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Testing the Chapeau-Tests on Special and Differential Treatment

How WTO Case-Law Could Inform Flexibilities in General WTO Law

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ABSTRACT

Most recent case-law and scholarly work suggests that the exception clauses in GATT Art. XX and GATS Art. XIV provide a meaningful regulatory instrument in balancing domestic trade policies. Arguably, results from the two-tier analysis could serve as a basis for a legal benchmark for the scope of Special and Differential Treatment (SDT) flexibilities. SDT could theoretically altogether be replaced with the general exceptions if they were to provide sufficient and meaningful flexibility for developing countries and Least-Developed Countries (LDCs). This paper assesses the suitability of the two-tier analysis for providing a meaningful legal benchmark for the scope of SDT flexibilities in a case-study on GATS Art. V flexibility, and discusses the implications of replacing SDT flexibility by the general exception clauses. It shows that the two-tier analysis indeed provides for an interesting legal instrument for introducing transparency and graduation in SDT flexibilities, but that the general exceptions do not appear suitable for replacing SDT flexibilities as long as their lists of legitimate policy objectives remains unchanged.

1 WTO Law and the Challenge of Inequality

About two-thirds and therewith the majority of WTO members are developing or least-developed countries (LDCs). Contrary to other international organisations,¹ the votes of all members of the WTO – whether LDC or industrialised – have the same weight: decisions are taken by consensus.² While the political reality of differing economic and political strength certainly impacts on decisions taken by the WTO,³ it is nevertheless remarkable that the WTO's

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¹ E.g. the UN has a two chamber system with the Security Council and its permanent members; the weight of the vote depends on the money transferred to the organisation both within the IMF and the World Bank, which marginalizes the vote of developing countries.

² See Agreement Establishing the World Trade Organisation Art. IX.

³ See for a critical note on the consensus decision making: STEINBERG, RICHARD H. (2002) 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organisation*, vol. 56, no. 2, pp. 339-374.

organisational structure treats developing countries as full members, on equal footing with industrialised members. Consequently, developing countries have a decisive shaping power in all decisions taken by the WTO today.⁴

In balance for the equal rights and treatment, the WTO provides neither financial support nor permanent exemptions from legal obligations to developing countries. Nonetheless, the obligations of developing countries have been eased to some extent in comparison with industrialised members of the WTO. For instance, developing countries are typically offered longer time frames for meeting their legal obligations, in addition to administrative and technical assistance. The WTO treaties reflect their concern about the difficult economic and social circumstances by providing for the additional flexibility – the aim being to facilitate trade liberalisation in these poorer countries suffering from economic insecurity and a weak institutional environment.⁵

MUNIN (2010) states that this reflects the principle of teaching developing countries how to fish, rather than sending them the fish.⁶ While this is one possible view and conceptual explanation of the legal status of developing countries within the WTO, arguably, the equal treatment as manifested by the WTO is also a strong commitment to the concept of free trade, which in theory should be more efficient in alleviating poverty than any form of foreign aid.⁷ Seen this way, demanding equal rights and obligations from developing countries is in their interest: structural adjustment, a trade- and competition-friendly policy, and the sheer power of economic activity should have a sustainably positive impact on economic growth in the poorer countries of this world.⁸

1.1 A Short History of Special and Differential Treatment

However, while the concept of free trade is fundamentally based on equal treatment of everyone involved in it, claims started early – referring to Aristoteles among others – that equal treatment is only valid as long as it involves equally strong economies. MFN treatment, the core of equal treatment in the free trade regime, was not seen as a suitable principle for trade regulation involving countries of highly unequal economic strength⁹.

In the – initially successful – attempt to accommodate the different levels of economic development in the WTO, the concept and philosophy of progressive liberalisation was introduced in the early GATT in 1947. Subsequent rounds of multilateral trade negotiations then served the purpose of ‘progressively and individually’ lowering tariff rates. Both market access and domestic needs of protection were taken into account in this process, as well as needs of social and eco-

⁴ It has been observed that developing countries used to be reluctant or unsuccessful with respect to shaping the decisions within the WTO in the past. This may have changed, given that developing countries are now organised in interest groups and manage to exert considerable pressure on industrialised countries. See also ISMAIL, FAIZEL AND VICKERS, BRENDAN (2011) ‘Towards fair and inclusive decision-making in the WTO negotiations’, In: Carolyn Deere Birkbeck (ed.), *Making Global Trade Governance Work for Development*, Cambridge University Press, Cambridge, pp. 461-485, p. 478.

⁵ See e.g. KECK, ALEXANDER AND LOW, PATRICK (2004) *Special and Differential Treatment in the WTO: Why, When and How?*, Staff Working Paper ERSD-2004-03, WTO, Geneva.

⁶ MUNIN, NELLIE (2010) *Legal Guide to GATS*, Kluwer Law International, Alphen aan den Rijn, p. 323.

