for graduating LDCs. Therefore, although the EU is adopting new GSP programmes, these provisions will likely remain.

graduation.¹¹⁷ Table-10 shows the state of smooth transition provision in different preference-providing countries.

Table 10: Smooth transition provisions in selected LDC-specific market access arrangements¹¹⁸

Markets	Smooth transition clauses
EU and Turkey	A smooth transition period of 3 years after graduation. The EU has also granted additional periods in the past.
Australia, Canada, China, India, New Zealand, Norway, the Republic of Korea, Switzerland, and the USA	No formal smooth transition provision. An additional extended period is granted to some graduates through bilateral engagement.
Chile, Eurasian Economic Union, Japan, and Thailand	No formal smooth transition provision and no record of additional extension after graduation.

b. **Advisory supports:** Various UN entities and the WTO provide specific assistance to the graduation processes of LDCs through training, workshops, studies, and assistance in developing smooth transition strategies. The advisory services come in two broad categories:

- i. **Analytical, advisory services:** When an LDC is first deemed eligible for graduation, UNDESA and UNCTAD prepare an ex-ante impact assessment and a vulnerability profile, respectively.¹¹⁹
- ii. **Technical advisory services:** The Sustainable Graduation Support Facility (iGRAD)¹²⁰ provides dedicated capacity-building support through policy and technical advisory services across six specific lines, including addressing the loss of LDC-specific existing ISMs, improving access to non-LDC-specific support, and preparing and implementing national smooth transition strategies (STS).¹²¹

Other UN entities also provide different types of advisory support.¹²²

¹¹⁷ Kimberly Ann Elliot, 'A Smoother Trade Transition for Graduating LDCs' (Centre for Global Development 2019) <<https://www.cgdev.org/sites/default/files/Elliot-LDC-Trade-Final.pdf>> accessed 3 March 2020

¹¹⁸ UNDESA, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures*. 4th Edition (United Nations 2021) 35.

¹¹⁹ The impact assessment identifies the significant post-graduation consequences that could hinder development by focusing on withdrawing LDC-specific ISMs and any applicable 'smooth transition' mechanisms. On the other hand, the vulnerability profile is intended to serve as a background document for CDP deliberations regarding a country's readiness for graduation.

¹²⁰ OHRLLS has recently established SGSF as chair of the United Nations Inter-Agency Task Force (IATF) and UNDESA and as the secretariat of the CDP to respond to the growing need of the graduating and recently graduated LDCs.

¹²¹ It also assists with transitional financing and beyond, facilitating South-South Cooperation and ensuring active participation in the CDP monitoring process. However, these are an integral part of the LDC graduation process.

¹²² For example, The United Nations Inter-Agency Task Force (IATF) on LDC Graduation brings together UN agencies and other international and regional organisations to assist countries with a smooth transition. The Enhanced Integrated Framework (EIF), the Technology Bank for LDCs, UNCDF, and the Investment Support Programme for LDCs have 'smooth transition' provisions that allow them to continue supporting countries for several years after graduation. The CDP has advocated for smooth transition measures and enhanced support for

The Expanded Integrated Framework (EIF), Technology Bank for LDCs, Investment Support Programme for LDCs, and the UN Capital Development Fund (UNCDF) all include 'smooth transition' features that allow them to serve countries for several years after graduation.

Faced with the inadequacy of graduation support, the Doha Programme of Action (DPoA) has clarified which assistance graduating LDCs need most for a smooth transition. LDCs have requested an extension of preferential trade access and transition periods stipulated in several WTO agreements.¹²³ The DPoA reiterated the conviction that no graduating LDCs 'should have its development progress disrupted or reversed.' and invited the 'development and trading partners to consider extending to the graduated country trade preferences previously made available as a result of least developed country status or reducing them in a phased manner in order to avoid their abrupt reduction.'¹²⁴

In essence, except for a three-year extension of trade preferences in the EU and a few advisory services primarily provided by the United Nations, there is no significant assistance for a smooth transition upon graduation.

7.4.3 Navigating Graduation Challenges: Support is the Key to a Smooth Transition

Currently, 26 out of the total 46 LDCs are in various stages of the graduation process.¹²⁵ LDCs that have previously benefited from preferential schemes and WTO flexibilities risk losing them upon graduation, posing a sudden threat to their economic development. Graduated LDCs are confronted with the triple erosion of national loss of policy space, global loss of preference margin, and favourable RoO policies. The risks are exacerbated by their limited export base and dependence on a few international markets.

Effective measures of support from the WTO and the international community for the graduating LDCs may assist in the sustainability of their development efforts over the coming decades.

a. International commitments for graduation

Supports provided to the LDCs are termed 'special efforts' based on the concept of 'international solidarity', 'shared responsibility', 'common human interest', and 'human security' to ensure that 'no one is left behind' through sustainable development of these countries.¹²⁶

graduated and graduating LDCs. In addition, UNCTAD, UNDESA, UNESCAP, and other UN entities are engaged in various capacity-building projects to prepare governments for graduation.

¹²³ WTO General Council, 'Trade Related Challenges of the Least Developed Countries and Way Forward : Proposal for a WTO Smooth Transition Package in Favour of Countries Graduated from the LDC Category - Communication from Djibouti on Behalf of the LDC Group - Revision' (2022) WT/GC/W/807/Rev.1.

¹²⁴ UN General Assembly, 'Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031' (n 113) para 165. It also referred to the LDC group proposals at the WTO relating to a smooth transition of the graduating LDCs and 'seek to further examine these issues.'

¹²⁵ Communication from Chad on behalf of the LDC group, 'A Smooth Transition Package in Favour of Members Graduating from the LDC Category' (WTO) WT/GC/W/829, 18 October 2021.

¹²⁶ UN General Assembly, 'Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031' (n 113); Resolution of High-Level Expert Group Meeting, 'Increased Assistance to the Least Developed Countries' (InterAction Council 1984) <<https://www.interactioncouncil.org/publications/increased-assistance->

The LDC list was created to facilitate targeted assistance for successful graduation which may come only through a 'smooth transition'. For that, successive UN General Assembly resolutions have urged trading and development partners as well as the WTO to support a 'smooth transition' through a variety of measures, such as an extension of existing differential treatment and unilateral trade preferences available to LDCs for a time period proportional to their level of development and avoidance of abrupt cuts in development or technical assistance.¹²⁷ An overarching objective of the IPoA for the decade 2011–2020 was the graduation and smooth transition of the LDCs.¹²⁸ It recommended a plethora of actions to facilitate the graduation journey of LDCs. DPoA for 2022 to 2034 reiterated those commitments and urged more specific and pronounced support.

b. Extensive consequences due to loss of preferential access

As detailed in the preceding sections, for many graduating LDCs, the most critical loss will come in the form of a significant loss of preference. This includes losing preferential access to major trading partners, such as the European Union, and regional trading arrangements, such as SAFTA and ASEAN free trade agreements.

However, not every LDC benefits from preferential trade regimes; consequently, not every LDC will be equally impacted by its elimination.¹²⁹ According to a WTO-EIF analysis, whereas graduating LDCs such as Tuvalu, Timor-Leste, Sao Tomé & Príncipe, and Angola will see only a tiny effective tariff adjustment in percentage (below 2 per cent), Myanmar and Bangladesh could witness a staggering 175 and 537 percentage increase in effective rates respectively. As a result, graduation-induced tariff changes will wipe out one-seventh of Bangladesh's average annual export revenue from 2016 to 2018.¹³⁰

Graduation-induced disruption in development is in direct opposition to the underlying principles of the concept. The primary objective of graduation is not to push a country's trading capacity to its pre-graduation level, but to facilitate its growth momentum, allowing it to continue expanding post-graduation without external assistance. In addition, a well-defined incentive-driven graduation support system can bolster the confidence of exporting firms in the graduating LDCs and enable them to prepare for the impending changes in trade regulations.

c. Support is integral to the graduation roadmap

Graduation entails a transition process involving multiple steps to ensure a smooth and sustainable graduation.

least-developed-countries> accessed 22 May 2022. UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, A/Res/70/1, 21 October 2015.

¹²⁷ UN General Assembly, 'Smooth Transition Strategy for Countries Graduating from the List of Least Developed Countries' (n 109); UN General Assembly, 'Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/22, Resolution adopted by the General Assembly on 21 December 2012.

¹²⁸ UN-OHRLLS (n 110).

¹²⁹ Rahman and Bhattacharya (n 70) 13. The range of losses will depend on (a) the structure of exports and markets, (b) the nature and extent of preferences, (c) the ability to comply with rules of origin that apply to developing countries, and (d) the difference between the preferences that LDCs and developing countries get.

¹³⁰ WTO and EIF (n 7) 49.

LDCs are recommended for graduation after two successful triennial reviews.¹³¹ The graduating LDC is required to create a consultative mechanism and a smooth transition strategy. The UN system, development, and trade partners are anticipated to participate in the consultation process and provide targeted assistance and capacity-building support to ensure graduation success. The UN CDP is responsible for monitoring the transition strategy's implementation.¹³² Following graduation for the first three years, countries must submit an annual report to the CDP regarding implementing their transition strategy.

These UN-articulated graduation steps align closely with the assurance of graduation support. Consequently, successive United Nations resolutions have urged development and trading partners and the WTO to support a 'smooth transition' through various measures, such as extending existing ISMs for a period and avoiding abrupt cuts in development or technical assistance. A transparently articulated set of measures to support the graduation process will ensure that the preceding steps are not merely formalities but designed to help LDCs achieve graduation success.¹³³

Therefore, a UN report 'underscored the importance of establishing appropriate international support measures for graduating and graduated countries to ensure that they are able to maintain their development progress, prepare for and manage graduation and build their resilience in order to transition smoothly beyond graduation, which will be even more challenging in the context of COVID-19' pandemic and global economic crisis.¹³⁴

d. The structural impediments of smooth graduation

Following the adoption of the IPoA in 2011, which set the goal of halving the number of LDCs by 2020, the HAI (66 and above) and EVI (32 and below) scores have been fixed at their 2012 levels. In contrast, previously, they were moving averages reflecting overall progress in respective areas. As a result, many LDCs found eligible for graduation in recent years may graduate with significant deficits in some HAI and EVI key sub-indices.¹³⁵ Concerningly, three-quarters of the current graduating LDCs did not meet the criteria when they were first recommended for graduation.¹³⁶ Long-term graduation supports have become more critical because of these adjustments.

¹³¹ The review involves deliberations of an impact assessment conducted by UNDESA and a vulnerability profile prepared by UNCTAD.

¹³² UNCDP submits an annual evaluation report to UN-ECOSOC on the monitoring.

¹³³ Rahman and Bhattacharya (n 70) 14.

¹³⁴ UN ECOSOC, 'Committee for Development Policy Report on the Twenty-Third Session (22–26 February 2021)' (UN) E/2021/33, para-88. It emphasised the significance of mobilising all stakeholders, particularly development partners, the United Nations, and the Bretton Woods Institutions, to produce tangible outcomes. Other institutions such as UN CDP, which recommends the graduation of LDCs, recommended a new set of concrete international support measures for graduating and graduated least developed countries, including special considerations for such provisions in regional trading arrangements and the LDC group's proposal to WTO for a time-bound extension of LDC-specific SDT and preferential market access.

¹³⁵ Rahman and Bhattacharya (n 70) 8. While many LDCs have made commendable progress toward fulfilling the criteria for LDC graduation, this component of this graduation narrative deserves special attention.

¹³⁶ Only three of the twelve LDCs currently awaiting graduation met the EVI criteria. An LDC can graduate by meeting only two criteria (income, human assets index, and economic and environmental vulnerability index) or having a per capita income higher than twice the income graduation threshold at two consecutive UNCDP triennial meetings.

To summarise, the potential for significant loss because of the loss of preferences and the evolving global landscape has made international support for graduation crucial, as the process must be structured to prevent disruptions in development.

7.4.4 Proposed Design of Graduation Support

In this section, I present the proposed design of the graduation support system, which is crucial for mitigating the impact of the loss of SDT in the trading system and preventing development disruptions.

a. Gradual phase-out of preference schemes

LDC-specific DFQF market access schemes positively impact many LDC economies, significantly improving graduation indicators.¹³⁷ Gradual phasing out of these benefits may make it easier for graduating LDCs to face the difficulties of preference erosion.

Recognising this need, the United Nations established the ‘smooth transition’ principle, stipulating that LDC-specific support measures should be phased out gradually and predictably to avert development disruption following graduation. So, in multiple UN resolutions, development and trading partners have been urged to extend the benefits and refrain from suddenly withdrawing them. Given the adverse impact of preference erosion and in line with previous UN resolutions, it may be prudent to emulate the EU approach by providing DFQF market access for a period following graduation.¹³⁸ Adopting such a decision should not be difficult for the WTO because LDCs export few products and account for less than one per cent of global exports.¹³⁹

b. Gradual phase-out of other SDT provisions

Graduation results in losing access to SDT provisions specific to LDCs in WTO agreements and decisions.

¹³⁷ Preference erosion due to graduation depends on many factors, including the graduates' product and market structure, tariffs facing their exports, and the disparity between preferential margins applicable to LDCs and developing countries.

¹³⁸ The WTO LDC Group submitted a draft ministerial decision for a smooth transition for graduating LDCs in November 2020 (WT/GC/W/807), proposing to extend all support measures for LDCs for 12 years after graduation. To a resolution at MC12, the LDC Group revised their proposal and urged preference-granting members to extend and phase out their preferential market access programmes over six to nine years (WT/GC/W/829). The draft decision submitted in October 2021 also proposes instructing the Sub-Committee for Least-Developed Countries to prepare a package of support measures for graduating LDCs and report to the General Council at its first meeting in 2023. In another revised submission dated 5 December 2022, the LDC group reduces the requested support lengths to six years (corresponding to two triennial reviews by the UN CDP) or a period determined by the preference-providing Member following graduation (WT/GC/W/807/Rev.). LDCs also urged that the support package apply automatically, uniformly, and unconditionally to all graduated LDCs. Though the WTO MC12 outcome document (WT/MIN(22)/24; WT/L/1135 paragraph 5) acknowledges the unique challenges that graduation presents for LDCs, such as the loss of trade-related ISM, and recognises the role that specific WTO measures can play in facilitating a smooth and sustainable transition after graduation, WTO Members have not yet decided on a support package for graduation. Some developed countries, including the USA, prefer country-specific support. LDCs fear a case-by-case approach would fail to bring predictability and legal certainty for a smooth transition, as envisaged in relevant UN resolutions. They would depend on the negotiating capacity of a single graduating LDC negotiating with the entire membership and could be vetoed by any WTO Member.

¹³⁹ WTO and EIF (n 7) 34. Accordingly, the 12 currently graduating LDCs accounted for just 0.45% of global exports of goods and services.

The focus of assistance for graduating and graduated countries should be on provisions that protect the policy space of LDCs and allow them to pursue policies they could not do otherwise. For instance, using TRIPS exemptions for the LDCs, several LDCs, including Bangladesh, Ethiopia, Tanzania, and Uganda, have already made significant gains in the local production of pharmaceuticals.¹⁴⁰

Tesfachew argued that a gradual phase-out of these provisions is necessary to ensure a 'soft landing' instead of a 'hard landing' that could stifle development gains.¹⁴¹

The point here is not that LDCs should have SDTs indefinitely after graduation. On the contrary, sustaining the development process requires time; if an additional period of support could help countries consolidate their gains, this would more than justify the extended period.

For instance, though on a limited scale, LDCs can access aid for trade (AfT) through the EIF, which grants an automatic transition period of up to five years after graduation, with the possibility of a two-year extension.¹⁴²

c. Interpreting WTO ambiguities in favour of graduating LDCs

A lack of clarity and interpretive uncertainties in some WTO Agreements make it challenging to ascertain eligibility for graduating LDCs.

For instance, LDCs and developing countries listed in Annex VII (b) with a GNI per capita of less than \$1,000 (in constant 1990 dollars) are exempted from the prohibition on export subsidies under the SCM Agreement. A graduating LDC meeting the criteria should automatically qualify for the exemption, but SCM Annex VII(b) listing is compulsory. Though the LDC group in WTO submitted a proposal in this regard in 2018,¹⁴³ there is currently no indication of how or when this will be implemented.¹⁴⁴ The other ambiguous provisions in various Agreements should likewise be interpreted in favour of the graduating LDCs.

d. A new strategy for graduation with momentum

A new strategy is vital to make graduation sustainable and irreversible.

¹⁴⁰ UNCTAD, 'Investment in Pharmaceutical Production in the Least Developed Countries: A Guide for Policy Makers and Investment Promotion Agencies.' (UNCTAD 2011). The general and pharmaceutical transition periods are extended until 2033 and 2034, respectively, under the TRIPS. However, the current and some upcoming graduating LDCs will graduate before this timeframe. Therefore, they may be allowed to enjoy the provision's benefits until the end of its term to establish a solid technological platform as required by Article 66.1 of the Agreement.

¹⁴¹ Taffere Tesfachew, 'Support for Post-Graduation Soft-Landing of LDCs: Implications in the Context of the WTO' (CUTS International 2018) 27–28.

¹⁴² Rahman and Bhattacharya (n 70) 17.

¹⁴³ WTO Submission, 'Communication from the Mission of the Central African Republic on Behalf of the LDC Group with Regard to Measures to Allow Graduated LDCs, with GNP Below US\$1000, Benefits Pursuant to Annex VII(b) of the Agreement on Subsidies and Countervailing Measures' G/C/W/752, 19/04/2018.

¹⁴⁴ Mohammad Razzaque, Hamim Akib and Jillur Rahman, 'Bangladesh's Graduation from the Group of LDCs: Potential Implications and Issues for the Private Sector' in Mohammad Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020) 70.

The graduating LDCs may engage bilaterally with preference-granting nations to facilitate a smooth transition. This is also relevant in various RTAs, such as SAFTA and ASEAN-FTA, which offer preferential treatment to LDCs.

The second approach is for preference-granting countries to extend their respective LDC-specific preferential programmes to the graduating LDCs for a period comparable to the EU's three-year extension. However, instead of such diverse approaches, it is proposed that WTO members reach a broad consensus to reach a shared understanding in this area within the context of bilateral, regional, and global preferential schemes involving the LDCs.¹⁴⁵ Therefore, the WTO General Council reached an important milestone in October 2023 in the global efforts to assist LDCs on their path to graduation, adopting a decision on the extension of support measures for graduating countries.¹⁴⁶

However, a smooth transition strategy is currently considered a time-bound (three to five years) transitional strategy that aims to ensure a gradual phase-out of LDC-specific ISMs. The conceptualisation of the strategy lacks a systemic approach, and the implementation timeline and scope are ambiguous.¹⁴⁷

As post-graduation challenges are a continuation of pre-graduation obstacles, graduating countries need a smooth transition strategy that builds on the development of productive capacities to achieve graduation based on their long-term development needs and objectives, not just the graduation criteria. UNCTAD calls this 'graduation with momentum' and proposed two critical adjustments to the current strategy to achieve that: 'an alternative policy framework to help refocus the objectives and strategic direction; and a new time frame for implementation.'¹⁴⁸

The alternative policy framework is built on three key processes: (i) the development of productive capacities, (ii) through structural transformation (iii) to catch up with other developing countries.¹⁴⁹ Without gains in these processes, a mere extension of ISM phase-out will yield no value.

¹⁴⁵ Rahman and Bhattacharya (n 70) 17. Still to effectively address graduation shocks, a multilateral approach is preferable over unilateral or bilateral approaches as it offers the necessary certainty and is preferable to most LDCs that lack negotiating capacities. The LDC group has submitted several proposals to the WTO, highlighting the need for support towards a smooth transition and seeking up to 12 years extension of LDC-specific SDT provisions and ISMs after graduation.

¹⁴⁶ WTO, 'WTO Members Reach Deal to Support Least-Developed Countries on Path to Graduation' <https://www.wto.org/english/news_e/news23_e/ldevc_23oct23_e.htm> accessed 1 December 2023.

¹⁴⁷ For example, a formal procedure for a smooth transition for all ISMs is not in place; only a few are automatically granted after graduation. The ability of a graduating country to retain access to such measures for a transitional period depends on its ability to negotiate with development partners on a case-by-case basis. Other concerns include the variable time frame, which ranges between three and five years, and when preparations for a smooth transition should begin.

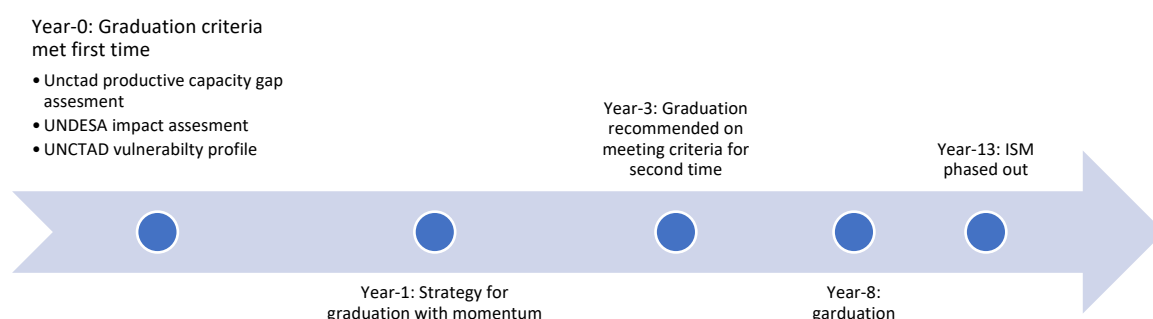
¹⁴⁸ UNCTAD, 'Strategy for Graduation with Momentum: Bridging Pre-Graduation and Post-Graduation Development Processes in the Least Developed Countries' UNCTAD Policy Brief No.99, April 2022 2.

¹⁴⁹ Graduation should signify catching up and narrowing the development gap between LDCs and ODCs, which involves a process of structural transformation in which a country's production structure climbs up the productivity ladder and begins to generate the conditions for improved human development, social equity, and prosperity. This is the foundation for the rapid expansion of productive capacities.

The proposed graduation timeline is based on a productive capacities gap assessment, vulnerability profile, and impact assessment as part of the first CDP review.¹⁵⁰ Within one year of first meeting the criteria, the graduating country must prepare its strategy for graduation with a momentum that will serve as a roadmap for all ISMs throughout the process.¹⁵¹ The preparatory period for final approval for graduation upon meeting the criteria for the second time and the transition period for the country's final removal from the LDC list should be standardised at five years.¹⁵²

Thus, as shown in Figure-19, a graduating country will have 12 years to implement the strategy if all development partners offer a five-year preparatory period and a five-year smooth transition period.¹⁵³ Through a synergy of policy and strategy between pre-graduation development trajectory and post-graduation sustainable development, the proposed graduation strategy will allow LDCs to graduate with momentum.¹⁵⁴

Figure 19: Strategy for graduation with momentum: Time frame proposed by UNCTAD¹⁵⁵



7.5 Experiences of the Past Graduates

Over the last 52 years of the creation of the group, most LDCs have struggled to overcome development challenges. As a result, only six countries so far have graduated from LDC status:

¹⁵⁰ Tesfachew (n 141) 26. Tesfachew also suggested that a programme for a smooth transition should begin not after the LDC has been recommended for graduation but as soon as the CDP determines that the country is eligible for graduation.

¹⁵¹ The strategy for graduation with momentum should be supported by a productive capacities gap assessment that clearly outlines the policies required to improve existing production capacities. In addition, the strategy must identify specific areas of productive capacity for which international support and domestic policies must be prioritised.

¹⁵² The preparatory period should ensure the graduating country has sufficient time to prepare for graduation with momentum by enhancing productive capacities. The transition period would allow the least developed countries to effectively utilise ISMs and other targeted support measures identified through assessments of gaps in productive capacity.

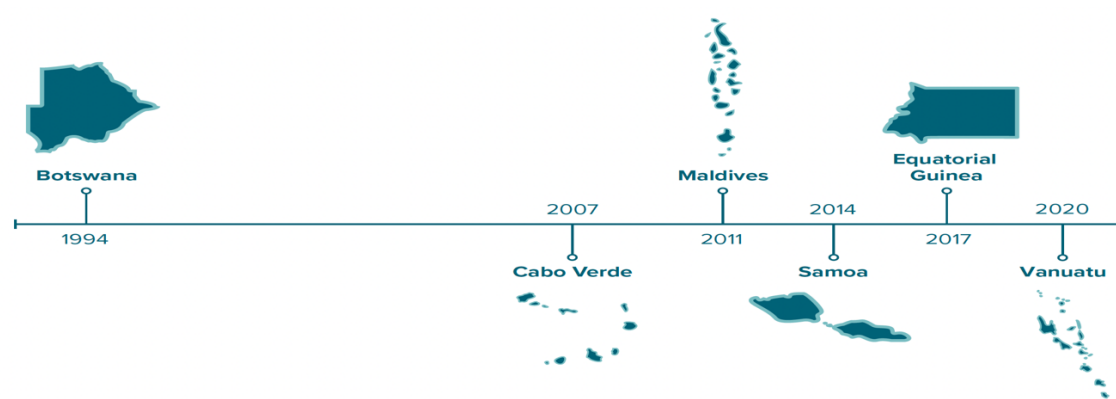
¹⁵³ The graduating LDC should start implementing the strategy for graduation with momentum within one year of meeting the graduation criteria for the first time.

¹⁵⁴ Post-graduation support measures can only be effective if they build on pre-graduation skills and development. Therefore, the 12-year graduation with momentum strategy also connects the pre- and post-graduation processes.

¹⁵⁵ UNCTAD, 'Strategy for Graduation with Momentum: Bridging Pre-Graduation and Post-Graduation Development Processes in the Least Developed Countries' (n 147).

Botswana (1994), Cape Verde (2007), Maldives (2011), Samoa (2014), Equatorial Guinea (2017), and Vanuatu (2020).¹⁵⁶

Figure 20: Graduated LDCs¹⁵⁷



Moreover, there are concerns about the negative consequences of graduation, which not all LDCs are willing to accept.¹⁵⁸ Several LDCs, such as Maldives, Samoa, Equatorial Guinea, and Nepal, had resisted graduation and obtained some postponements, arguing for their economic vulnerability.¹⁵⁹ Many eligible countries have often sought to postpone graduation for two reasons:

- to buy time to recover from shocks caused by natural disasters or global economic conditions; and
- to alleviate perceived fears about losing preferential market access and development assistance.¹⁶⁰

Table 11: Changes in key indicators following graduation.¹⁶¹

Country	Reference Year	Real GDP growth rate (%)	FDI (% of GDP)	Share of ODA (% of GNI)
Botswana	Pre-graduation (5 years)	10.55	0.66	3.67
	Post-graduation (5 years)	5.50	1.32	2.06
Cape Verde	Pre-graduation (5 years)	6.18	6.66	15.92
	Post-graduation (5 years)	3.98	10.46	14.04
Maldives	Pre-graduation (5 years)	9.09	7.43	3.08
	Post-graduation (5 years)	7.40	12.14	1.70
Samoa	Pre-graduation (5 years)	0.43	1.73	16.44
	Post-graduation (5 years)	1.53	2.41	11.98
	Pre-graduation (5 years)	-5.46	1.66	0.06

¹⁵⁶ UNCTAD, 'UN Recognition of the Least Developed Countries' (UNCTAD) <<https://unctad.org/topic/least-developed-countries/recognition#:~:text=Six%20countries%20have%20so%20far,2017%2C%20and%20Vanuatu%20in%202020.>> accessed 1 June 2022.

¹⁵⁷ UNDP, 'Graduation of African Least Developed Countries (LDCs): Emerging Issues in a New Development Landscape' (2021).

¹⁵⁸ Vinaye Ancharaz, 'Graduating from LDC Status' <<https://policycommons.net/artifacts/1159891/graduating-from-ldc-status/1718046/>> accessed 1 June 2022.

¹⁵⁹ Alassane Drabo and Patrick Guillaumont, 'Graduation from the Category of Least Developed Countries: Rationale, Achievement and Prospects' (HAL 2018).

¹⁶⁰ UNDP (n 156) 8.

¹⁶¹ Author's calculation based on World Bank data

Equatorial Guinea	Post-graduation (3 years)	-5.73	4.10	0.45
Vanuatu	Pre-graduation (5 years)	2.2	4.08	16.62
	Post-graduation (more time needed)	-	-	-

As reflected in Table 11, concerns about the effects of graduation on the economy are warranted, as historical evidence indicates that GDP growth slowed significantly for all graduates.¹⁶² ODA had also decreased in all former LDCs, apart from Equatorial Guinea, which experienced a slight increase. However, graduation may have increased investor confidence. Foreign direct investment has increased noticeably in all graduates.

Table 12 shows that the experiences of previous graduates reveal a few patterns: Most graduates are from small island nations with high economic vulnerability. Moreover, these countries are characterised by a small population and a modest economy that relies heavily on mineral resources or tourism. In addition, their trade and economic patterns significantly differ from most currently graduating countries. The graduates are tiny in terms of global trade. Most importantly, all six graduates have successfully overcome slide-back to the LDC group. However, not all past graduates did so because of better access to international markets or global integration. Better government policies, such as better health and education, have driven the most progress.¹⁶³

Table 12: Experiences of Graduated LDCs¹⁶⁴

Graduated LDCs	Graduation year/ Income level	Top Features
Botswana	1994 Upper middle income	Botswana achieved upper-middle income status by 2005 after decades of rapid economic growth. In 2021, the country's per capita GNI was \$6,805. In the 1970s and 1980s, diamond extraction fueled Botswana's economic growth. As a result, the importance of services has grown since the 1990s.
Cabo Verde	2007 Lower middle income	Due to its reliance on remittances and ODA, Cabo Verde's graduation discourse focused on the loss of aid, which accounted for 18% of GNI 10 years before graduation and still accounts for 14%. Targeted tourism policies have driven Cabo Verde's growth since graduation. Participation of the diaspora in the formation of national policy was crucial.
Maldives	2011 Upper middle income	The country graduated in 2011 with a longer transition period after two triennial LDC reviews in 2001 and 2004. As a result, Maldives' GNI per capita (\$8,280 in 2021) and human assets index score (90) have continued to rise, but economic vulnerability to environmental and external factors remains. Nevertheless, its primary industries—tourism and fish exports—are growing.

¹⁶² Except in the case of Samoa. Vanuatu just graduated in 2020 and needs more time for impact assessment. However, the pre-and post-graduation economic scenario in Equatorial Guinea is bleak, as the country has been experiencing negative GDP growth due to the depletion of its oil reserves. Vanuatu's lower GDP growth and greater reliance on ODA may make it difficult to overcome the graduation hurdles.

¹⁶³ Daniel Gay, 'A Critical Reflection on International Support for Least Developed Countries' (The Commonwealth of Nations 2020).

¹⁶⁴ UNDP (n 156); UNCTAD, 'Report on the Twentieth Session (12–16 March 2018)' E/2018/33, ECOSOC, Supplement No. 13; UNCTAD, 'Vanuatu Graduates from Least Developed Country Status' (UNCTAD, 4 December 2020) <<https://unctad.org/news/vanuatu-graduates-least-developed-country-status>> accessed 2 June 2022.

Samoa	2014 Upper middle income	Samoa has continued to progress since its graduation, as evidenced by its rising per capita GNI and very high levels of human capital. However, it remains vulnerable to economic and environmental shocks. Therefore, Samoa continued to collaborate with its trading and development partners to mitigate the adverse effects of graduation.
Equatorial Guinea	2017 Upper middle income	The oil-dependent country graduated after meeting income-only criteria. Petroleum accounts for 90% of its exports. Since 2013, its real GDP has fallen due to the depletion of oil reserves and low investment. As a result, Equatorial Guinea's HAI progress is slow. The country's HAI progress remains slow; its productive capacity index (42.9) is below the LDC group average (45), and its human capital component is also falling behind.
Vanuatu	2020 Lower middle income	Vanuatu graduated from LDC in 2020 with a prolonged transition period after meeting HAI and Income thresholds in 2006, 2009, and 2012. Since the mid-2000s, international services have driven Vanuatu's growth. However, its economic transformation is threatened by its vulnerability to economic and environmental disasters. Therefore, maintaining duty-free, quota-free access to the Japanese market for organic beef is of utmost importance to the country and is still under negotiation.

Examining the annual CDP monitoring reports for the graduated countries reveals improvement across the board. Still, graduates reported a lack of progress in development assistance and access to concessionary financing, explaining that development partners have largely failed to honour their commitments.¹⁶⁵ Due to the infancy of the graduation programme, the relatively small number of graduated countries, and the absence of a collective commitment from development partners, the graduation process has been far from smooth and remains unpredictable.¹⁶⁶

7.6 Conclusion

This chapter has found that LDCs have benefitted from the LDC-specific preference programmes.¹⁶⁷ However, preference use is highly context-specific and varies considerably across LDCs, sectors, and products. In addition, this chapter has found inadequate data and a lack of consensus regarding the severity of graduation impact on the graduated LDC trade. Still, there is a consensus that graduation will have an adverse trade impact.

The experiences of previous LDC graduates are of little use to the current and upcoming graduates due to the vast differences in their trade profiles and other characteristics. The impact will vary depending on the rate of preference utilisation by the specific LDC and the tariff the graduate must pay after graduation. Specific sectors, such as agriculture and apparel that benefit the most from preferential schemes because of their higher preference margins will be hit the hardest by preference withdrawal. Several graduating LDCs, such as Bangladesh, Nepal, or Myanmar that primarily export such products (e.g., apparel) to preference-granting countries will face a sharp tariff increase upon graduation, which, in the absence of other arrangements, could quickly wipe out a substantial portion of their exports.

¹⁶⁵ 'Working Group on LDC Graduation Hears Experience of Maldives' (*IISD*, 26 March 2012).

¹⁶⁶ LDC News, 'Maldives: The Challenges faced by LDCs when they graduate' <<http://ldcnews.com/1603/>> accessed 2 March 2020

¹⁶⁷ Gains, however, vary between programmes based on their coverage of products of interest to LDCs and their simplicity of origin requirements. On the other hand, the preferences could not be utilised equally by all LDCs. Still, preference programmes helped some graduating LDCs to better integrate into global trade and expand economic growth to reach a level of development sufficient to meet the graduation criteria.

As a record number of LDCs are currently in various stages of the graduation process, which involves an international commitment to continue supporting the graduating LDCs to accelerate growth with momentum, a graduation package tailored to ensure a smooth transition is urgently required. Accordingly, this chapter has made its recommendation supporting UNCTAD's suggestion for a strategy for smooth graduation with momentum. Without speedy adoption of such a support mechanism, graduation may be riskier for many LDCs, jeopardising their development progress in an uncertain economic and global landscape.

So far, Part I of the thesis has provided an extensive analysis of the specific SDT measures relevant to this research and the impact of their withdrawal due to LDC graduation. Moving forward, the subsequent two chapters in Part II will present those findings in two case studies on the apparel and pharmaceutical industries of Bangladesh.

PART II

Case Studies

CHAPTER 8: GRADUATION CHALLENGES OF BANGLADESH APPAREL INDUSTRY

8.1 Introduction

Bangladesh has a vibrant clothing industry which dominates its export revenue. The exports of Bangladesh are highly concentrated at the sector, product, and destination levels. Bangladeshi apparel exports receive preferential treatment in its leading export markets. There is still much room for the garment industry in Bangladesh to grow and capture a larger global market share as the industry is expanding rapidly. However, because Bangladesh is in the process of graduating, the industry will soon experience a change in market access regulations result in a significant increase in tariffs in its primary export destinations. Tariffs on apparel products are among the highest globally.¹ Thus, trade preferences offered by many developed and developing countries for apparel exports from LDCs seems to be economically valuable. On the other hand, Bangladeshi exports face increasing competition from rivals in clothing exports, such as Vietnam and India, whose exports are also expanding rapidly. Therefore, Bangladesh's significant concern is how the new market access regime will affect the industry.

Bangladesh is an ideal case for analysing the beneficial effects of ISMs and the impacts of graduation on an LDC that can use trade preferences to determine the optimal course of action for streamlining the process for Bangladesh and all graduating LDCs.

This chapter will examine how trade preferences have helped the exponential growth of the apparel sector, the ramifications the sector may face because of Bangladesh's graduation, and how Bangladesh can better manage these implications to reduce their adverse effects and support the industry's continued growth.

8.2 Bangladesh Apparel Industry

8.2.1 Global Apparel Manufacturing Sector

a. Structure

Manufacturing ready-made garments (RMG) is one of the world's oldest and most globalised export industries.² It also remains a significant engine for economic growth and development in many DCs worldwide, particularly in some Asian countries where it contributes to a significant source of employment, export earnings and GDP.³

As opposed to a producer-driven value chain primarily involving capital and technology-intensive industries, the RMG or apparel⁴ industry is an ideal example of a buyer-driven value

¹ The average import tariff rate for clothing was 17.0% globally in 2018, more than twice the rate for all manufactured goods combined.

² Over the last two centuries, apparel manufacturing has shifted from one-person artisan tailors to multinational corporations. In addition, the oldest and most globalised apparel industry has shifted to different regions since the early 1970s.

³ Gary Gereffi and Stacey Frederick, 'The Global Apparel Value Chain, Trade and the Crisis: Challenges and Opportunities for Developing Countries' (World Bank Washington, DC 2010).

⁴ The terms 'apparel' and 'ready-made garments' (RMG) are used interchangeably in many studies. However, no official guidance is found on whether these terms are interchangeable. As RMG is widely used and popular in Bangladesh, this report uses the term to refer to apparel products.

chain.⁵ It means the lead firms or large retailers from advanced countries are ‘manufacturers without factories’.⁶ They play a crucial role in setting up decentralised production networks in various exporting countries, acting as strategic brokers in connecting dispersed networks of overseas suppliers with final consumer markets.⁷ They also perform the most valuable activities in the value chain (e.g., research, design, branding, marketing) and control access to major resources that generate higher profit. On the other hand, suppliers, typically based in low-cost developing nations, execute the production process according to the specifications provided by the lead firms.⁸ Global sourcing helps retailers to reduce costs and respond quickly to changing markets. Production location is chosen per procurement requirements such as manufacturing cost, quality, capacity, and possible risk involved.⁹ Generally, companies set up production plants in regions where land and labour are cheaper. Clothes are then shipped to the desired markets.

In this age of fast fashion and social media influence, apparel retailers are aggressively competitive and fast, so fashion brands are constantly refining their global sourcing practices to reduce production costs and delivery time.¹⁰ By the late 1990s, most larger retailers and leading manufacturers were sourcing ready-made garments from low-cost production centres in China and south-southeast Asia.¹¹ Production hubs in East Asia were among the first to reap the benefits of offshoring, which moved slowly to countries with lower wages, such as Vietnam, Bangladesh, India, Cambodia, etc. (Figure-21).¹² Relatively low entry barriers due to low fixed costs, low technology and high labour-intensive manufacturing have incentivised many underdeveloped countries to enter the lucrative apparel market valued at \$825bn in 2021.¹³ These new outsourcing hubs must rise to the challenges to stay relevant in this everchanging offshoring game.

⁵ Bertha Jacobs and others, ‘Matching Sourcing Destination with Fashion Brands’ Business Model: Comparative Advantages of Bangladesh and Vietnam Apparel Industries’ (2016) 14 Fashion, Industry and Education 11.

⁶ Gary Gereffi and Olga Memedovic, ‘The Global Apparel Value Chain: What Prospects for Upgrading by Developing Countries?’ (United Nations Industrial Development Organization 2003) 3.

⁷ Gereffi and Frederick (n 3).

⁸ Karina Fernandez-Stark, Stacey Frederick and Gary Gereffi, ‘The Apparel Global Value Chain’ [2011] Duke Center on Globalization, Governance & Competitiveness.

⁹ Kelbesa Megersa, ‘Structure of the Global Ready-Made Garment Sector’ 3
<<https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14705>> accessed 29 December 2021.

