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Special and Differential Treatment under the World Trade Organization: A Legal Typology

Vineet Hegde
Jan Wouters



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Abstract

The World Trade Organization (WTO) has developed a typology to categorize various Special and Differential Treatment (SDT) provisions accorded to developing Members in WTO agreements. This typology is based on the aims and intended effects of such provisions. However, it fails to highlight the legal effects of such provisions. A legal typology is particularly important because the developed Members note that developing Members have taken advantage of the system through this treatment and intend to abolish SDT for certain advanced developing Members, whereas developing Members have called SDT a non-negotiable and treaty-embedded “right”. Moreover, developing Members have called for an effective operation of SDT provisions. These claims give rise to two questions: (i) do SDT provisions provide legal rights to developing Members? (ii) if so, what provisions confer differential treatment rights? In this article we devise a legal typology for SDT by distinguishing the provisions that confer rights and duties from provisions that constitute merely political commitments. We also consider the types, and the scope, of rights and duties that result in a special or differential treatment. Our results, *inter alia*, highlight that only 21 percent of SDT provisions actually provide special privileges to developing Members. The rest are mere best-effort endeavors and political commitments.

Keywords

World Trade Organization, Special and Differential Treatment, Legal Typology, Obligations of Means and Obligations of Result.

Authors

Vineet Hegde is a PhD Researcher at the Leuven Centre for Global Governance Studies and the Institute for International Law, KU Leuven, Belgium. Contact: vineet.hegde@kuleuven.be

Professor Dr. Jan Wouters is Full Professor of International Law and International Organizations, Jean Monnet Chair *ad personam* EU and Global Governance, and the founding Director of Leuven Centre for Global Governance Studies and the Institute for International Law at KU Leuven, Belgium. Contact: jan.mf.wouters@kuleuven.be

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I. INTRODUCTION

“Reciprocity” plays a key role in the making of, and compliance with, international law.¹ It has also been included prominently in international trade law. The 1947 General Agreement on Tariff and Trade (GATT) highlighted the wish of its signatories to enter into reciprocal and mutually advantageous agreements to reduce global trade barriers.² Such a vision was also adopted at the time of the establishment of the WTO in 1995.³ While reciprocity underpins most of World Trade Organization (WTO) law, there are several exceptions. One such example is the Special and Differential Treatment (SDT) provided to developing and least-developed countries. It operates as an exception to the most-favored nation (MFN) principle of equal treatment towards all WTO Members.⁴ In other words, SDT was “an acceptance of

¹ Jianming Shen, *The Basis of International Law: Why Nations Observe* 17(2) Dickinson Journal of International Law 289-355, 301, 345 (1999); Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36(1) Cornell Journal of International Law 93-123 (2002); Bruno Simma, *Reciprocity*, Oxford Public International Law (2008), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1461>.

² Preamble, General Agreement on Tariffs and Trade 1994 [GATT].

³ Preamble, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization [WTO Agreement].

⁴ Pallavi Kishore, *Special and Differential Treatment in the Multilateral Trading System*, 13(2) Chinese Journal of International Law, 363-394, 367 (2014) [Kishore, *SDT in the Multilateral Trading System*].

deviation from the general rule of *quid pro quo* or reciprocity for the developing countries”.⁵ Due to their inability to commit to all the obligations, developing Members received a certain degree of relaxation in commitments through SDT provisions embedded in the WTO agreements. The treatment includes reduced commitments or provisions for technical assistance, which only developing and least-developed Members can avail, and not developed Members.

Historically, developing countries have sought certain exemptions and relaxations through the negotiating rounds. Hudec’s seminal work on developing countries in the GATT describes the history of the issue and the whole saga in detail.⁶ After heavy contestation by the developing countries throughout the negotiating process, SDT as a principle was concretely embedded in the WTO agreements in 1995. Developing and least-developed country (LDC) Members received concessions like exemptions from certain commitments, technical assistance or a deferred time-period by which they could adjust their trade policies to match the rules and regulations of the WTO framework.⁷ However, during the 2001 Doha Ministerial Conference, developing Members highlighted some fundamental gaps in the design structure of the SDT provisions. They claimed that these provisions do not bestow the expected level of differential treatment on them. These claims were also based on their experience in attempting to enforce SDT provisions through the dispute settlement process.⁸ They sought for a higher degree of operationalization, effectiveness, and enforcement of SDT provisions.⁹ In light of the comatic state of the Doha negotiations, many have speculated

⁵ Communication from Cuba, India, Pakistan, et. al., *Preparations for the Fourth Session of the Ministerial Conference, Proposal for a Framework Agreement on Special and Differential Treatment*, the World Trade Organization General Council, WT/GC/W/442, para. 6 (2001) [Communication from Cuba, India et. al., *Proposal for a Framework Agreement on SDT*].

⁶ See generally, Robert E. Hudec, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* (Cambridge University Press, 2010).

⁷ Andrew Mitchell, *Special and Differential Treatment* in *LEGAL PRINCIPLES IN WTO DISPUTES* 238–266 (Cambridge University Press, 2008); Nicolas Lamp, *How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking*, 18(4) *Journal of International Economic Law* 743-751 (2015); Charlotte Sieber-Gasser, *Special and Differential Treatment in the WTO*, in *DEVELOPING COUNTRIES AND PREFERENTIAL SERVICES TRADE* 3–26 (Cambridge University Press, 2016); Paola Conconi & Carlo Perroni, *Special and Differential Treatment of Developing Countries in the WTO*, 14 *World Trade Review* 67–86 (2015).

⁸ For example, Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, 20 August 1999; Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, 22 September 1999; Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, 12 March 2001.

⁹ *Doha WTO Ministerial 2001: Ministerial Declaration*, the World Trade Organization Ministerial Conference Fourth Session, para. 44, WT/MIN(01)/DEC/1 (20 November 2001).

that the negotiations will not reach a fruitful outcome to suit the needs of developing Members.¹⁰

Fast-forward to 2019. The United States (US) doubled-down on certain WTO Members like China, India, South Africa, Brazil and South Korea that claim “developing country” status to seek SDT.¹¹ It contends that these Members are taking advantage of the system, and that there is no need for these Members to receive special treatment under WTO rules.¹² On the other hand, developing Members still claim that SDT is an unconditional, treaty-embedded right, and must be used for existing and future negotiations.¹³

While these polarized narratives have created a rift in the negotiating agendas that require imminent attention, like that of fisheries subsidies,¹⁴ the question remains: what is the legal significance of SDT provisions under WTO agreements? The uncertainty concerning the legal status of SDT has created misconceptions about the aims and effects of these provisions.

The uncertainty is mitigated to a limited extent due to the WTO Secretariat’s efforts in tabulating SDT provisions.¹⁵ The Secretariat has created a typology that classifies these provisions based on the aim and intended effect of the provisions. However, the Secretariat’s note neither highlights the legal nature of these provisions, nor does it base its typology on the legal status of the same. So, the pressing question still remains: *is SDT a treaty-embedded right like the developing Members claim for it to be?*

¹⁰ Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 Texas International Law Journal 573-60 (2010); Robert Wolfe, *First Diagnose, Then Treat: What Ails the Doha Round*, 14(1) World Trade Review 7-28 (2015); Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks its Wounds*, 3 Trade Law and Development 367–381 (2012); Uche Ewelukwa Ofodile, *The “New” Development Agenda: Challenges to Operationalizing Special and Differential Treatment*, 103 Proceedings of the American Society of International Law Annual Meeting 423–427 (2009).

¹¹ Judith H. Bello & Alan F. Holmer, *Special 301: Its Requirements, Implementation, and Significance*, 13(3) Fordham International Law Journal 259-275, 260 (1989-90); Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27(1) European Journal of International Law 9–77, 18 (2016).

¹² Presidential Memoranda, *Memorandum on Reforming Developing-Country Status in the World Trade Organization*, 26 July 2019, Federal Register 84(147), 31 July 2019.

¹³ Co-sponsored by the African Group, China, India, et. al., *Statement on Special and Differential Treatment to Promote Development*, World Trade Organization General Council, para. 1.2 and 1.5, WT/GC/202/Rev.1 (14 October 2019) [Communication from China, India, et. al., *Statement on SDT to Promote Development* (October 2019)].

¹⁴ *Id.* at para. 1.6.

¹⁵ The latest version was updated in October 2018. See *Special and Differential Treatment Provisions in WTO Agreements and Decisions - Note by the Secretariat*, World Trade Organization Committee on Trade and Development WT/COMTD/W/239 (12 October 2018) [WTO Secretariat Note 2018].

