

GLOBAL AND REGIONAL ORDER

# MAKE A DIFFERENCE!

Differential Treatment of Developing Countries  
in Trade and Climate Change Regimes

**By Yasmin Ismail and Varun Bhagat**  
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The »development lens« is a key and over-arching similarity between the respective trade and climate change global regimes. It emphasises that countries are at different stages of development and have different resources and capacities.



The WTO and UNFCCC adopted implementation and enforcement approaches that were »anything but similar«.



The challenge in both fora lies more in ensuring an effective match between the pre-conditioned needs of developing countries to meet expected developments and the support provided by developed countries.

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### Differential Treatment of Developing Countries in Trade and Climate Change Regimes

Perspective Series: »Climate and Trade Communities:  
Joining Hands to attain a Prosperous and Sustainable Future« | N°3



Trade and climate change communities – including policy-makers, negotiators and other stakeholders – need to close ranks to achieve global prosperity for all in a sustainable future. This will only be possible through more intensive exchange and better communication between the two communities. To facilitate and promote this, FES Geneva and CUTS International Geneva are putting out three perspectives on issues involving both the multilateral trading system and the international climate regime, while traversing the spotlight to subject areas which are being addressed within the framework of both the United Nations Framework Convention on Climate Change (UNFCCC) and the World Trade Organization (WTO). This will nurture an understanding for these issues in a larger framework on the part of the trade and climate change communities.



Perspective N°3 in the series focuses on differential treatment of developing countries. Both the multilateral trading system and the international climate change regime generally recognise that the rights and obligations of individual members should correspond to their levels of development.



This is addressed through the concept of Special and Differential Treatment (SDT) in the WTO, which has a long history, as well as a number of specific provisions in various agreements. One can argue that the principle of Common but Differentiated Responsibilities and Respective Capacities under the UNFCCC serves a similar purpose by aligning responsibilities with contribu-

tions of Members to climate change as well as their capacities – both generally linked to the level of development of a Member.

The objective of this paper is to examine and compare the main elements of both SDT under the WTO and CBDR-RC under the UNFCCC with a view to promoting a better understanding of these concepts in the two fora and learning useful lessons for their better implementation in each.

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in cooperation with



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## INTRODUCTION

In an increasingly interconnected world, development challenges and aspirations have become more complex, interdependent, and global in nature.<sup>1</sup> In this context and for the last century, the world has been increasingly realising the significant implications of international trade and climate change on economies and development aspirations. To quote Pauw & Al. (2014, p.37), »The stakes in both issue areas are very high, potential costs of compliance are very high and an endless number of many different kinds of interest groups are involved.«<sup>2</sup> This statement could not be more accurate than for developing countries and least developed countries (LDCs). Global trade and its multilateral rule-based system as represented in the World Trade Organisation (WTO) are key guiderails for national policy and they impact developing countries' economic and social development prospects, while climate change is continuously and rapidly altering the environment in which economic activities and trade relations unfold.<sup>3</sup> Climate mitigation and adaptation are increasingly finding their way into developing countries' development policy toolsets implementing the United Nations Framework Convention on Climate Change (UNFCCC) regime and its 2015 Paris Agreement.<sup>4</sup>

Reconciling the two realms of Trade and Climate Change has become one of the most significant challenges facing the post-2015 sustainable development agenda as represented in the United Nations' unanimously agreed 17 Sustainable Development Goals (SDGs).<sup>5</sup> Part of this complex task stems from the fact that they have conflicting driving purposes.<sup>6</sup> On the one hand, the trade regime is intended to promote trade expansion through liberalisation and a reduction (to the greatest extent possible) of government interventions. On the other, the climate regime aims to reduce greenhouse gas (GHG) emissions and »achieve a climate-neutral world

by mid-century«,<sup>7</sup> which would require greater government intervention to regulate private actors' actions.<sup>8</sup> But despite their different purposes, both regimes share a common institutional foundation, namely their Member States' right to seek sustainable development, with this applying particularly to the developing countries and LDCs.<sup>9</sup> This precept is reflected in the preamble of the WTO Marrakesh Agreement (1994) and various provisions in the UNFCCC convention (1992).

Hence, both the WTO and UNFCCC acknowledge that their Member States have different development levels and that their obligations should consider their various capacities and needs.<sup>10</sup> This is reflected in the »Special and Differential Treatment« (SDT) concept under the WTO and its parallel, »Common But Differentiated Responsibilities and Respective Capabilities« (CBDR-RC) under the UNFCCC. In other words, both regimes adopt a »development lens« in their global action.

## THE DEVELOPMENT LENS

### FROM GATT TO DOHA ROUND

The multilateral trading system and its institutional history, from the General Agreement on Tariffs and Trade (GATT) to the WTO, reflect the evolution of the post-Second World War global economic order, which was marked by the rise of a new western superpower (the US), a Europe undergoing reconstruction and a decolonising developing world.<sup>11</sup> In the ensuing decades, a trade liberalisation discourse predominated as a framework for constructing a multilateral system governing international trade in sync with other Bretton Woods Institutions<sup>12</sup> with the aim and intent of managing the new economic order. At the same time, a development discourse came about, as countries that regained their independence made it their ultimate priority to catch up with their developed counterparts. To achieve their objective, they followed a path of economic structural transformation through trade and industrial policies like the developed countries before them in seeking integration into the new rule-based multilateral system. Special and Differential Treatment (SDT) for developing countries was conceived in the intersecting area between the two discourses.<sup>13</sup>

1 Knoll, A. Grosse-Puppenthal, S. and Mackie, J. (2015). Universality and differentiation in the post-2015 development agenda, Discussion Paper, European Centre for Development Policy Management, [https://ecdpm.org/application/files/5616/5546/9120/DP173\\_Universality-and-differentiation-in-post2015-dev-agenda\\_final.pdf](https://ecdpm.org/application/files/5616/5546/9120/DP173_Universality-and-differentiation-in-post2015-dev-agenda_final.pdf) (accessed on 3 March 2023).