⁷ See e.g. MORRISSEY, OLIVER (2006) ‘Aid or Trade, or Aid and Trade?’, *Australian Economic Review*, vol. 39, no. 1, pp. 78-88.

⁸ See e.g. WINTERS, ALAN L. (2004) ‘Trade Liberalisation and Economic Performance: An Overview’, *The Economic Journal*, vol. 114, no. 493, pp. F4-F21.

⁹ EBERHARD (2008), p. 10.

conomic development.¹⁰ This avenue was supported by the all of the initial 25 Members of GATT 1947, including 11 developing countries. They all agreed on the potential gains from multilateral trade, assuming that ‘they identified the sectors in which they had comparative advantage’.¹¹ COTTIER (2006) writes in this context:¹²

It is, therefore, not astonishing that the basic rules relating to progressive liberalisation *per se* do not need to take recourse to the concept of special and differential [...] treatment for [developing countries]. The same rules can apply to all Members alike as results can be tailored, taking into account highly diverging levels of development.

In the early 1950s, a number of newly independent developing countries joined the GATT, and challenged the treatment of developing countries as equal partners under the GATT:¹³

Most of these countries challenged the very basis on which the GATT was built; that is, as a rules-based, non-discriminatory multilateral trading system. They argued that it was not realistic to expect newly independent countries with fragile economies to compete on a level playing field with established industrial countries at that time.

Subsequent pressure from developing countries and later also the UNCTAD first led to a number of specific measures of Special and Differential Treatment (SDT) and later to the adoption of Part IV of the GATT, which was entitled ‘Trade and Development’. These changes formalised the acceptance of the non-reciprocity principle ‘under which developed countries gave up their right to ask developing countries to offer concessions during trade negotiations’.¹⁴ Finally, introducing the ‘Enabling Clause’ during the Tokyo round placed SDT at the core of the GATT system, and created a permanent legal basis for a variety of measures that ought to support and protect developing economies.

Before the Uruguay round, however, the majority of developing countries came to question the effectiveness of the different SDT provisions. They realised that substantial market access to developed countries would by far outnumber the gains from SDT.¹⁵ As developed countries were, however, not prepared to offer substantial commitments in market access and national treatment in sensitive sectors crucial to economic prospects in developing countries, the concept of SDT was held on to as a means to balance inequalities of the world trading system. Finally, on completing the Uruguay round, SDT was firmly anchored across the board in WTO law.¹⁶

The majority of the SDT provisions are to be found in the agreements of the Uruguay Round and the number of SDT provisions is high, as pointed out by LEE (2011):¹⁷

¹⁰ COTTIER, THOMAS (2006) ‘From Progressive Liberalisation to Progressive Regulation in WTO Law’, *Journal of International Economic Law*, vol. 9, no. 4, pp. 779-821, p. 779.

¹¹ KESSIE, EDWINI (2007) ‘The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements’, In: G. A. Bermann and P. C. Mavroidis (eds.), *WTO Law and Developing Countries*, Cambridge University Press, Cambridge, pp. 12-35, p. 16.

¹² COTTIER (2006), p. 781.

¹³ KESSIE (2007), p. 16-7.

¹⁴ *Ibid.*, p. 18.

¹⁵ *Ibid.*, p. 21; see also HOEKMAN, BERNARD (2005a) ‘Operationalising the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment’, *Journal of International Economic Law*, vol. 8, no. 2, pp. 405-424, p. 410-1.

¹⁶ COTTIER (2006), p. 784; HOEKMAN (2005a), p. 421-4.

¹⁷ LEE (2011a), p. 115.

One hundred and forty-five such provisions are scattered throughout WTO agreements, understandings, and GATT articles, among which twenty-two are applied exclusively to LDCs.

SDT provisions in WTO law provide for different flexibilities and preferences for developing countries and LDCs. Provisions and flexibilities generally refer to developing countries, which encompasses the group of LDCs. In addition, there are a smaller number of additional provisions that explicitly provide preferences to the LDC group. In 1997, the 'twin track approach' was adopted regarding SDT.¹⁸ This approach consists of one track seeking to support LDCs with flexibilities in their commitments to market liberalisation, and of another track encouraging developed countries to increase commitments regarding market access for and technical assistance to LDCs.¹⁹ This approach was recently complemented by the Trade Facilitation Agreement (TFA) of the WTO²⁰, which establishes mainly technical assistance for the benefit of low income countries. Nevertheless, SDT provisions remain incoherently scattered around the different legal texts of the WTO, which makes it challenging to keep the overview.

