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INEQUITABLE TRADE RULES IN WORLD TRADE ORGANISATION (WTO): IMPACT ON DEVELOPING COUNTRIES* *

ABSTRACT:

The GATT (General Agreement on Trade and Tariffs) rules of 1947 were seen as prejudicial to the economic and development concerns of developing countries. With the coming into effect of World Trade Organization (WTO), it was expected that some of the concerns of the developing countries will be addressed. Notwithstanding the tremendous improvement made by WTO, there remained many areas of the current rules of WTO that reinforce the disadvantages faced by developing economies. This essay deals with these unfair trade rules and disadvantages inherent in the World Trade Organization (WTO) system by critically examining some important agreements that affect developing economies, specifically the Trade-Related Intellectual Property (TRIPs), Agreement on Agriculture (AoA) and Sanitary and Phytosanitary Barriers to Trade (SPS & TBT). This essay argues that WTO rules have locked most developing countries into an unfair and unbalanced trade system leaving them little space to introduce policies that advance their economy, a situation which not only perpetuate poverty but also hampers development and runs contrary to the objective for which WTO was born and set up.

1. Introduction

In 1986, the United Nations adopted the Declaration on the Right to Development (UNDRD). Thus over the last decade, the international

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community has devoted substantial resources to elevating the importance of this right and promoting its implementation. The WTO as an international institution is not left out in this renewed interest in development, more so in recognition of the intricate connection between trade and development in the global world of today. One of the problems associated with the GATT 1947 was its insensitivity to the trading inequalities that existed between the rich and the poor countries, which impacted tremendously on the development concerns of the developing countries. With the birth of WTO and the eventual succession of the GATT – 1994, it was expected that this imbalance should have been addressed. Reflecting this expectation, the preamble to the agreement establishing the WTO, recognized the need for positive efforts to ensure that developing countries and especially the least developed among them secure a share in the growth in international trade, commensurate with the needs of their economic development. In spite of these efforts, structural inequalities have persisted in trade relations in the WTO rules and agreements. In some areas, the WTO rules grievously threaten to reinforce the disadvantages faced by developing countries and to further skew the benefits of global trade integration.

The thrust of this essay is to identify these areas of WTO rules that constitute potential drawbacks to development concerns and global integration of developing nations. This paper will establish that the many promises of trade liberalization as championed by WTO have not been translated into action, perhaps due to some structural and systemic arrangements of the WTO itself. In doing this, the work is divided into five sections excluding the introduction. Section two discusses the general framework of the paper, clarifying the necessary concepts and explaining the driving philosophy of WTO and its impact on the developing economies. Section three describes the policy space of developing countries in the WTO system and as well identifies its strengths and weaknesses in achieving development goals. In section four, the paper focuses on some of the specific agreements in the WTO, making necessary analysis as to their implications for developing economies. For the purposes of this essay, only the Trade-Related Intellectual Property (TRIPs), Agreement on Agriculture (AoA), and

Sanitary and Phytosanitary and Technical Barriers to Trade (SPS & TBT) agreements will be examined. Section five will consider the necessary proposals towards achieving an equitable trading environment. Section six is the conclusion to the paper.

2. WTO, Development, and Trade Liberalization

2.1 The Concept of Development

Development is often associated with civilization which means the establishment of economic, political and social structures within a set geographical area which has become a national entity. It is however not generally agreed that development is synonymous with civilization. Civilization is a term that is loaded with bias, as it has the ability of categorizing a set of people using the standard of one's own culture. Development understood in the modern sense refers to better living standards and the availability of resources that makes life easier and more enjoyable. Thus in the preamble to the Charter of the United Nations (UN), it is provided that the UN is determined to "promote social progress and better standards of living."¹ To effectively manifest its commitment to social progress and development, the UN General Assembly in 1986 adopted the UNDRD. The UNDRD defines the right to development as "an inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to, and enjoy economic, social and political development in which all human rights and fundamental freedoms can be fully realized."² Although the UNDRD does not define the features of development, it is unarguable that there is an unavoidable link between the civil/political rights, economic, social and cultural rights and development. In this connection, development in this context can mean no more than, "A transformation of society ... which enriches the lives of individuals by widening their horizons, and reducing their sense of isolation and afflictions brought by disease and poverty, not only increasing their

¹ I. Brownlie (ed), *Basic Documents in International Law, 5th Edn., Preamble to the Charter of the United Nations*, (New York, Oxford University Press, 2002), p. 2

² UNDRD, Art. 1.

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lifespan but improving their vitality of life.”³ Development in this context transcends economics and regards both material and non material aspects of human/national life. The idea of developing countries, which cannot be totally removed from the history of the origin of the third world states, has indeed transcended that phenomenon. The third world states today are not necessarily developing states or less developed states, although many so called third world states belong to the class of developing countries. As has been said, economic growth is not the only taxonomy for development, although it seems to be the overarching index for branding who is developed and who is not, in modern international relations. This approach may be justified based on the fact that economic development statistically proceeds and is accompanied by positive social change and attendant provision of the resources that make life worth living. As observed by Wiarda, “You need economic growth to create jobs, provide investment for future growth, build infrastructure, dynamise the economy and pay for social services. Economic growth is a *sine qua non* for development.”⁴ To speak of developing countries in this essay, we refer primarily to the countries whose economic situations make them incapable of exploiting the gains of international trade and therefore unable to compete favorably in the world market. Traced to their very low Gross Domestic Product (GDP), these countries are unable to make life better in all respects for the citizens. So the phenomenon is multi-faceted as it relates to the economic, social and political aspects, all of which are interdependent. In this essay the concern is to establish a connection between development and trade, and to examine how unfair trade rules in WTO regime have impacted on the development rights of many developing countries.