Feuer in 1994 stated that whether SDT is a right or not will be based on the application of these provisions.¹⁶ While the concept of SDT has been extensively discussed in academic writings,¹⁷ there is little research that considers essentially legal questions such as: what are the rights? what are the duties? (to what extent) are they binding? can SDT provisions be enforced? Kessie has examined the legal status of SDT in general, and some provisions under the covered agreements.¹⁸ However, his analysis is also based on the Secretariat's typology. While some scholars have reoriented the typology to some degree, devising a legal typology has not been their main focus. Lee highlights that SDT provisions come as relaxations, protection of developing countries' interests, and longer transitional periods.¹⁹ Alessandrini analyzes some of the WTO agreements to highlight that "most of them" are best-effort clauses.²⁰ Garcia recategorizes SDT provisions based on the language into four categories: discretionary provisions, best endeavor clauses, "fake mandatory" provisions, and mandatory provisions.²¹ Rolland goes one step further in reorienting the types of drafting patterns in SDT provisions.²² She classifies them into "escape clauses, best effort provisions, provisions defining an objective but devoid of specific implementation prescriptions, and accountability provisions".²³ While she highlights that the object of her research is not to conduct a "systematic article-by-article review", she notes that such a research would add value to the scholarship.²⁴ We submit that an article-by-article research becomes quintessential in order to identify the true legal nature of the SDT provisions. The results

¹⁶ Guy Feuer, *L'Uruguay Round et les Pays en Voie de Développement*, 40 *Annuaire Français de Droit International* 758-775, 775 (1994).

¹⁷ The list is extensive. Some important works that have not been referenced elsewhere in this article include: Petros Mavroidis, *Doha, Dohalf, or Dohaha? The WTO Licks its Wounds*, 3(2) *Trade, Law and Development* 367-381 (2011); David A Gantz, *LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES* (Cambridge University Press, 2013); Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How?* in *ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION* 147-188 (Simon Evenett & Bernard Hoekman, Trade and Development, World Bank, 2006); Petros Mavroidis & Bernard Hoekman, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS AND POLITICS* 109-128 (2nd ed. Routledge, 2016); Andrew Mitchell & Tania Voon, *Operationalizing Special and Differential Treatment in the World Trade Organization: Game Over?* 15(1) *Global Governance* 343-357 (2009); See generally, Will Martin & L. Alan Winters (eds.), *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES* (Cambridge University Press, 1996).

¹⁸ Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements*, in *WTO LAW AND DEVELOPING COUNTRIES* 23-34 (George A Bermann and Petros C. Mavroidis eds., Cambridge University Press, 2010).

¹⁹ Yong-Shik Lee, *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM* 39 (Cambridge University Press, 2009).

²⁰ Donatella Alessandrini, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADE REGIME: THE FAILURE AND PROMISE OF THE WTO'S DEVELOPMENT MISSION* 174 (Hart Publishing, 2010).

²¹ Frank Garcia, *Beyond Special and Differential Treatment*, 27(2) *Boston College International and Comparative Law Review* 291-317, 310-311 (2004) [Garcia, *Beyond Special and Differential Treatment*].

²² Sonia E. Rolland, *DEVELOPMENT AT THE WTO* 109-138 (Oxford University Press, 2012) [Rolland, *DEVELOPMENT AT THE WTO*].

²³ *Id.* at 117.

²⁴ *Id.*

would strengthen the legal understanding on the developmental divide so as to enable WTO Members in addressing the issue effectively. We endeavor to do this here.

The aim of this article is neither to address the question whether developing Members need more or less differential treatment,²⁵ nor to analyze the economic benefits derived through SDT, or determine which Members can claim “developing country” status. Rather, our objective is to critically reconsider the WTO’s typology from a legal perspective. The structure of the article is as follows. In Section II, we elaborate our approach and present the empirical results of our study. Subsequently, we devise a legal typology that will be applied to the existing rights and duties inscribed in the SDT provisions through an article-by-article analysis. We use this typology to highlight the obligations that bind developed Members in conferring SDT to developing and LDC Members based on the civil law distinction of obligations of means and obligations of result (Section III). Section IV concludes.

II. SPECIAL AND DIFFERENTIAL TREATMENT: TOWARDS A LEGAL TYPOLOGY

In February 2000, the WTO Secretariat prepared a note on SDT provisions, which it now updates on a regular basis.²⁶ In its latest version of 2018, the Secretariat has highlighted that a total of 155 provisions in the WTO agreements contain SDT provisions, including the Trade Facilitation Agreement (TFA) that was ratified in 2017.²⁷ The provisions are classified into six categories: provisions aimed at increasing trade opportunities, provisions aimed at safeguarding developmental interests, provisions for LDCs, flexibility in commitments, transitional time periods, and technical assistance.²⁸ The enlisted typology highlights the aims and intended effects of a specific SDT provision: what does the provision intend to seek? Is it aimed at increasing trade opportunities? Does it provide flexibility? What are the provisions for LDCs? etc. The typology is designed to highlight whether the needs of developing Members and LDC Members have been taken into account in a specific SDT provision. It does not focus on the legal nature and characteristics of such provisions. Among the 155 provisions, some provisions have dual purposes. Based on this data, the WTO Secretariat highlights that there are 183 provisions, out of which 21 provisions are enlisted in more than one of the categories.²⁹

²⁵ Joost Pauwelyn, *The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes*, 22(1) *Review of European Community & International Environmental Law* 29-41, 41 (2013).

²⁶ See *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions - Note by the Secretariat*, the World Trade Organization WT/COMTD/W/66 (16 February 2000).

²⁷ *WTO Secretariat Note 2018* at 5. Please refer to the “Table on Special and Differential Treatment Provisions by Type and Agreement” as well as footnote 3.

²⁸ *Id.* at 4, para 1.5.

²⁹ *Id.*

Unlike the Secretariat’s typology, which has its basis in the aims and effects of the SDT provisions, our analysis is based on legal reasoning. To that effect, we use the seminal work on legal relations by Wesley Newcomb Hohfeld to determine rights and obligations for developed and developing WTO Members.³⁰ Hohfeld, more than a century ago, stated that any legal relationship can be described through eight variables, divided into two sets:

Hohfeldian Analysis of Legal Relations

Right	No-right	Power	Disability
Duty	Privilege	Immunity	Liability
First order relations		Second order relations	

Our analysis limits itself to first order relations and does not include second order relations. This is because second order relations have to do with the changes in the first order relations, which is outside the scope of this contribution.

Right-Duty: A right, in simple terms, is whatever that may be lawfully claimed. A duty is that which one ought or ought not to do as per the terms of the law. These two elements are interlinked together, and one does not exist without the other. Hohfeld terms them as “jural correlatives”. A legal right gives rise to a legal duty, and vice versa.

Privilege-No Right: A privilege is a liberty to do an act. An interference with the performance of that act does not give rise to any liability. For example, if Y does not have a duty not to interfere with X’s liberty to speak, Y will not be held accountable if she interferes with X’s liberty to speak.

³⁰ Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16-59 (1913) [Hohfeld, *Fundamental Legal Conceptions I*]; Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale Law Journal 710–770 (1917). We acknowledge that the Hohfeldian methodology has some shortcomings, i.e., in terms of determining “power” as criticized by Raz, or the gaps in the concept of “permissibility”. But these criticisms do not pertain to the rights-duties relationship, which is the main focus of our research. Moreover, we have also used recent scholarship that has aimed to bridge this gap and defend the Hohfeldian theses. See Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63(2) American Journal of Jurisprudence 295–354 (2018) [Hurd and Moore, *The Hohfeldian Analysis of Rights*].

Based on this methodology, we classify various SDT provisions as rights, duties,³¹ privileges and no obligations.³² In carrying out an article-by-article analysis, we examine the legal nature of SDT provisions as per the ordinary meaning of their wording provided in the text in the WTO agreements, based on their contexts, and in light of the object and purpose of such agreements according to the Vienna Convention on the Law of Treaties. We also account for the interpretations provided by the WTO panels and the Appellate Body to interpret such provisions. The legal significance of rights and duties can be analyzed through terms like “shall”, “should”, “may”, “recognize” etc.³³ Moreover, the WTO agreements also impose duties on several WTO organs, such as the Secretariat, the panels, various committees etc. These duties may be considered binding, because its addressees are organs of the WTO and the latter possesses legal personality under international law.³⁴ However, there is no scope for enforceability as Article 1.1 of the Dispute Settlement Understanding (DSU) states that the dispute settlement mechanism is only reserved between two or more WTO Members. Also, we have counted some SDT provisions more than once because they either: a) impose different kinds of legal relations in the same provision; or b) impose legal relations between two different types of Members, i.e., between developed and developing Members or between developed and LDC Members.

Our empirical research highlights the following results:

1. There are 227 commitments (legal and non-legal) that are embedded in 200 provisions of the WTO agreements.³⁵

³¹ It must also be noted that the “rights-duties” terminology can be used interchangeably.

³² Provisions that are meant for best efforts and recognize the goals of WTO law contain no legal effects. This must not be confused for a “no-right” as a corollary to a “privilege” in Hohfeldian terms. According to Hurd and Moore, “no-right” is a mere construct created in void to match Hohfeld’s matrix, but is not necessary to be included in the legal relation. See Hurd and Moore, *The Hohfeldian Analysis of Rights*, at 307-309.

