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Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law

Suyash Paliwal

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ARTICLE

**STRENGTHENING THE LINK IN LINKAGE:
DEFINING “DEVELOPMENT NEEDS” IN
WTO LAW**

SUYASH PALIWAL*

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INTRODUCTION

In the latest “to be continued” in the story of the Doha Development Agenda (“DDA”),¹ Director-General Pascal Lamy suggested “that Members wish to continue to explore any opportunities to gain the necessary traction and try to make tangible progress as soon as possible.”² This is a far cry from the earlier-expressed goal of the Group of Twenty and World Trade Organization (“WTO”) to complete the Round in 2011.³ The present slow-down is nothing new; the delegates of the WTO Members have maintained a dogged, albeit on-and-off, effort to complete the DDA’s ambitious goals since the Round’s inception in 2001.⁴ But the ebb and flow of the DDA’s progress highlights the complexity of promoting economic development through reconciling the interests of nations across the economic spectrum.⁵ Juxtaposed between

1. Ved P. Nanda, *Selected Aspects of International Trade and the World Trade Organization’s Doha Round: Overview and Introduction*, 36 DENV. J. INT’L L. & POL’Y 255, 257–59 (2008) (explaining that the DDA, also known as the Doha Round, is a round of trade negotiations initiated in 2001 with a core objective of improving developing countries’ trade prospects); see also *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Aug. 23, 2011).

2. Director-General Pascal Lamy’s Statement, Report by the Chairman of the Trade Negotiations Committee, 1-2 May. 2012, available at http://www.wto.org/english/news_e/news12_e/gc_rpt_01may12_e.htm.

3. Group of Twenty, *The G20 Seoul Summit Leaders’ Declaration*, ¶ 9 (Nov. 11–12, 2010), available at <http://www.g20.utoronto.ca/2010/g20seoul.pdf>; Trade Negotiations Comm., *Lamy: “The final countdown starts now”*, WORLD TRADE ORG. (Nov. 30, 2010), http://www.wto.org/english/news_e/news10_e/tnc_dg_stat_30nov10_e.htm.

4. See Sungjoon Cho, *Doha’s Development*, 25 BERKELEY J. INT’L L. 165, 165–67 (2007) (providing a brief history of the Doha Round); see also Nanda, *supra* note 1, at 255–56; Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT’L L.J. 1, 5–9 (2009) (citing multiple negotiation breakdowns over farm tariffs, agricultural subsidies, and quota protections as particularly contentious).

5. Cho, *supra* note 4, at 170-73 (discussing deadlocked negotiations arising from agricultural market issues).

criticisms as a rich nations' club on the one hand⁶ and attractiveness as an avenue for a greater share of the world's prosperity⁷ on the other, the WTO presents an opportunity for developing countries but also poses a challenge of grappling with the bargaining power of their developed trading partners.⁸

In part to address this dilemma, the legal framework of international trade has provided a place for the special needs of developing countries since the inception of the General Agreement on Tariffs and Trade ("GATT").⁹ Historically, developing countries have enjoyed special and differential treatment ("S&DT") purportedly commensurate with their "development, financial, and trade needs."¹⁰ Yet, despite the fact that this phrase is employed in various places within the WTO's legal architecture,¹¹ and lies at the heart of the test to determine the legality of S&DT granted to developing countries,¹² the phrase has never been defined or given substantive elaboration in WTO covered agreements, adjudication, or scholarship.¹³

6. *Id.* at 165–66, 168–69.

7. JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 170 (2006).

8. *Id.* at 170–71; Richard N. Gardner, *The Bretton Woods-GATT System After Sixty-Five Years: A Balance Sheet of Success and Failure*, 47 COLUM. J. TRANSNAT'L L. 31, 62 (2008).

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; PETROS C. MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS* 138-39 (2009) [hereinafter TRADE IN GOODS].

10. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 3(c), L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203-05 (1989) [hereinafter Enabling Clause]; TRADE IN GOODS, *supra* note 9 at 138-39; Peter Lichtenbaum, *Reflections on the WTO Doha Ministerial: "Special Treatment" vs. "Equal Participation": Striking a Balance in the Doha Negotiations*, 17 AM. U. INT'L L. REV. 1003, 1010-14 (2002).

11. *See, e.g.*, TRADE IN GOODS, *supra* note 9, ¶ 3(c); *see also* GATT art. XXXVII: 4.

12. Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 164, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter AB Report]; TRADE IN GOODS, *supra* note 9, at 144-45.

13. Gene M. Grossman & Alan O. Sykes, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R, DSR 2004:III, 925)*, in *THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES ON WTO CASE LAW* 790, 808-09 (Henrik Horn & Petros C. Mavroidis eds., 2007)

As a result of this lacuna in WTO law and policy guidance, S&DT granted to developing countries has typically been severely influenced by politically or special interest-motivated actors in developed countries.¹⁴ The typical vehicle for S&DT is the generalized system of preferences (“GSP”),¹⁵ through which developed countries grant tariff concessions or zero-tariff market access to certain products originating in developing countries.¹⁶ For example, as described by Lance Compa and Jeffrey Vogt¹⁷ and echoed by Robert Howse,¹⁸ “[t]he GSP is a centerpiece of U.S. trade policy,”¹⁹ which as of 2010 provided “duty-free entry for about 4,800 products imported into the United States from 131 designated beneficiary countries and territories, including 44 least developed beneficiary countries so designated.”²⁰

In practice, GSP provisions commonly incorporate conditionality whereby the tariff concession is tied to some requirement that the developing country must meet to receive the concession.²¹ Often included under the rubric of “linkage,”²² a term used to describe the

[hereinafter ALI COMMENTARY]; Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT’L L. 221, 252-53 (2007).

14. TRADE IN GOODS, *supra* note 9, at 147; Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT’L L. 126, 127–28 (2002); Robert Howse, *India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy*, 4 CHI. J. INT’L L. 385 (2001) [hereinafter Howse, *India’s WTO Challenge*]; P. Trachtman, *Institutional Linkage: Transcending “Trade and . . .”*, 96 AM. J. INT’L L. 77, 77-78 (2002).

15. TRADE IN GOODS, *supra* note 10, at 137-38.

16. JUAN C. SÁNCHEZ ARNAU, *THE GENERALISED SYSTEM OF PREFERENCES AND THE WORLD TRADE ORGANISATION* 187 (2002).

17. Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199, 201 (2001).

18. Howse, *India’s WTO Challenge*, *supra* note 14, at 386.

19. Compa & Vogt, *supra* note 17, at 201.

20. United Nations Conference on Trade & Dev., *Generalized System of Preferences: Handbook on the Scheme of the United States of America 1*, UNCTAD/ITCD/TSB/Misc.58/Rev.2 (2010) [hereinafter U.S. GSP Handbook], available at http://www.unctad.org/en/docs/itcdtsbmisc58rev2_en.pdf.

21. ALI COMMENTARY, *supra* note 13, at 792-93; SÁNCHEZ ARNAU, *supra* note 17, at 220-25.

22. Kevin Kolben, *Integrative Linkage: Combining Public and Private*

coupling of trade with non-trade issues,²³ these conditions in the GSP have covered admirable issues such as the enforcement of internationally-recognized labor standards²⁴ and environmental protection,²⁵ but have extended to other linkages such as “good governance”²⁶ and, as was the case under the former GSP scheme of the European Community (“E.C.”), even a requirement that the developing country police drug trafficking in its borders.²⁷

This last GSP condition was the target of a challenge by India at the WTO’s Dispute Settlement Body (“DSB”).²⁸ After an unsuccessful defense of this linkage to the “development, financial, and trade needs” standard, the E.C. was forced to amend its GSP system.²⁹ India’s legal challenge was underpinned by concerns that

Regulatory Approaches in the Design of Trade and Labor Regimes, 48 HARV. INT’L L. J. 203, 213–14 (2007); Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT’L L.J. 483, 535–36 (2007).

23. CHRISTIAN BARRY & SANJAY G. REDDY, INTERNATIONAL TRADE AND LABOR STANDARDS: A PROPOSAL FOR LINKAGE 3-5 (2008); Kolben, *supra* note 22, at 203; David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5, 5–6 (2002).

24. *See, e.g.*, Trade Act of 1974, 19 U.S.C. § 2462(b)(2)(G)(1999) (presenting the U.S. GSP scheme conditioning preferential tariff treatment on “internationally recognized worker rights”); 19 U.S.C. § 2467(4) (1999) (defining “internationally recognized worker rights”); Compa & Vogt, *supra* note 17, at 202 (explaining that a country’s GSP status is directly tied to a country’s ability to provide for “internationally recognized workers rights”).

25. Council Regulation 732/2008, Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2009 to 31 December 2011 and Amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulation EC No 1100/2006 and (EC) No 964/2007, art. 8, Annex III, Part B, 2008 O.J. (L 211) 4, 5 (EC) [hereinafter EC GSP Plus].

26. *Id.*

27. Council Regulation 2501/2001, Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004, arts. 10, 25, 2001 O.J. (L346) 5, 8 (EC) [hereinafter EC 2001 GSP].

28. Request for the Establishment of a Panel by India, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/4 (Dec. 9, 2002) [hereinafter India Panel Request]; *see also* Request for Consultations by India, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/1 (Mar. 12, 2002); Howse, *India’s WTO Challenge*, *supra* note 14, at 386.

29. AB Report, *supra* note 12, ¶¶ 190-91; TRADE IN GOODS, *supra* note 9, at 145; Dionysia-Theodora Avgerinopoulou, Legislative Development, *Implementation and Enforcement of Multilateral Environmental Agreements – The New EC Generalized System of Preferences Scheme*, 12 COLUM. J. EUR. L. 828, 835–38 (2006).

the conditions upon access to the E.C. GSP program enabled Pakistan to gain preferential access to the E.C.'s market by meeting a condition that India argued had little or nothing to do with economic development,³⁰ not to mention the alleged \$300 million that Indian exporters averred they were losing because of the condition.³¹ GSPs were meant to promote economic development,³² but by allowing developed countries the choice to grant S&DT to some developing countries and not others, those other eligible developing countries lose out on economic opportunity.³³ While this sort of differentiation is permissible,³⁴ it thwarts the development of any nation denied the S&DT and works to further the preference-granting country's interest if left completely at the whim of the preference-granting country.³⁵ This is not only economically disadvantageous but, as determined by the Appellate Body ("AB"), is also inconsistent with the WTO legal structure.³⁶ For institutional reasons of the WTO and recipient nations' economic competitiveness, GSP linkages should conform to a legal standard even if they may simultaneously advance individualistic, social, and political agendas.³⁷

As articulated by the AB, the only WTO-consistent linkages in

30. Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 4.38, WT/DS246/R (Dec. 1, 2003) [hereinafter Panel Report]; TRADE IN GOODS, *supra* note 9, at 144; Amy Mason, Note, *The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP*, 54 DUKE L.J. 513, 528 (2004).

31. Mason, *supra* note 30, at 515.

32. AB Report, *supra* note 12, ¶ 160 ("[T]he very purpose of the special and differential treatment permitted under the Enabling Clause is to foster economic development of developing countries.").

33. TRADE IN GOODS, *supra* note 9, at 147 (discussing trade diversion as a criticism of GSP conditionality).

34. See AB Report, *supra* note 12, ¶ 156 (stating that preference-granting countries do not have to offer identical tariff preferences to all developing countries to be nondiscriminatory).

35. See ALI COMMENTARY, *supra* note 13, at 809; see also Debra P. Steger, *Afterword: The "Trade and . . ." Conundrum—A Commentary*, 96 AM. J. INT'L L. 135, 138 (2002).

36. See AB Report, *supra* note 12, ¶ 163 (stating that "[P]aragraph 3(c) does not authorize any kind of response to any claimed need of developing countries.").

37. See Steger, *supra* note 35, at 138 (positing that the WTO has solidified into a rules-based system despite originally being subject to typical treaty and contract interpretation principles).

GSPs are those that “respond positively” to the beneficiary country’s “development, financial, and trade needs”³⁸ (for convenience, “development needs”). There are at least two consequences of this legal requirement. First, a GSP condition that fails to respond positively to a WTO-consistent “development need” is in breach of Paragraph 3(c) of the Enabling Clause,³⁹ which by its text requires this “positive response”⁴⁰ and which, under *EC–Tariff Preferences*, calls for an objective development need.⁴¹ This objective “development need” could be determined by recourse to “the WTO Agreement or multilateral instruments adopted by international organizations.”⁴² Second, a developed country conditioning GSP on such a “development need” must provide non-discriminatory standards by which a potential recipient developing country can demonstrate compliance with the condition and then grant the GSP to all developing countries that so demonstrate compliance; otherwise, the GSP condition would fail the requirement in Paragraph 2(a) of the Enabling Clause that GSP must be non-discriminatory.⁴³

The requirement that GSP linkages respond to development needs thus creates a great challenge to international trade policymakers

38. AB Report, *supra* note 12, ¶¶ 160-65.

39. See Steve Charnovitz, *A New WTO Paradigm for Trade and the Environment*, 11 SING. Y.B. INT'L L. 15, 22 (2007) (highlighting the example that “[i]f sustainable timber management is not considered a development need, then the Appellate Body’s holding would seem to disallow that sort of environmental conditionality in a GSP programme.”).

40. Enabling Clause, *supra* note 10, ¶ 3(c); AB Report, *supra* note 12, ¶ 179; ALI COMMENTARY, *supra* note 13, at 803.