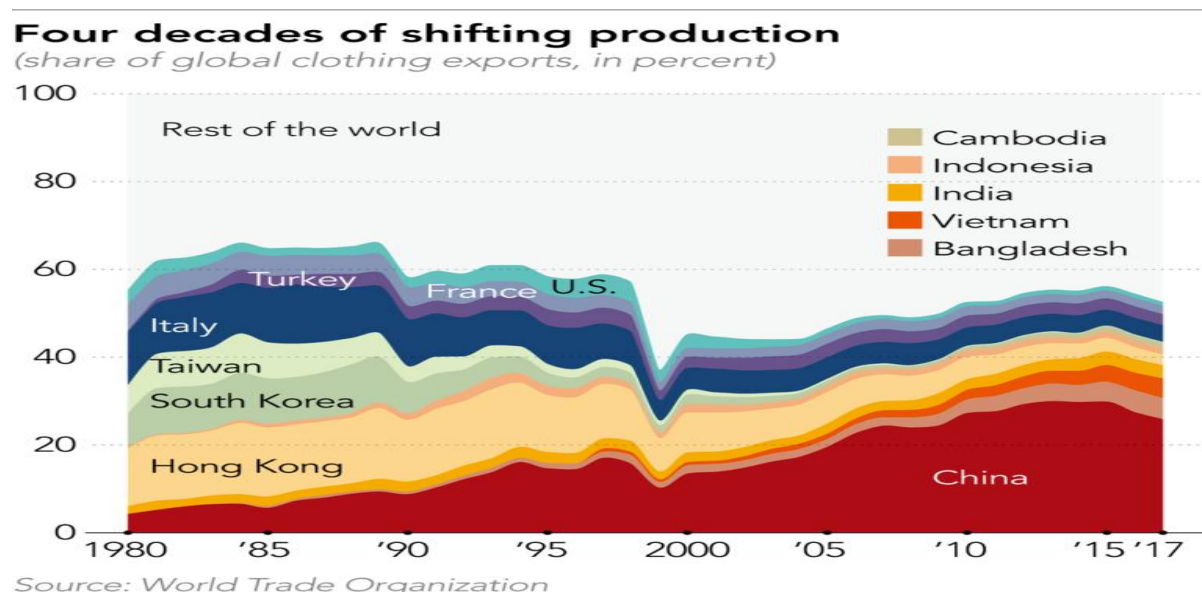
¹⁰ RP Rollins, K Porter and D Little, ‘Modelling the Changing Apparel Supply Chain’ (2003) 15 International Journal of Clothing Science and Technology 140.

¹¹ *ibid* 140.

¹² ‘How the Death of Fast Fashion Is Transforming Asia’s Garment Industry’ (*Nikkei Asia*)
<<https://asia.nikkei.com/Spotlight/The-Big-Story/How-the-death-of-fast-fashion-is-transforming-Asia-s-garment-industry>> accessed 30 December 2021.

¹³ ‘Global Apparel Manufacturing Industry - Market Research Report’ (IBISWorld 2021)
<<https://www.ibisworld.com/global/market-research-reports/global-apparel-manufacturing-industry/>> accessed 31 December 2021.

Figure 21: Global RMG production shifting 1980-2017¹⁴



As artificial intelligence and robotics technology grow in sophistication, digital transformation of the production process and widespread automation is becoming a real prospect.¹⁵ The production of high-end, quick-turn products is set to shift to (semi)automated plants in developed markets.¹⁶ Manufacturers in Europe, the USA and other developed countries have already focused on manufacturing low-volume but highly-priced garments for niche markets.¹⁷ However, automation will coexist with manual production in the near future in low-cost countries where technology will support, not replace, the workforce.¹⁸ However, the relationship between the retailers and their manufacturing suppliers remained that of dominance and dependency, and the asymmetry is unlikely to disappear soon.¹⁹

b. Apparel protectionism

The textile and clothing industry has contributed profoundly to the early stages of industrialisation in many countries, including the United Kingdom, Japan, and the United States.²⁰ However, the global clothing industry has experienced significant transformations in geographical distribution, governance structure and outcomes throughout the past decades.

¹⁴ Robinson Gowen, Zhou Marrian and Maulia Erwida, 'How the Death of Fast Fashion Is Transforming Asia's Garment Industry' *Nikkei Asia* (20 November 2019) <<https://asia.nikkei.com/Spotlight/The-Big-Story/How-the-death-of-fast-fashion-is-transforming-Asia-s-garment-industry>> accessed 30 December 2021.

¹⁵ Achim Berg and others, 'Digitization: The next Stop for the Apparel-Sourcing Caravan' (McKinsey & Company, September 2017). The report finds that automation will significantly drive sourcing decisions by 2025. That will strike at the basic model upon which many low-cost producers have relied. Digitisation and upgrading the value chain will determine the players of the game.

¹⁶ *ibid.*

¹⁷ Rollins, Porter and Little (n 10).

¹⁸ Phạm Thị Thu Lan, 'Automation and Its Impact on Employment in the Garment Sector of Vietnam' [2020] Friedrich-Ebert-Stiftung.

¹⁹ Louise Crewe and Eileen Davenport, 'The Puppet Show: Changing Buyer-Supplier Relationships within Clothing Retailing' [1992] *Transactions of the Institute of British Geographers* 183; Nebahat Tokatli, Neil Wrigley and Ömür Kizilgün, 'Shifting Global Supply Networks and Fast Fashion: Made in Turkey for Marks & Spencer' (2008) 8 *Global Networks* 261.

²⁰ Junichi Goto, 'The Multifibre Arrangement and Its Effects on Developing Countries' (1989) 4 *The World Bank Research Observer* 203, 203.

As the labour-intensive clothing industry²¹ offers entry-level jobs for unskilled workers in developed as well as developing countries²², it remains one of the most protected sectors globally.²³ It is inherently sensitive to the policies and politics that shape international trade.

Countries have long pursued a protectionist policy for the industry.²⁴ That practice was institutionalised on a multilateral basis in the early 1960s by adopting the Short-Term Arrangement (STA 1961) and then the Long-Term Arrangement (LTA 1962) regarding International Trade in Cotton Textiles. Though adopted as a temporary and declining protection measure, the STA and LTA were eventually expanded into the GATT Multifibre Arrangement (MFA) in 1974 and renewed in 1977, 1981, and 1986. The basic idea of MFA was the same as in the STA and LTA: developed countries imposed quantitative import restrictions to protect their local industries.²⁵ A significant portion of textile and apparel exports from DCs to developed countries were subject to MFA quotas. It was a substantial departure from the basic GATT rules, particularly the principle of non-discrimination.

After two decades of protectionism, the MFA was taken over by the Agreement on Textiles and Clothing (ATC) negotiated under WTO in 1995. This self-destructive ATC removed all the quotas in four phases over ten years to streamline the sector to GATT rules before it ceased to exist on 1 January 2005.²⁶ The end of the MFA and the ATC regime resulted in an exponential increase in competition, a significant rise in apparel exports, and a reallocation of production and employment between countries.²⁷

²¹ Textiles and clothing industries are closely related regarding technology and trade policy. Textile is an essential input to the clothing industry. The textile and apparel or clothing sectors are increasingly integrated through vertical supply chains where the clothing retailers increasingly manage the supply chain of the clothing and textiles sectors.

²² The industry is regarded as the 'vanguard of industrialisation'. (Aggarwal, *Liberal Protectionism: The International Politics of Organized Textile Trade*, p.9) It long remained significant for developed countries regarding manufactured output and employment generation. A 1980 US Trade Commission Report estimated that the industry provides 14 per cent of the manufacturing employment in developed countries and 30 per cent in DCs.

²³ Hildegunn Kyvik Nordås, *The Global Textile and Clothing Industry Post the Agreement on Textiles and Clothing* (WTO discussion paper 2004); Stacey Frederick and Gary Gereffi, 'Review and Analysis of Protectionist Actions in the Textile and Apparel Industries' (2009) 8 The fateful allure of protectionism: taking stock for the G 65.

²⁴ Vinod K Aggarwal, *Liberal Protectionism: The International Politics of Organized Textile Trade* (Univ of California Press 2018) 10. Aggarwal presented an excellent account of the early conflicts among countries over the apparel product trade that started in the 1300s (or possibly earlier). The English King Edward III banned the import of woollen cloth in 1337. The local textile industry in England had successfully prevented the import of inexpensive handcrafted textiles from India and China. However, subsequently, England was able to export vast quantities of cotton textiles to India, thereby undermining the Indian indigenous industry. At the beginning of the 20th century, England accounted for 70 per cent of textile exports. However, by the end of World War II, Japan, along with some DCs such as Hong Kong, South Korea, India, and Pakistan, made great strides in the textile trade. But their growing export drives soon began to face concerted attacks from the producers in the developed countries.

²⁵ Vincent Cable, 'Textiles and Clothing in a New Round of Trade Negotiations' (1987) 1 *The World Bank Economic Review* 619, 622.

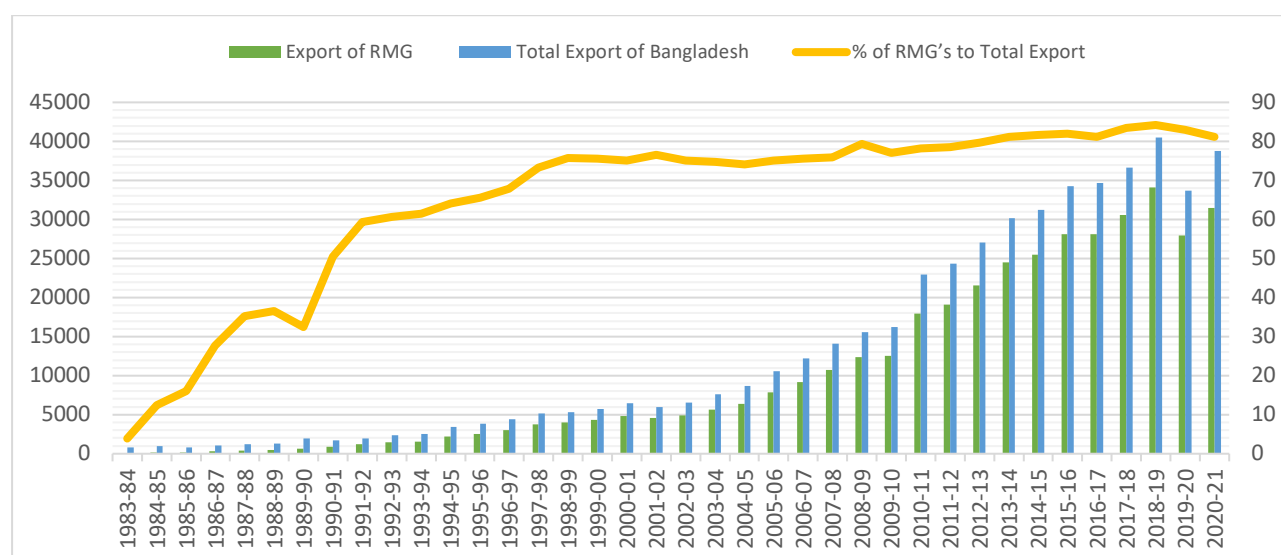
²⁶ WTO, *Understanding the WTO* (World Trade Organization 2008) 31.

²⁷ Global apparel exports increased from US\$252 billion in 2004 to US\$825 billion in 2021.

8.2.2 The Rise of the Bangladesh Apparel Industry

The Bangladeshi clothing industry is founded on a legacy of textile production and distribution that dates back centuries.²⁸ In the late 1970s, trade consisted primarily of microbusinesses, dominated by small tailoring shops catering to domestic demand. In 1978, one of these tailoring firms, Reaz Garments, made a giant leap by exporting 10,000 woven shirts to France as the country's first RMG order.²⁹ By the following year, the country had approximately 22 export-oriented businesses.³⁰ The establishment of 'Desh Garments Ltd' in 1979, the first 100 per cent export-oriented garment industry with technical and marketing collaboration with Daewoo Corporation of South Korea, was a breakthrough that unleashed a tremendous influence on the growth, development, and expansion of the industry in Bangladesh. The Daewoo-Desh partnership is credited with catalysing the early growth of Bangladesh's garment industry. It helped the country overcome entry barriers and establish a reputation as a reliable supplier of garments to key markets, leveraging Daewoo's brand and marketing network.³¹

Figure 22: Meteoric Rise of Bangladesh RMG Industry³²



²⁸ Prasannan Parthasarathi, 'Cotton Textiles in the Indian Subcontinent, 1200-1800' in Giorgio Riello and Prasannan Parthasarathi (eds), *The Spinning World: A Global History of Cotton Textiles, 1200-1850* (OUP/Pasold Research Fund 2011); Zaria Gorvett, 'The Ancient Fabric That No One Knows How to Make' *BBC* <<https://www.bbc.com/future/article/20210316-the-legendary-fabric-that-no-one-knows-how-to-make>> accessed 9 May 2022. Parthasarathi noted that Bengal fabrics dominated European markets during the 17th and 18th centuries. The current export-oriented industry emerged from the ashes of jute fibre, the country's former export leader.

²⁹ Cornelia Staritz and Stacey Frederick, 'Bangladesh' in Gladys Lopez-Acevedo and Raymond Robertson (eds), *Sewing success?: Employment, wages, and poverty following the end of the multifibre arrangement* (World Bank Publications 2012) 214; Sawlat Zaman, 'Researching the Garment Sector in Bangladesh: Fieldwork Challenges and Responses', *Field Guide for Research in Community Settings* (Edward Elgar Publishing 2021); Mohammad Yunus and Tatsufumi Yamagata, 'Chapter 6: The Garment Industry in Bangladesh', *Dynamics of the Garment Industry in Low-Income Countries: Experience of Asia and Africa (Interim Report)* (2012).

³⁰ Mohammed Ali Rashid, 'Rise of Ready-made Garments Industry in Bangladesh: Entrepreneurial Ingenuity or Public Policy' (2006).

³¹ Marilyn Rock, 'Globalisation and Bangladesh: The Case of Export-oriented Garment Manufacture' (2001) 24 *South Asia: Journal of South Asian Studies* 201.

³² BGMEA calculations from Export Promotion Bureau data.

Thanks to government policy support, low labour costs, and the persistent entrepreneurial efforts of innovative native enterprises, the industry flourished rapidly.³³ Although the first knit-apparel exports took place in 1978, apparel exports did not become significant until 1985, when RMG accounted for 12.5% of Bangladesh's total exports, and the number of industries increased to 587.³⁴ Throughout the succeeding decades, RMG exports increased substantially in absolute value and as a share of total exports. In the early years of the industry's growth, privileged access to a captive market under the MFA quota system, market liberalisation, and export-promoting policies pursued by successive governments of Bangladesh provided the initial impetus.³⁵

Figure 22 depicts the value of Bangladesh's RMG exports, total exports (in millions of US dollars), and the proportion of RMG exports to total exports from fiscal year FY1983 to FY2021. The sector's stable growth over the long term is reassuring, but the figure also demonstrates the country's upsetting reliance on one industry for export revenue since the 1990s. From its humble beginnings in the early 1980s, Bangladesh's RMG industry has proliferated to become the world's second-largest apparel exporter by 2011³⁶ and maintains this position with 7.9 per cent of the global market in 2022 (Figure-23).³⁷

*Figure 23: Top 10 global clothing exporters in 2022*³⁸

³³ Jahid Hasan, 'The Competitiveness Of Ready Made Garments Industry Of Bangladesh In Post Mfa Era: How Does The Industry Behave To Face The Competitive Challenge?' (2013) 3(3) British Journal of Economics, Management & Trade 296, 303; 'About Garment Industry of Bangladesh' (BGMEA) <<https://www.bgmea.com.bd/page/AboutGarmentsIndustry>> accessed 1 January 2022; Md Saiful Islam, 'Ready-Made Garments Exports Earning and Its Contribution to Economic Growth in Bangladesh' (2021) 86 GeoJournal 1301, 1302.

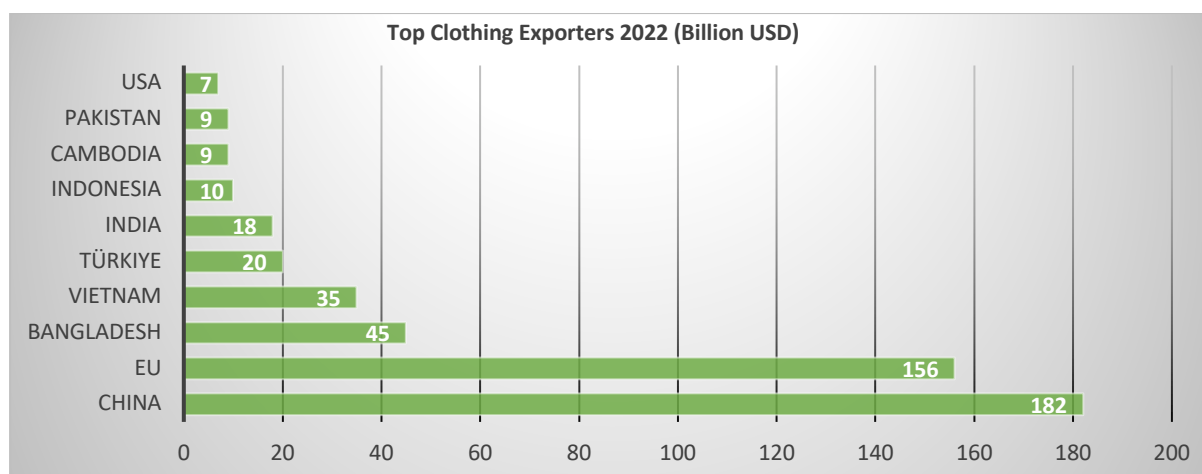
³⁴ 'Garment Industry' <https://en.banglapedia.org/index.php?title=Garment_Industry> accessed 28 December 2021.

³⁵ Md Samsul Alam, EA Selvanathan and Saroja Selvanathan, 'Determinants of the Bangladesh Garment Exports in the Post-MFA Environment' (2017) 22 Journal of the Asia Pacific Economy 330, 331.

³⁶ WTO, 'International Trade Statistics 2012' 132; WTO, 'World Trade Statistical Review 2021' 78. In 2011, the largest exporter China (USD\$ 154 billion and 37.3% of the world trade), was followed by Bangladesh (USD\$ 20 billion with a 4.8% share), and India and Turkey (USD 14 billion with 3.5% and 3.4% share each). However, Bangladesh (USD\$ 28 billion with 6.3% share) slid to the third position in 2020 due to the Covid pandemic and was preceded by China (USD\$ 142 billion and 31.6% of the world trade) and Vietnam (USD 29 billion with 6.4% share). These figures do not include the European Union (EU28) and Hong Kong.

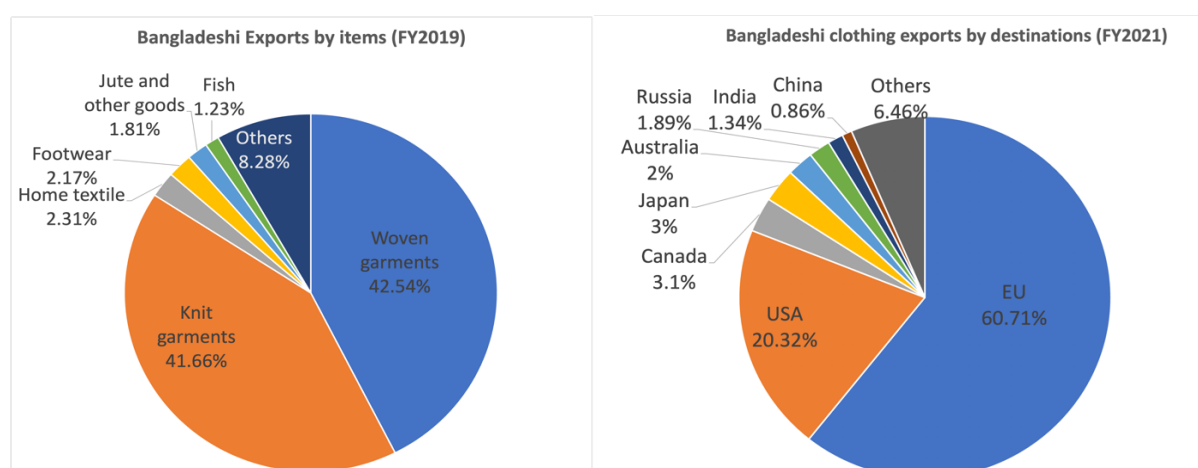
³⁷ WTO, 'World Trade Statistical Review 2022' (2023) 80.

³⁸ *ibid.*



Despite this, Bangladesh's export basket and destinations are highly concentrated, as are those of the RMG industry (Figure-24). Since the 1980s, the RMG industry has dominated Bangladesh's exports. In 2019-2020, it accounted for 83 per cent of the total export revenue.³⁹ In addition, approximately 80 per cent of its exports are shipped to the European Union and the United States.⁴⁰

Figure 24: Bangladeshi exports by key items and clothing exports by key destinations⁴¹



Foreign investments have significantly influenced the garment industry's initial development. In contrast to the apparel sectors of other LDCs, which serve primarily as transshipment hubs for Chinese apparel firms,⁴² homegrown enterprises dominate Bangladesh's apparel

³⁹ EPB data; Conversely, a handful of garments generate most of the industry's export revenue.

⁴⁰ EPB data

⁴¹ ibid

⁴² Lorenzo Rotunno, Pierre-Louis Vézina and Zheng Wang, 'The Rise and Fall of (Chinese) African Apparel Exports' (2013) 105 Journal of Development Economics 152.

industry.⁴³ According to one estimate, Bangladesh had 3,723 exports oriented RMG factories in 2021.⁴⁴

Bangladeshi RMG products are broadly divided into two categories: woven and knitted. Initially, Bangladesh produced and exported only woven apparel. While knitted apparel represented 15.1% of total RMG export revenues in 1990-1991, it climbed to 48.3% in 2005-06 and surpassed woven revenues for the first time in 2020-2021.⁴⁵

In addition to its vast export contribution,⁴⁶ the industry contributes to the GDP through various backward and forward links to inputs suppliers, banking and insurance, shipping and logistics, transportation and communications, the government treasury, professional services, engineering services, real estate, hotel and tourism, utilities, and information and communication technology.⁴⁷ The sector employs over 4 million people directly. However, with a male-to-female ratio of 41:59, the workforce is predominantly female.⁴⁸ As a result of the pervasiveness of this industry, a greater number of people are indirectly employed by the sector.⁴⁹ Thus, the industry contributes significantly to job creation, poverty reduction, and women empowerment.⁵⁰ Jackson argued that Bangladesh has the potential to develop a robust and possibly unique RMG ecosystem and could become the Silicon Valley of RMG.⁵¹

8.3 Role of LDC-specific Preferences and Exemptions in the Growth of the Industry

Since the early 1980s, Bangladesh's RMG industry has grown exponentially in terms of export value and share of total export. The industry grew at an average annual rate of 19 per cent between 1990 and 2005⁵². After the MFA phase-out, the average annual growth rate accelerated by 21% between 2005 and 2019.⁵³ Even in 1990-1991, it was a business worth only \$868 million. In the last three decades, clothing exports have increased substantially, from \$868 million in 1990-91 to \$7.9 billion in 2005-06 to \$36 billion in 2018-2019. The

⁴³ Gladys Lopez-Acevedo and Raymond Robertson, 'Stitches to Riches?: Apparel Employment, Trade, and Economic Development in South Asia' (World Bank Publications 2016); Zaid Bakht and others, 'Competitiveness of a Labor-Intensive Industry in a Least Developed Country: A Case of the Knitwear Industry in Bangladesh' [2006] mimeographed, Chiba, Japan: Institute of Developing Economies.

⁴⁴ Export Policy 2018-21, Ministry of Commerce, Government of Bangladesh; To be considered an export-oriented industry, a factory must export at least 80 per cent of its products, per the Export Policy 2018-21. In 2021, according to this definition, the digital initiative 'Mapped in Bangladesh' found 3,723 export-oriented RMG factories in Bangladesh.

⁴⁵ EPB and BGMEA data. Knitted apparel manufacturing and exports started in the early 1990s and increased fast.

⁴⁶ In 2019-2020, clothing exports accounted for 83% of total export revenues and approximately 10% of the GDP. EPB and World Bank data

⁴⁷ Debapriya Bhattacharya and Mustafizur Rahman, 'Experience with Implementation of WTO-ATC and Implications for Bangladesh' [2000] CPD Working Paper.

⁴⁸ AK Haque and Estiaque Bari, 'A Survey Report on the Garment Workers of Bangladesh 2020' (2021).

⁴⁹ Without employment opportunities in the sector, a significant portion of these workers could have remained unemployed.

⁵⁰ M Saiful Islam, Md Abdur Rakib and ATM Adnan, 'Ready-Made Garments Sector of Bangladesh: Its Contribution and Challenges towards Development' (2016) 5 Journal of Asian Development Studies 50.

⁵¹ Ira A Jackson, 'Ready for Reinvention' (2021) 13 Innovations: Technology, Governance, Globalization 76.

⁵² Nazneen Ahmed, 'Sustaining Ready-Made Garment Exports from Bangladesh' (2009) 39 Journal of Contemporary Asia 597.

⁵³ EPB data

number of clothing factories has also steadily increased from 134 in 1983-84⁵⁴ to 3,723 in 2021.⁵⁵ Several factors have contributed to the success of the RMG sector in Bangladesh.⁵⁶ They may be broadly categorised as national and international drivers.

8.3.1 National Drivers

Since the early 1980s, the government has sought to deregulate, decontrol, and liberalise the economy to stimulate industrial growth and economic development.⁵⁷ Successive national regulatory regimes (Table 13) have facilitated the growth and expansion of the industry into the global value chain. The Industrial Policy, the Export Policy, the Import Policy Order, the Small and Medium-sized Enterprises (SME) Policy, the Foreign Investment Act of 1980, and the Bangladesh Export Processing Zones Authority Act of 1980 all placed a premium on the growth of the sector's production and export bases.⁵⁸

Bangladesh's government facilitated apparel exports through various incentive schemes that ensure easy access to imported raw materials and incentives for export-orientated activities. Many of these incentives would have violated its international trade obligations if it were not an LDC. As a result, exporters could benefit by importing intermediate inputs on credit and duty-free, needing less working capital, and receiving cash benefits based on the value of their exports.⁵⁹ An abundant supply of low-wage workers is a significant competitive advantage. For the decade from 2010 to 2019, Bangladesh's average minimum wage was just \$48 per month, compared to \$215 in India, \$353 in China, and \$388 in Vietnam.⁶⁰ The industry could take advantage of this seemingly endless supply of cheap labour, primarily young women migrating from remote rural areas to cities for the first time.⁶¹ In the post-MFA period, the industry's access to cheap labour enables it to maintain and expand exports faster than competitors.

Substantial public investment in trade infrastructure and logistics has also contributed significantly to the industry's expansion. For example, the development of the Chattogram port, the upgrading of major highways, including the Dhaka–Chattogram road, investment in

⁵⁴ Salma Chowdhury Zohir, 'Beyond 2004: Strategies for the RMG Sector in Bangladesh' in A Abdullah (ed), *Bangladesh economy 2000, Selected Issues* (BIDS 2001) 138.

⁵⁵ Data from the RMG factory census conducted by Mapped in Bangladesh

⁵⁶ Md Samsul Alam, EA Selvanathan and Saroja Selvanathan, 'Determinants of the Bangladesh Garment Exports in the Post-MFA Environment' (2017) 22 *Journal of the Asia Pacific Economy* 330, 331.

⁵⁷ Mohammad A Hossain and Mohammad Alauddin, 'Trade Liberalization in Bangladesh: The Process and Its Impact on Macro Variables Particularly Export Expansion' (2005) 39 *The Journal of Developing Areas* 127. The country's move to a liberalised system began with adoption of the New Industrial Policy (NIP) in 1982. Then, the Revised Industrial Policy (RIP) of 1985-86 streamlined its provisions, followed by a third wave of adjustments in 1991. As a result, the industry achieved massive momentum in the early 1980s through several structural reforms (such as privatising state-owned industries and promulgating a new industrial policy in 1982, tax holidays, duty-free machinery inputs, letters of credit facilities, etc.).

⁵⁸ The first Industrial and Investment Policy was created in 1973 and revised in 1975. Finally, in 1982, an industrial strategy was established, with the term "investment" omitted from its title. Industrial policies have been revised seven times since then, including modifications. The same holds for other policies or policy orders.

⁵⁹ The interviewees assert that while ISMs have provided the industry with significant incentives, the strategic government support and entrepreneurial skills of local manufacturers have been crucial to the success of the sector. It is evident that while all other LDCs have access to ISMs, not all have been able to reap the same benefits.

⁶⁰ ILO, 'Global Wage Report 2020-21: Wages and Minimum Wages in the Time of COVID-19' (ILO 2020).

⁶¹ Bangladesh is the 8th most populous country in the world, with a median age of 26.7 years.

the energy sector, the implementation of ASYCUDA, and the reduction of import and export documents and signatures have all resulted in lower trade costs and increased industry efficiency.

Table 13: Incentives for apparel manufacturers

Incentives	Description
Back-to-back letters of credit (L/C) facilities	Exporters may get credit from commercial banks to cover the cost of imported inputs (fabrics and accessories) by showing an export order made in their favour by end apparel importers. This option allows exporters to finance working capital without utilising their resources. After repaying the commercial banks for the loan, the exporter may receive payment for the final product.
Duty drawback	Tariffs and value-added taxes, respectively, paid on imported inputs and local inputs used for export goods are refunded. All export-oriented manufacturers that do not have access to bonded warehouse facilities are eligible for the drawback.
Bonded warehouse facilities (BWF)	Duty payments may be delayed until a firm prepares to use previously imported products. No duty is payable if these inputs are used to produce export products. As a result, firms may hold unsold inventory free of taxes or tariffs, cutting the total inventory management cost. Furthermore, an export industry may be reimbursed for import duties on imported inputs.
Cash incentives	Export-oriented apparel firms received a cash payment of up to 10% of the value added to the exported RMG. In addition, in 2020, the industry received various cash incentives under different schemes, including 4% cash assistance for export shipment for export-oriented apparel firms that do not use bonded warehouses and duty-drawback facilities and a special cash incentive of 1% for all RMG firms.
EPZ-specific benefits	Firms have benefited from special incentives available in export processing zones (EPZs), including duty-free import of construction materials, capital machinery, and spare parts, a ten-year tax exemption for newly established industrial businesses. Firms established in 2012 enjoy a tax exemption of 100% for the first two years, 50% for the third and fourth years, and 25% for the fifth year. Additionally, the elimination of double taxation, offering securely bonded areas, offshore banking, back-to-back letters of credit, customs clearance at plant locations, simplified sanction procedures, and a subcontracting facility with export-oriented factories inside and outside EPZs may all contribute to streamlining the manufacturing and export processes.
Other Incentives	Other incentives include duty-free import of capital machinery for export-oriented industries, a 50% tax exemption on the export income of all exporters, and a unique bonded warehouse against back-to-back letters of credit issued to exporters to invest in technology, equipment, and products.

8.3.2 International Drivers

Bangladesh government played an exceptionally proactive role in promoting the sector. However, the industry's emergence and growth primarily occurred within the confines of the Multifibre Arrangement (MFA)⁶², which, despite its highly discretionary nature, was a 'blessing in disguise' for Bangladesh due to its relative predictability.⁶³ The MFA imposed quotas on the amount DCs could export to developed countries. This arrangement was particularly beneficial for LDCs like Bangladesh, as it provided them with a guaranteed market for their textile and garment exports. For Bangladesh specifically, the MFA's quota system served as the primary international market driver until 2005. The quotas ensured a steady demand for Bangladeshi clothing exports in major markets, leading to rapid growth in the industry.⁶⁴ While exports from the more competitive countries, such as China and India, were

⁶² The MFA was an international agreement that governed the operations of the global textile and garment industries from 1974 to 2004. Its primary objective was to shield the textile and garment industries of developed countries from competition posed by developing nations. More on this on page 202.

⁶³ Debapriya Bhattacharya and Mustafizur Rahman, 'Seeking Fair Market Access for Bangladesh Apparels in the USA: A Strategic View' (Centre for Policy Dialogue (CPD) 2000) 11 2.

⁶⁴ Bhattacharya and Rahman (n 62); Mustafizur Rahman and Asif Anwar, *Bangladesh Apparels Export to the US Market: An Examination of Her Competitiveness Vis-à-Vis China* (Centre for Policy Dialogue Dhaka 2006);

restrained by the quotas, Bangladesh's quota-free access to key markets gave the sector an initial boost and opportunities for development and expansion.⁶⁵

Since the MFA ended, several developed and developing countries have granted LDC products preferential market access through unilateral preferential schemes. Among them, the EU-EBA programme launched in 2001 played a vital role for the industry. As a result, Bangladeshi suppliers have extensively used the market access facility over the years, accounting for around 92% of knit product exports and 28% of woven product exports.⁶⁶ The renewal EU-EBA scheme in 2011 with simplified origin criteria requiring only 'single stage' transformation opened opportunities for increased usage of the facilities for woven products, which had so far been hampered by a lack of capacity to comply with the 'double stage' origin rules.⁶⁷ The broad use of the EU-EBA DFQF market access demonstrates its vital role in promoting Bangladeshi exports. LDC-specific preferential market access was also crucial in capturing market share in other significant export markets such as Canada, Australia, Japan, India, and China. Preferential access to crucial markets ensures Bangladeshi products have a competitive edge and offers suppliers long-term predictability, allowing for large-scale investments in technology and human resources.

8.3.3 Importance of Trade Preferences and Exemptions

Bangladesh has benefited significantly from the high preferential tariff margins and favourable rules of origin under GSP schemes.⁶⁸ Several empirical studies show that preferences are important factors for trade.⁶⁹ This is particularly evident for the European Union market following the GSP rules of origin reform in 2011.⁷⁰ This is also true for other markets. Ito and Aoyagi concluded that Asian LDCs benefit from DFQF market access to the Japanese market, and the benefits are higher for tariff lines with substantial preference margins.⁷¹

Alessandro Nicita, Victor Ognitvsev and Miho Shirotori, *Global Supply Chains: Trade and Economic Policies for Developing Countries* (CiteSeer 2013).

⁶⁵ Md Samsul Alam, EA Selvanathan and Saroja Selvanathan, 'Determinants of the Bangladesh Garment Exports in the Post-MFA Environment' (2017) 22 *Journal of the Asia Pacific Economy* 330; Yongzheng Yang and Montfort Mlachila, 'The End of Textiles Quotas: A Case Study of the Impact on Bangladesh' (2007) 43 *The Journal of Development Studies* 675.

⁶⁶ Mustafizur Rahman, 'Trade Benefits for Least Developed Countries: The Bangladesh Case Market Access Initiatives, Limitations and Policy Recommendations' (UN 2014).

⁶⁷ Tobias Sytsma, 'Improving Preferential Market Access through Rules of Origin: Firm-Level Evidence from Bangladesh' (2022) 14 *American Economic Journal: Economic Policy* 440.

⁶⁸ The interviewees unanimously agreed that ISMs have provided indispensable incentives to the industry. Specifically, interviewees 1, 2, 3, and 5 argue that Bangladesh would not have achieved its status in clothing exports without the crucial assistance it received from DFQF market access and other LDC benefits.

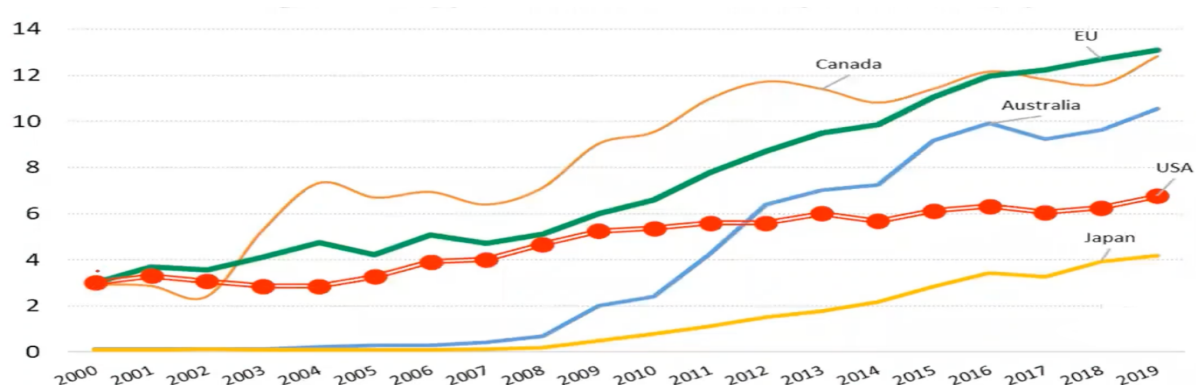
⁶⁹ World Trade Organization, 'Textiles and Clothing in Asian Graduating LDCs: Challenges and Options' (World Trade Organization 2022) 11; *Keynote Presentation by Dr M A Razaque: Getting Ready for LDC Graduation of Bangladesh* (2021) <<https://www.youtube.com/watch?v=IRnjHpKzTjc>> accessed 26 March 2022.

⁷⁰ Maria Persson and Fredrik Wilhelmsson, 'EU Trade Preferences and Export Diversification' (2016) 39(1) *The World Economy* 16; Xavier Cirera, Francesca Foliano and Michael Gasiorek, 'The Impact of Preferences on Developing Countries' Exports to the European Union: Bilateral Gravity Modelling at the Product Level' (2016) 50 *Empirical Economics* 59.

⁷¹ Tadashi Ito and Takahide Aoyagi, 'Did the Least Developed Countries Benefit from Duty-Free Quota-Free Access to the Japanese Market?' (2019) 49 *Japan and the World Economy* 32.

Figure-25 shows how Bangladesh has utilised preferential market access to expand its share in crucial export destinations and why the significance of preferential access cannot be overemphasised. Bangladesh had almost an identical market share of around 3.3 per cent in Canada, the EU, and the United States in the 2000s. However, over the next two decades, its share in Canada and the EU, which both offer DFQF access, increased to around 13%, compared to just above 6 per cent in the US, which offers no such preferences. We can see similar trends in Australia and Japan, where the preference has helped expand the market shares from less than 1 per cent in both countries to more than 10 per cent in Australia and above 4 per cent in Japan.

Figure 25: Export performance of Bangladeshi apparel products in key markets⁷²



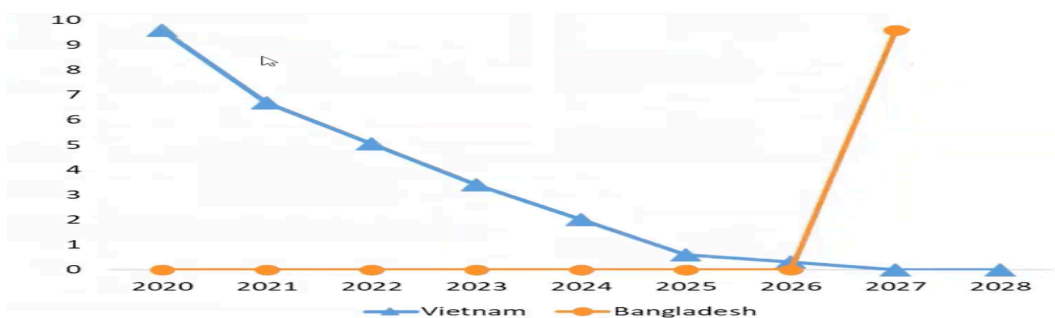
A closer examination of the market share of major garment exporters in the EU and the US demonstrates the critical significance of Bangladesh's privileged access. China's market share is declining in each of these markets. However, trade preference schemes heavily influence those who reap the benefits of Chinese firms' share loss. In the EU, most of these shares are captured by Bangladesh, which had experienced fast growth since 2010, when the EU's rules of origin were relaxed for LDCs. Vietnam's exports to the market have also been increasing but at a slower pace. In the US market, the situation is very different. Vietnam is thriving there. Nevertheless, Bangladesh's market share continues to expand without preferential access, albeit at a snail's pace compared to what it has achieved in the EU market.