2 Pauw, P., Brandi, C., Richerzhagen, C., Bauer, S., & Schmole, H. (2014). Different perspectives on differentiated responsibilities: a state-of-the-art review of the notion of common but differentiated responsibilities in international negotiations, Deutsches Institut für Entwicklungspolitik. [https://www.die-gdi.de/uploads/media/DP\\_6.2014..pdf](https://www.die-gdi.de/uploads/media/DP_6.2014..pdf) (accessed on 3 March 2023).

3 Khor, M. F. Montes, M. Williams, M. and Paolo B. Yu III, V. (2017). Promoting Sustainable Development by Addressing the Impacts of Climate Change Response Measures on Developing Countries. Research Paper, South Centre. [https://www.southcentre.int/wp-content/uploads/2017/11/RP81\\_Promoting-Sustainable-Development-by-Addressing-the-Impacts-of-Climate-Change-Response-Measures-on-Developing-Countries\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2017/11/RP81_Promoting-Sustainable-Development-by-Addressing-the-Impacts-of-Climate-Change-Response-Measures-on-Developing-Countries_EN.pdf) (accessed on 3 March 2023).

4 Ibid.

5 UN. Historic New Sustainable Development Agenda Unanimously Adopted by 193 UN Members, <https://www.un.org/sustainable-development/blog/2015/09/historic-new-sustainable-development-agenda-unanimously-adopted-by-193-un-members/> (accessed on 3 March 2023).

6 Kohr, M. & Al. (2017).

7 UNFCCC. (2022). *The Paris Agreement*, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (accessed on 3 March 2023).

8 Kohr, M. & Al. (2017).

9 Ibid.

10 Knoll & Al. (2015).

11 Irfan, M. (2020). Debate on Special and Differential Treatment in the Multilateral Trading System: Past, Present and Future. Geneva: CUTS International, Geneva. [https://www.cuts-geneva.org/pdf/KP2020-Study-Special\\_and\\_Differential\\_Treatment\\_in\\_the\\_MTS.pdf](https://www.cuts-geneva.org/pdf/KP2020-Study-Special_and_Differential_Treatment_in_the_MTS.pdf) (accessed on 3 March 2023).

12 The Bretton Woods System is made up of what we now know as: GATT, which became the WTO in 1995, the International Monetary Fund and the World Bank.

13 Irfan, M. (2020)

When it was created in 1947, GATT did not consider different development needs, as many developing countries were not yet recognised as independent States.<sup>14</sup> Hence, developing countries could not negotiate with developed ones based on the two fundamental principles of the GATT: reciprocity<sup>15</sup> and Most Favoured Nation (MFN)<sup>16</sup>. This quandary goes back to the early negotiations leading to the formation of the International Trade Organisation (ITO) in 1946 and the signing of the Havana Charter in 1948.<sup>17</sup> The charter included an indirect reference to what would later be SDT by highlighting the need for policy frameworks to support industrial development in underdeveloped economies.<sup>18</sup> However, following non-ratification of the charter by the rising superpower, the US, the ITO project was shelved. Since then, developing countries have been striving for acknowledgement of their development level and particular needs in GATT through provisions that give them »special rights and allow other members to treat them more favourably«, or »special and differential treatment provisions«.<sup>19</sup>

The first concrete SDT rule was an amendment to Article XVIII in the 1954–55 GATT review session. The revised rule permitted developing countries to take actions inconsistent with GATT principles to safeguard their infant industries and improve their balance of payments deficits.<sup>20</sup> The findings of the Haberler Report, commissioned by GATT and published later in 1958, further noted that market access for developing countries is limited. Their export earnings, it posited, were not enough for their development. The declaration on »Promotion of Trade of Less-Developed Countries« was adopted in 1961, calling for trade unconstrained by reciprocal actions between developed and developing countries.<sup>21</sup> One can maintain that the declaration was echoed in GATT through its Part IV, which was adopted during the Kennedy Round of negotiations from 1964 to 1967. Part IV categorically emphasised that developing countries are not obliged to make the same reductions in tariffs and barriers as devel-

oped ones are and called for the latter to reduce their tariffs and barriers while prioritising goods exported by developing countries.<sup>22</sup>

In 1971, developing countries' Generalised System of Preferences (GSP) schemes were legalised to waive the MFN principle, permitting developed countries to accord preferential treatment to developing countries for ten years. GSPs were legalised permanently by adopting the »Enabling Clause« in 1979 during the Tokyo Round.<sup>23</sup> Developing countries' specific needs were recognised. During the Uruguay Round (UR, 1986 to 1994), the eighth and last round of GATT, the SDT provisions took on new dimensions above and beyond preferential market access, in recognition of the much greater coverage and scope of various UR Agreements. These consisted of different levels of obligations, longer implementation periods, and provision of technical assistance and capacity-building to developing countries. Following the adoption of the Single Undertaking principle<sup>24</sup>, such provisions were arguably necessary to assist developing countries in implementing the disciplines and agreements of the newly established WTO.<sup>25</sup>

The Uruguay Round has systematised recognition of developing countries' special needs through a variety of SDT provisions, which are summarised in Box 1. However, the lack of binding language in these provisions as well as incomplete and patchy implementation by developed countries triggered a strong protest by developing countries, which argued that SDT provisions were »often not fully responsive to (their) demands, (and) were dressed up in best endeavour language, without legal effect«<sup>26</sup>. This failure to effectively address the special needs of developing countries has continued to plague the Members of the WTO in the (uncompleted) Doha Round since 2001.<sup>27</sup> Improvements in SDT served as the core for the Doha Development Round based on Paragraph 44 of the 2001 Doha Ministerial Declaration, mandating »that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational«<sup>28</sup>.