41. AB Report, *supra* note 12, ¶ 163.

42. *Id.*

43. See *id.* ¶¶ 187–88; ALI COMMENTARY, *supra* note 13, at 803-04, 809. There is the additional potential implication that a developed country that *ignores* a WTO-consistent development need would be held in breach of its obligation to offer GSP in a non-discriminatory manner as set forth in Paragraph 2(a) of the Enabling Clause. To elaborate, suppose a developed country conditions tariff preferences on some undertaking X, identified as a development need. A particular developing country may have no need to undertake X, but may as its own development need require a different undertaking, Y, also identified as a development need. It would be costly for this developing country to undertake X and it instead must devote its resources to undertaking Y. It is possible that the developing country could allege that the developed country is discriminating by granting tariff preferences based on X but not Y.

who must design or defend GSP schemes that aim to advance non-trade policy goals. For instance, labor rights linkage incorporated into a nation's GSP serves a laudable social goal.⁴⁴ But in order to survive a challenge as to its consistency with WTO law, under the guidance provided in *EC-Tariff Preferences*, a nation conditioning trade preferences upon a labor rights linkage must demonstrate that promoting labor rights somehow responds positively to the recipient country's development needs.⁴⁵ With the term "development, financial, and trade needs" still undefined in WTO law, even eight years after *EC-Tariff Preferences*, the expansive question of what economic development objectives or requirements constitute "development needs" within the constructs of the WTO legal framework remains a tortuous knot in trade policy.⁴⁶

The ambiguity around the definition of "development needs" creates challenges for both developing and developed countries as they consider GSPs. For the developing country, this ambiguity allows special interest groups in developed countries to enjoy wide leeway in shaping GSPs according to individualistic agendas. Developing countries that choose not to comport with these individualistic agendas will lose out on market access to which they should be entitled in accordance with WTO commitments.⁴⁷ For developed countries, the ambiguity means that meritorious human rights and social objectives that could be effectively achieved through GSPs may not enjoy the certainty of enforceability, or worse still, may falter under a challenge before the WTO DSB.⁴⁸ To better coordinate the interests of developed and developing countries as trading partners, and in the interest of greater legal and policy certainty, it is necessary to articulate what is meant by "development, financial, and trade needs."

This article seeks to begin formulating what constitute "development, financial, and trade needs" within the legal framework of the WTO with the hope of contributing a measure of

44. Compa & Vogt, *supra* note 17, at 200.

45. ALI COMMENTARY, *supra* note 13, at 803-04.

46. *Id.* at 808-10.

47. See SÁNCHEZ ARNAU, *supra* note 16, at 207-09.

48. See Howse, *India's WTO Challenge*, *supra* note 14, at 387.

clarity to the linkage debate.⁴⁹ Part I briefly reviews, as a backdrop to the discussion of “development needs,” the negotiating role of developing countries through important rounds in the WTO’s history, the nature of GSPs among leading developed entities in the international economic system, and the conditionality that GSPs typically include. To provide the framework for a definition of “development needs,” Part II discusses the AB Report in *EC–Tariff Preferences*, the only case to elaborate upon the phrase “development, financial, and trade needs.”⁵⁰ This Part then briefly discusses the sources of law in the WTO framework that one would use to determine which economic development needs are consistent with WTO law. Part III proceeds to articulate specific development needs that, in light of the standard from *EC–Tariff Preferences* and sources of WTO law, fall within the WTO’s contemplation according to this article’s argument. Specifically, this Part discusses market access, poverty reduction, sustainable development, and education as WTO-consistent “development needs.”

I. FRAMEWORK FOR ASSESSING LINKAGE AND “DEVELOPMENT NEEDS”

A. ACCOMMODATIONS FOR DEVELOPING COUNTRIES IN THE WTO

The international trading order has evolved to accommodate, to an extent, the different international economic position of developing countries in relation to their developed trading partners.⁵¹ These institutional accommodations indicate WTO Members’ recognition that the development needs of developing countries are distinct, as well as the WTO’s goal as an institution to promote economic growth in light of these needs. The existing system of accommodations for developing countries thus serves as a backdrop against which to view the specific “development needs.”

49. See Steger, *supra* note 35, at 138-39 (supporting linkage through GSP while recognizing the limits of viewing the WTO as a contract subject to interpretation rather than a firm set of rules governing trade relations).

50. TRADE IN GOODS, *supra* note 9, at 144-45; Broude, *supra* note 13, at 253.

51. GATT, *supra* note 9, at 194; Enabling Clause, *supra* note 10, ¶ 1; Lichtenbaum, *supra* note 10, at 1007-09.

1. Initial Stages of the GATT

Even during the earliest stages of the post-war trading evolution, nations realized that rules creating a level playing field irrespective of a country's level of economic development have the unintended effect of disadvantaging developing countries.⁵² While arguably appropriate as between two developed countries, a trade regime in which a less-developed country (“LDC”) must compete by the same tariff structures as a developed country poses a significant challenge to the LDC.⁵³ In the initial negotiations of the 1947 GATT, developing countries saw the benefits to trade and were willing to participate in the envisioned international trading system.⁵⁴ However, burdened by adverse terms of trade, they sought some degree of non-reciprocity and ability to protect their fledgling domestic industries.⁵⁵ Developing countries were not, however, recognized as a distinct group in the 1947 GATT's drafting,⁵⁶ and the only provision allowing for any special circumstances of developing countries was GATT Article XVIII, Governmental Assistance to Economic Development.⁵⁷

GATT Article XVIII, as originally drafted, was a mixed blessing for developing countries, containing certain special exceptions for these Contracting Parties but providing only limited access to these

52. AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT: ECONOMICS, LAW AND POLITICS 570 (2005) [hereinafter KOUL]; TRADE IN GOODS, *supra* note 9, at 137; Communication from Cuba, Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe, Proposal for a Framework Agreement on Special and Differential Treatment, *Preparations for the Fourth Session of the Ministerial Conference*, ¶ 1, WT/GC/W/442 (Sept. 19, 2001) [hereinafter Framework Agreement on S&DT].

53. TRADE IN GOODS, *supra* note 9, at 137.

54. See BARTON ET AL., *supra* note 7, at 160 (explaining that developing countries' demands were addressed in Part IV of the GATT agreement).

55. KOUL, *supra* note 52, at 571.

56. BRIAN McDONALD, THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND 49 (1998); Hunter Nottage, *Trade and Development*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 481, 484 (Daniel Bethlehem et al. eds., 2009); see also Inaamul Haque, *Doha Development Agenda: Recapturing the Momentum of Multilateralism and Developing Countries*, 17 AM. U. INT'L L. REV. 1097, 1107–08 (2002) (arguing that the original trading regime excluded developing countries from any meaningful participation).

57. GATT art. XVIII; KOUL, *supra* note 52, at 571; Nottage, *supra* note 56, at 485.

exceptions.⁵⁸ It was not until the 1954-1955 GATT Review Sessions that developing countries received their first dedicated accommodation through an amended Article XVIII.⁵⁹ Under this amendment, Article XVIII recognized that developing countries may need to adopt protectionist measures “in order to implement programmes and policies of economic development designed to raise the general standard of living of their people,”⁶⁰ that the “objectives of [the GATT] will be facilitated by the progressive development of their economies,”⁶¹ and that protectionist measures for specific industries may be required to raise living standards.⁶² Most importantly, these measures were not derogations from GATT obligations; rather, they were part and parcel of the GATT framework for mutual cooperation.⁶³

While this specific provision in the GATT was not heavily utilized by developing countries, it opened the door for their more active participation in a way that accommodated their special needs and curbed their apprehensions of the GATT as a rich nations’ club.⁶⁴ In addition, even from its earliest phraseology, the goal of raising living standards, beyond the GATT’s main purpose of market access, is woven into the text and indicates that the GATT’s objectives will be advanced through the economic development of Contracting Parties with an eye to raising standards of living.⁶⁵

2. *The Tokyo Round and The Enabling Clause*

Developing countries continued to negotiate for special and differential treatment up to and including the Kennedy Round in

58. KOUL, *supra* note 53, at 571 (noting that GATT Article XVIII requires less developed countries to negotiate meaningful tariff concessions to receive infant-industry exceptions under the GATT).

59. *Id.* at 572; Nottage, *supra* note 57, at 485; Framework Agreement on S&DT, *supra* note 53, ¶ 3(a).

60. GATT art. XVIII.2.

61. GATT art. XVIII.1.

62. GATT art. XVIII.3.

63. KOUL, *supra* note 52, at 572.

64. *Id.*

65. See Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L L. 165, 165 (2007); Chantal Thomas, *Poverty Reduction, Trade, and Rights*, 18 AM. U. INT'L L. REV. 1399, 1399 (2003).

1962-1967, and they achieved incremental victories along the way.⁶⁶ Notable among their victories was the creation of the United Nations Conference on Trade and Development (“UNCTAD”) in 1964,⁶⁷ a body that championed the cause of developing countries.⁶⁸ Specifically regarding provisions of the GATT, Articles XXXVI, XXXVII, and XXXVIII were added in 1965 to address developing countries’ needs of expanded export earnings, product diversification, and joint action, respectively.⁶⁹ These three provisions resonated most with the GATT’s overarching objective of market access⁷⁰ rather than internal development needs such as raising standards of living. The most significant victory for developing countries and their S&DT agenda came in 1979 with the Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries,⁷¹ popularly called the Enabling Clause.⁷²

The Enabling Clause was adopted at the end of the Tokyo Round and enshrined the principle of S&DT in the GATT framework.⁷³ Later adjudged by the AB to constitute a legal exception to the cornerstone GATT obligation of most-favored nation (“MFN”) treatment,⁷⁴ the Enabling Clause is recognized as the “central pillar of S&DT in WTO law.”⁷⁵ The Enabling Clause allows developed Member States to provide better-than-MFN treatment to developing countries, and for developing countries to provide the same for one another so that developing countries may enjoy greater economic development.⁷⁶ What started as a temporary measure pursuant to

66. TRADE IN GOODS, *supra* note 9, at 140.

67. KOUL, *supra* note 52, at 574; Framework Agreement on S&DT, *supra* note 52, ¶ 3(b).

68. KOUL, *supra* note 52, at 573.

69. *Id.*; GATT arts. XXXVI–XXXVIII; Framework Agreement on S&DT, *supra* note 52, ¶ 3(c).

70. KOUL, *supra* note 52, at 573–74; Nottage, *supra* note 56, at 485.

71. Enabling Clause, *supra* note 10; Framework Agreement on S&DT, *supra* note 52, ¶ 3(d).

72. KOUL, *supra* note 52, at 575; Nottage, *supra* note 56, at 485–86.

73. KOUL, *supra* note 52, at 575; Nottage, *supra* note 56, at 485–86.

74. AB Report, *supra* note 12, ¶¶ 98-103; *see also* GATT art. I.1; TRADE IN GOODS, *supra* note 9, at 137-38; ALI COMMENTARY, *supra* note 13, at 802.

75. Nottage, *supra* note 56, at 486; AB Report, *supra* note 12, ¶ 90.

76. TRADE IN GOODS, *supra* note 9, at 137-38; KOUL, *supra* note 52, at 575;

UNCTAD Resolution 21(ii)⁷⁷ later became a permanent provision of law among GATT Contracting Parties.⁷⁸ In particular, the Enabling Clause allows for Generalized Systems of Preferences in order to promote the economic development of a less-developed country.⁷⁹ Initially intended to be a unilateral grant of preferential treatment by developed countries to their LDC trading partners, the Enabling Clause and its related trade benefits later evolved into a system in which developed countries would attach conditions to the preferential treatment.⁸⁰

3. *Developing Countries' Voice in the Uruguay Round and the Marrakesh Agreement*

The main emphasis of the Uruguay Round was to create a singular system with consistent application to all WTO members.⁸¹ To that end, and in light of experience with S&DT that was less favorable than expected,⁸² developing countries de-emphasized S&DT during the Uruguay Round in favor of a consistent, rule-based system and enhanced market access,⁸³ and enjoyed a far more pronounced voice during those negotiations.⁸⁴ Drawing some comfort from the dispute settlement mechanism established in the Marrakesh Agreement,⁸⁵ developing countries both gained and made concessions regarding market access while retaining recognition of their economic

AB Report, *supra* note 12, ¶ 166.

77. Expansion and Diversification of Exports of Manufacturers and Semi-Manufacturers of Developing Countries, Resolution 21(II), Mar. 26, 1968, WT/DS246/R (2003).

78. Panel Report, *supra* note 30, ¶ 7.64; TRADE IN GOODS, *supra* note 9, at 137.

79. Enabling Clause, *supra* note 10, ¶ 2(a); McDonald, *supra* note 56, at 50.

80. See Gene Grossman & Alan O. Sykes, *A Preference for Development: The Law and Economics of GSP*, in WTO LAW AND DEVELOPING COUNTRIES 255, 257-58 (George A. Bermann & Petros C. Mavroidis eds., 2007) (highlighting a list of examples of conditions on preferential treatment, including conditions by the U.S. requiring that recipients do not have communist governments or support terrorism); see also AB Report, *supra* note 12, at ¶¶ 107-08.

81. McDonald, *supra* note 56, at 52.

82. *Id.*; Nottage, *supra* note 56, at 487.

