

# Multilateral and Bilateral Trade Agreements at the Service of 'Common Interest'

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### **Abstract**

Common interest or community interest is a term that is frequently used in contemporary international law. Undoubtedly, there is a shift from the traditional international law concept of co-existence to cooperation. Due to a shared interest in other areas of inter-state relations and concerns, like eradication of poverty, and development, common interest has become a central focus. As a result, the international trading regime, which was integrated into the World Trade Organization, has gone beyond reciprocity to addressing issues of development in less developed countries. It is believed that common interest is addressed by two principles in the World Trade Organization—reciprocity and special and differential treatment. Common interest is also addressed in bilateral agreements, for example, the Economic Partnership Agreement between the EU and countries in Africa. It is maintained that reciprocity correlates with a common interest in the context of ensuring mutual benefits to all WTO Members and at the same time assisting less developed countries that are also members of the WTO. This work underscores the importance of special and differential treatment, notwithstanding its controversial origin and hortatory provisions.

**Keywords:** common interest, international, law, WTO, Africa, EU, SDT, Trade, development

## 1 Introduction

‘Common interest’ is usually used interchangeably with ‘community interest’, collective interest, common concerns or common values.<sup>1</sup> These terms are rarely defined, and if they are conceptualised, they carry varied meanings.<sup>2</sup> According to Bruno Simma, community interest is: ‘...a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se*, but it is recognised and sanctioned by international law as a matter of concern to all states’.<sup>3</sup> Peter-Tobias Stoll viewed common interest in the context of WTO relations among countries. According to him, the WTO is an international organisation that promotes trade liberalisation and cooperation among its members.<sup>4</sup> Its aim is to help governments create more open and predictable trading systems, which it believes can contribute to economic growth and development.<sup>5</sup> To achieve this goal, the WTO seeks to establish common rules and standards for international trade and to resolve disputes between its members.<sup>6</sup> It does this through negotiations and by providing a forum for governments to discuss trade-related issues and find mutually beneficial solutions.<sup>7</sup> To Stoll, the WTO, on the face of it, represents the pursuit of personal advantage, in other words, the WTO does not seem to take into account other matters not related to reciprocal trade.<sup>8</sup> However, some aspects of global economic law are not far removed from serving the common interest of all or certain groups.<sup>9</sup> In other words, international economic law is not all about reciprocity *stricto sensu* because, notwithstanding the nature of its dispute settlement, its roots can be traced to Article 55 of the United Nations Charter,<sup>10</sup> later discussed in this chapter.

The WTO aims to promote trade and cooperation in order to help create a more prosperous and stable world economy in which all members can benefit from economic growth.<sup>11</sup> This was reflected in the EU-Africa partnership joint vision 2030<sup>12</sup> and past agreements.<sup>13</sup> It was declared in the joint vision that the EU-Africa partnership is aimed at promoting ‘our common priorities, shared values, international law, and preserving together our

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<sup>1</sup>Kritsiotis (2002), pp. 961-992.

<sup>2</sup>Villalpando (2010), p. 385.

<sup>3</sup>Rao (2011), pp. 334-5

<sup>4</sup>Stoll (2011), p. 174

<sup>5</sup>Id p. 179.

<sup>6</sup>Id.

<sup>7</sup>Id, pp.173-8. Cottier and Ahmad (2021), pp 195, 446 Van de Bossche and Zdouc (2017), p. 3

<sup>8</sup>Stoll (2011) *supra* note 4, p. 173.

<sup>9</sup>Id.

<sup>10</sup>Article 55 Charter of the United Nations and Statutes of the International Court of Justice (San Francisco 1945), <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. Accessed: 16 December 2022.

<sup>11</sup>Preamble to the Marrakesh Establishing the WTO. Available at [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm). Accessed 11 April 2023:

<sup>12</sup>The Agenda 2030 was originally formulated by the United Nations. See United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development A/RES/70/1, 10 May 2022. <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for>. Accessed: 3 April 2023

<sup>13</sup>European Economic Community (EEC) and African, Caribbean and Pacific (ACP) countries (1975) Lomé Togo

interests and common public goods'.<sup>14</sup> Thus, the proponents of the renewed EU-Africa partnership believe there is much that holds the two continents together, hence, the promotion of common public goods.<sup>15</sup> The EU-Africa relationship is metamorphosed into a two-level common interest as identified by Stoll—reciprocity and special treatment that can be extended to the less powerful countries in the trade arrangement.<sup>16</sup>

Therefore, the expression 'common interest' is widespread in contemporary discourse.<sup>17</sup> Both multilateral and bilateral agreements point to common interest and international law as guiding principles.<sup>18</sup> As such, it has been argued that reciprocity correlates with a common interest in the world economic order in the context of ensuring mutual benefits and assisting less developed countries.<sup>19</sup> However, Stoll did not dwell on SDT being a common interest but agreed that it is part of the international trade structure. This paper takes the argument forward by contending that SDT represents common interest, notwithstanding its controversial origin. However, it needs strengthening for the benefit of countries in need. The terms common interest or community interest shall be construed broadly in this chapter. It shall not be translated to mean the exclusive interest held by the international community as a whole but a common interest shared on a non-universal level and protected by law that binds a group of people or states.<sup>20</sup>

Practical illustrative examples can be found in the ECOWAS Trade Liberalisation Scheme and non-reciprocal trade opportunities provided under the Africa Growth and Opportunity Act (AGO).<sup>21</sup> Contrary to the Yaoundé Convention,<sup>22</sup> the Lomé Agreement granted preference based on non-reciprocity.<sup>23</sup> According to the ACP-EU Courier, under Lomé

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<sup>14</sup> European Council, Sixth European Union-African Union Summit: A Joint Vision for 2030, European Council Press Release, 18 February 2022, pp 1-6, 1. [https://www.consilium.europa.eu/media/54412/final\\_declaration-en.pdf](https://www.consilium.europa.eu/media/54412/final_declaration-en.pdf). Accessed: 3 April 2023.