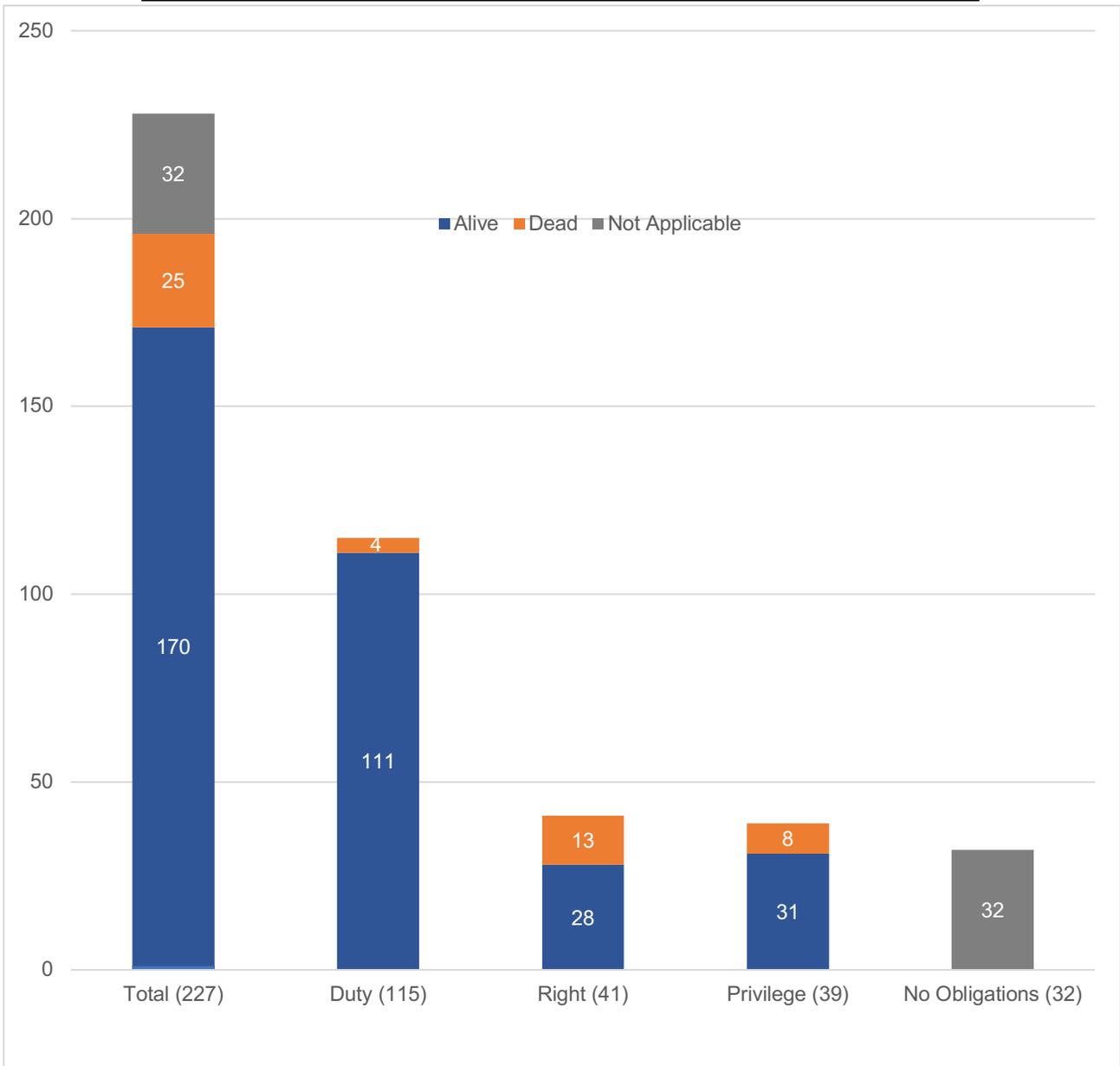
³³ See Graham Cook, *A DIGEST OF WTO JURISPRUDENCE ON PUBLIC INTERNATIONAL LAW CONCEPTS AND PRINCIPLES* 326-331 (Cambridge University Press, 2015).

³⁴ Art. VIII, WTO Agreement; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) *European Journal of International Law* 753-814, 802 (2002).

³⁵ The difference in the total number of SDT provisions in the WTO Secretariat’s counting and our analysis is due to the following reasons: i) the WTO Secretariat counts Annex 5 Section B of the AoA as one provision. However, there are two paragraphs 7 and 10 under Annex 5. Therefore, it is counted as two SDT provisions, bringing the total number of SDT provisions under the AoA to 14 and not 13; ii) for GATS, the WTO Secretariat counts the recitals in the Preamble as one SDT provision. However, it counts different recitals of the TBT Agreement as different SDT provisions. In order to maintain uniformity, we have included all the recitals of GATS separately, bringing the total to 15, and not 13; iii) for TFA, the Secretariat states that there are 10 SDT provisions – from Art. 13-22, TFA. However, each sub provision of these Articles imposes a different action or an obligation. In total, there are 62 provisions under the TFA; and iv) we have discounted the 10 SDT provisions under the Government Procurement Agreement (GPA) as it is not a multilateral treaty applicable to all WTO Members. The math adds up to: 155 provisions (as highlighted by the WTO Secretariat) + 1 additional provision in the AoA + 2 additional provisions in the GATS + 52 additional provisions (62-10 provisions already highlighted by the Secretariat) under the TFA - 10 SDT provisions under the GPA = 200 provisions. There are 27 obligations that are counted more than once as per hypothesis 3. Therefore, the total adds up to 227 commitments.

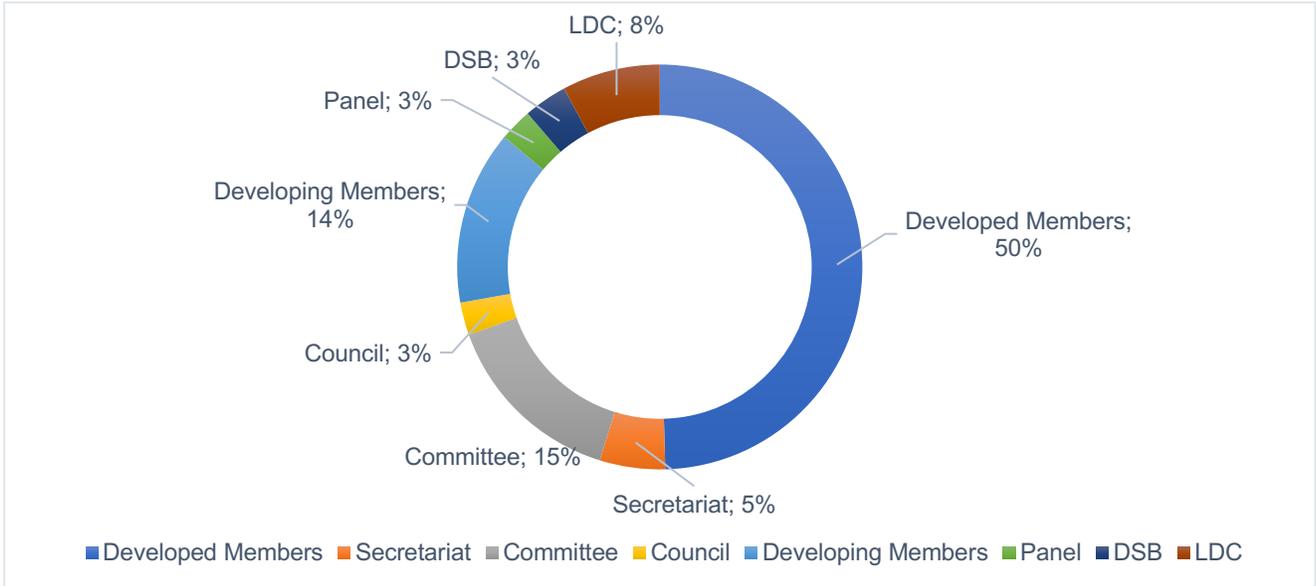
2. Out of the 227 commitments, 195 are legal obligations and 32 are non-legal, aspirational commitments.
3. Out of 195 legal obligations, 170 of the obligations are alive, and 25 of the obligations have expired.
4. Out of 195 legal obligations, 115 are legal duties, 41 are rights and 39 are privileges.
 - a. Out of 115 legal duties, 111 legal duties are alive, and 4 legal duties have expired.
 - b. Out of 41 legal rights, 28 legal rights are alive, and 13 legal rights have expired.
 - c. Out of 39 legal privileges, 31 privileges are alive, and 8 have expired.