The figure-26 illustrates another impending difficulty for Bangladesh. Due to the EU-Vietnam FTA, tariffs on Vietnamese garment exports to the EU are fast declining and will be zero by 2027. However, duties on Bangladeshi exports may suddenly increase to more than 9%.⁷³ One can easily imagine the impact on Bangladeshi exports and market share distribution in the EU.

Figure 26: Changes in tariffs on clothing products in the EU market for Bangladesh and Vietnam

⁷² Organisation (n 64) 11; *Keynote Presentation by Dr M A Razzaque: Getting Ready for LDC Graduation of Bangladesh* (n 64). Bangladesh had nearly the same market share (about 3.3 per cent) in 2000 in Canada, the European Union, and the United States. Where duty-free access is available, Bangladesh's market share has increased. However, since 2009, Bangladesh's market share in the United States has increased only modestly, as Bangladeshi apparel products have no duty-free access in the United States.

⁷³ The new GSP guideline is not yet finalised, and considerable uncertainty exists.



8.4 Potential Trade Implications of Graduation

As an LDC, Bangladesh has enjoyed certain SDTs, including concessions, special attention, trade preferences and technical assistance. Bangladesh benefits from preferential treatment in the European Union EU-EBA policy and Canada, Japan, and the United States through their respective GSP programmes. Bangladesh also benefits from preferential market access in several other developed nations, including Australia, and several DCs, including China, India, and the Republic of Korea, through RTAs and bilateral agreements. All these programmes are non-reciprocal in that Bangladesh is not expected to reciprocate by offering preferential access to items originating in the preference-granting nations in exchange for the offer made to her as an LDC. More than ninety per cent of the country's exports are shipped to these preference-granting markets, so preferential access is crucial for Bangladesh trade.

Bangladesh also benefits from exemptions from implementing certain obligations under various WTO agreements, including the SCM Agreement and TRIPS. Graduation will take away these LDC-specific benefits. Implications could broadly result from the following areas:

(i) trade preference erosion potentially affecting export competitiveness, and (ii) loss of policy space, reducing the scope of supporting exporters and particular domestic industries.⁷⁴

8.4.1 Preference Erosion in International Trade

LDC Graduation essentially implies loss of LDC-specific preferential market access. The potential implications will depend on two issues: a) how the existing exports of a graduating LDC benefit from utilising such preferential schemes and b) what changes in market access conditions it will face after graduation. Changes in market access conditions imply less favourable tariff treatment and more stringent rules of origin requirements for exports from a graduated LDC. Where LDCs cannot use their existing trade preferences or importing countries do not offer such preferences, graduation will not produce any noticeable impact.

8.4.1.1 Changes in GSP regulations and preferential tariffs

LDCs have DFQF access to many of their key export markets through LDC-specific GSP schemes. Unless bilateral, regional, or multilateral trade arrangements exist, exports from graduated LDCs will be subject to MFN tariffs or any tariff preferences available to non-LDC developing countries. Tariff preferences available to DCs through GSP schemes are much lower than those offered through LDC-specific schemes (that mainly offer DFQF access). Even

⁷⁴ It can be argued that the only consequence of graduating is the loss of future opportunities; there are no actual current consequences.

in trade arrangements, market access benefits come with stricter conditions.⁷⁵ LDCs are not, in most cases, party to many important trade arrangements. For example, there are no trade agreements between Asia's graduating LDCs and Canada, meaning their exports will face GSP or MFN rates after graduation. Clothing products (HS 61, HS 62 and HS 63 categories) in the Canadian market are subject to higher MFN tariff rates of up to 18 per cent.⁷⁶

8.4.1.2 Changes in Rules of Origin

Graduation also means losing access to the more liberal RoO integrated into the LDC-specific GSP schemes. So, exports from a graduated LDC will face stricter RoO that may disqualify access to general GSP for products that were enjoying LDC-specific market access.

Liberal RoO is critically vital for the clothing sector.⁷⁷ RoO set by the prominent export destinations determines how the global garment value chain has historically evolved and where it leads to.⁷⁸ A 2012 European Commission report identified three critical complications related to stringent RoO: product-specific rules can be very complicated, and compliance can be costly and burdensome, resulting in low utilisation of preferences.⁷⁹ Moreover, LDCs primarily operate at the basic CMT (cut, make and trim) level, so complying with stricter RoO after graduation will pose a significant challenge.

8.4.2 Changes in Market Access Conditions

Though the MTS offers various favourable conditions and flexible terms to encourage the participation of LDCs in global trade, Bangladesh has primarily benefited from unilateral trade preferences provided by many developed and developing countries. Most of these nations grant DFQF market access to LDC-origin goods under their respective GSP programmes. In addition, it is conventional for exports from LDCs to be subject to less stringent rules of origin (RoO) while still being eligible for market access benefits.⁸⁰ However, upon graduation from LDC groups, these benefits are terminated. The potential changes in market access conditions Bangladeshi apparel could face in key destinations are analysed here.

8.4.2.1 Implications in the Top Export Destinations

a. European Union

⁷⁵ Interviewee-1 stressed that the opportunities for unrestricted market access are diminishing worldwide. The unconditional benefits of free market access will eventually phase out, and conditions such as human rights, labour rights, climate change actions, social and economic stability, and other donor interests will become increasingly stringent.

⁷⁶ Customs Tariff Schedule of Canada, effective on 01-01-2022

⁷⁷ Louise Curran, Lars Nilsson and Gaspar Frontini, 'Assessing the Scope for Preference Erosion on the EU Market: A Pragmatic Approach' (2007) 2 Global Trade & Cust. J. 347; John Pickles, 'Economic and Social Upgrading in Apparel Global Value Chains: Public Governance and Trade Policy' (2012) Capturing the Gains Working Paper 2012/13.

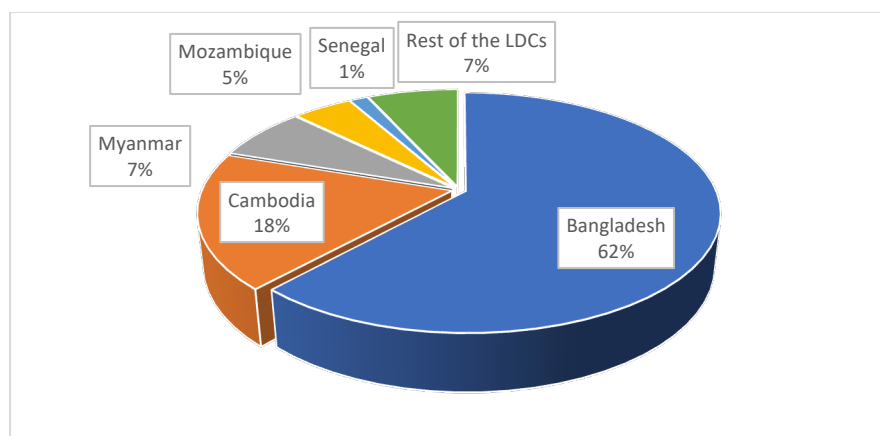
⁷⁸ Louise Curran and Khalid Nadvi, 'Shifting Trade Preferences and Value Chain Impacts in the Bangladesh Textiles and Garment Industry' (2015) 8 Cambridge Journal of Regions, Economy and Society 459.

⁷⁹ Commission of the European Communities, 'Commission Staff Working Document: Trade, Growth and Development Tailoring Trade and Investment Policy for Those Countries Most in Need' (2012) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52012DC0022>> accessed 4 April 2022.

⁸⁰ Mohammad Razzaque, Hamim Akib and Jillur Rahman, 'Bangladesh's Graduation from the Group of LDCs: Potential Implications and Issues for the Private Sector' in Mohammad Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020) 56.

The current GSP scheme has three unique arrangements with 67 different beneficiary countries and levels of preferential treatment: (i) Standard GSP, a general arrangement for DCs; (ii) GSP+, a special incentive arrangement for DCs addressing sustainable development and good governance; and (iii) Everything but Arms (EBA), a special arrangement for LDCs. Bangladeshi exports to the EU are heavily concentrated in one product category: apparel. Although other products also benefit from the EBA programmes, they did not quite manage to take advantage of the tariff suspensions. In 2021, apparel accounted for 93.7% of Bangladesh's exports to the EU.⁸¹ Bangladesh is by far the greatest beneficiary of the EBA programme (Figures 27 and 28). It increased its exports to the EU (including the UK) from \$2.5 billion in 2000-01 to approximately \$23 billion in 2018-19⁸², thanks to its EBA initiative.

Figure 27: Top EU EBA scheme beneficiaries in 2018⁸³



Bangladesh is one of the countries that makes effective and strategic use of the existing preferential market access for LDCs. The country's ability to utilise DFQF market access for apparel products that enjoy lucrative preference margins in the EU has significantly contributed to its booming exports. High utilisation rates of LDC-specific preferences are, however, a mixed blessing because LDC graduation will eventually result in the loss of DFQF access and, depending on the conditions, a transfer to other preferential schemes or MFN regimes.

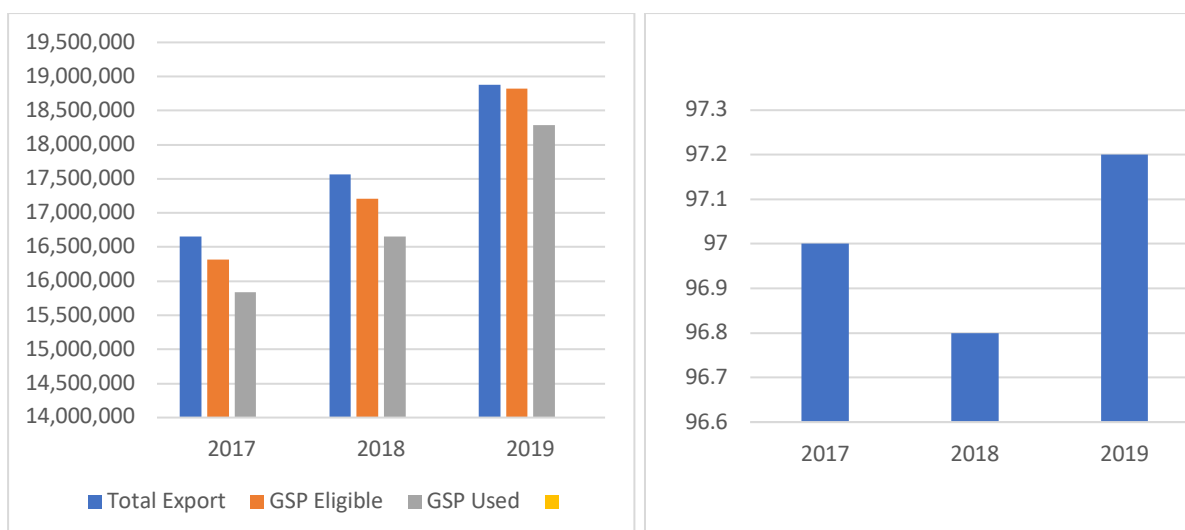
Figure 28: EU GSP Utilization (in millions of Euros) and Utilisation rate by Bangladesh⁸⁴

⁸¹ European Commission, 'European Union, Trade in Goods with Bangladesh' (2022) Units R4 / A3 6 <https://webgate.ec.europa.eu/isdb_results/factsheets/country/details_bangladesh_en.pdf> accessed 1 January 2022.

⁸² EPB Data

⁸³ European Commission, 'Report on the Generalised Scheme of Preferences Covering the Period 2018-2019' (2020) JOIN(2020) 3 final.

⁸⁴ European Commission, 'GSP Statistics' (2020).



As the anticipated trade benefits are proportional to the depth and variety of offered preferences, a lesser option would significantly erode preference benefits.⁸⁵ When an LDC graduates, it can apply for either GSP+ or Standard GSP preferential access. GSP+ is the best alternative to the EBA, allowing duty-free access to 66 per cent of EU tariff lines, including access to apparel products. (Table-14).

Table 14: EU GSP schemes important provisions⁸⁶

Preference Scheme	Eligibility	Products coverage	Rules of origin
Standard GSP	Low/lower-middle-income countries	Around 66% of all EU tariff lines, including apparel products	A minimum of 50 per cent local value added, Double transformation for apparel products
GSP+	Standard GSP beneficiaries that implement 27 relevant conventions	Around 66% of all EU tariff lines, including apparel products	A minimum of 50 per cent local value added, Double transformation for apparel products
EBA	LDCs	All goods except arms and ammunition	A minimum of 30 per cent local value added, Single transformation for apparel products.

The current EU GSP rule provides graduating LDCs with a three-year transition period. Therefore, if Bangladesh graduates in 2026 as expected, it will have access to EBA benefits through 2029. Then, applying Standard GSP or MFN rates would impose tariffs on virtually all of Bangladesh's exports to the EU. This is due to the export concentration of clothing, which is subject to higher EU-MFN duties. In Standard GSP, approximately 98 per cent of clothing exports would be subject to an average tariff rate of 9.6 per cent. (Table-15)

⁸⁵ Persson and Wilhelmsson (n 68); Francesca Foliano, Xavier Cirera and Michael Gasiorsek, 'The Impact of Preferences on Developing Countries' Exports to the European Union: Bilateral Gravity Modelling at the Product Level' (2016) 50 Empirical Economics 59.

⁸⁶ Various documents available on the European Commission website. Double transformation rule requires two stages of manufacturing, such as weaving and sewing, to be carried out in the country of origin.

However, if Bangladesh qualifies for the GSP+ scheme, the clothing products would continue to benefit from duty-free access, though there will be changes in origin requirements. Recent research, however, shows that Bangladesh will not qualify for GSP+ following its LDC graduation under the existing EU-GSP regime that expires in 2023.⁸⁷ The current GSP+ regime requires a beneficiary country to meet three eligibility criteria: import share⁸⁸, diversification⁸⁹ and sustainable development conditions.⁹⁰ Bangladesh also meets the diversification requirement and may qualify for the sustainable development criteria. However, it is unlikely to meet the import share threshold, given that its proportion of all GSP-covered imports is more than 17%.⁹¹

Table 15: Post-graduation tariff rates on Bangladeshi apparel exports to the EU⁹²

HS Code	Products	GSP+ Tariffs rate	Standard GSP Tariffs rate	MFN Tariffs
61	Knitwear	0%	Average rate 9.3% (Overall 6.4% - 9.6%, but 9.6% for most products)	12% for most products
62	Woven garments	0%	Average rate 9.25% (Overall 5% - 9.6%, but 9.6% for most products)	12% for most products
63	Home textile	0%	Average rate 8.25% (Overall 0% - 9.6%, but 9.6% for most products)	12% for most products

Therefore, under the current regimes, Bangladesh can only opt for the least appealing Standard GSP plan. However, the European Commission has adopted a legislative proposal for the next GSP for the period 2024-2034. It aims, among others, to ‘facilitate access to the GSP+ arrangement to the growing number of LDCs graduating from the EBA status’, for example, by removing the import-share criterion.⁹³ Though it is still a proposal that will be finalised by the EU parliament by the end of 2023, it is crucial for all those who seek to benefit from GSP+, Standard GSP, and EBA.

The draft has proposed several changes that Bangladesh must consider and study closely.

- a. In a welcome move, the draft proposal drops the import share condition from the GSP+ eligibility. As a result, the new GSP plan seeks to facilitate a smooth transition from EBA to GSP+ status.⁹⁴

⁸⁷ UNCDP, ‘Ex Ante Assessment of the Possible Impacts of the Graduation of Bangladesh from the Category of Least Developed Countries (LDCs)’ (2019); Razzaque, Akib and Rahman (n 78).

⁸⁸ The beneficiary's GSP-covered imports must remain less than 6.5 per cent of total GSP-covered imports from all countries.

⁸⁹ The seven largest sections of the GSP-covered imports represent at least 75% of total GSP imports by that beneficiary country.

⁹⁰ The beneficiary must have ratified and effectively implemented 27 international conventions on human rights, labour rights, environmental protection and good governance. European Commission, ‘Generalised Scheme of Preferences Plus (GSP+)’ <<https://trade.ec.europa.eu/access-to-markets/en/content/generalised-scheme-preferences-plus-gsp>> accessed 4 April 2022.

⁹¹ UNCDP (n 85) 7.

⁹² UNCDP (n 85). Average tariff rates reflect simple averages.

⁹³ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Applying a Generalised Scheme of Tariff Preferences and Repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council’ (2021) COM(2021) 579 para 1(a).

⁹⁴ The ceiling removal has significant ramifications for Bangladesh since it would have been ineligible for the GSP+ programme if it had been in place.

- b. The proposal has also expanded the number of convention countries that must ratify to benefit from GSP+ from 27 to 32. The implication is that to be eligible for GSP benefits, Bangladesh must not only ratify all 32 international conventions and agreements but also take concrete steps to ensure their implementation.⁹⁵
- c. A matter of concern for Bangladesh is an automatic safeguard provision relating to the product graduation threshold (the threshold at which a product loses tariff preferences due to its too-high share of imports).⁹⁶ The draft has proposed lowering the product graduation threshold from 57 per cent to 47 per cent and from 47 per cent to 37 per cent for apparel, clothing and textiles.⁹⁷ The current share of Bangladesh in EU GSP-covered imports in the relevant product group is almost 50 per cent. Moreover, apparel products⁹⁸ from a beneficiary do not qualify for GSP+ preferential access if they represent more than 6% of the EU's total imports of the same products in a calendar year.⁹⁹ Bangladeshi clothing exports currently exceed the thresholds for safeguards and product graduation. Thus, if the EU Parliament passes the draft as proposed, Bangladesh's apparel exports will be excluded from GSP+ preferential access. Though Bangladesh may still get access to GSP+ for some products, the benefits will be insignificant because of its export concentration on apparel products.

Moreover, GSP+ benefits come with stringent conditions and stricter monitoring of the implementation of those conditions.¹⁰⁰ Ratification and implementation of the relevant international conventions require substantial national efforts and political commitments, which may have other ramifications. Though there are concerns about labour rights and compliance issues¹⁰¹, Bangladesh has made real improvements over the years on these

⁹⁵ The proposal highlights that the EU GSP is extended to countries that 'respect international standard and principles related to human rights, including labour rights, as well as environmental protection and good governance'.

⁹⁶ Mohammad A Razzaque, 'The Proposed EU GSP Scheme for 2024-34: What Bangladesh Must Do Now' (Policy Research Institute 2022).

⁹⁷ Instead of the present 57 per cent, a product can lose tariff preference if the import value of GSP-eligible products surpasses the 47 per cent (as a proportion of the import value of items in the relevant section) threshold. However, the corresponding shares are lowered from 47 per cent to 37 per cent for clothing and textiles.

⁹⁸ Apparel products are defined as product group S-11b comprising HS codes 61, 62 and 63

⁹⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Applying a Generalised Scheme of Tariff Preferences and Repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council' (n 91) Article 29.

¹⁰⁰¹⁰⁰ The proposed draft has included an improved monitoring mechanism to ensure compliance with GSP+ requirements (Article 14) and a refined withdrawal of preference procedures in case of grave violations of international standards. (Articles 19.16 and 19.17)

¹⁰¹ European Commission, 'Report from the Commission to the European Parliament and the Council, Report on the Generalised Scheme of Preferences Covering the Period 2016-2017' (2018) COM(2018) 36 final.; Zaid Bakht and Monzur Hossain, 'Workplace Safety and Industrial Relations in the Ready-made Garments (RMG) Industry in Bangladesh'; European Parliament News, 'Bangladesh Should Do More for Its Textile Workers, MEPs Warn' (14 June 2017) <<https://www.europarl.europa.eu/news/en/press-room/20170609IPR77025/bangladesh-should-do-more-for-its-textile-workers-meps-warn>> accessed 8 April 2022.

issues.¹⁰² So these conditions should not stop Bangladesh from accessing the GSP+ scheme after graduation.¹⁰³

Graduation would also come up with the challenges of complying with more stringent RoO to benefit from GSP schemes. Two significant changes will happen: GSP+ or Standard GSP requires clothing items to go through the process known as 'double transformation'. The single transformation rule introduced by the EU back in 2011 for the LDCs has greatly benefitted Bangladesh. As opposed to 'single transformation', double transformation refers to two distinct manufacturing processes, i.e., textile production and garment manufacturing are undertaken within the beneficiary country. It aims to promote value addition and integrated production structures in beneficiary countries. Thus, garments must be manufactured from fabrics that have been domestically produced from yarns. Even if Bangladesh secures access to the GSP+ scheme after graduation, the double transformation requirement could pose a significant challenge, given the fragile supply-side capacity of Bangladesh's RMG sector.¹⁰⁴ Bangladesh heavily relies on imported fabric for its garment production, as it lacks a robust domestic textile industry. Consequently, the double-transformation rule will constrain the value of the EU's preferential access scheme for Bangladesh, as it becomes difficult for the country to meet the rule's requirements. As backward linkage textile production is highly capital intensive, such rules often become prohibitively restrictive for low-income countries.¹⁰⁵ Moreover, for non-clothing items, GSP+ requires a minimum of 50 per cent local value additions instead of the minimum 30 per cent bar applicable for the LDCs.

For comparison, the preference utilisation rate by Bangladesh in the EU market was 78 per cent in 2010 as opposed to 95.6 per cent in 2012. The utilisation rate started to improve sharply after introducing the 'single transformation' rule in 2011 (Figure-29).¹⁰⁶

Figure 29: EBA utilisation rate for Bangladesh apparel products¹⁰⁷

¹⁰² European Commission, 'Mid-Term Evaluation of the EU's Generalised Scheme of Preferences (GSP) – Final Report' (2018) Directorate-General for Trade; Nazila Fathi, 'Safety First: Bangladesh Garment Industry Rebounds' [2020] International Finance Corporation Insights 1.

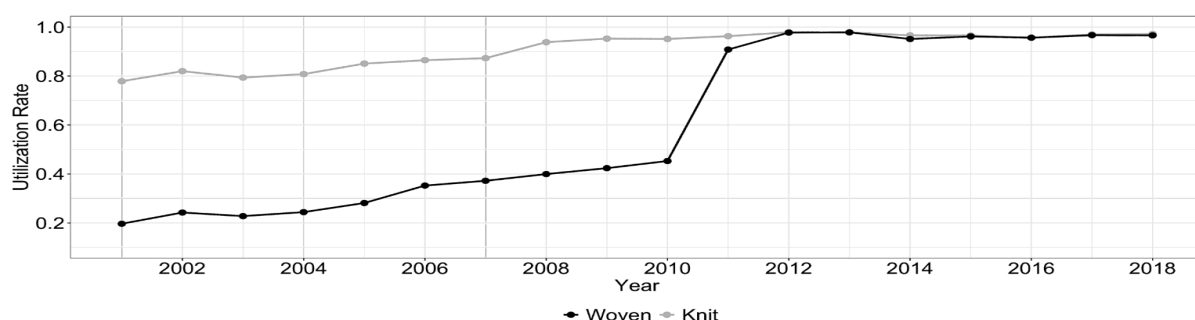
¹⁰³ Razzaque, 'The Proposed EU GSP Scheme for 2024-34: What Bangladesh Must Do Now' (n 94).

¹⁰⁴ *ibid.*

¹⁰⁵ Catherine Barber, Balachandiran Gowthaman and Jonathan Rose, 'Stitched Up: How Rich Country Protectionism in Textiles and Clothing Trade Prevents Poverty Alleviation' (Oxfam International 2004); Paul Brenton and Miriam Manchin, 'Making EU Trade Agreements Work: The Role of Rules of Origin' (2003) 26 *The World Economy* 755; Stacey Frederick and Cornelia Staritz, 'Developments in the Global Apparel Industry after the MFA Phase-out' in Gladys Lopez Acevedo and Raymond Robertson (eds), *Sewing success? Employment, Wages, and Poverty following the End of the Multifibre Arrangement* (2012); Rahman (n 62).

¹⁰⁶ Sytsma (n 65).

¹⁰⁷ *ibid.* Calculation by Tobias Sytsma from Eurostat data.



However, some observers believe that the double transformation requirement (Table-16) would, in the long term, be helpful and encourage the development of a vibrant local textile industry.¹⁰⁸ The benefits of domestic procurement, notably in terms of decreased lead time, are projected to provide domestic fabric makers with a competitive edge over imports. It can also help promote export diversification – to open up opportunities for preferential market access for products, including those in the knit-RMG industry that presently do not export but may acquire a competitive edge over time.¹⁰⁹ So, strategic planning for the textile sector may expedite the ongoing structural changes in the Bangladeshi textile industry to cover the shortcomings in the woven garment backward linkage and to benefit from the GSP+ scheme.¹¹⁰

Table 16: EU rules of origin conversion requirements for Bangladeshi apparels exports (from the 1990s to post-graduation)¹¹¹

Type of products	Early 1990s (GSP)	2004-2010 (EBA)	2011-2028 (EBA)	2029 onwards (Prospective GSP+/GSP)
Knit apparels	Three and then two stages	Two stages	One stage	Two stages
Woven Apparels	Two stages	Two stages	One stage	Two stages

Moreover, Bangladesh may have the option to apply for a derogation to the double transformation rule for specific products if “internal or external factors temporarily deprive [it] of the ability to comply with the applicable rules of origin where it could do so previously, or ... it requires time to prepare itself to comply with the ‘normal’ rules of origin”.¹¹² Another potential option may come from the regional cumulation clause in Commission Delegated Regulation (EU) 2015/2446, which recognises the members of the South Asian Association for

¹⁰⁸ Edwin A Vermulst, ‘Rules of Origin as Commercial Policy Instruments-Revisited’ (1992) 26 J. World Trade 61; Olivier Cadot, Calvin Djiofack and Jaime de Melo, ‘Trade Preferences and Rules of Origin: The Economic Partnership Agreements’ Prospects for West and Central Africa’ (2008) 16 Revue d’économie du développement 93.

¹⁰⁹ Rahman (n 64) 16.

¹¹⁰ Abdullah Hil Rakib, ‘Bangladesh’s Graduation from LDC: What Are the Strategies Required?’ (*Textile Today*, 4 November 2021) <<https://www.textiletoday.com.bd/bangladeshs-graduation-ldc-strategies-required/>> accessed 9 April 2022.

¹¹¹ Various GSP documents available on the EC website.

¹¹² European Commission, ‘The European Union’s Rules of Origin for the Generalised System of Preferences – A Guide for Users’ (2016).

Regional Cooperation (SAARC) as a regional group.¹¹³ Bangladesh might use the provision to obtain specific materials from other SAARC countries to meet the GSP's origin standards.¹¹⁴

To summarise, the upcoming revisions to the EU's GSP hold immense significance for Bangladesh. Graduation impact would be significantly mitigated if Bangladesh obtains GSP+ access for its clothing products. Otherwise, the industry would encounter substantial challenges in maintaining its competitiveness and preserving or expanding its market share in the EU.¹¹⁵

b. The United Kingdom

Since 2021, the United Kingdom has implemented its own GSP programme, retaining LDC privileges identical to those in the European Union in three frameworks: Least Developed Countries Framework (similar to the EU EBA programme), General Framework (similar to EU Standard GSP) and Enhanced Framework (identical to GSP+).¹¹⁶ The UK covered the same countries as the European Union and offered the same market access benefits regarding tariffs and rules of origin.¹¹⁷ It also offered a three-year grace period for graduating LDCs.

The Developing Countries Trading Scheme (DCTS) replaced the UK's EU-style GSP in early 2023.¹¹⁸ The DCTS applies to 65 countries or territories, including 47 LDCs and 18 countries or territories classified by the World Bank as low-income (LIC) and lower-middle-income (LMIC), currently receiving GSP benefits.¹¹⁹ The DCTS is designed to be one of the most generous preference schemes in the world, offering DFQF trade on 85 per cent of eligible goods to the eligible LICs and LMICs and on all goods except arms to LDCs. LDC products will also benefit from the scheme's more liberal origin rule or product-specific rules (PSRs). In addition, the government can suspend a country's preferences for serious and systematic human rights and labour rights violations based on 30 international conventions. The new UK scheme is precedent-setting for several reasons. First, it is equipped with a graduation support mechanism. Graduated LDCs will remain LICs or LMICs, so they will continue to be eligible for GSP benefits. Second, it has extensive product coverage but a narrower product graduation policy.¹²⁰, which will apply only to India and Indonesia. Therefore, graduate LDCs such as Bangladesh need not worry about the graduation of apparel products.

¹¹³ Article 55, paragraph 1 (c), Commission Delegated Regulation (EU) 2015/2446.

¹¹⁴ UNCDP (n 85) 8. Cabo Verde was granted such a derogation on some processed fish products, allowing it to use imported raw fish to make processed fish products that were subsequently exported under the GSP.

¹¹⁵ Interviewee-3 highlighted that the EU MFN rate for most clothing products is 12%, and the average national cash incentive is currently 5%. Therefore, the impact of graduation would be equivalent to a 17% tariff, in contrast to the current zero tariff. It is unprecedented for a country facing a 15 to 17% increase in tariffs to export in the same manner as before.

¹¹⁶ 'Trading with Developing Nations' (*GOV.UK*) <<https://www.gov.uk/government/publications/trading-with-developing-nations>> accessed 13 April 2022.

¹¹⁷ Mohammad A Razzaque, 'Textiles and Clothing in Asian Graduating LDCs: Challenges and Options' (WTO, UNDESA, ITC, EIF and UNCTAD 2022) Synthesis Report.

¹¹⁸ The UK has also finished a consultation with stakeholders both inside and outside of the UK, including the beneficiary countries, before finalising its new policy report.

¹¹⁹ India, Indonesia, the Philippines, and several DCs are among the DCTS's beneficiaries.

¹²⁰ The UK's narrower graduation criteria ensure that only genuinely competitive goods in the UK market are graduated from the DCTS. As a result, clothes, shoes, and foods not widely produced in the UK will benefit from lower or zero tariffs.

In FY 2018-2019, the United Kingdom accounted for over 10% of Bangladeshi exports.¹²¹ There will not be any immediate tariff changes for Bangladeshi clothing products after graduation, which is a massive relief for the country's exports under the new GSP policy.

c. The United States

The United States does not grant preferential market access to Bangladesh. In addition, the United States suspended GSP status for Bangladesh in 2013 over compliance with workers' rights and safety standards.¹²² However, Bangladeshi apparel products were never granted preferential market access to the USA. So only about 0.6 per cent of the total Bangladeshi exports benefitted through the GSP before its suspension.¹²³ Bangladesh currently pays the highest effective tariff rates in the United States.¹²⁴ Even if GSP is restored for Bangladesh and apparel products are included for preference, little would change because the US MFN and GSP rates for apparel products are nearly identical. (Table-17) So, Bangladesh's graduation is unlikely to impact access to the US market significantly.

Table 17: MFN/GSP rates applicable to apparel imports 2020¹²⁵

HS Code	Description	EU			US		Canada		Japan		Australia		China	India
		MFN	GSP	GSP+	MFN	GSP	MFN	GSP	MFN	GSP	MFN	GSP	MFN	MFN
61	Knitwear	7.9	6.3	0	12.8	12.7	16.8	16.5	9.0	8.9	4.5	-	6.8	25
62	Woven garments	11.7	9.3	0	10.1	10.0	15.6	15.1	9.1	8.5	4.5	-	6.8	25
63	Home textile	11.3	9.0	0	6.8	6.7	15.5	14.2	5.7	3.3	4.1	-	6.0	25

d. Canada

Post-graduation, Bangladeshi apparel products will lose preferential market access as the Canadian General Preferential Tariff (CGPT) does not cover apparel products as of 2022. As a result, most apparel products are likely to face as high as 18% tariffs (Table-17). They also must meet stringent rules of origin to be eligible for any other preference. In addition, as an LDC, Bangladesh now benefits from the special provision whereby all beneficiary LDCs are regarded as a single area.

8.4.2.2 Implications in other export destinations¹²⁶

a. Australia

¹²¹ Export Promotion Bureau data

¹²² USTR (United States Trade Representative), 'GSP Action Plan Review Finds More Needs to Be Done to Improve Worker Rights and Worker Safety in Bangladesh' (*Press release*, 2014) <<http://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/GSP-Action-Plan-Review-Finds-Need-to-Improve-Worker-Rights-Safety-in-Bangladesh>> accessed 14 April 2022.

¹²³ Sanjay Kathuria and Mariem Mezghenni Malouche, *Toward New Sources of Competitiveness in Bangladesh: Key Insights of the Diagnostic Trade Integration Study* (World Bank Publications 2015) 20.

¹²⁴ USITC data reveals that nearly all Bangladeshi imports were subject to US duty. The tariffs were equivalent to 15.2% of its shipments to the USA – the highest average rate among the 232 countries and territories in the ITC database. Drew Desilver, 'Despite Talk of "trade War" with China, Highest US Tariffs Are on Imports from Other Asian Countries' (*Pew Research Center*) <<https://www.pewresearch.org/fact-tank/2018/04/05/despite-talk-of-trade-war-with-china-highest-u-s-tariffs-are-on-imports-from-other-asian-countries/>> accessed 14 April 2022.

¹²⁵ Paul Baker, 'Impact of LDC Graduation on the Textiles and Clothing Sector' (Enhanced Integrated Framework (EIF) and World Trade Organization (WTO) 2021). The calculation is based on a simple average. Australian GSP for developing countries does not include apparel products.

¹²⁶ Except for the traditional US, EU, and Canadian markets, all other export markets for Bangladeshi apparel are considered non-traditional or emerging.

Australia's GSP scheme, known as the Australian System of Tariff Preferences (ASTP), has offered DFQF market access to LDCs exports since 2003. After graduation, Bangladesh will continue to benefit as a developing country. As a general rule, ASTP for developing countries applies preferences of 5 percentage points where the MFN rate is greater than 5% but zero percentage points where the MFN rate is less than 5%.¹²⁷ However, only a few tariff lines—including clothing products, most of which are subject to an MFN duty rate of 5%—are excluded from those reductions.¹²⁸ Additionally, Bangladeshi exports would not be eligible for the LDC-specific rules of origin and would need to ensure a minimum of 50% value addition. Maldives, Samoa, and Equatorial Guinea were provided extended DFQF access after graduation by Australia.¹²⁹ In that vein, Australia has promised to continue providing DFQF treatment to Bangladeshi exports even after graduation in 2026.¹³⁰

b. Japan

Clothing products are not included in the preferential tariff lines of Japanese Standard (non-LDC) GSP. So Bangladeshi exports would face MFN tariffs ranging from 7.4% to 12.8%. In addition, simplified rules of origin applicable to the LDCs would no longer be available.

c. India

India became the first developing country to introduce a duty-free tariff preference (DFTP) scheme for LDCs in 2008.¹³¹ As an LDC, Bangladesh presently enjoys DFQF market access in India on 94.1 per cent of tariff lines, including apparel products. Depending on the product, SAFTA, APTA (non-LDC), or MFN charges would apply after graduation. Tariffs on most of Bangladesh's primary exports to India would range between 0% and 10%. India is fast becoming a top destination for Bangladeshi exports, but preferences will end before businesses can take advantage.¹³²

Table 18: At-a-glance tariff preferences and rules of origin for key export destinations¹³³

Destination	Criteria	Preference Schemes	Rules of Origin	Description
European Union	LDC	Everything But Arms, DFQF for all LDCs	Single transformation for clothing products	DFQF access for all products except arms and ammunition from the LDCs, including Bangladesh. Bangladesh may not qualify for GSP+.
	Non-LDC	GSP+, Standard GSP	Double transformation for clothing products.	
Canada	LDC	LDCT-DFQF for LDCs	For apparel and textile products, VA is 25%.	LDC-DFQF access for 98.9% of its tariff lines, including apparel and

¹²⁷ UNCTAD, 'Generalised System of Preferences: Handbook on the Scheme of Australia' 4.

¹²⁸ UNCDP (n 85) 9.

¹²⁹ Razzaque, Akib and Rahman (n 78) 60.

¹³⁰ Shahan Alam, 'Australia to Continue Duty Free Market Access in the Post -LDC Period' (SBS) <<https://www.sbs.com.au/language/bangla/en/article/australia-to-continue-duty-free-market-access-in-the-post-ldc-period/62ij9ohsl>> accessed 22 December 2022.

¹³¹ UNCTAD, 'Handbook on India's Duty-Free Tariff Preference Scheme for Least Developed Countries' (2017).

¹³² For the first time in 2019, Bangladesh's exports to India crossed the \$1 billion mark. However, Bangladeshi firms have just recently begun to benefit from India's LDC-specific preferences, and graduation will soon remove this favourable market access.

¹³³ Adapted from Razzaque, Akib and Rahman (n 78) 62. Note: CTH—change in tariff heading, DFQF—duty-free quota-free, DFTP—Duty-Free Tariff Preference, RC—regional cumulation, and VA—value addition.

	Non-LDC	General Preferential Tariff for developing countries	VA is 60% for all products	textiles. GPT for developing countries contains up to 18–20% on major export items.
Japan	LDC	Duty-free access (on 98.2% of tariff line, including apparel and textiles) for LDCs	De minimis applied for clothing products. Requires sufficient transformation resulting in a different product under the HS tariff heading (4 digits).	Apparel and textiles are duty-free for LDCs. A country is graduated from GSP if its export to Japan exceeds ¥1 billion, or 25% of imports to Japan for a product.
	Non-LDC	GSP exists. However, most applied tariff rates are MFN rates if not otherwise stated.	Partial graduation (developing) and entire graduation (high-income countries) using World Bank's income classification.	
China	LDC	DFQF for LDCs	For Bangladesh, VA is 35% (APTA) and RC-VA is 50% (APTA)	Bangladesh has duty-free access in 97% of the lines. Non-LDC APTA preferences are allowed on 1,697 products with a 26.7% preference margin.
	Non-LDC	MFN applied if not stated otherwise	VA 45% (APTA) RC-VA 60% (APTA)	
India	LDC	Duty-free access for LDCs. Bangladesh gets SAFTA-LDC market access.	VA 30% (DFTP) VA: CTH+30% (SAFTA) RC-VA: CTH+40% (SAFTA)	Regular LDC-DFTP on 98% of products in tariff line. SAFTA contains LDC-DFQF for almost all products.
	Non-LDC	Bangladesh will get non-LDC SAFTA Preferences.	VA: CTH+40% (SAFTA) RC-VA: CTH+50% (SAFTA)	Non-LDC SAFTA preferences do not include duty-free access.
Australia	LDC	DFQF Australian System of Tariff Preferences	VA 25%	DFQF access for LDCs for the entire tariff schedule. GSP imposes up to 5% non-MFN tariff on apparel products.
	Non-LDC	GSP	VA 50%	

d. Other Developed and Developing Countries' Markets

Bangladesh also enjoys attractive preferential access in countries such as China and South Korea. For example, China offered duty-free market access to 97 per cent of its tariff lines, including some Bangladeshi apparel products, in June 2020. However, Bangladesh has not taken advantage of this access due to its limited export basket.¹³⁴ Following graduation, Bangladeshi apparel products would face tariffs ranging from 6 to 14 per cent under APTA or MFN rate.¹³⁵ Another significant destination, South Korea, allows DFQF access to around 95% of its tariff lines for Bangladeshi exports. Bangladesh also has preferential access to New Zealand, Norway, Russia, Switzerland, Thailand, and Turkey. As a result, Bangladeshi clothing exports will lose LDC-specific preferences in all these markets.

Due to the higher tariff rates and stricter rules of origin imposed on non-LDC developing nations, LDC graduation could affect the export competitiveness of the graduates. In addition, some preference providers lack special treatment for graduated LDCs or developing countries. For example, Norway grants non-LDC preferences to countries with a population

¹³⁴ RMG exports to China showed declining trends in 2022. 'Duty-Free Market Access to China: Bangladesh Need to Diversify Products to Increase Apparel Exports' [2021] *Textile Today* <<https://www.textiletoday.com.bd/duty-free-market-access-china-bangladesh-need-diversify-products-increase-apparel-exports/>> accessed 24 April 2022.