<sup>15</sup> Id. 1.

<sup>16</sup>Stoll (2011) supra note 4, pp. 182-183. (emphasis added). see, European Council Decision, Interim Agreement Establishing a Framework for an Economic Partnership Agreement between the Eastern and Southern African States, on one Part and the European Community and its Members States on the other Part Official Journal of the European Union L 111 VOLUME 55, 24 April 2012 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:111:FULL>. Accessed: 3 April 2023.

<sup>17</sup>Kritsiotis (2002) supra note 1.

<sup>18</sup>Villalpando (2010) supra note 2, p.385.

<sup>19</sup>Rao (2011) supra note 3, pp.334-5.

<sup>20</sup>Feichtner (1994); Rao (2011) supra note 3, pp.334-5. Simma (1994), pp. 217-384.

<sup>21</sup> OECD (2015), p 152.

<sup>22</sup> see Article 3 (3) of the second Convention of Association between the European Economic Community and the African and Malagasy States Associated with that Community and Annexed Documents (hereinafter Convention of Association) (May 1970). The first Yaoundé Convention was signed on 20 July 1963 in Yaoundé, Cameroon. The European Economic Community and 18 Associated African States and Madagascar (AASM), which was valid for five years. The association was founded on free trade and financial aid from the Six.

<sup>23</sup> The Yaoundé Convention, Article 3 (3) Convention of Association between the European Economic Community and the African and Malagasy States Associated with that Community and Annexed Documents (herein after Convention of Association), (May 1970).

Conventions,<sup>24</sup> several protocols produced a significant profit by allowing export products such as bananas, beef, rum, and sugar into the EU market.<sup>25</sup> Another point evident in the spirit of the New International Economic Order (NIEO) was aid, which formed a substantial component of the Lomé Convention, funded through the European Development Fund (EDF).<sup>26</sup> Furthermore, a mechanism was put in place to provide indemnity for countries that had experienced losses due to fluctuations in the prices of raw materials through the Stabilisation of Commodity-export earnings (STABEX).<sup>27</sup> EU-Africa relations Must continue in some form. The argument here is that the developing countries must continue to argue constructively for SDT with a robust legal commitment on the side of the developed countries. As Stoll posits, where a system is established by states, usually it does not focus mainly on strict bilateral or contractual ‘exchange’; by implication a ‘measure of justice’ will be introduced into the regime for the benefit of less powerful countries.<sup>28</sup> Instructively, the Lomé Convention is a trade and aid agreement because it is meant to increase foreign aid to African, Caribbean and Pacific (ACP) countries by European Community; and to enable the former export goods duty free to latter based on the agreement that they do not compete with European products.<sup>29</sup>

The rest of the chapter is divided as follows: Section 2 discusses reciprocity to unpack its nature in the trading system and whether the system of special and differential treatment has a marked effect or influence on its operation in the trading regime. Section 3 explores special and differential treatment and common interests. Section 4 looks at the EU-Africa trade relationship and common interests, and section 5 concludes the chapter.

## 2 Reciprocity

Bruno Simma, a prominent international legal scholar and former judge on the International Court of Justice, advocated that the principles of reciprocity and common interest are important factors in developing and maintaining the international legal system.<sup>30</sup> Reciprocity refers to the

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<sup>24</sup> European Parliament ‘Relations with the Africa, Caribbean and Pacific Countries: From Yaoundé and Lomé to Cotonou Agreement’ ‘Economic development cooperation started between EU and West Africa in 1963 with leading successive agreements: First Lomé Convention (1975-1980) signed between 9 EU States and 46 ACP States, following the foundation of the ACP group in Georgetown (Guyana); 1979, Second Lomé Convention (1980-1985), signed between 9 EU States and 58 ACP States; 1984, Third Lomé Convention (1985-1990) signed between 9 EU States and 58 ACP States; and 1990, Fourth Lomé Convention (1990-2000) signed between 12 EU States and 68 ACP States. The Fourth Lomé Convention was in two stages, 1990-1994 and 1995-2000. Lomé IV bis was signed between 15 EU Members and 70 ACP States. The ACP group is presently composed of 78 states (46 African, 16 Caribbean and 14 Pacific). Available at [www.europarl.europa.eu/facts\\_2004/6-4-5-en.htm](http://www.europarl.europa.eu/facts_2004/6-4-5-en.htm). Accessed: 17 June 2018; Long (1980) pp. 3-6.

<sup>25</sup>The ACP-EU Courier, (1996) Special Issue on the Revised Lomé Convention, No 155- 6.

<sup>26</sup>Regulation (EEC) No 1598/75 of the Council 24 June 1975, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31975R1598&qid=1680503731575&from=EN>. Accessed: 3 April 2023; Bretherton and Vogler (2006), p. 116.

<sup>27</sup>Articles 23 (1) and (2), 24 and 25, Second ACP-EEC Convention, 1979 available at <https://edit.wti.org/app.php/document/show/8a201121-e8e8-4722-9657-9db3ef9f46ee>. Accessed: 3 April 2023.

<sup>28</sup> Stoll (2011) pp. 182-3.

<sup>29</sup> See Articles 49,53, 54, 1 of the Second Lomé Convention.

