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Differential Treatment and Inequalities under the Sustainable Development Goals: Beyond Preferential Market Access

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Abstract: Reducing inequality in its multiple dimensions is key to sustainability. Under the United Nations 2030 Agenda for Sustainable Development, one way to meet the goal of narrowing gaps between and within countries is by implementing the special and differential treatment (SDT) principle. The most concrete and well-established implementation of this principle within international trade law is through the Enabling Clause, which authorizes wealthy States to grant, under specified conditions, preferential market access to select developing countries. Yet commentators, consisting primarily of economists and developing-country representatives, argue that tariff preferences are often inadequate to grow the economies of many in the Global South, much less to reduce inequalities. A legal perspective that could bolster this argument remains sparse. This article fills said gap by explaining that while international trade law operationalizes the SDT principle with a heavy emphasis on tariff preferences, the principle is additionally expressed in several other provisions under the other World Trade Organization (WTO) covered agreements: Agreement on Technical Barriers to Trade; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Trade Facilitation. These under-studied provisions demonstrate crucial but overlooked aspects of the SDT principle, namely, capacity-building and international assistance and cooperation. Therefore, critically analyzing these provisions is important to ascertain whether and how implementation of the SDT principle can reduce inequalities and support sustainable development. This legal analysis contributes in two ways to the broader inquiry about the role of international trade law in achieving the Sustainable Development Goals (SDGs). First, on a practical level, the article suggests legal bases or sources for additional indicators needed to better measure and monitor progress in reaching the target. Second, the analysis reveals a necessity to revisit and further scrutinize assumptions underlying the legal mechanisms within the trade regime that States and other relevant actors are using to pursue valuable global objectives.

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1 Introduction

> *'People love to say, "Give a man a fish and he'll eat for a day. Teach a man to fish and he'll eat for a lifetime." What they don't say is, "And it would be nice if you gave him a fishing rod." That's the part of the analogy that's missing…'*[1]

The multilateral trading system, and the World Trade Organization (WTO) rules supporting it, assume that more trade translates to economic growth and improved standards of living. But, as in the case of the absent fishing rod, essential to one's ability to eat for a lifetime, the lived experiences of many peoples and States in the Global South do not correspond with this assumption. Opening foreign markets has often been insufficient to increase developing countries' incomes–much less to narrow the gap with wealthy States or decrease disparities among individuals–because these countries lack the tools and capacity to utilize trade opportunities.

The United Nations 2030 Agenda for Sustainable Development ('UN 2030 Agenda'), which lays down the Sustainable Development Goals (SDGs), can likewise be criticized for adopting a similar premise as WTO law. In this article, I take the first steps towards building a critique by probing the relationship portrayed in *SDG 10–Reduce Inequalities* between reducing inequality and developing countries' participation in global trade.

Different kinds of inequalities interrelate with multiple sustainability concerns. Hence, having a stand-alone goal to reduce inequalities[2] within and between countries is a remarkable enhancement to the earlier Millennium Development Goals (MDGs). SDG 10 highlights this link and, together with its targets and indicators, identifies ways by which its realization can be measured and monitored. Within the UN 2030 Agenda, one way to narrow gaps within and among States involves "[i]mplement[ing] the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements" ('SDT Target').[3] The inclusion of this target–which is one of three Means of Implementation (MOI) Targets under SDG 10–presupposes a positive relationship between trade and international trade law, on the one hand, and the achievement of sustainable development on the other. This assumption also underpins other SDGs,[4] and thus should be scrutinized when inquiring whether and

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1 Trevor Noah, *Born A Crime: Stories from a South African Childhood* (New York: One World, 2016), p. 195.

2 The actual wording of SDG 10 uses the singular form: "Reduce inequality within and among countries," although its short version states "Reduce Inequalities."

3 Target 10.a. Interchangeably referred to in this paper as the "SDT Target."

how the SDT principle contributes to the reduction of intra- and inter-State inequalities. As shown below, this assumed relationship rests on the apparent consensus among the 193 UN members, who signed the General Assembly resolution, that it is beneficial for States from the Global South to participate and be included in the multilateral trading system. In this respect, the UN 2030 Agenda echoes and affirms the rationale for SDT provisions in WTO covered agreements.

The sole indicator to evaluate progress in meeting the SDT Target looks at how much developing countries' exports receive duty-free treatment. My analysis focuses on this metric that, I submit, is too narrow an interpretation of the SDT principle, because it only corresponds to preferential market access, which is only one component of the principle. While international trade law does operationalize the SDT principle with heavy emphasis on tariff preferences, the principle is additionally embodied and concretized in other provisions under several WTO covered agreements. These under-studied provisions demonstrate crucial but overlooked aspects of the SDT principle, namely, capacity-building and international assistance and cooperation. They deserve to be more closely examined to ascertain whether and how implementation of the SDT principle could contribute to sustainable development, particularly to reducing inter- (and possibly intra-) State inequalities. I undertake such an examination by investigating the object and purpose of specific provisions in three WTO treaties and mapping the legal rights and obligations that they create. While this paper is primarily a legal analysis of the relevant WTO provisions, I acknowledge the importance of economic analysis that elicits the rationale and/or assumptions underlying these rules. For this reason, I cite works from (development) economics in some parts of the paper, to better understand the objectives or aims of relevant WTO agreements and their articles. Here, there exists a potential conversation, if not collaboration, between lawyers and economists. For instance, many commentators, primarily economists,[5] as well as developing-country representatives, argue that granting preferential market access through reduced tariffs is often insufficient to grow the economies of those in the Global South, much less to reduce inter-country inequalities. A legal perspective could bolster this claim. Remarkably, the literature is sparse in this respect, and it is such a lacuna that this article fills.

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4 See Goal 1 – No Poverty; Goal 5 – Gender Equality; Goal 8 – Decent Work and Economic Growth, United Nations, *Take Action for the Sustainable Development Goals*, available at: <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>, accessed May 6, 2023.

5 See Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment,* 8 Journal of International Economic Law, no. 2 (2005), 405–424; Susan Prowse, *The Role of International and National Agencies in Trade–Related Capacity Building,* 25 The World Economy, no. 9 (2002), 1235–1261; Constantine Michalopoulos, *The Role of Special Differential Treatment for Developing Countries in GATT and the World Trade Organization,* World Bank Policy Research Working Paper (Washington, D.C., 2000).

Two modest objectives are sought in this study. The first is to enhance measurement and monitoring of progress towards reduced inequalities by suggesting reforms and additions to the current indicator for Target 10.a of SDG10, based on a clarification and specification of what States are supposed to be implementing under WTO law. The second is to shed light on the legal expressions of the SDT principle involving or alluding to a duty of international cooperation and assistance that could contribute to ongoing discussions concerning SDT reform.

Before proceeding further, a few words on terminological choices and scope limitations are warranted. The terms "Goals," "Targets," and "Indicators" are characterized under the 2030 Agenda in this manner:[6]

> Goal–expresses an ambitious, but specific, commitment. Always starts with a verb/action.
>
> Targets–quantified sub-components that will contribute in a major way to the achievement of goal. Should be an outcome variable.
>
> Indicators–precise metric from identified databases to assess if the target is being met (often multiple indicators are used).

Defining these terms is useful, since the object of the present study–the SDG Target–is an MOI target. This designation signifies that the target is meant to aid in accomplishing the other targets that comprise the goal. The types of inequalities within and among countries that this paper analyzes are thus confined to those specified in seven substantive targets. Most trade-related efforts in the UN 2030 Agenda are MOI targets, meaning they are instrumental to realizing the Goals. They are ways by which States can fulfill their integrated economic, social and environmental commitments. MOI targets "are key to realizing [the] Agenda and are of equal importance with the other Goals and targets."[7]

The article proceeds as follows. Section 2 revisits the UN 2030 Agenda's drafting history, explaining how the drafters understood the SDT principle and its envisioned contribution(s) to the goal of reduced inequalities. This part also discusses Target 10.a's current indicator, whose inadequacy prompts this paper's intervention to consider SDT as being more than about tariff preferences. Section 3 then turns to WTO law itself and outlines the legal rights and obligations arising from provisions in the agreements on technical barriers to trade ('TBT Agreement'),[8] sanitary and phytosanitary measures ('SPS Agreement'),[9] and trade facilitation ('TFA').[10] These

6 Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development* (2013), p. 57, available at: <https://www.un.org/sg/sites/www.un.org.sg/files/files/HLP_P2015_Report.pdf>, accessed February 3, 2023 ('HLP Report').

7 UN 2030 Agenda, para. 40.

8 Agreement on Technical Barriers to Trade, 15 April 1994, LT/UR/A-1A/10.

provisions articulate the SDT principle in a more comprehensive manner than preferential tariff schemes that the General Agreement on Tariffs and Trade (GATT), particularly the Enabling Clause, permitted. As part of the legal analysis of these SDT-related provisions, the ways that they address, if at all, the wealth and power asymmetries among WTO Members are likewise interrogated. Identified here are possible measures that States can lawfully undertake and/or demand under these provisions to eliminate or lessen those asymmetries. By way of conclusion, observations made in the paper are summarized, and some preliminary recommendations are offered. While positing that there exist provisions operationalizing SDT that have yet to be tapped into to further the objective of reducing inequalities–which merit the inclusion of additional indicators for Target 10.a–this article concludes with a recognition of lingering limitations in the law, given the fact that the existing agreements themselves envisage a more limited function for the principle.