Table 1: Number of Provisions by Typology and Status (n = 227)



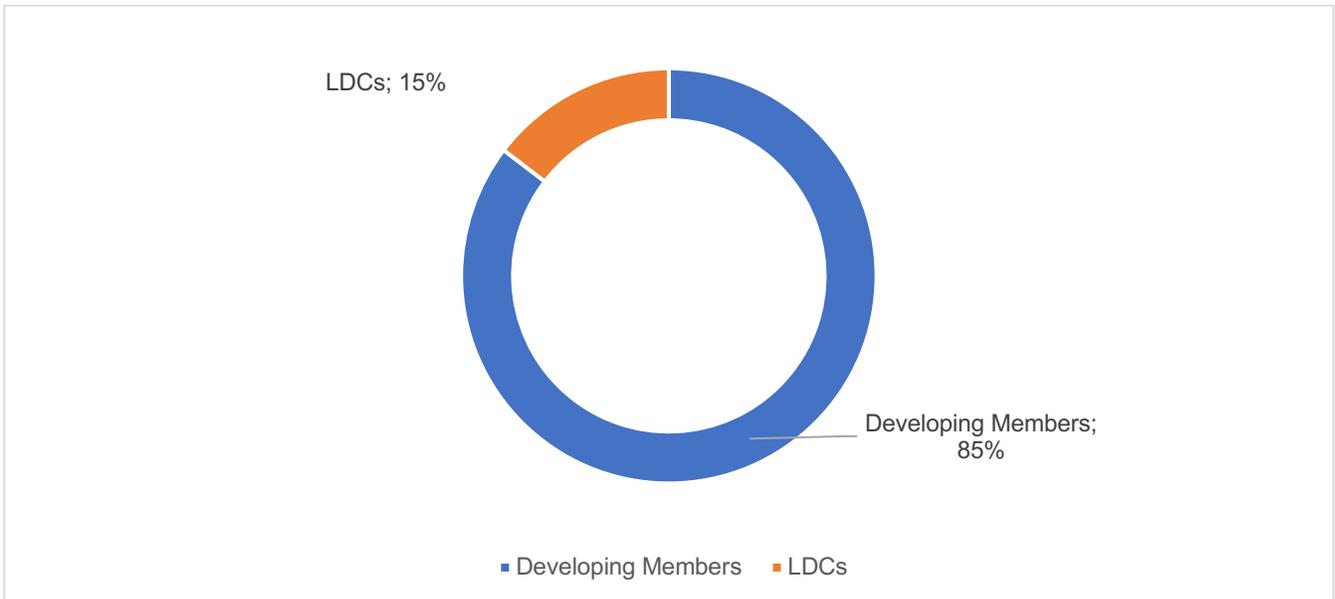
5. Out of 115 legal duties, developed Members bear 57 such duties; developing Members bear 16 duties and LDC Members bear 9 duties. The other duties are imposed on WTO organs.

Table 2: Who Bears the Duty? Proportion of Duties by Bearer (n=115)



6. Out of 41 rights, 6 are rights specifically provided to LDCs, and 35 are provided to developing Members.

Table 3: Who Bears The Right? Proportion of Rights By Bearer (n=41)



Based on this data, we have devised a legal typology of SDT provisions:

Table 4: A Legal Typology of Special and Differential Treatment Provisions

Commitments	Actors	Type of Action
Duties	On developed Members	<p>A duty to:</p> <ol style="list-style-type: none"> 1. Consider the needs of developing and LDC Members while adopting certain measures;³⁶ 2. Facilitate and assist developing Members;³⁷ 3. Collaborate with developing Members;³⁸ 4. Consult developing Members;³⁹ 5. Provide access to international trade and review its progress;⁴⁰ 6. Take action in enforcing a Ministerial Decision;⁴¹ 7. Due diligence towards developmental interests;⁴² 8. Refrain from introducing measures that affect developmental interests;⁴³ 9. Refrain from litigation;⁴⁴ and 10. Inform and notify developing Members.⁴⁵
	On developing and LDC Members	<p>A duty to:</p> <ol style="list-style-type: none"> 1. Inform or notify other Members;⁴⁶ and 2. Comply with WTO obligations.⁴⁷

³⁶ Eighteen duties. Arts. XXXVII:1(a), XXXVII: 3 GATT; Arts. 9.2 and 10.1, SPS Agreement; Arts. 12.2, 12.3, 12.5, 12.6, 12.7 (twice), 12.8 and 12.9, TBT Agreement; Annex III: 1, CV Agreement; Art. 15, Antidumping Agreement; Art. 1.2, Import Licensing Procedures Agreement; Art. 20.4, TFA; Art. IV:3 and Art. XV:1, GATS.

³⁷ Sixteen duties. Art. XXXVII:2(f), GATT; Arts. 10.5, 11.1-6, 12.7, TBT Agreement; Art. 20.3, CV; Art. IV:1-2, GATS; Arts. 66.2, 67, TRIPS Agreement; and Arts. 20.5, 21.2 TFA.

³⁸ Four duties. Arts. XXXVIII:1 and XXXVII:2(b), (c) and (e), GATT.

³⁹ Two duties. Arts. XXXVII:2 and 5, GATT.

⁴⁰ Two duties. Arts. XXXVIII:2(a) and (d), GATT.

⁴¹ One duty. Arts. 16.1, AoA.

⁴² One duty. Art. XXXVI:9, GATT.

⁴³ Two duties. Arts. XXXVII:1(b)-(c), GATT.

⁴⁴ Six duties. Arts. 18.5 (twice), 20.1-4, TFA.

⁴⁵ Five duties. Art. XXXVII:2, GATT; Art. 3(5)(a)(iv), Import Licensing Procedures; §6(c) Annex Telecommunication, GATS; Arts. 22.2, 22.4, TFA.

⁴⁶ Twenty-one duties. For LDCs: Arts. 16.2.a-f, 17.1.a, 17.3, TFA; For developing Members: Arts. 16.1.a-e, 16.3, 17.1.a-b, 17.3, 18.1, 19.1, 22.1, 22.3, TFA.

⁴⁷ Two duties. Art. XXXVII:4, GATT; Art. 15.1, TFA.

Rights	For developing Members	A right: <ol style="list-style-type: none"> 1. Of delayed application;⁴⁸ 2. To exemptions;⁴⁹ 3. To reduced commitments;⁵⁰ 4. To presumption (or lack thereof);⁵¹ and 5. Of temporary derogation.⁵²
Privileges	For developed Members	Privileges to: <ol style="list-style-type: none"> 1. Provide technical assistance;⁵³ 2. Allow temporary derogation;⁵⁴ 3. Refrain from adopting certain measures against developing Members;⁵⁵ 4. Prioritize developmental needs;⁵⁶ and 5. Exempt developing Members from strict reciprocity.⁵⁷
No obligations	On all WTO Members	Provisions that: <ol style="list-style-type: none"> 1. Recognize the goals of SDT;⁵⁸ and 2. Lay down general principles.⁵⁹

⁴⁸ Fourteen rights. Alive rights: Arts. 14.1.b-c, 17.2, TFA; Art. 66.1 TRIPS Agreement; Art. 27.5, SCM Agreement. Dead rights include: Art. 15.2, AoA; Art. 5.2, TRIMS Agreement (twice); Arts. 27.2.b., 27.3 (twice), 27.4, SCM Agreement; Art. 65.2, TRIPS Agreement; Art. 14.1.a., TFA.

⁴⁹ Eight rights. Arts. 6.2, 12.2, 15.2 and §B(7) Annex 5, AoA; Arts. 27.2.a., 27.7, 27.13, SCM Agreement; Art. 13.2, TFA.

⁵⁰ Eleven rights. Arts. 6.4, 9.2.b.iv, §B(10) of Annex 5 of AoA; Arts. 27.10, 27.11 (twice), SCM Agreement; Art. 9.1 (footnote 2), Safeguards Agreement; Arts. V:3, XIX:2, GATS; Art. 3.12, DSU; Art. 13.3, TFA.

⁵¹ Three rights. Footnote 5, para 3, and footnotes 5 and 6, para 4, Annex 2, AoA; Art. 27.8, SCM Agreement.

⁵² Five rights. Art. 4, TRIMS Agreement; Art. 9.2 (twice), Safeguards Agreement; Arts. 2.12 and 5.9, TBT Agreement.

⁵³ Seven privileges. Arts. 11.2-7, TBT Agreement; Art. 20.3, CV Agreement.

⁵⁴ Two privileges. Art. 10.2, SPS Agreement; Art. III:4, GATS.

⁵⁵ Two privileges. Art. XXXVII:1(b)-(c), GATT.

⁵⁶ Two privileges. Art. XXXVII:1(a), GATT; Art. 11.8, TBT Agreement.

⁵⁷ Four privileges. Art. 9.4, AoA; Art. 10.3, SPS Agreement; 27.9, SCM Agreement; Art. XII:1, GATS.

⁵⁸ Eight provisions. Art. XVIII:B(8), GATT; Recitals 8 and 9, TBT Agreement; Art. 27.1, SCM Agreement; Recitals 2-4, Preamble, GATS; Recital 6, Preamble, TRIPS Agreement.

⁵⁹ Twenty-four provisions. Arts. XXXVI:2-7, GATT; Recital 5 of the Preamble, Art. 15.1, AoA; Arts. 9.1, 10.4, SPS Agreement; Arts. 12.1, 12.4, 14.4 TBT Agreement; Art. 27.12, SCM Agreement; Arts. 13.1, 13.4, 18.3, 18.4, 21.3.a-f., TFA.

Through this typology, our goal is to clarify the legal status of SDT provisions in the WTO agreements. In doing so, we characterized the provisions into rights, duties, privileges, and provisions that are mere political commitments and do not impose any legally binding obligations. This typology is not without limitations. It does not highlight the type of provisions that developing and LDC Members can utilize to seek differential treatment and hold developed Members accountable for their commitments. This typology in the first step in the analysis. The next step analyzes the type of rights and obligations that concretely result in special or differential treatment to developing and LDC Members.