<sup>30</sup>Simma (1994) supra note 19, p. 261.

idea that states will be more willing to comply with their legal obligations if they believe that other states will do the same.<sup>31</sup> In other words, states will be more likely to comply with their obligations if they believe that other states' actions will protect their interests.<sup>32</sup>

Simma maintains that common interest dictates that states have a shared interest in maintaining the stability and predictability of the international legal system.<sup>33</sup> Simma argues that these principles are closely linked and that the effectiveness of the international legal system depends on the extent to which states are willing to act in both their own self-interest and the collective interest of the international community.<sup>34</sup> According to Stoll, it is debatable if this idea propounded by Simma is in tandem with international trade law. Nevertheless, according to Isabel Feichtner, the interpretation of common interest resembles the WTO's common good because it ensures 'security and predictability in international trade relations.'<sup>35</sup> It is noted that while the first paragraph of the WTO preamble refers to raising standards of living, the third paragraph of the preamble dwelt on the mutuality of reduction of trade barriers and non-discrimination. To a large extent, this third point on the agenda has been realised. It may seem that WTO is about reciprocity and as such, has no affinity with other global concerns,<sup>36</sup> but as demonstrated below, there is a meeting point for reciprocal common interest and common concern or interest for less developing countries in the trading system.<sup>37</sup>

While the international legal order focused on sets of rules meant to protect and respect state sovereignty into the future, there has been a change in focus.<sup>38</sup> This shift has altered certain social relations between states. In other words, there was a transformation in international law that considers the protection of public goods to fulfil common interests.<sup>39</sup> On that note, Stoll asserts that the WTO may appear to be founded on strict reciprocity; however, on closer examination, the WTO does not strictly follow the principle of reciprocity to promote a common interest.<sup>40</sup> Consequently, Stoll conceives that the WTO seems to be driven by absolute self-interest in situations where the state acts as an 'accountant' and seeks any possible advantage.<sup>41</sup> He acknowledged that WTO cases depicted the trading system that operates purely 'by sheer

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<sup>31</sup> Simma (2012) Reciprocity. In Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Oxford University Press, Online). Available at <http://apil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1461?prd=EPIL>. Accessed: 17 May 2022, para. 1.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* also Paulus (2011), p. 118.

<sup>34</sup> Paulus (2011), pp. 114-5.

<sup>35</sup> Feichtner (2007), *supra* note 19.

<sup>36</sup> Paulus (2011) *supra* note 28, questioning whether treaty arrangements without mutual exchange can be termed 'law'.

<sup>37</sup> Scotchmer (2008), p. 2. (emphasis added).  
generally, Buchanan (1965). Brummer (2007).

<sup>38</sup> Pauwelyn (2003), pp. 17-20.

<sup>63</sup> *Id.*, pp. 17-18.

<sup>39</sup> Stoll (2011), pp. 172-3.

<sup>40</sup> European Communities-Customs Classification of Frozen Boneless Chicken Cuts WT/DS269/AB/R, WT/DS286/AB/R (12 September 2005). Mexico-Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) WT/DS132/R, (28 January 2000).

<sup>41</sup> Stoll (2011) *supra*, pp. 172-3.

interest' and nothing more.<sup>42</sup> But the WTO does dilute the first kind of common interest, reciprocity, to promote the second type of common interest through special and differential treatment briefly mentioned in Stoll in the concluding section of his work.<sup>43</sup>

## 2.1 From Reciprocity to Common Interest

Some scholars of international relations attribute the Peace of Westphalia, 1648 with paving the way for the foundation of the modern state system.<sup>44</sup> Arguably, the treaties articulated mainly territorial integrity.<sup>45</sup> Thus, the society of states, stemming from the Peace of Westphalia was founded on strict repartition jurisdiction based on territory.<sup>46</sup> The partition between states was quite restrictive and did not envisage cooperation.<sup>47</sup> Nonetheless, Leo Gross maintained that international norms went beyond repartition by providing for co-existence between Protestants and Catholics through safeguards for religious minorities, including freedom of conscience.<sup>48</sup> Similarly, to an extent due to the increase in international interconnectedness, particularly due to inter-state trade and the transnational movement of individuals, social connections were promoted to mutual contract to fulfil positive reciprocated obligations in the context of compromise of interest of the individual state.<sup>49</sup>

Regarding common values and institutions, the Australian political scientist Heley Bull differentiates between three orthodox lines of thinking of states' relationships.<sup>50</sup> First, the Hobbesian concept demonstrated that states are either in a cold or hot war. It is entrenched in power politics, brief alliances and national interest.<sup>51</sup> However, according to Samantha Besson, states are not mainly 'self-interested' because nations can pursue both domestic 'collective' and global interests.<sup>52</sup> The second view of the state is the Kantian or universalist, who 'sees at work in international politics a potential community of mankind'.<sup>53</sup> This group sees the state as temporary; it is not an end.<sup>54</sup> They underscore international civil society, multinational cooperation and non-governmental organisations.<sup>55</sup> These authors focus on promoting justice and equity, which call for community interposition, sometimes for protecting persons against the state to which they

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<sup>42</sup> Id.

<sup>43</sup> Id., p. 182.

<sup>44</sup> Patton (2019) pp. 91-2.

<sup>45</sup> Croxton (1999) p. 574.

<sup>46</sup> Id pp.569-591.

<sup>47</sup> Id., p. 589. Villalpando (2010) supra note 2, P. 390.

<sup>48</sup> Ward (1948), pp. 20-41.

<sup>49</sup> Villalpando supra, note 2, p. 390.

<sup>50</sup> Bull (2002), p. 23.

<sup>51</sup> Morgenthau (1948), pp. 14-17. Carty (1991), p. 66.

<sup>52</sup> Besson (2018), p. 39.

<sup>53</sup> Bull (2002) p. 23. Slaughter (1995), p. 6. Teson (1992) p. 92.

<sup>54</sup> Simma, (1994). p.217. see Gaja (2011).

<sup>55</sup> Supra, Bull.

belong.<sup>56</sup> The third group is what Bull referred to as the Grotian or internationalist view. It conceives of international society as made up of states and individuals.