³ J. Stiglitz , *Towards a New Paradigm for Development: Strategies, Policies and Processes*) Given as the 1998 Prebisch Lecture at UNCTAD, Geneva, 19 Oct. 1998, p. 3.

⁴ H. Wiarda, *Political Development in Emerging Nations- Is There Still a Third World*, (Belmont, USA, Thomson, 2004), p. 35.

2.2: WTO-Birth and Mandate

In this section, the paper will examine the vision and mission of WTO as well as its philosophy of trade liberalization. It will be imperative to also look at the argument that have been advanced that trade liberalization contributes to development especially in developing countries.

Towards the end of the World War II the leading politicians and governments felt the need to establish a system of rules to run the post war global economy. The Bretton Wood Conference of 1944⁵ was aimed to erect a framework for the post war global economy. Amongst other proposals, the Bretton Woods agreement called for an international trade organization. But no consensus was agreed on. However, GATT emerged in 1947 to set rules on global trade in industrial goods only. According to Ellwood, "Its aim was to reduce national trade barriers and to stop competitive, beggar -thy-neighbor trade policies that had hobbled the global economy prior to world war two."⁶ At this time most of the developing countries were not parties to GATT. After repeated rounds of negotiations for agreements amongst members and governments, prompted by the need to form a multilateral trade organization to serve as mechanism for coordinating these innumerable agreements, the new WTO was approved in Marrakech in 1994 to replace the more loosely structured GATT. The WTO was a tremendous improvement on GATT; it not only had the status of international

⁵ www.britannica.com/event/Bretton-Woods-Conference accessed on 16/11/15: Bretton Woods Conference, formally United Nations Monetary and Financial Conference, meeting at Bretton Woods, N.H. (July 1–22, 1944), during World War II to make financial arrangements for the postwar world after the expected defeat of Germany and Japan. The conference was attended by experts noncommittally representing 44 states or governments, including the Soviet Union. It drew up a project for the International Bank for Reconstruction and Development (IBRD) to make long-term capital available to states urgently needing such foreign aid, and a project for the International Monetary Fund (IMF) to finance short-term imbalances in international payments in order to stabilize exchange rates.

⁶ Ellwood Wayne, *The No Nonsense Guide To Globalisation*, (Toronto, New International Publications Ltd, 2006), p. 34.

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organization unlike GATT which lacked an organizational structure, but also expanded its mandate by the inclusion of many issues like services, often known as General Agreement on Trade in Services (GATS) and intellectual property. The key economic principle that underlies the WTO was the Neo-liberal paradigm⁷ which found its roots in economic theories expounded by Adam Smith⁸ and David Ricardo

2.3 The Principle of Trade Liberalization

According to Stiglitz, liberalization is “the removal of governmental interference in financial markets, capital markets and of barriers to trade.”⁹ In this sense there are many dimensions to liberalization in economics. Trade liberalization or liberal trade means “the goal to minimize the amount of interference of governments in trade flows that cross national borders.”¹⁰ The basic argument in support of freer trade is that it promotes mutually profitable division of labor and greatly enhances the potential of real national product of all nations.¹¹ Free trade advances the theory of comparative advantage in which a

⁷ “Neo-liberalism is rooted in the classical liberal ideals of Adam Smith(1723-900 and David Ricardo (1772-1823) both of whom viewed market as a self regulating mechanism tending toward equilibrium of supply and demand, thus securing the most efficient allocation of resources. They considered that any constraint on free competition would interfere with the natural efficiency of market mechanisms...they advocated the elimination of tariffs on imports and other barriers to trade and capital flows between nations”. See, M. Stegner, *Globalization, A Very Short Introduction*, (Oxford University Press) 2006), p. 40.

⁸ Adam Smith’s theory provided the justification for economic liberalism. Economic liberalism is that stance against state intervention in the economic affairs of a country. This stance also goes under the name of *laissez-faire*, let it be, which argues for market forces, demand and supply, to be let alone by the state. Smith provided a general and broad justification for *laissez-faire*, of no state intervention, and even roots it into an understanding of what human beings are. See M. De Angelis, Lecture Note 5, *Introduction to Political Economy*, Spring 2000. Available at: www.uel.ac.uk/M.DeAngelis/In5-Smith&C.pdf Accessed 16/11/15.

⁹ Stiglitz Joseph, *Globalisation and Its Discontents*, (New York: W.W. Norton & Company), 2003, p. 59.

¹⁰ J. Jackson, *The World Trading System*, (2nd edn). (London: MIT Press, 1997), p. 11.

¹¹ *Ibid.* p. 12.

country's income is enhanced by forcing resources to move from less productive uses to more productive ends. The entire logic is that, as countries open their borders for import by the reduction of tariff and non tariff barriers; they also expand their exports given the comparative advantage they have in respect of those national products, counting on the doctrine of reciprocity with other member nations. It therefore boils down to the age old idea that participation in trade enhances human welfare, and national development. The UN 2005 Human Development Report aptly describes as, "the idea that openness to trade is inherently good for both growth and human development now enjoys almost universal support. Translated into policy terms, the belief has led to an emphasis on the merits of rapid import liberalization as the key to successful integration into global market."¹² This represents the simple mathematics for the advocacy for trade liberalization, but the matter is much more complex given that the WTO members are not playing in a level playing ground.