In 2002 and early 2003, developing countries submitted »Agreement-specific proposals« to the Committee on Trade in Development in Special Session (CTD-SS). Most of the proposed reviewed provisions were forwarded by the African Group and the LDC group. Minimal LDC-specific proposals were adopted in Annex F of the Hong Kong Ministerial in 2005. Still, the substantial work needed to fulfil the mandate laid down in paragraph 44 remains. To revive the process,

<sup>22</sup> Irfan, M. (2020).

<sup>23</sup> Hudec, R. E. (1987) »Developing Countries in the GATT Legal System«. Cambridge University Press

<sup>24</sup> This concept meant that nothing could be agreed upon unless everything was agreed, implying that countries could not pick and choose which agreement or provision to adopt.

<sup>25</sup> Irfan, M. (2020).

<sup>26</sup> Ismail, F. (2020). P. 14.

<sup>27</sup> Ibid.

<sup>28</sup> WTO Official Document WT/MIN(01)/DEC/1.

<sup>14</sup> Ismail, F. (2020). WTO Reform and the Crisis of Multilateralism, A Developing Country Perspective, Geneva: South Centre. [https://www.southcentre.int/wp-content/uploads/2020/09/Bk\\_2020\\_WTO-reform-and-the-crisis-of-multilateralism\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2020/09/Bk_2020_WTO-reform-and-the-crisis-of-multilateralism_EN.pdf) (accessed on 3 March 2023).

<sup>15</sup> The concept of reciprocity is not defined explicitly, but it is understood to mean that WTO Members are expected to make similar efforts in undertaking concessions. WTO. [https://www.wto.org/english/res\\_e/reser\\_e/ersd201216\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201216_e.pdf) (accessed on 3 March 2023).

<sup>16</sup> Under the WTO agreements, countries cannot normally discriminate between their trading partners or grant a member a special favour without extending the same treatment to all other WTO members.

<sup>17</sup> Irfan, M. (2020)

<sup>18</sup> Irfan, M. (2015) »A Political Economy of Subsidies and Countervailing Measures in International Trade and Development«, Doctoral Dissertation, Centre for Development Studies, University of Cambridge.

<sup>19</sup> WTO. (2022). Special and Differential Treatment, [https://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/sdt\\_e.htm#:~:text=The%20WTO%20agreements%20contain%20special,abbreviated%20as%20S%26D%20or%20SDT](https://www.wto.org/english/tratop_e/dda_e/status_e/sdt_e.htm#:~:text=The%20WTO%20agreements%20contain%20special,abbreviated%20as%20S%26D%20or%20SDT) (accessed on 3 March 2023).

<sup>20</sup> Irfan, M. (2020).

<sup>21</sup> Keck, A. and P. Low, (2004), »Special and differential treatment in the WTO: Why, when and how?«, WTO Staff Working Papers, World Trade Organization (WTO), Economic Research and Statistics Division, <https://EconPapers.repec.org/RePEc:zbw:wtowps:ersd200403> (accessed on 3 March 2023).

in 2015 the G90<sup>29</sup> tabled a proposal reducing the initially presented number of provisions from 88 to a package of 25 »most relevant« proposals.<sup>30</sup> Developed countries continued to argue that the package was too broad-based and demanded the G90 make their requests more specific.<sup>31</sup> The G90 then tabled a narrower version of 10 proposals, presenting it as a draft ministerial decision in MC11 in 2017.<sup>32</sup> Again, no consensus was achieved as developed countries continued to criticise the scope and coverage of the proposals, contending that they »lacked meaningful differentiation«<sup>33</sup>.

Box. 1:

#### WTO SDT Provision Types and Number

According to the WTO secretariat document WT/COMTD/W/239, as of October 2018 there were 155 SDT provisions across various agreements, which break down into the following 6 categories:

- » 1. provisions aimed at increasing the trade opportunities of developing country members;
2. provisions under which WTO members are to safeguard the interests of developing country members;
3. flexibility of commitments, of action, and use of policy instruments;
4. transitional time periods;
5. technical assistance;
6. provisions relating to LDC members.«

It can be said the Secretariat's counting is »a best calculative effort« as the actual number of SDT provisions can vary depending on the methodology adopted. For instance, whether preambular language is taken into consideration or not.