83. Nottage, *supra* note 56, at 487-88.

84. McDonald, *supra* note 56, at 52; KOUL, *supra* note 52, at 579-81.

85. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

development needs.⁸⁶ Still, S&DT remained an integrated part of the WTO system after the Uruguay Round, but the form it took was largely that of allowing developing countries longer timeframes to implement uniform standards, rather than holding developing countries to different standards altogether.⁸⁷ The special needs of developing countries remained encapsulated in various places in the relevant WTO agreements⁸⁸ and Ministerial Declarations⁸⁹ even if an articulation of the needs themselves has nowhere been codified.⁹⁰

4. The Doha "Development Round"

Some argue that the developing countries' more active voice in the Doha Round has caused this latest round of trade negotiations to reach such a seemingly insurmountable impasse.⁹¹ In the Doha Round, which commenced in 2001,⁹² the interests of developing countries have been appreciably more prominent.⁹³ Reduction of agricultural subsidies by developed countries and non-agricultural market access ("NAMA") granted to developing countries constituted two of the most contentious issues in the Doha Round.⁹⁴ By early 2006, these had coalesced into a "triangle" of issues, namely, agricultural subsidies, agricultural tariffs, and industrial tariffs.⁹⁵ In order for the Doha Development Agenda to have succeeded at that stage, the U.S. would have had to reduce its agricultural subsidies, the E.U. would have had to reduce its

86. KOUL, *supra* note 52, at 579-80; McDonald, *supra* note 57, at 53.

87. Lichtenbaum, *supra* note 10, at 1012-14; Framework Agreement on S&DT, *supra* note 52, ¶¶ 7, 9.

88. *See, e.g.*, WTO Agreement pmbl.; GATT art. XVIII; *see also* KOUL, *supra* note 52, at 580.

89. *See, e.g.*, World Trade Org., Decision on Measures in Favour of Least-Developed Countries, ¶¶ 1, 3, 33 I.L.M. 1248 (1994); *see also* KOUL, *supra* note 52, at 579.

90. Broude, *supra* note 13, at 252-53.

91. *See* Nanda, *supra* note 1, at 255-56.

92. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

93. Peter M. Gerhart, *Slow Transformations: The WTO as a Distributive Organization*, 17 AM. U. INT'L L. REV. 1045, 1047 (2002) (discussing the WTO's increasing role in the distribution of wealth); Haque, *supra* note 56, at 1109; Lichtenbaum, *supra* note 10, at 1024-25.

94. Cho, *supra* note 4, at 174-77.

95. *Id.* at 185.

agricultural tariffs, and developing countries, led by Brazil and India, would have had to decrease industrial tariffs.⁹⁶ Such a compromise was never reached,⁹⁷ and the Doha Round was suspended in July 2006.⁹⁸ Developing countries' voices were particularly more pronounced during the Ministerial Conference in Hong Kong that was part of the Doha Round,⁹⁹ and in large part because the Round highlighted the divergent interests of developed and developing countries, the Round has produced only tepid results.¹⁰⁰ The developing countries left the Seattle Round prior to Doha with a unified agenda,¹⁰¹ brought this agenda to the Doha Round,¹⁰² and have stood fast that they will not let another round of negotiations pass without their interests being heard, even if it means an impasse.¹⁰³ It calls to mind a characterization of India's Minister of Commerce and Industry Kamal Nath at the July 2008 Ministerial Meeting—a trade official remarked that Mr. Nath “just sat there and said ‘No’ for 12 straight hours.”¹⁰⁴

While agricultural subsidies and NAMA were the more headline-grabbing issues raised by developing countries, the text of the Doha Development Agenda includes a call for a substantial review of S&DT in light of the Framework Agreement on Special and Differential Treatment proposed by Cuba, the Dominican Republic, Honduras, India, Indonesia, Kenya, Malaysia, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe (“Framework Agreement”).¹⁰⁵ The DDA echoes the Framework Agreement's urging for a review of all S&DT provisions “with a view to strengthening them and making

96. *Id.*

97. *Id.* at 186-87.

98. *Id.* at 165. Trade Negotiation Comm., *DG Lamy: time out needed to review options and positions*, WORLD TRADE ORG. (July 24, 2006), http://www.wto.org/english/news_e/news06_e/tnc_dg_stat_24july06_e.htm.

99. Cho, *supra* note 4, at 180-81.

100. *Id.* at 183; Nanda, *supra* note 1, at 261-64.

101. Cho, *supra* note 4, at 168-69.

102. *Id.* at 169-70.

103. *Id.* at 165.

104. Bhala, *supra* note 4, at 120; John W. Miller, *Indian Minister Frustrates West at Trade Talks*, WALL ST. J., July 25, 2008, at A6.

105. Doha Declaration, *supra* note 92, ¶ 44; Framework Agreement on S&DT, *supra* note 52.

them more precise, effective, and operational.”¹⁰⁶ In particular, the Framework Agreement calls for “the establishment of a concrete and binding [S&DT] regime which is responsive to the development needs of the developing countries.”¹⁰⁷ The Framework Agreement includes the following among the desired elements of this S&DT regime:

- (1) mandatory and binding S&DT through the WTO dispute settlement system,
- (2) a reconciliation of the S&DT regime with development targets, for instance, those identified by the United Nations General Assembly Millennium Declaration,¹⁰⁸
- (3) implementation costs of the S&DT regime,
- (4) transition periods linked to objective economic and social criteria,
- (5) no prohibitions on growth and development in developing countries, and
- (6) non-automatic application of the concept of a single undertaking, as contemplated in the Uruguay Round.¹⁰⁹

Thus, the Framework Agreement reaffirms the developing countries’ stance that their position in the international trading order is notably different, their legal obligations should be accordingly adjusted, and the adjustment should be commensurate with their development needs.

5. *Synthesis: Incorporating Development in the WTO as an Institution*

The negotiating history of the WTO framework shows a progressively greater role played by developing countries. While by

106. Doha Declaration, *supra* note 92, ¶ 44; Lichtenbaum, *supra* note 10, at 1028-29; Nanda, *supra* note 1, at 259.

107. Framework Agreement on S&DT, *supra* note 52, ¶ 10.

108. United Nations Millennium Declaration, G.A. Res. 55/2, ¶¶ 11-23, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

109. Framework Agreement on S&DT, *supra* note 52, ¶ 15.

no means a sideline player even in the earliest stages, they enjoyed growing prominence as the timeline moved towards the present and an undeniable influence in the Doha Round. The goals of developing countries remain at best partly fulfilled by the WTO system despite deliberate and overt attempts to accommodate such goals through S&DT and various other provisions outlining rights and obligations in the WTO legal framework. But while practice, economic theory, and rhetoric have all elucidated some of what constitutes developing countries' "development needs," as referenced in the relevant provisions in WTO law, the legal basis for identifying specific needs as falling under the rubric of this term remains to be set forth.

B. GSPs AND CONDITIONALITY

This article submits that greater coherence to GSPs, as a widely used form of S&DT, will represent a step towards achieving the Doha Development Agenda's goal to make S&DT more "precise, effective, and operational."¹¹⁰ This increased coherence can be achieved through defining the "development needs" to which GSP conditionality must respond¹¹¹ in light of S&DT's goal of promoting economic development.¹¹² Before reviewing the WTO law and interpretative elements that may be used to define "development needs," this article will briefly discuss GSPs and the linkages they typically involve, as well as two points regarding this article's argument in light of the legal standard with which GSP linkage must comport.

1. GSPs in Developed Countries' Municipal Laws

By agreement of the GATT Contracting Parties, GSP is a mechanism through which developed countries can assist developing countries in their economic development by granting them tariff treatment that is better than the MFN treatment they must afford to their developed trading partners.¹¹³ There are presently thirteen national or regional GSP schemes reported to the UNCTAD

110. Doha Declaration, *supra* note 92, ¶ 44.

111. AB Report, *supra* note 12, ¶¶ 163-64; ALI COMMENTARY, *supra* note 13, at 803.

112. AB Report, *supra* note 12, ¶¶ 160-61.

113. TRADE IN GOODS, *supra* note 9, at 137-38.

Secretariat,¹¹⁴ among which the largest are offered by the United States, European Community ("E.C."), and Japan as preference-granting WTO Members.¹¹⁵

Broadly speaking, the U.S. GSP affords duty-free access to products that are eligible for GSP treatment, come from a designated beneficiary country, and comport with the GSP rules of origin.¹¹⁶ The value of imports for an eligible product, however, is capped by the competitive need limitation ("CNL") for that product, and, if the cap is exceeded in a given year, the beneficiary country loses GSP-eligibility for that product in the following year.¹¹⁷

Somewhat similar to the U.S. scheme, Japan offers a general preferential tariff for the importation of industrial and agricultural goods.¹¹⁸ This scheme allows for duty-free import in some cases,¹¹⁹ subject to quantitative ceilings by product¹²⁰ and an escape clause allowing suspension of GSP treatment for a product if it causes or threatens to cause domestic market disruption.¹²¹

The E.C.'s scheme is more variegated, with eligible products satisfying the rules of origin receiving different preferential rates, a feature that replaces quantitative caps on GSP imports.¹²² Under the

114. *About GSP*, UNITED NATIONS CONFERENCE ON TRADE & DEV., <http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1> (last visited Aug. 23, 2011) (identifying the thirteen countries that currently present GSP schemes: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey, and the United States).

115. Rolland, *supra* note 22, at 536; SÁNCHEZ ARNAU, *supra* note 16, at 237, 239, 242, 244 (analyzing the size and impact of GSP schemes in various nations including Switzerland, Japan, the United States, and Canada).

116. US GSP Handbook, *supra* note 20, at 7.

117. *Id.* at 17 (defining CNLs as limitations on preferential treatment for items that a beneficiary nation already exports competitively).

118. United Nations Conference on Trade & Dev., Generalized System of Preferences: Handbook on the Scheme of Japan 9–10, UNCTAD/ITCD/TSB/Misc.42/Rev.3 (2006) [hereinafter Japan GSP Handbook], available at http://www.unctad.org/en/docs/itcdtsbmisc42rev3_en.pdf.

119. *Id.*

120. *Id.* at 10.

121. *Id.* at 11; SÁNCHEZ ARNAU, *supra* note 16, at 196.

122. United Nations Conference on Trade & Dev., Generalized System of Preferences: Handbook on the Scheme of the European Community viii, UNCTAD/ITCD/TSB/Misc.25/Rev.3 (2008) [hereinafter EC GSP Handbook],

E.C.'s GSP program, beneficiary countries are then eligible for additional tariff reductions, termed "special incentives," in accordance with the E.C.'s "GSP Plus" and its conditionality upon the beneficiary country adopting certain international treaties.¹²³

Two salient factors adding complexity to GSP schemes are "graduation" clauses and conditionality.¹²⁴ Graduation clauses allow a preference granting country to exclude a beneficiary country from GSP treatment when the beneficiary country has achieved a degree of economic development.¹²⁵ Conditionality in GSP schemes allows preference-granting countries to vary or suspend GSP benefits depending on policies adopted by the beneficiary country.¹²⁶ Because the AB's exploration of GSP focused on linkage, which in turn gave rise to the legal requirement that GSP linkage must be reconciled with "development needs," this article will highlight this aspect of GSP.

2. *Linkages Employed in GSP*

Under the overarching rubric of promoting development through GSP, linkage is a permissible facet to the GSP scheme.¹²⁷ Linkage in GSP arises when preferential tariff rates or duty-free access granted to a beneficiary country are conditioned on the adoption of certain domestic policies by the beneficiary country.¹²⁸ These domestic

available at http://www.unctad.org/en/docs/itcdtsbmisc25rev3_en.pdf.

123. *Id.* at viii-ix, xi; EC GSP Plus, *supra* note 25, art. 8, Annex III.

124. SÁNCHEZ ARNAU, *supra* note 16, at 202.

125. EC GSP Handbook, *supra* note 122, at viii; Japan GSP Handbook, *supra* note 119, at 11; U.S. GSP Handbook, *supra* note 20, at 17, 56; *see also* Trade Act of 1947, 19 U.S.C. § 2462(e) (1994). There is disagreement as to whether WTO law governs the decision as to whether a developing country is an eligible developing country under a GSP scheme, separate from whether a linkage employed by the GSP scheme upon such eligible developing countries is valid, or is instead a matter of domestic political determination. *Compare* Broude, *supra* note 14, at 255-58 and Kelé Onyejekwe, *International Law of Trade Preferences: Emanations from the European Union and the United States*, 26 ST. MARY'S L.J. 425, 458-59 (1995), with Peter M. Gerhart & Archana Seema Kella, *Power and Preferences: Developing Countries and the Role of the WTO Appellate Body*, 30 N.C. J. INT'L & COM. REG. 515, 555-56 (2005).

126. SÁNCHEZ ARNAU, *supra* note 16, at 200.

127. AB Report, *supra* note 12, ¶ 162; Howse, *India's WTO Challenge*, *supra* note 14, at 395-96.

128. Kyle Bagwell et al., *It's a Question of Market Access*, 96 AM. J. INT'L L.

policies run the gamut, from political, to commercial, to social, to human rights.¹²⁹ Under the U.S. GSP scheme, for instance, “[t]he President shall not designate any country a beneficiary developing country” eligible for GSP treatment if the country aids or abets any group that has committed any act of international terrorism,¹³⁰ fails to act in good faith in recognizing or enforcing arbitral awards rendered in favor of U.S. citizens,¹³¹ or takes no steps “to afford internationally recognized worker rights to workers in the country.”¹³² The term “internationally recognized worker rights” is defined to include the right of association, the right to collective bargaining, the prohibition of forced labor, prohibition of child labor, and acceptable working conditions with respect to minimum wages, working hours, and safety conditions.¹³³

In the E.C.’s GSP Plus, “special incentive” tariff treatment is conditioned on “sustainable development and good governance,” requiring the beneficiary country to have “ratified and effectively implemented all the conventions listed in Annex III.”¹³⁴ These conventions include international human rights instruments such as the International Covenant on Civil and Political Rights (“ICCPR”);¹³⁵ International Covenant on Economic, Social, and Cultural Rights (“ICESCR”);¹³⁶ and Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment;¹³⁷ International Labour Organization conventions including the Convention Concerning Freedom of Association and Protection of

56, 71-72 (2002) [hereinafter *Market Access*]; Kolben, *supra* note 22, at 213-14.