The doctrine of free trade presupposes that everybody enjoys comparative advantage; it also presupposes equal opportunities to trade, geared toward greater wealth. But it is evident that the system of international trade under WTO is characterized by massively unequal players. In the words of Udombana, trade liberalization has worked to undermine the comparative advantages that Africa might have had, aggravating their development problems and leading to the abuse of labor standards and human rights."¹³

2.4. Trade Liberalization and Developing Economies:

Hudson writes,

International trade has enabled some countries to trade their way out of poverty. Indeed no country has developed successfully by isolating itself for international trade. But despite their efforts to integrate into the global

¹² *UN Human Development Report, 2005*, (New York; United Nations Development Programme, 2005), p. 119.

¹³ N. Udombana, *A Question of Justice: The WTO, Africa, and Countermeasures for International Trade Obligations* (2005), 38 *John Marshall L.Rev.*1153., at 1167.

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economy, many countries particularly sub-Saharan Africa have seen few benefits from international trade.¹⁴

While acknowledging the potential gain in free trade, there is need to highlight that, openness of developing nations to international trade on its own will not deliver the magic of economic development and progress. Part of the problem is that many developing nations do not have the capacity to respond to the opportunities of free trade by producing additional goods for export, and thus exploit their comparative advantage. Succinctly put, “without the capacity to respond to new export opportunities, enhanced access to the developed world markets will be a hollow victory for many developing countries, especially the poorest. A game played on a level playing field between unequal players will produce inequitable outcomes.”¹⁵ Events in history have really shown that unqualified voluntary or involuntary trade liberalization is not an automatic index to development and economic recovery; Haiti¹⁶ and Mali constitute clear examples. In the 1980s the developing economies were pressed to liberalize imports some times as a condition for loans from the World Bank or as a requirement for joining the WTO. For example Cambodia and Vietnam were required as a condition for entry into WTO to implement deep cuts in tariff on agriculture and manufacturing.¹⁷ In many instances this proved counter-productive to those economies and is indeed unjustified. It is

¹⁴ A. Hudson, *Equitable Trade and Development, In Just World, A Fabian Manifesto*, (London: Zed books), 2005, p. 81.

¹⁵ *Ibid.*, p. 82.

¹⁶ Before 1986, Haiti was self-sufficient in rice production even in the midst of low yields and traditional farming practices. An influx of rice imports from the United States priced lower than domestic rice has slowly displaced Haitian rice. Producers have found that they are unable to compete with the cheaper imported rice. The low tariffs on rice in Haiti prevent Haitian producers from being able to compete with lower priced imported rice. In 1995, tariffs on rice were decreased from 35 percent to 3 percent. The majority of the rice imported into Haiti originated from the United States, where farmers receive heavy subsidies from the government. As a result, the price of the imported rice does not reflect true production costs. Since Haitian producers are not subsidized, Haitian producers are at disadvantage.

¹⁷ *Human Development Report*, above, note 12, p. 119.

unjustified because many of the countries depend on a very narrow range of commodities for which world prices have declined. This means that they had to double their export volumes to maintain income at constant levels. Moreover the purchasing power of manufactured goods for export from developing economies has gone so low, and worst still, there are cases of zero export incomes for lack of capacity and resources. It has been seriously argued from historical evidence that there is no simple relationship between trade liberalization and economic growth, as most developed countries United States of America, United Kingdom, South Korea, tended to liberalize as they got richer and they developed behind barriers that protected infant industries. In this regard Hudson says “the developed world’s current effort to persuade developing countries to liberalize amounts to kicking away the ladder of development.”¹⁸

Another dimension that is important to highlight is the hypocrisy that pervades the liberalization process in trade between nations. Recognizing that this is a trade related relationship, whose end is profit, some nations tend to enact policies to protect the growth of industries and firms within their borders. Unfortunately, this is contrary to the spirit of free trade and WTO. In the words of Stiglitz,

The western countries pushed trade liberalization for the products that they exported, but at the same time continued to protect those sectors in which competition from developing countries might have threatened their economies. This was one of the bases of the opposition to the new round of trade negotiations that was supposed to be launched in Seattle; previous rounds of trade negotiations had protected the interest of the advanced industrial countries...without concomitant benefit for the lesser developed countries.¹⁹

Blanket prescription for trade liberalization as a factor for development is not supported by evidence on ground. As with the developed nations in their periods of recession, sequencing and timing and rate of liberalization matter so much. Thus it is not enough to focus on the

¹⁸ Hudson, above note 14, p. 86.

¹⁹ Stiglitz, above note 9, p. 60 – 61.

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process of liberalization, the level of development of each country must be put in perspective so as realize the end of trade which is human development. Liberalization should not be treated as if it is an end in itself. According to Hudson,

If countries are to translate the enhanced market access that liberalization brings into positive human development outcomes, they must have the space... to adopt policies appropriate to their levels of development. Market access through liberalization is important for developing countries but it will not suffice, and must be bought at the expense of policy space. Appropriate trade policies and measures to build the capacity of developing countries to respond to market access opportunities are crucial if developing countries are to benefit from trade liberalization.²⁰

3. The WTO Policy Space for Developing Countries

Recognizing the inequality that pervades the trading relationship between the developed and the developing countries, the WTO members conceptualized the Doha negotiations as a development round for the purposes of responding to such concerns regarding the imbalance in the previous negotiations especially the Uruguay round. At Doha in 2001, so many trade- developments related concerns of the developing countries were addressed. According to the UN Human Development Report, "the Doha Round of multilateral trade negotiations provides developed countries with an opportunity to bring international trade rules and domestic policies in line with their development pledges."²¹ Thereat, many agreement regarding the participation of the developing nations in the international trade were fine tuned to ensure their potential benefits and market access in the global economy.

The principle of non-discrimination obliges member nations not to indulge in selective trade with nations, and to refrain from favoritism in trading relations. The principle is amplified in two key provisions in the

²⁰ Hudson, above note 14, p. 87.