2 Special and Differential Treatment and the UN 2030 Agenda

Answering the question of how the SDT principle is expected to lessen inequalities within and between countries requires not only appreciating the implications of Target 10.a being an MOI target, but also, and more importantly, unpacking the assumptions that SDG 10 and the 2030 Agenda have regarding the international economic order. The negotiating and drafting history of SDG 10 reveals in part the reasons for including the SDT principle as an MOI target. These premises help explain the current framing of the SDT target and its sole indicator. In this paper, they also form part of the bases for analyzing the UN 2030 Agenda's approach to intra- and inter-country inequalities. To emphasize, MOI targets are supposed to assist or enable countries to pursue and realize the SDGs. Accordingly, implementing the SDT principle, as Target 10.a prescribes, is intended to capacitate countries, particularly developing and least-developed ones, to reduce economic, political, social and legal asymmetries within and among States. For greater specificity as to how this relationship can occur, it is necessary to discuss what implementing the SDT principle involves from a WTO law perspective. Before engaging in such legal analysis in Part 2, however, it is also valuable to understand how drafters of the target imagined the role of SDT in the post-2015 development agenda. In the following sections, I refer to deliberations and outputs from the Open Working Group on

9 Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, LT/UR/A-1A/12.
10 Agreement on Trade Facilitation, 28 November 2014, WT/L/940.

Sustainable Development Goals ('OWG')[11] as part of what could be deemed the *travaux préparatoires* of the UN 2030 Agenda and the SDGs.[12] The OWG–comprising UN Member States and Observer States, as well as Major Groups and other Stakeholders ('MGoS') representing women, youth, et al.–was part of the intergovernmental process that formulated proposals for a post-2015 development agenda to the General Assembly.[13]

2.1 Expectations About Differential Treatment

In one of its earliest iterations, Target 10.a did not refer specifically to the SDT principle. Rather, the then proposed target simply referred to the promotion of "an open, rules-based, non-discriminatory and equitable multilateral trading system." This target is now Target 17.10. At certain points in the drafting history of the post-2015 development agenda, there had been more than one trade-related target, but they were placed under the MOI goal. One such target focused on the Global South's market access:

> 17.24 improve market access for agricultural, fisheries and industrial exports of developing countries in particular African countries, Least Developed Countries, LLDCs and SIDS with a view to increasing their share of exports in global markets

The SDT principle was first raised during the twelfth session of the Open Working Group ('OWG12'). The MGoS proposed this target under the goal of reducing inequalities:

> by 2030, reform trade systems to promote equality among trade partners, recognizing the need for special and differential treatment of developing countries, and more equal distribution of profits along the value chain, by x% over y number of years

The OWG partly accepted the proposal to mention SDT. Hence, the Revised Zero draft during OWG13 included target 10.a, stating "respect the principle of special and differential treatment for least developed countries in relevant international agreements including the WTO". The MGoS subsequently sought to amend this target by expressly mentioning that SDT is to be accorded not only to LDCs but also, more generally, to developing countries. After further revisions, the OWG's Final Proposal (to the Co-Chairs) stated:

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11 United Nations, *Sustainable Development Knowledge Platform*, available at: <https://sustainabledevelopment.un.org/owg.html>, accessed February 22, 2023.

12 See Johanna Aleria P Lorenzo, "SDG 10: Reduce Inequality Within and Among Countries," in Ilias Bantekas and Francesco Seatzu (eds.), *The UN Sustainable Development Goals: A Commentary* (Oxford University Press, 2023 (forthcoming)).

13 United Nations Department of Economic and Social Affairs, *Methods of Work – Open Working Group on Sustainable Development Goals* (n.d.), available at: <https://sdgs.un.org/documents/methods-work-open-working-group-sustainabl-19560>, accessed February 22, 2023.

> 10.a implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with WTO agreements

One notable point about this revised wording is the change in the verb from "respect" to "implement." The records are unclear why such change was effected. A possible explanation lies in the fact that, as elaborated below, the SDT principle is contained in different provisions under several agreements, and some of these provisions require positive actions, whether by the developed WTO Member States or by the developing WTO Member States themselves who are the intended beneficiaries of such provisions. The change was therefore appropriate, although it would have also been accurate to retain both verbs, since some SDT provisions do require implementation (positive act)–*e.g.* providing technical assistance to the developing or least developed country–while others can be complied with by one State respecting (negative act) another Member's exercise of rights or privileges–*e.g.* not expecting reciprocity in compliance with certain treaty obligations or by refraining from suing a developing country who is entitled to delayed implementation of commitments.

At some point during the OWG discussions, the Focus Area (Goal) on promoting equality had been merged with that of poverty eradication and building shared prosperity. This change hints at the prevalent economic thinking, *i.e.* the participants' theory that economic growth causes decreased levels of both poverty and inequality. Notably, in this merger the targets concerning inter-country inequalities were moved to the Focus Area on "Means of implementation/Global partnership for sustainable development." The specific concern with preferences and market access can be traced to the proposal from Benin and other LDCs: "Promoting an open, rules-based, non-discriminatory and equitable multilateral trading system *with duty-free and quota-free market access for all LDCs on a preferential basis*." Likewise, Paraguay suggested the following formulation: "*Recognition and mainstreaming of the principle of SDT* for LLDCs and other countries in special situations in the international trading system." Yet another related proposal from Egypt states: "Improve the climate for trade for developing countries, and ensuring that *trade and trade rules work to the benefit of developing countries and to help meet their development objectives*."

The UN System Technical Support Team ('TST') also suggested tackling international inequalities "through a strengthened set of targets and indicators for a more equitable global system in relation to trade, investment, debt relief, technology transfer and global governance."[14] Relatedly, there were proposals to include targets on global (apart from

14 United Nations, *TST Issues Brief: Promoting Equality, including Social Equity* (n.d.), p. 6, available at: <https://sustainabledevelopment.un.org/content/documents/2406TST%20Issues%20Brief%20on%20Promoting%20Equality_FINAL.pdf>, accessed February 22, 2023 ('TST, Equality Brief').

national) income inequalities, "such as reducing the global Palma ratio or that each country reaches at least the next World Bank income category by 2030."[15] Global inequality in these proposals seems to fit Branko Milanovic's definition: "Global inequality, that is, income inequality among the citizens of the world, can be formally considered as the sum of all national inequalities plus the sum of all gaps in mean incomes among countries."[16] These recommendations appear to be responding to criticisms against the MDGs, and such criticisms arguably echoed the demands–mainly from Third World countries–in previous decades to renew the international economic order, which perpetuated, if not aggravated, the existing inequalities between rich, powerful States in the North and impoverished, newly decolonized States in the South.

In the end, these suggested targets were not adopted. Accordingly, the 2030 Agenda has no target specifically addressing international inequality, *e.g.* to reduce the global Palma index.[17] It instead opted to focus on enhancing the voice and representation of developing countries (Target 10.6), improving the implementation of their special and differential treatment within international trade law (Target 10.a), and increasing aid and capital flows to the developing world (Target 10.b). To the extent that these targets fail to question or challenge the neoliberal underpinnings of the current international economic legal framework and institutions, one can expect that they and Goal 10 itself would be criticized for supporting, rather than transforming, the international economic order that has negligently disregarded "approaches to economic activity that are more compassionate, or indeed more effective when it comes to … narrowing the gap on inequality, as well as with regard to economic growth in developing countries."[18]

2.2 Which Inequalities and Among Whom?

As one of three MOI targets under SDG 10, the SDT Target is intended to contribute to the substantive targets contained in Targets 10.1 to 10.7. Roughly, the first four targets concern disparities among individuals and groups within countries. The inequalities covered by these targets pertain to economic concerns, specifically income (10.1) and wage (10.4), political (10.2), social (10.2; 10.4), and legal (10.3) aspects. Notably, Target 10.3 touches on the link between (in-)equalities of opportunity and of outcome, and

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15 *Ibid.*

16 Branko Milanovic, G*lobal Inequality: A New Approach for the Age of Globalization* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2016), pp. 3–4.

17 See Edward Anderson, *Equality as a Global Goal*, 30 Ethics & International Affairs, no. 2 (2016) 189–200, at 196.

18 Margot E. Salomon, *Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*, 51 German Yearbook of International Law (2008), 39–74, at 46.

the role of discriminatory laws, policies, and practices. Targets 10.1 to 10.4 operate at the domestic level and are thus similar to targets in the other SDGs that make it the primary responsibility of each State to realize the Goals and targets, consistent with the 2030 Agenda's affirmation of the foundational principle of international law, *i.e.* sovereign equality of States.

On the other hand, the remaining three targets arguably pertain to economic and political asymmetries among countries. Target 10.5 confusingly addresses global financial markets regulation, 10.6 concerns developing countries' representation and voice in international economic organizations, and 10.7 tackles migration and mobility of people. For these targets, the identity of the primarily responsible actors is ambiguous, unlike the targets focused on inequalities within a country for which the main addressee is clearly the territorial State. I surmise that the distinction can be attributed to the presupposition that the sources of those inequalities, considering their inter-country character, are especially for States who are in a position of power–especially due to their superior wealth–to minimize or eliminate. Simply put, as the problem can be traced to the international level, the solution can most likely be found at that level as well. To illustrate, the asymmetries manifested by and resulting from the weighted voting system in international financial institutions (IFIs) can only be remedied by the wealthy powerful States who are the major shareholders and decisionmakers in these international economic organizations. The regulation of global financial markets is likewise a matter that primarily lies within the capability of countries whose financial services sectors have greater activity and involvement within global markets. The private actors heavily participating in, and benefitting from, the international financial system are likewise within the jurisdiction of States in the Global North. Lastly, facilitating "orderly, safe, regular and responsible migration" is a target that more persuasively requires cooperative and coordinative efforts by host and receiving States.

As important and interesting as the issue of assigning and allocating the duties to achieve the targets relating to inter-State inequalities might be, it is a question that can be left for future research. Resolving this issue is not indispensable to the present section about the types of inequalities that Target 10.a is supposed to help reduce.