A core neo-Grotian<sup>57</sup> thinks of the international system as an ‘organised state community’ with particular importance placed on the common interest of all states. Therefore, there is support for Wolfgang Friedmann’s ‘Law of cooperation’ of collective security of the international legal order.<sup>58</sup> According to Christian Tomuschat, it would be wrong to assume that states constitute the international community as the only propinquity of individual units. Instead, the concept denotes an overarching system that embodies all states’ common interests and, indirectly, humanity.<sup>59</sup> This, to writers, is the current state of affairs.<sup>60</sup>

John Jackson’s view aligns with the third position mentioned above. According to Jackson, the extensive adjustment precipitated by globalisation, with a focus on ‘market economic ideas’ and its adverse reaction, had watered down the traditional theory of co-existence of international law.<sup>61</sup> Therefore, as a result of correlating interests in other fields of inter-state relations, such as eradicating poverty, development, telecommunications, and disease control, the discussion of common interest has taken centre stage.<sup>62</sup> Thus, the international trade regime integrated into the WTO is more than a set of written works and agreements.<sup>63</sup> The global trading system’s regulation goes beyond the definitive and traditional gains to the direct parties in a separate agreement to ensure that issues of development concerns are addressed due to interdependence identified at the global level.<sup>64</sup> While McRae strictly defined international law as a law of ‘co-existence’, Joost Pauwelyn states that international law has been expanded to include the law of cooperation to tackle common problems.<sup>65</sup> To Pauwelyn, international law has ‘shifted’ its focus to other areas to protect the common interest.<sup>66</sup> Scholars seem to agree that common interests connote the interdependence of two or more states with shared values.<sup>67</sup>

When Tony Blair addressed the Economic Club of Chicago in April 1999, he declared that: by the ‘new doctrine of the international community, it is believed there is an ‘explicit recognition that today more than ever before, we are mutually dependent, that national interest is to a significant extent governed by international collaboration....’<sup>68</sup> In 2001, Blair revisited the idea of countries coming together. In a speech at the Annual Labour Conference in Brighton. He made it

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<sup>56</sup> Id.

<sup>57</sup> Verdross and Simma (1984), VII-VIII. Cited in Paulus (2011), p. 114.

<sup>58</sup> Falk et al (2018), p. 74-85.

<sup>59</sup> Tomuschat (1993), p. 241.

<sup>60</sup> Id.

<sup>61</sup> Jackson (2006), p. 3.

<sup>62</sup> Id.

<sup>63</sup> Stoll (2011), pp. 172-3. Jobim (2013), p. 55. Tasioulas (1996), p. 88.

<sup>64</sup> Alessandrini (2011), p. 168. Cited in Jobim supra note 56

<sup>65</sup> Pauwelyn (2003), p. 31.

<sup>66</sup> Id., pp. 17-18.

<sup>67</sup> Keohane and Nye (1995), p. 221. Rao (2011), supra note 3.

<sup>68</sup> Speech by Prime Minister Tony Blare to the Economic Club of Chicago on 22 April 1999. Available at: <http://www.britishpoliticalspeech.org/speech-archive.htm?speech=279>. Accessed: 13 May 2022.



known that the ‘power of community is asserting itself’ globally.<sup>69</sup> The community has become the ‘lesson’ of ‘the financial markets, climate change, international terrorism, nuclear proliferation [and] world trade’ because ‘our self-interest and our mutual interests’ are indivisible.<sup>70</sup> Thus, the relationship between the EU and Africa, or other WTO members, or the EU can be located in the neo-Grotian and Kantian ideas.<sup>71</sup>

According to Bruno Simma, community interest calls for a consensus for respect for specific ‘fundamental values’ due to these intense connections or globalisation.<sup>72</sup> To him, a common interest is a shared objective or goal that is pursued by two or more states. Common interests can be based on a variety of factors, such as economic, political or security considerations. States may have a common interest in maintaining regional stability, promising economic development, or preventing the spread of nuclear weapons, for example. In international relations, states often work together to achieve common interests through cooperation and coordination. Common interests can also be used to build trust and strengthen relationships between states. Thus, industrialisation, the advancement of modern economies, and globalisation have led to a rapid paradigm shift in international relations.

Common interest found a niche in Article 55 mentioned above. It provides that for peaceful co-existence among nations, the United Nations (UN) should encourage the promotion of a ‘higher standard of living, full employment, and conditions for economic and social progress and development.’<sup>73</sup> Although economic law does not have the key concepts that could be considered ‘values’.<sup>74</sup> However, as mentioned earlier, the WTO contains some language for raising standards of living.<sup>75</sup> It states that trade relations should be carried out to raise the standard of living through full employment, and this only happens with the expansion of the production and exchange of resources—reduction of barriers to trade and non-discrimination.<sup>76</sup> To a large extent, the second paragraph has realised that the first part of common interest and the second part of common interest represented in the first paragraph of the WTO preamble is yet to produce a satisfactory result.<sup>77</sup> Special consideration for developing countries as provided by the WTO is explored next to demonstrate whether it serves common interest.

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<sup>69</sup> Blair (2001). A Moment to Seize: Let Us Reorder this World Around Us’, The Guardian. Available at: <https://www.theguardian.com/politics/2001/oct/02/labourconference.labour7>. Accessed: 13 May 2022

<sup>70</sup> Id; also Cottier and Ahmad (2021), pp. 3-4.

<sup>71</sup> Supra Slaughter note 34 p. 526.

<sup>72</sup> Id.

<sup>73</sup> Article 55 Charter of the United and Statute of International Court of Justice 24 October 1945. Available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. Accessed: 16 December 2022.

<sup>74</sup> Supra Stoll note 4.

<sup>75</sup> Preamble para 1 of the Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, came into force 1 January 1995); Supra, Stoll p 174.