¹³⁵ UNCDP (n 85) 10.

of fewer than 75 million, which excludes Bangladesh.¹³⁶ However, any adverse impacts will likely be less noticeable in markets with a modest export presence now.

In essence, due to graduation, the industry is set to encounter significant challenges in the form of increased tariffs and greater complexity of RoO in most of its major export markets.

8.4.2.3 Implications in the Regional Trade Agreements

In addition to the conventional loss of DFQF entry under GSP schemes, the loss of LDC-specific preferential treatment in regional trade agreements will have an impact. The two most significant regional endeavours, the SAFTA and the APTA, feature beneficial elements for Bangladesh as an LDC. Both allow for less rigorous origin standards for LDCs.¹³⁷ SAFTA contains lenient sensitive lists (products not eligible for tariff concessions), while APTA offers LDC members a relatively progressive list of positive items (products eligible for tariff discounts).¹³⁸ Graduation will forfeit these benefits. These benefits will no longer be available upon graduation. However, the Maldives is allowed to retain LDC concessions under SAFTA after graduation and Sri Lanka, a non-LDC developing country, is granted additional concessions under APTA.¹³⁹ This calls for exploring the possibility of negotiation for an extension of LDC benefits after graduation.

8.4.3 Loss of Policy Space

LDC graduation entails a significant reduction in policy space for the Government to promote the apparel industry. LDCs are often exempted from making promises and executing rigorous provisions of various WTO agreements. Additionally, WTO members often hesitate to express concerns or file formal complaints against individual LDCs' use of policy support measures that would be regarded as inconsistent or non-compliant with international trade laws.

Bangladesh has extensively used this policy space to promote the private sector, particularly with export incentives, agricultural support measures and pharmaceutical industry support. The use of export incentives is relevant for the RMG sector. For example, Bangladesh provides different incentives to the apparel sector to stimulate growth and diversify exports. Some of these incentives, such as cash grants, might be regarded as subsidies.¹⁴⁰ Subsidies under the SCM can come under two basic categories: prohibited and actionable subsidies. Export subsidies (contingent upon export performances) and local content subsidies (based on the use of domestic over imported goods) are expressly prohibited under the Agreement.¹⁴¹ In

¹³⁶ UNCTAD, 'Generalised System of Preferences: Handbook on the Scheme of Norway' (2020) UNCTAD/ITCD/TSB/Misc.29/Rev.1.

¹³⁷ The general RoO criterion for APTA is a minimum value addition of 35% for LDCs and 45% for non-LDCs. Regional accumulation (for raw materials sourced from APTA members) is permitted under APTA, provided that regional value addition is at least 50% for LDCs and 60% for non-LDCs.

¹³⁸ Each SAFTA can maintain a sensitive list of products for which tariff concessions will not apply. On the other hand, APTA takes a product-by-product positive list approach, identifying the specific goods agreed for tariff concessions by the members.

¹³⁹ UNCDP (n 85) 10.

¹⁴⁰ The SCM Agreement regulates the use of subsidies and the countervailing measures that a member state may use to offset the trade-distorting impacts of subsidies. A measure is defined as a subsidy under SCM if it involves any of the following three elements: (a) a financial contribution; (b) provided by a government or other public entity within the territory of a member state, and (c) the contribution delivers a benefit.

¹⁴¹ They are prohibited as they are intended to influence trade directly and are, therefore, most likely to impact the interests of other Members negatively.

contrast, actionable subsidies are not illegal per se, but member states may challenge them.¹⁴²

8.4.3.1 Export Incentives are Central to Bangladesh's Export Policy

Export incentives have been a focal point of Bangladesh's export policy with the primary objectives of alleviating policy and administrative constraints on export operations, strengthening backward linkages, diversifying the export basket, encouraging export-oriented investment, and boosting price competitiveness in global markets.¹⁴³ The apparel industry has received numerous significant incentives since the 1990s, including bonded warehouse facilities,¹⁴⁴ cash compensations, income tax rebates, and discounted credits, among others.¹⁴⁵ Most incentive schemes continue to function; however, their form and scope of coverage have altered.

Cash assistance is the most notable example. In FY 2019–20, the following cash assistance is provided through various schemes:

- (i) cash assistance equal to 4% of the value of their export shipment for export-oriented RMG firms that do not use bonded warehouses and duty-drawback facilities,¹⁴⁶
- (ii) an additional 4% assistance for small and medium-sized RMG firms,
- (iii) an additional 4% assistance to firms exporting to new markets,¹⁴⁷
- (iv) an extra 2% financial support for RMG exporters exporting to Eurozone countries, and
- (v) a special cash incentive of 1% for RMG firms.¹⁴⁸

Bangladesh provided around \$560 million in FY19 as export incentives for 36 items, including apparel products. Cash assistance as a percentage of exports was about 2% in FY03, dipped below 1% in FY06-FY07, and has been hovering around 1.5% in recent years.¹⁴⁹ Over the last

¹⁴² Most subsidies, such as production subsidies, are actionable subsidies. In addition, subsidies directed at specific firms, industries/sectors, or regions may constitute breaches of the Agreement and come under the category of actionable subsidies.

¹⁴³ Mohammad A Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' in Mohammad A Razzaque (ed), *Navigating New Waters Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020) 28.

¹⁴⁴ Bonded warehousing refers to the facility provided to export-oriented industries for duty-free importation of inputs/raw materials and packaging materials. It is provided to promote export-oriented industrialisation and facilitate exports and the export competitiveness of firms.

¹⁴⁵ Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 28. Significant export incentives provided in the 1990s included (i) bonded warehouse facilities that allowed exporters to import intermediate inputs duty-free, (ii) duty drawbacks on intermediate goods, (iii) cash compensation schemes for so-called non-traditional exports, (iv) duty-free imports of machinery for export-oriented firms, (v) income tax rebates, (vi) an export credit guarantee scheme that protected exporters' marketing risks, and (vii) credit disbursed through the Export Development Fund at subsidised interest rates.

¹⁴⁶ The drawback is the refund of duties and taxes paid on inputs/raw materials used to manufacture exported goods and services.

¹⁴⁷ Markets other than Canada, the EU, and the United States are considered new.

¹⁴⁸ Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 28.

¹⁴⁹ Razzaque, Akib and Rahman (n 78) 68.

decade, the RMG industry has benefited from more than half of all export incentives.¹⁵⁰ Other than the direct cash incentives, the use of sector- or industry-specific assistance, duty-free imports of capital machinery, tax holidays, income tax rebates, and subsidised loans through the Export Development Fund (EDF), among other things, may also be deemed as actionable or prohibited subsidies.¹⁵¹ Article 27.1 of SCM recognises the critical role of subsidies in promoting exports and the economic development of DCs. So, LDCs are permitted exemptions in the use of prohibited subsidies.¹⁵² However, post-graduation, Bangladesh must comply with the provisions of the Agreement.¹⁵³

8.4.3.2 Concern with Export Incentives after Graduation

The SCM Agreement exempts all LDCs and 21 DCs listed in Annex VII(b) from compliance with prohibitive subsidy commitments.¹⁵⁴ Why is Bangladesh concerned if it may maintain its exemptions as a developing country? The issue is that the exemptions for Annex VII (b) developing countries come with two necessary conditions that Bangladesh may not meet after graduation, notably:

- a. For the exemptions to apply after graduation, Bangladesh's GNP per capita income must remain below \$1,000 in 1990 constant USD,¹⁵⁵ and
- b. No developing country member can grant such subsidies for a product (defined at the HS 4-digit level) that has reached export competitiveness internationally.¹⁵⁶

The primary cause of concern is that Bangladesh may not satisfy these two conditions, and its export-promoting policy space will be disrupted by the current WTO requirements immediately after graduation. Although Bangladesh's GNI per capita was \$2,030 in current dollars (in 2020),¹⁵⁷ it may still take a few years to reach the \$1,000 mark in 1990 pricing.¹⁵⁸ Razzaque et al. estimate that Bangladesh may reach the threshold mark by 2027, i.e., in one year of graduation.¹⁵⁹

¹⁵⁰ WTO, 'Trade Policy Review of Bangladesh' (World Trade Organisation 2019).

¹⁵¹ Razzaque, Akib and Rahman (n 78) 69.

¹⁵² Art. 27.2 and Annex VII (a) of the SCM Agreement

¹⁵³ In case of any violations, a WTO member may take unilateral steps (such as imposing countervailing measures) or use the WTO's dispute settlement mechanism to seek remedy. Countervailing measures (usually a duty applied to counteract the injurious effects of subsidised imports and restore fair competition) are applicable when detrimental to industries in export destinations and impede other members' export potential.

¹⁵⁴ However, LDCs and Annex VII (b) countries may still face countervailing measures for using actionable subsidies that result in injury, nullification, or impairment of benefits, as specified in the Agreement.

¹⁵⁵ Art. 27.2 and Annex VII (b) of the SCM Agreement

¹⁵⁶ Art. 27(5) and Art. 27(6) of the SCM Agreement; A product is considered export competitive if a developing country member's exports account for at least 3.25 per cent of world trade in that product for two consecutive calendar years.

¹⁵⁷ World Bank data

¹⁵⁸ WTO, 'GNP Per Capita Calculations for All WTO Members Using the Methodology in G/SCM/38: Note by the Secretariat' G/SCM/W/585, 22 November 2021. GNI per capita data for developing member countries included in Annex VII (b) is released by the World Trade Organization (WTO) to establish their continued eligibility for SDT under the SCM. However, no such experiment has been done since Bangladesh is not included in Annex VII. So, no official estimate is available for Bangladesh, either from the WTO or any relevant international organisations. However, as data for GNI and GNP per capita for the 1990s based on both 1990 and 2010 prices are readily available, it is relatively simple to calculate GNI per capita in 1990 prices.

¹⁵⁹ Razzaque, Akib and Rahman (n 78) 70. According to the estimate, assuming the GNI per capita continues to grow at an average rate of 5 or 6 per cent, Bangladesh will cross the threshold by 2030 and 2028, respectively. However, if the growth rates are higher, i.e., 7 per cent, it will cross the benchmark as early as 2027.

Another critical point is that a developing country must be enlisted in SCM Annex VII (b) for subsidy benefits. Currently, there is a lack of clarification about the status of graduating LDCs with per capita GNP below the criteria mentioned. However, LDCs have already raised the issue in the WTO officially.¹⁶⁰ Thus, graduation may create a unique situation¹⁶¹ where Bangladesh loses eligibility for the SDT under the SCM Agreement even though its GNI per capita remains below the threshold.¹⁶²

The other condition relates to the 'export competitiveness' of products, i.e., when a product achieves a market share of at least 3.25 per cent in its world trade for two consecutive calendar years. As per the Agreement, Annex VII (b) developing countries must gradually phase out export subsidies on one or more products that have achieved export competitiveness over eight years. In 2018, 22 apparel products (12 knit products under HS-61 and ten woven products under HS-10) and two home textile items (HS-63) exceeded the export competitiveness benchmark. Together, these products account for about 98 per cent of total clothing export revenues.¹⁶³ Thus, even though Bangladesh is included in SCM Annex VII (b), its key export products may remain out of subsidy benefits.¹⁶⁴

So far, Bangladesh has used the policy space of export promotions without much worry about SCM compliance.¹⁶⁵ Arguably, not all cash assistance provided to exporters qualifies as a subsidy.¹⁶⁶ However, determining how much of the total financial assistance qualify as a subsidy is difficult. Regarding effects on export competitiveness, export subsidies may be compared with tariffs. By using the partial equilibrium model, Razzaq et al. estimated a graduation-induced total loss for the industry in the range of \$540–\$815 million (i.e., about 1.3 per cent–2.0 per cent of FY2019 exports) if the total cash assistance of \$560 million in FY2019 is considered a subsidy, or a total loss in the range of \$270–\$410 million (about 0.7 per cent–1.0 per cent of FY2019 exports) if half of them is construed as subsidy.¹⁶⁷

¹⁶⁰ WTO Submission, 'Communication from the Mission of the Central African Republic on Behalf of the LDC Group with Regard to Measures to Allow Graduated LDCs, with GNP Below US\$1000, Benefits Pursuant to Annex VII(b) of the Agreement on Subsidies and Countervailing Measures' G/C/W/752, 19/04/2018.

¹⁶¹ Since this entails initiating changes to the Agreement, a range of other procedural consequences would ensue, including the need to ratify amendments. Interviewee-4 asserts that this could potentially lead to complications.

¹⁶² It may be while many other DCs, including Pakistan, Ghana, Honduras, Kenya, Nicaragua, Nigeria, Zimbabwe, Côte d'Ivoire, and Senegal, continue to benefit from SCM provisions based on their lower per capita income levels. It is worth mentioning that Senegal is included in Annex VII (b) category despite its status as an LDC. Bangladesh may utilise this example as a negotiating tool to ensure that any graduating LDCs would be immediately considered for inclusion in Annex VII (b) nations if their GNP per capita remains below the threshold.

¹⁶³ Razzaque, Akib and Rahman (n 78) 70.

¹⁶⁴ However, Bangladesh could still use subsidies to promote other export categories whose share is still negligible.

¹⁶⁵ Razzaque, Akib and Rahman (n 78) 68. No one complained about that, as it is very unusual for members to act against LDCs for using subsidies since other members have historically exercised caution in adopting such a course of action. Graduation, however, would result in increased monitoring to ensure compliance. In addition, direct export subsidies are unlikely to be permitted under WTO rules.

¹⁶⁶ Generally, firms that do not employ bonded warehouses or duty drawback support are eligible for such assistance. In addition, as exporters must use raw materials at world prices, subsidies may be seen as compensation for duties paid on imported intermediate inputs.

¹⁶⁷ Razzaque, Akib and Rahman (n 78) 72.

8.4.4 Other Consequences

Graduation could have unintended effects on several other areas, such as FDI in the sector, that would negatively impact RMG exports. For example, though the role of FDI in Bangladesh's apparel industry is not particularly substantial, its DFQF market access benefits could have helped to attract some FDI in the sector thus far.¹⁶⁸

In a recent survey of 100 Japanese and 30 Bangladeshi multinational corporations, the Japan External Trade Organization (JETRO) and the Japan-Bangladesh Chamber of Commerce and Industries (JBCCI) found that the loss of DFQF market access could make it challenging for Bangladesh to retain foreign companies that are currently operating in Bangladesh. Twenty per cent of Japanese firms have expressed a desire to relocate to more competitive countries, such as China, India, and other ASEAN countries if an FTA is not signed with Japan to retain the duty benefit following Bangladesh's graduation.¹⁶⁹

8.4.5 Estimated Loss of Exports and Export Competitiveness

In policy-oriented literature, preference margin,¹⁷⁰ utilisation,¹⁷¹ utility,¹⁷² and product coverage¹⁷³ are used to evaluate the economic value of trade preference schemes for a particular beneficiary.¹⁷⁴ Bangladesh is an adept preference user of clothing products with one of the highest preference margins, so the loss of economic value may be more pronounced. However, to obtain a more precise estimate, one must also consider the extent of preference available to the competitors; the costs of RoO compliance in terms of documentation and the sourcing of inputs from more expensive sources; the various conditions and limitations embodied in preferential schemes; and the distribution of related rents.¹⁷⁵

Economists use various methods to assess the expected consequences of tariff adjustments. Several studies have attempted to calculate the anticipated loss resulting from the increase in tariffs. By comparing the existing tariff structure to a counter-factual post-graduation scenario for each LDC using a gravity modelling framework, UNCTAD calculated that graduation would result in a loss of 5.5 to 7.5 per cent of Bangladesh's overall exports.¹⁷⁶ Similarly, Rahman and Bari (2018) assessed the impact as a possible drop in Bangladesh's

¹⁶⁸ Marco Fugazza and Claudia Trentini, 'Empirical Insights on Market Access and Foreign Direct Investment' (UNCTAD 2014).

¹⁶⁹ Star Business Report, '85pc Firms Want Bangladesh-Japan FTA: Survey' (*The Daily Star*, 6 June 2022) <<https://www.thedailystar.net/business/economy/news/85pc-firms-want-bangladesh-japan-fta-survey-3040381>> accessed 6 June 2022.

¹⁷⁰ The difference between MFN and preferential tariffs on manufactured goods.

¹⁷¹ The ratio of imports that obtain preferential treatment in practice to those that are covered in principle (a measure of preference use effectiveness)

¹⁷² The ratio of the value of preferential imports to the total value of all dutiable imports from that exporter (the lower the ratio, the less generous the preference scheme).

¹⁷³ The ratio of items covered by a scheme to dutiable imports from the beneficiary country.

¹⁷⁴ Bernard Hoekman, Will Martin and Carlos A Primo Braga, *Trade Preference Erosion: Measurement and Policy Response* (World Bank 2009) <<https://openknowledge.worldbank.org/handle/10986/9437>> accessed 25 April 2022.

¹⁷⁵ *ibid.*

¹⁷⁶ UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (UNCTAD 2016) UNCTAD/LDC/2016/Corr1 UNCTAD/LDC/2016/Corr.1.

exports of 8.7%, or \$2.7 billion, based on total exports in FY15.¹⁷⁷ One such prominent strategy is to employ a partial equilibrium model developed by the Commonwealth Secretariat that uses disaggregated data on the value of specific export items and their related tariff rates (e.g., at the HS 8-digit level). Razzaque et al. used the model to examine the prospective consequences of graduation in important export destinations such as Australia, Canada, China, India, and the European Union, which account for about 75% of Bangladesh's garment exports and more than 90% of preferential apparel exports.¹⁷⁸ (Table-19)

Table 19: Potential loss of export earnings after graduation¹⁷⁹

Export Destination	Present Tariff (%)	Post-graduation average tariff (%)	Loss of export revenue (million \$)	Assumed post-graduation scenarios
EU	0	9.5	1602.0	Standard GSP
Canada	0	17	175.0	GTP for developing countries
Japan	0	8.71	98.7	GSP for developing countries
China	0	16.2	88.6	MFN tariffs
India	0	8.65	33.1	SAFTA non-LDC tariffs
Australia	0	5	29.0	MFN Tariffs
Total		9.8	2026.4	

The predicted outcomes for the EU assume that if Bangladesh gets Standard GSP in the EU following LDC graduation, it will face an average tariff rate of 9.5% on apparel products. This would result in a possible loss of \$1,602 million in export revenue (i.e., 9.53 per cent of average EU export revenues between 2015 and 2017). In addition, Bangladesh would be eligible for Canada's GSP for developing nations (GTP) which does not apply to most garment items. This would expose apparel products to an average tariff rate of 17%, resulting in an estimated \$175 million in export losses. As a whole, Bangladesh may incur a loss in export income of above \$2 billion, or around 9.8 per cent of exports from these markets, in 2018 (Table-18). However, there are other costs, as these findings do not include the impacts of Bangladesh's exposure to stringent rules of origin provisions due to graduation.¹⁸⁰

Bangladesh's dependence on apparel exports to markets with high preferential tariff margins and its higher rate of preference utilisation indicate that its graduation may have a more significant impact than other LDCs. A WTO-EIF ex-ante analysis utilising a partial equilibrium model concluded that Bangladesh's exports would suffer severely after graduation.¹⁸¹ Even though the study considers the optimal alternative tariff rates after graduation, Bangladesh is estimated to lose approximately one-seventh of its export revenue. While most graduating LDCs such as Angola (2 per cent), Tuvalu (0 per cent), Timor-Leste (1 per cent), Sao Tome and Principe (3 per cent), and Kiribati (6 per cent) will experience a minimum increase in effective tariff rates, Bangladesh will experience a massive 573 per cent increase resulting in a 14.3 per

¹⁷⁷ Mustafizur Rahman and Estiaque Bari, 'Pathways to Bangladesh's Sustainable LDC Graduation: Prospects, Challenges and Strategies' in Debapriya Bhattacharya (ed), *Bangladesh's Graduation from the Least Developed Countries Group* (Routledge 2018).

¹⁷⁸ Razzaque, Akib and Rahman (n 78) 63.

¹⁷⁹ *ibid.* Razzaque et al. estimation. Estimation of partial equilibrium using the Commonwealth Secretariat's model (2018). The figures on EU trade come from the Comext database. Bangladesh's exports to Canada and Australia are sourced from the International Trade Centre's Trade Map database.

¹⁸⁰ *ibid.*

¹⁸¹ Figure-17 in Chapter-7 details the impacts.

cent drop in its total export revenue between 2016 and 2018, amounting to \$5.37 billion.¹⁸² Given Bangladesh's export composition, apparel products will be responsible for any decline in export revenue. Therefore, the additional tariffs will significantly reduce its competitiveness.

However, it should be noted that the outcome of these models should be regarded cautiously.¹⁸³ Numerous uncertainties limit the accuracy of these quantitative estimates, including the terms on which Bangladesh and competing countries will export¹⁸⁴; exchange rates; and the extent to which Bangladesh's producers and producers in other countries reacclimate. As a glaring example of such limitations, many of the forecasts made about the effects of phasing out of MFA quotas on Bangladesh's garment sector turned out to be inaccurate.¹⁸⁵

Despite these shortcomings, the findings of the studies demonstrate the strain on competitiveness caused by the loss of tariff preferences, putting downward pressure on export performance. Jodie Keane analysed the potential trade effects arising from changes by graduation through two broader angles. In particular:

- How does the additional tariff impact price-setting by the firms in the graduated LDCs, and how does that reflect in the demands from importing destinations?
- How might supplies from competitors increase, and how does the share in destination markets change?¹⁸⁶

Given the increasing market share of their rivals in all preference-granting markets, it will become increasingly difficult for Bangladeshi firms to remain competitive and expand their market share after graduation.¹⁸⁷ Regardless of how it is viewed, one thing is sure: Bangladeshi apparel export will experience substantial changes in the market access conditions that have supported its expansion to date, and if strategic planning is not undertaken and implemented, the challenges associated with graduation may transform the entire industry for the worse.

It may be noted that graduation is not the industry's only critical hurdle in the coming years. The effects of graduation must be seen in the context of the sector's other challenges, including technical advancements, new competitors' emergence, and market demands for compliance with labour and environmental norms. The effects of losing preferences also vary according to market access conditions and competing nations' competitive variables

¹⁸² WTO and EIF, *Trade Impacts of LDC Graduation* (World Trade Organization 2020) 49.

¹⁸³ The inadequacies are due to the underlying assumptions used to build and operationalise the models. Additionally, the models are incapable of capturing many real-world complications. For instance, it may be difficult for customers to shift their sourcing to other nations, which may lack the ability to manufacture in bulk or the tariff preferences necessary to compete with Bangladeshi suppliers.

¹⁸⁴ e.g., whether they will enter free trade agreements, lose or maintain preferential market access, or face restrictions on exports from certain countries.

¹⁸⁵ UNCDP (n 85) 11.

¹⁸⁶ Jodie Keane, *A Guide to Graduating from Least Developed Country Status: The Trade in Global Value Chains Perspective* (Commonwealth Secretariat 2018).

¹⁸⁷ Due to the EU-Vietnam trade agreement, apparel exports from Vietnam, Bangladesh's top competitor in clothing, would enter the EU market duty-free from 2027. Other significant competitors, such as Cambodia and Myanmar, have some excellent arrangements too.

(efficiency, cost of doing business, logistics, and so on). Moreover, impacts on the apparel sector would not be evenly distributed. Even though some larger and more resourceful companies might be able to upgrade their products or absorb the price shock with lower profit margins, the smaller companies with low-profit margins that cannot change or upgrade much would be the hardest hit.¹⁸⁸

8.4.6 Increased Implications due to Covid-Pandemic Impact

The graduation implications are set to be more pronounced due to the severe effects of the Covid-pandemic on the industry. Four decades of the phenomenal growth of Bangladesh's RMG industry since the 1980s has faltered due to the COVID-19 pandemic and subsequent global and domestic economic slump. The outbreak of COVID-19 brought the RMG sector to a standstill and added to the difficulty that the sector was already experiencing. Research shows that the COVID-19 pandemic has had a significant impact on the supply chain management of the RMG industry.¹⁸⁹ This has made it difficult for factories to import raw materials and export finished garments. Many orders from international buyers were cancelled due to the lockdown measures imposed by various countries to prevent the spread of the virus. It is estimated that international buyers cancelled orders worth approximately \$3.7 billion since the beginning of the pandemic.¹⁹⁰ Producers responded by lowering output to minimize the loss. In June 2020, orders from international brands and retailers were down by 45% compared to the same period in 2019 due to low demand in Western markets. However, some of the cancelled orders have been reinstated after intense negotiations.¹⁹¹ The industry experienced a 17% decline in export revenue in 2020 compared to the previous year.¹⁹² A 2023 study found a 30% decrease in exports and a 58% increase in raw material import prices due to the pandemic.¹⁹³

Millions of workers in the RMG industry have been adversely affected due to the pandemic. These workers, who are mostly women from poor socioeconomic backgrounds, are employed in garment factories where they earn low wages while producing low-priced garments. As a

¹⁸⁸ UNCDP (n 85) 12.

¹⁸⁹ Lise Cecilie Nylænder and Fredrik Pedersen, 'The Impact of COVID-19 on Global Supply Chains' (University of South-Eastern Norway 2021); Lorenzo Musella, 'The Impact of Covid-19 on the Supply Chain: Review of the Effects of a Pandemic Crisis on the Global Supply System and Analysis of Its Fragilities' (2023); Samit Chakraborty and Manik Chandra Biswas, 'Impact of COVID-19 on the Textile, Apparel and Fashion Manufacturing Industry Supply Chain: Case Study on a Ready-Made Garment Manufacturing Industry' (2020) 3 *Journal of Supply Chain Management, Logistics and Procurement* 181.

¹⁹⁰ Laura Boudreau and Farria Naeem, 'The Economic Effects of COVID-19 on Ready-Made Garment Factories in Bangladesh' [2021] *Private Enterprise Development in Low-Income Countries* 173. BGMEA Data indicated that a minimum of 127 prominent brands had terminated contracts at various points in the production process. This includes their refusal to accept products already lying at the port. Additionally, certain brands have demanded substantial discounts for products that have already been produced or have postponed payments for a period ranging from six to twelve months, and in the worst-case scenario, indefinitely. Renowned brands such as Primark, H&M, C&A, Marks & Spencer, and Tesco were found to have postponed or cancelled the highest volume of orders.

¹⁹¹ Refayet Ullah Mirdha, 'Fresh Orders for Apparel Plunge 45pc' (*The Daily Star*, 10 June 2020) <<https://www.thedailystar.net/business/news/fresh-orders-apparel-plunge-45pc-1911933>> accessed 26 December 2023.

¹⁹² EPB and BGMEA data

¹⁹³ Mohammad Hosen, Sheikh Hossain and Sahira Yasmin, 'Post COVID-19 Impact on Export-Import Industry of Bangladesh: A Case Study on RMG Sector', *Post COVID-19 Impact on Export-Import Industry of Bangladesh* (2023).

result of the pandemic, over one million RMG workers in Bangladesh have lost their jobs due to order cancellations and buyers' refusal to pay for finished products.¹⁹⁴ Although the Bangladesh government announced financial aid of BDT 500 million¹⁹⁵ for workers' wages and benefits, many of the laid-off workers were reportedly sent home without pay.¹⁹⁶

Despite the end of the pandemic, the textile industry continues to face significant challenges. The current economic slowdown in Bangladesh, coupled with rising utility costs,¹⁹⁷ acute foreign exchange shortages,¹⁹⁸ and discontent over minimum wage increases,¹⁹⁹ has had a detrimental impact on the industry. These issues add to the graduation worries requiring strategic planning and implementation at both the industry and economy levels.

8.5 Existing Graduation Supports in the Trade Regime

Chapter 7 has investigated in detail the present supports for LDC graduation. There are no specific WTO rules regarding LDC graduation. Most preference-granting countries have no formal rules for extending trade preferences beyond graduation.

One notable exception is the European Union, which has a 'smooth transition clause' that extends benefits automatically for three years. Various UN entities and the WTO offer advisory support to the graduating LDCs. Recognising the inadequacy of the graduation supports, the DPoA clarified which forms of assistance graduating LDCs require most for a smooth transition. The LDCs have requested an extension of the preferential trade access and transition periods stipulated in several WTO agreements.²⁰⁰ WTO Members are currently considering another proposal of the LDC Group on exempting graduated LDCs from the ban on export subsidies if their GNI per capita remains below US\$ 1,000 (in 1990, constant dollar

¹⁹⁴ M Sultan and others, 'Effect of COVID-19 on RMG Sector and Trade Union Efforts to Mitigate Fall Out' (Brac Institute of Governance and Development 2020); Mei-Ling McNamara, 'Anger at Huge Shareholder Payout as US Chain Kohl's Cancels \$150m in Orders' *The Guardian* (10 June 2020) <<https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders>> accessed 30 December 2023.

¹⁹⁵ On March 25th, 2020, the government announced a stimulus package worth BDT 500 million to address the concerns raised by trade unions and RMG employers. The package was mainly designed to provide benefits and wages to workers and to protect the industry from the economic fallout of the pandemic. The owners of factories and export-oriented companies could utilise the stimulus package to pay their workers' salaries for up to three months.

¹⁹⁶ Sultan and others (n 63).

¹⁹⁷ The Ukraine-Russia conflict has significantly impacted fuel prices globally. Coupled with other domestic issues, this has significantly increased RMG production cost.

¹⁹⁸ The Forex crisis is affecting the industry's ability to import necessary inputs. This is due to the increased costs associated with the weakened Bangladeshi Taka and the higher prices of raw materials.

¹⁹⁹ While it is crucial to ensure fair wages for the workers, the increase in wages adds to the cost pressures faced by the industry.

²⁰⁰ WTO General Council, 'Trade Related Challenges of the Least Developed Countries and Way Forward : Proposal for a WTO Smooth Transition Package in Favour of Countries Graduated from the LDC Category - Communication from Djibouti on Behalf of the LDC Group - Revision' (2022) WT/GC/W/807/Rev.1. WTO Submission, 'Trade Related Challenges of the Least Developed Countries and Way Forward: Proposal for WTO Smooth Transition Measures in Favour of Countries Graduated from the LDC Category Communication from Djibouti on Behalf of the LDC Group-Revision' WT/GC/W/807/Rev.2, 06/12/2022; Communication circulated at the request of the delegation of Chad on behalf of the LDC Group., 'Trade-Related Challenges of the Least Developed Countries and Way Forward: A Draft for MC Decision Communication from the Mission of Chad on Behalf of the LDC Group on Smooth Transition in Favour of Countries Graduating from the LDC Category' WT/GC/W/807 17, November 2020.

terms).²⁰¹ If adopted, such measures may offer a massive incentive for LDCs to graduate with legal certainty, confidence, and sustainability.²⁰² Given how long these proposals have been pending, it is unlikely that WTO members will adopt them anytime soon.

8.6 What Bangladesh can do to Reduce the Impact of Graduation

Bangladesh's graduation from the LDC group is a significant achievement. However, graduation comes with its own set of challenges.

Nevertheless, it is well recognised that graduation should not disrupt a country's growth trajectory. Though the UN systems and its development partners broadly emphasise smooth graduation and transition procedures, there is a lack of clarity on how bilateral and multilateral assistance will be made available.²⁰³ So, preparation is the key to facing the challenges of graduation. Bangladesh must build its resilience and capacity to cope with changing conditions to achieve expected economic growth. A smooth graduation that supports the industry in preserving and promoting its competitiveness must be ensured.²⁰⁴ A plethora of activities must be done to prepare for seamless graduation, but just a few of the most important ones are discussed here.

8.6.1 Proactive Exploration of Trade Preferences

Trade continues to be critical to the economic prospects of LDCs. As a result, sustaining the present favourable market access arrangements has been a crucial concern for graduating LDCs.²⁰⁵ So, it is a priority now to begin proactive engagements with trade partners to secure extended transition periods or explore alternative measures to smooth out any abrupt changes in market access.

The United Kingdom is the only major preferential market where DFQF entry requirements for Bangladeshi apparel exports will not change immediately after graduation. Bangladesh has recently received similar assurance from Canada and Australia.²⁰⁶ Similarly, the EU EBA scheme permits an additional three-year transition period; therefore, Bangladesh's EBA

²⁰¹ WTO Submission (n 158).

²⁰² D Rabi Kanth, 'WTO: Growing Support for 12-Year Transition Period for Graduating LDCs' (8 March 2021) <<https://www.twn.my/title2/unsd/2021/unsd210303.htm>> accessed 12 June 2022. Most DCs, including China, India, and South Africa, endorsed it at the WTO's General Council (GC) meeting on 4 March 2021, but no consensus has yet been achieved. It requires negotiation and adjustment. However, if adopted, it may provide a foundation to help the graduating LDCs complete the process smoothly.

²⁰³ UN General Assembly, 'Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/22, Resolution adopted by the General Assembly on 21 December 2012.

²⁰⁴ The interviewees from government officials expressed optimism regarding the prospect of graduation. However, expert interviewees emphasised the challenges and lack of preparation observed on the government's side. Despite concerns about the investment climate and the high cost of doing business in Bangladesh, the RMG sector has grown at an admirable rate and contributed significantly to the country's economic progress. Therefore, when developing an adaptation strategy, it is essential to consider national and firm-level policy alternatives and changes in businesses and operational practices.

²⁰⁵ Compared to other LDCs, Bangladeshi apparel firms have taken advantage of trade preference schemes, as reflected in the country's export performance. This, however, also expose the enormous risk owing to the looming policy changes induced by graduation.

²⁰⁶ Refayet Ullah Mirdha, 'Apparel's Duty Benefit in Canada to Remain Intact' (*The Daily Star*, 28 August 2023) <<https://www.thedailystar.net/business/global-economy/news/apparels-duty-benefit-canada-remain-intact-3404781>> accessed 29 August 2023.

benefits will likely continue until 2029. This provides more time to prepare for any challenges in the next few years and proactively engage the EU to secure access to the GSP+ scheme after graduation.²⁰⁷ Bangladesh is actively pursuing with the EU to extend the EBA scheme beyond the three-year mark.²⁰⁸ It may also endeavour to form a coalition of graduating LDCs to facilitate necessary amendments in the proposed GSP or secure automatic access of LDC graduates to the GSP+ scheme subject to the fulfilment of some less stringent trade conditionalities.²⁰⁹ Other major preference-providing countries such as China, Japan, and the Republic of Korea, among others, should be persuaded to follow the UK's or at least the EU's lead and extend at least a three-year transition period to LDCs.²¹⁰ Similarly, Bangladesh must engage in regional forums to secure a prolonged graduation transition time, gradual withdrawal of tariff concessions, and negotiation of bilateral FTAs as part of deepening trade and economic cooperation with these economies.²¹¹

Graduation with momentum is a prerequisite for successful graduation. The Covid pandemic, Ukraine crisis²¹² and global economic slump has broken the momentum that pulls Bangladesh to the graduation stage. As a result, export earnings and poverty reduction efforts have faced a stumbling block.²¹³ The momentum is all but gone. These extreme predicaments have created a situation requiring extraordinary measures. Bangladesh must be able to communicate to relevant multilateral and bilateral forums its precise level of vulnerability and its support requirements.

8.6.2 Prioritising Negotiation for Bilateral Trade Arrangements

Given the current priority on keeping market access to key export destinations, Bangladesh must explore the potential of bilateral trade arrangements (FTA or PTA) with the EU, UK, Canada, Japan, China, India, the Republic of Korea, Australia, Russia, and other top export destinations. However, only China and India have expressed interest in launching FTA negotiations.²¹⁴

²⁰⁷ WTO and EIF (n 180) 9. For example, the Solomon Islands has negotiated an interim Economic Partnership Agreement with the EU to keep EBA-like advantages in the EU market.

²⁰⁸ Refayet Ullah Mirdha, 'Bangladesh Reiterates Demand for Extension of Benefits' (*The Daily Star*, 31 March 2023) <<https://www.thedailystar.net/business/economy/news/bangladesh-reiterates-demand-extension-benefits-3285071>> accessed 1 April 2023.

²⁰⁹ Razzaque and Rahman also suggested extending the EBA's transition term or seeking more flexible GSP+ provisions, including maintaining EBA's origin criteria for graduating LDCs. Mohammad A Razzaque and Jillur Rahman, 'Bangladesh's Apparel Exports to the EU: Adapting to Competitiveness Challenges Following Graduation from Least Developed Country Status' (Commonwealth Secretariat 2019) International Trade Working Paper 2019/02.

²¹⁰ WTO and EIF (n 180) 9. China has granted Samoa a three-year transition period to continue to benefit from LDC preferences after graduation. Bangladesh should use such examples as negotiating tools in urging extended access to their most generous GSP schemes.

²¹¹ Thanks to its current regional trade agreements (primarily APTA and SAFTA), Bangladesh enjoys several LDC-specific concessions in China and India, the second and fifth-largest economies of the world.

²¹² Jonathan Josephs, 'Ukraine War Is Economic Catastrophe, Warns World Bank' *BBC News* (4 March 2022) <<https://www.bbc.com/news/business-60610537>> accessed 20 May 2022.

²¹³ Selim Raihan and others, 'COVID -19 Fallout on Poverty and Livelihoods in Bangladesh: Results from SANEM's Nation-Wide Household Survey (November-December 2020)' (SANEM Publications 2021).

²¹⁴ Refayet Ullah Mirdha, 'Govt Goes All out to Sign FTAs' (*The Daily Star*, 10 September 2021) <<https://www.thedailystar.net/business/economy/news/govt-goes-all-out-sign-ftas-2172601>> accessed 28 April 2022. Despite years of work, Bangladesh could only sign one PTA with Bhutan in 2021.

However, negotiating an FTA with the EU would be difficult due to the EU's usual inclination for negotiating comprehensive trade agreements that encompass goods, services, investment, and other WTO-plus issues (e.g., public procurement).²¹⁵ FTA, with other developed countries, covers similar issues and liabilities. For example, negotiations to conclude a PTA with Nepal, an FTA with Japan, Indonesia, Sri Lanka, Belarus and the Czech Republic, and a comprehensive economic cooperation agreement (CEPA) with India are ongoing.²¹⁶ Bangladesh has already sought an FTA with Canada, Brazil, Malaysia, and the Eurasian Economic Commission, which includes Russia.²¹⁷ However, trade agreements with Bangladesh's key trading partners are required to achieve the intended results.

Bangladesh's attractiveness as an FTA trade partner stems from its big economy²¹⁸ and steady economic development, complemented by a highly protected trade policy system.²¹⁹ However, to enter bilateral trade agreements with larger economies would be monumental for Bangladesh, which has limited trade negotiation skills and no bilateral free trade agreements with major economies.²²⁰

8.6.3 Proactive Exploration of New Markets

The concentration of the export market is a significant cause of concern. More than 80 per cent of total apparel exports are shipped only to two markets, the EU and the USA.²²¹ Bangladesh's geographical placement between the world's two biggest economies, India and China, offers huge export diversification prospects.²²² Razzaque found that Bangladesh's untapped export potential to South Asian and Southeast Asian countries accounts for about

²¹⁵ Razzaque, Akib and Rahman (n 78) 84. The current EU–Vietnam FTA conditions may provide a guide to evaluate the preparations required for initiating negotiation with the EU. Due to many complications, the India–EU FTA negotiation started in 2007 and is yet to be finalised. After many years of preparation, Vietnam and the EU agreed on an FTA text in 2015. Even then, it took four years for them to sign the FTA in 2020.

²¹⁶ Mirdha, 'Govt Goes All out to Sign FTAs' (n 200); UNB, '5 per Cent Further Cash Incentive Sought for RMG Sector in next Budget' (*Independent*) <<https://www.theindependentbd.com/printversion/details/198051>> accessed 21 May 2022. Refayet Ullah Mirdha, 'Bangladesh, Japan Agree to Sign FTA' (*The Daily Star*, 12 December 2022) <<https://www.thedailystar.net/business/economy/news/bangladesh-japan-agree-sign-fta-3193751>> accessed 22 December 2022.