²¹ *UN Human Development Report (2005)*, above note 12, p. 126.

GATT-WTO regime, namely the Most Favored Nation Principle (MFN)²² as provided in Article I and the principle of National Treatment²³ in Article III. The second major driving philosophy in WTO is the principle of Reciprocity. This principle endeavors to limit free riding which might otherwise be common on the strength of non discrimination and it makes the process of agreeing to tariff concessions attractive. This creates obligations among members to respond to fellow nations concessions in similar ways possible. Although GATT provides for unconditional application of these key principles,²⁴ there are inbuilt exceptions that are meant to accommodate the trade imbalance between the developed nations and the developing nations. These exceptions are the Generalized System of Preferences (GSP) which is the offshoot of the Special and Differential Treatment (SDT), the Doctrine of Non Reciprocity, and the Enabling Clause.

The Special and Differential Treatment (SDT):

The SDT is a concept that cuts across the entire WTO legal regime and agreements. It finds clear expression in the multi-lateral decision of 28 November 1979 on Differential and more Favourable Treatment of Developing Countries (The Enabling) Clause- L/4903, where it was introduced as an integral part of GATT. It is an arrangement devised to derogate from the general obligations enunciated in the MFN rule, in favour of the developing countries. It fundamentally supports the view that economic inequality should be taken into account in the design and interpretation of WTO rights and obligations. In short, SDT represents “the notion that within the GATT/WTO system, poor countries would be

²² The MFN rule requires that a product made in one member country be treated no less favorably than like goods that originates in any other country. In other words, a concession granted by any one party to another in the WTO must be multilateralised to all other parties. See Amrita Narlkar, *The World Trade Organization* (Oxford University Press) 2005, p. 28.

²³ The national treatment rule requires member countries to treat foreign goods no less favorably than domestically produced like goods once the former have met whatever border measures are applied by the particular country. See. *Supra*

²⁴ Art. 1.1 of the GATT provides for an unconditional obligation MFN obligation, that is, any concession accorded to one country must be unconditionally and without payment extended to all WTO members.

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given treatment that reflected their poverty, and thus their relative lack of bargaining power.”²⁵ For Lichtenbaum, at the international level, the principle of special and differential treatment is the translation of the concept that un-equals should benefit from different treatment through the operation of redistributive mechanisms.²⁶ The SDT comprises of two aspects namely: market protective measures and preferential access. The former is to be seen from the perspective of avoiding obligations wherein commitments made by developed countries would be implemented more slowly for developing countries and applying the doctrine of non reciprocity, the developing countries would not have to make the same concessions. Such deviations include tariff increases to foster infant industries and shield them from foreign competition. The latter is to be seen from the angle of receiving privileges, wherein, the developed countries were allowed and encouraged to give preferential market access to the developing countries by lowering tariffs for developing countries below the level of tariffs for developed countries. The implication of these rules is that, “in the absence of any official authorization, preferences given to developing countries, would have violated the prohibition on discriminatory treatment contained in the “cornerstone” most favoured nation obligation of article 1 of GATT.²⁷

The incorporation of the SDT principle in the GATT-WTO provisions translates concretely under the concept of *Generalized System of Preferences (GSP)*. According Trebilcock and Howse,

The GSP was initiated under the auspices of UNCTAD in 1968. The intent was to build on existing colonial preferences which had been grandfathered in the GATT-MFN requirement-no longer would only ex-colonial powers grant such preferences and the ex-colonies be their only recipients (hence the expression generalized).Each developed

²⁵ Gehart & Seema Kella, *Power and Preferences: Developing Countries, Role of the WTO Appellate Body (2004) 30 NCJ Int'l. law and Comm. Reg.* pp. 515 at p. 530.

²⁶ P. Lichtenbaum, *Reflections on the WTO DOHA ministerial: “Special Treatment” vs. Equal Participation:” Striking a Balance in the DOHA Negotiations (2002) 17 Am. U. Int'l L Rev.* 1003, p. 1009.

²⁷ Gerhart & Seema Kella, *above note 25*, p. 531.

country will be free to grant or not grant such preferences as it chose.²⁸

Consequently, necessary exceptions to the MFN rule was created by members first in 1971, by way of a waiver of article 1, pursuant to Art XXV of GATT in 1971 and later by way of the 1979 decision at the Tokyo Round that became known as the Enabling clause, which “authorized Developed countries to depart from their MFN obligations in according differential and more favorable treatment to developing countries²⁹ Although the enabling clause continues to provide the legal basis for the MFN exception, allowing countries to give preferences , it does have some inherent shortcomings in relation to its objective, because it does not impose an obligation on developed countries to accord differential treatment to exports (products) from developing countries. It merely allows countries to depart from their MFN obligations to accord preferential treatment on products from developing countries³⁰. In a sense, the developing countries may not be able to make justiciable claims against the developed countries under the SDT regime. It is essentially a soft law obligation.

In the celebrated *EC-Tariff Preferences (GSP)*³¹ case (*European communities –conditions for the granting of preferences to developing countries*), the Panel as well as the Appellate Body (AB) attempted a comprehensive interpretation of the enabling clause. In that case, India had challenged a program by the EC as discriminatory, which provided an additional margin of preference (beyond that accorded to all developing countries), to those recipients with drug enforcement issues. The case proceeded from the WTO panel to the appellate body. The AB dealt with the issue of whether Europe violated the requirement of non discrimination in Generalised System of Preferences (GSP) programme by granting Pakistan and twelve other beneficiaries and not India special privileges under its drug program. The AB amplified the

²⁸ M. Trebilcock & R. Howse, *The Regulation of International Trade*, (New York: Routledge Publ.) 2007, p. 477.