Source: Irfan (2020)

## FROM STOCKHOLM TO KYOTO

The first time environmental issues made their way onto the global scene was at the 1972 UN Conference on the Human Environment in Stockholm.<sup>34</sup> This coincided with the emergence of the post-war new economic order described earlier. At the time, environmental concerns were not an element of the global economic regime.<sup>35</sup> The resulting Stockholm

declaration highlighted the »complex transboundary nature« of environmental degradation.<sup>36</sup> Hence, principle 24 of the declaration pointed to the need for a »cooperative spirit by all countries, big and small, on an equal footing« and »in such a way that due account is taken of the sovereignty and interests of all States.«<sup>37</sup> While there is no clear statement of CBDR, developing countries were reassured that their specific environmental challenges, development aspirations and limited capacities will be taken into consideration (see principles 9 to 12).<sup>38</sup>

Other milestones which have not mentioned CBDR, but have laid down elements of its foundation, are the 1987 World Commission on Environment and Development Report (Brundtland Commission Report) and the 1989 Noordwijk Declaration from the Ministerial Conference on Atmospheric Pollution and Climatic Change.<sup>39</sup> The former posited that »our inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations.«<sup>40</sup> Hence, it concluded, there is a need to address the differences between countries to ensure an inclusive approach to climate change.<sup>41</sup> The latter declaration acknowledged that »[i]ndustrialised countries, in view of their contribution to the increase of greenhouse gas concentrations, and in view of their capabilities, have specific responsibilities of different kinds.«<sup>42</sup> For instance, industrialised countries should be at the forefront of the global action against climate change and provide support, including financial, to countries which find it burdensome.<sup>43</sup>

In 1992, the United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, was held in Rio de Janeiro. The conference produced several principles which make clear reference to CBDR. Principle 7 of the Rio Declaration states that »in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities.«<sup>44</sup> The UNFCCC is considered the most important result of the Earth Summit, as it has offered a legal framework for global environmental governance and climate change action negotiations since its entry into force in March 1994.<sup>45</sup> The Preamble of the UNFCCC acknowledges that »the largest share of historical and current global emissions of GHGs has originated in

<sup>36</sup> Ibid, p. 17.

<sup>37</sup> Stockholm Declaration (1979) – A/CONF.48/14/Rev.1.

<sup>38</sup> Josephson, P. (2017).

<sup>39</sup> Ibid.

<sup>40</sup> Report of the World Commission on Environment and Development: Our Common Future, available at: <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (accessed on 3 March 2023).

<sup>41</sup> Josephson, P. (2017).

<sup>42</sup> NOORDWIJK Declaration on Climate Change (1989), available at: <https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB90210196.xhtml#> (accessed on 3 March 2023).

<sup>43</sup> Ibid.

<sup>44</sup> Report Of The United Nations Conference On Environment And Development (1992) – A/CONF.151/26 (Vol. I),

<sup>45</sup> Josephson, P. (2017).

<sup>29</sup> Africa Group; Least Developed Countries; and the ACP – African, Caribbean, and Pacific countries.

<sup>30</sup> WTO official document JOB/DEV/29/Rev.1; JOB/TNC/51/Rev.1.

<sup>31</sup> Irfan, M. (2020).

<sup>32</sup> WTO official document WT/MIN(17)/23/Rev.1.

<sup>33</sup> Irfan, M. (2020). P. 20.

<sup>34</sup> Hirst, D. (2020). The history of global climate change negotiations, House of Commons Library. <https://commonslibrary.parliament.uk/the-history-of-global-climate-change-negotiations/> (accessed on 3 March 2023).

<sup>35</sup> Josephson, P. (2017). Common But Differentiated Responsibilities In The Climate Change Regime – Historic Evaluation and Future Outlooks, Faculty of Law, Stockholm University. <https://www.diva-portal.org/smash/get/diva2:1134510/FULLTEXT01.pdf> (accessed on 3 March 2023).



developed countries.<sup>46</sup> On the other hand, it also recognised that for developing countries to continue on the path of development, »their energy consumption will need to grow.<sup>47</sup> Hence, article 3.1 called for international action »on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.<sup>48</sup>

In other words, CBDR »establishes that the obligation to combat climate change is a common responsibility for all nations, but also that this responsibility may be different for each country.<sup>49</sup> It bases the differentiation on historical responsibilities and »present and future vulnerability and economic inequality.<sup>50</sup> In the UNFCCC, the CBDR was shifted into a rigid differentiation approach to central obligations. The Convention identified different sets of commitments in article 4: Commitments that are »common« to all Parties and those that apply to the developed country Parties and other Parties included in Annex I<sup>51</sup> or Annex II<sup>52</sup> of the Convention. With regard to the implementation of these obligations, the Convention allows for flexibility in order »to take into consideration the situation of Parties, particularly developing country Parties and countries in transition.<sup>53</sup> An example of this would be the period stipulated for initial communication after joining the treaty: this was six months for developed countries and three years for developing countries, whereas LDCs were given the option of submitting it at their discretion.

At the first meeting of the Conference of the Parties (COP), the Berlin Mandate was adopted »to begin a process to enable (Parties) to take appropriate action for the period beyond 2000, including strengthening the commitments of the Parties listed in Annex I to the Convention (Annex I Parties) in Article 4, paragraph 2(a) and (b) through the adoption of a protocol or another legal instrument.<sup>54</sup> Consequently, the Kyoto Protocol was adopted at the third COP in 1997. It sought to lower GHG emissions through a »top-down

approach« by committing developed countries (Annex I countries) to »quantified limitation and reduction objectives within specified time frames.<sup>55</sup> These commitments would gradually become more ambitious with each consecutive commitment period. On the other hand, developing countries relied on CBDR principles in the UNFCCC and its differentiation of central obligations and did not assume any mitigation commitments. This is reflected in Article 10 of the Kyoto Protocol, which states that advancing towards the fulfilment of commitments will be »without introducing any new commitments for Parties not included in Annex I.<sup>56</sup>