²¹⁷ 'FTAs Top Priority in Bangladesh's Post-LDC Strategy' (*The Business Standard*, 8 March 2022) <<https://www.tbsnews.net/economy/ftas-top-priority-bangladeshs-post-ldc-strategy-381973>> accessed 28 April 2022.

²¹⁸ Bangladesh will be the 28th biggest economy by 2030 in terms of GDP measured in purchasing power parity (PPP) dollars. PricewaterhouseCoopers forecasts in 2019. Bangladesh's GDP is estimated to reach a PPP of US\$1.34 trillion in 2030 and a PPP of \$3.06 trillion in 2050, making it the world's 23rd biggest economy.

²¹⁹ Many potential FTA partners should be interested in such an expanding market protected by high tariffs since preferred partners would gain a significant competitive advantage (over those who do not have such preferences). Mohammad A Razzaque, 'Global Trade Slowdown and Globalisation Backlash: Trade and Development Perspectives from Bangladesh', *ISAS Workshop on Revisiting Globalisation: Comparing Country Experiences from South Asia and the World, Organised by the National University of Singapore* (2017). Except for one country, no other country has implemented higher average tariff rates than Bangladesh while maintaining a higher average growth rate.

²²⁰ Bangladesh will need to strengthen its capacity to analyse market access opportunities, the ramification of any reciprocal offers it would be required to make, implementation constraints, and trade policy alternatives to maximise the effectiveness of any negotiated outcomes.

²²¹ Bangladesh's current export connections are confined to a small group of markets. Thus, expanding into other markets will need far more policy support.

²²² Geographic proximity and the size of trading partners are critical factors for increasing trade volume.

25% of its total exports in 2020.²²³ It is also critical to explore important markets such as Brazil, Mexico, Chile, Norway, Switzerland, New Zealand, Russia, Poland, South Africa, and Turkey, as well as countries in the Middle East such as the UAE, Qatar, Kuwait, the Kingdom of Saudi Arabia, and Bahrain, which have significant untapped potential.²²⁴

8.6.4 Product Diversification

In 2021, just five products (trousers, T-shirts and knitted shirts, sweaters, shirts and blouses, and undergarments) would account for more than 72% of export revenue.²²⁵ Since 2005, knitwear exports have been more diverse, while woven garments have become more concentrated, highlighting the lack of competitiveness associated with a narrow export basket.²²⁶ While Bangladeshi products have the best survival rate among LDCs,²²⁷ they do poorly compared to those from India, China, and Vietnam.²²⁸ Thus, export promotional strategies should prioritise the need to assist new and surviving products during their first few exporting years, emphasising domestic initiatives²²⁹ to increase resource utilisation efficiency, enhance product quality, and build capacity to fulfil big export orders.²³⁰

8.6.5 Domestic Reforms and Increasing Competitiveness of the Sector

Bangladesh's poor performance in various areas, such as infrastructure, institutions, skills, internal competition, and trade openness, hurts the economy's overall competitiveness.²³¹ As a result, Bangladesh was placed 99th out of 137 nations on the World Economic Forum's 2018

²²³ Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 32. Using the gravity model, he estimated that Bangladeshi exports to India, China, and most South Asian neighbours and Southeast Asian nations are substantially lower than anticipated. For example, Bangladesh's exports to India are projected to be at least \$6 billion less than anticipated, while exports to China are anticipated to be \$2 billion less. Corresponding figures for South and Southeast Asia are around \$7.2 billion and 1.6 billion.

²²⁴ RMG Bangladesh, 'Market Diversification Key to RMG Growth' (*RMG Bangladesh*, 21 September 2021) <<https://rmgbd.net/2021/09/market-diversification-key-to-rmg-growth/>> accessed 29 April 2022.

²²⁵ Trousers are the most extensive exported product, accounting for over 28% of overall exports. Due to this high concentration of exports, policymakers are under pressure to diversify the export basket to secure a broader base for the country's export-led growth.

²²⁶ Khondaker Golam Moazzem and Mehrun Nesa, 'In Search of Strategies for Export Diversification' (*Centre for Policy Dialogue (CPD)*, 10 March 2015) <<https://cpd.org.bd/search-strategies-export-diversification-bangladesh-khondaker-golam-moazzem-cpd/>> accessed 29 April 2022; Khondaker Golam Moazzem and Farzana Sehrin, 'Economic Upgrading in Bangladesh's Apparel Value Chain during the Post-MFA Period: An Exploratory Analysis' (2016) 17 *South Asia Economic Journal* 73, 78.

²²⁷ Alessandro Nicita, Miho Shirotori and Bolormaa Tumurchudur Klok, 'Survival Analysis of the Exports of Least Developed Countries: The Role of Comparative Advantage' (UNCTAD 2013) Policy issues in international trade and commodities study series no. 54.

²²⁸ Bangladesh can sustain only 40% of its newly established export ties, compared to 70% for China. Significant impediments to the competitiveness of new and diversified products include a lack of comparative advantage in resource utilisation, limited capacity to secure product and market diversity, high trade costs, and a low initial export value. Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 33.

²²⁹ Interviewee-5 observed that Bangladesh could not diversify exports so far with LDC benefits; it will be more challenging to achieve after graduation.

²³⁰ Moazzem and Nesa (n 213).

²³¹ According to Interviewee-1, the primary graduation hurdle lies in domestic reforms. The preparation for graduation in Bangladesh is heavily concentrated on DFQF and RMG, which reflects the political economy. However, the preparation neglects domestic reforms and domestic capacity building, which are crucial for smooth graduation.

Global Competitiveness Index, well below other Asian countries, including its export competitors.

a) Improving quality and product sophistication

Upgrades in product quality, sophistication, and standards are frequently coupled with price increases and are essential for the survival and expansion of many export products. A recent study analysing the IMF Export Quality Database concludes that Bangladesh may significantly enhance export earnings by improving the quality of its exports.²³²

b) Upgrading in the value chain

The primary method for upgrading is to expand supplier capabilities. Apparel-producing countries are often classified according to the functional capabilities of most of their apparel manufacturing firms as CMT (cut, make, trim)/Assembly,²³³ OEM Original equipment manufacturing,²³⁴ Original design manufacturing (ODM),²³⁵ Original brand manufacturing (OBM).²³⁶ Bangladesh is still involved in volume production as an OEM full-package supplier with significant textile manufacturing capacity. Therefore, it needs planning, investment, and policy support to shift from OEM to ODM.²³⁷

Economic upgrading is critical for participants in global value chains to succeed.²³⁸ Several economic upgrading has been happening across the apparel value chain, including product upgrading,²³⁹ process upgrading,²⁴⁰ and functional upgrading.²⁴¹ Bangladeshi suppliers have achieved great strides in economic upgrading, notably in process and product upgrading.²⁴² However, the factors that have helped upgrade products and processes so far

²³² José Guilherme Reis and Thomas Farole, *Trade Competitiveness Diagnostic Toolkit* (World Bank Publications 2012). Bangladesh's quality-adjusted unit values are lower than those of China, India, and Vietnam in almost all categories at the 1-digit level of the Standard International Trade Classification (SITC).

²³³ The supplier firms perform some basic tasks such as cutting and sewing the fabric for low-cost volume products.

²³⁴ The manufacturer produces or purchases the textile inputs and offers all production services, finishing, packing, and delivery for retail distribution.

²³⁵ The suppliers design and develop products.

²³⁶ The suppliers oversee product branding and marketing; Stacey Frederick and Gary Gereffi, 'Upgrading and Restructuring in the Global Apparel Value Chain: Why China and Asia Are Outperforming Mexico and Central America' (2011) 4 *International Journal of Technological Learning, Innovation and Development* 67, 73.

²³⁷ Most upgrading operations are complex and require substantial machinery and skills development investment. Moazzem and Sehrin (n 213).

²³⁸ Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 *Review of international political economy* 78.

²³⁹ It refers to advancing into more sophisticated product lines.

²⁴⁰ It involves converting inputs to outputs more efficiently by reorganising the manufacturing process or adopting more advanced technologies.

²⁴¹ It is acquiring new functions or abandoning existing ones in the chain to increase the overall skill content of the activities. Gereffi and Memedovic (n 6); Jeff Neilson and Bill Pritchard, *Value Chain Struggles: Institutions and Governance in the Plantation Districts of South India* (John Wiley & Sons 2011).

²⁴² However, the next part is different. Humphrey and Schmitz conclude that in a quasi-hierarchical value chain structure, where downstream suppliers exercise little power over upstream lead firms, developing country firms 'experience fast product and process upgrading but make little progress in functional upgrading.' John Humphrey and Hubert Schmitz, 'Chain Governance and Upgrading: Taking Stock' in Hubert Schmitz (ed), *Local Enterprises in the Global Economy* (Edward Elgar Publishing 2004) 354.

may not be sufficient to sustain further upgrading, which requires a combination of better technology, skilled workers, and significant investments.²⁴³

c) Addressing skills shortage

The RMG industry is experiencing a significant shortage of skilled workers. According to a BIDS report, Bangladesh's garment industry has one of the most significant skills gaps.²⁴⁴ Besides the skilled worker shortage²⁴⁵, it has a significantly lower productivity rate than its apparel competitors.²⁴⁶ A significant gap between education and the required soft managerial skills exacerbates the problem. Part of the gap is filled by nearly 20,000 foreign nationals, primarily from India and Sri Lanka, who work in executive capacities in the RMG industry and are compensated annually for more than \$5 billion.²⁴⁷ One of the most effective methods of increasing productivity is to upskill employees by providing appropriate training and other skill development opportunities.²⁴⁸

d) Attracting FDI

Numerous academic studies and reports have established the importance of FDI in boosting exports and promoting export diversification.²⁴⁹ FDI directly impacts skill development, productivity enhancement, economic upgrading, positive spillover effects from knowledge and technology transfers, and better management practices.²⁵⁰ However, due to a weak investment environment and a high cost of doing business, FDI flow into Bangladesh has been deficient: on average, less than 1% of GDP between 2000 and 2018.²⁵¹ As Bangladesh

²⁴³ The manufacturing process's productivity depends on increased investment, including in digitalisation and automation, skill development for workers and mid-level management, quality control to ensure higher product quality, and increased physical and social compliance to ensure worker safety and a higher standard living. K Moazzem and others, 'Ongoing Upgradation in RMG Enterprises: Preliminary Results from a Survey' [2018] Centre for Policy Dialogue, Dhaka; Achim Berg, Harsh Chhaparia, Saskia Hedrich, and Karl-Hendrik Magnus, 'is dependent on increased investment. What's next for Bangladesh's Garment Industry, after a Decade of Growth? | McKinsey' <<https://www.mckinsey.com/industries/retail/our-insights/whats-next-for-bangladeshs-garment-industry-after-a-decade-of-growth>> accessed 19 December 2021.

²⁴⁴ BIDS, *Skill Gap Analysis for Selected Sectors* (2016).

²⁴⁵ The need for worker skill development has become crucial for the export industry. A study by the Directorate of Textiles (DoT) found a shortage of around 110,000 employees in the RMG sector in 2014, estimated to grow to approximately 180,000 by 2021.

²⁴⁶ Though Bangladesh has a substantial pool of cheap labour, its workforce productivity is just 77 per cent (assuming 100% for Chinese labour), far lower than that of its main competitors, India (92%), Vietnam (90%) and Pakistan (90%). Sabbir Rahman Khan, 'Future-Proofing Skill Development in Bangladesh | Independent' (*The Independent*, November 2018) <<https://m.theindependentbd.com/home/printnews/173843>> accessed 30 April 2022.

²⁴⁷ RMG Bangladesh, 'Garment Factories Still Rely on Foreign Experts' (*RMG Bangladesh*, 1 September 2018) <<https://rmgbd.net/2018/09/garment-factories-still-rely-on-foreign-experts/>> accessed 3 April 2023.

²⁴⁸ For a long-term solution, the country's education system requires some restructuring to better align the talent supply with the demands of the industry and the service sectors.

²⁴⁹ By establishing direct contact and commercial ties with global brands and retailers, FDI may significantly improve export growth and inclusion in global value chains. In addition, FDI firms are well-known for negotiating higher unit prices for export products. Champa Bati Dutta, Mohammed Ziaul Haider and Debasish Kumar Das, 'Dynamics of Economic Growth, Investment and Trade Openness: Evidence from Bangladesh' (2017) 6 South Asian Journal of Macroeconomics and Public Finance 82; S Ahmad, 'Foreign Capital Inflow and Economic Growth: A Two Gap Model for the Bangladesh Economy' (1990) 18 The Bangladesh Development Studies 55.

²⁵⁰ Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 73.

²⁵¹ By contrast, the average annual inflow of FDI into China, Cambodia, India, and Vietnam was 2.1%, 9.1%, 1.7%, and 5.6%, respectively. Mohammad A Razzaque and Jillur Rahman, 'Bangladesh's Apparel Exports to

prepares to leave the LDC category, it must prioritise attracting more FDI by addressing existing bottlenecks and implementing appropriate initiatives for the apparel industry.²⁵²

e) Addressing infrastructural bottlenecks

Infrastructure constraints are a key impediment to Bangladesh's export competitiveness.

There are a few areas that require massive improvements. Despite Bangladesh's tremendous efforts over the last decade to solve energy shortages, the enormous task of creating significant production and distribution capacity remains.²⁵³ In fact, no other country exports more while consuming less energy than Bangladesh.²⁵⁴

Another component is deficiencies in inland road transportation and trade logistics. As a result, Bangladesh ranks worse on the World Bank's Logistics Performance Index (LPI) 2018 than most South Asian nations and practically all of its trade competitors.²⁵⁵ Academic research shows that a ten-percentage point increase in transportation costs results in a 20% decrease in trade volumes.²⁵⁶ Thus, the country's cost advantage derived from cheap labour costs is reduced and sometimes eliminated by trade facilitation disadvantages.²⁵⁷ A World Bank study concluded that Bangladesh could boost its export significantly with better trade logistics.²⁵⁸ The country must prioritise allocating its limited infrastructure funding to maximise returns and maintain a fair distribution across competing sectors.²⁵⁹

the EU: Adapting to Competitiveness Challenges Following Graduation from Least Developed Country Status' (Commonwealth Secretariat 2019) 29.

²⁵² Kathuria and Malouche (n 121) 13. The World Bank study identified several areas for improvement, including serviced land allocation for business use, promoting FDI through high-level missions to potential FDI sources such as the European Union, China, India, and Japan, and enforcing standards more strictly to help bridge the gap between local and international markets; If successfully implemented, the ongoing project for developing 100 special economic zones (SEZs) to provide investors with serviced industrial plots and a more favourable business ecosystem might restructure the country's investment regime. Mohammad A Razzaque, Bazlul H Khondker and Abu Eusuf, 'Promoting Inclusive Growth in Bangladesh through Special Economic Zones' (The Asia Foundation 2018).

²⁵³ Sheoli Pargal, 'Lighting the Way: Achievements, Opportunities, and Challenges in Bangladesh's Power Sector' (World Bank 2017).

²⁵⁴ Razzaque, 'Revitalising Bangladesh's Export Trade: Policy Issues for Growth Acceleration and Diversification' (n 141) 36. Its per capita electricity consumption remains among the lowest in the world, at around one-third and one-fifth of the levels in India and Vietnam, respectively. Without a considerable increase in energy usage, sustaining this level of export productivity in the future would be exceedingly tricky.

²⁵⁵ Kathuria and Malouche (n 121) ch 3. This influences the two-way transportation expenses: the import of raw materials and, later, the export of finished goods. In addition, congestion on the Dhaka-Chittagong highway, the country's critical commercial artery; limited containerisation and poor container handling; inefficient customs processes; and inadequate port facilities all contribute to increasing trade costs.

²⁵⁶ Nuno Limao and Anthony J Venables, 'Infrastructure, Geographical Disadvantage, Transport Costs, and Trade' (2001) 15 *The World Bank Economic Review* 451.

²⁵⁷ Kathuria and Malouche (n 121) 30. As a result of these inefficiencies in trade logistics and infrastructure, suppliers are finding it more challenging to compete in international markets.

²⁵⁸ Matías Herrera Dappe and others, *Moving Forward: Connectivity and Logistics to Sustain Bangladesh's Success* (World Bank 2019). Improving logistics would help achieve greater global competitiveness by reaching out to more new and dynamic markets. Additionally, it would assist exporters in expanding into higher-value, shorter-lead-time commodities.

²⁵⁹ UNESCAP, 'Mainstreaming Inland Waterways into National Logistics Network: National Experience of Bangladesh' (UN ESCAP 2021) ch 3. Mohammad Masudur Rahman, 'Growing with Two Giants—A Mixed Blessings for Bangladesh' in Chanwahn Kim and Misu Kim (eds), *Great Transition in Indian Society: Religion, Economy And Foreign Policy* (World Scientific 2022) 131. Developing countries, on average, need infrastructure investment of between 2% and 8% of GDP. Bangladesh's infrastructure needs are projected to be

f) Compliance with safety and working conditions

Over the decades, the RMG industry has struggled to meet national and international standards in various compliance-related areas, including labour rights, pay, and workplace safety measures.²⁶⁰ There has been a renewed push for improvement in compliance since the collapse of the Rana Plaza garment factory in 2013, which received widespread global criticism for both local exporters and international purchasers involved with the sector.²⁶¹ Since then, substantial progress has been made on workplace and safety compliance issues, but much work remains.²⁶²

8.7 Findings

The RMG industry has been crucial to Bangladesh's export growth for several decades. LDC-specific trade preferences and exemptions have significantly contributed to the growth and expansion of the industry. However, upon graduation, the industry will no longer have access to the support that has helped it reach this point.

The country's extreme reliance on apparel exports to markets with high preferential tariff margins and its exceptionally high rate of preference utilisation indicate that graduation will have a more significant impact on the industry. As a result, graduation may wipe out as much as one-seventh of its total exports, reversing its current dynamic growth and diminishing its global competitiveness. Moreover, compliance with the WTO regime will significantly constrain the Government's ability to promote and accelerate the industry's growth.

Nevertheless, support for a seamless transition is scarce. Moreover, the WTO is not adequately addressing graduation challenges. So now it is up to the graduating LDCs to overcome these challenges and convince preference-granting countries of their need for continued support.

Despite these challenges, graduation also offers opportunities for the sector to upgrade its position in the global value chain by adopting cutting-edge technology, investing in innovation and human capital, and enhancing its resilience.

Bangladesh must strategically plan and execute tailor-made programs to prepare the industry to face the upcoming, imminently foreseeable challenges induced by graduation. Bangladesh may prioritise continuing preferential access in major trade destinations via increased participation in the WTO process and bilateral engagement with the destination countries.

8.8 Conclusion

This case study highlights several important conclusions. First, graduation will likely have significant implications for the Bangladesh garment industry, a critical economic growth and

10% of GDP, with transportation accounting for half of it. However, it may now spend only 2%, which implies that a significant portion of high-priority development initiatives may remain unfunded.

²⁶⁰ Vishal Sharma, 'Imperfect Work Conditions in Bangladesh RMG Sector' (2015) 57 *International Journal of Law and Management* 28. While the labour-intensive apparel industry is suitable for job creation, unfavourable labour issues attract extensive global attention and may harm export prospects.

²⁶¹ Uttama Barua, JWF Wiersma and Mehedi Ahmed Ansary, 'Can Rana Plaza Happen Again in Bangladesh?' (2021) 135 *Safety Science* 105103.

²⁶² *ibid.*

employment driver. The loss of LDC-specific trade preferences, trade-related exemptions, access to development finance, and resulting increased competition from other apparel exporters may reduce the growth and profitability of the industry.

These findings are generally significant for other LDCs, highlighting the potential risks and challenges these countries may face as they prepare to move out of the LDC group. In addition, they emphasise the need for these countries to diversify their economies, invest in human capital, and create an enabling environment for private sector growth.

Finally, it is crucial for the current graduation regime to be smooth and gradual, with adequate support provided to help these countries navigate the graduation challenges and ensure that development is not disrupted. For the WTO, the findings underscore the importance of adopting a graduation support mechanism that could involve the development of tailored transition plans, technical assistance, and capacity-building initiatives to help countries adapt to the new trade environment.

The case study highlights the complexities and challenges associated with graduation, the crucial role of assistance from the trading regime and trading partners, and policy interventions from the government and ongoing industry efforts to innovate and break new ground. As more LDCs approach graduation, these findings must be considered to ensure a smooth and sustainable transition for all.

CHAPTER 9: GRADUATION CHALLENGES OF BANGLADESH PHARMACEUTICAL INDUSTRY

9.1 Introduction

This chapter presents a case study of the Bangladeshi pharmaceutical industry that examines the significance of LDC-specific SDT on the industry's growth and expansion and the impending ramifications of withdrawing these support measures upon graduation. The analysis of the specific case of Bangladesh will pave the way for more general conclusions about graduating LDCs regarding the TRIPS and other WTO obligations.

Bangladesh is exempt from implementing several WTO agreements as an LDC, including TRIPS, TRIMS, and the Agreement on SCM. By utilising this policy space strategically, Bangladesh has implemented various domestic measures that have enabled the expansion of its pharmaceutical manufacturing, promotion of public health, and regulation of drug prices.

In contrast to many other LDCs and developing countries, Bangladesh now has a robust pharmaceutical industry that employs most white-collar workers, exports to over 100 countries, including the United States, and meets over 98% of domestic demand. However, upon graduation, the policies that have helped Bangladesh achieve these objectives and expand its nascent pharmaceutical industry would be on a collision course with the WTO regime.

This chapter examines how ISMs have helped the exponential growth of the pharmaceutical sector, the ramifications the sector may face because of Bangladesh's graduation, and strategies that Bangladesh can implement to mitigate these effects and sustain the industry's growth.

9.2 Bangladesh Pharmaceutical Industry

9.2.1 Global Structure of the Pharmaceutical Manufacturing Sector

Pharmaceutical manufacturing is a technically demanding and potentially lucrative industry.

Valued at \$1,112.6 billion in 2020¹, the global pharmaceutical industry is dominated by large multinational companies (MNCs) in revenue, while generic firms are beginning to dominate in volume.² The industry develops, manufactures, and distributes licenced pharmaceuticals and drugs, including both generic³ and brand-name drugs,⁴ and medical devices.

Compared to many other areas, the technology-intensive pharmaceuticals sector has notably higher entry barriers due to the need for extensive investments in developing infrastructure,

¹ Research and Markets, 'Pharmaceuticals Global Industry Guide - Market Summary, Competitive Analysis and Forecast to 2025' (2021).

² Janet Bumpas, Kees Kostermans and Dinesh Nair, 'Public and Private Sector Approaches to Improving Pharmaceutical Quality in Bangladesh' (World Bank 2007) Discussion Paper 68357 2.

³ Generic refers to a drug whose active ingredient is no longer patented and marketed under a different name than the original brand-name drug.

⁴ A brand-name drug is discovered and developed by a pharmaceutical company which, upon approval, has the exclusive right to market and sell the drug for the duration of its patent protection.

research and development (R&D), and constant expenditures in quality assurance, compliance, and supply chain management. In addition, both supply- and demand-side factors contribute to the hurdles. As a result, developing a new pharmaceutical is both time-consuming and expensive. According to studies, the average cost of bringing a new drug to market ranges could be as high as \$2.8 billion.⁵ The number of new drugs approved and accepted on the market has dropped extremely low.⁶ Similarly, getting approval for generic drugs is fraught with domestic approval procedures and other complex issues such as IPR, quality assurance and compliance.⁷

Exporting pharmaceutical products is challenging and competitive since it requires a substantial investment of money, time, and paperwork for product registration and certification in the destination country, as well as sales and marketing investments.⁸ Furthermore, all these investments are made without any assurance of future sales. So, most developing countries, especially LDCs, confront tremendous obstacles when accessing the global pharmaceutical industry.⁹

Pharmaceutical companies from high-income countries dominate the global pharmaceuticals trade, which accounted for about 90 per cent of global exports worth \$587 billion in 2018. While ten high-income developed countries held more than three-quarters of the global market, the share of DCs was only 10.02 per cent, and that of LDCs was a mere 0.03 per cent. In 2018, LDC imports of pharmaceutical products (US\$ 6.5 billion) far exceeded exports (US\$ 0.194 billion), resulting in a trade deficit of US\$ 6.3 billion. Only a handful of DCs have been able to break into the export market. India and China are the most notable exceptions, with 8 and 14 per cent global share, respectively, in 2018.¹⁰

9.2.2 Rise of the Industry in Bangladesh

a. Manufacture of formulations

The pharmaceutical industry is one of Bangladesh's most advanced capital-intensive technological sectors. There are two essential steps involved in pharmaceutical manufacturing: production of active pharmaceutical ingredients (APIs), a highly complex, technically demanding chemical and biochemical fermentation and synthesis procedure

⁵ The exact cost of developing a drug is a highly debated issue. Wouters et al. and Morgan and others found the cost between \$1.3 billion and \$2.8 billion. However, according to a recent study by Hay and others, the median cost of bringing a new drug to market is \$985 million, and the average cost is \$1.3 billion. The cost (including expenditures on failed trials) was calculated using data from 63 biologic drugs authorised by the US Food and Drug Administration. Olivier J Wouters, Martin McKee and Jeroen Luyten, 'Estimated Research and Development Investment Needed to Bring a New Medicine to Market, 2009-2018' (2020) 323 JAMA 844; Steve Morgan and others, 'The Cost of Drug Development: A Systematic Review' (2011) 100 Health policy 4. Michael Hay and others, 'Clinical Development Success Rates for Investigational Drugs' (2014) 32 Nature Biotechnology 40.

⁶ Hay and others (n 5).

⁷ Vincent Ahonkhah and others, 'Speeding Access to Vaccines and Medicines in Low- and Middle-Income Countries: A Case for Change and a Framework for Optimized Product Market Authorization' (2016) 11 PLOS ONE; Natalie Privett and David Gonsalvez, 'The Top Ten Global Health Supply Chain Issues: Perspectives from the Field' (2014) 3 Operations Research for Health Care 226.

⁸ Each nation has its product regulations, registration requirements, cultural preferences, language requirements, national packaging requirements, and mechanisms for protecting its industry.

⁹ Sanjay Kathuria and Mariem Mezghenni Malouche, *Toward New Sources of Competitiveness in Bangladesh: Key Insights of the Diagnostic Trade Integration Study* (World Bank Publications 2015) 111.

¹⁰ ITC Trade Map Database

requiring scale economies and final formulations, which is a manufacturing activity involving the mixing of APIs with other non-active ingredients into pills, tablets, or other forms of administration.¹¹

Bangladeshi pharmaceutical companies are predominantly engaged in the final formulations, which are as complex as API production, and require manufacturing skills but can be performed without economies of scale. Generic drugs are typically created by reverse engineering the chemical composition of a patented drug developed by another company.¹² The manufacturer then creates its drug using the same chemical formula, completing several steps, including designing and implementing product manufacturing processes, completing drug stability testing,¹³ and obtaining regulatory approval for the generic drug. Local manufacturers currently produce nearly every type of medicine, including some high-tech products such as insulin, hormones, and anti-cancer drugs.¹⁴

b. Expansion

The emergence and development of the industry are simply fascinating. Until the early 1980s, MNCs dominated the country's pharmaceutical sector, which was substantially reliant on imports of drugs and raw materials. Around 75% of the market was held by MNCs, while approximately 160 local firms held the remaining 25%.¹⁵ However, they could only meet 35% of the domestic pharmaceutical demand. Moreover, even in 1985, the top 10 pharmaceutical companies were all subsidiaries of MNCs. In contrast, by 2011, all the top 10 companies were owned and controlled by entrepreneurs and managers from Bangladesh, and this remains the case today.¹⁶ They accounted for approximately 70% of the market in 2022.¹⁷

The industry has experienced extraordinary growth in recent years, and local pharmaceutical companies have emerged as game-changer, supplying about 98 per cent of the domestic demands.¹⁸ The domestic market is populated with 287 registered pharmaceutical companies.¹⁹ consisting of medium-to-large Bangladeshi firms with international connections, specialised subsidiaries of multinational corporations, and several small firms.²⁰

¹¹ Bumpas, Kostermans and Nair (n 2).

¹² *ibid* 3.

¹³ i.e., if the product retains similar efficacy throughout its shelf-life.

¹⁴ Information from the Bangladesh Association of Pharmaceutical Industries (BAPI) Website

¹⁵ MR Reich, 'Bangladesh Pharmaceutical Policy and Politics' (1994) 9 Health Policy and Planning 130.

¹⁶ Ak Mohiuddin, 'An A-Z Pharmaceutical Industry: Bangladesh Perspective' (2019) 9 Asian Journal of Research in Pharmaceutical Science 17; Md Nurul Amin and Tetsushi Sonobe, 'The Success of the Industrial Development Policy in the Pharmaceutical Industry in Bangladesh' (National Graduate Institute for Policy Studies 2013) GRIPS Discussion Paper 13–07 <<https://econpapers.repec.org/paper/ngidpaper/13-07.htm>> accessed 9 May 2022; Mustafizur Rahman and others, 'Policy Space for Building Production Capabilities in the Pharmaceuticals Sector in Low-and Middle-Income Countries: Evidence from Bangladesh' [2022] Journal of Globalization and Development.

¹⁷ Information from the Bangladesh Association of Pharmaceutical Industries (BAPI) Website

¹⁸ Ministry of Finance, 'Bangladesh Economic Review 2021' (Ministry of Finance, Government of Bangladesh 2021) Chapter 8; Kuick Research, 'Bangladesh Pharmaceutical Market Future Opportunity Outlook 2025' (Research and Markets 2020).

¹⁹ DGDA website information. Seventy-four companies are labelled as 'non-functional' or 'suspended' by DGDA as of May 2022.

²⁰ The industry is currently highly concentrated, with the top 20 companies controlling about 85% of the market. Sudip Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (2020) 495 Centre for Development Studies, Working Paper 7.

Worth \$3.1 billion in 2019²¹, the industry is estimated to surpass \$6 billion by 2025. However, as in the preceding two decades, most of this growth will be attributable to local firms with market shares exceeding 90 per cent.²²

Today, branded generic drug production is the most significant part of Bangladesh's pharmaceuticals industry, followed by generic versions of patented drugs, low-end generics, and contract manufacturing, almost all of which depend on imported API.²³ Of about 5,600 brands of drugs produced in Bangladesh, over 75% are generic drugs, while 20% are patented products.²⁴ The share of generic drugs is estimated to exceed 85 per cent by 2025, which will further increase the market dominance of domestic pharmaceutical firms.²⁵ Where patented products have been made utilising imported API, the costs are much cheaper than the branded product of the inventor firm.²⁶ For example, Diovan 80 (used for type 2 diabetes) was retailed at 667% cheaper in Bangladesh compared to the USA.²⁷ Bangladesh has substantial competitive advantages, such as cheaper labour costs and the capacity to create generic pharmaceuticals at a time when the global generics market is fast expanding.²⁸

Local firms dominate investment in the pharmaceutical industry, with FDI having a minor role. As a result, Bangladesh's total FDI stock and inflows are low, and those in the pharmaceutical industry are way lower. As of December 2019, the industry received \$ 261.0 million out of the country's total FDI inflow of \$17.8 billion, accounting for just 1.45 per cent of overall FDI stock.²⁹

c. Challenges

The absence of backward linkages, specifically in raw materials manufacturing, is a significant constraint in the industry. Though a few local firms produce APIs on a commercial scale, most cannot synthesise complex formulations to fulfil the expanding local demand.³⁰ About 90 per cent of the raw materials are imported.³¹

In 2019, the sector imported around \$844.5 million in APIs (HS 29), mainly from China and India.³² Though recent initiatives have boosted research and development productivity in the industry, it still lacks the significant capacity for research or large advanced manufacturing, generating instead primarily final formulations of brand-name generics derived from

²¹ BIDA, 'Pharmaceuticals and API Industries' (Bangladesh Investment Development Authority 2020).

²² Kuick Research (n 18).

²³ South Centre, 'The End of the LDC Transition Period for Pharmaceutical Products Under the TRIPS Agreement upon LDC Graduation: Implications for Bangladesh' (2020).

²⁴ Kuick Research (n 18).

²⁵ *ibid.*

²⁶ Most patented drugs target non-communicable diseases such as diabetes, cardiovascular illness, cancer, HIV/AIDS, and anti-malarial diseases. Khondakar Saad and Safwan, 'An Overview of the Pharmaceutical Sector in Bangladesh' [2012] BRAC EPL Research.

²⁷ South Centre (n 23); Rahman and others (n 16).

²⁸ Nadeem Rizwan and Sanjay Kathuria, 'The Pharmaceutical Sector in Bangladesh: Attracting Investment in Bangladesh—Sectoral Analyses', *Attracting Investment in Bangladesh—Sectoral Analyses: A Diagnostic Trade Integration Study* (World Bank 2016).

²⁹ Bangladesh Bank data

³⁰ South Centre (n 23).

³¹ EPB data

³² Rahman and others (n 16).

imported APIs. In addition, many other aspects of the industry continue to lag, including bioequivalence testing and clinical research infrastructure, as well as regulatory monitoring and institutional enforcement.³³

d. Significance

Bangladesh is the only LDC and one of the few developing countries that has achieved near self-sufficiency in medicine, with a pharmaceutical industry that has achieved scale, complexity, and export focus.³⁴ During the past few decades, the thriving industry has contributed hugely to the country's remarkable healthcare gains, including access to medications and reducing infant mortality, immunisation, and other health indicators.³⁵ Life expectancy has increased from 46.6 years at independence in 1971 to 72.59 in 2019, above the South Asian average.³⁶ The sector has successfully provided inexpensive, life-saving medicines to the domestic market and international markets, particularly to LDC economies.

The pharmaceutical industry's contribution to the gross domestic product climbed to 1.8% in 2019 from 0.93 per cent in 1996.³⁷ The industry is the second-largest contributor to the national exchequer.³⁸ The industry has also contributed to the diversification of Bangladesh's export basket and the expansion of the job market. Recent trends indicate that the industry has enormous export potential, with a 15 per cent export growth rate from 2015 to 2021 and \$135.8 million in revenue in 2020.³⁹ The industry is the largest employer of white-collar workers in Bangladesh⁴⁰ employing more than 177,000 professionals and staff.⁴¹

9.2.3 Export of Bangladeshi Pharmaceuticals

Bangladesh had become a drug exporting country by the late 1980s, but exports have remained stagnant before registering a steep increase since 2010. Many local manufacturers meet international standards and export their products to 151 countries. Moreover, several firms have established immense footholds in the US and European markets and are expanding their reach.⁴² Bangladesh is the only LDC with a significant export impact on pharmaceutical products, with \$113.0 million in export in 2018, or 58% of total LDC exports.⁴³ Bangladesh's pharmaceutical exports have expanded remarkably recently, from \$41.0 million in FY 2010 to

³³ Mohammad Abdur Razzaque, Rabiul Islam Rabi and Hamim Akib, 'Bangladesh's Pharmaceutical Exports: Trends, Market Prospects, and Policies' in Mohammad A Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation*.

³⁴ Daniel Gay and Kevin Gallagher, 'The Need to Extend the WTO TRIPS Pharmaceuticals Transition Period for LDCs in the COVID-19 Era: Evidence from Bangladesh' (UN 2020) UN CDP Policy Review No. 10 2.

³⁵ *ibid*.

³⁶ World Bank data

³⁷ BIDA (n 21).

³⁸ Mustafizur Rahman and Sherajum Monira Farin, 'Research Report 2: WTO Decision on TRIPS and Public Health A Window of Opportunity for Bangladesh's Pharmaceutical Industry' (CPD 2018) 11.

³⁹ EPB data

⁴⁰ A Bhuiyan, M Sultana and Sharmin Sultana, 'Analysis of Pharmaceutical Industry of Bangladesh' (2011) 5 Bangladesh Research Publications Journal 142. Pharmaceutical production is a technically complex sector that requires trained staff.

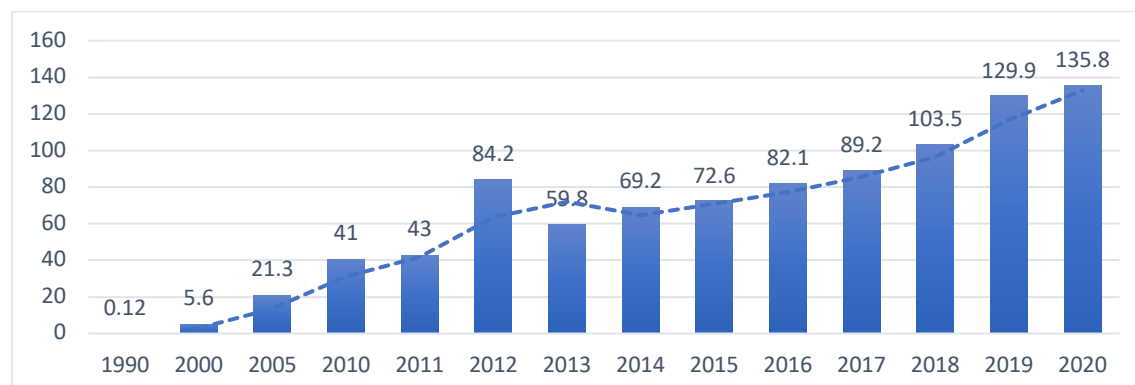
⁴¹ BBS data 2018

⁴² Razzaque, Rabi and Akib (n 33).

⁴³ ITC Trade Map Database. Bangladesh was ranked 71st on the \$635 billion global pharmaceutical export market in 2019

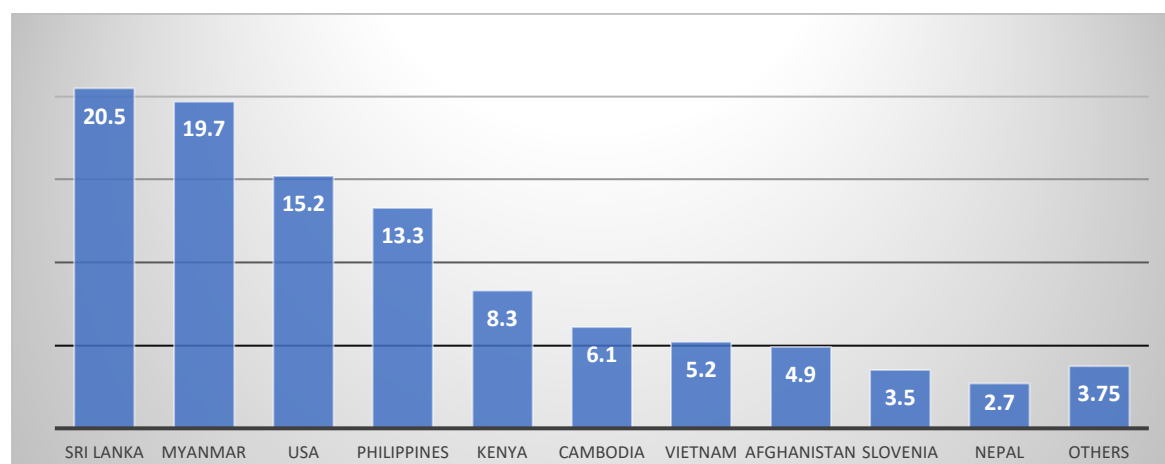
\$82.1 million in FY 2016 and then to \$135.8 million in FY 2020.⁴⁴ (Figure-30) With the current level of impressive growth, export revenue is estimated to cross \$1.5 billion by the end of this decade.⁴⁵

Figure 30: Pharmaceutical export of Bangladesh⁴⁶



However, the export market of Bangladesh is highly concentrated. In 2020, the top five export destinations accounted for 70 per cent of Bangladesh's pharmaceutical exports, as shown in Figure-31. The LDCs as a group represented a substantial market for Bangladesh. While it exported pharmaceuticals to 118 countries in FY 2020, 27 were LDCs, representing 29.6% of total exports.⁴⁷

Figure 31: Market share in the top ten export destinations for Bangladeshi pharmaceuticals⁴⁸



In addition to strictly regulated markets such as the United States, Australia, and the United Kingdom, Bangladeshi pharmaceuticals are also exported to semi-regulated markets such as Malaysia, the Russian Federation, and Tanzania. However, only a few companies have the required accreditation and export a limited number of products.⁴⁹ The absence of

⁴⁴ EPB data. ITC and Comtrade data (relating to a calendar year) do not match Bangladesh's Export Promotion Bureau (EPB) data (relating to a fiscal year of July to June) due to variations in the timing of calculation.