129. *See infra* notes 127-29 and accompanying text.

130. Trade Act of 1947, 19 U.S.C. § 2462(b)(2)(F) (1999).

131. *Id.* § (b)(2)(E).

132. *Id.* § (b)(2)(G); R. Michael Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs?*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 141, 148 (Lance A. Compa & Stephen F. Diamond eds., 1996).

133. Trade Act of 1947, 19 U.S.C. § 2467(4) (1999).

134. EC GSP Plus, *supra* note 25, art. 8.

135. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

136. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

137. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.1(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

the Right to Organise (No. 87)¹³⁸ and the Convention Concerning the Application of the Principles of the Right to Organise and Bargain Collectively (No. 98);¹³⁹ and environmental conventions such as the Montreal Protocol on Substances that Deplete the Ozone Layer.¹⁴⁰ Notably, the E.C. has maintained the linkage to combating illicit drug trafficking, the same conditionality that was invalidated by the AB,¹⁴¹ only cloaking it in the requirement that the beneficiary country ratify and implement the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,¹⁴² United Nations Convention on Psychotropic Substances,¹⁴³ and United Nations Single Convention on Narcotic Drugs.¹⁴⁴

Taking a step back, this article recalls that India's original argument at the inception of *EC – Tariff Preferences* was that GSP was meant to apply to all developing countries in a fully nondiscriminatory manner and that no conditionality was permitted under the Enabling Clause.¹⁴⁵ The Panel ruled in India's favor on this point,¹⁴⁶ but the Appellate Body curtailed the ruling to still allow GSP conditionality so long as it responded positively to development needs.¹⁴⁷ While not ignoring the obvious economic motivation for

138. Convention Concerning Freedom of Association and Protection of the Right to Organise (No. 87), July 9, 1948, 68 U.N.T.S. 17 [hereinafter ILO Convention No. 87].

139. Right to Organise and Collective Bargaining Convention (No. 98), Jan. 7, 1949, 96 U.N.T.S. 257 [hereinafter ILO Convention No. 98].

140. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol].

141. See EC 2001 GSP, *supra* note 27, arts. 10, 25; AB Report, *supra* note 12, ¶ 190(g).

142. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, reprinted in 28 I.L.M. 493 (1988) [hereinafter U.N. Convention Against Traffic in Drugs].

143. Convention on Psychotropic Substances, Feb. 2, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976).

144. Single Convention on Narcotic Drugs of 1961, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964) [hereinafter Single Convention on Narcotic Drugs].

145. Panel Report, *supra* note 30, ¶¶ 4.10–4.11, 4.28; Howse, *India's WTO Challenge*, *supra* note 14, at 387; Mason, *supra* note 30, at 528–29.

146. Panel Report, *supra* note 30, ¶ 7.116; Mason, *supra* note 30, at 531.

147. AB Report, *supra* note 12, ¶ 165; ALI COMMENTARY, *supra* note 13, at 803–04; Mason, *supra* note 30, at 533–34; see also Howse, *India's WTO Challenge*, *supra* note 14, at 393–95.

India's request for a panel,¹⁴⁸ India's challenge points to a broader criticism that GSP linkage has a trade-diverting effect whereby the gain of one developing country is the economic loss of another developing country.¹⁴⁹ This may be an acceptable systemic cost that results in a Pareto improvement if social justice objectives can be achieved through GSP linkage, though it is worth observing that the market experience with GSP and linkage has been something of a mixed bag.¹⁵⁰

Beyond that, however, it is not that simply any social justice objective can be roped into the GSP scheme; rather, only those conditions that ultimately advance a "development need" are permissible.¹⁵¹ Developing countries already faced challenges in coordinating their side of the GSP bargain because of the complexity and variability in GSP schemes.¹⁵² Without question, the vagaries of GSP, driven not only by the lobby-motivated conditionality but also through annual review and revision thereof,¹⁵³ can frustrate even the most sophisticated exporters in developing countries.¹⁵⁴ Moreover, they thwart the social goals that GSP linkage aims to achieve.¹⁵⁵ To add to this labyrinthine policy coordination obstacle course, the outer bounds of "development needs" remain an elusive mystery.¹⁵⁶

148. TRADE IN GOODS, *supra* note 9, at 147; Mason, *supra* note 30, at 515 (explaining that the E.C. scheme costs Indian exporters \$300 million per year).

149. TRADE IN GOODS, *supra* note 9, at 147. To crystallize this point, one can imagine a scenario where \$300 million of trade is shifted entirely from one developing country to another. Contrast this with a scenario in which the \$300 million is shared between the two developing countries. The two developing countries would both take from this \$300 million in preferential trade as they together approached the ceiling or CNL of the preference granting country.

150. SÁNCHEZ ARNAU, *supra* note 16, at 252, 262; Compa & Vogt, *supra* note 17, at 237-38; TRADE IN GOODS, *supra* note 9, at 146-47.

151. ALI COMMENTARY, *supra* note 13, at 808.

152. Kolben, *supra* note 22, at 214-16; TRADE IN GOODS, *supra* note 9, at 147; Lichtenbaum, *supra* note 10, at 1015-16.

153. SÁNCHEZ ARNAU, *supra* note 16, at 216-20.

154. *Id.*

155. See Compa & Vogt, *supra* note 17, at 237-38.

156. ALI COMMENTARY, *supra* note 13, at 808; Broude, *supra* note 13, at 252.

C. THE NEXUS BETWEEN GSPs AND “DEVELOPMENT NEEDS”—
THE LINK IN LINKAGE

1. *A Required Legal Reconciliation, even if not the Motivation, of
Linkage*

In light of the legal standard that GSP linkage must advance “development needs,” this article presents two brief clarifications as to its argument. The first clarification is that while the nexus between GSP and “development needs” is a legal reconciliation required under WTO law,¹⁵⁷ by no means would advancement of “development needs” have to be the motivation behind the GSP linkage. Professor Petros Mavroidis points out that even in the wake of *EC – Tariff Preferences*, “[i]t is at best debatable whether the donors have incentives to adopt criteria that will promote development of the recipients and not simply their own social preferences which might upset the prioritization of development options for the recipients.”¹⁵⁸ This claim is not here disputed.¹⁵⁹ But to be clear, the constraint imposed under WTO law is that the linkage must incentivize some undertaking by the beneficiary country that is a “development need.” In the words of the AB, “a sufficient nexus should exist between, on the one hand, the preferential treatment . . . and, on the other hand, the likelihood of alleviating the relevant ‘development, financial [or] trade need.’”¹⁶⁰ So long as the linkage can be tied back to a relevant development need, however, the original motivation of the linkage may come from any source.

2. *Enabling the Enabling Clause to Serve Human Rights and Social
Goals*

The second clarification is that this article offers a set of parameters whereby human rights and social goals can be advanced through a WTO mechanism, i.e., GSP linkage, and can be legitimized under WTO law through the Enabling Clause.

157. AB Report, *supra* note 12, ¶ 164.

158. TRADE IN GOODS, *supra* note 9, at 145.

159. *See id.* at 145 (noting diverging views which include the argument that developed countries may adopt GSP conditions precisely to advance the development of the recipient country).

160. AB Report, *supra* note 12, ¶ 164.

Advocates have sought to use the powerful enforcement capabilities of the WTO to promote social justice objectives in developing countries, sometimes arguing that these objectives are permissible under GATT Article XX's exceptions,¹⁶¹ and sometimes arguing for outright social clause inclusions in the covered agreements.¹⁶² GSP linkage is not only prevalent in the international trading community,¹⁶³ but is also regarded as a viable means of advancing social justice objectives through a WTO mechanism.¹⁶⁴ Thus social justice advocates seeking to (a) advance human rights objectives not presently covered through GSP linkage, or (b) defend existing linkages, may promote and protect their laudable objectives by preparing legal arguments demonstrating a nexus between the GSP condition and an economic development need.

This article's goal is to begin an enumeration of WTO-consistent “development needs” to help in the preparation of these arguments. Thus, this article reviews the principal WTO AB Report articulating a standard by which one may determine “development needs,” and presents other sources of WTO law that may be used to show that these needs comport with the WTO framework.

II. SOURCES OF LAW FROM WHICH TO DETERMINE “DEVELOPMENT NEEDS”

A. THE *EC – TARIFF PREFERENCES* APPELLATE BODY REPORT

In WTO Panel and Appellate Body decisions, the concept of “development needs” has come up only twice in any level of

161. Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 102 (2002) (explaining the challenges in arguing legality under the GATT of a U.S. trade embargo against tuna fished in a manner that harmed dolphins and the problem of applying domestic policy to import restrictions).

162. See Virginia Leary, *The WTO and the Social Clause: Post-Singapore*, 1 EUR. J. INT'L L. 118, 118–19 (1997) (discussing negotiations over a social clause from a historical perspective).

163. SÁNCHEZ ARNAU, *supra* note 16, at 234–35.

164. *Market Access*, *supra* note 128, at 71–72; Gadbow & Medwig, *supra* note 132, at 148; see also Terry Collingsworth, *International Worker Rights Enforcement?*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 227, 229–33 (Lance A. Compa & Stephen F. Diamond eds., 1996).

appreciable detail.¹⁶⁵ In *Brazil – Export Financing Programme for Aircraft*, the Panel found that “it is the developing country Member itself which is best positioned to identify its development needs.”¹⁶⁶ *EC – Tariff Preferences* was the principal case that articulated the standard for discerning development needs and forms the starting point for the analysis of such needs.¹⁶⁷ This article will review the arguments and holding in that case.

1. *India’s Legal Challenge to the European Communities’ GSP*

In December 2002, India questioned the legality of the GSP adopted by the European Communities and, in particular, the tariff preferences it granted to specified developing countries that combated drug production and trafficking (“Drug Arrangements”) and that upheld labor and environmental standards determined by the E.C.¹⁶⁸ India had been a beneficiary of preferential treatment from the E.C. until the adoption of the E.C.’s GSP scheme in December 2001.¹⁶⁹ This scheme designated Pakistan as a recipient of a special arrangement in exchange for combating drug production and trafficking, but excluded India,¹⁷⁰ and thus, the GSP threatened to put Indian goods at a competitive disadvantage in the E.C. market.¹⁷¹ Additionally, it was not at all clear that the Drug Arrangements,

165. Broude, *supra* note 13, at 253 (noting that *Brazil – Export* and *EC – Tariff Preferences* were the only instances in which the Panel or Appellate Body has spoken to “development needs”).

166. Panel Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS46/R p. 104 (Apr. 14, 1999). The Appellate Body left the finding unaddressed, speaking instead to the burden of proof issue regarding the developed country that challenges a developing country’s measure as inconsistent with its development needs. Appellate Body Report, *Brazil–Export Financing Programme for Aircraft*, ¶¶ 89-94 WT/DS46/AB/R (Aug. 2, 1999); *see also* Broude, *supra* note 13, at 253.

167. Broude, *supra* note 13, at 253; TRADE IN GOODS, *supra* note 9, at 143-45.

168. Request for the Establishment of a Panel by India, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/4 (Dec. 9, 2002) [hereinafter India Panel Request].

169. EC 2001 GSP, *supra* note 27; *see also* AB Report, *supra* note 12, ¶ 1.

170. EC 2001 GSP, *supra* note 27, at 15-17.

171. Anastasios Tomazos, *The GSP Fallacy: A Critique of the Appellate Body’s Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds*, in WTO LAW AND DEVELOPING COUNTRIES 306, 307 (George A. Bermann & Petros C. Mavroidis eds., 2007); TRADE IN GOODS, *supra* note 9, at 144.

environmental protection requirement, or labor standards specification bore any relation to the economic development needs of LDCs.¹⁷² India challenged the E.C.'s GSP in relation to Enabling Clause paragraph 2(a), which authorizes GSP schemes, paragraph 3(a), which stipulates that GSPs must not create undue difficulties for the trade of a contracting party that is not the recipient of the preference, and paragraph 3(c), which requires that the GSP must be designed "to respond positively to the development, financial and trade needs of developing countries."¹⁷³

2. *The Appellate Body's Ruling*

The AB first held that the "object and purpose" of the Enabling Clause was to promote the economic development of WTO Members who were developing countries.¹⁷⁴ While the GATT Article I:1 imposes the obligation of most-favored nation treatment upon all WTO Members, the Enabling Clause operates as a legal exception to that obligation.¹⁷⁵ Furthermore, Members have an international legal right within the WTO system to grant preferential treatment to LDCs;¹⁷⁶ indeed, developed Members are encouraged to provide this preferential treatment.¹⁷⁷ The AB noted that preferential treatment to LDCs is facially inconsistent with the MFN obligation of GATT Article I:1, but that the treatment can nonetheless be legally justified by virtue of the Enabling Clause.¹⁷⁸ Thus, in order for preferential treatment to be legal under the WTO, the treatment must comply with the Enabling Clause's requirements.¹⁷⁹

172. Robert Howse, *Back to Court After Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences*, 18 AM. U. INT'L L. REV. 1333, 1339-40 (2003).

173. India Panel Request, *supra* note 168; AB Report, *supra* note 12, ¶¶ 2-4. At a later point, India dropped the challenges to the environmental and labor standards, pursuing only the challenge to the Drug Arrangements. AB Report, *supra* note 12, ¶ 4.