2.3 Relation to Other MOI Targets in SDG 10

The three MOI targets for Goal 10, among which Target 10.a is one, can broadly be distinguished according to the type of economic resource being transferred and moved across borders. In this analytical framework, Target 10.a concerns international cooperation in the trade regime, while the other two targets pertain to foreign direct investment, official development assistance (ODA), and other financial flows

(Target 10.b)[19] and to migrant remittances (Target 10.c).[20] The movement and transfer of each source of capital are governed by different international legal regimes. Foreign direct investment (FDI), predominantly private capital, is regulated by international investment law, while aid, considered international public finance, is covered by the so-called law of development cooperation.[21] Quite distinctly, there appears to be no specific field of international law that regulates migrant remittances *per se,* as they are presently treated as transfers among private individuals to which regular banking channels and regulations apply. These differences aside, what Targets 10.a to 10.c share is the idea that developing countries need some external infusion of funds, including earnings from the exchange of goods and services, to realize the goal of reducing inequalities not only among individuals and groups within their jurisdiction but also between them and the wealthy States.

For the SDT Target, the assumption is that increased export earnings for the Global South, through preferential access to developed-country markets, would help the former's economies grow. The developing countries' income growth would, in turn, help them achieve the targets relating not only to the economic and political asymmetries at the international level (Targets 10.5 to 10.7) but also to the economic, social, political, and legal disparities at the domestic level (Targets 10.1 to 10.4). This presumed relationship obscures the question of how, if at all, implementing the SDT principle in international trade law leads to a redistribution of the gains from trade–specifically a bigger share for developing countries – created by the latter's increased participation in the multilateral trading system. Significantly, the theory of comparative advantage, on which the multilateral trading system and its rules are premised, does not engage with distributional concerns.

2.4 Outgrowing Disparities?

Three points about the OWG deliberations are worth highlighting. First, most participants advocating for the inclusion of an SDT target appear to be mainly

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19 "Encourage official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes," United Nations, *SDG Indicators*, available at: <https://unstats.un.org/sdgs/metadata/?Text=&Goal=10>, accessed May 6, 2023.

20 "By 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent," United Nations, *SDG Indicators*, available at: <https://unstats.un.org/sdgs/metadata/?Text=&Goal=10>, accessed May 6, 2023.

21 See generally Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge: Cambridge University Press, 2013).

concerned about economic and political asymmetries between developing and developed countries. Although some attempted to clarify and make more explicit the link between inter- and intra-country inequalities through the notion of global inequality, such attempts failed. Parenthetically, Philip Cullet laments that SDG 10 missed an opportunity to "confirm the frameworks that address inequality and that are already in place in international law," *e.g.* common but differentiated responsibilities under international environmental law, by excessively focusing on inequalities at the domestic level "that are largely seen as falling under the purview of sovereign states' internal policies, which limits [the Goal's] potential reach."[22] SDG 10s foundations in international human rights law are fairly solid, at least for the targets concerning intra-country inequalities, but I agree with Cullet that more could have been done in terms of targets concerning inequalities among States and of grounding such targets in international law.

Second, the Global South's apparent optimism about growing their economies through trade is remarkable. Proponents of an SDT-related target, while critical of GATT/WTO law, including the manner in which SDT had thus far been codified and implemented, nonetheless staunchly insisted on including such target. From their perspective, preferential market access facilitates developing countries' economic growth. The gains from trade can, in turn, be useful not only in enabling them to "catch up" with the wealthy States, but also in fulfilling the other Goals concerning social and environmental matters. Several statements and proposals during the OWG's Tenth Session carry such rationale in varying degrees. For example, one suggestion states: "Some areas that could be considered in furtherance of greater equality between and among countries *through high and sustained growth in developing countries* include: (a) promoting an open, rules-based, non-discriminatory and equitable multilateral trading system."[23] Whether or not this trust is misplaced will be briefly discussed in Part 2.

The third noteworthy point about the OWG deliberations is that the SDT target's proponents mainly seemed to equate the SDT principle with developing countries' duty-free and/or quota-free access to developed-country markets. This interpretation likely explains the focus of Indicator 10.a.1 on the "proportion of tariff lines applied to imports from least developed countries and developing countries with zero-tariff." The assumption, it seems, is that through enhanced export opportunities–and presumably performance–the developing world will be able to bridge the gap with their rich "counterparts." Put differently, more trade results in the Global South's higher

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22 Philippe Cullet, "SDG 10: Reduce Inequality within and among Countries," in Jonas Ebbesson and Ellen Hey (eds.), *The Cambridge Handbook of the Sustainable Development Goals and International Law* (Cambridge: Cambridge University Press, 2022).

23 Emphasis added.

income, bringing them closer to the Global North. As I elaborate below, preferential market access is merely one aspect, albeit the most established and prominent application, of the SDT principle under GATT/WTO law.

3 Special and Differential Treatment in WTO Agreements

In one of his speeches as WTO Director-General, Pascal Lamy said:

> True equality can only exist between equals. When it comes to trade, some of the less developed countries require certain flexibilities if trade and development are to continue to exist side by side. So the developing countries can enjoy non-reciprocal benefits, in particular special and differential treatment.[24]

Yet, within the GATT/WTO legal system, the principles and objectives underpinning SDT remain contentious, if the debates among developed and developing countries at the Special Sessions of the WTO Committee on Trade and Development (CTDSS) and other forums are any indication. In these debates, the developed countries take the position that SDT's purpose is the full (or further) integration into the multilateral trading system of developing countries. The latter, in contrast, contend that the SDT principle aims at rebalancing the impacts of trade and trade rules on their growth and development prospects, as well as rectifying the imbalances between the WTO Members' rights and obligations that resulted from the single package system.[25]

If the SDT principle were to seriously help reduce inequalities, as the UN 2030 Agenda envisions, its various legal expressions need to be studied more closely. Corresponding indicators can thereby be formulated and added to enhance the measurement and monitoring of the SDT Target and Goal 10. With these considerations in mind, this part of the article analyzes the contents of a select number of WTO-covered agreements whose expressions of the SDT principle extend beyond preferential market access. I map the legal rights and obligations, with varying degrees of binding force, arising from SDT-related provisions in the TBT Agreement,

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24 Pascal Lamy, *The Place of the WTO and its Law in the International Legal Order*, 17 European Journal of International Law, no. 5 (2006), 969–984, at 973.

25 See *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*, Communication from China, India, et al., WT/GC/W/765/Rev.2 (4 March 2019); *Strengthening the WTO to Promote Development and Inclusivity*, Communication from Plurinational State of Bolivia, Cuba, et al., WT/GC/W/778/Rev.2 (7 August 2019). See also Seung Wha Chang, *WTO for Trade and Development Post-Doha*, 10 Journal of International Economic Law, no. 3 (2007), 553–570, at 556, 561.

the SPS Agreement, and the TFA. The purpose of this mapping exercise is to understand whether and how measures, which international trade law sanctions through the SDT principle, could potentially reduce inequalities, whether within or among countries, or both.

Based on the WTO Secretariat's classification, a total of 155 SDT provisions are found in WTO-covered agreements as of March 2021.[26] Introduced in 2001, the WTO Secretariat's typology categorizes the provisions as follows:

(a) Provisions aimed at increasing the trade opportunities of developing country Members;
(b) Provisions under which WTO Members should safeguard the interests of developing country Members;
(c) Flexibility of commitments, of action, and use of policy instruments;
(d) Transitional time-periods;
(e) Technical assistance;
(f) Provisions relating to LDC Members.

Other classification systems have been proposed by legal scholars and policymakers whose objectives in categorization partly differ from the WTO Secretariat's own purpose.[27] Given that my present interest in the SDT provisions is driven by the inquiry about whether and how they contribute to the goal of reduced inequalities, it is more useful to categorize these provisions according to their objectives:[28] (i) integrating poor countries into the multilateral trading system; (ii) increasing the trade opportunities of developing countries; (iii) promoting the economic growth of developing countries; (iv) giving the latter policy or regulatory space to pursue their respective development objectives, *i.e.* permitting them to pursue development-oriented domestic measures, including those that might be inconsistent with WTO law; (v) providing Members in the Global South with financial and technical assistance to enable them to comply with their WTO obligations; and, optimistically, (vi) bridging the economic gap between developed and developing country Members. Unpacking and drawing attention to the presumed connections or relationships–that might, in fact, be tenuous–among these aims help determine not only the appropriateness of the SDT principle as a means of

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26 *Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat*, Note by the Secretariat, WT/COMTD/W/258 (2 March 2021) ('WTO Secretariat SDT Note').
27 See *e.g.* Vineet Hegde and Jan Wouters, *Special and Differential Treatment Under the World Trade Organization: A Legal Typology*, 24 Journal of International Economic Law, no. 3 (2021), 551–571; Sheila Page and Peter Kleen, *Special and Differential Treatment of Developing Countries in the World Trade Organization*, no. 2 (2005), available at: <https://odi.org/en/publications/special-and-differential-treatment-of-developing-countries-in-the-world-trade-organization/>, accessed February 20, 2023.
28 Ascertaining the object and purpose of an agreement and a given provision also matters for treaty interpretation.

reducing inequalities, but also which among its legal expressions can and should be translated into an indicator for Target 10.a of SDG 10. The distinction that Patrick Low[29] makes between market access SDT and regulatory SDT is likewise helpful in the legal analysis below.

The above mentioned objectives need not be mutually exclusive, and some could even be pursued simultaneously. Relatedly, Sonia Rolland observes that among the myriad objectives of SDT, "emphasis has shifted from creating opportunities for development, as envisioned at the time of the New International Economic Order, to bridging the gap between the trade liberalization expectations of the Uruguay Round agreements and the actual capabilities of developing country members."[30] Somewhat conversely, Gillian Moon posits that international trade law's approach to reducing inequality–"taking positive steps to promote the trading capacity of an "unequal" group"[31] and enabling developing countries "to participate on a proportionately beneficial basis in international trade"[32] – is similar to that of international human rights law. She then proceeds to explain that both regimes recognize that prohibiting discrimination will not suffice to reduce inequality where disparate capacities exist and some are unable to utilize opportunities that, in principle, are available to all. Both Rolland and Moon identify bridging some gaps as among SDT's objectives. Rolland, however, refers to a disconnect between the ideals and requirements of the law and the implementation capacity of the subjects expected to comply with such law. Moon likewise focuses on "trade-related inequality," meaning, disparities in engagement with international trade due to capacity constraints of some WTO Members. These gaps or asymmetries, albeit important, are not the same inequalities (within and among countries) that SDG 10 covers and that I tackle in this article.