<sup>76</sup> General Agreement Tariffs and Trade 1994 (GATT), Marrakesh Agreement Establishing the World Trade Organisation (adopted 15 April 1994, entered into force 1 January 1995) Annex 1A 1867 UNTS 4, 190 Art XI GATT

<sup>77</sup> Supra, Stoll note 1 pp. 174-5.

### 3 Special and Differential Treatment and Common Interest

Special and differential treatment (SDT) in the World Trade Organisation (WTO) refers to the provision of special consideration for developing countries in the rules and operations of the organisation.<sup>78</sup> This treatment is intended to help these countries participate more effectively in the global trading system and to take into account their special needs and difficulties.<sup>79</sup> The principle is embodied in various WTO agreements, including the GATT, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>80</sup> and the Agreement on Agriculture.<sup>81</sup> Examples of special and differential treatment provisions include more extended implementation periods for trade agreements, flexibility in meeting certain obligations, and technical assistance to help developing countries implement and benefit from WTO agreements.<sup>82</sup> SDT provisions are intended to ensure that developing countries are not disadvantaged by the rules and procedures of the WTO and provide them with additional support to help them take advantage of the opportunities provided by the global trading system.<sup>83</sup>

According to Trebilcock and Howse, at the time of the negotiation in Bretton Woods, developing countries have little or no influence shaping the agenda and design of the regime that would govern international trade over the decades that followed.<sup>84</sup> As such, at any given opportunity, developing countries sought more preferential treatment.<sup>85</sup> These demands developed gradually into a central focal point in the United Nations Conference on Trade and Development (UNCTAD) as part of the innovation in the international trading system in the 1960s and 1970s.<sup>86</sup> However, according to Hudec<sup>87</sup> and Lamp,<sup>88</sup> it was far from the intention and plan of the developing countries to be treated in a special way. Nevertheless, they requested to be able to fashion their GATT obligations in a manner consistent with their needs—which turned out not to be compatible with developed countries’ preferences in certain areas. Consequently, SDT for developing countries as it is known today was crafted by ‘developed countries to preserve their preferred design of the trade regime, and to stick to their favoured method of making trade law, while keeping developing countries within the system.’<sup>89</sup> In essence, Lamp argued that the main reason for the provision of special treatment for

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<sup>78</sup>Fukasaku (2000), pp. 156-170. Hoekman et al. (2000), pp. 562-5.

<sup>79</sup>Id, Fukasaku.

<sup>80</sup>Articles 65.2 and 65.4 provides for transition periods for the implementation of the agreement; 67, technical and financial assistance and 66.2, encouraged technology transfer to least developed countries. See Michalopoulos (2003), Special and Differential Treatment of Developing Countries in TRIPS. TRIPS Issues Paper, Quaker United Nations (QUNO) Geneva. Available at, <https://quno.org/sites/default/files/resources/Special-Differential-Treatment-in-TRIPS-English.pdf>. Accessed 17 January 2023

<sup>81</sup>E.g. Articles 15.2. 6.2. 6.4. 9.4 and 12.2 of the Agreement on Agriculture. Available at, [www.wto.org/english/docs\\_e/legal\\_e/14-ag\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm). Accessed: 17 January 2023.

<sup>82</sup> Id.

<sup>83</sup>Edwini (2007), pp. 12-8.

<sup>84</sup>Trebilcock and Howse (1995) p. 518.

<sup>85</sup> Id.

<sup>86</sup>Id; Pauwelyn supra note 58 PP. 17-18.

<sup>87</sup>Hudec (1987), p. 4.

<sup>88</sup>Lamp (2015), pp. 743-771.

<sup>89</sup> Id.

developing countries was to placate them without changing anything fundamental about the trading system.<sup>90</sup>

As mentioned above, in 1964, the first UNCTAD took place in Geneva where the idea of a special section on trade and development to be added to the GATT was developed.<sup>91</sup> Consequently, part IV –Trade and Development was made part of the GATT to consider the concerns of developing countries.<sup>92</sup> The principle was expressed in the Generalised System of Preference (GSP), which was politically adopted at UNCTAD II in New Delhi in 1968 and technically accepted by UNCTAD’s Trade and Development Board in 1970 to create a generalised, non-reciprocal, non-discriminatory system of preferences to favour developing countries.<sup>93</sup>

There are many angles to the idea of SDT. It embraces non-reciprocity, permissive protection and a general preference system—the focus of this chapter. It is essential to give a brief overview of this to find out how efficiently the mechanisms worked in practice and if advocating for it—whether it has served the common interest of the members of the multilateral trading system.

### **3.1 Non-reciprocity Mechanism**

Non-Reciprocity is provided for in part IV of the General Agreement on Tariff and Trade (GATT). Article XXXVI considers the concerns of developing countries. Article XXXVI provides that the contracting parties are not expected to trade reciprocally with less developing countries in negotiations regarding reducing or removing tariffs.<sup>94</sup> This idea is further amplified in Article XXXVII:3 (c ). The provision requires that developed countries give special attention to the trade interest of developing countries when measures are being applied. Developed countries are enjoined to explore all possibilities of constructive remedies before taking such measure, especially if they would affect essential interest of the less developed countries. It encouraged developed countries to remove certain obstacles that may prevent products of developing countries from accessing their markets. However, this provision has been criticised; for instance, according to Alessandrini, the imprecise requirements on non-reciprocity and the lack of legal commitments remain the foremost obstacle to bringing about positive results for developing countries.<sup>95</sup> According to this author, the reason for this vagueness is that developed countries are not willing to concretise the SDT in legal terms as there are no reciprocal benefits.<sup>96</sup>

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<sup>90</sup> Id., p. 745.

<sup>91</sup> UNCTAD (1964), PP. 18-25.