174. AB Report, *supra* note 12, ¶ 92.

175. *Id.* ¶¶ 90, 98-99.

176. *Id.* ¶¶ 101-02.

177. *Id.* ¶ 111.

178. *Id.* ¶¶ 101-02.

179. AB Report, *supra* note 12, ¶¶ 111-12.

3. *The Standard for Compliance with the Enabling Clause*

The Appellate Body articulated four substantive requirements for compliance with the Enabling Clause.¹⁸⁰ First, the preferences must not impair Members' ability to uphold their otherwise-applicable MFN obligations.¹⁸¹ Second, the treatment must not "raise barriers to or create undue difficulty for" the trade of a non-recipient Member.¹⁸² Third, the preferential treatment must be "generalized, non-reciprocal and non-discriminatory."¹⁸³ Finally, the preferential treatment must "respond positively to the development, financial and trade needs of developing countries."¹⁸⁴ The Appellate Body did not elaborate upon the first of these requirements, stemming from paragraph 3(b) of the Enabling Clause. As to the second, arising from paragraph 3(a) of the Enabling Clause, the Appellate Body stated that the preferential treatment to LDCs must "not impose unjustifiable burdens on other Members."¹⁸⁵ Ultimately finding the Drug Arrangements in the E.C.'s GSP to be inconsistent with the Enabling Clause because this GSP linkage was discriminatory,¹⁸⁶ the AB explored the remaining two standards in depth.

a. *Generalized, Non-Discriminatory, and Non-Reciprocal*

Paragraph 2(a) of the Enabling Clause allows for GSP schemes, but footnote 3 to this paragraph imposes the legal obligation that the GSP scheme be "generalized, non-reciprocal and non-discriminatory."¹⁸⁷ The term "generalized" requires that "the GSP schemes of preference-granting countries remain generally

180. *Id.* ¶ 112. This article presents the requirements articulated in ¶ 112 of the AB Report in slightly different order than that in the AB Report for convenience of presentation.

181. *Id.* ¶ 112; Enabling Clause, *supra* note 10, ¶ 3(b).

182. AB Report, *supra* note 12, ¶ 112; Enabling Clause, *supra* note 10, ¶ 3(a).

183. AB Report, *supra* note 12, ¶ 112; Enabling Clause, *supra* note 10, ¶ 2(a), n.3.

184. AB Report, *supra* note 12, ¶ 112; Enabling Clause, *supra* note 10, ¶ 3(c).

185. AB Report, *supra* note 12, ¶¶ 167, 179.

186. *Id.* ¶¶ 187-89.

187. *Id.* ¶¶ 112, 131, 145 (stating that "only preferential tariff treatment that is in conformity with the description 'generalized, non-reciprocal and non-discriminatory' treatment can be justified under paragraph 2(a)").

applicable.”¹⁸⁸ The Appellate Body did not elaborate on the term “non-reciprocal,” but in line with other provisions within the GATT, non-reciprocal can be interpreted to mean that “the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”¹⁸⁹ LDCs should not be required to give trade preferences to developed countries in exchange for treatment under GSP schemes.¹⁹⁰ Finally, the term “non-discriminatory” means that, while different treatment may be granted to different LDCs or groups of LDCs,¹⁹¹ in light of paragraph 3(c), the recipient LDCs must share a development need and any LDC that has the same development need must be able to avail itself of the GSP treatment.¹⁹²

b. Paragraph 3(c): Development, Financial, and Trade Needs

The remaining legal obligation of the Enabling Clause is the one stemming from paragraph 3(c), the requirement that any preferential treatment “be designed, and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”¹⁹³ While the Panel made no finding as to the consistency of the Drug Arrangements with paragraph 3(c), the Appellate Body elaborated upon this standard for purposes of determining the nature of the requirement that the E.C.’s GSP scheme be non-discriminatory.¹⁹⁴

Because the object and purpose of the Enabling Clause is to promote economic development, the “development needs” falling under paragraph 3(c) must similarly be needs of economic development.¹⁹⁵ Preferential treatment responds positively to these needs if it has the effect of “*improving* the development, financial or

188. *Id.* ¶ 156.

189. GATT art. XXXVI(8); TRADE IN GOODS, *supra* note 9, at 141.

190. *See* TRADE IN GOODS, *supra* note 9, at 141.

191. AB Report, *supra* note 12, ¶ 159.

192. *Id.* ¶¶ 157, 159-62, 165.

193. Enabling Clause, *supra* note 10, ¶ 3(c); *see also* AB Report, *supra* note 12, ¶¶ 112, 158.

194. *See* AB Report, *supra* note 12, ¶¶ 130, 133, 157.

195. *Id.* ¶¶ 92, 160.

trade situation of a beneficiary country, based on the particular need at issue.”¹⁹⁶ A need does not qualify as a development need simply because it is identified this way by the preference-granting Member or beneficiary.¹⁹⁷ By contrast, “the existence of a ‘development, financial [or] trade need’ must be assessed according to an *objective* standard,”¹⁹⁸ whereby qualifying development needs are those that are “widely-recognized.”¹⁹⁹ In order to determine these development needs, the AB directs WTO Members to look to “broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations.”²⁰⁰ The Appellate Body did not address key areas of the definition of “development needs” necessary to be workable guidance: what specifically qualifies as valid, widely-recognized economic development needs and which multilateral instruments were suitable for use in determining broad-based recognition.

B. BEYOND *EC – TARIFF PREFERENCES*: SOURCES OF WTO LAW

While heavily persuasive, WTO Panel and Appellate Body reports are not strictly a source of WTO Members’ rights and obligations; rather, these rights and obligations derive from the agreements listed in Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”, and such agreements, the “Covered Agreements”) and interpretative elements.²⁰¹ The WTO is best understood as a creation of international contract, whereby principles of applicable law are selectively chosen and given relevance in the Covered Agreements.²⁰² Some principles of international custom may not find their way into the WTO, while

196. *Id.* ¶ 164 (emphasis in original).

197. *Id.* ¶ 163.

198. *Id.* ¶ 163 (emphasis in original).

199. AB Report, *supra* note 12, ¶ 179.

200. *Id.* ¶ 163.

201. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 23 (2d ed. 2006) [hereinafter Matsushita et al.]; *see, e.g.*, Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421, 426 (2008) [hereinafter Mavroidis] (listing various interpretive elements including GATT panel reports, decisions by international courts, and customary international law).

202. Matsushita et al., *supra* note 201, at 22-23.

other binding principles, for instance, the treatment of the most-favored nation principle in WTO law and Members' practice, may apply in the WTO even though they do not enjoy sufficient widespread state practice and supporting *opinio juris* to give them the status of custom.²⁰³ However, the WTO Agreement is not an exhaustive, self-contained treaty creating a completely isolated institution, but rather, is best thought of as an incomplete contract.²⁰⁴

As a result, the WTO dispute settlement mechanism must determine the rights and obligations of Members with occasional reference to elements of international law outside of the WTO system.²⁰⁵ These and other sources that have aided the dispute settlement bodies in understanding the precise meaning and scope of the rights and obligations under WTO law constitute the interpretative elements in WTO adjudication.²⁰⁶ While the fundamental rights and obligations are codified in the WTO Agreement, the interpretation of its provisions often involves recourse to external sources, within limits.²⁰⁷ The outer bound of what is applicable to interpreting Member States' rights and obligations is set forth in Article 3(2) of the DSU.²⁰⁸ Specifically, this provides that the Dispute Settlement Body ("DSB") must interpret Member States' rights and obligations "in accordance with customary rules of interpretation of public international law."²⁰⁹ These interpretative elements thus do not create additional rights and obligations upon Members under WTO law, nor can the rights and obligations embodied in non-WTO multilateral agreements be

203. Matsushita et al., *supra* note 201, at 23; *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 184-89 (June 27) (describing widespread state practice and supporting *opinio juris* as the elements of customary international law).

204. Matsushita et al., *supra* note 201, at 23.

205. AB Report, *supra* note 12, ¶ 163; *see also* Mavroidis, *supra* note 201, at 450-51.

206. Mavroidis, *supra* note 201, at 426.

207. *Id.* at 426.

208. *Id.*

209. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also* Mavroidis, *supra* note 201, at 426.

enforced through the WTO dispute settlement mechanism.²¹⁰ Instead, these outside sources are means of determining the nature of rights and obligations that derive from sources within the WTO Covered Agreements.²¹¹

1. Sources of Rights and Obligations under WTO Law

The underlying rights and obligations of WTO Member States are found exclusively in the Covered Agreements.²¹² Beginning with the WTO Agreement itself, Appendix 1 of the DSU goes on to list the agreements mentioned in the Annexes of the WTO Agreement.²¹³ In addition to these agreements-proper, there are international agreements that are incorporated into the Covered Agreements and also give rise to rights and obligations for WTO Member States.²¹⁴ Of specific relevance to this discussion are decisions adopted by GATT Contracting Parties prior to the WTO; these are specifically incorporated into the WTO Agreement by Article XVI.1.²¹⁵ In particular, the Enabling Clause is a decision of the GATT Contracting Parties.²¹⁶ The Appellate Body specifically recognized the Enabling Clause as among the Covered Agreements, providing rights to developed countries to offer trade preferences and a corresponding obligation “to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause.”²¹⁷

2. Interpretative Elements to Determine Contours of WTO Rights and Obligations

The requirement that rights and obligations of WTO Member States must be carried out in accordance with “the customary rules of

210. DSU, *supra* note 209, art. 3.2; Mavroidis, *supra* note 201, at 426.

211. Mavroidis, *supra* note 201, at 425.

212. DSU, *supra* note 209, art. 3.2 (stating that “Members recognize that [the dispute settlement system of the WTO] serves to preserve the rights and obligations of Members under the covered agreements . . .”); Mavroidis, *supra* note 201, at 427.

213. DSU, *supra* note 209, art. 1; WTO Agreement app. 1.

214. Matsushita et al., *supra* note 201, at 25.

215. GATT art. XVI(1).

216. Enabling Clause, *supra* note 10, pmb1.

217. AB Report, *supra* note 12, ¶ 98.

interpretation of public international law”²¹⁸ has been found to include the General Rule of Interpretation embodied in Article 31 of the Vienna Convention on the Law of Treaties.²¹⁹ This includes, among other things, that rights and obligations under a treaty must be interpreted based on the ordinary meaning of the terms of the treaty itself in their context,²²⁰ in light of the treaty’s object and purpose,²²¹ and with regard to subsequent agreements and state practice on the same subject matter.²²² In *EC – Tariff Preferences*, the Appellate Body looked to the preamble of the WTO Agreement to determine the instrument’s object and purpose.²²³ This is consistent with Panel and AB reports that have looked to the GATT’s preamble, with the limitation on teleological interpretation that it must be mindful of the ends sought by the treaty as well as the means to achieving the ends.²²⁴ As to subsequent state practice, the weight of authority is that only unanimous practice by all WTO Member States qualifies as an interpretative element.²²⁵

As with the International Court of Justice (“ICJ”),²²⁶ there is no rule of *stare decisis* in the WTO dispute settlement system, and no WTO Panel or Appellate Body is formally bound by past reports.²²⁷ However, also like the ICJ,²²⁸ WTO dispute settlement entities look

218. DSU, *supra* note 209, art. 3(2).

219. Vienna Convention on the Law of Treaties art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* 15, WT/DS2/AB/R (May 20, 1996) [hereinafter *U.S. – Gasoline*] (quoting a previous panel report on a WTO case to interpret key language); Mavroidis, *supra* note 202, at 444; Jan Bohanes & Nicolas Lockhart, *Standard of Review in WTO Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 378, 387 (Daniel Bethlehem et al. eds., 2009).

220. Vienna Convention, *supra* note 219, art. 31(1).

221. Vienna Convention, *supra* note 219, art. 31(1).

222. Vienna Convention, *supra* note 219, art. 31(3); *see also* Mavroidis, *supra* note 201, at 444.

223. AB Report, *supra* note 12, ¶¶ 91-92.

224. Mavroidis, *supra* note 201, at 452.

225. *Id.* at 453.

226. *See* Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 3 Bevens 1153, 1179 [hereinafter ICJ Statute].

227. Mavroidis, *supra* note 201, at 464.

228. *See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Nov. 1, 1996) [hereinafter

to past DSB reports as an interpretative element.²²⁹ The Appellate Body, in *U.S. – Shrimp (Article 21.5–Malaysia)*, affirmed that past DSB reports are relevant to a Panel or Appellate Body “as a tool for its own reasoning.”²³⁰ The Panel in *India – Patents (EC)* stated that while Panels are not bound by previous panel or Appellate Body decisions, they will take into account the conclusions and reasoning of past decisions because of the DSU’s goal of providing predictability to the multilateral trading system and avoiding inconsistent DSB rulings.²³¹

The WTO AB and Panels have, when necessary, looked to agreements outside of the WTO-proper in interpreting the standards of WTO law.²³² The Appellate Body in *U.S. – Shrimp* sought recourse to the Convention on International Trade in Endangered Species²³³ to determine whether the species of sea turtles in question fell within the meaning of the term “exhaustible natural resources” as it appears in GATT Article XX(g).²³⁴ In a later stage of the same dispute, the Appellate Body used non-WTO international agreements to ascertain evidence of practice that may or may not be consistent with obligations arising from a Covered Agreement.²³⁵ In yet

Japan – Alcoholic Beverages] (“[ICJ Statute Article 59] has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.”); see also Mavroidis, *supra* note 201, at 464.