The Kyoto Protocol strengthened the »dichotomous« and »mitigation focus« interpretation of CBDR-RC.<sup>57</sup> Eventually, this rigid differentiation of obligations generated disagreements between Annex I Parties and non-Annex I parties. Remarkably, the United States, the largest emitter at the time, did not ratify the Protocol, criticising that other large emitters, such as China and India, have not made any commitments to reduce emissions.<sup>58</sup> In this context, the future of climate change commitments became uncertain, and a need surfaced to rethink the approach to differentiation of CBDR-RC.<sup>59</sup>

## RECENT DEVELOPMENTS: TOWARDS »CONTEXTUAL« DIFFERENTIATION FOR BETTER IMPLEMENTATION

### THE TFA MODEL: AN »INDIVIDUAL« AND »CONTEXTUAL« SDT<sup>60</sup>

Since 2019, SDT has become a »serious bone of contention between developed and developing countries.<sup>61</sup> The G90 continued their consultation efforts and further revised the ten proposals that year.<sup>62</sup> At the same time, the US tabled a paper calling for »an undifferentiated WTO«<sup>63</sup> and arguing that self-declared development status had been undermining the negotiations in the WTO and »lumping countries that

<sup>46</sup> United Nations Framework Convention on Climate Change (1992), [https://unfccc.int/sites/default/files/convention\\_text\\_with\\_annexes\\_english\\_for\\_posting.pdf](https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf) (accessed on 3 March 2023).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Josephson, P. (2017). P.13.

<sup>50</sup> Ibid.

<sup>51</sup> Annex I: Industrialised countries as present in 1992 (shown by OECD membership) plus countries with economies in transition (EIT Parties) including the Russian Federation, the Baltic States, and several Central and Eastern European States.

<sup>52</sup> Annex II: Includes countries that are members of Annex I and not EIT Parties. These countries are obliged to provide financial support to assist developing countries in reducing their emissions intake and thus contribute to achievement of the overall mandate of the Convention.

<sup>53</sup> United Nations Framework Convention on Climate Change (1992), [https://unfccc.int/sites/default/files/convention\\_text\\_with\\_annexes\\_english\\_for\\_posting.pdf](https://unfccc.int/sites/default/files/convention_text_with_annexes_english_for_posting.pdf) (accessed on 3 March 2023).

<sup>54</sup> Report Of The Conference Of The Parties On Its First Session, held at Berlin from 28 March to 7 April 1995, FCCC/CP/1995/7/Add.1, 6 June 1995. <https://unfccc.int/resource/docs/cop1/07a01.pdf> (accessed on 3 March 2023).

<sup>55</sup> Josephson, P. (2017). P.40.

<sup>56</sup> Article 10: Kyoto Protocol Agreement to UNFCCC.

<sup>57</sup> Pauw, P. Mbeva, K. & van Asselt, H. (2019). Subtle differentiation of countries' responsibilities under the Paris Agreement. *Palgrave Commun* 5, 86 (2019). <https://doi.org/10.1057/s41599-019-0298-6> (accessed on 3 March 2023).

<sup>58</sup> Josephson, P. (2017).

<sup>59</sup> Ibid.

<sup>60</sup> The most recent WTO agreement, i.e. the Agreement on Fisheries Subsidies concluded at the 12th Ministerial Conference of the WTO in June 2022, adopts a traditional approach to SDT, i.e. longer implementation periods for developing countries and LDCs and voluntary commitments to provide technical assistance and capacity-building assistance to them. This may be partly due to the limited coverage of this Agreement, which, establishes disciplines only on subsidies contributing to Illegal, Unreported and Unregulated (IUU) fishing and subsidies regarding overfished stocks. It will be interesting to see whether the SDT in the final full agreement will be any different.

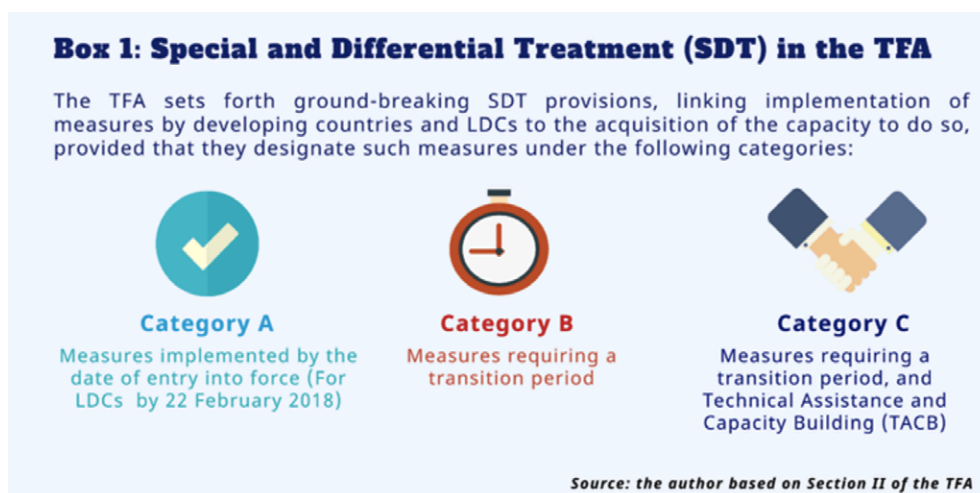
<sup>61</sup> Irfan, M. (2020), p. 22.

<sup>62</sup> WTO official document JOB/DEV/60 and JOB/TNC/79.

<sup>63</sup> Bacchus, J. and Manak, I. (2020). The Development Dimension: What to Do About Differential Treatment in Trade, Working Paper available at SSRN: <https://ssrn.com/abstract=3561131> (accessed on 3 March 2023).