⁴⁵ Md Risalat Huda and Masum Alvi Chowdhury, 'Journey towards a Trillion: Bangladesh Pharma Outlook in the Fresh Decade' (UCB Asset Management 2021).

⁴⁶ EPB data

⁴⁷ EPB data

⁴⁸ ECB data

⁴⁹ Kathuria and Malouche (n 9) 110.

manufacturing facilities, costing at least \$50 million, and lacking technical expertise prevent Bangladesh from entering regulated markets.⁵⁰ Still, the United States is currently Bangladesh's third-largest export market.⁵¹

Regarding pharmaceutical market diversification, Bangladesh lags significantly behind some of its major competitors.⁵² Nevertheless, it has much potential as a low-cost generic drug and vaccine supplier.⁵³ This is evidenced by the rate of international certification and market authorisation obtained by its significant companies in recent years.⁵⁴ These are also essential steps for entering the world market.

Patent protection on drugs worth \$251 billion globally is set to expire in 2024.⁵⁵ Furthermore, the world's largest generic hubs, such as China and India, are losing cost advantages. As a result, increased contract manufacturing opportunities may benefit local businesses, especially large ones. As a result, local exporters could expect an increase in export volume comparable to the current annual rate of industry expansion, which is about 15–16 per cent. Razzaque et al.⁵⁶ estimated that if Bangladesh maintains an annual growth rate equal to the immediate past five years' average export growth rate (23.35 per cent), pharmaceutical export receipts will reach \$1.3 billion by 2030.⁵⁷ (Figure-32)

Figure 32: Growth projection of Bangladeshi pharmaceuticals⁵⁸

⁵⁰ Bumpas, Kostermans and Nair (n 2).

⁵¹ This demonstrates the rapid development of quality generics by the industry. Moreover, as LDCs and other developing nations are significant importers of Bangladesh's pharmaceutical exports, there is potential for export expansion in these nations.

⁵² When considering all individual products and market combinations, Bangladesh performs poorly (it reached out to 274 expanded export market destinations) as against India (2,866), China (2,465), Vietnam (492), and Pakistan (372). Export market destinations calculate all pharmaceutical items exported to different countries based on their 6-digit Harmonized System Code.

⁵³ Naznin Sultana Niti, 'Potentials of Bangladesh Pharmaceutical Industry: A Comparative Study' (2019) 19 Global Journal of Human Social Science.

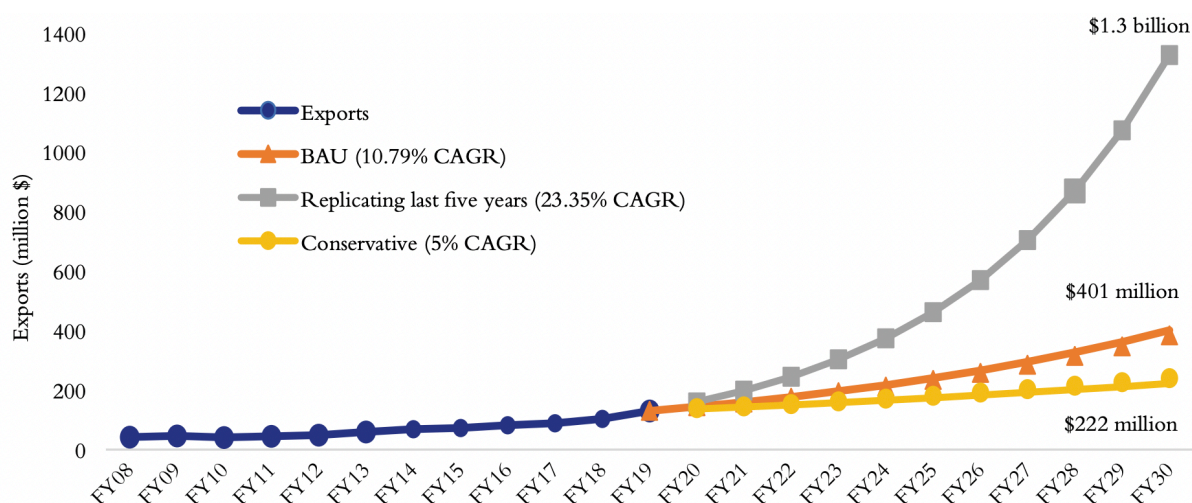
⁵⁴ In recent years, two companies (Beximco and Incepta) have received WHO pre-qualification, while three (Beximco, Square and Incepta) received US FDA certification. Regulatory authorities in the UK, Canada, the EU, and Australia, among others, have granted market authorisation to leading Bangladesh pharmaceutical companies. Ibrahim Hossain Ovi and Niaz Mahmud, 'Bangladesh Pharmaceutical Industry Blooms Bigger' (*Dhaka Tribune*, 22 August 2019) <<https://archive.dhakatribune.com/business/2019/08/22/bangladesh-pharmaceutical-industry-blooms-bigger>> accessed 8 May 2022; BIZDATA INSIGHTS, 'ICB Raises Investment to 6.3% in Renata Pharma' (*BizData Insight*, 27 March 2020) <<https://bizdatainsights.com/icb-raises-investment-to-6-3-in-renata-pharma/>> accessed 8 May 2022.

⁵⁵ IPA, 'The Indian Pharmaceutical Industry- the Way Forward.' (2019).

⁵⁶ Razzaque, Rabi and Akib (n 33) 377.

⁵⁷ If the growth rate comes down to 10% (the average over the last ten years) or a conservative 5%, exports by 2030 would be around \$400 million or \$222 million.

⁵⁸ Razzaque, Rabi and Akib (n 33) 377. CAGR stands for Compound Annual Growth Rate.



The pharmaceuticals export worth \$136 million is still very tiny and accounts for less than 0.35% of the export earnings of Bangladesh.⁵⁹ However, excluding apparel and traditional industries such as footwear and leather, pharmaceuticals are the country's largest exporter of manufactured goods. Moreover, it is one of the fastest-growing export sectors, with exports increasing at a compound annual growth rate of 23.35 per cent from 2015 to 2019.⁶⁰

9.3 Role of LDC-specific Exemptions in the Growth of the Industry

National and international factors facilitated by LDC-specific exemptions have immensely contributed to the growth of Bangladesh's pharmaceutical industries. While the TRIPS transition period offered the policy space required for industry development, timely and appropriate domestic policy incentives were crucial to the industry's rapid expansion. Many domestic policies that have helped the industry to this stage were otherwise violative of the WTO trade regime.

9.3.1 National Factors: Strategic use of Domestic Policies

Bangladesh's pharmaceuticals boom can be linked to a progressive government policy, low labour costs, the scale and dynamism of the domestic market, and the recent rise in domestic and global healthcare expenditure.⁶¹ Ensuring availability and affordability of health care and medicines are of utmost importance and a policy priority for governments in an LDC like Bangladesh. Given that Bangladesh has the lowest government allocation for healthcare (approximately 0.90 percent of its GDP) and the highest out-of-pocket health expenditures⁶² in South Asia,⁶³ medicine prices must remain low.⁶⁴ Therefore, successive governments adopted policies that promote local manufacturing to achieve affordable medicine prices.

To develop a national drug policy, the government established an Expert Committee in 1982 which approached the issue from the industrial policy goal of promoting local production of

⁵⁹ EPB data

⁶⁰ Razzaque, Rabi and Akib (n 33) 377.

⁶¹ Gay and Gallagher (n 34) 6.

⁶² 73.9% of the total average health costs per person.

⁶³ The World Bank (World Development Indicators) data

⁶⁴ Mohiuddin (n 16).

essential medicines and the health policy goal of removing non-essential products from the market. The National Drug Policy (NDP) and the Drugs (Control) Ordinance (DCO), enacted in 1982 to implement the committee's recommendations, were the first legal interventions to establish the industry's foundation by encouraging the entry of local entrepreneurs and pharmaceutical companies and decreasing cartelisation by MNCs. Amin and Sonobe underlined three 'aggressive measures' in the policy package that translates these into a successful industrial strategy:

- a. It opened market space for new Bangladeshi firms by preventing MNCs from concentrating on the production and development of innovative, complex, and high-tech items (such as antibiotics);
- b. It encouraged demand for these newly produced domestic items by barring imports of substitutes for the finished medications and intermediate inputs created by two or more domestic enterprises; and
- c. It provided incentives for MNCs to invest in establishing local facilities by prohibiting MNCs without local production facilities from selling items made by other companies on a toll manufacturing basis.⁶⁵

Bangladeshi companies were prohibited from performing contract manufacturing for multinationals.⁶⁶ The policy also restricted importing a pharmaceutical product or a close substitute if manufactured domestically. Several MNCs sold their businesses to local entrepreneurs because of these restrictions.⁶⁷

In 1998, the Prime Minister's Office issued an executive order prohibiting the import of such pharmaceuticals (in finished form) manufactured in 'sufficient quantity' by more than two domestic companies. This reinforced a protected domestic market for local companies to produce many of the pharmaceuticals they continue enjoying. Bangladesh implemented further NDPs in 1985, 2005, and 2016, all supporting special fiscal-financial incentives that contributed to the sector's growth.⁶⁸ The 2005 NDP permitted MNCs without manufacturing facilities in Bangladesh to produce pharmaceuticals under licencing arrangements to introduce new competition to the sector and create new export and manufacturing opportunities for patented items for an industry already demonstrating its value worldwide.⁶⁹

In 2008, Bangladesh used the TRIPS exemption for pharmaceuticals by postponing patent examination and issuance.⁷⁰ The removal of product patent protection facilitated the

⁶⁵ Amin and Sonobe (n 16).

⁶⁶ The policy prohibits MNCs from producing vitamins, enzymes, and cough syrups. Only local manufacturers were permitted to produce them. The 2005 NDP lifted the ban on contract manufacturing by local firms for the MNCs.

⁶⁷ Rizwan and Kathuria (n 28) 110.

⁶⁸ Munzur E Murshid and Mainul Haque, 'Bangladesh National Drug Policy 1982-2016 and Recommendations in Policy Aspects' (2019) 18 *Eurasian Journal of Emergency Medicine* 104.

⁶⁹ South Centre (n 23).

⁷⁰ *ibid.* The Patents and Designs Act of 1911 recognised patent protection for pharmaceutical items. Before joining the WTO in 1995, Bangladesh had the option to abolish pharmaceutical patent protection. However, in compliance with Article 66.1, Bangladesh has a longer transitional period to enforce pharmaceutical patents as an LDC. The transition period has been extended to 2033, or until Bangladesh graduates. Bangladesh, an LDC, exercised this option to exempt pharmaceuticals from patent protection in 2008. To do that, Bangladesh did not

expansion of the industry and diversified production in patented pharmaceuticals. The Patent and Designs Act, 1911⁷¹ stipulated a 16-year patent life, broad discretion for issuing compulsory licences, and relatively straightforward patent revocation and opposition procedure. Each element enables the government to consider the public interest while enforcing IPR. To comply with TRIPS and prepare for the LDC graduation, Bangladesh passed a new Patent Act in 2022⁷² extends the patent term to twenty years while preserving the flexibility to safeguard the public interest.⁷³ To take advantage of the TRIPS flexibilities, the new Patent Act has stipulated 18 exceptions to patent rights,⁷⁴ set high standards for novelty and innovative steps to stop practices such as 'evergreening',⁷⁵ and requires the applicant to disclose the best method of implementing the invention in a manner sufficiently clear and complete for a person skilled in the art to implement that.⁷⁶ However, as long as Bangladesh remains entitled to the TRIPS exemption, the Act will not be operational for pharmaceuticals.⁷⁷

The 2016 NDP reinforced the price regulation policy, a strategy to make essential medicines affordable and accessible.⁷⁸ Since the 1980s, drug costs in Bangladesh have declined significantly and are currently between 5 and 1,500 per cent less costly than in countries like India and Sri Lanka.⁷⁹ In a recent intervention, The National API Policy 2018⁸⁰ seeks to establish a pharmaceutical backward linkage industry that will serve both domestic and international markets through API production.⁸¹ It anticipates that Bangladesh will gradually enter the lucrative and promising export market for API products, with import substitution being the primary objective of the sector.⁸² It simplifies (financially and logistically) the import of supplies for manufacturers, offers tax relief, deductions, and other incentives, and facilitates business financing.⁸³ The local API manufacturing firms are offered tax exemption

amend or revise the Act of 1911 but issued a notification suspending the examination and processing of patent applications for pharmaceutical products.

⁷¹ Act No. II of 1911, Bangladesh

⁷² Act No. V of 2022, Bangladesh

⁷³ For example, t

⁷⁴ Section 5(1), Patent Act 2022 (Act No. V of 2022); Article 30 of the TRIPS permits members to adopt limited exceptions to patent rights.

⁷⁵ Section 3, Patent Act 2022 (Act No. V of 2022); Patenting new 'inventions' that are only slight modifications of existing drugs is known as 'evergreening' in the pharmaceutical sector. Typically, it emphasises the economic advantage of a company instead of significant therapeutic benefit.

⁷⁶ Section 6(5), Patent Act 2022 (Act No. V of 2022); Article 29(1) of TRIPS Agreement

⁷⁷ Section 5(2), Patent Act 2022 (Act No. V of 2022)

⁷⁸ Article 3.6 and Annex 1, National Drug Policy 2016, Ministry of Health and Family Welfare, Government of Bangladesh. Government publishes a list of essential drugs currently consisting of 285 medicines. Consequently, the DGDA approved the maximum retail price that pharmaceutical companies may charge for essential drugs.

⁷⁹ Amin and Sonobe (n 16).

⁸⁰ The National API and Laboratory Reagents Production and Export Policy 2018, Ministry of Commerce, Government of Bangladesh

⁸¹ Article 2.3, National Drug Policy 2016; The 2016 NDP also prioritises reducing reliance on imported drugs and raw materials and achieving self-sufficiency in drugs and API production.

⁸² The policy establishes specific goals for the sector, including reducing import dependence to 80%, \$1 billion in foreign investment, an increase in API molecules produced domestically (from 41 to 370 over a decade), and API production of \$685 million by 2032.

⁸³ BIDA (n 21). Other incentives include VAT exemption on raw materials, advance income tax (AIT) exemption on imports, 20% cash incentive/export subsidy, guaranteed access to the back-to-back letter of credit, and priority land allocation at industrial parks and economic zones (EZs). However, implementing the

until 2032.⁸⁴ The production of API molecules in the API industrial park, set up to boost investment for API production, is expected to launch in early 2023.⁸⁵

The 1982 Ordinance, along with subsequent NDPs and executive actions, established a successful industrial strategy that led to the current expansion of Bangladesh's domestic and export-oriented pharmaceutical industry (Table-20).⁸⁶

Table 20: Policy interventions to safeguard and promote the pharmaceutical industry

Year	Law/Policy	Important/relevant interventions
1982	National drug policy (NDP) 1982	- Prepared a list of 150 essential drugs and 100 specialised drugs. - Recommended for the prohibition of pharmaceutical product patents
1982	Drugs (Control) Ordinance (DCO) 1982	- Authorised price regulation of drugs and raw materials, - Prohibited foreign firms from producing vitamins, enzymes, and cough syrups. - Prohibited import of locally produced drugs by at least three companies or has three close substitutes. - Banned production, import and sale of 'unnecessary' or 'harmful' drugs.
1998	Executive order	Prohibited import of drugs produced in 'sufficient quantity' by more than two local manufacturers.
2002	Official gazette notification	Prohibited pharmaceutical process patent
2005	NDP 2005	- Lifted the ban on manufacturing under contract or license by local manufacturers - Recommended for setting up an API park
2008	Official gazette notification	Prohibited product patent to exploit the benefits of the TRIPS transition period
2016	NDP 2016	Highlighted preparations for TRIPS compliance
2018	The National API and Laboratory Reagents Production and Export Policy 2018	- Sought to establish a pharmaceutical backward linkage industry through establishing API park - Offered different incentives to API producers
2020	The Patent Act 2022	- Sought to make the patent regime TRIPS-compliant - Suspended operation of the law for a pharmaceutical patent for the time being.

incentives will gradually depend on production capacity, location, domestic value-added, and export performance.

⁸⁴ Doulot Akter Mala, 'API Manufacturers to Enjoy Tax Break until 2032' (*The Financial Express*) <<https://thefinancialexpress.com.bd/trade/api-manufacturers-to-enjoy-tax-break-until-2032-1634010499>> accessed 11 May 2022.

⁸⁵ TBS Report, 'Pharma Raw Material Production Expected in 2023' (*The Business Standard*, 2 December 2019) <<https://www.tbsnews.net/companies/pharma/api-industrial-park-expected-launch-production-2023>> accessed 12 May 2022. Established on 200 acres of land, the park is planned to house 42 manufacturing plant sites. According to industry insiders, Bangladesh may save up to 70 per cent on the cost of importing raw materials from the effective operation of those plants.

⁸⁶ Bangladesh continues to devise ways to support the industry. Recently, the Ministry of Health and Family Welfare drafted a Drug Act in 2019 by consolidating and revising the 1940 Drugs Act and the 1982 Drugs (control) Ordinance. Following consultations with government organisations and other stakeholders, the draft is now ready for government approval prior to introduction into the Parliament as a Bill. This proposed law aims to foster the expansion of the industry while holding imprudent firms accountable. Ali Asif Shawon and Ashif Islam Shaon, 'New Law on Medicine Regulation on the Cards' (*Dhaka Tribune*, 13 November 2020) <<https://archive.dhakatribune.com/bangladesh/2020/11/13/new-law-on-medicine-regulation-on-the-cards>> accessed 11 May 2022.

To summarise, the government of Bangladesh has made significant efforts to safeguard and develop its domestic pharmaceutical industry to establish a competitive, productive generic pharmaceutical sector that would ensure easy access to medicine for its citizens and boost the country's export competitiveness. The following were the most important policy tools in their toolkit:

- a) intellectual property measures, including the suspension of pharmaceutical patents, the adoption of reduced patent protection terms, and laws for the expansive use of compulsory licencing and patent revocation;
- b) industrial policies, such as the suspension or cancellation of already registered or licenced medications, the restriction of imports, and the creation of numerous incentives for domestic and foreign firms to source their output locally or export a specific percentage of the same;
- c) investment measures requiring foreign investors to manufacture their licenced medications domestically or engage in a licencing agreement with a domestic company under parallel laws; and
- d) other measures, including offering API manufacturers direct subsidies, tax incentives, preferential access to financing, and other benefits for willing companies entering the market.

9.3.2 International Factors: LDC-specific Exemptions

While the government's strategic actions have laid a solid foundation for the industry, international factors such as TRIPS exemptions have contributed to its rapid growth.⁸⁷ The TRIPS transition phase, which has been in effect since 2001, permitting Bangladesh not to enforce a patent, has supported sustaining the policy space created by a health-oriented, innovative, and indigenous industrial strategy. The exemptions have contributed significantly, especially since Bangladesh seized the opportunity in 2008 to suspend the examination and granting of a patent. Moreover, Bangladesh was first in line to utilise the TRIPS exemptions among the LDCs due to its technological infrastructure and capacity to manufacture medicine.

Even though most Bangladeshi firms manufacture generic or non-originator drugs whose patents frequently expire, about one-fifth of the drugs produced in Bangladesh are patented outside of the country⁸⁸ and, due to the TRIPS exemptions, those patents currently cannot be enforced in Bangladesh. In addition, the transition period permits Bangladesh's erstwhile 1911 Patent Law to contradict several TRIPS requirements in various ways, including suspending pharmaceutical patents, implementing shortened patent protection terms, and allowing the broad application of compulsory licencing and patent revocation, among others. Similarly, the Drugs Control Ordinance of 1982 permitted the government to fix prices and restrict imports of any medicine produced domestically or for which a substitute was available. As a result, Bangladesh made significant progress in promoting the local production

⁸⁷ The interviewees unanimously agreed that ISMs have provided indispensable incentives to the pharmaceutical industry.

⁸⁸ Rahman and Farin (n 38).

of essential drugs by prohibiting pharmaceutical patents and restricting imports and production of locally produced drugs by MNCs.⁸⁹

The exemption also gives Bangladesh a competitive advantage over countries such as India and Brazil. Bangladesh can legally reverse engineer patented pharmaceutical products, sell them domestically, and export them to other countries (primarily LDCs where product patents were not recognised).⁹⁰ Without having to pay royalties to the patent holder, Bangladeshi firms can manufacture any drug they choose, resulting in a significant reduction in costs and an increase in availability.⁹¹ During the Pandemic, local companies demonstrated efficiency by producing the generic versions of anti-coronavirus drugs such as Favipiravir, Molnupiravir, Paxlovid, and Remdesivir in a very short period, allowing people to purchase them at a reasonable price worldwide. Remdesivir from Bangladesh was exported to Central America, Central Asia, and Africa.⁹²

Bangladesh is also exempt from implementing several other WTO agreements, including SCM and TRIMS, in addition to the TRIPS Agreement. The government has provided various subsidies that may have violated the SCM Agreement to increase pharmaceutical production and export. Similarly, the government has pursued investment policies, such as requiring local partnerships for investment in the pharmaceutical industry, by utilising the exemption of TRIMS. In addition, several Bangladeshi pharmaceutical policies, including import substitution, discriminatory treatment of foreign products, and quantitative restrictions, violate the provisions of GATT 1994. As WTO members typically refrain from filing complaints against LDCs, Bangladesh has been able to use them so far.

9.4 Implications of LDC Graduation

Exemptions from the TRIPS and some other WTO Agreements, which contain strong intellectual property protection rules and the power to regulate international trade, have allowed Bangladesh's pharmaceutical sector to expand consistently. However, approaching graduation, Bangladesh must begin bringing its policy landscape into compliance with these regulations. Consequently, Bangladesh's pharmaceutical industry is on a possible collision course with the trade regime, as the country must begin phasing away the flexibilities that gave the industry its initial dynamism. As an LDC, it can impose import restrictions, adjust tariff rates, selectively subsidise exports, and terminate pharmaceutical patents to pursue economic expansion and diversification policies, temporarily shielded from global competition.⁹³ Those policies assisted local companies in meeting domestic demand at an affordable price by manufacturing any medicine regardless of patent protection.⁹⁴

⁸⁹ M Monirul Azam, 'The Impacts of TRIPS on the Pharmaceutical Regulation and Pricing of Drugs in Bangladesh: In Search of Policy Direction' (2017) 59 *International Journal of Law and Management* 376, 383.

⁹⁰ Rizwan and Kathuria (n 28) 109.

⁹¹ Daniel Gay, 'Pharmaceutical Dreams: TRIPS and Drugs Policy in Bangladesh' [2018] UN CDP.

⁹² Mayuri Mathur, 'Bangladesh Pharma: Pandemic Impact and Present Scenario' (*Pharmabiz.com*, 20 October 2021) <<http://pharmabiz.com/ArticleDetails.aspx?aid=143357&sid=9>> accessed 12 May 2022.

⁹³ The country's domestic policies prioritised the development of domestic drug manufacturing capacity and limited the market dominance of multinational corporations.

⁹⁴ Reich (n 15).

As Bangladesh prepares to leave the LDC group in 2026, several studies have examined the impact on the pharmaceutical industry of reintroducing patent protection upon graduation.⁹⁵ The majority forecasts a negative outcome. Graduation would significantly reduce its policy space to continue building productive capacity in the pharmaceutical sector and providing access to affordable medications for its people.

9.4.1 Compliance with the TRIPS

9.4.1.1 Updating Current Patent-related Laws

One obvious implication of graduation is that Bangladesh must bring its domestic laws, rules, regulations, and executive orders into compliance with the TRIPS (Table-21).

Bangladesh enacted a new Patent Act in April 2022 to progressively achieve compliance with the TRIPS provisions. In a post-TRIPS regime, achieving compliance and leveraging the flexibilities included in the Agreement are the primary objectives. To ensure compliance with TRIPS, the 2022 Patent Act has increased the duration of patents from 16 to 20 years and clarified provisions regarding patentee rights, cancellation procedures, licencing requirements, and the use of competition law to stop predatory pricing.⁹⁶ It also includes provisions for 'working requirement', sometimes interpreted as violating TRIPS obligations.⁹⁷ A reading of the 2022 Patent Act reveals that a conscious effort was made to ensure TRIPS compliance and incorporate TRIPS flexibilities.⁹⁸

However, pharmaceutical patents will not be regulated by the Patent Act of 2022 so long as Bangladesh is eligible for the TRIPS transition period for pharmaceutical products.⁹⁹ In addition, Bangladesh is also working on the 2019 draft of the 'Drugs Act' to update and consolidate the provisions of the Drug Act of 1940 and the Drug (control) Ordinance of 1982

⁹⁵ Gay (n 91); Gay and Gallagher (n 34); Md Islam and others, 'The Social Costs of Success: The Impact of World Trade Organization Rules on Insulin Prices in Bangladesh upon Graduation from Least Developed Country Status' (2022) 39 Asian Development Review 239; Rahman and others (n 16); Razzaque, Rabi and Akib (n 33); South Centre (n 23).

⁹⁶ Section 24.11.c of Patent Act 2022

⁹⁷ Section 24.11.a of Patent Act 2022; A 'working requirement' requires that a patentee locally manufacture or import their patented product within a stipulated time. Though TRIPS Agreement is silent on working requirements, it contains provisions that some commentators interpret as prohibiting or limiting such requirements. This interpretation is debatable. The WTO dispute between the United States and Brazil over a working requirement was settled, but no binding opinion was provided on the issue. *Request for Consultations by the United States, Brazil—Measures Affecting Patent Protection*, WTO Doc WT/DS199/1 (8 June 2000); Marketa Trimble, 'Patent Working Requirements: Historical and Comparative Perspectives' (2016) 6 University of California Irvine Law Review 483. Trimble argues that insofar as TRIPS obligations do not prevent countries from introducing and maintaining patent working requirements, countries should use the requirements to calibrate their national patent systems to meet their needs.

⁹⁸ TRIPS flexibilities that find a place in the Act include strict patentability requirements: absolute novelty (Section 3), and high level of disclosure (Section 3.3 and 6.5), early working or Bolar exception and research & experimental use (Section 38), pre-grant and post-grant opposition (Section 16.1 and 18.2.b), compulsory licences (Section 21 and 36), and parallel importation with international exhaustion principle (Section 37). In addition, the bolar exception is crucial for the reverse engineering of pharmaceuticals. It permits the development, testing, and experimental work required for the registration of a generic drug to occur during the duration of a patent so that generic equivalents can be readily available the day after the patent expires.

⁹⁹ Section 5.2 of Patent Act 2022; The exemption for pharmaceuticals is valid until 2033 or until the graduation of an LDC. Thus, the current patent regime will govern pharmaceutical issues until Bangladesh's graduation in 2026.

to comply with TRIPS requirements and changing times.¹⁰⁰ Bangladesh must also amend or repeal its drug policies and other executive orders incompatible with the TRIPS regime.¹⁰¹

Table 21: Changes required for a TRIPS-compliant pharmaceutical regime¹⁰²

Issues	Existing regulations	Changes required
Product and process patent for pharmaceuticals	Both product and process patents for pharmaceuticals remain suspended. However, the Patent Act 2022 includes both types.	Both product and process patents must be allowed.
Duration of patent protection	The Patent Act 2022 extends the protection period from 16 to 20 years, but not operative now.	The provision must be operational.
Import restrictions	Import restrictions on the pharmaceuticals and pharmaceutical raw materials that are locally produced.	There are no import restrictions regarding local production, as it will be discrimination and a violation of TRIPS and WTO principles.
Requirement of local production facilities	Certain pharmaceuticals of MNCs are excluded from licensing unless they have local production facilities.	The local production facility is not mandatory.
Production restrictions	MNCs cannot produce some drugs such as vitamins, antacids, etc.	Any production restriction will be discrimination.
Working requirement	Manufacture or import needs to start with four years of receiving patent protection. The Patent Act 2022 also include the provision with modifications. (Section 24.11)	Such working requirements may be discrimination.
Marketing approval restrictions	Marketing approval restriction on MNCs for pharmaceuticals that are locally produced.	Any marketing approval restriction based on local production will be discrimination.
Advertising restrictions	Advertising on pharmaceuticals is prohibited.	Advertising needs to be allowed, but there may be reservations.
Single-ingredient	Only single-ingredient products can be produced and marketed	Combination drugs need to be allowed.
Data exclusivity/ test data protection ¹⁰³	There is no legal provision for test data protection in Bangladesh.	MNCs and developed countries increasingly demand test data protection in national legislation.

9.4.1.2 Restriction on Production and Export of Patented Drugs

As a result of the pharmaceutical transition period, Bangladesh can now manufacture any drug, including patent-protected drugs. About one-fifth of the locally produced drugs are

¹⁰⁰ Shawon and Shaon (n 86). The Drugs (Control) Ordinance of 1982, which restricts imports and marketing of pharmaceuticals by multinational corporations and mandates local production, is incompatible with TRIPS provisions.

¹⁰¹ Through notification of the Official Gazette by the Government, a process patent was disallowed in 2002 (Azam, 2016), and a product patent was suspended in 2008 (Chaudhuri, 2020); These notifications suspending product and process patents are in violation of TRIPS and the Patent Act of 2022 and must be revoked upon graduation.

¹⁰² Adapted from Azam (n 89) 383.

¹⁰³ While innovator companies conduct their clinical trials to obtain marketing approval, generic manufacturers rely on the clinical trials conducted by the innovator. Data exclusivity prohibits using test data by generic manufacturers to register a generic drug for a specified period. Many countries, such as India, do not have a data exclusivity law.

currently on a patent.¹⁰⁴ The change in the patent regime in 2008 has helped accomplish patented products¹⁰⁵ what the 1982 Ordinance achieved for generic products.¹⁰⁶

In recent years, significant progress has been made in producing high-profile drugs. Bangladesh has introduced numerous patent-protected products to the market at affordable prices.¹⁰⁷ Bangladesh has acquired vital expertise in producing these drugs, which require advanced technical knowledge through reverse engineering and subsequent innovation. As a result, Bangladesh will no longer enjoy the benefits following its graduation when its patent laws must comply with TRIPS provisions. Moreover, Bangladesh currently exports locally produced patented drugs to LDCs and other countries where those drugs are not patented. As a result, LDCs constitute a significant market for Bangladeshi drugs accounting for around 30 per cent of total exports in 2020.¹⁰⁸ Restrictions on the production and export of patented drugs will significantly impact Bangladesh and other LDCs that import drugs from Bangladesh at affordable prices.

9.4.1.3 Local Manufacturers to Face Tough Competition

In the early 1980s, MNCs held approximately 75 per cent of the market share in the pharmaceutical industry.¹⁰⁹ By various policy interventions (e.g., import restrictions), many of which do not comply with TRIPS, local manufacturers could grow and compete with MNCs and outperform them. As a result, local companies now have a market share of more than 90 per cent, which is rare worldwide.¹¹⁰ Moreover, approximately 98 per cent of domestic demand is currently met by local firms.¹¹¹

The Drugs (Control) Ordinance of 1982 enacted the two essential steps that transformed the market structure in favour of local companies:

- The manufacturing, importation, and marketing of drugs deemed dangerous, unnecessary, or otherwise undesirable were prohibited, and
- The sale of drugs manufactured under contract for MNCs was prohibited if they lacked a local manufacturing plant and the drugs or their substitutes were manufactured locally.¹¹²

¹⁰⁴ Rahman and Farin (n 38).

¹⁰⁵ Bangladesh terminated pharmaceutical product patent protection in 2008.

¹⁰⁶ Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 4.

¹⁰⁷ Saad and Safwan (n 26). Most patent-protected locally produced drugs treat diabetes, cardiovascular disease, cancer, HIV/AIDS, psychological disorders, and anti-malarial diseases. Unfortunately, these non-communicable diseases are fast becoming Bangladesh's primary cause of death.

¹⁰⁸ EPB data; Bangladesh's export-oriented pharmaceutical industry is well-positioned to serve a significant portion of the expanding LDC markets and other low-income nations with limited or no manufacturing capacity due to the TRIPS flexibility and supply-side capacity.

¹⁰⁹ Reich (n 15).

¹¹⁰ Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 7.

¹¹¹ Ministry of Finance (n 18).

¹¹² Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 9; Zafrullah Chowdhury, *The Politics of Essential Drugs: The Makings of a Successful Health Strategy: Lessons from Bangladesh* (Zed Books 1995). In 1982, the Government established an Expert Committee to formulate a national drug policy to boost the local manufacturing of essential medicines and eliminate non-essential items from the market. The committee proposed import restriction, contract manufacturing, product patent abolition, and API production promotion. The multinational firms supported by foreign governments, especially the United States, reacted adversely to the initiative. The Government was pressured not to adopt the approach or

These extreme measures altered the pharmaceutical manufacturing sector and eliminated a substantial portion of the MNCs' market share. Around 1700 of the 4340 drug products registered were banned and removed from the market in phases.¹¹³ Local companies seized the opportunity and led the industry's explosive growth. Then, in the late 1980s, Bangladesh shifted from a drug importer to an exporter.¹¹⁴

Still, Bangladesh's existing regulations permit several restrictions on importing medicines and raw materials that are locally produced.¹¹⁵ However, domestic firms will face competition from cheaper imported drugs after eliminating the import restrictions following graduation. The local company will lose market share if an importer can sell the same product for less than a domestic company. India and China could be formidable competitors and threats due to their production scale and well-established backwards-linkage industries.¹¹⁶ The local firms are used to functioning in a closed market with favourable treatment. However, smaller firms with a diminished competitive advantage may face a significant threat from intensified market competition. There is also a possibility that multinationals with plans to establish local manufacturing operations will acquire smaller companies.

9.4.1.4 Increase in API Import Costs

The Bangladeshi pharmaceutical industry primarily relies on imports, locally producing only about 10% of the demand for APIs.¹¹⁷ Only a few local companies, such as Square and Beximco, produce primarily simple APIs, while some big companies, such as Incepta, do not produce APIs. The Government approved an API Park on 200 acres of land with infrastructure facilities in 2008. It is expected to be fully operational by 2023, but it would take longer to produce APIs at a larger scale.¹¹⁸

delay its implementation. As a result, concessions were made, and the Government avoided adopting the other Expert Committee proposals about API and eliminating product patents.

¹¹³ Chowdhury (n 112) 53–58; Reich (n 15). As the Ordinance did not prohibit the operations of multinational corporations, they had the choice to reorganise their production and marketing operations by focusing on essential medications or leaving the market. Several of them, such as Squibb, ceased operations in Bangladesh. However, multinational corporations were not prepared to restructure their operations. These events led to establishment of local pharmaceutical firms and increased domestic output of drugs formerly imported or produced by MNCs.

¹¹⁴ Zafrullah Chowdhury, 'Bangladesh: A Tough Battle for a National Drug Policy' [1995] Development Dialogue. Making National Drug Policies a Development Priority. A Strategy Paper and Six Country Stories 96; Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20). The market share of domestic pharmaceutical firms rose from 35% in 1981 to 60% in 2005 and to more than 90% in 2020

¹¹⁵ A drug cannot be imported if it is not on the DGDA's list of essential medicines or if more than three local companies produce it. These safeguard the local producers. Moreover, as the industry is experiencing rapid expansion, most of this growth will be attributable to local companies in the present set-up.

¹¹⁶ Rahman and Farin (n 38) 21. They also manufacture raw materials and, most importantly, APIs, which are used to create pharmaceuticals

¹¹⁷ Mohiuddin (n 16) 4; Fitch Solutions, 'Bangladesh Pharmaceuticals & Healthcare Report, Quarter 3.' (2020) 9.

¹¹⁸ TBS Report, 'Pharma Raw Material Production Expected in 2023' (*The Business Standard*, 2 December 2019) <<https://www.tbsnews.net/companies/pharma/api-industrial-park-expected-launch-production-2023>> accessed 14 May 2022; Sudip Chaudhuri, 'Product Patent Protection, the TRIPS LDC Exemption and the Bangladesh Pharmaceutical Industry' (TWN 2021) Intellectual Property Rights Series no. 17. After a prolonged delay, 28 local firms were handed over 42 plots of land in 2017.

Bangladesh can import APIs from developed and developing countries, including India and China. However, due to the cheap access to APIs from India, China, and other countries, the local manufacturers concentrated on formulations and neglected the API market. API underdevelopment did not limit the growth of the formulations sector before graduation, but it would emerge as a critical factor when TRIPS compliance is a requirement.

After graduation, generic companies in India and China that recognise product patent protection could not manufacture and export copyrighted APIs to Bangladesh unless they meet TRIPS criteria.¹¹⁹ So, existing IP royalties on importing raw materials for Bangladeshi pharmaceutical companies would increase significantly. This increase is expected to result in a rise in production costs.¹²⁰ The industry remains at risk as API production remains low because it cannot thrive by purchasing raw materials at higher prices. Therefore, the expansion of API production is crucial for Bangladesh.

9.4.1.5 Loss of Competitiveness for Local Manufacturers

In part, the lack of patent enforcement has permitted reverse engineering and learning-by-doing, which has contributed to the expansion of the pharmaceuticals cluster and improved product sophistication, with spillover effects throughout the industry. However, the reverse engineering of complex formulations and the production of APIs are still in their infancy. These advances require additional time to consolidate and sustain themselves.¹²¹ With little investment in R&D, however, it is more challenging to develop a technological foundation. Moreover, due to the increasing cost and complexity of importing APIs, it will be challenging for local producers to market their goods at existing prices. Imports will challenge the dominance of domestic manufacturers after eliminating import restrictions upon graduation. The combined effects of technological deficiency, liberalisation and API dependence would severely negatively impact local firms' competitiveness and export performance.

9.4.1.6 Impact on Pricing and Access to Medicine

The issue can be examined from two perspectives: medicines with patents and those without. Since most essential drugs used in Bangladesh are off-patent, enforcing patents will have little impact on locally produced generic versions of off-patent drugs. Analysis reveals that Bangladesh's top ten selling medicine are off-patent and manufactured by local enterprises. Moreover, the patents on the top-selling drugs manufactured and sold by MNCs have also expired. Azam found that most medicines necessary to treat the most common diseases in Bangladesh are no longer patent-protected.¹²² In this regard, adopting patents in Bangladesh is unlikely to have a significant effect. Since import restrictions on pharmaceuticals and raw materials must be lifted, competition from imported drugs will likely lower local drug prices. Consumers could benefit from lower drug costs.¹²³

¹¹⁹ Chaudhuri, 'Product Patent Protection, the TRIPS LDC Exemption and the Bangladesh Pharmaceutical Industry' (n 118) 23.

¹²⁰ Abbas Uddin Noyon, 'API Park to Be Ready by June for Pharma Industry' (*The Business Standard*, 4 March 2021) <<https://www.tbsnews.net/economy/industry/api-park-be-ready-june-pharma-industry-211144>> accessed 14 May 2022.

¹²¹ Gay and Gallagher (n 34) 6.

¹²² Monirul Azam, *Intellectual Property and Public Health in the Developing World* (Open Book Publishers 2016).