III. NATURE OF SDT PROVISIONS: OBLIGATIONS OF MEANS AND RESULT

The use of the Hohfeldian method provides clarity in terms of legal relationship between the developed and the developing Members through differential treatment provisions in the WTO agreements. However, it only aids in clarifying what the rights and obligations are. It does not provide a deeper understanding of the kind of provisions that bind the developed Members to provide special treatment to developing and LDC Members. There are SDT provisions that impose obligations on developed Members, but do not hold them accountable if differential treatment is not provided by them to developing Members.⁶⁰ This creates confusion regarding the type of provisions that the developing Members can utilize in reaping the benefits of differential treatment provided in the WTO agreements. Due to these limitations, we add a second layer to our methodology and develop an analysis of the type of provisions that developing Members can utilize in seeking differential treatment. In doing so, we use the civil law distinction of contractual “obligations of means” and “obligations of result” (*obligations de moyen* and *obligations de résultat*).⁶¹

Obligations of means refer to a specific action imposed on a party, without promising a specific result.⁶² The content of such obligations is essentially determined by a party’s “best efforts” or “reasonable care and skill” to reach a desired result.⁶³ In contrast, obligations of

⁶⁰ For example, obligations such as the duty to consider or the duty to collaborate.

⁶¹ Jean Bellissent, CONTRIBUTION A L'ANALYSE DE LA DISTINCTION DES OBLIGATIONS DE MOYEN ET DES OBLIGATIONS DE RESULTAT paras. 644-652, 291-298 (Librairie Générale de Droit et de Jurisprudence, 2001); Philippe Le Tourneau et. al., DROIT DE LA RESPONSABILITE ET DES CONTRATS paras. 3211-3295, 1023-1037 (Daloz Action, 9th ed. 2012); Geneviève Viney, Patrice Jourdain & Suzanne Carval, TRAITE DE DROIT CIVIL : LES CONDITIONS DE LA RESPONSABILITE paras. 521-555, 591-644 (Librairie Générale de Droit et de Jurisprudence, 4th ed, 2013).

⁶² James Crawford, *Second Report on State Responsibility*, UN Doc. A/CN.4/498 and Add. 1-4 para. 57 (1999) [Crawford, *Second Report on State Responsibility*]; Konrad Zweigert & Hein Kötz, AN INTRODUCTION TO COMPARATIVE LAW 501 (Tony Weir (trans.), Oxford University Press 3rd ed. 1998) [Zweigert & Kötz, AN INTRODUCTION TO COMPARATIVE LAW].

⁶³ Stephan Vogenauer, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 626 (Stephan Vogenauer ed, Oxford University Press 2nd ed, 2015); Joseph Frossard, LA DISTINCTION DES OBLIGATIONS DE MOYEN ET DES OBLIGATIONS DE RESULTAT 1, 47 (Librairie Générale de Droit et de Jurisprudence, 1965).

result impose the achievement of a specific result,⁶⁴ whereby the party failing to do so will be held accountable.⁶⁵ The responsibility of a debtor under such an obligation will be based on a more strict liability standard.⁶⁶ A breach of this obligation is easier to prove by virtue of its strictness and rigidity, as compared to that of obligations of means, as the creditor only has to show that the result was not achieved.

A. SDT Provisions as Obligations of Means

According to our typology, many SDT provisions impose a duty on developed Members to undertake or perform an action. They are more flexible, less burdensome, and do not hold developed Members liable for not providing differential treatment to developing and LDC Members. The commitments undertaken by developed Members under this category of obligations are merely best-effort endeavors. The Members are obligated to act in good faith. However, they are not obligated to actually provide an advantage through SDT to developing Members. There are 51 obligations of means under the WTO agreements. Such duties are:

1. *Duty to consider the needs of developing Members*

The “duty to consider” consists of developed Members taking into account the needs and interests of the developing Members in enacting a measure that affects international trade. This duty is an obligation of means, as it does not promise a desirable result and only regulates the conduct of developed Members.

While Garcia categorizes some of these duties as “de facto non-binding or fake mandatory provisions”,⁶⁷ it should be borne in mind that their finality is not to generate an act that actually provides SDT. The identical content of the duty to consider relevant factors before reaching a decision indicates that there is a correlative right of such factors to be considered. This does not necessarily mean that the course of action indicated in the provision at hand needs to be followed. For example, Article 5.3 of the Sanitary and Phytosanitary (SPS) Agreement⁶⁸ states that while Members conduct risk assessment, certain economic factors need to be taken into account. The Panel in *Russia – Pigs*, while interpreting Article 5.3, held that a duty is imposed to consider the relevant economic factors and further stated that “[t]his obligation

⁶⁴ Solène Rowan, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE* 29 (Oxford University Press, 2012) [Rowan, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE*].

⁶⁵ Constantin P Economides, *Content of the Obligation: Obligations of Means and Obligations of Result* in *THE LAW OF INTERNATIONAL STATE RESPONSIBILITY* 372 (James Crawford, Alain Pellet, and Simon Olleson eds., Oxford University Press, 2010) [Economides, *Content of the Obligation*].

⁶⁶ Hein Kötz, *Comparative Contract Law* in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 930 (Mathias Reimann & Reinhard Zimmermann eds, Oxford University Press 2nd ed, 2019) [Kötz, *Comparative Contract Law* in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*].

⁶⁷ Garcia, *Beyond Special and Differential Treatment* at 311.

⁶⁸ Although Art. 5.3, SPS Agreement is not an SDT provision, it uses the phrase “shall take into account”.

does not imply, however, that consideration of the relevant economic factors will require a particular course of action from the Member imposing an SPS measure.”⁶⁹

The panel in *US – COOL* stated that Article 12.3 of the Technical Barriers to Trade (TBT) Agreement that lays down a duty to consider the needs of developing Members “does not amount to a requirement of WTO Members to conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision”.⁷⁰ The panel in *EC – Biotech* also held that a mere absence of reference to developmental needs in the European Communities’ (EC) approval legislation is not sufficient evidence to prove that the EC had violated the SDT provision.⁷¹

While much discussion has been devoted to this duty, WTO case law has not provided any specific threshold for the developed Members’ *duty to consider* and what actions and omissions would constitute a breach of such a duty. Moreover, the duty to consider has been seen as a positive obligation,⁷² and no WTO panel has ever held that this duty was violated by a Member.

2. Duty to collaborate with developing Members

The duty on developed Members to collaborate and consult in disciplining trade areas does not necessarily result in the provision of special treatment to developing Members. While this is the case, pre-WTO jurisprudence has enforced the obligation to collaborate under Article XXXVIII:1 of the GATT that imposes a duty to collaborate jointly with other Members to further the objectives of Part IV of the GATT. In a 1980 GATT report in *EC – Sugar Exports (Brazil)*, the panel held that the EC had failed to collaborate with other contracting parties to adopt measures on sugar imports, thereby violating GATT Article XXXVIII:1.⁷³ However, there was no decision on whether actual results of meeting developmental interests were to be achieved.

3. Duty to consult developing Members

A duty to consult the developing Members in adopting trade-related measures is also an obligation of means that would not result in actual special treatment, but merely consult the developing Members in carrying out such obligations. Economides has stated that an

⁶⁹ Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R, 21 March 2017, para. 7.767.

⁷⁰ Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, 23 July 2012, para. 7.781.

⁷¹ Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, 21 November 2006, para. 7.1623.

⁷² Panel Report, *United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina*, WT/DS447/R, 31 August 2015, para. 7.690.

⁷³ GATT Panel Report, *European Communities – Refunds on Exports of Sugar – Complaint by Brazil*, L/5011, 10 November 1980, BISD 27S/69, Conclusion (h).

obligation of co-operation is generally an obligation of means as it is a positive obligation formulated in a relatively weak manner.⁷⁴ Therefore, this duty falls under the ambit of obligations of means as it provides a framework of conduct without resulting in any special treatment of developing and LDC Members.

4. Duty to provide access to international trade and review its progress

The duty to provide access to the share of world trade and review its progress does not obligate developed Members to provide differential treatment, but merely imposes a duty to monitor and review the developments. For the duty to review, the Secretariat's report merely informs on the level of economic development achieved by the developing Members.⁷⁵

5. Duty to take action in enforcing a Ministerial Decision

The duty under the AoA to enforce the 1993 Ministerial Decision on LDCs and Net Food-Importing Developing Countries might seem like an obligation of result.⁷⁶ However, it is important to study the content of the Ministerial Decision to determine the nature of this duty. The Ministerial Decision does not impose any obligation on developed Members to provide differential treatment. Most of the provisions of the Decision use the term "recognize", highlighting the lack of legal bindingness for the same.⁷⁷ In parts of the Decision where obligations are imposed, they operate to ensure that appropriate mechanisms are set up so that the implementation of Uruguay Round negotiations does not adversely affect the availability of food aid,⁷⁸ and that any agreement on agricultural export credits make appropriate provisions to include SDT.⁷⁹ Therefore, the Decision itself does not provide any SDT, thereby making the duty to enforce the same an obligation of means.