1.2 Special and Differential Treatment remains inefficient

However, it is generally acknowledged that SDT so far has failed to deliver the intended results. For instance, while the initial UN list of LDCs was composed of 25 countries in 1971, the number of LDCs has nearly doubled since (from 25 in 1971 to 48 in 2015).²¹ Furthermore, of the 48 LDCs, 34 are members of the WTO, with eight more negotiating to join. However, membership in the WTO does not appear to have resulted in substantial welfare improvements for LDCs – in four decades, only four countries graduated from the status of LDC (Botswana in 1994, Cape Verde in 2007, the Maldives in 2011, and Samoa in 2014).

Some believe that it would serve developing countries more economically if they were to assume full responsibilities at the WTO, as this would help locking in domestic reforms and assist sustainable economic growth and development. Developing countries themselves, however, do not agree with the view that SDT has failed to achieve its objective and therefore should be eliminated. Rather than being concerned with the ineffectiveness of the measures, developing countries see a problem in the fact that many SDT measures are 'best-endeavour' clauses, which are in essence voluntary for developed countries. They would instead prefer strengthening SDT provisions by giving them the force of law.²²

Today, the problem may be that the key issues of multilateral trade liberalisation are no longer centred on tariff reduction, but are concerned with the unification of regulation of domestic legislation and other behind-the-border regulatory barriers to trade. Thus, the risk of multilateral rules having a negative impact on economic growth in developing countries has increased, since

¹⁸ High-Level Meeting on Integrated Initiatives for Least-Developed Countries' Trade Development, Note on the Meeting, WT/LDC/HL/M/1 (26 November 1997).

¹⁹ MICHALOPOULOS, CONSTANTINE, 2000, *Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries*, Working Paper, World Bank, Washington DC, p. 22.

²⁰ The Trade Facilitation Agreement (TFA) is part of the wider negotiations concluded at the WTO Ministerial Conference in Bali in December 2013. Members reached an agreement on the Protocol text on November 27 2014. See also: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

²¹ UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) [online], Available at: <http://unohrlls.org> (last visited 4 July 2015).

²² KESSIE (2007), p. 34-5.

they may not be capable of guaranteeing and following the same standards as developed countries.²³

1.3 Flaws in the System and Suggestions on how to mend it

In addition, the group of developing countries in the WTO encompasses some relatively advanced economies such as Singapore, Israel, or Chile. *De jure*, there is no doubt that SDT treatment is available to these economies. *De facto*, however, it is in some cases questionable whether SDT applies to the right countries. In a way, this contradicts the very idea of SDT and therewith risks eroding the whole concept. HOEKMAN, MICHALOPOLOUS AND WINTER (2003) therefore suggested to introduce an 'LDC+' group, which would capture those countries in need of SDT, but exclude those countries which are in fact better off by assuming full responsibilities under WTO law.²⁴ They argue that the fewer countries are eligible for SDT, the more substantial the concessions are likely to be.²⁵

Others suggest country-specific evaluations, which would result in tailored packages of individual commitments, temporal exemptions and technical assistance for each developing country in the WTO.²⁶ Other ideas are rather concerned with a country's capabilities of implementing and enforcing WTO law and suggest that the criteria of who qualifies for SDT be redefined depending on a threshold specific to the application of individual rules. General pre-defined economic needs would, following this idea, automatically identify the countries eligible for and most likely to benefit from SDT.²⁷ Many more suggestions on how to fix the gap between the *de jure* system of SDT and the *de facto* outcome have been put forward in recent years.²⁸ One of the more recent suggestions is to rethink the concept of single undertaking. In a way, this could replace the current SDT system and allow for more of a 'pick and choose membership' in the WTO for those countries that cannot afford to, or are not yet capable of complying with the entire body of WTO law.²⁹

COTTIER (2006) follows a similar logic by introducing the concept of graduation to WTO law: taking into account the different levels of development in the structure and content of the rules themselves would enable a return to the concept of progressive liberalisation and the equal application of single, uniform rules to all members. This would allow abandoning the relatively tiring debate about how to define and depict different groups of countries based on their respective level of development. Rather than opting out of obligations, the concept of graduation aims at gradually phasing in. WTO law would, thus, serve as the basic regime defining the manner and

²³ See also LOW, PATRICK (2007) 'Is the WTO Doing Enough for Developing Countries?', In: G. A. Bermann and P. C. Mavroidis (eds.), *WTO Law and Developing Countries*, Cambridge University Press, Cambridge, pp. 324-357.

²⁴ HOEKMAN ET AL. (2003).

²⁵ *Ibid.*, p. 27.

²⁶ E.g. PROWSE, SUSAN (2002), 'The Role of International and National Agencies in Trade-related Capacity Building', *The World Economy*, vol. 25, no. 9, pp. 1235-1261.