¹²³ Rahman and Farin (n 38) 22. However, due to the inelastic nature of drug demand (consumers have limited control over which drugs they consume, as physicians prescribe), the effect on price is uncertain and may vary

Concerns exist, however, over the pricing, availability, and affordability of patented medicines, which account for around one-fifth of local manufacture. Most patent-protected medications are used to treat cancer, cardiovascular diseases, HIV/AIDS, and cases of multidrug resistance. Bangladeshi companies sell generic versions of these patented products at a fraction of the cost of the original brand.¹²⁴ However, these medicines can no longer be manufactured without the patent holder's consent or payment of a royalty fee. Paying a royalty fee would increase the cost of manufacture and the selling price, placing upward pressure on the price of medicines on the domestic market.¹²⁵

In this regard, the Indian experience can be beneficial. The price differences for patent drugs between India and Bangladesh are striking. Before TRIPS, India was well-known for producing and selling low-cost patented medicine. After reinstating product patent protection in 1995, MNCs have used their monopoly to demand exorbitant prices, especially for anti-cancer drugs available from Bangladeshi companies at a fraction of the price in India. Bangladeshi goods have penetrated the Indian market due to the substantial price differential.¹²⁶

There are not many empirical studies or field studies in Bangladesh that have investigated the potential impact of TRIPS on the prices of pharmaceuticals. However, in a recent study, Deen et al. analysed the potential impact of LDC graduation on the price of insulin in Bangladesh. They found that LDC graduation requiring TRIPS compliance would substantially increase insulin prices, significantly increasing the poverty rate among diabetic households.¹²⁷

9.4.1.7 A 'Global Good' in Jeopardy

Gay and Gallagher termed the pharmaceutical industry in Bangladesh as a 'global good' as it serves DCs at low cost across Asia, Africa and Latin America.¹²⁸ Bangladesh is the only LDC with significant production and exporting capacity.¹²⁹ The pandemic has shown that Bangladesh can play a vital role in helping countries that do not have enough manufacturing capacity to access essential medicines.¹³⁰

Chaudhuri argued that Bangladesh could accomplish things that other countries, such as India, cannot.¹³¹ Like multiple other nations, India granted product patents on remdesivir

across the various drug categories. For example, the price of lifestyle drugs will be significantly more impacted than essential medicines.

¹²⁴ Sudip Chaudhuri, 'Making Medicines for Pandemics: Can Bangladesh Do for Covid-19 What India Did for HIV/AIDS?' (2020) The India Forum. For instance, Incepta, a local firm, created a sensation in 2015 when it launched the generic version of the patented Hepatitis C medicine Sofosbuvir at \$10 a tablet, compared to \$1000 in the US.

¹²⁵ Rahman and Farin (n 38) 22.

¹²⁶ Chaudhuri, 'Making Medicines for Pandemics' (n 124).

¹²⁷ Islam and others (n 95). They find that the insulin price increase could result in a 1% to 15% decrease in the welfare (i.e. an increase in expenditures) of households with diabetes, thereby increasing the poverty rate of households with diabetes by 54% to 58% and of those requiring insulin by 54% to 58%, if policy adjustments are not made.

¹²⁸ Gay and Gallagher (n 34).

¹²⁹ Most LDCs cannot produce essential pharmaceuticals, and the availability of affordable drugs is vital for them. Bangladesh exported to 27 LDCs in 2020, which accounts for about one-third of its total exports.

¹³⁰ Chaudhuri, 'Making Medicines for Pandemics' (n 124).

¹³¹ *ibid.*

(potential covid-19 treatment) under an arrangement with Gilead that discovered the medicine.¹³² But Indian companies were prohibited from selling the medication to more than 70 countries, or almost half of the world's population. If patents were the only barrier, these nations could manufacture the drug by issuing compulsory licences. Nevertheless, those with little or no manufacturing capacity lack this choice.¹³³ However, generic producers in Bangladesh could manufacture the medicine promptly and without restriction.¹³⁴ Countries with limited supply or no manufacturing capacity imported these patented drugs from Bangladesh to avoid being at the mercy of patentees regarding supply and pricing.¹³⁵ Before exposing it to international trade restrictions, this burgeoning industry in Bangladesh needs policy space to expand production, build a reliable backward linkage, and consolidate development.

9.4.2 Compliance with forthcoming TRIPS+ Compliance

Bangladesh will become less competitive because it loses preferential trade benefits upon graduation.¹³⁶ To absorb the shock, the Government is working to sign FTAs with major export destination countries even before graduation. Outside of the WTO, numerous bilateral, regional, and mega-regional treaties generally contain languages that could further restrict policy space and make it more difficult for Bangladesh's pharmaceutical industry to flourish. Table-3 summarises the TRIPS-plus provisions pertinent to the Bangladesh pharmaceutical industry in various international agreements, such as the CPTPP.¹³⁷ and KORUS.¹³⁸ The TRIPS-plus provisions include, among others, extended patent protection and secondary patent availability.¹³⁹, six to twelve years of data exclusivity¹⁴⁰, and patent linkage¹⁴¹.

More importantly, if Bangladesh enters into regional trade agreements with the neighbouring countries, especially those already members of the CPTPP, its upcoming patent-related laws will need to protect innovators even more. This leaves Bangladesh with less policy space to restrict patentability, permit liberal patent revocation, and make the protected data of

¹³² To manufacture and market remdesivir in 127 countries, the pharmaceutical company Gilead entered into non-exclusive voluntary licencing agreements with a few generic manufacturers. As a result, the patent limited its production until Indian generic manufacturers secured licences from the patent holder Gilead. However, under TRIPS exemptions, an LDC such as Bangladesh may grant a company a licence to copy a patented medication without the patent holder's consent.

¹³³ Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 29.

¹³⁴ Remdesivir has not proven to be a successful Covid-19 treatment. However, suppose effective patent-protected treatments for COVID-19 or other diseases are developed. In that case, they can be manufactured in Bangladesh without facing a product patent barrier, to the benefit of Bangladesh and other nations.

¹³⁵ Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 29.

¹³⁶ Chapter-8 details the impacts on its main exports of RMG.

¹³⁷ Comprehensive and Progressive Agreement for Trans-Pacific Partnership among Canada-Australia-Brunei-Chile-Japan-Malaysia-Mexico-New Zealand-Peru-Singapore-Viet Nam 2018

¹³⁸ US-South Korea FTA 2019

¹³⁹ Commonly, secondary patents, as opposed to original or primary patents, are understood to protect, among other things, a polymorph, derivative, or specific medical use of the protected chemical entity. The 'secondary' patent application is submitted after the 'primary' patent application and contains some improvements.

¹⁴⁰ During 'data exclusivity,' an innovator company's pre-clinical and clinical trial data submitted to the regulatory body cannot be used by another company (typically a generic company) for the same drug substance. In order to gain approval for the same drug substance, generic companies can rely on information filed by the innovator company.

¹⁴¹ Patent linkage is the link between a generic drug's approval and the patent status of its branded equivalent. Linking patent protection to generics' regulatory approvals is a topic of heated discussion. In addition, bilateral and regional agreements outside the WTO have promoted patent linkage.

patented medicines accessible to generic manufacturers to facilitate their entry into the market. In addition, TRIPS-plus treaty provisions frequently require enhanced civil and criminal enforcement and stringent border controls to protect patentees (Table-22).

Table 22: TRIPS+ measures with implications for the pharmaceutical industry¹⁴²

TRIPS+ measures	Mechanism of creating impacts
Patent term extension	Extensions for delays in processing patent applications and other regulatory delays.
Reduced standards of patentability	Lowers standards on novelty, inventive step, and industrial applicability.
Limitations on patent revocation/opposition	A further limitation on grounds for patent opposition or revocation by Government.
A further limit on patent use exceptions	An additional restriction on the use of Bolar exceptions, use for research and non-commercial use, and government use.
Elimination of certain patent exceptions	Patents must be allowed on diagnostic, therapeutic and surgical human treatment methods.
Patent registration linkage	Restricts the authority of regulatory bodies to register a generic medicine on the mere claim of an originator that a patent would be infringed.
Data exclusivity	In the case of generic drug registration applications, patent holders are allowed exclusive access to regulatory data, whereas regulators are restricted from referring to the innovator's submission data.
Broadened enforcement of civil and border measures	Deterrent civil remedies include seizure of goods in transit, mandatory destruction, compensations based on average retail price, and allowing third-party enforcement.
Enhanced criminal enforcement	Criminal sanctions for patent violations
Trade secrets protection	Trade secret protection is not time-limited so it can exclude competition indefinitely.
Investment dispute settlement provisions	Including IPRs as covered investment permits investor-State dispute settlement (ISDS) claims based on patent decisions.

9.4.3 Compliance with Trade and Investment Rules outside TRIPS

In addition to the TRIPS agreement and IP rules in FTAs and RTAs, other aspects of the trade regime will also limit Bangladesh's policy space.

Under the WTO, for instance, numerous rules govern the non-discriminatory treatment of foreign products, quantitative restrictions, and measures prohibiting investment and subsidies exist. Each of these affects the forthcoming pharmaceutical policies in Bangladesh.

Bangladesh's 1982 steps of cancelling medicine registrations and licences and its policy of banning imports that compete with locally made medicines would have violated GATT Article XI on quantitative restrictions had they been used today. Similarly, its policies, which required local production or a partnership with a domestic company, would have violated national treatment rules as they placed more restrictions on foreign products than on their domestic

¹⁴² Deborah Gleeson and others, 'Analysing the Impact of Trade and Investment Agreements on Pharmaceutical Policy: Provisions, Pathways and Potential Impacts' (2019) 15 *Globalization and Health* 78; Rahman and others (n 21) n Adjusted from Gleeson et al. and Rahman et al. Although this table is quite comprehensive, it excludes a broader set of treaty provisions that could affect fundamental pharmaceutical policy objectives, such as procedural requirements for national pharmaceutical pricing and reimbursement, government procurement rules, and rules on state-owned enterprises and designated monopolies.

competitors.¹⁴³ These quantitative restrictions and national treatment rules are also integrated into the TRIMS agreement¹⁴⁴ and apply to investment measures that limit imports or discriminate against foreign investors. Similarly, Bangladesh's incentive programmes, especially those that aim to build backward linkages in the pharmaceutical sector by making a new API Industrial Park, are likely to break the rules about subsidies set out in article 3 of the SCM agreement.¹⁴⁵ Export incentives provided to stimulate the production and export of pharmaceuticals could be called into question after graduation.¹⁴⁶

Bangladesh's health, industrial, and investment policies would be further affected if it signed bilateral or regional agreements like the CPTPP or KORUS. Those treaties often include investor-state dispute settlement (ISDS), which gives these international commitments extra 'teeth'. Bangladesh has already signed several investment agreements.¹⁴⁷ However, they differ substantially from the CPTPP and KORUS-type investment features.¹⁴⁸ However, becoming a party to any such treaty in the future would undoubtedly require more stringent commitments.

Bangladesh's selective health, industrial, and patent policies are compared to the WTO regime, CPTPP/KORUS rules, and the provisions of various bilateral investment agreements (BIT) signed by Bangladesh in Table-23.

¹⁴³ Rahman and others (n 16) 16. Furthermore, despite the neutral appearance of specific administrative requirements, such as having the Government review all licencing agreements and having domestic staff oversee them, they may have placed a more significant burden on foreign firms than their domestic competitors.

¹⁴⁴ Agreement on Trade-Related Investment Measures 199

¹⁴⁵ Rahman and others (n 16) 17. Subsidies (such as special duty and tax concessions, priority project loans, and duty-free equipment imports for establishing compliant industries) that target specific subsectors and potentially harmful foreign competitors could result in a neighbouring country filing a complaint for injury to its domestic firms.

¹⁴⁶ The WTO dispute of India-Export Related Measures sheds light on SCM standards relevant to Bangladesh. Without any other intervention favouring graduating LDCs, the SCM agreement does not permit additional compliance transition time. The challenged measures in the India case are comparable to those in Bangladesh that support the development of a new API Park. Even though many of these measures are relatively new, they may have to be phased out almost immediately upon graduation before having their full effect. *Panel Report, India — Export Related Measures, DS541*. The US challenged India's export incentive measures (including exemptions of customs duties, indirect taxes and central excise duties provided based on export performance) to boost exports and manufacturing competitiveness. India argued that these measures were still protected by provisions allowing countries to transition to a higher level of development. The Panel decided that the 8-year transition period for low-income countries ends in 2003 (8 years after the SCM Agreement came into force). Countries initially exempt from SCM obligations do not get an additional eight years after that graduation. As India surpassed the development indicator (\$1000 per capita income) in 2017, it must immediately phase out the prohibited export subsidies.

¹⁴⁷ Bangladesh has bilateral investment treaties (BIT) with Turkey (2012), Denmark (2013), India (2011), Vietnam (2005), Thailand (2002), the United Kingdom (1980) and the United States (1989).

¹⁴⁸ Rahman and others (n 16) 18. They differ in three significant ways: the ability to exclude foreign firms that pose a competitive threat to domestic firms, the absence of commitments on performance requirements, and national treatment.

Table 23: Compliance with Bangladesh's industrial and investment policies¹⁴⁹

Bangladesh health, industrial and patent policies	WTO-compliant	CPTPP/KORUS-compliant	BIT-compliant
Import bans on strategic pharmaceuticals	No	No	Yes
Local manufacturing and joint venture requirements (1982)	Yes	No	Yes
Export performance requirements for MNCs	No	No	No
Selective cancellation or suspension of medicine registration/licensing	No	No	No
Cash incentives and tax benefits contingent on domestic value added (2018)	Possible	Possible	Yes
Requirement of a government review of licensing agreements, supervision, and strict enforcement of unlicensed imports (1982)	Possible	No	Yes
Special access to preferred finance for API producers	Yes, but subject to dispute	Yes	Yes
Priority plot allocation in special economic zones for API producers	Yes, but subject to dispute	Yes	Yes
Removal of red tape, particularly for API producers	Yes, but subject to dispute	Yes	Yes

9.4.4 Increased Implications due to Covid-Pandemic Impact

The consequences of graduation are set to be more significant due to the severe effects of the pandemic on the industry. Bangladesh's Pharmaceutical industry is heavily dependent on imports of active pharmaceutical ingredients (APIs), which are essential for manufacturing various medicines. The global demand for APIs has increased due to the pandemic, while lockdowns, border closures, and transportation issues have disrupted the supply.

About 95% of APIs are sourced annually from foreign markets led by China and India. However, mitigation strategies instituted by these key supplier nations in response to the pandemic have disrupted supply chains. India instituted an export ban on all raw materials associated with Covid-19¹⁵⁰. Concurrently, China's implementation of stringent lockdown measures led to a full-scale halt in economic activity, exacerbating scarcities and substantially inflating prices for requisite production inputs.¹⁵¹

Still, the industry has demonstrated its innovation and quality standards by developing new formulations and technologies to combat Covid-19. For example, some local manufacturers have produced their versions of remdesivir, a drug used to treat Covid-19.¹⁵² During the fiscal

¹⁴⁹ *ibid* Adjusted from Rahman et al. Bangladesh is a party to 32 BITs. (WTO 2019). The following BITs are checked for compliance: Bangladesh-UK 1980; Bangladesh-Turkey 2012; Bangladesh-Thailand 2002; Bangladesh-Vietnam 2005; Bangladesh-U.S. 1989; Bangladesh-Denmark 2013 and Bangladesh-India 2011.

¹⁵⁰ Teena Thacker, 'Covid-19: Pharma Companies Ask Govt to Lift API's Export Restrictions' *The Economic Times* (10 March 2020)

<<https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/pharma-cos-ask-govt-to-lift-apis-export-restrictions/printarticle/74558607.cms>> accessed 23 December 2023.

¹⁵¹ Nylænder and Pedersen (n 58).

¹⁵² Mayuri Mathur, 'Bangladesh Pharma: Pandemic Impact and Present Scenario' (20 August 2021) <https://www.pharmabiz.com/ArticleDetails.aspx?aid=143357&sid=9&utm_source=pocket_reader> accessed 23 December 2023.

year 2020, the pharmaceutical industry saw a 27% increase in export earnings due to the rising global demand for medicine.¹⁵³

As the industry was gradually recovering from the pandemic's effects, the Russia-Ukraine war caused further disruption in the worldwide supply chain, leading to a rapid increase in raw material prices. In the fiscal year 2022-23, Bangladesh's exports decreased by 7% due to a shortage of US dollars, caused by the global economic crisis, which affected the import of raw materials.¹⁵⁴ These obstacles will compound the existing inherent problems in the industry, resulting in increased concerns about graduation.

9.5 Existing graduation support for the industry

As detailed in chapter 7, WTO has no graduation mechanism to support LDCs for the transition. So, the provisions of LDC-specific TRIPS transition periods and technology transfer will no longer be available to Bangladesh from graduation. However, the Sustainable Graduation Support Facility (iGRAD) and several UN organisations provide policy and technical advisory services on improving access to non-LDC-specific support and preparing and implementing national smooth transition strategies (STS). In addition, the World Intellectual Property Organization (WIPO) provides a Graduation Support Package for LDCs that focuses on assisting graduating LDCs in upgrading their national laws to meet TRIPS obligations and enabling them to utilise IPR for boosting productivity and structural transformation.

9.6 Options for Bangladesh to Reduce the Impact of Graduation

9.6.1 Engagement in WTO to Extend TRIPS Transition Period

Without any special arrangement, Bangladesh is scheduled to lose the benefits of the TRIPS transition period upon its graduation in 2026, whereas other LDCs may continue to enjoy the benefits until 2033. As no other previously graduated country has a pharmaceutical production base comparable to Bangladesh, it is widely accepted that a termination of the waiver in 2026 rather than 2033 would significantly and unprecedentedly affect local pharmaceutical exporters. Bangladesh may have the option to request a transition period extension through WTO procedures under Article 66.1 of the TRIPS Agreement.¹⁵⁵ The LDC group has already requested to extend the general and pharmaceutical TRIPS exemptions for a period beyond graduation.¹⁵⁶ The group makes several submissions in this regard.¹⁵⁷

¹⁵³ Jagaran Chakma, 'Pharma Companies Count Their Blessings as Exports Rise' (*The Daily Star*, 13 July 2020) <<https://www.thedailystar.net/business/news/pharma-companies-count-their-blessings-exports-rise-1929577>> accessed 23 December 2023.

¹⁵⁴ Jagaran Chakma, 'Pharmaceutical Exports Shrank 7pc in FY23' (*The Daily Star*, 6 July 2023) <<https://www.thedailystar.net/business/economy/news/pharmaceutical-exports-shrank-7pc-fy23-3362106>> accessed 23 December 2023.

¹⁵⁵ According to Article 66.1 of the TRIPS Agreement, any graduating LDC may submit a request to the TRIPS Council for an extension of the transition period, and the Council 'shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.'

¹⁵⁶ WTO Submission, 'Trade Related Challenges of the Least Developed Countries and Way Forward: Proposal for WTO Smooth Transition Measures in Favour of Countries Graduated from the LDC Category Communication from Djibouti on Behalf of the LDC Group-Revision' WT/GC/W/807/Rev.2, 06/12/2022.

¹⁵⁷ The LDC group applied in 2020 to the Council for an extension of the general transition period under Article 66.1, set to expire on 1 July 2021 and requested the TRIPS Council for an extension 'as long as the Member remains in the category of least developed country and for a period of twelve years from the date of graduation. The request reflected an earlier communication from the LDC group to the General Council requesting a 12-

Although the need for the extension beyond graduation was recognised by many DCs, including China, India, and South Africa, most developed countries, including the USA, the EU emphasised the need for a 'case-by-case approach.'¹⁵⁸ So, Bangladesh should make a case for itself.¹⁵⁹

Article 66.1 only requires a 'duly motivated' request.¹⁶⁰ Though there is no authoritative interpretation of this requirement, presumably, this means that the LDC must demonstrate ample reason.¹⁶¹ The following arguments, among others, could make a compelling case for such a well-founded request:

- a. There is a precedent supporting the entitlement of the extension for Bangladesh. Following UN approval of its LDC graduation in 2004, the TRIPS Council granted the Maldives a two-year general extension of the general TRIPS transition period in 2005.¹⁶² Bangladesh's case for an extension is just as compelling as Maldives'.
- b. The criteria for LDC graduation have nothing to do with the vulnerabilities, special needs, and requirements of LDCs mentioned in article 66.1, which can remain even after graduation. Bangladesh is a textbook example of such continuing vulnerabilities, special needs, and requirements envisioned in Article 66.1.¹⁶³
- c. Article 66.2 mandates that developed country members 'provide incentives to enterprises and institutions' in LDCs 'to enable them to establish a sound and viable technological base.' However, Bangladesh has not benefited from technology transfer as promised in Article 66.2.¹⁶⁴ As graduation from the LDC category is based on criteria

year extension from the graduation of all LDC-specific international support measures (ISM). The TRIPS Council decided for an extension until 1 July 2034, or until the date when they cease to be an LDC, whichever date is earlier. On the request to extend the transition period for 12 years from graduation, The Council noted that it should be decided at the General Council, WTO's highest-level decision-making body in Geneva. Communication from Chad on Behalf of the LDC Group, 'Extension of the Transition Period under Trips Article 66.1 for Least Developed Country Members' (WTO) IP/C/W/668, 1 October 2020; Communication circulated at the request of the delegation of Chad on behalf of the LDC Group., 'Trade-Related Challenges of the Least Developed Countries and Way Forward: A Draft for MC Decision Communication from the Mission of Chad on Behalf of the LDC Group on Smooth Transition in Favour of Countries Graduating from the LDC Category' WT/GC/W/807 17, November 2020; Decision of the Council for TRIPS, 'Extension of the Transition Period under Article 66.1 for Least-Developed Country Members' (WTO 2021) IP/C/88; WTO, 'WTO Members Agree to Extend TRIPS Transition Period for LDCs until 1 July 2034' <https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm> accessed 16 May 2022.

¹⁵⁸ D Rabi Kanth, 'WTO: Growing Support for 12-Year Transition Period for Graduating LDCs' (8 March 2021) <<https://www.twn.my/title2/unsd/2021/unsd210303.htm>> accessed 12 June 2022.

¹⁵⁹ Gay and Gallagher (n 34) 7. It may be noted that none of the six countries (Botswana, Cabo Verde, Samoa, Maldives, Equatorial Guinea, and Vanuatu) that have graduated so far and none of the LDC now in the process of graduation has a significant pharmaceutical industry. So, there was little opportunity for making case studies or precedents in this context.

¹⁶⁰ Bangladesh can apply under Article 66.1 of the TRIPS Agreement any time before graduation as an LDC and seek help from other LDCs and sympathetic developing and developed country partners to bolster its case for an extension.

¹⁶¹ South Centre (n 23).

¹⁶² The decision of the Council for TRIPS, 'Maldives – Extension of the Transition Period under Article 66.1 of the TRIPS Agreement' (WTO) IP/C/35 17 June 2005.

¹⁶³ Bangladesh is the only LDC with a significant pharmaceutical industry. The special needs and vulnerability envisioned in Article 66.1 reflect the status of its fledging industry and public health concerns.

¹⁶⁴ The insignificant API production, lack of bio-equivalence testing facilities, and insufficient R&D constrain the supply-side capacity for an industry intrinsically tied to public health concerns.

unrelated to expanding a technological base, technological vulnerability and the need to develop a technological foundation will persist after graduation.

- d. Bangladesh is entitled to an extension for public health reasons under paragraph 4 of the Doha Declaration on TRIPS and Public Health.¹⁶⁵ and under UNGA resolution 67/221 (adopted in 2021) 'for a period appropriate to the development situation of the country.'¹⁶⁶ The Covid-19 pandemic and resulting complexities have only heightened these concerns.
- e. When read together, the language of Articles 66.1 and 65.2 reveals the distinction and the real purpose of Article 66.1, which is to support the specific needs of LDCs.¹⁶⁷ Additionally, Article 66.1 does not authorise or require TRIPS Council to include any condition, including forfeiture of the extension benefits upon graduation, in the extension decision.¹⁶⁸

Even if certain members of the TRIPS Council believed that an extension beyond graduation would be beyond the scope of Article 66.1, such an extension might nevertheless be granted as a waiver under the WTO Agreement Establishing the World Trade Organization.¹⁶⁹ Suppose the TRIPS Council determines that extending the transition period beyond graduation is essential but could only be implemented via a waiver. In that case, it might recommend the approval of such a waiver to the General Council.¹⁷⁰

Syam argues that the extension of the transition period is purely a matter of the political will of WTO members. If there is political will, the question of implementing the post-graduation extension is merely procedural.¹⁷¹ Unfortunately, an LDC like Bangladesh has little capacity to shape and exploit global political will in its favour. However, it must be able to communicate

¹⁶⁵ As stated in paragraph 4 of the Doha Declaration on TRIPS and Public Health, the TRIPS 'Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all', Bangladesh is entitled to an extension of the transition period in order to secure the development in its pharmaceutical industry, which is crucial for protecting public health concerns of this 8th most populated country in the world.

¹⁶⁶ United Nations, 'Resolution Adopted by the General Assembly on 21 December 2012 on Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/221. The General Assembly 'reiterates its invitation to all members of the World Trade Organization to consider extending to graduated countries the existing special and differential treatment measures and exemptions available to least developed countries for a period appropriate to the development situation of the country.' Notably, the general and pharmaceutical transition periods under TRIPS will abruptly end upon graduation.

¹⁶⁷ Article 65.2 categorically states that a developing country member is entitled to a four-year transition period in addition to the one-year available to all members. Article 66.1 only addresses the '...special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base'.

¹⁶⁸ Article 66.1 does not mandate that transition periods expire early upon graduation. Under Article 66.1, neither the 2002 extension of the transition period for pharmaceutical products nor the 2005 general extension required the transition period for a graduating LDC to expire before its full term. Only in the decisions to extend the transition period in 2013, 2015, and 2023 was the condition of the transition period's early expiration upon graduation included.

¹⁶⁹ Chaudhuri, 'Product Patent Protection, the TRIPS LDC Exemption and the Bangladesh Pharmaceutical Industry' (n 118) 4. Considering the importance of such an extension for the graduating LDCs, the LDC Group and many international and national civil society organisations have urged WTO members to extend the Article 66.1 transition period for an additional period after a country graduates from LDC status.

¹⁷⁰ Nirmarya Syam, 'Need for Extension of the LDC Transition Period Under Article 66.1 of the TRIPS Agreement Until Graduation and Beyond' (South Centre) Policy Brief No-88/March 2021 7.

¹⁷¹ *ibid.*

the authenticity and uniqueness of its 'vulnerability' and 'special needs', which justifies such an extension.

9.6.2 Deepening Policy Support to Prepare for Graduation

As noted earlier, pharmaceutical products are now eligible for a 10% export subsidy (cash assistance). In contrast, APIs are eligible for a 20 per cent cash incentive on exports and other incentives in Bangladesh. After graduation, it is unlikely that export incentives would comply with the WTO Agreement on SCM.¹⁷² Therefore, it is time to implement well-planned strategies that address both the short-term goal of maximising the current policy space and the long-term objective of preparing the industry for a significant shift in the regulatory regime after graduation. One option could be to maintain the current level of cash assistance while increasing the rate for any additional exports made annually until graduation.¹⁷³ Another option is supporting export-oriented firms' service-related activities, such as human resource development, training, skill enhancement, and technology accumulation. In addition, the private sector must conduct research to design and demand WTO-compliant export incentives.¹⁷⁴

9.6.3 Exploring scope for Joint Venture and Contract Manufacturing

Bangladesh should take advantage of the TRIPS transition period by increasing FDI in the pharmaceutical industry through joint ventures with MNCs and foreign firms. Large MNCs operating in highly regulated markets actively pursue joint venture opportunities in developing and least developed countries.¹⁷⁵ As its domestic market will be more open and competitive after graduation, Bangladesh must explore contract manufacturing opportunities with MNCs.¹⁷⁶ Government can offer financial and tax incentives to capture a portion of the global contract manufacturing market, valued at \$79 billion in 2019.¹⁷⁷

Though the history of collaboration between local manufacturers and major MNCs is extensive, the industry's involvement in contract manufacturing has been restricted to the formulation of drugs during their final stages, which requires minimal technological expertise. Through technology transfer and capacity building, full-scale contract manufacturing with

¹⁷² Article 3 of the Agreement prohibits subsidies based on export performance. Article 6 states that industry-, region-, and firm-specific subsidies are subject to countervailing measures or other retaliatory actions from other countries.

¹⁷³ Such assistance should not place undue strain on the public exchequer while simultaneously promoting additional exports and expanding the export base. In addition, support measures for exports to highly regulated markets, such as the European Union, the United Kingdom, and the United States, should also be carefully considered, as export success in these markets will yield enormous profits.

¹⁷⁴ Razzaque, Rabi and Akib (n 33) 398.

¹⁷⁵ According to reports, several Indian and Chinese pharmaceutical companies have already signed contracts to expand their collaboration with local firms. In addition, once production begins at the API park, Bangladeshi firms could manufacture APIs for foreign companies for domestic use and export, thereby increasing the local production base and export revenue and technology transfer. Nandita Vijay, 'India Stands to Benefit from Bangladesh for API Markets' <<http://www.pharmabiz.com/NewsDetails.aspx?aid=121680&sid=21>> accessed 25 December 2022.

¹⁷⁶ MNCs can avoid making substantial capital investments for drug production by utilising the local contract manufacturer's plant and equipment. Bangladesh has a robust manufacturing base and lower manufacturing costs than its competitors, making it an excellent candidate for contract manufacturing.

¹⁷⁷ Nigel Walker, 'Strong Growth Ahead for Contract Manufacturing' (*Pharma Manufacturing*, 18 January 2016) <<https://www.pharmamanufacturing.com/articles/2016/strong-growth-ahead-for-contract-manufacturing/>> accessed 16 May 2022.

MNCs will help develop the industry's research, clinical trial, and custom synthesis capabilities.¹⁷⁸

Moreover, with an estimated \$251 billion worth of patented drugs set to lose their patent protection by 2024,¹⁷⁹ and the declining cost advantages of prominent global generic hubs such as China and India, the Bangladeshi pharmaceutical industry can leverage its experience in manufacturing otherwise patented drugs to benefit from this trend.

9.6.4 Development of API Manufacturing Capacity

The current underdevelopment of the API sector is a significant constraint, as local firms cannot produce most of the APIs required for new patented products. In addition, the sourcing of APIs and price uncertainty are significant obstacles. API production is a high-volume, low-margin industry dependent on economies of scale and dedicated production lines. Therefore, a robust petrochemical industry is required to attain cost leadership in API production, which can assist in strengthening backward links.¹⁸⁰ To accomplish these objectives, the Government and BAPI may work together to create institutional skills to enhance synthetic chemistry capabilities.¹⁸¹

Policymakers in Bangladesh have acknowledged the importance of a robust and competitive API industry, and some vital policy steps have been taken, including the adoption of the National API (Active Pharmaceutical Ingredients) and Laboratory Reagents Production and Export Policy in 2018, the establishment of API Park and the provision of tax incentives for production.¹⁸² However, for new and more sophisticated pharmaceuticals, priority investment in R&D is necessary.¹⁸³

9.6.5 Investment in R&D

Bangladesh relies heavily on reverse engineering to produce pharmaceuticals. Incremental innovation, which will make local firms more competitive in the global generics sector, will

¹⁷⁸ Razzaque, Rabi and Akib (n 33) 397. A proactive initiative in this regard could encourage MNCs, particularly those operating in Bangladesh and other LDCs, to source their low-cost generics from Bangladesh, increasing export supply via contract manufacturing. Moreover, some pharmaceutical companies in developed nations are reportedly willing to sell their product licences due to insufficient manufacturing facilities and cost disadvantages. In contrast, many Bangladeshi firms maintain manufacturing facilities for commercial production and distribution at highly competitive prices. Therefore, it is possible to acquire such product licences and expand exports.

¹⁷⁹ Indian Pharmaceutical Agency, 'The Indian Pharmaceutical Industry- the Way Forward' (2019) Indian Pharmaceutical Alliance, Mumbai.

¹⁸⁰ According to experts, Bangladesh's absence of a robust petrochemical industry limits the pharmaceutical supply response.

¹⁸¹ Chaudhuri, 'Evolution of the Pharmaceutical Industry Bangladesh, 1982 to 2020' (n 20) 22. Domestic manufacturing of patent-protected high-value API molecules will reduce dependency on international markets. In addition, improved capacities will allow the production of newly patented APIs, increasing exports of generic drugs when the API loses its patent protection. Without a developed API sector, Bangladesh may not reap the full advantages of the absence of product patent protection.

¹⁸² BIDA (n 21).

¹⁸³ The API Park and other incentives reduce investment and production costs for APIs; However, if companies do not have the skills and expertise to make APIs, these incentives will not work.

require technological upgrading and investments in API skills development.¹⁸⁴ To accomplish this, government support can increase R&D expenditures across the sector. In addition, the policies pursued by China and India demonstrate that developing a large-scale pharmaceutical capability will demand a planned strategy for fostering expertise and attracting substantial investment.¹⁸⁵ It is also vital to implement the 2018 API Policy with priority.¹⁸⁶

9.6.6 Development of Pharmaceutical Infrastructure

The industry is deficient in the crucial infrastructure necessary to ensure its productivity and competitiveness on a global level.¹⁸⁷

a. Bioequivalence (BE) testing facilities are vital for companies exporting to regulated and semi-regulated markets.¹⁸⁸ Currently, Bangladeshi producers depend heavily on the BE testing¹⁸⁹ facilities of India, Malaysia, and several other countries for the test at high prices.¹⁹⁰ The costs and time can be significantly reduced if the test is conducted domestically.¹⁹¹ Bangladesh also falls short in private-sector contract research organisations (CROs) that conduct BE tests globally.¹⁹² Industry experts believe Bangladesh could become a hub for BE testing facilities due to its large population and manufacturing capacity.¹⁹³

b. Special economic zone (SEZ) for pharmaceuticals can increase export capacity.¹⁹⁴ Evidence from China and India shows that numerous SEZs have increased pharmaceutical exports.¹⁹⁵

¹⁸⁴ Padmashree Gehl Sampath, 'Intellectual Property in Least Developed Countries: Pharmaceutical, Agroprocessing, and Textiles and RMG in Bangladesh' (Study Prepared for UNCTAD as a Background Paper for The Least Developed Countries Report 2007)' (UNCTAD 2007) 8. Private sector investment in R&D is scarce in Bangladesh. For instance, the largest and third largest pharmaceutical companies in Bangladesh, Square Pharmaceuticals and Beximco Pharma, spend only 0.27 and 1.25 per cent of their revenue on R&D, respectively. (Annual Reports, 2018-19).

¹⁸⁵ India and China offer significant examples of government interventions that have contributed to expanding their pharmaceutical industry.

¹⁸⁶ National API (Active Pharmaceutical Ingredients) and Laboratory Reagents Production and Export Policy 2018; The 2018 API Policy mandates that API producers allocate at least 1 per cent of their annual turnover to research and development. Local manufacturers may develop a research-oriented attitude if this provision is successfully implemented. The policy has also highlighted the importance of academic and research institutions partnering with industry to increase productivity.

¹⁸⁷ Interviewee-2 has emphasized that the pharmaceutical industry has been disappointingly sluggish in developing crucial infrastructure, such as the ongoing API park and the installation of an effluent treatment plant. Other expert interviewees aligned with his views.

¹⁸⁸ Sampath (n 179) 8.

¹⁸⁹ BE testing that employs a variety of testing procedures, including clinical studies on human volunteers, is required by foreign markets for product registration to assess the interchangeability of a generic drug with its brand-name equivalent.

¹⁹⁰ Rizwan and Kathuria (n 28). BE test abroad costs between \$50,000 and \$200,000 per product.

¹⁹¹ The Government has already started a project to construct BE testing facilities, but completion of the project is highly delayed.

¹⁹² IPA (n 55). Pharmaceutical companies frequently encounter challenges when conducting clinical trials in such government facilities.

¹⁹³ Razzaque, Rabi and Akib (n 33) 392.

¹⁹⁴ This SEZ should have the infrastructure and an industry structure that meet global standards. SEZs should also offer expedited permit processing, reduced taxes or fees, and simplified controls over the movement of capital and goods.

¹⁹⁵ Razzaque, Rabi and Akib (n 33) 391.

c. High-end export infrastructure: Due to the extreme storage sensitivity, cold chain system, and handling conditions required for pharmaceutical and biological products, establishing a dedicated cargo storage and handling zone exclusively for sensitive pharmaceuticals (such as biologics, insulins, vaccines, etc.) may be an essential step for increasing the export of high-end drugs.¹⁹⁶

9.7 Findings

The case study highlights the following key findings:

- a) The Bangladeshi pharmaceutical industry has greatly benefitted from LDC-specific exemptions, notably the transition periods under the TRIPS Agreement, which have been extended twice so far. These exemptions have allowed the country to access essential medicines at a lower cost and fostered the growth of the local pharmaceutical sector.
- b) Upon graduation, the industry will lose access to the transition periods, limiting its ability to produce and export generic medicines without paying royalties to patent holders. This may hamper the industry's growth and competitiveness.
- c) The withdrawal of exemptions under the SCM Agreement and other WTO laws will disrupt government incentives for the industry in Bangladesh, which may potentially slow growth.
- d) The trade regime currently does not have a specific mechanism to help LDCs overcome these graduation challenges. Despite their proposals for graduation support, there seems to be no prospect of a prompt resolution.
- e) It is now for the Bangladeshi Government to engage with the WTO to achieve any buffer for a smooth transition and carefully plan and support the industry's growth after graduation.

9.8 Conclusion

The case study concludes that the Bangladeshi pharmaceutical industry has greatly benefitted from LDC-specific transitional measures, and graduation will pose significant challenges. Furthermore, it has revealed significant implications for the sector in Bangladesh and for graduating LDCs, the WTO, and the current graduation regime.

Graduating LDCs need to carefully consider the implications of losing the TRIPS transition period and other exemptions. In addition, they must develop strategies to mitigate the potential adverse effects on their pharmaceutical industries and public health. This may include investing in capacity building, enhancing R&D, and exploring technology transfer and IPR protection mechanisms.

The WTO should recognise the challenges faced by graduating LDCs and consider options to provide graduated countries with a smoother transition. This may involve extending the transition periods or offering a phased withdrawal of exemptions and benefits.

The current graduation regime should be re-evaluated to better address the challenges faced by LDCs in maintaining and growing their industries, including the pharmaceutical sector. In

¹⁹⁶ *ibid.* India's 'Pharma Zone' for such products can serve as an inspiration. Furthermore, Bangladesh may seek WHO assistance to bring these facilities to meet international standards.

addition, the UN, WTO, and other relevant international institutions must work together to develop a more inclusive and supportive framework that helps graduating countries transition smoothly without disrupting their development gains.

The case study underscores the need for graduating LDCs, the WTO, and the current graduation regime to work collaboratively to mitigate these challenges and ensure continued growth and development for these countries and their industries.

CHAPTER 10: CONCLUSION

10.1 Introduction

This thesis contributes to the emerging body of evidence regarding the importance of prioritising the unique needs and interests of graduating LDCs within the MTS. Moreover, it contributes to ongoing discussions regarding redefining the trade and development nexus in the MTS, including reforming SDTs to establish an appropriate balance between development levels and trade liberalisation commitments. Additionally, it provides significant insights into the necessity of implementing a well-designed, incentive-based graduation mechanism to ensure the sustainable and irreversible graduation of LDCs, enabling them to continue their journey toward development without any artificial disruptions.

This thesis advances knowledge in three distinct but interdependent ways: First, by determining whether SDT has contributed to its ostensible goal of promoting development in developing countries, particularly in LDCs, as evidenced by specific sectors in Bangladesh. Second, by examining whether the concept of graduation has been seriously considered in the MTS and why a well-considered strategy is required to achieve the long-promoted development goals of the international trading system. Third, by demonstrating how specific industries that benefit from LDC-specific exemptions and market access may face challenging obstacles due to graduation.