²⁹ Lichtenbaum, above note 26, p. 1013.

³⁰ *Ibid.* p. 1014.

³¹ Panel Report cited in WT/DS246/R & Appellate Body report cited in WT/DS246/AB/R. See Trebilcock & Howse, note 28, p. 478.

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boundaries of Enabling clause by holding that in order to qualify for an exception to the MFN obligation under the enabling clause, the preferences had to be given on a general, non discriminatory and non reciprocal basis. It then went on to clarify the controversial issue of non-discrimination as different levels of preference are accorded to different developing countries. In establishing the principles, it suggested that,

According to the enabling clause, the preferences are to be designed and if necessary modified to respond positively to the development, financial and trade needs of the developing country...accordingly different preferences for different countries if the donor country classifies recipients according to their different developmental , financial or trade needs.³²

In this decision, the AB adopted this general concept of non-discrimination that countries similarly situated should be treated in the same way and not differently. However it set up a series of procedural hurdles a GSP donor county must face before it can sustain its differential treatment between countries. They are: 1) that the different countries are not similarly situated 2) that the tariff preferences are an effective means of addressing those special needs 3) that all developing countries who have those special needs are offered the greater preferences, 4) that any conditions or performance requirement imposed on the eligible countries be objective, transparent and non-discriminatory.³³ This landmark case showed the sensitivity of the WTO to the development needs of the developing countries, although, it made GSP program more complex by giving the donor country the liberty to withhold preferences, or to withdraw them arbitrarily³⁴ and creating conditions upon which they may be granted. Besides, the conditions attached to GSP on many occasions are potentially not conducive for the

³² Gehart & Seema Kella, *above note 25*, p. 550.

³³ Trebilcock & Howse, *above note 28*, p.479

³⁴ The understanding then is that the Generalised System of Preferences (GSP) is a gift not an obligation and can be used by the donor country as an expression of power, which is contrary to the aim of the enabling clause, designed to confer benefits unconditionally to the recipients.

development needs of the recipient country and thus works to counterbalance the donation.

Again the requirement of non-reciprocity also counts positively to the response to the imbalance in trade between developed and developing countries. It has the capacity of opening up access to the markets of the developed world, without expecting the same from the developing nation and will therefore potentially enhance their development. On account of these problems associated with GSP, a number of developing countries threatened to abandon the system during the Uruguay round of negotiation. However in the Doha development round it was reinforced and promises were made to review it with a view of consolidating it and making it operational so as to achieve its objective.

In addition to the SDT programme, it was considered in the Uruguay round that capacity building and technical assistance were necessary for the implementation of these new set of rules. Thus they were granted deferred application of the WTO disciplines. An example of such concession is "Article 27.4 of the subsidies code, which allows developing countries to phase out all export subsidies within an eight year period and Art. 20 of the customs valuation code, which provides that developing countries may delay application of the code for a period of five years from the date of entry into force of WTO.³⁵

4. Inequitable Trade Rules in WTO and Development Concerns in Developing Countries

This section argues that the trade agreements of the WTO perhaps negotiated under the lopsided influence of the developed countries is not only supportive of the imbalance in trade relations between the developed and developing nations but also do not encourage the development needs of the developing countries. To achieve this, the paper will examine some of the agreements in WTO which will include the Agreement on Agriculture (AoA), Trade-Related Intellectual Property (TRIPS), Agreement on Sanitary and Phytosanitary Standards (SPS) and Technical Barriers to Trade (TBT), as it affects the developing countries.

³⁵ P. Lichtenbaum, *above note 26*, p.1014

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4.1. Agreement on Trade-Related Intellectual Property Rights (TRIPS)

The agreement on TRIPs was negotiated and signed at Marrakesh. The negotiation was very controversial because it required Governments to adjust their national legislation on patents, copyrights and trademarks to bring them in line with new agreement. The idea of strengthening international legislation on intellectual property rights stems from the concerns of the developed nations regarding the competition which their manufactured export face with the products of the newly industrialized countries in Asia and Latin America. The crux of the issue was that the domestic policies of these developing countries and new industrialized nations allowed narrowly defined protection to products than do the developed countries like the US and the Europe. This fact made it possible for these countries to imitate these products from industrialized nations, with resultant loss of potential foreign sales by the original producers from Europe or US who financed the innovation.

The regulation on intellectual property rights under the agreement has the potential of creating monopoly rent to the innovator. The enjoyment of these monopoly rights under the agreement can frustrate the development objective of the WTO. According to Condon and Sinha, "Two core objectives of TRIPs are to achieve a balance between the rights of producers and users of intellectual property and to promote development."³⁶ It is not within the scope of this work to lay out the entire provisions of the TRIPs and the argument that are advanced to support it.³⁷ For our purposes, this essay will drive home the argument that TRIPs does not encourage development in the developing economies using the provisions of article 27 to article 34 of TRIPs.

³⁶ B. Condon & T. Sinha, *Global Diseases, Global Patents and Differential Treatment in WTO Law: Criteria for Suspending Patent Obligations in Developing Countries* (2005) 26 *NW.J. Int'l L & Bus* 1, p. 22.

³⁷ For example, the argument based on property Rights and incentives for further development.