²⁷ E.g. STEVENS, CHRISTOPHER (2002) 'The Future of Special and Differential Treatment (S&D) for Developing Countries in the WTO', *IDS Working Paper 163*, Institute of Development Studies, Sussex; KECK, ALEXANDER AND LOW, PATRICK (2004) 'Special and Differential Treatment in the WTO: Why, When and How?', *Staff Working Paper ERSD-2004-03*, World Trade Organisation, Geneva.

²⁸ See for an overview also HOEKMAN (2005a).

²⁹ See e.g. COTTIER (2006); LEVY, PHILIPPE I. (2006) 'Do We Need an Undertaker for the Single Undertaking? Considering Angles of Variable Geometry', In: S. J. Evenett and B. M. Hoekman (eds.), *Economic Development and Multilateral Cooperation*, The World Bank / Palgrave Macmillan, Washington DC, pp. 417-438; CORNFORD, ANDREW (2004) *Variable Geometry for the WTO: Concept and Precedents*, Discussion Paper, UNCTAD, Geneva.

direction of regulatory development and trade liberalisation, but countries' individual social and economic level of development would be factored in as determinant of the individual speed of liberalisation and commitment.³⁰

Strikingly, the issue of re-thinking the concept of SDT and the pursuit of ideas brought forward by the pre-cited authors have largely disappeared from scholarly publications after 2005. Thus, we are left today with not much more than the insight that the legal position of developing countries in the WTO needs to be reconsidered and that the specific measures targeting at helping developing countries and LDCs to participate in and gain from the global market have so far not led to the results that were intended.³¹

1.4 Lessons from Case-Law and the General Exceptions

Prominently, policymakers and scholars suggest that WTO law provides too much flexibility with regard to compliance and therewith impedes the positive impact of trade liberalisation for sustainable economic growth. This concern is mainly related to SDT provisions granting developing countries and LDCs extra flexibilities and is not related to technical assistance or SDT provisions encouraging developed countries to grant benefits to developing countries and LDCs. The general concept of graduation has been embraced widely, as shown above.

Since graduation requires a case-by-case analysis, a general legal test considering the individual level of development as well as the contribution of a measure towards economic growth is required. The general exceptions for domestic policies in GATT XX and in GATS XIV may constitute a meaningful regulatory instrument for balancing flexibility for versus commitments of developing countries and LDCs under WTO law. In particular, they are concerned with the justification of inconsistent domestic policies and explicitly also refer to 'the conditions, which prevail' in a WTO member. Possibly, SDT provisions providing for extra flexibility for developing countries and LDCs could even be replaced by a consistent legal practice of using the general exceptions for development policies in poorer economies. And more generally, while the exceptions are not *per se* part of the legal body of SDT, they could nevertheless inform the legal discussion about the scope of SDT flexibilities.

Most recent case-law and scholarly work suggests that the exception clauses indeed provide a meaningful regulatory instrument in balancing domestic trade policies.³² Results from the two-tier analysis³³ and the necessity-test³⁴ in the exception clauses could therefore serve as a basis

³⁰ COTTIER (2006).

³¹ See also Pauwelyn, Joost, 2013, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes', *RECIEL*, vol. 22, no. 1, pp. 29-41.

³² BARTELS, LORAND, 2015, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements*, (January 30, 2015). Available at SSRN: <http://ssrn.com/abstract=2557971>.

³³ In order to be consistent with the exception clauses in GATT and GATS, a domestic measure has to pass a two-tier test. In *US – Gasoline*, the Appellate Body presented the two-tier test under GATT Art. XX: "In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions — paragraphs (a) to (j) — listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX." (United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, April 29 1996, para. 1152)

³⁴ In order to be consistent with WTO law, a domestic measure has to be no more trade restrictive than necessary. The corresponding 'necessity-test' was elaborated by the Appellate Body in *Brazil – Retreaded Tyres*, saying: „In order to determine whether a measure is “necessary” within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contri-

for a legal benchmark for SDT flexibilities in the future. In fact, the chapeau-test could generally be used in cases where different policy objectives and commitments under international law have to be weighed against each other. For instance, the chapeau-tests are also discussed as a meaningful legal instrument to balance the scope of a public interest clause in WTO law.³⁵ This general approach to the legal regime of SDT flexibilities is tested and discussed in this paper by applying the chapeau-tests to the SDT flexibilities provided in GATS Art. V. Naturally the discussion will have to be broadened to other provisions and a more theoretical assessment in the future.

2 Lessons from Case-Law: The Chapeau-Tests, Developing Countries and Exceptions

The general exception clauses in WTO law are GATT Art. XX and GATS Art. XIV. Both provisions establish the legal requirements for the justification of a discriminatory measure. Exemplary, the chapeau of GATT Art. XX reads as follows:³⁶

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

Generally, the measure needs to be appropriate for its objective, and it needs to be necessary. Furthermore, the discrimination shall not be arbitrary or unjustifiable, nor shall it be disguised. A trade restrictive measure furthermore needs to serve an objective from the list of acknowledged objectives in the general exceptions. While the chapeau-texts of the two general exceptions in GATT and GATS are almost identical, the lists of justified objectives differ. GATT Art. XX says:³⁷

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, [...];
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

tribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued." (Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, December 3 2007, para. 156.)