The present legal analysis serves to demonstrate that none of the SDT-related provisions and WTO-covered agreements is particularly aimed at reducing inequalities of any kind. Rather, the accommodations they extend to developing countries serve the purpose of enhancing the latter's participation in the multilateral trading system. At best, such enhanced participation would enable the Global South to reap substantial gains from trade. In turn, their improved economic situation would narrow the gap with developed-country Members and, possibly, even help them address inequalities within their jurisdictions. My overall critique and concomitant recommendation serve not to refute that zero-tariff access for the Global South's products can facilitate their

29 Patrick Low, "Special and differential treatment and developing country status: Can the two be separated?," in Bernard Hoekman et al. (eds.), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe* (London: CEPR Press, 2021), p. 76.

30 Sonia E. Rolland, *Development at the WTO* (Oxford: Oxford University Press, 2012), p. 110.

31 Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 Journal of International Economic Law, no. 3 (2009), 617–642, at 618.

32 *Ibid.*

economic growth. It remains crucial to continue "remov[ing] the barriers affecting market access for products produced by poor countries [to help] achieve a more even distribution of the gains from trade," but in order for trade laws and policies to reduce inter-State inequalities, as the 2030 Agenda envisions, multilateral efforts should likewise be directed to "[e]liminating supply-side restrictions and developing productive capacity."[33] Indeed, as in inequality at the domestic level, merely creating opportunity–here, market access–does not guarantee equal, much less equitable, outcomes, since the beneficiaries of such opportunity may not be able to utilize such access to begin with. Some WTO Members, particularly LDCs, face considerable supply-side constraints[34] and scarce legal resources that inhibit their participation and exercise of rights in the multilateral trading system. In this respect, Gregory Shaffer's research empirically shows how crucial developing "trade law capacity" is to making WTO membership beneficial to emerging economies like Brazil, China and India.[35] Given these circumstances, how can one reasonably expect the implementation of the SDT principle to contribute to reduced inequalities?

3.1 What Came Before?: SDT in the GATT

The decolonization period was underway, albeit arguably far from complete, when "Part IV–Trade and Development" was added to the GATT in 1965 and the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries"[36] was adopted in 1979. The United Nations Conference on Trade and Development (UNCTAD) played a central role in advocating for the New International Economic Order (NIEO) and especially the GSP's institutionalization.[37]

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33 *Empowering people and ensuring inclusiveness and equality,* Report of the Secretary-General, E/2019/65 (1 May 2019), para. 22.

34 See Ratnakar Adhikari, *Targeting Aid for Trade for Impactful Capacity-Building in the Least Developed Countries*, 10 Global Policy, no. 3 (2019), 408–412; Amelia U. Santos-Paulino, *Aid and Trade Sustainability under Liberalisation in Least Developed Countries*, 30 The World Economy, no. 6 (2007), 972–998; Amelia U. Santos-Paulino, *Trade Liberalisation and Economic Performance: Theory and Evidence for Developing Countries*, 28 The World Economy, no. 6 (2005), 783–821.

35 Gregory Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (Cambridge & New York: Cambridge University Press, 2021).

36 *Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries,* Decision of 28 November 1979, L/4903 ('Enabling Clause').

37 See Gamani Corea, *UNCTAD and the New International Economic Order*, 53 International Affairs (Royal Institute of International Affairs 1944-), no. 2 (1977), 177–187; Anindya K. Bhattacharya, *The Influence of the International Secretariat: UNCTAD and Generalized Tariff Preferences*, 30 International Organization, no. 1 (1976), 75–90; Gene M. Grossman and Alan O. Sykes, *A preference for development: the law and economics of GSP*, 4 World Trade Review, no. 1 (2005), 41–67, at 42–47.

GATT Part IV comprises three provisions that supposedly obligate the Contracting Parties, especially the developed ones, to respond to the "need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development."[38] Apart from committing to non-reciprocity in their trade liberalization measures,[39] developed contracting parties also purportedly assumed obligations under Article XXXVII–Commitments to reduce and/or eliminate tariff and non-tariff barriers to "products currently or potentially of particular export interest to less-developed contracting parties."[40] GATT Contracting Parties likewise agreed to collectively take action "to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties" and to "keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties."[41] The Global South's export earnings form the core of the link between trade and development under these provisions.[42] Similarly, as elaborated below, the Enabling Clause, which made permanent the waiver permitting wealthy States to maintain preferential tariff schemes in favor of (mainly) their former colonies, was premised on the theory that economic development results from developing countries' increased exports and greater participation in the multilateral trading system. This paper does not directly engage with the debates[43] concerning the legal character of these articles. Although important, their outcome does not undermine my proposition that other provisions in WTO-covered agreements express the SDT principle and can be used as additional indicators for the SDT target in the UN 2030 Agenda.

38 GATT, art. XXXVI:3.

39 GATT, art. XXXVI:8.

40 GATT, art. XXXVII:1.

41 GATT, art. XXXVIII:2(a) and (d).

42 GATT, art. XXXVI:1(b): "export earnings of the less-developed contracting parties can play a vital part in their economic development" and "the extent of this contribution depends on" the prices and volume of their exports, as well as the prices of essential imports.

43 Hegde and Wouters (2021), *supra* note 27; Edwini Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements," in George A. Bermann and Petros C. Mavroidis (eds.), *WTO Law and Developing Countries* (Cambridge: Cambridge University Press, 2007), p. 12; Alexander Keck and Patrick Low, *Special and differential treatment in the WTO: Why, when and how?*, WTO Staff Working Paper No. ERSD-2004-03 (Geneva, January 2004), available at: <https://doi.org/10.30875/f567d449-en>, accessed February 20, 2023.

It is also beyond the scope of this article to refute empirical evidence underpinning the trade-growth nexus. Suffice to say, however, that although economists largely support this relationship, their findings contain certain assumptions and caveats that caution against broad conclusions.[44] While trade openness indeed creates benefits, including for developing countries, variations in the latter's economic structure, productivity, and specialization also preclude oversimplifications. Indeed, Gene Grossman and Alan Sykes stress that the Generalized System of Preferences (GSP) "inevitably produces a kind of *de facto* discrimination across beneficiaries," since it is premised on reducing the Global South's reliance on exporting primary products.[45] Moreover, the specific contribution of tariff preferences to the trade-growth nexus has been subject to debate and is seemingly contingent on economic modelling/specifications.[46] It likewise bears noting that studies regarding the effects of trade, specifically tariff preferences for developing countries, predominantly focus on economic growth and not necessarily on reduction of inequalities, whether intra- or inter-country. Exceptionally, results of some econometric investigation about trade liberalization's impacts on income inequality within countries tentatively conclude that intra-country inequality (and poverty) decreases with greater trade openness via economic growth.[47] Other studies,

44 See, *e.g*. Pam Zahonogo, *Trade and economic growth in developing countries: Evidence from sub-Saharan Africa*, 3 Journal of African Trade, no. 1 (2016), 41–56; Muhammad Tariq Majeed, *Economic growth, inequality and trade in developing countries*, 15 International Journal of Development Issues, no. 3 (2016), 240–253; Jamel Jouini, *Linkage between international trade and economic growth in GCC countries: Empirical evidence from PMG estimation approach*, 24 The Journal of International Trade & Economic Development (2015), 341–372; Tarlok Singh, *Does International Trade Cause Economic Growth? A Survey*, 33 The World Economy, no. 11 (2010), 1517–1564; Marilyne Huchet-Bourdon, Chantal Le Mouël, and Mariana Vijil, *The relationship between trade openness and economic growth: Some new insights on the openness measurement issue*, 41 The World Economy, no. 1 (2018), 59–76; Joshua J. Lewer and Hendrik Van den Berg, *How Large Is International Trade's Effect on Economic Growth?*, 17 Journal of Economic Surveys, no. 3 (2003), 363–396.

45 Grossman and Sykes (2005), *supra* note 37 at 43.

46 R. E. Baldwin and T. Murray, *MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP*, 87 The Economic Journal, no. 345 (1977), 30–46; Richard Pomfret, *MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP: A Comment*, 96 The Economic Journal, no. 382 (1986), 534–536; Robert E. Baldwin and Tracy Murray, *MFN Tariff Reductions and Developing Country Trade Benefits Under the GSP: A Reply*, 96 The Economic Journal, no. 382 (1986), 537–539.

47 Florian Dorn, Clemens Fuest, and Niklas Potrafke, *Trade openness and income inequality: New empirical evidence*, 60 Economic Inquiry, no. 1 (2022), 202–223; Martin Ravallion, *Inequality and Globalization: A Review Essay*, 56 Journal of Economic Literature, no. 2 (2018), 620–642; Yilmaz Bayar and H. Funda Sezgin, *Trade Openness, Inequality and Poverty in Latin American Countries*, 96 Ekonomika (2017), 47–57; Javier Lopez Gonzalez, Przemyslaw Kowalski, and Pascal Achard, *Trade, global value chains and wage-income inequality*, OECD Trade Policy Working Papers (2015), available at: <https://www.oecd-ilibrary.org/content/paper/5js009mzrqd4-en>, last accessed March 27, 2023); Ann

however, claim that trade liberalization has generally narrowed the South–North divide by enabling some developing countries to grow, but widened income inequalities among individuals within the trading partners (regardless of developing status).[48] As Milanovic emphasizes, "the world is unequal in a very particular way: most of the inequality, when we break it down to inequality within countries and inequality among countries, is due to the latter."[49] Notably, the trade-growth-inequality dynamics identified above do not specifically or exclusively concern the effects of tariff preferences or any other type of SDT for developing countries.