229. Mavroidis, *supra* note 201, at 464.

230. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse by Article 21.5 of the DSU by Malaysia*, ¶ 109, WT/DS58/AB/RW (Nov. 21, 2001) [hereinafter *U.S. – Shrimp (Article 21.5–Malaysia)*]; see also Mavroidis, *supra* note 202, at 464.

231. Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 7.30, WT/DS79/R (Sept. 22, 1998); see also Mavroidis, *supra* note 201, at 465-66; Bohanes & Lockhart, *supra* note 219, at 382.

232. See Mavroidis, *supra* note 202, at 468.

233. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, 12 I.L.M. 1085 (1973).

234. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 132, WT/DS58/AB/R (Nov. 6, 1998) [hereinafter *U.S. – Shrimp*]; Mavroidis, *supra* note 201, at 468-69.

235. *U.S. – Shrimp (Article 21.5–Malaysia)*, *supra* note 235, ¶ 124 (finding that, by reference to multilateral environmental agreements, “a multilateral approach is strongly preferred. Yet it is one thing to *prefer* a multilateral approach in the

another dispute, the Appellate Body sought recourse to multilateral instruments in order to ascertain a factual state of affairs.²³⁶ Additionally, the Appellate Body in *EC – Tariff Preferences* indicated that “the existence of ‘development, financial [or] trade need’ must be assessed according to an *objective* standard”²³⁷ and that “[b]road based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.”²³⁸

Finally, multilateral instruments are important to finding the living, dynamic meaning of treaty terms “in light of contemporary concerns of the community of nations.”²³⁹ Treaty terms written decades ago must be interpreted in the light of the treaty’s object and purpose, but that same object and purpose can contemplate a long-term vision so that the substantive nature of terms and their definitions can grow and evolve with time.²⁴⁰ The same can be said about “development needs,” and, consequently, the Appellate Body opened the door to multilateral instruments as the basis for the objective standard to determine the evolving content of this term.²⁴¹

C. SYNTHESIS: A LIVING, EVOLVING STANDARD FOR ECONOMIC DEVELOPMENT NEEDS

The Appellate Body elucidated that development needs must be economic in nature, in light of the Enabling Clause’s object and purpose, and that a goal may qualify as a “development need” by reference to the Covered Agreements and other multilateral

application of a measure that is provisionally justified under one of the subparagraphs of Article XX of the GATT 1994; it is another to require the *conclusion* of a multilateral agreement as a condition of avoiding “arbitrary or unjustifiable discrimination” under the chapeau of Article XX.”) (emphasis in original); see also Mavroidis, *supra* note 201, at 468.

236. Appellate Body Report, *EC–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 114, 135, WT/DS135/AB/R (Apr. 5, 2001) [hereinafter *EC – Measures*]; see also Mavroidis, *supra* note 201, at 469.

237. AB Report, *supra* note 12, ¶ 163 (emphasis in original).

238. *Id.*

239. *U.S. – Shrimp*, *supra* note 234, ¶ 129.

240. AB Report, *supra* note 12, ¶¶ 160, 169; see also *U.S. – Shrimp*, *supra* note 234, ¶¶ 129, 131.

241. See *id.* ¶ 163.

instruments. A textual basis in a specific article from a Covered Agreement delineating a WTO Member's right or obligation provides perhaps the strongest basis in law for a goal to be deemed a "development need," but in the view of the AB, "development needs" may also take on a living, evolving character through interpretative elements outside of the Covered Agreements. As other multilateral instruments and other interpretative elements have served as sources by which to understand WTO Members' rights and obligations in the past, they are equally valid in the analysis of "development needs." In light of the above sources of law, and as further informed by the practice of WTO Members, this article proceeds to delineate specific "development needs."

III. ANALYSIS OF "DEVELOPMENT, FINANCIAL, AND TRADE NEEDS"

A. RELEVANT ATTRIBUTES OF ECONOMIC DEVELOPMENT

To begin, the term "economic development" is itself seldom defined in economics discourse. When a definition of the term is proffered, economists, scholars, and policymakers tend to include macroeconomic growth,²⁴² wealth creation and increased per capita income,²⁴³ industrialization and production of higher-quality or more sophisticated goods,²⁴⁴ and sustainability²⁴⁵ as attributes of economic development. Professor Alan Deardorff specifically defines "economic development" to mean the "[s]ustained increase in the economic standard of living of a country's population, normally accomplished by increasing its stocks of *physical* and *human capital* and improving its *technology*."²⁴⁶ Professor Gerald Meier defined it as "the process whereby the real per capita income of a country increases over a long period of time—subject to the stipulations that

242. JAMES M. CYPHER & JAMES M. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 31 (3d ed. 2009) (1997).

243. *Id.* at 31.

244. *Id.*; EDWARD J. BLAKELY & NANCEY GREEN LEIGH, *PLANNING LOCAL ECONOMIC DEVELOPMENT: THEORY AND PRACTICE* 84 (4th ed. 2010).

245. Douglas Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1, 22–28 (2001).

246. ALAN V. DEARDORFF, *TERMS OF TRADE: GLOSSARY OF INTERNATIONAL ECONOMICS* 79 (2006) (emphasis in original).

the number below an 'absolute poverty line' does not increase, and that the distribution of income does not become more unequal."²⁴⁷ This article makes the extension that a "development need," something needed to attain economic development, can consequently be defined as an undertaking, process, input, objective, or policy required to achieve one or several goals of economic development.²⁴⁸ From this starting point, this article proceeds to argue that macroeconomic growth, poverty reduction, sustainability, and education are "development needs" consistent with the WTO legal framework.²⁴⁹

247. Gerald M. Meier, *Objectives of Development—Note*, in LEADING ISSUES IN ECONOMIC DEVELOPMENT 5, 5-6 (4th ed. 1984).

248. The definition proffered herein is simply based on parsing the phrase "development needs" into "things needed for development." The specific contributors to economic development articulated herein, not meant to be an exhaustive list, are based on economics discourse. For instance, as undertakings or processes that contribute to economic development, economists have included improving technology or techniques of production, John P. Lewis, *Development Promotion: A Time for Regrouping*, in DEVELOPMENT STRATEGIES RECONSIDERED 3, 9-10 (John P. Lewis & Valeriana Kallab eds., 1986); Meier, *supra* note 247, at 6, and improved infrastructure, M.K. Datar, *Development Banking: Is it the End?*, in CHALLENGES TO INDIAN BANKING: COMPETITION, GLOBALISATION AND FINANCIAL MARKETS 229, 231 (Narendra Jadhav ed., 1996). Development economists have identified labor productivity, ALAN S. BLINDER, GROWING TOGETHER 50-67 (1991), and the availability of financing/credit, Datar, *Development Banking*, *supra* note 249, at 231, as inputs that contribute to economic development. An objective of economic development could include, simply, an economic growth target, for instance through increased productive output or new industries. Meier, *supra* note 247, at 6. A policy of poverty reduction to increase disposable income has been identified as contributing to economic development as distinguished from simply economic growth. Meier, *supra* note 247, at 7-8; Irma Adelman, *A Poverty-Focused Approach to Development Policy*, in DEVELOPMENT STRATEGIES RECONSIDERED 49, 54-56 (John P. Lewis & Valeriana Kallab eds., 1986); Montek S. Ahluwalia, *Income Inequality: Some Dimensions of the Problem*, in REDISTRIBUTION WITH GROWTH 3, 3 (Hollis Chenery et al. eds., 1974). This article's goal is to take certain contributors to economic development that are well-recognized in the economics discourse and reconcile these contributors with WTO legal text and interpretative elements.

249. This article focuses on these four development needs, again meant to be indicative rather than exhaustive. Additionally, this article notes that these needs relate to actions that the government of the developing country can choose to engage in. There is a separate category of needs that are based on the circumstances in which a developing country finds itself, for instance, a low literacy rate, or even more separated from social factors, low access to rainfall

B. THE “DEVELOPMENT NEEDS” CONSISTENT WITH WTO LAW

1. *Macroeconomic Growth as a Development Need*

The initial impetus for creating the GATT, and an objective maintained as the GATT transformed into the WTO,²⁵⁰ was to further the goal of providing Contracting Parties with access to one another's markets.²⁵¹ This access was to be provided through trade market liberalization, taking down barriers to trade, and eliminating discriminatory treatment.²⁵² The goal of providing market access remained a motivation of later trade negotiation rounds addressing non-tariff barriers and voluntary export restraints.²⁵³ While market access, as a goal of developed countries, serves the goal of economic growth for already-established economic powers,²⁵⁴ the evolution of the GATT as it progressed towards the WTO saw a greater voice for developing countries and their concerns of market access.²⁵⁵ Having accepted to a sufficient degree that trade liberalization can lead to economic growth,²⁵⁶ developing countries advocated enhanced flexibility to export their economically significant goods to developed markets.²⁵⁷ Correspondingly, developed countries

giving rise to economic challenges. The latter category of needs may constitute needs for assistance, but not factors or undertakings necessary to achieve economic development. The factors or undertakings necessary for economic development, including policy undertakings, are the focus of this article's definition of the “development needs” which this article argues can be the subject of GSP conditionality.

250. WTO Agreement art. II.1, Annex I.

251. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 10 (2005); *see also* Market Access, *supra* note 128, at 59; *see also* KOUL, *supra* note 53, at 9.

252. GATT pmb.

253. KOUL, *supra* note 52, at 19, 23-24.

254. *Id.* at 20-21.

255. *Id.*

256. Edwini Kessie, *The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements*, in *WTO LAW AND DEVELOPING COUNTRIES* 12, 19 (George A. Bermann & Petros C. Mavroidis eds., 2007); KOUL, *supra* note 52, at 569.

257. Kessie, *supra* note 256, at 21. Kessie notes that at the time of the Uruguay Round, developing countries were willing to accept a dilution of special and differential treatment in exchange for greater market access and stricter rules. *Id.* at 20. In light of subsequent experience, the majority of developing countries now view special and differential treatment as having had a favorable effect on their

undertook to protect the interests of developing countries when the GATT was assumed into the WTO Agreement and as the WTO Agreement later evolved.²⁵⁸

From the decisions of GATT Contracting Parties leading up to the WTO and in the WTO Agreement itself, macroeconomic growth, and in particular that of developing countries, has been a founding principle and recognized goal of the international trading system.²⁵⁹ The GATT Preamble expresses the agreement’s goal of “expanding the production and exchange of goods.”²⁶⁰ The WTO broadens this to enshrine the goal of “expanding the production of and trade in goods and services.”²⁶¹ The “cornerstone principle” of MFN treatment is itself most fundamentally aimed at advancing mutual market access.²⁶² In the development of S&DT, the original decision of the GATT Contracting Parties that allowed for GSPs, the Waiver Decision on the Generalized System of Preferences,²⁶³ affirms that “a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development.”²⁶⁴ This was to be achieved in a collaborative manner between developed and developing countries,²⁶⁵ and in light of the development need to achieve macroeconomic growth, this article submits that measures promoting the goal of increased market access advance a “development need” that is consistent with the WTO legal regime.²⁶⁶

economic development. *Id.* at 34.

258. Kessie, *supra* note 256, at 27-30.

259. AB Report, *supra* note 12, ¶ 110; *see also* Broude, *supra* note 13, at 236.

260. GATT pmbl.

261. WTO Agreement pmbl.; AB Report, *supra* note 12, ¶¶ 161, 168.

262. AB Report, *supra* note 12, ¶ 101; Sam Laird, *Multilateral Approaches to Market Access Negotiations*, in *TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS* 205, 205 (Miguel Rodríguez Mendoza et al. eds., 1999); *TRADE IN GOODS*, *supra* note 9, at 122.

263. GATT Document L/3545, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 [hereinafter Waiver Decision].

264. Waiver Decision, *supra* note 263, pmbl.; *see also* AB Report, *supra* note 12, ¶ 92.

265. *See* GATT art. XXXVI:1(d).

266. AB Report, *supra* note 12, ¶ 107; *see also* WILLIAM R. CLINE, *TRADE POLICY AND GLOBAL POVERTY* 41-42 (2004) (pointing to empirical economic evidence indicating that export growth is associated with increased growth in GDP).

2. *Raising Standards of Living as a Development Need*

Based on sources of international law both within the WTO system and from other multilateral treaties, this article proceeds to argue that the goal of raising standards of living is equally as widely-recognized as a need of developing countries. Economic theory, outside of the context of international and WTO law-proper, has consistently championed poverty reduction as a bedrock goal of economic development.²⁶⁷ Furthermore, the practice of states and international institutions has borne out this development goal in both domestic and international settings.²⁶⁸ This article submits that poverty reduction is a development need in line with the WTO goal of raising living standards, and presents both the economic and legal bases for this submission.

Of the four development needs discussed herein, poverty reduction may be the most challenging to argue as falling within the WTO's contemplation. It is consistent with the construction of the WTO to say that the WTO legal framework contemplates the objective of raising living standards.²⁶⁹ In order to proceed and argue that this implies and includes poverty reduction, however, this article analyzes this development need from the perspectives of international law and economics. This article's assertion that poverty

267. Montek S. Ahluwalia & Hollis Chenery, *The Economic Framework*, in REDISTRIBUTION WITH GROWTH 38, 38-39 (Hollis Chenery et al. eds., 1974); Montek S. Ahluwalia, *The Scope for Policy Intervention*, in REDISTRIBUTION WITH GROWTH 73, 73 (Hollis Chenery et al. eds., 1974); Meier, *supra* note 247, at 7; *see also* Cline, *supra* note 266, at 28 (stating that "sustained economic growth in developing countries is essential to the reduction of global poverty").