³⁵ Sucker, Franziska and Moon, Gillian (2015) The case for a public interest clause as a general exception in trade agreements, draft, SSRN.

³⁶ GATT Art. XX.

³⁷ GATT Art. XX.

- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement [...];*
- (i) involving restrictions on exports of domestic materials [...] as part of a governmental stabilization plan; [...];
- (j) essential to the acquisition or distribution of products in general or local short supply; [...].

And GATS Art. XIV, on the other hand, establishes the following list of objectives:³⁸

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is [...] ensuring the [...] effective imposition or collection of direct taxes [...];
- (e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation [...].

The differences between the two lists of justified objectives in GATT and GATS are on the one hand related to the nature of services or goods trade respectively and on the other hand to the differences in the year of the respective negotiations. [...] ³⁹

If SDT provisions providing extra flexibility for developing countries and LDCs were to be replaced by the general exceptions, it is critical to discuss whether typical SDT flexibilities, such as the decision to use a longer time-frame for the implementation of commitments under WTO law, are considered a measure within the meaning of the general exceptions. Furthermore, the implications of the notion ‘between countries where the same conditions prevail’ for SDT flexibility require careful consideration. Finally, in the lists of justified objectives, the objective to promote economic development is not to be found. Possibly, however, some SDT flexibilities may serve one of the justified objectives nevertheless.

If the scope of SDT flexibilities were to be merely informed by the well-established chapeau-tests and regulatory logic of the exception clauses in GATT and GATS, case-law is more relevant for legal guidance. Whether the chapeau-tests and the regulatory logic of the general exceptions are indeed suitable for establishing a legal benchmark for SDT flexibility can be discussed theoretically on the basis mainly of the recent clarifications in WTO case-law.

2.1 Most recent Case-Law

The respondent in a WTO dispute regularly uses the general exceptions in GATT Art. XX and GATS Art. XIV as a defense. Since 1994, no less than 44 cases dealt with the general exceptions, 43 of them with GATT Art. XX and one with GATS Art. XIV. However, only in *EC-Asbestos* the respondent’s defense was entirely successful. Thus, it appears generally difficult to justify a dis-

³⁸ GATS Art. XIV.

³⁹ Add short review of negotiating history explaining the differences.

criminary trade measure with the general exceptions. Nevertheless, WTO members continue to use the general exceptions as a possible defense and case-law therewith continues to be crucial in the understanding and interpretation of the general exceptions.

[review of most recent case law]

Unfortunately, however, the case-law is naturally limited to the list of legitimate objectives in the subparagraphs of the general exceptions to date. More recently, moral considerations and the protection of the environment were at the heart of disputes involving GATT Art. XX. Developing countries and LDCs to date have mainly entered their economic development policies under SDT instead of the general exceptions, there is to date no specific case-law concerned with trade restrictive measures explicitly linked with and justified by its economic development objective.

This renders the most recent discussion on how to integrate considerations beyond trade into WTO law (human rights, morality, labour conditions, environment, aso.) less relevant for the assessment of how appropriate the general exceptions are for replacing of informing SDT flexibilities. While some flexibilities – the waiver for generics for LDCs, for instance – arguably, could also be justified clearly with the protection of human life or one of the other legitimate objectives, most measures targeting economic development in a poor economy will only be linked with one of the objectives in the subparagraphs more indirectly. Furthermore, the legitimate objectives in the general exception are targeting other policy considerations beyond trade. Typically, economic development policies are, however, trade considerations. Therefore, case-law today informs the interpretation and understanding of the general exceptions, without however, directly relating to the specific suitability of the exception clauses for meaningfully informing SDT flexibility.

2.2 “The conditions which prevail”

One of the conditions set out in the chapeau of the general exceptions is ‘between countries where the same conditions prevail’. Bartels (2014) suggests that not the countries should be compared, but the products. This view is substantiated by case-law and by the fact that the term ‘countries’ is used, instead of ‘WTO member’.⁴⁰ Furthermore, he suggests that ‘unjustifiable discrimination’ and ‘where the same conditions prevail’ essentially is the same, both concerned with justifying the discriminatory effect of a trade measure.⁴¹ Consequently, the relative level of development in a particular country would be irrelevant, and instead the focus of the provision’s discrimination test should be about products from different origins.

However, the provisions do not refer to products or services from different countries, but to discrimination between countries. Clearly also, the prevailing conditions are linked to the countries and not to the product or service. Thus, it is submitted here that the general exceptions can be interpreted in a way that the level of economic and institutional development in a country of origin, as well as in the country implementing the trade-restrictive measure, be taken into consideration for the discrimination test.