<sup>92</sup> Part IV of the General Agreement on Tariff and Trade, entitled, Trade and Development. Available at, [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/part4\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/part4_e.pdf). Accessed: 11 April 2023.

<sup>93</sup> UNCTAD (1968), PP.11-12,200-2.

<sup>94</sup> Article XXXVI:8 Part IV of the GATT.

<sup>95</sup> Alessandrini (2011), pp 174-176.

<sup>96</sup> Id.

### 3.2 Import Substitution and Protection of the Infant Industry

Under the GATT, certain protections are granted to developing countries. Regarding GATT responsibilities, developing countries are granted special treatment in Articles XI, XII, and XVIII. Article XVIII was the GATT's first try to assist developing countries' concerns. The article comprises three components. Article XVIII, Section A permits developing countries to renegotiate tariff bindings to encourage the establishment of industry. If a developing country decides to use this provision, the expectation is that it must offer compensation or face retaliation.<sup>97</sup> Article XVIII, Section B provides for a balance of payment escape clause for developing countries. The provision in Article XVIII, Section B basis for imposing such restrictions is less burdensome than the criteria that apply to developed countries under Article XII. Article XVIII, Section C allows developing countries to impose quantitative restrictions for infant industry protection. Similar to Article XVIII: A tariff renegotiation, Article XVIII, Section C provides compensation and retaliation in the absence of a negotiated agreement.

Article XXVIII: bis (3), which appeared for the first time in the 1955 Review Session, provides that developing countries provide that negotiations shall take into account "the needs of less-developed countries" to use tariffs for economic development and fiscal purposes. At the time of the reviewing of the GATT Articles, the Contracting Parties were urged to increase capital flows to developing countries to facilitate the objectives of the General Agreement by stimulating the economic development of these countries while at the same time rendering it less necessary for them to resort to import restrictions.<sup>98</sup>

During the 1960s, 1970s and 1980s, many African countries adopted import substitution policies as a way to promote industrialisation and economic development.<sup>99</sup> Some examples of African countries that experienced gains from import substitution during this period include Ghana, Tanzania, Kenya, Côte d'Ivoire, Senegal, and many other African countries; import substitution policies led to the growth of domestic industries, particularly in the manufacturing sector.<sup>100</sup> This helped diversify the economy and create jobs, contributing to economic growth and development.<sup>101</sup> On the contrary, others argued that import substitution was uncertain and only favoured the mining industry for the most part; this sector was focused on due to the small nature of the market size and poor infrastructure.<sup>102</sup>

### 3.3 General Systems of Preference

One of the most concrete outcome in the SDT concerned the Generalised System of Preferences (GSP). At the initial stage, the GSP was designed under the aegis of the United Nations Conference

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<sup>97</sup> Article XVIII: A GATT; Governmental Assistance to Economic Development. Available at [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art18\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art18_gatt47.pdf). Accessed: 17 January 2023.

<sup>98</sup>Id.

<sup>99</sup> Mendes et al. (2014), pp. 128-131.

<sup>100</sup>Huq and Tribe (2018) p. 17. Gulhati and Sekhar (1982), pp. 949-972.

<sup>101</sup> Herbst (1990), pp. 494-958; Stein (1992) pp. 86-6.

<sup>102</sup>Supra, note 98, p. 125.

on Trade and Development<sup>103</sup> (UNCTAD, 1971), and it included differential treatment among developing countries, depending on their stage of development. At the preparatory stage, the intention was for the developed countries to grant preferences to their former colonies.<sup>104</sup> The scope of the GSP was then expanded. For the GSP to come into force, a waiver had to be obtained according to Article XXV of the GATT.<sup>105</sup> It was created to mitigate the MFN clause in GATT Article I permitting the implementation of a preferential system within the global trade system. In 1979, the rule of preferences became fully established, introducing the Enabling Clause.<sup>106</sup> The Enabling Clause has given developed countries optional powers to direct and design their systems of preferences.<sup>107</sup> Developing countries could choose products they prefer to import and provide incentives for primary product industries, which provided ‘perverse incentives’ against manufacturing in poor countries.<sup>108</sup>

It is noted that when differential treatment has been granted, Europe and the US would impose several conditions to its being granted, then adopting a controversial ‘graduation policy’, which was designed according to their needs.<sup>109</sup> Thus, preferences are conditional gains that could be withdrawn at any time, depending on the benchmark used by the granting country.<sup>110</sup> Uncertainty and unpredictability inherent in preferential treatment have become an obstacle for developing countries, and the infant industries seeking to be protected; this, in the long term, is an obstacle to prevents economic growth.<sup>111</sup> For example, market access in sectors such as textiles, manufacturers, agriculture, and tropical products, sectors of interest to developing countries, remained uncertain.<sup>112</sup> It is not in doubt that GSP has advanced export growth in developing countries, but the system was used as a political and economic weapon. For example, the US Trade Act of 1974 gave the US President power to waive GSP status if the recipient country failed to provide ‘reasonable access’ to its markets and commodities and failed to afford sufficient and adequate protection of intellectual property rights.<sup>113</sup>

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<sup>103</sup> UNCTAD (1972) Proceedings of the United Nations Conference on Trade and Development, Third Session, Santiago de Chile, 13 April to 21 May 1972, United Nations, New York. [https://unctad.org/system/files/official-document/tdl80voll\\_en.pdf/](https://unctad.org/system/files/official-document/tdl80voll_en.pdf/).

<sup>104</sup> Patterson (1996), pp. 1945-1965.

<sup>105</sup> Article XXV:5 GATT. Available at,

[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art25\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art25_gatt47.pdf). Accessed: 30 January 2023.