Under TRIPs, patents rights extends as much as 20 years³⁸. It is to be noted that country by country transition periods was rejected during the Uruguay round negotiations. However the agreement accommodated the peculiar situation of the developing countries. Aptly put, “the agreement acknowledges the concern of developing countries and some developed countries, to protect the scope for legitimate domestic trade-offs of social and economic interests in the determination of patent rights.”³⁹ Recognizing the social and economic consequences that developing countries might have in respect of high levels of patent protection, the TRIPs does allow for compulsory licensing⁴⁰ which allows countries in emergency situations to grant license to domestic manufacturer to make a product without the consent of the patent holder, wherein the patent holder refuses to give authorization. As some may argue that without patents, the invention of new pharmaceutical product cannot be pursued, but it can also be argued that the restrictions on patent frustrate the scientific development of the developing countries. The Human Development Report is apt when it declared as follows:

The TRIPs agreement threatens to widen the technological divide between technology –rich and technology-poor countries. The ability to copy technologies developed in economically advanced countries has historically been an important element enabling other countries to catch up.⁴¹

Innovations are not island unto themselves. They are really an improvement of some other persons work so to say. For the developing countries to grow, they must have a foundation from the work already done by the developed world, given their infrastructural disadvantage. The whole idea of innovations in drugs should not be overtly commercial oriented. There is also the overarching dimension of interest for health care delivery that is attendant to it. Again, the patent

³⁸ Art. 33, TRIPs.

³⁹ Trebilcock & Howse, *above note 28*, p. 413.

⁴⁰ Art. 31, TRIPs.

⁴¹ UN Human Development Report 2005, *above note 12*, p.135

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rights to products have created such a monopoly with the resultant high cost that works against the provision of these drugs to the developing countries that really need them. For example, in Africa the politics of global patent rights for retroviral drugs had not only made these drugs unavailable but also unaffordable to the average person suffering from Human Immuno-deficiency Virus/Acquired Immune Deficiency syndrome Virus (HIV/AIDS). There is no doubt that this has a tremendous impact on development needs of these affected countries. Succinctly described,

Drug patents have neither positive economic impact on developing countries nor meet their development needs. They have the opposite effect. The lack of affordable and effective access to medical treatment has a negative impact on development. Several measures of development are affected by HIV/AIDS, including GDP per capita, economic growth, education, life expectancy and health. Peter Piot, the executive director of the United Nations HIV/AIDS program has stated that, 'countries like Botswana risk becoming what I will call "un-developing" because of HIV/AIDS.'⁴²

It is however very obvious that TRIPs has not been effective in meeting the development objectives of WTO. It has been suggested that it is better to eliminate the obligations of developing countries to provide patent rights for pharmaceuticals or at best to extend the waiver/transitions periods they already have or where it has expired, to provide for indefinite extension until they come to some level of development. This is especially needed in context of the problems associated with global diseases or so called neglected diseases.

4.2. Agreement on Agriculture (AoA)

The AoA attempts to set a new standard for trade liberalization in agriculture. It came into force in 1995 as part of the WTO agreement. As has been opined by scholars like Carin, Sinha and Condon, it adopts an

⁴² Condon & Sinha, *above note 36*, p. 30.

export oriented⁴³ agricultural policies, which benefit large scale producers and food traders.⁴⁴ However, paragraphs 13 & 14 of the DOHA declaration maintains that the AoA “recognizes the need of developing countries to effectively take account of their development needs, including food security and rural development.”⁴⁵ In most developing countries, only a small percentage of agricultural products is traded internationally and even where they have market access to the developed world market, there is no guarantee that they will be accepted for reasons of international standards such as safety and packaging which for lack of capacity, the developing countries cannot meet. So clearly there is an apparent imbalance from the start in international trade in agriculture. This is aggravated further by the three key principles upon which the AoA is based namely; market access, domestic support, and export subsidies.

Market access aims to increase international trade of agricultural produce by reducing border obstacles to trade such as taxes and duties commonly known as tariffs. It also requires countries to eradicate all quantitative restrictions and further to convert all other non tariff barriers such as health standards and packaging to tariffs (tarrification). Reflecting on the effect of this , it has been noted that “While this should in theory open up large markets and increase access for poorer country producers, it has actually prevented the south from maintaining its domestic sector and protecting against imports from industrialized nations,”⁴⁶ and consequently not conducive to development concerns of

⁴³ Art. 12 of AoA clearly provides for prohibition of exports, with qualified exceptions for developing countries. It merely allows prohibition of export for other countries under acceptable conditions-notice in writing.

⁴⁴ S. Carin, *Planting the Seed: A Human Rights Perspective on Agriculture Trade and the WTO* (2005), Swiss Agency for Development (SDC). See <http://creativecommons.org/licenses/by-nc-sa>

⁴⁵ WTO, DOHA Ministerial Declaration, 14 Nov. 2001, WT/MIN(01)/DEC/1, para. 13, available at www.wto.org/english/thewto.e/minist.e/min01.emindecl.e.htm last visited 10 Sept. 2007.

⁴⁶ *Understanding Global Trade and Human Rights* (2005), Report and Resource Guide for National Human Rights NGOs in the View of the 2005 WTO Ministerial conference, Hong Kong (MC6), based on the FIDH training seminar. Trade, WTO, and Human Rights, 17-19 May, 2005, Geneva, p. 6.

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the developing economy. However, the AoA would have sounded more development sensitive to the developing nations, if it had provided for waiver for developing countries to restrict their market access of imported agric-product instead of prohibition on export. The second principle, domestic support, as defined by AoA, is all types of government support to farmers, ranging from subsidies for producing specific products or guaranteed prices, to agricultural infrastructure and research."⁴⁷ It was meant to reduce the amount of subsidies available in the production of farm goods which alter or negatively affect the global market, i.e. the subsidies that distort the farmer's decision about what and how much they will produce. All domestic supports are placed in three colours-coded box representing their categories of permissibility.⁴⁸ The last is export subsidy which mandates the elimination of government payments that cover some of the cost of doing business for firms that export produce. This third factor was designed to combat dumping of agricultural products in the importing countries potentially in favour of the developing countries whose markets serve as the outlet for these excess produce of the developed nations.