In any case, amidst these economic debates, the SDT principle under GATT law essentially relies on developing countries' enhanced export performance. Discussions during the post-2015 development agenda about the principle and the goal of reduced inequalities can be better understood when viewed in this context. Interestingly, these discussions also echo to some extent the international trade law reforms that were disputed along South–North lines as part of the NIEO movement. These trade-inequality-development issues, contextualized in the Global South's engagement with international law post-independence, have been tackled by other authors.[50] Instead of retelling these comprehensive accounts, I focus on two topics linking the sustainable development agenda to the NIEO that are most relevant to the Goal, target, and indicator being examined here.

Harrison, John McLaren, and Margaret McMillan, *Recent Perspectives on Trade and Inequality*, 3 Annual Review of Economics, no. 1 (2011), 261–289; A Wood and C Ridao-Cano, *Skill, trade, and international inequality*, 51 Oxford Economic Papers, no. 1 (1999), 89–119.

48 Milanovic (2016), *supra* note 16, at 118–154; Dani Rodrik, *A Primer on Trade and Inequality* (Cambridge, Massachussetts, 2021), available at: <https://www.nber.org/papers/w29507>, last accessed February 8, 2023; Shujiro Urata and Dionisious A. Narjoko, *International trade and inequality*, ADBI Working Paper 675 (Tokyo, 2017), available at: <https://www.adb.org/sites/default/files/publication/230591/adbi-wp675.pdf>, last accessed March 27, 2023; E. Kwan Choi, *North–South trade and income inequality*, 16 International Review of Economics & Finance, no. 3 (2007), 347–356; Satya P. Das, *Gradual Globalization and Inequality between and within Countries*, 38 The Canadian Journal of Economics / Revue canadienne d'Economique, no. 3 (2005), 852–869; Ajit K. Ghose, *Global inequality and international trade*, 28 Cambridge Journal of Economics, no. 2 (2004), 229–252; Miguel Székely and Claudia Sámano, *Did trade openness affect income distribution in Latin America? Evidence for the years 1980–2010*, UNU-WIDER Working Paper 2012/003 (Helsinki, 2012), available at: <https://www.econstor.eu/handle/10419/80891>, last accessed March 28, 2023.

49 Milanovic (2016), *supra* note 16 at 132.

50 See, *e.g.* Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 Humanity: An International Journal of Human Rights, Humanitarianism and Development, no. 1 (2015), 145–158; Margot E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 International & Comparative Law Quarterly, no. 1 (2013), 31–54.

3.1.1 Enabling Clause and GSP

The most concrete and established implementation of the SDT principle within GATT/WTO law is through the Enabling Clause that authorizes wealthy States to apply preferential tariffs in favor of select developing countries under specified conditions typically relating to human rights, labor standards, good governance, and environmental protection. The Enabling Clause allows the global North, predominantly the United States (US) and the European Union (EU), to maintain a Generalized System of Preferences (GSP) scheme, through which they grant qualifying developing countries lower (or zero) tariffs on certain products, exemption from quotas, and other forms of more favorable market access. In *EC–Tariff Preferences*, the Appellate Body affirmed that the Enabling Clause "is among the "positive efforts" called for in the Preamble to the WTO Agreement to be taken by developed-country Members to enhance the "economic development" of developing-country Members."[51] The same case also clarified that, in granting preferences, the non-discrimination obligation in GATT/WTO law does not prohibit needs-based differentiation. The relevant portion of the Appellate Body report is worth quoting in full as it additionally reveals the adjudicators' understanding of the economic logic behind the Enabling Clause:

> Although enhanced market access will contribute to responding to the needs of developing countries *collectively*, we have also recognized that the needs of developing countries may vary over time. We are of the view that **the objective of improving developing countries' "share in the growth in international trade," and their "trade and export earnings," can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* at those interests shared by sub-categories of developing countries based on their particular needs**. An interpretation of "non-discriminatory" that does not require the granting of "identical tariff preferences" allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be "generalized" and "non-reciprocal." We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause.[52]

This discussion resonates with certain arguments during the OWG deliberations for including an SDT target in the post-2015 development agenda. Importantly, this ruling forms part of the substantive equality jurisprudence that emerged from the WTO dispute settlement system's shift from a power-orientation to a rules-based model.[53] An emphasis on substantive equality is indeed a significant departure from

51 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Report of the Appellate Body, WT/DS246/AB/R (April 7, 2004), para. 92 ('*EC–Tariff Preferences*').
52 *Ibid.*, para. 169 (italics in the original) (emphasis added).

the notion of formal equality underpinning the doctrine of States' sovereign equality under international law. However, although SDT is the Global South's "claim for redistribution of the gains from trade in the global economy" and could be viewed as "the closest thing to social and economic entitlements in the trading system," Chantal Thomas rightly points out that even if one were to accept that SDT "would support the creation of monies (through increased market access for exports, tariffs, or quota-related price increases for imports) that could be used to target business development, poverty reduction, or both," it is uncertain that the exporting developing country would actually utilize those benefits in such manner, *i.e.* that the increased producer profits will translate to social and economic benefits for the larger population.[54] These observations cast doubt on the SDT principle's presumed contribution to reducing inequalities within States.

At the inter-State level, there is likewise no guarantee that a higher national income level and/or growth rate for developing countries would narrow the gap with developed countries; especially if the latter's national income level and/or growth rate is simultaneously increasing. Finally, from an empirical and practical perspective, the positive effect of preferential tariff schemes considerably depends on the beneficiaries' capacity to utilize the preferences. Explaining why SDT is inadequate on its own to promote development objectives in trade, a former South African ambassador to the WTO enumerates various sources of such supply-side factors that constrain developing countries from attaining export-driven growth: "lack of infrastructure, low research and innovation capacity, lack of access to finance and poor investment environment," coupled with poor institutional capacity and limited human resources.[55] Bernard Hoekman additionally attributes the lacking benefits from preferential trade programs to "uncertainty/costs created by "political conditionality," product exclusions[,] and rules of origin."[56] In sum, the impacts of preferential market access on developing countries' economic growth and on inter-country inequalities remain uncertain and debatable.

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53 See Chantal Thomas, "The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development in the WTO," in Chi Carmody, Frank J. Garcia, and John Linarelli (eds.), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge: Cambridge University Press, 2012), pp. 203–204.

54 *Ibid.,* at 206.

55 Faizel Ismail, *Mainstreaming Development in the World Trade Organization*, 39 Journal of World Trade, no. 1 (2005), 11–21, at 18.

56 Hoekman (2005), *supra* note 5, at 407.

3.1.2 Doha Development Agenda

The failure and demise of the Doha *Development* Round have already been repeatedly pronounced at the time of drafting the UN 2030 Agenda and the SDGs.[57] Still, the latter opted to rely on certain instruments and outputs from such rounds of negotiations. Some of those references are made in targets concerning the modification of trade restrictions and distortions in world agricultural markets (Target 2.b) and the affirmation of developing countries' right to use flexibilities under the TRIPS Agreement to protect public health (Target 3.b). Notably, both are MOI targets like the SDT Target.

The 2001 Doha Declaration reaffirmed that provisions embodying the SDT principle "are an integral part of the WTO Agreements," and agreed to pursue the work programme aimed at strengthening the SDT provisions and "making them more precise, effective and operational."[58] It maintained the proposition that the multilateral trading system generates increased opportunities and welfare gains crucial for economic development and poverty alleviation.[59] It likewise recognized that in the status quo, not all peoples are enjoying these benefits. There is a need for "positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development,"[60] and therefore, "enhanced market access, balanced rules, and *well targeted, sustainably financed technical assistance and capacity-building programmes* have important roles to play."[61] These statements rely on economic and policy research about SDT extending beyond preferential market access and non-reciprocity towards attention to the cost of implementing agreements.[62]

Lending support to the Doha statements above, I demonstrate in the succeeding sections the insufficiency of measuring the SDT Target through developing country exports' tariff-free treatment, through a legal analysis of SDT-related provisions in other WTO-covered agreements that concern capacity-building and assistance.

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57 See *e.g.* Thomas (2012), *supra* note 53; Robert Wolfe, *First Diagnose, Then Treat: What Ails the Doha Round?*, 14 World Trade Review, no. 1 (2015), 7–28; Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 Texas International Law Journal, no. 3 (2009), 573–602.

58 *Ministerial Declaration of 14 November 2001*, Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC, para. 44 ('Doha Declaration').

59 *Ibid.*, paras. 1–2.

60 *Ibid.*, para. 2.

61 *Ibid.*, para. 2, last sentence (emphasis added).

62 Hoekman (2005), *supra* note 5, at 406; Keck and Low (2004), *supra* note 43.

3.2 TBT Agreement

The TBT Agreement aims to "encourage the development of international standards and conformity assessment systems" given their "important contribution [in furthering the GATT/WTO objectives] by improving the efficiency of production and facilitating the conduct of international trade."[63] It obliges WTO Members to base their technical regulations on relevant international standards.[64] Even as it requires that technical regulations are "not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade," the TBT Agreement nonetheless recognizes Members' right to regulate for public policy concerns–*e.g.* protection of human, animal or plant life or health or the environment; prevention of deceptive practices; national security.[65] In this context, the obligation to harmonize technical regulations based on international standards has raised concerns, mostly from States in the Global South, that more stringent labour or environmental standards to access developed-country markets constitute non-tariff barriers and meeting those would cause developing countries to lose their comparative advantage.[66] It is thus fitting that two preambular paragraphs cite developing countries' potential special difficulties and the assisting role of developed countries and the whole WTO Membership:

> *Recognizing* the contribution which international standardization can make to the transfer of technology from developed to developing countries;
>
> *Recognizing* that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard

According to the WTO Secretariat, there are twenty-eight (28)[67] SDT provisions in the TBT Agreement. Using the six-fold typology developed by the Secretariat, the TBT provisions concerning SDT are divided, thus: three (3) on increasing trade opportunities; ten (10) on interests-safeguarding; two (2) on commitments and instruments flexibilities; one (1) on transitional time-periods; nine (9) on technical assistance; and three (3) on LDCs. It bears highlighting at the outset that none of these provisions has

63 TBT Agreement, Preamble, second to fourth recitals.
64 TBT Agreement, art. 2.4.
65 TBT Agreement, art. 2.2; Preamble, fifth recital.
66 Graham Mayeda, *Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries*, 7 Journal of International Economic Law, no. 4 (2004), 737–764, at 738.
67 With three (3) appearing in more than one category/type.

been discussed, whether at the TBT Committee or in a dispute settlement proceeding, relative to any objective to decrease the (economic) gap between developing and developed country Members.