6. Duty to facilitate and assist developing Members

The duty to facilitate and assist developing Members includes actions such as setting up institutional arrangements, facilitating developing Members' participation, providing translated documents and advice, and establishing enquiry points. Especially under Article 11 of the TBT Agreement, developed Members bear a duty to provide technical assistance on "mutually agreed terms".⁸⁰ This qualifier places the power on the developed Members to furnish technical assistance as they deem fit. Such a duty does not obligate the developed

⁷⁴ Economides, *Content of the Obligation*, at 378.

⁷⁵ *Participation of Developing Economies in the Global Trading System - Note by the Secretariat*, the World Trade Organization Committee on Trade and Development, WT/COMTD/W/230, (7 November 2017).

⁷⁶ Art. 16.1, AoA.

⁷⁷ *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, The Uruguay Round Agreement, paras. 1, 2 and 5, https://www.wto.org/english/docs_e/legal_e/35-dag.pdf

⁷⁸ *Id.* at para. 3.

⁷⁹ *Id.* at para. 4.

⁸⁰ Arts. 11.2-6, TBT Agreement.

Members to provide differential treatment, but merely prescribes conduct to integrate the developing Members into the lawmaking processes at the WTO. The desired outcome of differential treatment cannot be achieved through the performance of this duty. Therefore, it is placed in the category of the obligations of means.

7. Duty of due diligence towards developmental interests

GATT Article XXXVI:9 merely obliges a developed Member to make conscious efforts to further the objectives of development in international trade. This provision does not impose an obligation to achieve the results of development, but guides the developed Members in considering the needs of developing Members to further the objective of trade and development. Due to the nature of such a duty, it falls within the ambit of obligations of means.

8. Duty to refrain from introducing measures that affect developmental interests

GATT Articles XXXVII:1(b) and (c) impose a duty on developed Members to refrain from adopting measures such as customs duties, non-tariff barriers, as well as fiscal measures that hamper the interests of developing Members. While *prima facie* this may appear an obligation of result, the drafters of the GATT introduced a qualifying term “shall... to the fullest extent possible” in the execution of this duty, thereby diluting the degree of legally binding consequences for the developed Members. In 1964, the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Members in its report stated that the phrase “to the fullest extent possible” leaves the application of the provision to the subjective judgment of the GATT contracting parties.⁸¹ While developing Members were concerned about the effectiveness of such provisions, this qualifier provided them with an avenue to engage in consultations with developed Members regarding the rights laid down under this provision.⁸² Therefore, this obligation imposes conduct on developed Members and does not compel them to undertake a promise to achieve an intended result of differential treatment. Hence, it falls within the category of obligations of means.

9. Duty to inform developing Members

Developed Members are obligated to notify and provide information relating to certain trade measures and contact points. The reasoning behind imposing such a duty is to enhance transparency, whereby developing Members can utilize the information provided to them and reap the benefits of the multilateral trading system in an efficient manner. This duty does not prescribe a desired result of differential treatment but facilitates developing Members to

⁸¹ *Report of the Committee*, Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries, L/2281, para. 4 (26 October 1964).

⁸² *Id.*

comprehend the measures taken by the developed Members. Therefore, this duty forms a part of the obligations of means.

B. SDT Provisions as Obligations of Result

Obligations of result involve in some measure a guarantee of the outcome.⁸³ The guarantee of the outcome may predict how the result ought to look like. For the purposes of this research, we analyze what provisions actually provide a result rather than a best-effort endeavor without an ultimate commitment.

While developing Members have claimed that many SDT provisions have not been made operational, there are some rights that are strict, rigid, concrete and impose a duty on developed Members to provide differential treatment. The United Nations Conference on Trade and Development in its 1994 report stated that “[i]n certain Agreements, differential and more favorable treatment has been given a more precise, contractual character, particularly in the form of numerical thresholds for undertaking certain commitments or of exemption from others.”⁸⁴ This statement holds value, as some SDT provisions provide exemptions, temporary derogations, numerical thresholds etc. that result in special treatment for developing Members, thereby holding them to a lower degree of reciprocity in performing their WTO commitments.

Based on the typology elaborated in Section III, it is evident that there are some provisions that obligate developed Members to reach the result of differential treatment. For example, Article 9.1 of the Safeguards Agreement provides a right of reduced commitment to developing Members when safeguard measures are applied against them. Such a provision is not merely meant as a best-effort endeavor, but concretely provides that different treatment be given to developing Members. There are 47 duties distributed in six categories where obligations on developed Members result in differential treatment to developing Members: 1) right to exemptions; 2) right to reduced commitments; 3) right of temporary derogation; 4) right to delayed application; 5) right of presumption; 6) duty on developed Members to refrain from litigation.

While we chart out the type of rights and duties that result in a differential treatment, we also analyze the degree of such treatment. Two criteria are used to determine the degree: 1) the duration for which the differential treatment is enjoyed, i.e., whether it is a time-bound flexibility, or whether it is can utilized indefinitely; 2) the extent to which full reciprocity is

⁸³ Crawford, *Second Report on State Responsibility*, at para. 57; Rowan, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ANALYSIS OF THE PROTECTION OF PERFORMANCE*, at 29; Kötz, *Comparative Contract Law* in *THE OXFORD HANDBOOK OF COMPARATIVE LAW*, at 930; Zweigert & Kötz *AN INTRODUCTION TO COMPARATIVE LAW*, at 501.

⁸⁴ The United Nations Conference on Trade and Development, *The Uruguay Round: An Initial Assessment in Trade and Development Report*, 1994 122, UNCTAD/TDR/14 (United Nations, 1994).

foregone, i.e., whether it is a complete exemption, or a partial one. Based on the criteria devised, we place the six categories in one quadrant or another in the table below:

Table 5: Degree of Differential Treatment

		Temporary / Limited Time Period			
		Quadrant I		Quadrant II	
		<ul style="list-style-type: none"> • None 		<ul style="list-style-type: none"> • Right of temporary derogations • Right of delayed application • Duty to refrain from litigation 	
Partial					Full
		Quadrant III		Quadrant IV	
		<ul style="list-style-type: none"> • Right of reduced commitments • Right of presumption 		<ul style="list-style-type: none"> • Right to exemptions 	
		Permanent / Indefinite			

It is evident that some SDT provisions provide a higher degree of differential treatment than others. For example, a complete exemption from a commitment for an indefinite period of time provides the highest degree of differential treatment, as compared to a temporary one that provides a complete exemption for a limited time period like a right of temporary derogation.⁸⁵ We analyze the nature of these rights and obligations from Quadrant IV to

⁸⁵ The argument here is not of an economic order. Of course, depending on the degree of effectiveness of SDT provisions, some of them may produce more value in monetary terms than others. Our aim is to analyze the nature of such provisions from a legal lens.

Quadrant I as the degree of differential treatment provided ranges from the highest to the lowest when the provisions are examined in this order.

Quadrant IV

1. Right to exemptions

Exemptions provided to developing and LDC Members constitute a complete derogation of the reciprocity principle. Moreover, exemptions under this category operate for an indefinite period of time, provided certain criteria are met. They create policy space for developing Members to pursue their developmental interests. For example, it is well-known that export subsidies inherently disrupt the free flow of goods and are highly trade-distortive.⁸⁶ This is why developed Members assumed to the commitment to ban any subsidies that were export-oriented.⁸⁷ While this is the case, certain developing Members have been exempted from this commitment. For example, Annex VII of the SCM Agreement lists countries that have not achieved \$1000 per annum of Gross National Product per capita for three consecutive years. Countries like Bolivia, Cameroon, Congo and Côte d'Ivoire have been listed under this category. This is also because of Article 27.1 of the Subsidies and Countervailing Measures (SCM) Agreement, which recognizes that subsidies can play an important role in the pursuit of economic development. India recently graduated from Annex VII, and the panel in *India – Export Related Measures* stated that the country no longer enjoyed this exemption and had to phase out its export subsidies.⁸⁸ The US could not bring a claim until India had graduated from the threshold of \$1000 Gross National Product per annum per capita for three consecutive years. Until then, India could maintain export subsidies as a part of its developmental policy. Therefore, a right to exempted commitments creates a high degree of differential treatment based on the criteria of duration and extent of such treatment.

Quadrant III

2. Right to reduced commitments

As compared to the right to exemptions, a right to reduced commitments does not provide a complete derogation of a WTO commitment for developing Members. This right creates a difference in the degree of reciprocity in commitments between the developed and the developing Members by providing reductions without any time-bound limitations.

⁸⁶ THE GATT URUGUAY ROUND – A NEGOTIATING HISTORY (1986-1992) VOLUME I: COMMENTARY 886 (Terence P. Stewart ed., Kluwer Law and Taxation Publishers, 1993); Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, 23 March 2012, 7, at para. 1253.

⁸⁷ Art. 3.1(a), SCM Agreement.

⁸⁸ Panel Report, *India - Export Related Measures*, WT/DS541/R, 31 October 2019, para. 7.44 [PR, *India – Export Related Measures*].

Under Article 9.1 of the Safeguards Agreement developing Members have a right of reduced commitment as compared to that of developed Members when safeguard measures are applied against them. The Appellate Body in *US – Line Pipe* held that “Article 9.1 obliges Members not to *apply* a safeguard measure against *products* originating in developing countries whose individual exports are below a *de minimis* level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product.”⁸⁹ In doing so, it recognized the right of developing Members to be exempt from the application of safeguard measures if their exports fall below a certain threshold.