<sup>106</sup> ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries’ Decision of 28 November 1979 (L/4903), <https://docs.wto.org/do12fe/Pages/SS/directdoc.aspx?filename=Q:/JCR/TOKYO/ENABLEING.pdf&Open=True>. Accessed: 30 April 2022.

<sup>107</sup> Trebilcock and Howse, (2005), Third edn, pp. 630-1.

<sup>108</sup> Thomas and Trachtman (2009) pp. 1-21; Id. Trebilcock & Howse, (2005) P. 561.

<sup>109</sup> Whally (1990), pp. 1324-5.

<sup>110</sup> Id., p. 1320.

<sup>111</sup> Id.; Trebilcock & Howse (2005), P. 518. Franck (1995), p 12. also Trachtman (2011), pp. 3-4.

<sup>112</sup> Id.

<sup>113</sup> Id. P. 528.

### 3.4 The Merit and Demerit of SDT

Undoubtedly, the GSP has supported and encouraged relatively modest gains in developing countries.<sup>114</sup> However, there has been a broader argument against the adoption of preferences than the inadequacy of SDT.<sup>115</sup> The proponents of expeditious liberalisation direct attention to the fact that developing economies persistently seek to advance their own interests by development policies that have adverse consequences for other developing countries.<sup>116</sup> Another argument put forward is that SDT promotes protectionist trade policies, which do not create a system for achieving maximum productivity in developing countries.<sup>117</sup> Therefore, an exception from the WTO discipline would rather heighten the disadvantageous position of developing countries because it promotes protectionism and excludes them from the worldwide economy.<sup>118</sup> In other words, every country's compliance with the reciprocity and non-discrimination principle will become competitive, notwithstanding the differences in their level of development.<sup>119</sup> However, according to Chang's argument, supported with evidence, the United Kingdom and the United States engaged in trade protectionism and government support for industries during their own development processes.<sup>120</sup>

The principle of reciprocity, which became the foundation of the GATT, originates in sovereign equality under international law. The idea of sovereign equality is premised on the supposition that states are identical in identity and abilities.<sup>121</sup> Article I of the GATT, or MFN treatment, transfers the concept of equality from international law into the economic field.<sup>122</sup> This assumption was challenged by developing countries from the 1950s to the 1970s. They contended that the idea took no cognisance of inequality between states in terms of development. Thus, it was from this argument that SDT in the form of the Enabling Clause emerged. SDT is founded on the position that 'equal treatment could secure equality only among identical parties',<sup>123</sup> and it was believed that only SDT could alleviate the negative impact of economic and power asymmetries between developing and developed countries. The argument is widely accepted that the MFN principle is not an adequate or convenient means of attaining development, especially in developing countries.<sup>124</sup> Thus, arguably the SDT has some benefits and has not been a total failure.

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<sup>114</sup>Kleen and Page (2005), pp. 2-4.

<sup>115</sup>Trump, (2019) Reforming Developing Country Status in the World Trade Organisation. Available at: <https://www.presidency.ucsb.edu/documents/memorandum-reforming-developing-country-status-the-world-trade-organization>. Accessed: 29 January 2023.

<sup>116</sup>Stiglitz and Charlton (2005) p. 13.

<sup>117</sup>Trubek and Cottrel, (2009). Jagdish et al, (2004) 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium', Report by the Consultative Board to the Director General Supachai Panitchpakdi Geneva. Available at [https://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf). Accessed: 3 April 2023. Hoekman and Howse (2005) pp. 13-14.

<sup>118</sup> Stiglitz and Charlton, p. 85.

<sup>119</sup>Isard (1995) p. 95.

<sup>120</sup>Chang, (2007) pp. 125-2, 41-2.

<sup>121</sup>Yanai (2004) APEC Study Centre, Working Paper Series 03/04 – 8 No 6

<sup>122</sup>Espiell E, (1971) p 29.

<sup>123</sup> Supra, note 113, p. 88.

<sup>124</sup> Supra note 89 P. 29.

For example, the Generalised System of Preference (GSP) of the United States and the EU gave their leaders the discretion to extend beneficiary status to any country that conforms to stipulated conditions.<sup>125</sup> countries such as South Korea, Singapore, Malaysia, and Hong Kong used the scheme, and after they became successful exporters and achieved ‘high income’ positions, they ‘graduated’.<sup>126</sup> However, according to Stiglitz and Charlton, the Asian countries did not rely on GSP or free trade or non-interference policies by the government but benefitted from government involvement and tackling difficult internal reforms were largely responsible for the success of the of the above-mentioned countries.<sup>127</sup> Notwithstanding that Stiglitz and Charlton encourage developing countries to focus on reforms internally<sup>128</sup>, the SDT can be of substantial benefit if it is genuinely targeted at assisting developing countries.

The United States recognised the second aspect of common interest by extending assistance to Europe through the Marshall Plan. The former United States Secretary of State, George C Marshall, gave a speech at Harvard University and emphasised the need for substantial aid to Europe to stop economic and political retrogression.<sup>129</sup> He declared, ‘our policy is directed not against any country or doctrine but hunger, poverty, desperation, and chaos’.<sup>130</sup> Between 1948 and 1953, the Marshall Plan made a huge contribution of more than \$13 billion dollars in economic and technical assistance for the recovery of 16 countries.<sup>131</sup> The Marshall Plan was described as a ‘politics of prosperity’<sup>132</sup> and a clear case of the ‘principle of solidarity’ between advanced countries to eliminate poverty and prevent the threat of war. The effort was to achieve industrial productivity in Europe by creating international agreements among actors for economic growth.<sup>133</sup> It has been argued that this similar solidarity should be extended to developing countries that exist in the vicious cycle of poverty.<sup>134</sup>

#### 4 EU-Africa and Common Interests

By 1960, most overseas territories had gained independence, and Guy<sup>135</sup> notes that it became imperative to renegotiate the ‘Associate Status’ between the six European Economic Community (EEC) and 18 African Associate and the Malagasy States.<sup>136</sup> The second Yaoundé Convention from January 1971 to March 1975 brought some minor improvements.<sup>137</sup> However, it maintained

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<sup>125</sup> Grossman and Sykes (2005) pp. 45, 56.