One striking feature of the TBT Agreement is that the provisions on technical assistance (article 11) are separate and distinct from those on SDT (article 12). While WTO Members have recognized the link between SDT and technical assistance (since the Fourth Triennial Review in 2006), and some scholars have likewise argued the significance of technical assistance in "regulatory SDT,"[68] the TBT Committee has been discussing these two issues separately.[69] A possible reason for the separation is that potential recipients of technical assistance are not limited to "developing countries."[70] As is the case throughout the GATT/WTO system, this term is undefined and subject to Members' self-designation, a practice that has lately become controversial.[71] Under TBT article 11, WTO Members are "mandated"[72] to grant technical assistance to others, especially developing country Members, subject to two (2) general requirements, namely, a request and mutually agreed terms and conditions. Such assistance pertains to any of the following: (i) preparation of a technical regulation; (ii) establishment of national standardizing bodies, regulatory bodies, or bodies for the assessment of conformity with technical regulations; (iii) methods by which technical regulations (within the territory of the granting Member) can best be met; (iv) steps to be taken by producers in the requesting Member who wish to access systems for conformity assessment operated by bodies within the territory of the Member receiving the request and (v) establishment of institutions and legal framework that would enable requesting Members to fulfill the obligations of membership or participation in international or regional systems for conformity assessment.

Despite the seeming disconnect between these two articles, the first paragraph of TBT article 12 makes clear that the "differential and more favourable treatment to developing country Members" shall be provided "through the relevant provisions of other Articles of this Agreement" as well. Moreover, TBT article 12.7 expressly refers to the provisions of article 11 when it obligates ("shall") WTO Members to provide

68 See *e.g.* Low (2021), *supra* note 29, at 98.

69 WTO Secretariat SDT Note (2021), *supra* note 26, at para. 2.42.

70 See *e.g.* TBT Agreement, art. 11.2: 'Members shall, if requested, advise *other Members, especially the developing country Members,* and shall grant them technical assistance…'

71 *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance: Communication from the United States*, Communication from the United States, WT/GC/W/757/Rev.1 (14 February 2019); *Statement on Special and Differential Treatment to Promote Development*, Co-Sponsored by the African Group, the Plurinational State of Bolivia, et al., WT/GC/202/Rev.1 (14 October 2019).

72 TBT, arts. 11.1 to 11.8 all contain the word "shall."

technical assistance to developing countries for the purpose of "ensur[ing] that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members."

TBT article 12.7, however, is likely to be interpreted in a similar manner as TBT article 12.3, that is, it only requires WTO Members to provide technical assistance but not to ensure the absence of unnecessary obstacles to developing countries' trade. The SDT obligations under article 12 are generally limited to "tak[ing] into account the special development, financial and trade needs of developing country Members in the implementation of [the TBT] Agreement." Interpreting TBT article 12.3, the *US–Clove Cigarettes* Panel adopted the construction from the *EC–Biotech Products* Panel for SPS article 10.1 (to "consider along with other factors before reaching a decision") and stated that a Member taking account of developing countries' special needs is not necessarily required to "agree with or accept the developing country's position and desired outcome."[73] The Panel in *US–COOL* elaborated that, apart from merely giving consideration to developing countries' special needs "along with other factors before reaching a decision," there is no requirement under TBT article 12.3 for WTO Members "to conform their actions" to such needs.[74] Although clarifying that "the term "take account of" entails that Members are obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members," the same Panel found that there is no particular way prescribed to comply with such obligation and it "does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs."[75] Neither does the provision require Members "to document specifically in their legislative process and rule-making processes how they actively considered the special development, financial and trade needs of developing country Members."[76]

Regarding the last clause of TBT article 12.3–"ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members"–two Global South States, Indonesia and Mexico, have unsuccessfully attempted to argue that this provision creates a separate and distinct obligation not to create unnecessary obstacles to developing country Members' exports. In *US–Clove Cigarettes,* the Panel rejected the argument and read the clause "as providing guidance on *how* and *why*

73 *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* Report of the Panel, WT/DS406/R (September 2, 2011), para. 7.646 ('*US–Clove Cigarettes*').

74 *United States – Certain Country of Origin Labelling (COOL) Requirements,* Report of the Panel, WT/DS384/R, WT/DS386/R (November 18, 2011), para. 7.781 ('*US–COOL*').

75 *US–COOL,* paras. 7.786–7.788.

76 *US–COOL,* para. 7.787.

the Member preparing or applying the technical regulation should "take account of" these special needs–namely, "with a view to" ensuring that technical regulations do not create unnecessary obstacles to exports from developing country Members."[77] The *US–COOL* Panel reiterated that TBT article 12.3 does not contain a guarantee that no such obstacles would indeed arise, since the second half of the provision is not the operative part and only sets out the objective of the obligation to "take account of."[78]

As applied to TBT article 12.7, it is also unlikely to be interpreted as containing an obligation not to create obstacles to the developing country Members' export expansion and diversification. Put more simply, TBT articles 12.3 and 12.7 express obligations of conduct rather than of result. Thus, there is little clarity how this apparent obligation of conduct can become legally meaningful and effective in ensuring that the developing country Members' exports are not confronted with unnecessary obstacles relating to technical regulations, standards or conformity assessment procedures. The obvious problem is that an obligation to take something into account is difficult to enforce, particularly in dispute settlements where the evidentiary burden rests on developing countries as the complainants. Parenthetically, one wonders whether the Panels might have decided differently had the complainants argued for a teleological interpretation of these SDT provisions, following one scholar's proposition that when these provisions are interpreted "in accordance with the objective of sustainable development [as enshrined in the Preamble of the Marrakesh Agreement], the resulting jurisprudence will confirm and reinvigorate existing obligations in favour of developing countries."[79]

TBT article 12.8 adds some specificity to the factors that WTO Members "shall take [] fully into account," namely, "that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures" and that their special needs and stage of technological development "may hinder their ability to discharge fully their obligations under [the TBT] Agreement." The TBT Committee is likewise obliged to consider these factors when deciding whether to grant a request for "time-limited exceptions in whole or in part from obligations." Interestingly, according to TBT article 12.8, the purpose of taking into account developing countries' special problems is to "ensur[e] that [they] are able to comply with [the] Agreement" and "discharge fully their obligations" thereunder.

Neither of the panel reports discussed above offered a detailed interpretation of the phrase "special development, financial and trade needs." In *US–Clove Cigarettes,*

77 *US–Clove Cigarettes*, para. 7.614.

78 *US–COOL*, para. 7.762.

79 Maureen Irish, *Special and Differential Treatment, Trade and Sustainable Development*, 4 Law and Development Review, no. 2 (2011), 72–98, at 83–84.

the Panel acknowledged that its meaning is not entirely clear but "appears to be deliberately vague."[80] It is unclear whether and how this panel's decision was affected by its reference to a case[81] dealing with Article 27.4 of the Agreement on Subsidies and Countervailing Measures, which permits developing countries a longer period to phase out export subsidies, following a determination by the Committee on Subsidies and Countervailing Measures, which examines "all the relevant economic, financial and developing needs of the developing country Member." The reference was to the statement that "an examination of whether export subsidies are inconsistent with a developing country Member's development needs is an inquiry of a peculiarly economic and political nature, and notably ill-suited to review by a panel whose function is fundamentally legal."[82] The expression, therefore, remains open to interpretation as far as the WTO dispute settlement system is concerned.

As previously alluded to, conspicuous in its absence is any reference–whether by WTO Members, panels, or the TBT Committee–to the SDT provisions having the purpose of reducing inequalities among countries. Rather, TBT articles on SDT and technical assistance have so far been applied and interpreted to address implementation or compliance concerns arising from the Global South's special development, financial, and trade needs. These provisions are thus simply intended to consider and respond to those needs so that developing countries can become "full-fledged" WTO Members and comply with their obligations under the WTO law. It is only a positive side-effect if, in the process of addressing such needs, the developing countries manage to "catch up" with the developed ones.

3.3 SPS Agreement

The SPS Agreement aims, among others, to multilateralize/harmonize the rules and disciplines for developing, adopting, and enforcing sanitary and phytosanitary measures "in order to minimize their effects on trade."[83] The Global South's objections–that this treaty's demand for harmonization of SPS measures amounts to disguised protectionism and creates additional burdens (financial, legal, administrative/institutional)–are largely similar to those discussed relative to the TBT Agreement.[84] Accordingly, in the SPS Agreement's preamble, WTO Members "*recogniz[e]* that developing country Members may encounter special difficulties in

80 *US–Clove Cigarettes*, para. 7.627.

81 *Brazil– Export Financing Programme for Aircraft,* Report of the Panel, WT/DS46/R (April 14, 1999) ('*Brazil–Aircraft*').

82 *Brazil–Aircraft*, para. 7.89.

83 SPS Agreement, Preamble, fourth recital.

84 See Mayeda (2004), *supra* note 66, at 751–52.

complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desir[e] to assist them in their endeavours in this regard."