A similar reduction in commitment can also be found in the SCM Agreement. The exports from developing Members that receive subsidies are exempted from countervailing duties with a differential calculation for the value of subsidies and volume of exports as compared to that of the developed Members. The Appellate Body in *US – Carbon Steel* held “that Articles 27.10 and 27.11 of the SCM Agreement require termination of a countervailing duty investigation with respect to a developing country Member whenever ‘the overall level of subsidies granted does not exceed’ 2 or 3 percent, depending on the circumstances. These provisions require authorities, in a countervailing duty investigation, to apply a higher *de minimis* subsidization threshold to imports from developing country Members.”⁹⁰

SDT provisions that provide *de minimis* thresholds give us a picture of how the right operates. It is a permanent right and operates without a time-bound flexibility. However, the extent of the differential treatment for developing Members is not absolute. Under such a right, developing Members are not exempted from the level of full commitment of a particular WTO obligation, but are merely entitled to a lower degree of reciprocity. Therefore, such provisions are ranked lower than that of a right to seek exemptions.

3. Right of presumption (or lack thereof)

The right of presumption grants a degree of leeway to developing Members for certain WTO commitments. For example, a developing Member’s stockholding program is presumed to be in conformity with its commitments under the Agreement on Agriculture (AoA). Under this right, the burden of proof is on the complainant to negate such presumptions.⁹¹ Developing Members are held to a lower degree of reciprocity, rather than being completely exonerated for the breach of their commitments. Moreover, no limitation has been imposed on the

⁸⁹ Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 8 March 2002, para. 129.

⁹⁰ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, 19 December 2002, para. 82.

⁹¹ Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, July 1998, para. 14.158 at para. 14.158.

duration of the enjoyment of this right. The differential treatment granted to developing Members is partial and for an indefinite period. The nature of this right operates similarly to that of the right to reduced commitments. Therefore, this right is positioned in Quadrant III.

Quadrant II

4. Right of temporary derogation

Temporary derogations are allowed for developing Members, whereby WTO commitments are foregone for a limited time period. For example, Article 4 of the Agreement on Trade Related Investment Measures (TRIMS) provides a right of temporary derogation to adopt measures that are inconsistent with the TRIMS Agreement as well as national treatment and quantitative restriction commitments under the GATT. The right of temporary derogation provides a room for developing Members to completely detract from a WTO commitment. However, this right operates on a time-bound flexibility, whereby such Members are able to exercise it on a temporary basis. Therefore, such a right is placed in Quadrant II.

5. Right to delayed application

At the time of the entry into force of WTO agreements, developing Members were provided a detraction of their commitments for a limited time period due to the incapacity of developing and LDC Members to carry out such obligations. From a policy perspective, this time period was granted in order to ensure that developing Members could align their trade policies with that of the WTO agreements.

For example, Article 27.2(b) of the SCM Agreement provided an eight-year exemption for certain developing Members to maintain export subsidies that were otherwise prohibited for developing Members. In a 2019 dispute (*India – Export Related Measures*), almost 15 years after the date of entry into force, India claimed that the ordinary meaning of the eight year time period must be interpreted to provide differential treatment to developing Members even after the expiry of the timeframe.⁹² The panel did not consider such an argument to be valid and held that there must be a delicate balance between “constraining certain types of subsidies on the one hand and providing special and differential treatment through clear and unambiguous time-bound flexibilities on the other hand”.⁹³ Therefore, while developed Members were subjected to undertake commitments on a fully reciprocal basis, developing Members were provided a time period within which they could enjoy non-compliance.

The right of delayed application operates in a similar manner as that of a right of temporary derogation. It provides full exemptions from a WTO commitment for a limited time-period. Therefore, it is placed in Quadrant II. However, it must be noted that most of the provisions

⁹² PR, *India – Export Related Measures*, at para. 7.44.

⁹³ *Id.* at para. 7.67.

under this right have been extinguished as they operated for a limited-time period since the establishment of the WTO in 1995, except for the TFA, which entered into force in 2017.

6. *Duty to refrain from litigation*

Developed Members are bound by the duty not to litigate against developing and LDC Members for a limited time-period. This duty is found in the TFA and operates on a time-bound basis. This duty operates as a corollary to the right of delayed application. A duty on developed Members not to litigate on the fulfillment of a commitment until a certain time-period has passed is the same as providing developing Members a right to delay the application of a commitment. Therefore, this duty is placed in Quadrant II.

C. Key Takeaways and Observations

1. *Obligations of Means and Result: Empirical Evidence*

Out of a total of 227 SDT provisions, we found that there are 98 legally binding obligations on developed Members. Out of these 98 obligations, 51 are obligations of means, and 47 are obligations of result. Therefore, only 21% (47 out of 227) of the provisions in the universe of SDT oblige the developed Members to actually provide differential treatment to developing Members.

Table 6: Obligations of Means and Results (n=98)

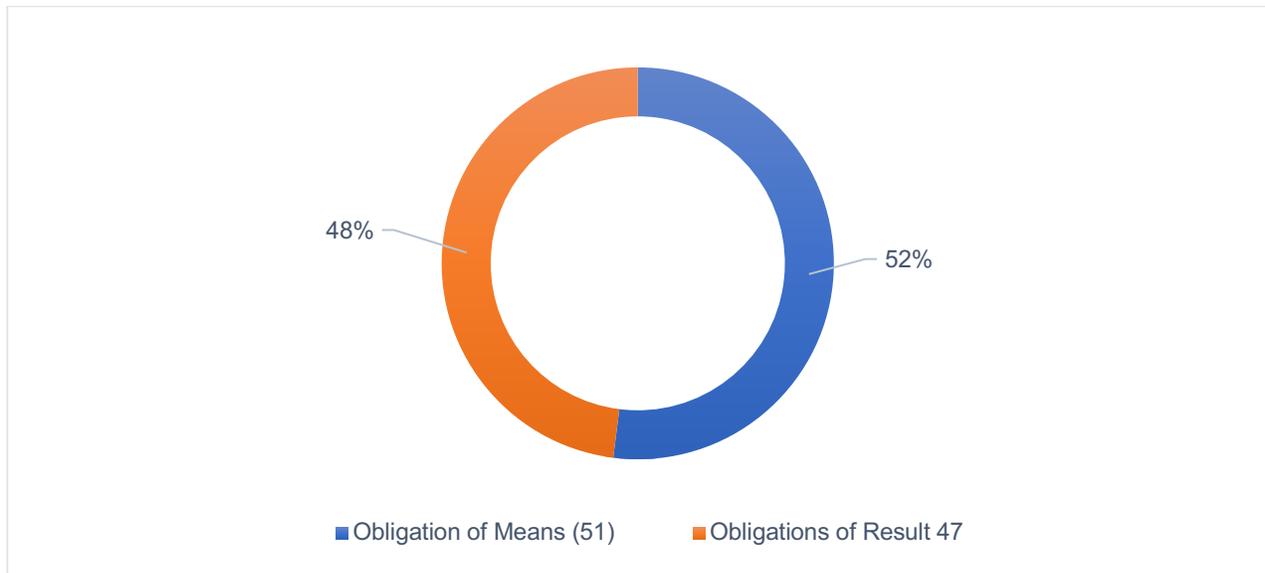
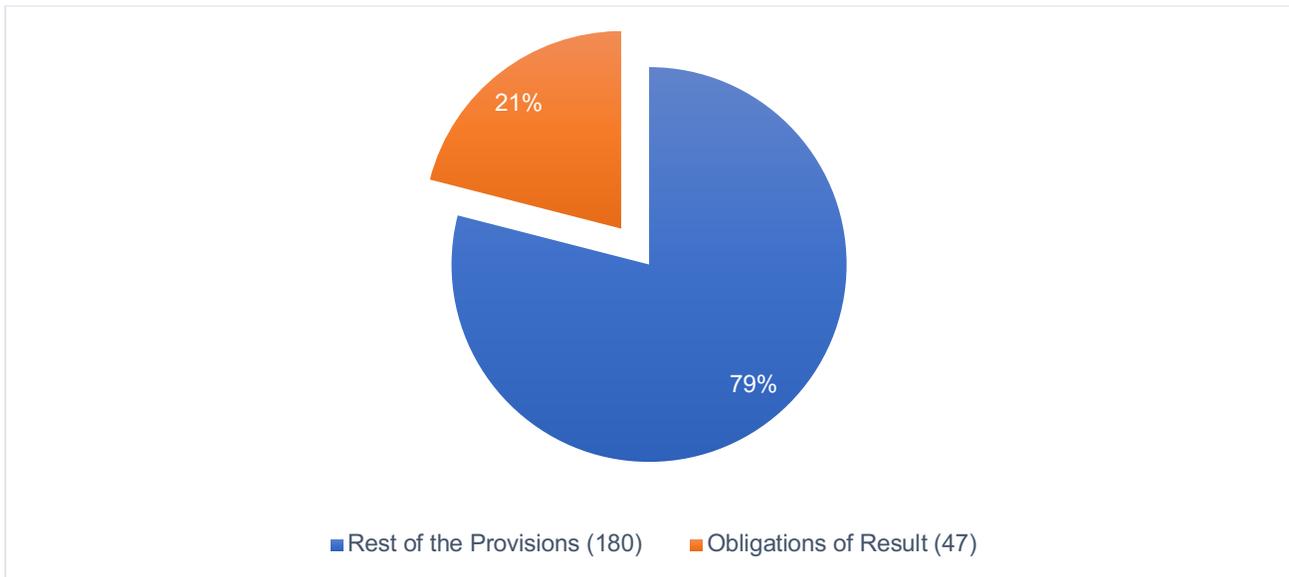


Table 7: Special and Differential Treatment Provisions (n = 227)



2. SDT provisions were not meant to be a complete exoneration

While we discuss the degree of differential treatment from the highest to the lowest (from Quadrant IV to Quadrant I), it is important to distinguish between the rights provided to developing Members on the one hand, and LDC Members on the other.