Figure 1:  
The Trade Facilitation Agreement's Scheduling Approach to SDT



Source: Ugaz, P. (2020) – adapted.<sup>64</sup>

truly need help in the same category as those that do not.<sup>65</sup> The paper was then converted into a draft General Council Decision identifying four development thresholds and proposing that a country that meets any of them may not avail itself of SDT. The US paper also proposed that SDT could be denied on a sectoral basis if a country was found efficient in a specific sector. Other developed countries, including the EU, Switzerland and Canada, proposed a needs-based approach to providing SDT on a »case-by-case« basis.<sup>66</sup> While less drastic than the US proposal, developing countries still found it daunting,<sup>67</sup> as they would be expected to build a case each time for their eligibility for time-bound and scope-defined flexibilities.

In response to the papers and statements tabled by developed countries<sup>68</sup>, developing countries submitted several counter papers which all argue that the gap between developed and developing countries continues to widen, while the challenges faced by developing countries are becoming more similar and complex. Hence, SDT provisions remain a necessity for their effective contribution to WTO negotiations, as it offers them the flexibilities and capabilities needed to meet future obligations. They also emphasise that »SDT is a treaty embedded, inalienable right of developing countries and any

attempt to dilute it would be in conflict with the fundamental premise of equity and fairness within the WTO.«<sup>69</sup>

It is worth noting that the idea of differentiating between developing Members in the WTO had also been raised previously, at least during the Doha round. But many experts found that »attempting differentiation based on arbitrary criteria and graduation triggers can be a complex, controversial and in the end a fruitless exercise.«<sup>70</sup>

In search of a solution, it has been argued that a better SDT design to embody the »specific individual country needs at the sectoral or activity level« can be more practical than negotiating and questioning a country's development level<sup>71</sup>. In line with this suggested design, SDT provisions in the Trade Facilitation Agreement (TFA), which was adopted in 2013 and entered into force on 22 February 2017, present a model and potential compromise.<sup>72</sup> The TFA aims to improve the efficiency of trade in goods and reduce trade costs by addressing complex border and customs procedures, taking advantage of ascendant technologies and enhancing transparency.<sup>73</sup> TFA's SDT provisions entrusted Members with the responsibility of determining whether technical assistance is required and the suitable timeframe in which to meet their obligations.

<sup>64</sup> Ugaz, P. (2020). Implementation of the WTO Trade Facilitation Agreement: Not a sprint but a marathon, *UNCTAD Transport and Trade Facilitation Newsletter*, N°85 – First Quarter 2020. <https://unctad.org/news/implementation-wto-trade-facilitation-agreement-not-sprint-marathon> (accessed on 3 March 2023).

<sup>65</sup> WTO official document WT/GC/W/757/Rev.1.

<sup>66</sup> See EU's Concept Paper: »WTO Modernisation – Introduction to Future EU Proposals« [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf) (accessed on 3 March 2023) and Canada's paper »Strengthening and Modernizing the WTO: Discussion Paper«, JOB/GC/201.

<sup>67</sup> Irfan, M. (2020).

<sup>68</sup> See WTO official documents: WT/GC/W/765, WT/GC/202, WT/GC/W/778 and their revisions.

<sup>69</sup> Irfan, M. (2020), p. 25.

<sup>70</sup> Ibid, p. 27.

<sup>71</sup> Low, P., Mamdouh, H., and E. Rogerson. (2019), Balancing Rights and Obligations in the WTO – A Shared Responsibility, Government Offices of Sweden, p. 5. <https://www.swedenabroad.se/globalassets/ambassador/fn-geneve/documents/balancing-rights-and-obligations-in-the-wto.pdf> (accessed on 3 March 2023).

<sup>72</sup> Ibid.

<sup>73</sup> Global Alliance for Trade Facilitation. The Trade Facilitation Agreement, A simple guide, <https://www.tradefacilitation.org/what-we-have-learned/the-trade-facilitation-agreement-a-simple-guide/> (accessed on 3 March 2023).

The TFA adopted a scheduling approach where SDT recipients individually break down their »common obligations« into three categories.<sup>74</sup> Category A is for immediate implementation of commitments. With category B, the Member stipulates its transitional timeline for implementation. Category C is for Members to propose commitments contingent on technical assistance and the timeframe to meet them. Furthermore, in July 2014 the WTO launched the Trade Facilitation Agreement Facility (TFAF), an institutional mechanism to ensure that the needed technical assistance and capacity-building are provided to needy developing countries and LDCs.

At the heart of the WTO discourse on SDT is the eligibility of individual developing countries to make use of these provisions as well as their scope and nature. Developing countries continue to insist on a *priori* eligibility of all developing countries (except those who opt out voluntarily) for legally binding and operational SDT in all areas. On the other hand, developed countries generally would like to see eligibility thresholds, a case-by-case approach for SDT that is focused on longer implementation periods and provision of technical and capacity-building assistance. The TFA model includes a novel approach to bridging the gap between developed and developing countries by avoiding directly addressing the issue of »eligibility« and leaving the selection of all TFA commitments to implementation in Categories A, B or C up to the individual Members. However, the focus of TFA »embedded SDT« is on implementation periods and capacity-building assistance only, which is in line with the subject of this Agreement, namely enhancing transparency and predictability for better compliance with customs regulations and release of goods. The broader application of this model to other WTO areas that are focused on trade liberalisation and rules (e.g. market access, subsidies and countervailing measures, rules of origin, etc.) is therefore not straightforward and will require further conceptual work and deliberations.