268. With regard to the practice of states, see, for example, Maurizio Bussolo et al., *Structural Change and Poverty Reduction in Brazil: The Impact of the Doha Round*, in POVERTY AND THE WTO: IMPACTS OF THE DOHA DEVELOPMENT AGENDA 249, 250-53 (Thomas W. Hertel & L. Alan Winters eds., 2006) (examining the impact of trade on the reduction of poverty in the Brazilian agricultural sector). In regard to the practice of international institutions, see, for example, James D. Wolfensohn, *A Partnership for Development and Peace*, in A CASE FOR AID: BUILDING A CONSENSUS FOR DEVELOPMENT ASSISTANCE 3, 7-8 (World Bank 2002); Frank J. Garcia, *Justice, the Bretton Woods Institutions, and the Problem of Inequality*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 475, 493-95 (Chantal Thomas & Joel P. Trachtman eds., 2009) (outlining several World Bank initiatives aimed at "reduc[ing] poverty while improving health, education, and the environment").

269. *See infra* notes 288-322 and accompanying text.

reduction is a "development need" should not be taken as an argument that the WTO as an institution should positively channel its machinery towards the goal of poverty reduction. Rather, this article submits that if a developed Member were to promote, or incentivize developing countries to take steps towards this goal, or provide trade preferences that responded positively to this need among developing countries, the developed Member would be within its rights to offer preferential treatment so designed.²⁷⁰

a. Poverty Reduction: Analysis in International Economics

From the definitions of economic development presented above,²⁷¹ the sub-goals of poverty reduction and income redistribution emerge as essential to economic development as distinguished from solely broad-based economic growth.²⁷² In addition to overall macroeconomic growth, the distribution of the returns from that growth is jointly a goal of economic development.²⁷³ In the present-day formulation, economic development is viewed to be inadequately achieved if the returns accrue only to the select few and the impoverished remain without those returns.²⁷⁴ For instance, an economy that includes both an indigenous or agricultural sector and a modern, industrial, or service sector may experience aggregate growth with all of the returns accruing to the modern sector; this is an inequitable distribution and does not satisfy the requirement of economic development even if it registers as macroeconomic growth.²⁷⁵

Poverty reduction is a goal of economic development as widely recognized as increasing overall macroeconomic production.²⁷⁶ Moreover, just as economic development aims to reduce poverty,

270. See *supra* Part I.C.1.

271. See *supra* Part III.A.

272. Meier, *supra* note 247, at 6-7.

273. Ahluwalia & Chenery, *Economic Framework*, *supra* note 267, at 38-39.

274. Wolfensohn, *supra* note 268, at 7-8.

275. Meier, *supra* note 247, at 7.

276. PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY 602-03 (7th ed. 2005); Meier, *supra* note 247, at 7; S. Vasudeva Shetty, *Re-inventing Rural Banking*, in CHALLENGES TO INDIAN BANKING: COMPETITION, GLOBALISATION AND FINANCIAL MARKETS 61, 74-75 (Narendra Jadhav ed., 2d ed. 1996).

poverty reduction depends on economic growth.²⁷⁷ In order for poverty reduction to accrue from macroeconomic growth, there must be mechanisms for distributing national income evenly across socio-economic sectors of the population.²⁷⁸ Thus, income redistribution has taken its place as a fundamental and essential component of successful economic development.²⁷⁹

Increased per-capita income alone does not reflect income distribution; by contrast, empirical economic analysis indicates a greater level of inequality between the wealthy and poor of the world despite increases in per-capita income. As an illustration, the World Bank's measure of poverty in developing and transition economies, the percentage of the population living below \$1 per day, fell from 28.3 percent in 1987 to 24.0 percent in 1998.²⁸⁰ World Bank survey data indicate that for every 1 percent increase in per-capita income, the poverty measure should fall by 2 percent if income is distributed according to expectations.²⁸¹ With real per-capita income growth in the developing and transition economies averaging 2 percent annually between 1987 and 1998, the poverty measure should have fallen to as low as 18.4 percent by 1998.²⁸² This disparity between the expected and actual results can be explained, in part, by increased inequality in the distribution of the gains from economic growth that was seen in relatively higher-poverty economies including Brazil, China, Indonesia, Mexico, and Nigeria.²⁸³

277. Cline, *supra* note 266, at 27. The proposition in this context, that economic growth is essential to poverty reduction, begs the related question of whether international trade leads to economic growth. While outside of the scope of this article, Cline observes that data indicates a causal relationship between international trade and economic growth. *Id.* at 40-42, 45.

278. Ahluwalia, *supra* note 267, at 73; *see also* Cline, *supra* note 266, at 28.

279. *See, e.g.*, Richard M. Bird & Eric M. Zolt, *Dual Income Taxation: A Potentially Promising Approach to Tax Reform in Developing Countries*, 1 COLUM. J. TAX L. 151, 214-15 (2010) (arguing for a progressive tax scheme in developing countries to promote sustained growth by redistributing income and reducing inequality in the distribution of gains from economic growth).

280. Cline, *supra* note 266, at 28.

281. *Id.* at 27.

282. *Id.* at 28-29.

283. *Id.* at 29, 35. The author mentions potential World Bank data inadequacies and a series of studies indicating that the reduction in poverty was greater than the data captured. While agreeing that the status of poverty may be more optimistic than the World Bank's study alone indicates there is still an amount of poverty that

This article makes the extension, based on this economic theory and practice, that poverty reduction is a natural corollary to the goal of raising living standards, and recalls that in economic practice, this has taken place through domestic income redistributive measures.²⁸⁴ Income redistribution allows for improvements in the standard of living on a national level across the wealth spectrum of the nation's population.²⁸⁵ Moreover, as this article argues below with regard to agreements between the WTO and the International Bank for Reconstruction and Development ("World Bank"), this extension is not inconsistent with the WTO Agreement:²⁸⁶ the World Bank's goals in practice have gone as far as to actively *promote* income redistribution to alleviate poverty.²⁸⁷ This article submits that domestic or international measures that raise living standards and reduce poverty by redistributing national income thus advance an internationally-recognized development need. And as this article proceeds to argue, such measures advance a "development need" that is consistent with WTO law.

b. Poverty Reduction: Analysis in International Law

Alongside promoting increased national income through macroeconomic growth, a sibling goal in the WTO legal order is to improve the living standards of individuals within a Member State.²⁸⁸ The AB cites, in relation to S&DT adopted pursuant to the Enabling Clause, Paragraph 7 of that instrument.²⁸⁹ Paragraph 7 of the

should have disappeared. *Id.* at 29-31. Income inequality remains an independent explanation even correcting for potential data inadequacies. *Id.* at 33.

284. *SEE* GORDON TULLOCK, *ECONOMICS OF INCOME REDISTRIBUTION* 1-3 (1983) (pointing to income redistributive measures to benefit the poor while acknowledging that, more generally, a greater proportion of redistributive measures in the U.S. historically has been a manifestation of influential groups exerting established political clout).

285. Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 3-4 (1996).

286. *See* WTO Agreement art. III.5 (drawing a connection between the WTO and World Bank); *see also* Gardner, *supra* note 8, at 67 (noting the World Bank's contributions to international development).

287. Carrasco & Kose, *supra* note 285, at 41.

288. AB Report, *supra* note 12, ¶ 107; *see also* GATT art. XXXVI:1(a), (d).

289. AB Report, *supra* note 12, ¶ 168; *see also id.* ¶ 161 (observing that "the

Enabling Clause expressly states:

The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT] should promote the basic objectives of the [GATT], including those embodied in the Preamble and in Article XXXVI.²⁹⁰

This article thus begins with a review of the GATT Preamble and Article XXXVI.

The goal of raising living standards is stated in the preamble of the GATT,²⁹¹ and the WTO Agreement carries this goal forward, augmenting it to include a “steadily growing volume of real income and effective demand.”²⁹² Both the GATT and WTO Agreement additionally include the goal of “ensuring full employment” as a founding principle.²⁹³ Moreover, the decisions of the Panel and AB have reaffirmed the goal of raising living standards as part of the WTO legal order. As recently as 2008, the Panel in *India – Additional and Extra-Additional Duties* bolstered its interpretation of GATT Article II:1(b) by observing the consistency of its interpretation with the object and purpose of the GATT.²⁹⁴ In particular, it cited the goals of “raising standards of living” and “expanding the production and exchange of goods” as integral to the GATT’s object and purpose.²⁹⁵

The goal of raising living standards is also enshrined in the text of GATT Article XXXVI, a provision that appears in Part IV of the GATT (Trade and Development).²⁹⁶ Part IV of the GATT contains

Preamble to the WTO Agreement . . . informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause”).

290. Enabling Clause, *supra* note 10, ¶ 7; *see also* Gregory O. Lunt, *Note, Graduation and the GATT: The Problem of the NICs*, 31 COLUM. J. TRANSNAT'L L. 611, 618 n.44 (1994).

291. GATT pmbl.

292. WTO Agreement pmbl.

293. GATT pmbl.; WTO Agreement pmbl.; *see also* AB Report, *supra* note 12, ¶ 161.

294. Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, ¶ 7.142, WT/DS360/1 (June 9, 2008) [hereinafter *India – Additional Duties on Imports*].

295. *India – Additional Duties on Imports*, *supra* note 294.

296. GATT art. XXXVI:1(a).

three provisions: Article XXXVI sets forth the objectives that will guide developed members in their trade relations and negotiations with less-developed members; Article XXXVII contains commitments to further these objectives; and Article XXXVIII calls on Contracting Parties to take joint action in furtherance of Article XXXVI's objectives.²⁹⁷ The commitments contained in Article XXXVII have been described as undertakings by developed countries to engage in their “best endeavor” and, hence, are non-binding in nature.²⁹⁸ But by virtue of Articles XXXVI and XXXVII, the Contracting Parties have agreed that when developed contracting parties engage in activities pursuant to the commitments in Article XXXVII:1, they do so in furtherance of the objectives contained in Article XXXVI.²⁹⁹ By way of express reference, Article XXXVII:2(b)(i) provides that if “effect is not being given to any of the provisions of subparagraph (a), (b) or (c) of [Article XXXVII:1] . . . [t]he CONTRACTING PARTIES shall, if requested so to do by any interested contracting party . . . consult with the contracting party concerned and all interested contracting parties with respect to the matter and with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI.”³⁰⁰ Article XXXVIII further provides that “[t]he contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere as appropriate, to further the objectives set forth in Article XXXVI.”³⁰¹

The very first objective articulated in Article XXXVI:1 is “the raising of standards of living,”³⁰² an objective to be “give[n] effect” through the “adoption of measures” as a matter of “conscious and purposeful effort on the part of the contracting parties both

297. GATT arts. XXXVI–XXXVIII; Uché Ewelukwa, *Special and Differential Treatment in International Trade Law: A Concept in Search of Content*, 29 N.D. L. REV. 831, 846–47 (2003).

298. Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT'L & COMP. L. REV. 291, 311 (2004); see also Ewelukwa, *supra* note 297, at 847.

299. GATT arts. XXXVI, XXXVII; Ewelukwa, *supra* note 297, at 846–47.

300. GATT art. XXXVII:2(b)(i).

301. GATT art. XXXVIII; M. Richard Komins, *Technical Analysis of the Group “Framework”*, 12 LAW & POL'Y INT'L BUS. 299, 310 (1980).

302. GATT art. XXXVI:1(a).

individually and jointly.”³⁰³ The Contracting Parties agreed that “[t]here is a need for positive efforts designed to ensure that the less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.”³⁰⁴ Article XXXVI:1 observes that “export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on . . . the volume of their exports, and the prices received for these exports.”³⁰⁵ The provision additionally notes, however, that “there is a wide gap between standards of living in less-developed countries and in other countries”³⁰⁶ and that “the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties.”³⁰⁷ The provision goes on to observe that this objective “is particularly urgent for less-developed contracting parties.”³⁰⁸

According to this article, GATT Article XXXVI is the clearest codification of the concept that raising standards of living is a “development need” that may be given effect through S&DT and other “positive efforts” by WTO Members. From its founding to its recent efforts, the international trading system has advanced the idea that the benefits from trade should accrue to those in need of these benefits.³⁰⁹ Article XXXVI:1(a) recalls that raising living standards is among the “basic objectives” of the GATT.³¹⁰ A policy that champions this goal thus promotes a development need that is within the contemplation of the WTO.

Additional review of the GATT provisions further reveals dedicated treatment of the goal of raising living standards and, in

303. GATT art. XXXVI:9.

304. GATT art. XXXVI:3.

305. GATT art. XXXVI:1(b).

306. GATT art. XXXVI:1(c).

307. GATT art. XXXVI:1(a).

308. GATT art. XXXVI:1(a).

309. TRADE IN GOODS, *supra* note 9, at 138–44; Gardner, *supra* note 8, at 62; *see also* Press Release, World Trade Org., Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study (Jun. 13, 2000), *available at* http://www.wto.org/english/news_e/pres00_e/pr181_e.htm#fn1 (pointing to more recent activity of the WTO advancing the goal of channeling trade benefits towards poverty reduction).