Arguably, this interpretation is indirectly supported by the difficulties in dealing with the exact meaning of the prevailing conditions demonstrated in case-law. The DSB interprets and applies

⁴⁰ Bartels, Lorand, 2014, The Chapeau of Article XX GATT: A New Interpretation, Legal Studies Research Paper Series, Paper No. 40/2014, University of Cambridge, Cambridge, pp. 7-8.

⁴¹ Bartels, Lorand, 2014, The Chapeau of Article XX GATT: A New Interpretation, Legal Studies Research Paper Series, Paper No. 40/2014, University of Cambridge, Cambridge, pp. 8-10.

this half-sentence of the chapeau incoherently and has linked the prevailing conditions to the products or services, the countries, or the nature of the measure itself in the past.⁴²

2.3 SDT and the two-tier analysis

As mentioned before, the difficulty with replacing SDT flexibility with the general exception lies primarily with the exhaustive list of legitimate objectives as provided in the subparagraphs of the general exceptions. The lists do not encompass 'economic development' as a legitimate objective for a trade restrictive measure. The first part of the two-tier analysis of the general exception consists, however, of substantiating that the trade restrictive measure serves one of the legitimate objectives. The main question is, therefore, whether there is a sufficiently clear link between one of the legitimate objectives and the economic development policy related to SDT flexibility.

As the Panel pointed out in *US-Gambling*, the content of the concepts embedded in the list of legitimate objectives 'can vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical, and religious values'⁴³, particularly with regard to public moral and public order. Diebold (2007) adds that not only do they vary in time and space, but also from one country to another.⁴⁴ Thus, despite being exhaustive, the lists of legitimate objectives also provide for the opportunity of a case-by-case analysis and of taking into consideration the particular situation of an individual WTO member.

If the policy objective of the trade restrictive measure falls within the scope of one of the legitimate objectives listed in the general exceptions, the measure and the objective need to be sufficiently connected. Or in other words, the trade restrictive measure has to be necessary to achieve the policy objective. The so-called necessity test is particularly interesting with regard to SDT flexibility: It forces the respondent or generally a developing country or LDC to consider carefully the implications of its trade restrictive measure. The necessity-test would in particular in theory rule out all the flexibility that according to economists is counter-productive with regard to economic development.

Finally, the trade restrictive measure shall not arbitrarily and unjustifiably discriminate between countries where the same conditions prevail, nor shall it constitute a disguised restriction on trade. It is submitted here, that in particular also this second part of the two-tier analysis provides the basis for taking into consideration the objectives of SDT. It allows considering the economic and institutional conditions in the country that implements a trade restrictive measure, while it also requires considering the economic and institutional conditions in the countries against which the trade restrictive measure develops discrimination. Arguably, trade restrictive measure aiming a fostering economic development cannot legitimately discriminate against other countries where 'the same conditions prevail'. South-South integration should, thus, in particular be encouraged by this interpretation of the chapeau of the general exceptions.

⁴² Add details from case-law.

⁴³ WTO Panel Report, *United States – Measures affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)*, WT/DS285/R, adopted 20 April 2005, para. 6.461.

⁴⁴ Diebold, Nicolas (2007), 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole', *Journal of International Economic Law*, vol. 11, no. 1, pp. 43-74, p. 50.

3 Testing the Tests

In order to substantiate the theoretical discussion, the two scenarios of 1) replacing SDT flexibilities altogether with the general exceptions, and 2) informing the scope SDT flexibility by applying the two-tier analysis to SDT measures, have to be tested against potential cases. Obviously, the differing scope and character of the different SDT flexibilities in WTO law in general and in use by developing countries and LDCs in particular requires investigation and assessment. Not all of the different SDT flexibilities may be equally relevant in terms of potential to develop a detrimental economic impact or in terms of practical relevance.

The subsequent paragraphs provide a test-run of one of the SDT flexibilities that has a proven track-record of having the ability to negatively impact on economic growth, if the individual pre-conditions of an individual country are not carefully assessed and taken into consideration with regard to the regulatory scope of the flexibility. The analysis shows that assessing other SDT flexibilities and their relation with the general exceptions may be worthwhile in order to substantiate the discussion in the future.