## THE PARIS AGREEMENT: A »BOTTOM-UP« AND »DILUTED« APPROACH TO CBDR

In the realisation that the period after 2012, the Kyoto Protocol's first commitment deadline, was fraught with uncertainty, the »Bali Action Plan« was adopted at COP13 in 2007, creating a parallel track to Kyoto. The »Bali Action Plan« launched a new, comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, with the aim of reaching an agreed outcome and adopting a decision at COP15 in Copenhagen in 2009.<sup>75</sup> Following the failure to reach an agreement in Copenhagen and the Parties' inability to decide the future

of the Kyoto track and the Bali Action Plan, the Durban Platform for Enhanced Action was adopted at COP17 in 2011. It mandated the launch of a »process to develop a protocol, another legal instrument or an agreed outcome with legal force (...) applicable to all Parties.«<sup>76</sup> While it did not clearly mention CBDR, the Durban Platform initiated the negotiations leading up to COP-21 in Paris in 2015, and CBDR was at centre stage.<sup>77</sup>

The CBDR principle was then shifted toward a more »contextual« approach. China and the United States first signalled this move toward flexibility in their 12 November 2014 statement affirming their commitment to »reaching an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, *in light of different national circumstances*.«<sup>78</sup> The reference to »different national circumstances« was also added alongside the reference to CBDR-RC in the Paris Agreement's Preamble.<sup>79</sup> At the heart of the Paris Agreement is setting a common global mitigation goal to limit the average global temperature to »well below 2° C above pre-industrial levels.« Under a more flexible CBDR-RC, the mitigation mechanism of the Paris Agreement is founded on progressive »nationally determined contributions« (NDCs) to be formulated by each Party reflecting their individual »highest possible ambition.«<sup>80</sup> (article 4.3)

While the CBDR-RC principle remains a critical element in climate-change negotiations, its context and application have been transformed under the Paris Agreement. It is no longer a basis for dividing Parties into a *priori* categories with and without binding mitigation obligations. All Parties are now required to take action to contribute to a mutually agreed goal. On the other hand, strictly speaking, no Party has any »binding top-down obligation« to cut its carbon emissions by a certain amount to meet the overall emission-reduction goal. Parties are required to do this through their own Nationally Determined Contributions (NDCs).

Adopting a common mitigation objective diluted the dichotomy of obligations to reduce emissions between Annex I and non-Annex I Parties, but preserved the obligation of OECD countries (Annex II) to provide the necessary financial support, capacity-building and technology-transfer to developing countries in order to help them meet their nationally determined objectives.<sup>81</sup> At the same time, »the

<sup>74</sup> Low, P. & Al. (2019). P.25.

<sup>75</sup> UNFCCC. Bali Climate Change Conference – December 2007, The Bali Road Map, accessed 26 May. <https://unfccc.int/process-and-meetings/conferences/past-conferences/bali-climate-change-conference-december-2007/bali-climate-change-conference-december-2007-0> (accessed on 3 March 2023).

<sup>76</sup> UNFCCC. (2011). Conference of the Parties Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 Addendum, FCCC/CP/2011/9/Add.1, <https://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf> (accessed on 3 March 2023).

<sup>77</sup> Josephson, P. (2017). P.36

<sup>78</sup> White House Press Release, »U.S.–China Joint Announcement on Climate Change«, 12 November 2014, Beijing, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>, (accessed on 3 March 2023).

<sup>79</sup> UNFCCC. (2015). The Paris Agreement, p.1. [https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf) (accessed on 3 March 2023).

<sup>80</sup> Ibid, P. 4.

<sup>81</sup> Pauw, P. & Al. (2017).

use of the term »contributions« instead of »commitments« softened the legally binding nature of the NDCs, reflecting the new »bottom-up« conception of CBDR-RC.<sup>82</sup> An NDC formulation guidance was adopted at COP24 in Katowice in 2018. It does not dictate what the Parties should include or report on every five years, however. While NDCs' flexibility allowed negotiations to move forward, concerns continue to be raised about whether the targets of the Paris Agreement would be met. One of the reasons behind this doubt is the non-requirement of developed Parties to include information on the provision of support to developing countries and LDCs, which leaves these in the dark when it comes to setting achievable targets.<sup>83</sup>

Unsurprisingly, Members recognised the significant gap between their emissions-reduction plans and the 1.5 °C target to be met by 2023. At COP26 in Glasgow, they recognised the need for a 45 per cent reduction in emissions compared to 2019 levels.<sup>84</sup> And a year later, at COP27, held in Sharm El Sheikh, this percentage remained more or less the same with merely a marginal improvement of two percentage points (43 per cent compared to 2019 levels).<sup>85</sup>

While the Paris Agreement diluted the dichotomy of mitigation obligations between Annex I industrialised Parties and non-Annex I Parties, some contend that the COP27 implementation plan has further diluted the CBDR-RC principle in terms of financial obligations. Praised for reaching a long-awaited decision to establish »new funding arrangements (including a dedicated fund) for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage«, the cover decision text called for »mobilizing new and additional resources, (...) under and outside the Convention and the Paris Agreement«.<sup>86</sup> Hence, contributions to this fund are expected to no longer be exclusively to Annex II Parties, instead placing high-income and big emitters among the developing Parties, with the private sector sharing financial responsibility towards the most vulnerable.<sup>87</sup>

## CONCLUSION

The development lens, as reflected in the SDT and CBDR-RC principles, reveals a key and over-arching similarity between the respective global trade and climate-change regimes. Both principles emphasise that countries are at different stages of development and have different resources and capacities. Each also acknowledges the right of developing countries to adopt national policies to catch up with their developed counterparts and realise their aspirations for sustainable development. Hence, they both share the aim of enabling developing countries' and LDCs' participation in global activities and supporting them in meeting their consequent commitments or objectives. Following the inception of those principles, however, the WTO and UNFCCC adopted implementation and enforcement approaches that were »anything but similar.«<sup>88</sup>