310. GATT art. XXXVI:1(a).

particular, those of less-developed countries. The Contracting Parties recognized that channeling the benefits of trade and economic development to the especially impoverished Members is most consistent with the object and purpose of the GATT.³¹¹ Article XVIII:1 recognizes that “the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly those contracting parties the economies of which can only support low standards of living and are in the early stages of development.”³¹² This provision indicates that less developed countries may be granted special attention in the GATT/WTO system; subsequent provisions in Article XVIII grant LDCs a greater degree of leeway in promoting their development while remaining in keeping with their GATT obligations.³¹³ For instance, Article XVIII:2 provides that “those contracting parties,”³¹⁴ i.e., “those contracting parties the economies of which can only support low standards of living,”³¹⁵ may take protectionist measures “in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, [] take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of [the GATT].”³¹⁶ The remainder of Article XVIII lays out measures these contracting parties may take towards the attainment of these objectives and, in particular, to raise the general standard of living of their people.³¹⁷ Commentators have treated the phrase “low standards of living” in Article XVIII as equivalent to poverty.³¹⁸ Thus, this article submits that GATT Article XVIII:2 provides textual support for the claim that “raising standards of living” as used in the Covered Agreements incorporates

311. See GATT art. XVIII:1; see also Raj Bhala, *Mercy for the Third World Through GATT Article XVIII*, 6 SING. J. INT’L & COMP. L. 498, 503–04 (2002).

312. GATT art. XVIII:1.

313. KOUL, *supra* note 52, at 281.

314. GATT art. XVIII:2.

315. GATT art. XVIII:1.

316. GATT art. XVIII:2.

317. GATT art. XVIII:4(a), (b). See generally *id.* Sections A–D.

318. Steve Charnovitz, *International Trade & Developing Countries*, 29 FORDHAM INT’L L.J. 259, 259 (2006); Bhala, *supra* note 313, at 503, 539; see generally *id.* (discussing GATT Article XVIII section by section in full detail).

“poverty reduction” as used in economics discourse.³¹⁹

Beyond the Covered Agreements themselves, the Appellate Body additionally pointed to multilateral instruments adopted by international organizations in order to determine, objectively, what constitutes a development need of LDCs.³²⁰ Here as well, one need not journey too far before the goals of raising living standards and reducing poverty become evident in the international instruments. GATT Article XXXVI:6 recognizes the need for collaboration between the Contracting Parties and “the international lending agencies.”³²¹ The WTO Agreement expressly recognizes the World Bank in this regard,³²² making the Agreement of the International Bank for Reconstruction and Development (“World Bank Agreement”)³²³ a valid interpretative element.³²⁴ One of the fundamental purposes of the World Bank is “to promote the long range balanced growth of international trade . . . thereby assisting in raising productivity, the standard of living and conditions of labour.”³²⁵ The practice of the World Bank has commonly interpreted this provision to include, and indeed, center on, poverty reduction.³²⁶ From this standpoint in particular, the development

319. See R.S. Pathak, *International Trade and Environmental Development: A View From India*, 1 INDIANA J. GLOBAL LEGAL STUD. 325, 333 (1994) (“Upon attaining independence, the new States realized that, among other things, poverty and low standards of living at home led to comparatively weaker bargaining positions in the arenas of international diplomacy and international economic opportunity. The development of national identities made those countries desire urgent development and modernization, improved conditions of living for their people, and a more equitable place in the comity of nations.”); Burns H. Weston, *Basic Human Needs: The International Law Connection: Remarks by the Chairman*, 72 AM. SOC’Y INT’L L. PROC. 224, 226 (1978) (“The poorest people are in those countries which have the lowest per capita income, the lowest growth rate, and, paradoxically, the greatest degree of equality—a degree of equality imposed precisely by the miserably low standards of living of those overall.”).

320. AB Report, *supra* note 12, ¶ 163.

321. GATT art. XXXVI:7.

322. WTO Agreement art. III:5.

323. Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134, amended Dec. 16, 1965, 16 U.S.T. 1942, 606 U.N.T.S. 294 [hereinafter World Bank Agreement].

324. AB Report, *supra* note 12, ¶ 163; see also Mavroidis, *supra* note 201, at 472-73.

325. World Bank Agreement, *supra* note 325, art. 1(iii).

326. Carrasco & Kose, *supra* note 285, at 41.

needs of raising the standards of living and redistributing income so as to alleviate poverty are deeply intertwined.

GATT Article XXXVI:7 calls for collaboration between the Contracting Parties and “other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.”³²⁷ The United Nations Charter, in Article 55, sets forth this goal of raising living standards as a founding principle of the post-war international legal order.³²⁸ Later, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) reaffirmed this goal.³²⁹ Article 11(2) of the ICESCR recognizes “the fundamental right of everyone to be free from hunger” and Article 7(a)(ii) recognizes “the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular, . . . remuneration which provides all workers, as a minimum, with . . . a decent living for themselves and their families in accordance with the provisions of [the ICESCR].”³³⁰ From the standpoint of these multilateral instruments, it becomes increasingly clear that the goal of raising living standards is meant to address the needs of the impoverished such that the process of redistributing national income towards the less-fortunate is integral to this development need.

From the Covered Agreements to other multilateral instruments as interpretative elements, the goal of raising living standards, with poverty reduction part and parcel, emerges as a goal that is consistent with WTO law. The preambles of both the GATT and WTO Agreement set forth this goal as part of the object and purpose of the WTO. GATT Articles XXXVI:1 and XVIII:1 further evidence this objective. Taking the step to other multilateral instruments, Article 55 of the UN Charter, Article 11 of the ICESCR, and Article 1(iii) of the World Bank Agreement each captures this goal and bolsters the legal link between raising living standards and poverty reduction.

327. GATT art. XXXVI:7.

328. UN Charter art. 55.

329. ICESCR, *supra* note 136, art. 11; *see also* Sarah H. Cleveland, *Why International Labor Standards?*, in *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY* 129, 157 (Robert J. Flanagan & William B. Gould IV eds., 2003).

330. ICESCR, *supra* note 136, arts. 11(2), 7(a)(ii).

This article thus submits that a measure advancing the goal of reducing poverty in a developing country promotes a development need within the contemplation of the WTO legal order.

3. Sustainable Development as a Development Need

The preamble of the WTO Agreement additionally recognizes the goal of sustainability, calling for “the optimal use of the world’s resources in accordance with the objective of sustainable development.”³³¹ Sustainable development, the concept of meeting present needs without compromising the ability of future generations to meet their needs,³³² relies most importantly on environmental protection and conservation of resources.³³³ If resources are too rapidly depleted or utilized, the duration over which a nation can maintain economic processes dependent on that resource is limited, and the development is unsustainable.³³⁴ More particularly, GATT Article XX has allowed for environmental protection to be introduced into the WTO’s institutional framework and dispute settlement process in relation to the goal of sustainable development.³³⁵

The AB in both *U.S. – Gasoline* and *U.S. – Shrimp* found measures adopted by the U.S. that compromised the conservation of an “exhaustible natural resource”³³⁶ to be contrary to the *chapeau* of

331. WTO Agreement pmb.; *see also* Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 505, 515 (Daniel Bethlehem et al. eds., 2009).

332. World Commission on Environment and Development, Report, *Development and International Economic Co-operation: Environment*, transmitted by Note of the Secretary-General, ¶ 27, U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter World Commission Report].

333. Jeffrey Kenners, *The Remodeled European Community GSP+: A Positive Response to the WTO Ruling?*, in WTO LAW AND DEVELOPING COUNTRIES 292, 295-96 (George A. Bermann & Petros C. Mavroidis eds., 2007); M.C.W. Pinto, *The Legal Context: Concepts, Principles, Standards and Institutions*, in INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE 16, 16 (Friedl Weiss et al. eds., 1998); *see generally* World Commission Report, *supra* note 334.

334. Kysar, *supra* note 245, at 22-23.

335. GATT art. XX(b), (g); Bodansky & Lawrence, *supra* note 333, at 516; Howse, *Back to Court After Shrimp/Turtle*, *supra* note 172, at 1335-37.

336. *See* GATT art. XX(g).

Article XX.³³⁷ In economic theory, sustainability has routinely been discussed as essential to economic development.³³⁸ To the extent that a measure supports conservation of exhaustible resources, and thus, sustainable development, this article submits that the measure supports a “development need” of developing countries consistent with the WTO legal framework.

4. *Education as a Development Need*

Education is not explicitly mentioned in the Covered Agreements as a means of promoting either macroeconomic growth or a better standard of living, but in light of multilateral instruments as interpretative elements,³³⁹ education is readily visible as an economic development need. In both theory and empirical studies, enhanced education has been shown to lead to growth and specialization of an economy, and thus enhanced wage-earning potential for individuals and economic growth.³⁴⁰ Greater specialization and diversification of the economy is addressed as a means to achieving macroeconomic growth in the GATT,³⁴¹ but including education as a development need requires the inferential step that education promotes this specialization and diversification.

While a readily made inferential step in light of the economic theory and studies,³⁴² inclusion of education as a development need from a legal standpoint is best appreciated in light of certain provisions in multilateral instruments. Article 55 of the UN Charter

337. *U.S. – Gasoline*, *supra* note 219, at 19; *U.S. – Shrimp*, *supra* note 234, ¶ 129. *But see U.S. – Shrimp (Article 21.5–Malaysia)*, *supra* note 234, ¶¶ 134, 152-53 (upholding the U.S. ban after negotiations proved fruitful); *see also* Bodansky & Lawrence, *supra* note 333, at 516.

338. HERMAN E. DALY, *BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* 27–30 (1996); Kenners, *supra* note 335, at 295-96.

339. AB Report, *supra* note 12, ¶ 163 (allowing for such recourse).

340. *See, e.g.,* Fan Zhai & Thomas W. Hertel, *Impacts of the DDA on China: The Role of Labor Markets and Complementary Education Reforms*, in *POVERTY AND THE WTO: IMPACTS OF THE DOHA DEVELOPMENT AGENDA* 285, 295-98 (Thomas W. Hertel & L. Alan Winters eds., 2006).

341. GATT art. XXXVI:5 (“The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products.”).

342. Zhai & Hertel, *Impacts of the DDA on China*, *supra* note 342, at 310-15.

states that the UN is designed to promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation,”³⁴³ with all UN Member States undertaking to take action to achieve this goal.³⁴⁴ Article 13 of the ICESCR affirms the right of everyone to education.³⁴⁵ However, this provision alone in the ICESCR requires the deductive step that education is not simply a development need, for instance, of a social or cultural character,³⁴⁶ but rather is an *economic* development need.³⁴⁷ For this latter step, Article 6 of the ICESCR serves as the bridge, addressing the importance of training, technical, and vocational education in support of the right to work.³⁴⁸ Specifically, Article 6(2) provides that the right to work is fully realized through “training programmes, policies and techniques to achieve steady economic, social and cultural development.”³⁴⁹ In light of these provisions, this article submits that the goal of providing education and training has consistently been recognized by states as an economic development need, and that programs, policies, and mechanisms that advance this goal promote a development need within the contemplation of the WTO legal order.

C. SYNTHESIS: ECONOMIC DEVELOPMENT AS THE WTO’S OBJECT AND PURPOSE

As the Appellate Body recognized, the object and purpose of the

343. U.N. Charter art. 55(b).

344. U.N. Charter art. 56.

345. ICESCR, *supra* note 136, art. 13(1).

346. *See id.* (providing that education enables “all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”). From this stand point, education can be viewed as a social or cultural need, but this provision of the ICESCR is notably silent on the economic benefits of education.

347. *See* AB Report, *supra* note 12, ¶ 92 (recognizing that the objective and purpose of the Enabling Clause is to promote LDCs’ economic development).

348. *See* United Nations, Econ. & Soc. Council, Comm. on Economic, Social and Cultural Rights, General Comment 13: The Right to Education, ¶ 15, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) (discussing technical and vocational education as jointly falling under the right to education and the right to work, promoting economic as well as social and cultural development).

349. ICESCR, *supra* note 136, art. 6(2).

Enabling Clause is to promote economic development,³⁵⁰ and that of the WTO Agreement is to ensure that developing countries receive a share of international trade commensurate with their needs.³⁵¹ Thus, any goals or needs promoted by the Enabling Clause and that fall within the WTO's ambit must necessarily relate to economic goals and needs. Advocates of human rights protections and good governance as development needs within the WTO's contemplation face the uphill battle of relating these goals back to some driver of economic development. As to goals such as poverty reduction, sustainable development, and education, beyond macroeconomic growth through increased market access, economic analysis readily demonstrates the impact of these pursuits on economic development.³⁵² As a matter of law, this article has argued that these goals are just as much encapsulated in (1) the Covered Agreements and (2) related multilateral instruments that serve as interpretative elements of WTO-consistent rights and obligations. Thus, measures conducive to these aims "respond positively to the development, financial, and trade needs of developing countries."³⁵³

CONCLUSION

With an institution as powerful as the WTO that aims to promote economic development and has seen success towards this end, it goes without saying that developing countries will fight for a greater voice in this forum. Observed with notable frequency in the Covered Agreements, the development needs of developing countries are singled out and given special attention. The institution can leave it to the practice of nations to determine exactly what constitutes "development needs." But the institutional goals of the WTO and its dispute settlement system to promote predictability and consistency would be well served by articulating these development, financial, and trade needs so that they may serve as bounds and guideposts for the practice of WTO Members. To that end, this article sought to begin to spell out some of the prominent development needs

350. AB Report, *supra* note 12, ¶¶ 91-92.

351. AB Report, *supra* note 12, ¶ 168.

352. See *supra* notes 271-287, 341-351 and accompanying text.

353. Enabling Clause, *supra* note 10, at ¶ 3(c).

ingrained in the WTO legal framework. The hope of this article is that through these four “development needs” of market access, poverty reduction, sustainable development, and education, the overlapping coverage of economic, social, and human rights objectives espoused by WTO Members can be pursued in a manner consistent with WTO law.