3.1 GATS Art. V

GATS Art. V generally establishes the requirements that a Preferential Trade Agreement (PTA) in services needs to fulfill in order to qualify for the MFN exemption. It basically requires that a PTA covers substantially all the services trade between its members and that it does not *a priori* exclude one of the services sectors or one of the modes of service supply. Thus, in order to comply with WTO law, generally a PTA would be expected to liberalise almost fully services trade between its members and to cover all of the 12 services sectors listed under GATS.⁴⁵

A first important flexibility with respect to meeting the requirements of GATS Art. V is to be found already in GATS Art. V:1. It says that an economic integration agreement has to fulfill the requirements of GATS Art. V either when it enters into force or ‘on the basis of a reasonable time-frame’.⁴⁶ This temporal dimension can also be found in GATT XXIV and is meant to accommodate development concerns. A next SDT flexibility is embedded in GATS Art. V:1 lit. b, GATS Art. V:2, which stipulates that ‘consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalisation among the countries concerned’.⁴⁷ The core of SDT flexibility of GATS Art. V lies, however in GATS Art. V:3, which provides flexibility specifically to developing countries with respect to the requirements established in GATS Art. V:1, ‘substantial sectorial coverage’ and ‘absence and elimination of substantially all discrimination’. GATS V:3 lit. a says:⁴⁸

Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

The scope of this specific flexibility for PTAs involving at least one developing country is, however, unclear. Adlung and Miroudot (2012) submit that at least it would not cover the introduc-

⁴⁵ For more details, see Sieber-Gasser, Charlotte, 2016, *Developing Countries and Preferential Services Trade*, Cambridge University Press, Cambridge [forthcoming July 2016].

⁴⁶ GATS Art. V:1.

⁴⁷ GATS Art. V:2.

⁴⁸ GATS Art. V:3 lit. a.

tion of new restrictions and discriminatory elements, which would be more restrictive than the countries' commitments in their GATS schedules.⁴⁹ That is, however, to a certain extent obvious, since GATS commitments would remain in place even if a PTA was more restrictive. In general, consideration should be paid to the state and prospects of the service sectors. Uncompetitive sectors may, thus, benefit from flexibility and therewith become subject of exemption or a lesser degree of liberalisation. However, what is typical for SDT flexibility in general – and why the SDT flexibility of GATS Art. V is used here for the theoretical assessment – is, that finally, the exact scope of the flexibility remains unclear.⁵⁰

Finally, GATS Art. V:3 lit. b in conjunction with GATS Art. V:6 allows PTAs among developing countries to be restricted to service suppliers owned or controlled by nationals of the members to the PTA, and to exempt third country nationals, even if they previously engaged in substantive business operations. GATS V:3 lit b, thus, basically exempts South-South PTAs in services from the obligations of GATS V:6. This additional flexibility – although substantially clear with regard to its scope – is of relatively little practical relevance. Whether or not a PTA in services among developing countries may exclude entire services sectors from its application is, however, highly relevant, given economic evidence which points towards the crucial role of services trade liberalisation in generating sustainable economic growth and value-added production in poor economies.

3.2 Applying the Two-Tier analysis to the scope of flexibility for South-South PTAs in Services

The analysis of more than 30 PTAs in services among developing countries showed, that the SDT flexibilities granted in GATS Art. V are rarely used. In fact, South-South PTAs in services tend to be slightly more compliant with GATS Art. V overall than other PTAs are: most of the South-South PTAs cover almost all sectors, all but one provide for National Treatment in general, basically all of them cover all modes of supply, and 14 out of 23 treaties are considered to be GATS+ with respect to the overall depth of liberalisation.⁵¹

There are, however, exceptions to this rule. Most prominently, the PTA among Central America and Panama, which fully liberalizes three sectors (business and professional services, communication services and education services), while it is overall considered as being more restrictive than the commitments of the parties made under GATS (so-called GATS-minus). Basically, this agreement is a sectorial agreement with a distinct focus on three specific services sectors, while other sectors are not further liberalized than the GATS at all. Arguably, sectorial agreements are within the scope of SDT flexibility of GATS Art. V.

When theoretically assessing, whether *Central America – Panama (2002)* would also pass the two tier analysis of the general exception in GATS Art. XIV, it is first of all assumed that the agreement is sectorial on purpose and in order to promote economic development between the parties to the agreement. Furthermore, it is submitted that indeed the PTA is considered a measure within the meaning of GATS Art. XIV. It is, thus, questionable, whether the measure discriminates third party service providers in the three sectors, which are fully liberalized under

⁴⁹ Adlung, Rudolf, and Miroudot, Sébastien, 2012, *Poison in the wine? Tracing GATS-minus Commitments in Regional Trade Agreements*, Staff Working Paper, ERSD No. 2012-04, World Trade Organisation, Geneva, p. 8.

⁵⁰ See Sieber-Gasser, Charlotte, 2016.

⁵¹ See Sieber-Gasser, Charlotte, 2016.

Central America – Panama (2002), because the agreement does not qualify for the MFN exemption and the violation of GATS Art. V cannot be justified under the general exception.