10.2 Research Objectives and Central Arguments

This study has sought to assess the effectiveness of existing STD mechanisms and LDC graduation strategies and identify strategies that can facilitate the smooth graduation of LDCs. To achieve this objective, the research has comprehensively examined the procedures and support mechanisms in place for graduating LDCs. This has been achieved by analysing the graduation experiences of the six LDCs. Using this methodology, the present study has sought to answer the primary research question: is the SDT regime prepared to support LDCs in graduating with momentum and development, as envisioned by the graduation concept? In particular, the research has endeavoured to answer the research question by establishing the three central arguments that inform and permeate the entire thesis.

First, the MTS is not designed primarily to facilitate the trade of DCs. Therefore, the products of interest to developing and least developed countries are heavily protected, and their exports are punished in developed countries with high tariffs. Agricultural subsidies and other trade-distorting practices have amplified these difficulties.

Second, the trade issues that LDCs face when attempting to increase their share of global trade are rooted in their domestic conditions and should therefore be addressed domestically. In other words, research indicates that effective domestic capacity building can increase the ability of LDCs to engage in more trade and reap the benefits of the SDT regime.

Thirdly, according to the research findings, sustainable graduation requires that the graduating LDCs receive streamlined graduation support. WTO, developed countries and the specific developing countries granting DFQF market access to LDCs play a crucial role in ensuring that graduates continue to increase their trade potential even after graduation.

Consistent with these arguments, this thesis has advanced the research objective by addressing the three central issues for investigation: how the SDT can be made more effective by engaging the concerns of the beneficiaries, how the graduating LDCs can be better supported with a smooth graduation support system; and how the governments of graduating LDCs can overcome the challenges of graduation through strategic planning and implementation.

10.3 Research Outcome: The Answer to the Research Questions

The thesis has demonstrated that LDC-specific SDT provisions are here from a long-term economic and historical perspective and should not be removed arbitrarily upon LDC graduation. Moreover, SDT arrangements have enabled LDC businesses to access overseas markets and establish a foothold in highly competitive markets. Consequently, the withdrawal strategy of SDT benefits, precisely the DFQF benefits, is crucial to the sustainable graduation journey of an LDC.

With the support of a conceptual framework, a theoretical and literature review, and two case studies, the research questions are answered by demonstrating that SDTs are sometimes effective. However, their usefulness may be disrupted by LDC graduation.

A. Do the rules of SDT, as developed from the GATT to the WTO, achieve the goals of fostering economic development?

The developed countries primarily design the MTS to suit their interest best and increase trade in products of their interest. At the time, DCs had little leverage to remove these trade barriers for products of their interest, and industrialised countries were unwilling to do so unilaterally. Decades have passed, and many of these obstacles continue to exist. DCs continue to face high tariffs, tariff escalation, domestic subsidies, and other trade restrictions on their exports to developed countries, mainly agricultural and labour-intensive manufactured goods.¹ A development-friendly trade regime would link implementation capacity and levels of development to a country's commitment to liberalisation. It would also require developed countries to make a binding commitment to eliminate export subsidies, decouple agricultural support, and significantly reduce or eliminate tariffs on export-oriented products of interest to DCs, thereby creating growth and development opportunities for DCs.²

SDT provisions were inserted into the MTS as ad hoc measures to address the absence of requirements addressing the needs of DCs. Still, GATT provided some differentiation in commitments based on the level of development of its members. However, the WTO diluted the system by establishing a 'single undertaking' for all countries and limiting SDT to transition periods and non-binding technical assistance. As a result, their effectiveness has been highly

¹ Gerard Curzon, 'Multilateral Commercial Diplomacy; the General Agreement on Tariffs and Trade and Its Impact on National Commercial Policies and Techniques.' [1965] *Multilateral commercial diplomacy; the General Agreement on Tariffs and Trade and its impact on national commercial policies and techniques*. 225–226.

² World Bank, 'Global Economic Prospects 2004 : Realising the Development Promise of the Doha Agenda' (World Bank 2004) 205.

debated, and examples of cases where the use of SDT has produced positive outcomes are few. LDCs and developing nations have utilised these benefits for decades, but their trade profiles have changed little. Thus, the dissatisfaction has been more pronounced than in the few instances in which they have helped countries and businesses trade more efficiently and integrate with global value chains, thereby contributing to the growth of their countries.

The regulatory part of the SDT provisions has been largely ineffective because they ‘lack precision, effectiveness, operationality and enforceability.’³ The market access SDTs have produced gains in some beneficiary countries in some sectors. Still, the gains are uneven across beneficiaries and industries within a single beneficiary country. The study finds that Bangladesh is one of the few LDCs that has converted market access SDT benefits into trade gains. The RMG and pharmaceutical industries have benefited tremendously from trade-related international support measures, albeit in various ways. RMG has utilised the DFQF regimes to accelerate its growth and broaden its market access in key export destinations. In addition, pharmaceuticals benefit from the non-implementation of TRIPS-required patent measures and policy space regarding subsidies and regulations. Besides these two industries, no other sector in Bangladesh has benefited significantly from SDT incentives.

B. Is the current trade regime adequately equipped to support the development needs of graduated LDCs?

Progressively, the UN General Assembly and the Programme of Action for the LDCs have established the legal framework for a graduation support mechanism to assist graduating and graduated LDCs in sustaining their growth momentum.

Graduation is currently characterised by the absence of a robust support mechanism, and the available supports are limited, time-bound, and primarily advisory in nature. Even most entities within the UN development system lack specific graduation support mechanisms for LDCs. Similarly, the WTO does not have a specific support mechanism for graduating LDCs. In recent years, the topic of LDC graduation has also gained momentum within the WTO. In 2017, the LDC Ministerial Declaration at the 11th WTO Ministerial Conference called for positive actions on graduation by extending LDC-specific preferences to the recently graduated countries and LDC-specific S&D treatment to LDCs for a period commensurate with the country's level of development. The WTO LDC Group subsequently submitted several graduation-related proposals to various WTO bodies. However, no decisions have yet been made regarding these proposals.

Regarding DFQF market access, only the EU and Turkey have three-year transitional periods for graduated LDCs to prepare for the total withdrawal of tariff benefits provided under LDC-specific schemes. The new UK GSP scheme that goes into effect in early 2023 will be the most significant improvement ever made to integrating support systems for graduated LDCs. They will continue to have access to duty-free market access benefits if they meet World Bank

³ WTO, ‘The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness’ (WTO 26 February 2019) Communication from China, India, South Africa, The Bolivarian Republic of Venezuela, Lao People’s Democratic Republic, Plurinational State of Bolivia, Kenya and Cuba WT/GC/W/765/Rev.1 2.

criteria for low- and low-middle-income countries. Other preference-granting countries have not yet taken steps toward integrating a graduation support system into their DFQF programmes.

The primary objective of graduation is not to strain a country's trading capacity to the point that it reverts to its pre-graduation level but rather to facilitate its growth with momentum so that it can continue to grow and expand even without such support after graduation.

If any graduating LDCs experience a reversal in development, it is regrettable and undermines the primary goal of establishing the group and lifting millions out of poverty. On the other hand, graduation-specific international support measures costing essentially nothing or a negligible amount for developed countries may provide a substantial boost for sustainable graduation.⁴

A defined, concrete, and incentive-driven graduation support system can bolster the exporting firms' confidence in the graduating LDCs and prepare them for the impending trade regulation changes. In addition, successive UNGA resolutions have urged trading and development partners and the WTO to support 'smooth transition'.⁵ An overarching objective of the IPoA was the graduation and smooth transition of the LDCs.⁶ The DPoA reiterated that no graduating LDCs 'should have its development progress disrupted or reversed'.⁷ Commitment to smooth graduation support exists in international documents, but in the real world, it is rare. The UNCDP, which oversees the graduation procedure, has called for the addition of crucial support to ensure the sustainability of the process. In the implementation of these commitments and to ensure a 'soft landing' as opposed to a 'hard landing' that could stifle development gains,⁸ the trading system must formulate and implement a 'new strategy for graduation with momentum' to ensure that-

- the preferential market access benefits are phased out gradually,
- access to other SDT provisions is phased out gradually, and
- the WTO ambiguities are interpreted in favour of graduating LDCs.

The UNCTAD-proposed Strategy for Graduation with Momentum, as analysed in Chapter 7, could be a viable option to follow.⁹ The proposed graduation strategy will allow LDCs to

⁴ WTO and EIF, *Trade Impacts of LDC Graduation* (World Trade Organization 2020) 34. The LDCs are marginal players in international trade. In 2018, the 47 LDCs only contributed 0.95 per cent of global exports. The exports of goods and services from the 12 graduating LDCs accounted for only 0.45% of global exports.

⁵ UN General Assembly, 'Smooth Transition Strategy for Countries Graduating from the List of Least Developed Countries' A/RES/59/209, Resolution adopted by the General Assembly on 21 December 2012; UN General Assembly, 'Smooth Transition for Countries Graduating from the List of Least Developed Countries' 67/22, Resolution adopted by the General Assembly on 21 December 2012.

⁶ UN-OHRLLS, 'Programme of Action for the Least Developed Countries for the Decade 2011-2020' (UN 2011) Adopted by the IV UN Conference on the LDCs (Istanbul, 9-13 May 2011), A/CONF.219/7.

⁷ UN General Assembly, 'Doha Programme of Action for the Least Developed Countries for the Decade 2022-2031' (UN 2022) A/CONF.219/2022/3 para 165. It also referred to the LDC group proposals at the WTO relating to a smooth transition of the graduating LDCs and 'seek to further examine these issues.'

⁸ Taffere Tesfachew, 'Support for Post-Graduation Soft-Landing of LDCs: Implications in the Context of the WTO' (CUTS International 2018) 27–28.

⁹ UNCTAD, 'Strategy for Graduation with Momentum: Bridging Pre-Graduation and Post-Graduation Development Processes in the Least Developed Countries' UNCTAD Policy Brief No.99, April 2022.

graduate with momentum through a policy-and-strategy synergy between pre-graduation development trajectory and post-graduation sustainable development.¹⁰

C. How will Bangladesh's specific sectors be affected by LDC graduation?

To gain a comprehensive understanding of the impact of graduation, this study analyses the effects on Bangladesh's apparel and pharmaceutical sectors, which are poised to undergo significant changes in terms of the support they have previously received and their export opportunities in international markets.

Various studies estimated a loss of approximately one-third of the RMG sector's export revenue, which accounts for more than eighty per cent of the country's total export revenue. In addition, the pharmaceutical industry may experience a slowdown in growth, threatening access to medicine for Bangladeshi citizens and citizens of many poorer countries that import cost-effectively from Bangladesh.

C.1. Impacts on the apparel industry:

The following summarises the effects on the apparel industry:

a. Preference erosion in exports

The loss of DFQF market access in its major export destinations will negatively affect the industry. Bangladesh is by far the largest recipient of the EU EBA scheme. However, following graduation, its apparel products will be subject to average EU tariffs of more than 9 per cent. Similar increases will occur in almost all other preferential markets, including Canada, Japan, Australia, South Korea, China, and India. In addition, Canada will impose tariffs of up to 16 per cent. The United Kingdom is an important exception, as its new GSP schemes would allow Bangladesh to continue to enjoy DFQF access after graduation. Bangladesh currently enjoys no such preference on the US market, so there will be no modifications to market access conditions.

With the increase in tariffs, Bangladesh also has to face stricter rules of origin to get access to general GSP schemes designed for DCs. For instance, the EU GSP+ or Standard GSP requires clothing items to go through 'double transformation' instead of 'single transformation'.¹¹ Loss of LDC-specific preferential treatment in regional trade agreements will also impact. For example, as an LDC, Bangladesh benefits from the SAFTA and the APTA.

b. Loss of policy space

Since the 1990s, the apparel industry has received numerous domestic incentives and cash assistance, many of which may be classified as export or local content subsidies. Such incentives are integral to promoting Bangladesh's clothing exports. However, Bangladesh is required to discontinue providing such incentives for compliance with the SCM agreement

¹⁰ Post-graduation support measures can only be effective if they build on pre-graduation skills and development. Therefore, the 12-year graduation with momentum strategy also connects the pre- and post-graduation processes.

¹¹ Double transformation refers to two distinct manufacturing processes undertaken within the beneficiary country, i.e., textile production and garment manufacturing.

following graduation. Moreover, its DFQF market access benefits could have helped to attract some FDI in the sector thus far.¹² There may be unintended consequences on such FDI following graduation.

C.2. Impacts on the pharmaceutical industry:

The following is a summary of the effects on the pharmaceutical industry:

a. Loss of policy space

Graduation implies that Bangladesh must bring its domestic laws and regulations into compliance with the TRIPS.¹³ Bangladesh can now manufacture any drug, including patent-protected drugs, because of the pharmaceutical transition period under TRIPS. Approximately one-fifth of locally produced drugs are currently protected by a patent. Through reverse engineering and subsequent innovation, Bangladesh obtained crucial expertise in producing these drugs, which require advanced technological knowledge. In the 1980s, MNCs controlled seventy-five per cent of the pharmaceutical market. Local manufacturers have grown and outperformed multinational corporations because of policy interventions (such as import restrictions), many of which violate the TRIPS Agreement. Ninety per cent of the market is controlled by local firms, a relatively rare occurrence internationally. After Bangladesh's graduation, when its patent laws are required to comply with TRIPS provisions, it will no longer enjoy the benefits. Due to mandatory patent implementations, firms will incur greater expenses when importing vital raw materials, such as APIs. As a result, the cost of production will undoubtedly increase. Due to market liberalisation, medicine imports will be easier and, in some cases, cheaper for non-patented items. As a result, maintaining competitiveness and market share in the domestic market will be increasingly difficult for local businesses. In addition, mandatory patent protection for essential drugs would likely result in a price increase for patented medications. The increased cost of essential medications may make accessing them difficult for low-income people.

In addition to TRIPS, the WTO has numerous rules governing the non-discriminatory treatment of foreign products, quantitative restrictions, and measures that regulate investment and prohibit subsidies. Each of these aspects impacts the future pharmaceutical policies in Bangladesh. Furthermore, the pharmaceutical industry will face increased uncertainty because of the country's imminent participation in FTAs or RTAs to mitigate the effects of globalisation on its clothing industry.¹⁴ Numerous bilateral, regional, and mega-regional treaties outside of the WTO typically contain TRIPS+ provisions that could further restrict policy space and make it more challenging for Bangladesh's pharmaceutical industry to flourish.

¹² Marco Fugazza and Claudia Trentini, 'Empirical Insights on Market Access and Foreign Direct Investment' (UNCTAD 2014).

¹³ Bangladesh enacted a new Patent Act in April 2022 to gradually achieve compliance with the TRIPS provisions. However, the Act will not govern pharmaceutical patents so long as Bangladesh is eligible for the TRIPS transition period for pharmaceutical products.

¹⁴ To absorb the shock, the government is working to sign FTAs with significant export destination countries even before graduation.

b. Loss of exports

Bangladesh is the only LDC with significant production and exporting capacity.¹⁵ Its pharmaceutical industry may be considered a 'global good' as it serves DCs cheaply across Asia, Africa, and Latin America.¹⁶ Bangladesh currently exports locally produced patented drugs to LDCs and other countries where those drugs are not patented.¹⁷ Restrictions on the production and export of patented drugs will significantly impact Bangladesh and other LDCs that import drugs from Bangladesh at affordable prices.¹⁸

10.4 Other Findings

a. The WTO debate on country classification will lead nowhere.

To increase the effectiveness of SDT, the WTO must abandon the contentious but unnecessary debate on the country [re] categorisation and adopt a problem-based and country-specific strategy. However, it is unlikely that WTO members will reach a consensus on re-categorisation. It is also highly improbable that new country categories will address the primary issue with SDT in the WTO, which is managing implementation and reform so that adjustment costs do not outweigh expected gains. This requires that SDT ensure the linking of capacity to commitments, assist DCs in managing the reform process, and leverage the flexibility of agreements to sequence and prioritise reforms within an overarching policy framework.¹⁹ Technical assistance and capacity building, which WTO members placed at the centre of the organisation's work at Doha, are also crucial for DCs to reap the benefits of open trade policies and a rules-based trading system. Again, however, the TFA is an effective framework for this type of advancement.

b. Minimisation of unfair trade practices by developed countries is crucial

To remain relevant, the WTO must be able to address the concerns of most of its members, which are DCs. The most significant contribution the WTO can make to DCs is reducing or eliminating trade-distorting measures on their products of interest.²⁰ A development-friendly trade regime requires reorientating the MTS and eliminating trade-distorting practices by developed countries. For example, Bangladesh would not have to worry about the effects of graduation if there were not such a high tariff on textiles. So long as these cannot be achieved, SDT preferences serve as stopgap measures. The textile industry has frequently played a pioneering role in the industrial development of many countries with high or moderately high

¹⁵ Most LDCs lack the capacity to produce essential pharmaceuticals, and the availability of drugs at affordable prices is vital for them. Bangladesh exported to 27 LDCs in 2020, which accounts for about one-third of its total exports.

¹⁶ Daniel Gay and Kevin Gallagher, 'The Need to Extend the WTO TRIPS Pharmaceuticals Transition Period for LDCs in the COVID-19 Era: Evidence from Bangladesh' (UN 2020) UN CDP Policy Review No. 10.

¹⁷ EPB data; LDCs are a significant market for Bangladeshi drugs accounting for around 30 per cent of total exports in 2020. Bangladesh's export-oriented pharmaceutical industry is well-positioned to serve a significant portion of the expanding LDC markets and other low-income nations with limited or no manufacturing capacity due to the TRIPS flexibility and supply-side capacity.

¹⁸ Sudip Chaudhuri, 'Making Medicines for Pandemics: Can Bangladesh Do for Covid-19 What India Did for HIV/AIDS?' (2020) The India Forum. The pandemic has shown that Bangladesh can play a crucial role in helping countries that do not have enough manufacturing capacity to access essential medicines.

¹⁹ Amar Breckenridge, 'Developing an Issues-Based Approach to Special and Differential Treatment' (Inter-American Development Bank 2002) 2197.

²⁰ *ibid* 3.

incomes today.²¹ This has been the case for several countries that have moved beyond textile exports and are now successfully exporting more sophisticated goods. There is currently no product category in which the export share of the LDCs is greater than in textiles and apparel.²² Over the past two decades, the apparel and textile industries have undergone extensive trade liberalisation reforms, including unilateral initiatives.²³ However, it remains one of the most protected industries in the world due to high tariffs. Bangladeshi exporters pay the highest rate of tariffs among the 232 exporting nations to the USA, as the country imposes substantial import taxes on apparel products. As a proportion of their total imports, several other developing nations are also subject to high tariff barriers.²⁴ This is a textbook example of how the MTS operates, disregarding the interests of its poorest members. After graduation, Bangladesh will encounter similar extreme tariff situations in other export markets. If the global trading rules were not unfavourable to Bangladesh, seeking extensions of preferential schemes after graduation would not have been necessary. Furthermore, Bangladesh lacks the leverage to change these rules in its favour. Many developed countries have done a commendable job of providing unilateral market access to labour-intensive industrial products and contributing to developing and reducing poverty in low-income countries. It is time to reduce import tariffs, make the opportunities permanent, and make them available to those who have not benefited from such programmes due to various restrictions and conditions.

c. National graduation strategies are vital for a sustainable transition:

Graduation affects each LDC differently, and national strategies must address the obstacles each LDC faces on the path to its sustainable graduation. Capacity building is the most critical factor in ensuring that trade growth continues and that risk following graduation is minimal. Therefore, sector-specific planning and implementation are required to prepare industries for graduation challenges.²⁵ In principle, graduation should incentivise LDCs to pursue development by supporting and obligating their governments to implement adjustment strategies that strengthen their industries.

Actively utilising WTO options, engaging with major trade partners, signing FTAs with selected countries, participating in significant RTAs, and supporting businesses that bear the brunt of graduation are crucial for navigating this challenging transitional phase. These are part of what may be called ‘growth pains’²⁶ that LDCs must go through to transition to a more

²¹ Ezra F Vogel, *The Four Little Dragons: The Spread of Industrialization in East Asia* (Harvard University Press 1991).

²² Johannes Van Biesebroeck and Elena Zaurino, ‘Effects of Trade Liberalization on Textile and Apparel Exports from Sub-Saharan Africa’ [2019] World Bank Policy Research Working Paper 2.

²³ For several decades, the potential for the textile industry to stimulate industrial growth has been limited. Under the Multi-Fiber Arrangement (MFA), import quotas on the markets of developing nations froze production shares at their historical levels. Abolishing all quotas by 2005 has re-established the industry's capacity to stimulate industrialisation. Since 2001, the EU EBA scheme has granted generous market access to LDCs by eliminating tariffs and quotas for LDCs. The African Growth and Opportunity Act (AGOA) offers African exporters similar advantages. The gradual easing of import quotas as the MFA was phased out under the Agreement of Textile and Clothing (ATC) enabled the two market access liberalisations to increase exports from developing and least developed countries to these two developed markets.

²⁴ Figure-1 in Chapter 3 reflects the distortion in developed countries' trade practices.

²⁵ Chapters 8 and 9 examine the best options for Bangladesh to pursue in the apparel and pharmaceutical industries.

²⁶ Mancur Olson, ‘Rapid Growth as a Destabilising Force’ (1963) 23 *The Journal of Economic History* 529, 550. ‘Growth pains’ refers to the range of economic, social, and political stresses that can accompany rapid

productive and respectable group of countries. However, these tasks may seem insurmountable for an LDC with many inherent difficulties in international engagements and national policy implementations. Therefore, the question arises as to whether the existing SDT and graduation regime presents challenges or even renders the adjustment process difficult, making it imperative to reform the system.

d. Sudden withdrawal of LDC benefits is not cost-effective.

The LDC category was created for a specific reason. It seeks to identify nations with severe structural impediments to economic growth, impediments that make them likely to remain poor over the long term. They are granted DFQF market access, expedited development aid access, and additional support. When a small number of LDCs have reached a point where they can be removed from the category, it is reasonable that any actions that can impede their rate of development must be taken with caution and after a thorough cost-benefit analysis. The WTO, UNCTAD, and other UN system organisations have conducted studies demonstrating the dangers of abruptly withdrawing support measures upon graduation.²⁷ In addition, most of the world's poorest people live in several of these countries.²⁸ Trade as a tool for development may play a more prominent role in alleviating poverty in these nations. According to a long-term cost-benefit analysis, trading partners must recognise that the continuation of support measures for an extended duration is more cost-effective than their abrupt withdrawal.²⁹

e. A well-planned graduation support mechanism is the need of the day.

The LDC category was created more than 50 years ago, but graduation rates did not increase until the IPoA set a lofty goal of graduating half of the LDCs in just ten years. Even though it has not happened, a record number of LDCs have started their graduation journey. Setting goals is more effortless and politically rewarding than achieving them, which requires careful planning, empowering incentives, and a growth-promoting support mechanism. However, graduation has been portrayed as a fearful growth-threatening step for LDCs, when it could be a confidence-boosting development milestone that inspires the possibility of consistent growth and rapid poverty reduction. It cannot be accomplished without genuine incentives that matter to the graduating LDCs, such as incentive-based market access and capacity-building assistance. Only advisory services cannot fill the void left by withdrawing LDC-specific support. Even though the majority of LDCs have not benefited significantly from DFQF programmes, it is possible that they would not have made it this far without those supports. Therefore, a well-thought-out graduation support strategy is now required to ensure graduation is sustainable, irreversible, and growth-promoting rather than growth-destructive.

development progress. Managing them is key for a smooth transition. Olson argued that institutional capacity building might help emerging nations 'endure the growing pains that industrialisation will involve'.

²⁷ WTO and EIF (n 12); UNCTAD, 'The Least Developed Countries Report 2016: The Path to Graduation and beyond: Making the Most of the Process' (UNCTAD 2016) UNCTAD/LDC/2016/Corr1 UNCTAD/LDC/2016/Corr.1; UNESCAP, 'In Preparation for WTO MC12: Safeguarding Trade Interests of LDCs and Securing Trade Interests of Graduating LDCs' (*ESCAP*) <<https://www.unescap.org/resources/preparation-wto-mc12-safeguarding-trade-interests-ldcs-and-securing-trade-interests>> accessed 22 November 2021.

²⁸ UNDP, 'Global Multidimensional Poverty Index (MPI) 2019' (United Nations 2019). India, Nigeria, Ethiopia, Pakistan, and Bangladesh are the top five countries with the highest concentration of poor people.

²⁹ 12 Graduating LDCs had a marginal global export share of 0.45% in 2019. As a result, continuing duty-free access to their products is not expensive for most preference providers.

f. UK-style GSP schemes can reduce graduation worries.

According to UNDP data, more than two-thirds of the low-income people (about 886 million) reside in middle-income countries. A further 440 million people live in low-income countries.³⁰ Trade as a tool for development has as its primary objective the reduction of poverty in DCs. Unfortunately, this has not been reflected in the preferential trade schemes of the many grantor countries. For instance, the United States imposes high tariffs on products from several LDCs, such as Bangladesh and Cambodia. The new UK Developing Countries Trading Scheme (DCTS) may serve as a beacon. It applies to 65 countries or territories, including 47 LDCs and 18 countries classified by the World Bank as low-income (LIC) and lower-middle-income (LMIC), currently receiving UK GSP. In addition, the scheme applies a stricter criterion for goods graduation, ensuring that only products that are genuinely competitive on the UK market are graduated from the DCTS. As a result, tariffs on labour-intensive manufactured goods, such as clothing and footwear, and foods not widely produced in the United Kingdom will benefit from lower or zero tariffs. This has ensured that the graduation of LDCs will not hinder their ability to profit from trade so long as they remain LICs or LMICs. This has also effectively shifted its focus from restricting beneficiaries' use of GSP benefits to expanding their use by countries that genuinely need them to export their way out of poverty. The WTO, as a multilateral trade forum, and the United Nations, a global sponsor of poverty reduction programmes, must encourage the expansion of carefully curated preferences to low-income countries that genuinely need them.

10.5 Limitations and Prospects for Further Research

A. Limitations of the research

- a. During the sampling procedure, Bangladesh government officials, international trade law experts, academics, and businesspeople from the Bangladesh RMG and pharmaceutical sectors were identified for interviews. They were contacted via phone calls and emails. Not everyone responded, particularly top businesspersons involved in national policymaking in the selected sectors did not provide a response.³¹ However, most responses came from Bangladeshi contacts, primarily due to the author's nationality and pre-existing connections. Therefore, there may be a bias in the case study of Bangladesh, as it is based solely on the findings gleaned from semi-structured interviews, and discussions from interviewees in the public and private sectors in Bangladesh. However, the existing literature has supplemented the data from a relatively limited number of interviews and discussions.³² Nonetheless, all the findings can shed light on the specific issues regarding the impact of graduation on the specific sectors of Bangladesh. A degree of uniformity is maintained because of my interviews with the key bureaucrats and experts who are actively involved in assessing the LDC graduation impact of Bangladesh or preparing for the graduation-induced changes to the trade regime.

³⁰ UNDP (n 28).

³¹ In the absence of direct interviews, I was still able to obtain their perspectives through the analysis of numerous interviews given by them to national media.

³² The limited response of other private and public sector officials may be attributable to a lack of willingness to participate, cultural barriers, and knowledge constraints.

- b. I have relied on the existing literature to examine the efficacy of the SDT, which has been the subject of numerous studies examining various facets of the principle. The focus of my research is on the impact on LDCs. Similarly, the trade impacts of LDC graduations have been examined in light of a few reports published by the WTO and a few other international and Bangladeshi organisations, as well as the scant literature that primarily addressed the issues in a fragmented manner. Local media reports and interviews with relevant business leaders and experts that have been published in the media have also been consulted. Consequently, my findings are affected by the limited treatment of the problem in the existing literature and other pertinent studies. The case study on the Bangladesh RMG and pharmaceutical industries was conducted to fill gaps in the current literature and to provide a comprehensive understanding of the potential impact of graduation on a very significant LDC.

B. The urgency for further research

LDC graduation is one of the least researched aspects of the low-income countries' development paradigm. This is true regarding the graduation process and its effects on individual LDCs. For decades, the idea has existed mainly on paper and failed to garner the attention of academics and policymakers. It came to light only after the 2011 adoption of IPoA, which established the ambitious graduation target. Despite this, academic research has avoided the topic for the most part. In recent years, a record number of LDCs have embarked on the path to graduation, prompting international organisations, including the UN system, to focus on this phenomenon. Nevertheless, there is little research that attempts to answer crucial graduation-related questions, such as how LDCs are impacted economically, socially, and politically; why LDCs have resisted graduation thus far; why LDCs are not supported adequately during the graduation process; what will be the cost of supporting graduating LDCs for a period after graduation; and what will be the implications of graduation on trade liberalisations.

Graduation is a significant development milestone for LDCs, marking the beginning of their journey as developing countries outside the LDC group. Graduation, as it is currently implemented, can have multidimensional effects on a graduated LDC, though it is contingent on achieving a certain level of development success. It aims to boost national confidence and prestige and attract investment, as the nation's credit ratings may improve as its development progresses. However, numerous concerns dominate its economic and other forms of development. Globally, the country will find it more difficult to obtain credit at concessionary rates. In most markets, tariffs and other obstacles will increase. Participation in international forums will become more challenging. However, the obstacles it faces as an LDC continue to hinder its development. It must maintain a faster economic growth rate during this challenging period to ensure its development does not stall and fall back into the LDC group. This may still be manageable, but complications may arise if the country relies heavily on exports and its previously duty-free exports are suddenly subject to all tariffs and obstacles. According to various studies, Bangladesh could lose up to 15% of its exports because of graduation.³³ This will severely affect the nation's households, which may experience a 4%

³³ Mohammad Razzaque, Hamim Akib and Jillur Rahman, 'Bangladesh's Graduation from the Group of LDCs: Potential Implications and Issues for the Private Sector' in Mohammad Razzaque (ed), *Navigating New Waters: Unleashing Bangladesh's Export Potential for Smooth LDC Graduation* (Bangladesh Enterprise Institute 2020);

decrease in income and consumption.³⁴ Maintaining a healthy growth rate and avoiding falling behind after such a significant shock will be challenging. However, these concerns are relatively novel and have not been studied extensively. Similarly, it is anticipated that the implementation of TRIPS in Bangladesh will significantly increase the price of insulin and, as a result, the poverty rate among diabetic households.³⁵ Therefore, numerous economic, social, political, and other ramifications of graduation in Bangladesh and other graduating LDCs merit in-depth examination from various angles.

10.6 Conclusion

Though the WTO is not a development organisation, it has development obligations as stated in its preamble and because of successive rounds of negotiations from the ITC to GATT to the present. Furthermore, the overwhelming presence of DCs within WTO membership implies an implicit commitment to prioritise their interests.

The WTO has achieved significant progress in liberalising trade in products of interest to developed countries. However, tariff walls protect agricultural and labour-intensive light manufacturing products globally. These trade-distorting practices have made it difficult for developing and least developed countries to use trade as a tool for development.

The SDT mechanism has been presented as a stopgap measure to achieve the same objectives through a different route when the needs of DCs for increased permanent market access to the markets of developed countries have not been met.³⁶ Various developed and developing country GSP programmes are intended to assist low-income DCs in pursuing export-driven development. However, the trade profile of most developing and least developed countries has not improved despite their access to such programmes, which calls into question their effectiveness. Nonetheless, they have assisted certain countries, especially in the industrialisation of specific sectors where tariff margins are exceptionally high. The GSP programmes have therefore benefited Bangladesh's labour-intensive clothing industry, which enjoys DFQF market access to various developed and developing country markets. In addition, the Bangladesh pharmaceutical industry has also benefited, albeit in a different way, from the policy space afforded to it as an LDC by its exemption from implementing various WTO provisions.

These development efforts have brought Bangladesh to the point of development where it meets the criteria for removal from the LDC list. Now that Bangladesh will be graduated, the DFQF market access and exemptions that helped it reach this stage of development will be removed. Moreover, Bangladesh is graduating at a time when the Covid-Pandemic and subsequent global economic uncertainties have severely impacted its economy. As graduation will bring significant changes, the transition period should be meticulously

Mohammad Masudur Rahman and Anna Strutt, 'Costs of LDC Graduation on Market Access: Evidence from Emerging Bangladesh' (2022) 0 Economic Systems Research 1.

³⁴ Rahman and Strutt (n 31).

³⁵ Md Deen Islam and others, 'The Social Costs of Graduating from Least Developed Country Status: Analysing the Impact of Increased Protection on Insulin Prices in Bangladesh' GEGI Working Paper 038, 05/2020 Global Development Policy Center, Boston University.

³⁶ As long as there are distortions in the WTO system against DCs (protection in agriculture and clothing, for example), distortions in their favour may be necessary as alternative economic solutions or as 'confidence-building' measures to prevent their alienation from the system.

planned, and Bangladesh should be supported throughout so that the transition is less rocky, and the country can maintain its growth momentum to reach the next stage of development.

However, the issue of graduation has never received serious consideration within the trading system. As a record number of LDCs are graduating, the multilateral trading regime and their trade partners must ensure that graduation does not disrupt their development. Graduation can be a cause for celebration, not dread; it can help a country begin a new phase of its journey with newfound confidence and competence. This vision inspired the formation of the LDC group. A well-designed graduation support system and low-cost incentives from trading partners can go a long way toward enabling LDCs to graduate with momentum and achieve further success in their efforts to use trade as a tool for development.

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APPENDICES

Appendix I

List of Participants Interviewed

	Participant Affiliation	Number
1	Centre for Policy Dialogue (CPD), Bangladesh	1
2	Centre for Policy Dialogue (CPD), Bangladesh	1
3	Research and Policy Integration for Development (RAPID), Bangladesh	1
4	WTO, Geneva	1
5	South Asian Network on Economic Modeling (SANEM), Bangladesh	1
6	WTO Wing, Ministry of Commerce, Government of Bangladesh	1
7	Department of Patents, Designs & Trademarks (DPDT), Ministry of Industries, Government of Bangladesh	
8	Bangladesh High Commission, The United Kingdom	1
Total Interviews		8

Appendix II

Interview Questions Category: Trade Expert

This semi-structured interview should take about thirty minutes. Views shared in the process will only be used for the specific research purpose and will not be shared in any other way. I would like to request your permission to record the interview as per the data management guidelines of the University of Birmingham.

The objective of the research is to find out the welfare effects of the WTO's special and differential treatment regime, how they have benefited the least developed countries (LDCs), what will change with LDC graduation, and how the graduation can be made smoother. Two distinct case studies on the ready-made garments (RMG) and pharmaceutical industries of Bangladesh will seek to explore the issues.

Research Title: Trade Challenges of LDC Graduation: Evidence from Bangladesh's Garment and Pharmaceutical Industries

Special and differential treatment (SDT) and LDC Graduation

Topic: Special and differential treatments

Questions:

- a) What is your view about the current SDT regime in the WTO?
- b) Does it provide enough support for the LDCs and developing countries?
- c) How can it be more effective? Do you suggest any reform?

Topic: LDC Graduation

Questions:

- a) What are the incentives for an LDC to graduate?
- b) Does the international community show enough commitment to ensure a smooth transition?
- c) How can relevant rules be reformed to facilitate smooth graduation?

Bangladesh RMG industry

Topic: LDC-specific SDT

Questions:

- a) How much has the industry benefitted from the LDC-specific SDT?
- b) Do you identify any significant obstacles for Bangladeshi firms to take advantage of the LDC-specific SDTs?
- c) How can Bangladesh benefit more?

Topic: LDC Graduation of Bangladesh**Questions:**

- a) How will graduation affect the RMG industry in Bangladesh?
- b) How is Bangladesh preparing for the transition?
- c) How can Bangladesh prepare better?

Miscellaneous Questions

- a) Would you like to add anything more to these issues?

Bangladesh Pharmaceutical industry**Topic: LDC-specific SDT****Questions:**

- a) How much has the industry benefitted from the LDC-specific SDTs?
- b) Do you identify any significant obstacles for Bangladeshi firms to take advantage of the LDC-specific benefits?
- c) How can Bangladesh benefit more?

Topic: LDC Graduation of Bangladesh**Questions:**

- d) How will graduation affect the pharmaceutical industry in Bangladesh? (TRIPS and other issues).
- e) How is Bangladesh preparing for the transition?
- f) How can Bangladesh prepare better?

Miscellaneous Questions

- a) Would you like to add anything more to these issues?

Appendix III

Interview Questions **Category: Bangladesh Government Officials**

This semi-structured interview should take about thirty minutes. Views shared in the process will only be used for the specific research purpose and will not be shared in any other way. I would like to request your permission to record the interview as per the data management guidelines of the University of Birmingham.

The objective of the research is to find out the welfare effects of the WTO's special and differential treatment regime, how they have benefited the LDCs, what will change with LDC graduation, and how the graduation may be made smoother. Two distinct case studies on the RMG and pharmaceutical industries of Bangladesh will seek to explore the issues.

Research Title: Trade Challenges of LDC Graduation: Evidence from Bangladesh's Garment and Pharmaceutical Industries

Special and differential treatment (SDT) and LDC Graduation

Topic: Special and differential treatments

Questions:

- a) What do you think about the present international trade support regime for the LDCs?
- b) How can it be more effective? Do you suggest any reform?

Topic: LDC Graduation

Questions:

- d) What are the incentives for an LDC to graduate?

Bangladesh RMG industry

Topic: LDC-specific SDT

Questions:

- c) How much has the industry benefitted from the LDC-specific SDT?
- d) Do you identify any significant obstacles for Bangladeshi firms to take advantage of the LDC-specific SDTs?

Topic: LDC Graduation of Bangladesh

Questions:

- g) How will graduation affect the RMG industry in Bangladesh?
- h) How is Bangladesh preparing for the transition?
- i) How can Bangladesh prepare better?

Miscellaneous Questions

- a) Would you like to add anything more to these issues?

Bangladesh Pharmaceutical industry**Topic: LDC-specific SDT****Questions:**

- d) How much has the industry benefitted from the LDC-specific SDTs?
- e) Do you identify any significant obstacles for Bangladeshi firms to take advantage of the LDC-specific benefits?

Topic: LDC Graduation of Bangladesh**Questions:**

- j) How will graduation affect the pharmaceutical industry of Bangladesh? (TRIPS and other issues).
- k) How is Bangladesh preparing for the transition?
- l) How can Bangladesh prepare better?

Miscellaneous Questions

- b) Would you like to add anything more to these issues?

Appendix IV

Participant Consent Form – Interview

Please tick the boxes below to show that you consent to the following:

1. I confirm that I have read and understood the information sheet about the study. I have had the opportunity to think about the information, ask questions and have had these answered satisfactorily. ☐
2. I understand that my participation is voluntary and that I am free to withdraw before the conclusion of the research without giving any reason. I understand I must withdraw until four weeks after the interview and should communicate this decision via email to the researcher. ☐
3. If I withdraw, my data will be removed from the study and will be destroyed. ☐
4. I am happy for Md Rezaul Karim to make audio or video recordings of my meetings with him. I understand that this data will be stored as per the data management policy of the University of Birmingham. The University of Birmingham will destroy my personal data 10 years after the completion of the project i.e., 2032. ☐
5. I understand that the personal details I have provided prior to the interview will remain confidential. I also understand that the interview I am about to take part may be transcribed and potentially used in the research report and future academic publications; however, the researcher will anonymise this data, so quotes cannot be attributed to me personally. ☐
6. I understand that the personal data provided by me will not be used for any other purpose and that the researcher or the University of Birmingham will not disclose my personal data to any third parties. ☐
7. If I no longer want to take part, I understand that I can stop at any time. ☐
8. If I say something that worries Md Rezaul Karim, I understand that he will have to pass the information on to someone who can help me. ☐
9. I understand that following the completion of the research I will be emailed with a short report of the research findings. ☐

Name of participant Date Signature

Name of person taking consent Date Signature