Under the right to exemptions, LDC Members are given prominence, rather than developing Members. LDC Members are provided with an exemption on reduction commitments under the AoA. For example, the reduction commitments on export subsidies relating to agriculture have been exempted for LDC Members.⁹⁴ Another example is the export subsidies maintainable under the SCM Agreement. LDC Members, along with Annex VII Members, are completely exempt from banning export subsidies.⁹⁵

In contrast to the exemptions provided to LDC Members, developing Members are excused from undertaking obligations under Category C of the TFA until they have acquired the capacity to implement such obligations.⁹⁶ Another provision that provides the right to exemptions for developing Members is where they are exempt from providing due consideration and notifications for export prohibitions and restrictions on foodstuffs.⁹⁷ This

⁹⁴ Art. 15.2, AoA.

⁹⁵ Art. 27.2(a), SCM Agreement.

⁹⁶ Art. 14.1(c), TFA.

⁹⁷ Art. 12.2 read with Art 12.1, AoA.

right does not exempt them from adopting export prohibitions, but excuses them from merely giving a due consideration of the effect of such measures.

The drafters of the WTO agreements considered the needs of the LDC Members as a priority and provided a higher degree of differential treatment as compared to that of developing Members. The exemptions are permanent, as long as LDC Members fall within the definition provided by the United Nations.⁹⁸ Moreover, even in other rights where developing and LDC Members are provided differential treatment, LDC Members are provided a higher degree of such a treatment as compared to developing Members. Therefore, LDC enjoy the highest flexibility through SDT provisions.

On the other hand, differential treatment granted to developing Members through rights such as reduced commitments or temporary derogations were either meant to be time-bound or provide a lower degree of reciprocity in commitments. It was never meant to be enjoyed to its fullest extent and for an indefinite period of time. The intention was to incentivize certain Members to graduate as “developing countries”. This is what the European Union (EU) proposes as well: eventually, WTO commitments must be universally implemented by also taking the differences in the levels of development within the developing Members group into account, rather than an open-bloc exemption for all developing Members.⁹⁹

Some advanced developing Members like India and China claim that SDT was not made effective and operationalized to the extent as imagined.¹⁰⁰ Their concerns hold some truth. The confusion surrounding the legal status of SDT provisions triggered a series of disputes under the duty to consider the needs of developing Members. The result of such litigation did not yield positive results for developing Members as panels and the Appellate Body held that differential treatment need not be achieved under such provisions. Whereas the obligations of means do not provide actual special treatment to developing Members, the latter can enjoy the rights under Quadrants II (complete exemption for a limited time period) and III (partial exemption for without time limits).

3. The dynamics of positive and negative obligations

The confusion regarding the legal status of SDT provisions can also partially be attributed to the drafting of such provisions. Many of the obligations of means are drafted as positive

⁹⁸ LDCs are classified based on their income, human assets and economic vulnerability determined by the Committee for Development Policy (CDP). The CDP is mandated by the UN General Assembly and the Economic and Social Council to do so and review the list. Currently, there are 47 LDC Members, <https://www.un.org/development/desa/dpad/least-developed-country-category.html>.

⁹⁹ European Commission, *Concept Paper on WTO Modernisation*, 7 (2018), https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

¹⁰⁰ Communication from China, India, et. al., *Statement on SDT to Promote Development* (October 2019), paras. 1.2 and 1.5.

obligations. One such example is the “duty to consider”. Such an obligation may or may not yield positive results of differential treatment depending on the conduct of the developed Members. On the other hand, negative obligations all belong to the category of obligations of result.¹⁰¹ Economides quotes Reuter to state that, as negative obligations “have a content which is more clearly determined than of positive obligations consequently, breach thereof is easier to define”.¹⁰²

The argument here is not that positive obligations produce no results and are automatically classified under obligations of means. For example, The MFN obligation under Article I:1 of the GATT imposes a positive obligation. It states that MFN treatment “shall be accorded” to the like products of all contracting parties. However, this obligation is precise. Such positive obligations also belong to the category of obligations of result as the contours of their performance are clearly defined.¹⁰³ On the other hand, positive obligations under SDT provisions that fall within the ambit of obligations of means are permissive and are not clearly defined. Therefore, they fall outside the scope of the obligations of result.

SDT obligations of means seem to be drafted as positive obligations. Moreover, they are diluted by wordings such as “mutually agreed terms” or “to the fullest extent possible”. Perhaps the mistake of developing Members was that they tried to change the tone of negotiating the obligations that were prohibitory in nature to positive permissions. As early as in 1946, India, while responding to the US proposals, stated that “the proposals tell us what countries should not do rather than what they should do to help one another. We believe that if the basic objective of promoting world trade and employment is to be attained, the proposals must be recast in a positive mold, and must, inter alia, place an obligation on the more advanced countries to assist the development of backward areas”.¹⁰⁴ Therefore, developing Members also share blame in the weakening of SDT provisions and banked on developed Members to accord differential treatment without holding them to a higher degree of accountability in such provisions.

IV. CONCLUSION

Kishore has observed that SDT provisions are “non-binding, unambiguous, unstructured and lack connectivity with each other”.¹⁰⁵ To bridge this, the WTO Secretariat has provided a typology based on the aims and intended effects of the provisions. While this typology

¹⁰¹ Economides, *Content of the Obligation*, at 378.

¹⁰² *Id.*; Paul Reuter, DROIT INTERNATIONAL PUBLIC 140 (THÉMIS, 1958).

¹⁰³ Economides, *Content of the Obligation*, at 379.

¹⁰⁴ Government of India, *Comments on US Proposals for Expansion of World Trade and Employment*, Preparatory Committee of the International Conference on Trade and Employment, United Nations Economic and Social Council E/PC/T/W.14, 60 (21 October 1946).

¹⁰⁵ Kishore, *SDT in the Multilateral Trading System*, at 363.

provides an economic rationale, it does not clarify the legal status of such provisions. Considering the confusion on this matter, this article has undertaken to reorient the typology through a legal lens.

Once we devised the typology, we also sought to clarify the scope and extent of the obligations at hand by using the distinction between obligations of means and obligations of result. The rights under the obligations of result category are the ones that actually provide for differential treatment to developing and LDC Members. The criteria of extent and duration aided in highlighting the type of rights that provide more differential treatment than other provisions. While the aspiration of developing Members is that “all S&D [SDT] provisions in various WTO agreements should be fully operationalized or implemented”,¹⁰⁶ this has not been the case in reality. Our analysis has shown that only 21% (47 provisions) of SDT provisions actually result in differential treatment. The rest of the provisions does not produce the intended goal of differential treatment to developing Members in a concrete manner.

Our findings also highlight that differential treatment rights were provided for either a limited duration or extent. This could potentially be to enhance the capacity of developing Members to live up to their WTO obligations on a strictly reciprocal basis. Once they would be aligned with their commitments like developed Members, they could join the level playing field of developed Members. Moreover, the low percentage of obligations of result may also be attributed to the textual wording of these obligations. Some SDT obligations on developed Members are worded as permissions rather than prohibitions. All these factors have contributed to a low percentage of obligations that bind developed Members in conferring SDT to developing and LDC Members. As Low, Mamdouh and Rogerson observe, SDT has become more a “political football than a productive approach”.¹⁰⁷ For this to change, developed WTO Members need to truly understand the complex position of developing Members. On the other hand, developing Members need to forego their narrative that SDT is a “non-negotiable right” that must be safeguarded in current and future negotiations. It is not in their interest to cling unreservedly to it, as many SDT provisions have not produced the intended results.

¹⁰⁶ Communication from Cuba, India et. al., *Proposal for a Framework Agreement on SDT*, at para. 12.

¹⁰⁷ Patrick Low, Hamid Mamdouh & Evan Rogerson, *Balancing Rights and Obligations in the WTO – A shared Responsibility*, 4, (2020), <https://www.swedenabroad.se/globalassets/ambassador/fn-geneve/documents/balancing-rights-and-obligations-in-the-wto.pdf>.

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Leuven Centre for Global Governance Studies
Huis De Dorlodot, Deberiotstraat 34, 3000 Leuven, Belgium
Tel. ++32 16 32 87 25
Fax ++32 16 37 35 47
info@ggs.kuleuven.be