Thus, the parties to the agreement will have to demonstrate that the discrimination in the three services sectors serves one of the legitimate objectives as listed in GATS Art. XIV. Depending on the respective reasons, the protection of public morals or public order (GATS Art. XIV lit. a), or the protection of human life or health (GATS Art. XIV lit. b) may be relevant. However, in the case of a PTA, and considering case-law, it may be very difficult and rare to substantiate a GATS Art. V violation with one of the legitimate objectives in GATS Art. XIV. Thus, as long as the promotion of economic development *per se* is not included in the list of legitimate objectives, it may not be possible to replace SDT flexibilities entirely with the general exceptions.

Nevertheless, with regard to the necessity-test, substantiating that the deviation from GATS Art. V is necessary for the objective (promoting sustainable economic growth) arguably would be possible to demonstrate. Economic theory and evidence shows that trade liberalization in services between developing countries and in specific services sectors plays a key role in fostering sustainable economic growth and value-added production. Arguably, the parties to *Central America – Panama (2002)* would be able to demonstrate that the measure is necessary in order to reach their objective of promoting sustainable economic growth. [add economic literature and reference to *Central America – Panama (2002)*] Thus, with regard to the second submission, that the two-tier analysis of the general exceptions provides a meaningful legal benchmark for the scope of SDT flexibilities, the theoretical assessment shows that this may indeed be the case particularly with regard to the necessity-test.

Finally, it needs to be assessed whether the measure arbitrarily or unjustifiably discriminates between countries where the same conditions prevail, and whether it constitutes a disguised restriction on trade. Since the measure is part of a publicly available PTA, it is not to be considered disguised. Linked with the interpretation of the prevailing conditions brought forward in this paper, the measure would be arbitrary if it discriminates against services and service providers originating in countries in which the same conditions prevail. Given that the fully liberalised sectors in *Central America – Panama (2002)* arguably require geographical proximity, similar economic development, and similar language in order to serve the objective of the measure, indeed the measure may be considered discriminatory vis-à-vis Spanish-speaking third countries in the region with a similar level of development. Other third countries, however, would not fulfill the requirements of the same conditions prevailing, and therefore, the measure would not be considered discriminatory against their services or service providers. This second part of the two-tier analysis may force countries to extend their SDT flexibilities to other developing countries that fulfill the basic conditions economically required to promote sustainable economic growth and to contribute to fostering value-added production. This appears fully in line with the underlying logic of SDT and of WTO law in general, which is to continuously liberalise trade to the benefit of all WTO members and to poorer economies in particular.

3.3 Preliminary Findings

The theoretical discussion shows that replacing SDT flexibilities with the general exceptions may only be possible in rare cases of SDT flexibilities, where those flexibilities are sufficiently linked with one of the legitimate objectives of the general exceptions (e.g. human life in the case of generics).

However, the example of applying the two-tier analysis to the SDT flexibilities in GATS Art. V also shows that the necessity-test along with the second part of the two-tier analysis indeed provides a meaningful legal benchmark for substantiating the scope of flexibility attributed to developing countries and LDCs under WTO law.

Obviously, the basic suggestions brought forward in this paper require further analysis and research with regard to the different types of SDT flexibilities. Possibly some SDT flexibilities are more suitable for the general exceptions than others. Furthermore, the legal benchmark for the scope of SDT flexibility provided by the necessity-test and the second part of the two-tier analyses of the general exceptions needs to be carefully assessed in terms of economic implications and in terms of legal coherence.

4 Conclusion

The promotion of economic development in poor countries, as well as the promise to contribute to fair and equal economic growth lies at the heart of WTO law. SDT flexibilities are one legal instrument to implement and enforce this objective. However, SDT flexibilities in particular have been widely inefficient in achieving their goal in the past. On the one hand, the term ‘developing country’ under WTO law comprises a large group of countries with substantially different levels of respective development. On the other hand, the scope of SDT flexibilities remains largely unclear and may at times be too large in order to still contribute economically to their objective of promoting economic growth.

This paper submits that 1) SDT flexibilities may be replaced by the general exceptions in GATT Art. XX and GATS Art. XIV, and 2) the two-tier analysis of the general exceptions may be applied to SDT flexibilities in order to introduce a meaningful legal benchmark to their scope. Applying theoretically the general exception of GATS Art. XIV to the SDT flexibilities embedded in GATS Art. V and to the PTA *Central America – Panama (2002)*, shows that SDT flexibilities may be difficult to subsume under one of the legitimate objectives of GATS Art. XIV. As long as ‘economic development’ is not considered a legitimate policy objective for trade restrictive measures, SDT flexibilities may arguably not be replaced by the general exceptions. However, the theoretical assessment also showed that indeed the necessity-test as well as the second part of the two-tier analysis of GATS Art. XIV could provide a meaningful legal benchmark for establishing the scope of SDT flexibility on a case-by-case basis. Applying the two-tier analysis to SDT flexibilities would furthermore increase graduation in SDT, and therewith help overcome one of the obstacles of SDT to achieve its objective.