Regrettably, some of the developed nations have continued to subsidize exports of domestic produce like cotton and coffee, dumping them in the markets of poor countries. This has resulted in loss of market for domestic products especially where it is the main source of income for the country. The only recourse which these countries have is either to respond with countervailing measures or seek remedy in Dispute Settlement Body (DSB) of the WTO. If they respond with countervailing measures, the rich countries may withdraw the SDT they have given them, if however they chose to go to the DSB, they may not reasonably have the technical expertise and the funds to prosecute the matter. Either way, they are at the mercy of the rich countries. The situation may be described in terms of seeking for a Right that will result in the denial of many vital privileges. Thus, the development

⁴⁷ *Ibid.* p. 6.

⁴⁸ The three-color coded box include: the amber box-of reduced permissibility; the blue box which need not be reduced but may be increased as it relates to program that limit production; and the green box which are assumed not to affect production levels and is related to environmental protection.

needs of the developing countries are being hampered by these dumping exercises of the developed nations which the WTO regime has been unable to check adequately.

The AoA, however admits of some provisions which are designed to assist poor countries to protect their infant agricultural industries, namely, the inclusion of Non Trade Concerns as avenue to disclaim obligation, the SDT (allowing for 10 year concession for implementation on the part of developing countries) which is an intrinsic part of the AoA,⁴⁹ and the Special Safeguard measure,⁵⁰ which is a mechanism available to countries that underwent tariffication to provide temporary protection to domestic farmers when there are surges of imports or fall in world prices. These are wonderful measures but the fact of the matter is that the rich countries will always contrive strategies to balance out these maneuvers. A critical look at the AoA will reveal that it paid more attention to export and liberalization of agric-trade rather than to livelihood and development needs of the countries involved especially the developing countries who are more disadvantaged in the enterprise. Again the emphasis on openness of agri-business potentially favours large farm arrangement practiced in the developed countries. Thus, the small and un-mechanized farm systems in most developing countries are put at disadvantage. Ewelukwa captures it vividly, when he said that trade liberalization forces countries to move toward policies that promote large farms and to increasingly adopt anti-small farm policies,⁵¹ and the potential social implication of this for million of small farmers in sub-Saharan Africa will be catastrophic. The story of AoA and developing nations can be summarized in the following words, "Instead of seeking to address the imbalance, the WTO rule have locked all countries into the existing unfair system, which is characterized by many developing countries having few trade barriers, leaving them little space to re-introduce trade policies to support their agriculture."⁵²

⁴⁹ Art 15, AoA, Art. 15.2 allows a ten year implementation period of the agreement for developing countries.

⁵⁰ Art. 5, AoA.

⁵¹ U. Ewelukwa, *Centuries of Globalization, Centuries of Exclusion: African Women, Human Rights and New International Trade Regime* (2005), 20 *Berkeley J, Gender L & Just.* 75, p. 126.

⁵² *Above* note 46, p. 10.

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**4.3. The Sanitary and Phytosanitary Standards (SPS) & Technical
Barriers to Trade (TBT)**

The agreement on sanitary and phytosanitary measures regulates the application of sanitary and phytosanitary measures dealing with food safety and animal and plant health. It recognizes that governments possess the right to take sanitary and phytosanitary measures but that they should be applied to the extent necessary to protect human, animal and plant life.⁵³ It also imposes obligation on members not to indulge in arbitrary and unjustifiable discrimination in the application of the measures so long as identical conditions prevail. The agreement recommends that the measures be harmonized to reflect the international standards, guidelines and recommendations where they are in existence.⁵⁴ However, it does not exclude the application of higher standards, where there is scientific justification to that effect or appropriate risk assessment.⁵⁵ In fact article 2.2 of SPS provides that SPS measures shall not be maintained without scientific evidence. In the Japan-Apples case the panel held that article 2.2 was violated by Japan because its measure was clearly disproportionate to the risk identified on the basis of scientific evidence available.

The agreement on Technical Barriers to Trade (TBT) seeks to ensure that technical regulations and standards as well as testing and certification procedures do not create undue obstacles to trade. Technical regulation is defined in Annex 1§1TBT as:

Document which lays down product characteristics or their related processes and production method including the applicable administrative provisions with which compliance is mandatory. It may include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.⁵⁶

⁵³ Art. 2, SPS agreement.

⁵⁴ Art. 3.1, SPS agreement.

⁵⁵ Art. 3.3, SPS agreement.

⁵⁶ Trebilcock & Howse, *above note 28*, p. 215.

In respect of the effect of these agreements on the development concerns of the developing countries it needs to be said immediately that SPS and TBT place greater burden on the developing countries. In the first place most standards other than those set by the international bodies are set by the developed countries. The implication is that developing nations are complying with the standards set by the developed countries, with far greater cost of compliance. Mayeda describes it thus, "Because the standards of developed countries will tend to be more similar in other importing developed countries than will the standards of developing countries, the costs of compliance for developed countries tend to be lower."⁵⁷ Again, the same argument goes for the setting of international standard which is usually done by the developed nations, subjecting the developing nations to comply with them at much greater cost, on account of the fact that these poor countries lack insufficient infrastructures and financial resources to enable adequate compliance. An added factor resulting from these agreements is that the developed nations may take advantage of the higher standards set by them to exclude the products of the developing countries from their market. Thus this may be used as a protectionist mechanism by the developed countries. It could be said that not only do these agreements accentuate the imbalance in trade but it does militate against the development objective of the WTO, more so that of the developing countries. To ameliorate the impact of these agreements on the developing countries it is recommended that the SDT provision in the SPS and TBT be reinforced such that special consideration is given to the different needs of the developing countries in developing standards and longer time frame for compliance or exceptions where necessary be granted. At the same time, it will not be violating the rule if the developed countries are advised to look for equivalents in the standards observed by the developing countries rather than expecting absolute identity with their standards.