Per the WTO Secretariat's account, the SPS Agreement contains six (6) SDT provisions broken down as follows: two (2) on interests-safeguarding, two (2) on transitional time-periods and two (2) on technical assistance. Similar to the TBT Agreement, it is noteworthy that none of these provisions has been construed by relevant actors within the trade regime as serving the purpose of reducing inter-country inequalities. Indeed, even the technical assistance to be provided is meant to address developing country Members' special difficulties relating either to compliance with the other WTO Members' SPS measures or to applying SPS measures within their own territories.

The obligation in SPS article 10.1 to "take account of the special needs of developing country Members" is clarified and arguably strengthened by a procedure adopted by the SPS Committee that allows an exporting developing country Member to identify significant difficulties with another Member's SPS measure–specifying the problems "that the proposed measure may create for its exports, or the specific reasons why it is unable to comply with the notified measure by the implementation date."[85] If a phased introduction of the new measure is possible while maintaining the chosen appropriate level of sanitary and phytosanitary protection, "a longer time-frame for compliance [meaning, a period of not less than six months] should be accorded to developing country Members."[86] If the appropriate level of sanitary and phytosanitary protection does not permit a phased introduction, or where such an option will not resolve the exporting developing country Member's specific problem, the notifying Member, *i.e.* the proponent of the SPS measure, "shall, upon such request, enter into consultations with the exporting Member with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection."[87] Importantly, these discussions can result in one or a combination of (i) a change in the proposed measure; (ii) the provision of technical assistance; and (iii) the provision of special and differential treatment. These options affirm earlier proposals raised with the SPS Committee. India, for instance, proposed that "if an SPS measure created problems for several developing countries but could not be withdrawn, the country adopting it should reconsider it and provide the necessary technical assistance to enable developing

85 *Procedure to Enhance Transparency of S&D in Favour of Developing Country Members*, Decision by the Committee, G/SPS/33/Rev.1 (18 December 2009), para. 2.

86 *Ibid.,* para. 3.

87 *Ibid.,* para. 4.

countries to adapt."[88] The extent to which exporting developing country Members have actually resorted to these procedures is beyond the scope of this article but worth studying further.

Regarding the legal interpretation of SPS article 10.1, Argentina argued in *US–Animals*, that the United States failed to accord Argentina special and differential treatment in the preparation and application of its SPS measures. The Panel, contrary to the EU's third-party submission, held that the phrase "shall take account of" does not render a provision "so vague that it cannot constitute a positive obligation" to be the subject of dispute settlement.[89] Yet, it did not give additional clarity to the meaning of "special needs of developing country Members"–what States are obliged to consider–apart from affirming the *EC–Biotech Product* Panel's pronouncement that "special needs" in SPS article 10.1 is equivalent to "special development, financial and trade needs of the developing country" in TBT article 12.3.[90]

Significantly, the *US–Animals* Panel seemed sympathetic to the difficult evidentiary burden confronting the Global South in establishing a violation of these "take account of" provisions. It hence clarified that lacking documentation (about how a Member has taken account of a developing country's needs) could be relevant and "particularly probative … where a special need has been expressly identified and brought to the importing Member's attention":

> [T]he absence of documentation in the form of a risk assessment or final measure is not sufficient itself for Argentina to establish a *prima facie* case under Article 10.1. However, we are cognisant that in considering what is required to show an inconsistency with Article 10.1 we cannot create a potentially insurmountable burden on the complainant. This is all the more so in the context of the obligation in Article 10.1 which is aimed at protecting the interests of developing countries. Therefore, we want to clarify that we do not understand the panel's reasoning in *EC–Approval and Marketing of Biotech Products* to stand for the proposition that there is no way to satisfy the burden of proof under Article 10.1.[91]

The *US–Animals* Panel additionally stated that the burden of proof shifts to the importing Member, once a developing country Member has shown (i) that "its special needs were expressly identified to or by the [former]" and (ii) the absence of documentation demonstrating consideration of such needs.[92] These statements underscore the potential importance of the SPS Committee's procedure discussed above. Ultimately, however, the Panel found that Argentina failed to satisfy its burden of

88 *Special and Differential Treatment,* Note by the Secretariat, G/SPS/W/105 (9 May 2000), para. 4.
89 *United States–Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina,* Report of the Panel, WT/DS447/R (24 July 2015), paras. 7.689–7.691 ('*US–Animals*').
90 *US–Animals*, para. 7.693.
91 *US–Animals*, para. 7.698.
92 *US–Animals*, para. 7.700.

proof to establish that the US did not take account of its special needs as required by SPS article 10.1.[93]

If SDT-related provisions in the TBT Agreement are problematic for the reasons outlined above, their counterparts in the SPS Agreement suffer from essentially similar problems, if not more. For instance, regarding longer timeframes for compliance, SPS article 10.2 uses "should" rather than "shall" in stating the "obligation" to afford such flexibility to developing country Members' products of interest. While there is some support in case law[94] for the argument that the word "should" also signifies a mandatory duty, this language choice nevertheless leaves room for doubt and dispute. It is indeed also ambiguous whether the SPS Committee has an obligation to consider a developing country Member's request for specified time-limited exceptions, or whether it only has discretionary power to do so. The ambiguity stems from the text of SPS article 10.3, which states that "the Committee is enabled to grant to such countries … specified, time-limited exceptions … from obligations under this Agreement, taking into account their financial, trade and development needs." While its counterpart provision in the TBT Agreement uses the same wording, TBT article 12.8 additionally provides that "[w]hen considering such requests the Committee *shall* take into account the special problems in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development." Using the word "shall" partly alleviates concerns about a provision's mandatory and legally binding character.

The two technical assistance provisions likewise leave much to be desired, as they are worded in "best efforts" language: "Members agree to facilitate the provision…";[95] "an importing Member … shall consider providing such technical assistance."[96] Relevantly, among the developing country Members' long-standing positions–expressed by Egypt in one of the SPS Committee discussions–is that "the

93 *US–Animals*, para. 7.713.

94 See *Canada – Measures Affecting the Export of Civilian Aircraft,* Report of the Appellate Body, WT/DS70/AB/R (August 2, 1999), para. 187: "Although the word "should" is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used "to express a duty [or] obligation". The word "should" has, for instance, previously been interpreted by us as expressing a "duty" of panels in the context of Article 11 of the DSU. Similarly, we are of the view that the word "should" in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU."

95 SPS Agreement, art. 9.1.

96 SPS Agreement, art. 9.2.

[SDT] provisions would be effective only if they were complemented by sufficient technical assistance to strengthen developing countries' ability to deal with scientific issues, especially risk assessment, and to improve laboratory facilities and technologies needed to comply with SPS obligations."[97] During the same discussions, Canada inquired about "concrete examples of how existing [SDT] provisions had failed to meet the expectations of governments and producers in developing and least-developed countries" and "specific examples of how Article 10 could be made more economically beneficial to developing countries."[98] The US also seemed interested in such examples, but at the same time its representative stated "that developing country Members must be realistic in their expectations of what an importing Member could do to facilitate compliance with their regulations, noting that governments were not willing to compromise public health."[99] Australia appeared more aware of the SPS Agreement's technical and infrastructural demands and how these requirements could be disproportionately burdensome to the Global South and their traders:

> 50. The representative of Australia observed that the process of conforming with SPS obligations placed a heavy burden on developing and least-developed countries. SPS activities such as providing information on pest and disease status, maintaining systems for providing valid inspection certification, providing valid lab test results and keeping up with technology so that treatments for pests and diseases were efficacious *required an infrastructure of laboratories, legislation, institutions and professional expertise.* In light of these requirements, substantial increased investment was necessary if Members were to reap the benefits of the SPS Agreement. He asked if these concerns were taken up in the World Bank programme, and if not, if there was a prospect of expanding the programme to address them. The representative of the World Bank noted that issues of practical investment in the areas of inspection and quarantine had been discussed at the Bank, within the units focussing on agriculture and in the context of the Integrated Framework.[100]

Some developing countries also noted in SPS Committee discussions that "although a substantial amount of technical assistance is provided in the SPS area, in many cases this assistance is not appropriate or does not correspond to the needs of the developing country."[101] Relatedly, Guatemala raised that for some developing countries, it is not so much the financial resources, equipment or infrastructure that are lacking. Their difficulties, rather, lie in a "lack of understanding of the Agreement, the absence of an operational framework for the authorities responsible for

97 *Summary of the Meeting held on 21-22 June 2000*, Note by the Secretariat (1 August 2000), G/SPS/R/19, para. 35.

98 *Ibid.*, para. 42.

99 *Ibid.*, para. 43.

100 Emphasis added.

101 WTO Secretariat SDT Note (2021), *supra* note 26, at comment on SPS Article 9.2.

administering the Agreement, and by limited participation in competent bodies and in the WTO's SPS Committee."[102] These statements make more salient the observation that there is an imperative to clarify and elaborate the oft-repeated but hardly understood phrase referring to "development, financial and trade needs." Indeed, in contrast to the TBT Agreement's fairly detailed provisions elaborating the "development, financial and trade needs" and the "special problems" that developing country Members have, SPS article 10.1 generalizes and lumps these factors together as simply "the special needs of developing country Members." On balance, SPS article 10.3 at least adopts the formulaic language "financial, trade and development needs" vis-à-vis the SPS Committee's action that could enable cross-references to panel and Appellate Body reports interpreting this phrase.

Ultimately, the foregoing analysis of SDT and technical assistance provisions in the SPS Agreement echoes that of the TBT Agreement provisions and leads to a similar conclusion: the legal expressions of the SDT principle are not intended to diminish the South–North divide at the WTO. At best, they should help developing country Members overcome implementation difficulties and address their development, financial, and trade needs. Any expectation about these actions eventually placing developing countries on equal footing with developed ones would simply be a positive byproduct. Again, these interpretations cast doubt on the appropriateness, more so effectiveness, of the SDT principle being a means for States to reduce inter- and intra-country inequalities.