In terms of responsibilities and obligations or commitments, the WTO was conceived to expand trade, and all Members share a »common« overall obligation to remove trade barriers on a »non-discrimination« basis. Hence, SDT provisions are adopted in WTO agreements as »exceptions« to allow developing countries and LDCs the flexibilities needed to meet those »common« obligations. WTO agreements also place a rather voluntary »moral responsibility« to contribute disproportionately to the overall cost of compliance by providing the capacity-building and technical assistance needed by developing countries and LDCs.<sup>89</sup>

In contrast, the UNFCCC acknowledges that developed countries bear the greater share of responsibility for environmental degradation owing to their historical emissions of GHG, which obliges them to shoulder more of the burden and provide the necessary support to developing countries. This was reflected in the UNFCCC convention differentiating between commitments that are »common« to all Parties and commitments that are specifically assigned to OECD Parties and economies in transition (Annex I), to adopt mitigation measures to reduce their emissions and, finally, the commitment of OECD countries or developed Parties (Annex II) to provide financial support that allows developing countries to also reduce their emissions and adapt to Climate Change impacts. In other words, the UNFCCC instilled a rigid dichotomy of core obligations between developed and developing Parties.

In terms of the basis for differentiation, the WTO assigns the right to benefit from SDT based on a country's self-differentiation and designation as a developing country and does not adopt any official list of developing countries, while the UNFCCC has adopted official lists for Annex I, Annex II and non-Annex I Parties.

Both the SDT and the CBDR-RC principles face implementation challenges and debates about their differential

<sup>82</sup> Petreson P. (2017).

<sup>83</sup> Pauw, P. & Al. (2017).

<sup>84</sup> UNFCCC. (2021). Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its third session, held in Glasgow from 31 October to 13 November 2021. FCCC/PA/CMA/2021/10/Add.1.

<sup>85</sup> UNFCCC. (2022). Sharm el-Sheikh Implementation Plan. [https://unfccc.int/sites/default/files/resource/cop27\\_auv\\_2\\_cover%20decision.pdf](https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf) (accessed on 3 March 2023).

<sup>86</sup> UNFCCC. (2022). Advance unedited version, Decision -/CP.27 -/CMA.4, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage. [https://unfccc.int/sites/default/files/resource/cma4\\_auv\\_8f.pdf](https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf) (accessed on 3 March 2023).

<sup>87</sup> Ismail, Y. (2022). COP27: A step towards bringing overdue justice to the most vulnerable, <https://www.cuts-geneva.org/News?id=BUL-221122-01> (accessed on 3 March 2023).

<sup>88</sup> Pauw, P. & Al. (2014).

<sup>89</sup> Pauw, P. & Al. (2014).

treatment approach. The 2013 TFA agreement of the WTO and the 2015 Paris Agreement sought to obtain a solution for effective application of SDT and CBDR-RC, respectively. Interestingly, it can be argued that these agreements caused both principles to converge towards a bottom-up, contextual approach where countries can individually determine the commitments they are able to meet based on their capacities and how long they would need to implement them. The TFA scheduling and categorisation also allow countries to make implementation of commitments conditional upon receiving the necessary support as well as progress in capacity-building. It made provision of this support to a certain extent binding upon developed Members if they want to hold developing countries to their word in the implementation of their Category C commitments, and created an institutional mechanism to coordinate this assistance.

With regard to CBDR-RC and the UNFCCC, the Paris Agreement also moved toward a joint overall commitment while allowing each Party to formulate its »contribution« based on its capacities, although developed countries are expected to make larger emission-reduction commitments due not only to their greater capacities, but also their historical contributions to carbon emissions. Later in COP27, the Parties agreed to establish a specific fund for loss and damage for the most vulnerable, but the deal clearly involves this funding arrangement not being limited to the convention and the Paris Agreement, under which only developed OECD countries are committed to financially supporting their developing counterparts. In other words, the rigid line between the UNFCCC Parties' lists and their respective obligation is blurring.

It can be argued that the challenges and debates surrounding both principles has shown that self-determined differential treatment facilitated negotiations, allowing more practical approaches to implementation. The challenge in both fora now lies more in ensuring that effective matching is performed between the pre-conditioned needs of developing countries to meet what is expected of them and the support that the developed countries provide. This will not be an easy task, especially as trade and climate-change measures are increasingly intersecting on the path to emissions-reduction and the green transition. It is evident that fostering collaboration between both organisations, the WTO and the UNFCCC, is needed to achieve their respective mandated objectives while ensuring the capacities and needs of developing countries are effectively taken into consideration. The following recommendations aim to trace out a possible way forward for the WTO and UNFCCC to exchange lessons on differential treatment and pave an inclusive path towards a prosperous and sustainable future for all:

- Regular and greater exchanges between the WTO and UNFCCC on the development and application of SDT and CBRD-RC within their respective spheres;
- Joint seminars by the WTO and UNFCCC, for example during the WTO MCs and UNFCCC COPs, encouraging participants to share experiences and lessons relating to SDT and CBRD-RC;
- Research and analysis by stakeholding international organisations (e.g. UNCTAD, UNEP, etc.), think tanks and similar institutions to examine and identify possible areas where further convergence can take place between international trade and climate-change regimes with the aim of more effectively dealing with different levels of needs and capacities of developing countries.

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