⁵⁷ M. Graham, *Developing Disharmony? The SPS and the TBT Agreements and the Impact of the Harmonization on Developing Countries* (2004), *Journal of International Economic Law* 7(4) p. 751.

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5. Towards a More Equitable Trading Environment

Fundamental inequity underlies the WTO trading arrangement and consequently contradicts its fundamental commitment in the preamble to development among the developing countries and more so the least developed countries.⁵⁸ The Seattle⁵⁹ incident clearly manifested the weak negotiating power of the developing countries in the WTO system. Although the WTO is a member driven group i.e. one member, one vote, there is clear evidence that the voice of the developing countries sound more in protecting their interest and their market. It is therefore recommended that for a more equitable trading relations, steps should be taken to enable developing countries participate more effectively. This can be done by assessing the development impact of the agreements on the developing countries and work out modalities to accommodate them on a more flexible basis, without giving room for renegeing of their commitments in the agreements. Sometimes, the weak bargaining power of the developing countries stem from lack of capacity and resources. Hudson suggests that, "developing countries need to be provided with resources to enable them to participate effectively in the WTO negotiations."⁶⁰

Again the excessive mercantilist approach to trade negotiations has contributed to the less interest in the development needs of the member countries. The priority should not be how to make the most profit out of trade, but how can trade agreements, work to enable countries to translate the opportunities of trade into economic growth and integral development. According to Halle, the WTO,

⁵⁸ The Preamble establishing the WTO in its second paragraph recognizes the need for the effort designed to ensure that developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.

⁵⁹ In the Seattle ministerial meeting, the developing countries came for the first time with a definite agenda that placed conditions on their participation in the next round of trade liberalization. By contrast, the US and the European Union were not only unable to agree on a common list of items for inclusion in the next round of negotiations, but they articulated priorities that either conflicted directly or failed to address the developing countries demands.

⁶⁰ Hudson, *above note 14*, .p. 95.

has yet to prove that it is capable of going beyond the narrow mercantilist horse trading approach to adopt one in which a broader concept of national interest is defended. In which multilateralism is defended in its own right, and the priorities of security, foreign policy, equitable development and sustainability are considered fundamental elements of trade policy.⁶¹

Furthermore, the WTO has been accused of pushing trade liberalization in products in which the developed countries have special interest and comparative advantage. For instance the AoA emphasized the export more than it focused on import, and this gives advantage to the developed nations, but in TRIPs it worked to restrict the violation of patent rights as the developed nations have a lot to protect in relation to that area. It is therefore suggested that trade liberalization should be balanced and it must reflect the concerns of the developing world. It must be balanced in agenda, process and outcomes.⁶² On the issue of access of industrialized nations market, it needs to be said that the SPS and TBT agreements frustrate the developing countries products from being accepted. This trade imbalance results to the problem of balance of payment which does not work in favour of the economy developing countries. Reasonable reforms are necessary to enhance the developing countries' product market accessibility. We cannot exhaust the issues that are imperative for more equitable trading relations, but we need to say a word about the soft law language in which the various benefit conferring provisions to developing nations were couched. For instance the various SDT provisions in the agreement are expressed in soft law language, which lowers the potential of the developing countries in seeking redress in the Dispute Settlement Body of the WTO. In this connection, Olivares asserts,

The set GATT/WTO legal provisions purported to confer benefits to developing countries and LDCs contains a birth defect: they are on the whole, a set of 'soft law' rules. The non-binding and non-enforceable

⁶¹ M. Halle, *Trading into the Future: Rounding the Corner to Sustainable Development*(2006), GTI Papers Series, Frontiers of Great Transition, no. 6.

⁶² P. Lichtenbaum, *above note 26*, p.1041

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'soft law' nature of these rules explain to a large extent why they keep a 'poor track record' as to their effectiveness in implementation.⁶³

It is herein suggested that this flaw be remedied in order to make sense of the benefit conferring provisions in the rules. Any benefit which cannot be enforced is as good as none at all.

6. Conclusion

The thesis pursued in this essay can be summarized as follows:

States must implement policies that have an explicit focus on the needs and capabilities of their people. This does not preclude the expansion of trade as trade can be a valuable tool for development. It does however require that trade policy be clearly people-oriented. Trade, seen as an end in itself will not improve enjoyment of human rights or contribute to lasting economic and social development.⁶⁴

Not much word is needed to say the final words in this paper. However, suffice it to hold that, the paper has attempted to add to the scholarship on the assessment of the objectives of the WTO system using the prism of development concerns of the developing countries. No attempt was made to sample any particular country a case in point, although the countries in focus regard those who are less industrialized and are located in greater part in Asia, Africa and Latin America. It is necessary to note also that the problems identified militating against the development concerns of the concerned states are not limited to the three identifiable areas selected for investigation in this paper. Other areas of agreement within the WTO system do exist. It is possible to extrapolate some of the theoretical problems inherent in the system and apply them to those others not mentioned here. At the base of our argument here is that, more work is needed in the area of WTO system to effectively streamline their objectives to reflect the development problems of the developing economies. The recommendations made in the paper may therefore be very helpful.

⁶³ G. Olivares, (2001), The Case of Giving Effectiveness to GATT/WTO Rules on Developing Countries and LDCs, *Journal of World Trade*, 35(3),545-551 at 551

⁶⁴ Above note 42, p. 13.