3.4 TFA

The Trade Facilitation Agreement was negotiated and concluded post-Uruguay, making it the newest WTO covered agreement.[103] It clarifies and improves relevant aspects of GATT provisions "to further expedit[e] the movement, release and clearance of goods, including goods in transit."[104] Its provisions thus mostly pertain to customs procedures and compliance therewith.

Following the WTO Secretariat's typology, the TFA has twenty-six (26) SDT provisions,[105] divided as follows: three (3) on commitments and instruments flexibilities; seven (7) on transitional time-periods; seven (7) on technical assistance; and nine (9) on LDCs. The TFA has an entire section consisting of ten (10) articles that pertain to SDT. Among the most notable and important features of these provisions is

102 *Special and Differential Treatment,* Note by the Secretariat (9 May 2000), G/SPS/W/105, para. 5.
103 Entered into force on 22 February 2017.
104 TFA Preamble, third paragraph.
105 With sixteen (16) appearing in more than one category/type.

the more express and distinct recognition of the bases for differentiating developing and least-developed country Members. Apart from "development, financial and trade *needs*," due attention is now also given to "implementation *capacities*" and "administrative and institutional capacities." Another significant shift in the TFA is the fact that the provision of technical assistance is subsumed under the SDT principle rather than being placed in separate articles, as the TBT and SPS Agreements do. Otherwise stated, this drafting choice affirms the long-held view by many developing countries that assistance remains necessary from the more capable, developed Members to enable other WTO Members with special development, financial, and trade needs to not only perform their trade law obligations but also, and more importantly, to benefit from their participation in the global trading system.

As I further discuss below, although interpreting SDT holistically to address both needs and capabilities is generally a move in the right direction, it remains crucial to interrogate and distinguish the aim(s) of enhancing capability: What are the SDT beneficiaries being capacitated to do, and for what purpose? Is it to meet/fulfil their development needs, or is it to integrate them more into the multilateral trading system by way of additional legal obligations (that have no clear connection to development)? Can these objectives overlap with each other with the goal of bridging the South–North divide?

Before delving into these issues, it bears highlighting an innovation that the TFA advances: it allows developing- and least-developed-country Members to designate their respective obligations into categories. Most noteworthy is Category C, which does not only involve a longer implementation period (Category B) but also requires the provisions of assistance and support for acquiring implementation capacity. According to the TFA Database, the top three (3) most requested types of technical assistance are: human resources and training (65.9 %); legislative and regulatory framework (58.8 %); and ICT (52.1 %).[106] Because TFA reforms mainly entail changes in border agencies' behaviour and practices,[107] it makes sense that training is the most requested type of assistance. Related requests pertain to the creation or amendment of laws and regulations that would enforce specific trade facilitation measures.

Interestingly, TFA provisions linking implementation to technical assistance, according to Maureen Irish, create a "reverse conditionality, which ties the obligation to the successful acquisition of capacity due to the assistance" and thereby "turn unilateralism around."[108] Another author posited that "by linking implementation to

106 WTO Trade Facilitation Agreement Database, *Category C Assistance Analysis*, available at: <https://tfadatabase.org/en/notifications/category-c>, accessed March 28, 2023.

107 *Ibid.*

108 Maureen Irish, *Development, Reciprocity and the WTO Trade Facilitation Agreement*, 14 Manchester Journal of International Economic Law, no. 1 (2017), 50–68, 62.

receipt of capacity-building support, there is a tacit understanding that while donor support is not obligatory, the lack of it can extend the implementation date of obligations scheduled under Category C."[109] Certain TFA provisions do appear to make the implementation of Category C obligations conditional or contingent upon developing countries' receipt of assistance and support from other WTO Members. TFA article 16.3 provides that if developing and least developed country Members experience difficulties in notifying definitive implementation dates for Category C obligations–and such difficulties are due to "the lack of donor support or lack of progress in the provision of assistance and support for capacity building"–the prospective recipients "should notify the Committee as early as possible prior to the expiration of [the initially specified] deadlines." In this situation, all that the Members agreed to do is "cooperate to assist in addressing such difficulties, taking into account the particular circumstances and special problems facing the Member concerned." For its part, the TFA Committee can only extend the deadline to notify the affected Member's definitive dates.

Plausible support for the precondition argument could additionally be found in TFA article 17.1, which permits developing- and least-developed-country Members to extend implementation dates for Category B and C commitments, including where the reason for delay is "the need for assistance and support for capacity building not earlier anticipated or additional assistance and support to help build capacity." To emphasize, this provision concerns an extension of the implementation period, not a defense or justification for non-compliance with an obligation. It can reasonably back the claim that the developing- or least-developed-country Member's obligation is temporarily suspended and unenforceable while there is an outstanding need for assistance and support for capacity building. In this regard, it is also possible for a Member to self-assess its inability to implement a provision. This assessment, however, will still need to be examined by an Expert Group, which can recommend to the TFA Committee the appropriate action. The right granted to the "unable" Member then is to not be subjected to dispute settlement understanding (DSU) proceedings "on this issue from the time the developing country Member notifies the Committee of its inability to implement the relevant provision until the first meeting of the Committee after it receives the recommendation of the Expert Group." This right is quite valuable as "what may be most appropriate from an economic welfare (development) perspective is to create a framework for assisting governments to [learn from others in complex regulation-intensive domestic policy domains]," rather than for enforcing a harmonization requirement by binding dispute settlement.[110]

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109 Bader Bakhit M. AlModarra, *The Special and Differential Treatment Provisions in the Trade Facilitation Agreement: New Teeth for an Old Gum?*, 30 African Journal of International and Comparative Law, no. 2 (2022), 135–148, at 147.

The previously mentioned concern about merging technical assistance and capacity-building and subsuming both aspects under the SDT principle stems in part from provisions like TFA article 21.1, which states that the objective of providing assistance and support is so that developing country and LDC Members can implement their obligations under the Agreement. This statement seems to omit the objective of SDT to promote the development of the poorer States. Otherwise stated, the merging of needs and capabilities, particularly the express attention given to the latter, could have the adverse (perhaps unintended) effect of neglecting the necessity to help developing countries reap the benefits/gains from full participation in the multilateral trading system. It bears emphasizing that under paragraph 3(c) of the Enabling Clause, differential and more favourable treatment "shall … be designed … to respond positively to the development, financial and trade needs of developing countries." To further recall, the Appellate Body in *EC–Tariff Preferences* explained "the importance of the Enabling Clause … as a "positive effort" to enhance economic development of developing-country Members."[111] In contrast, it may be argued that, based on the preambles and SDT provisions of the three WTO agreements studied here, their object and purpose is to simply enable or capacitate developing country Members' compliance with the obligations imposed by these treaties.

The TFA provisions in particular seem to presuppose that the implementation of the Agreement leads to increased trade, which, in turn, positively responds to the development needs of developing- and least-developed-country Members.

Somewhat assuaging the concern regarding this tenuous connection, TFA article 21.2 provides that "development partners shall endeavour to provide assistance and support for capacity building in this area *in a way that does not compromise existing development priorities*." Notably, though, this provision only refers to least-developed country Members. Moreover, at a more generic level, one of the principles (under TFA article 21.3) to be applied in providing assistance and support is to "take account of the overall developmental framework of recipient countries … and, where relevant and appropriate, ongoing reform and technical assistance programs."

To sum up the foregoing legal analysis: the SDT principle was not conceived, whether under GATT or WTO law, to tackle and diminish economic (much less power) asymmetries among States. Indeed, the current trade regime is not concerned with eliminating inter-country disparities *per se* but mainly with generating overall gains from trade based on the theory of comparative advantage and ensuring the participation of all States, including those from the Global South, in the multilateral trading system. The underlying premise of such objectives–which the UN framework likewise endorses–is that developing countries would be able to narrow the gap with developed

110 Hoekman (2005), *supra* note 5, at 414–15.
111 *EC–Tariff Preferences,* para. 95.

countries by growing their economies through increased trade and higher export earnings. A full-fledged scrutiny of such premise deserves a separate study that cannot be undertaken here.

4 Conclusions

Probing the role of international trade law in sustainable development, specifically SDG 10, this article examined how rights and obligations relating to the SDT principle under GATT/WTO law can contribute to the goal of reducing inequality within and among countries. Prompting this question is the Means of Implementation target under Goal 10 concerning SDT (Target 10.a) that is presently measured and monitored only through the "proportion of tariff lines applied to imports from least developed countries and developing countries with zero-tariff" (Indicator 10.a.1). This lone indicator is inadequate for focusing on only one aspect of the principle, namely, export-led growth for developing countries through the Enabling Clause, which allows preferential and non-reciprocal market access in favor of the Global South.

Based on a legal analysis of various provisions–in the TBT Agreement, the SPS Agreement, and the Trade Facilitation Agreement–operationalizing differential treatment, I have put forward two claims. First, the envisioned contribution of the SDT principle to Goal 10 needs to be revisited, because the main objective of the examined SDT-related provisions is not inequalities reduction per se. Rather, these provisions are primarily intended to facilitate implementation, especially by developing countries, of free trade commitments under the WTO covered agreements. The assumption underpinning these provisions–that intensifying trade liberalization results to developing countries' income growth–remains controversial even among economists. By including the SDT target, the UN 2030 Agenda made the further assumption that the Global South's income growth will (i) empower them to lessen inequalities among individuals within their territories and (ii) narrow the gaps with the global North.

The economic validity of this decision is quite beyond the scope of this article. Leaving aside such an empirical question, I make the second proposition that, short of abandoning the Agenda's vision to reduce inequalities through SDT favoring developing countries, the SDT Target under SDG 10 requires additional indicators. These indicators should correspond to the technical assistance and international cooperation dimensions of the SDT principle embodied by provisions in the three WTO covered agreements analyzed here. Although these proposed additions will not correct the arguably flawed assumptions or theories, they could at least provide States implementing the UN 2030 Agenda with a more comprehensive view of

measures sanctioned by GATT/WTO law, that they can adopt relative to the SDT principle to reduce intra- and inter-country inequalities.

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