<sup>126</sup> Id, p 45

<sup>127</sup> Stiglitz and Charlton (2005) p. 89

<sup>128</sup> Id p. vii.

<sup>129</sup> OECD, (1947) The ‘Marshall Plan’ Speech at Harvard University, 5 June 1947, [www.oecd.org](http://www.oecd.org). Accessed: 13 September 2022; see De Long and Eichengreen, (1991).

<sup>130</sup> Id, OECD.

<sup>131</sup> Supra note 93. Supra note 118, De Long and Eichengreen, pp. 3-5.

<sup>132</sup> Lakshmi, (2005).

<sup>133</sup> Supra Stiglitz and Charlton p. 118 De Long and Eichengreen, p. 55.

<sup>134</sup> Id Stiglitz and Charlton, p. 3. See footnote 3 of the book.

<sup>135</sup> Guy (1982).

<sup>136</sup> Nwobike (2008) pp. 87-124.

<sup>137</sup> Twichett (1974) pp. 51-63.

the fundamental structure of the earliest agreement.<sup>138</sup> It is important to note that the series of trade arrangements has its background in the European post-colonial settlement after World War II, what Minta referred to as an ‘unbroken historical continuum.’<sup>139</sup> A commercial imperialism which began in the 16<sup>th</sup> to the mid 19<sup>th</sup> centuries, moving through to the Commonwealth period and to the series of Lomé Conventions, and preferential arrangement yet no substantial advantage has accrued to the latter from the former which has been the dominant party in their trading relations.<sup>140</sup> The EU’s way forward with Africa in terms of advancing the ‘economic integration’ and development in the recent Economic Partnership Agreement has resulted in uncertainty.<sup>141</sup> Desta Melaku expressed the view that the EU-Africa has developed gradually over time from colonialism to serpentine relations, outlined as a ‘partnership’.<sup>142</sup> However, there has been reconditioning of the Europe-Africa relationship since the Lomé conventions—an evolution in the relationship from the colonial period.<sup>143</sup> Fundamentally, the relationship is still asymmetrical, but some positive elements in the Lomé and Cotonou Agreements are built on to advance the interests of African countries.<sup>144</sup> The Cotonou Agreement succeeded the Lomé Convention, which heralded a new era of EPAs.<sup>145</sup>

The early part of the year 2000 heralded a fundamental policy change to the preferential non-reciprocal trade arrangements between the EU and ACP countries<sup>146</sup> The reasons put forward by the European Union for the controversial<sup>147</sup> Economic Partnership Agreements (EPAs) are mainly twofold: (i) compliance with Article XXIV of the World Trade Organisation (WTO) rules,<sup>148</sup> and (ii) sustainable development and active participation of the developing countries in the world trading system. In other words, the EU and Africa are to trade based on reciprocity, and the former would offer some flexibility to the latter countries. The new relationship considers the two levels of common interest: reciprocal trade arrangements for the mutual benefit of both parties and special treatment provided to the African partners due to their lack of development. This point is further discussed later in this work. Brown argued that the circumstances that inform the relationship between Africa and the EU could only be critically understood from the point of view of

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<sup>138</sup> Id.

<sup>139</sup> Minta, (1980) p. 954.

<sup>140</sup> Id, pp. 943, 974. Luke et al. (2020).

<sup>141</sup> Id Luke et al. (2020)

<sup>142</sup> Melaku, (2021), The Normative Mess Governing Africa-EU Trade Relation Granted A New Lease of Life: A Preliminary Reflections on the Trade-Related Aspects of the Negotiated Between the EU and OACPS, 16 November 2021, Volkerrechts blog. Available at <https://voelkerrechtsblog.org/the-normative-mess-governing-africa-eu-trade-relation-granted-a-new-lease-of-life/>. Accessed. 31 January 2023.

<sup>143</sup> Supra note 24. See, Ravenhill, (1979/1980) pp. 151-157.

<sup>144</sup> Grossman and Sykes, (2005) p. 41.

<sup>145</sup> Ravenhill (2002), p. 6.

<sup>146</sup> European Commission, Economic Partnership Agreements (EPAs), New ACP-EU Trade Partnerships (July, 2010). Available at <http://eu.europa.eu/trade/wider-agenda/development/economic-partnerships>. Accessed: 29 May 2018.

<sup>147</sup> Ramdoo (2011) p. 3.

<sup>148</sup> Smith (2005) ‘The European Commissioner for Trade’s Speech to Civil Society Dialogue Group in Brussels’ Mandelson Peter, is quoted as saying “to end the grinding poverty which is the daily experience of so many ACP citizens”. Oxfam International, (2006), p. 13.



cooperation between developing countries in Africa and ‘Western’ developed countries.<sup>149</sup>

According to a World Bank report, Sub-Saharan Africa is home to more than 1 billion people, with the largest free trade area in the world.<sup>150</sup> If well implemented, the African Continental Free Trade Area (AfCFTA) has great prospects to eliminate extreme poverty on the continent. The World Bank identified the great potential of the region but also listed the woes that are likely to betide Africa. For example, it states that economic growth in SSA slowed down from 4.1 per cent in 2021 to 3.3% in 2022, partially due to sluggish growth globally. This is bound to be exacerbated due to the war in Ukraine, worsening debt related distress.<sup>151</sup> These problems undermine the vision of eradicating extreme poverty. It is forecasted to remain high at 59.5% of GDP in 2022 in SSA. The Bank further states that eight out of 38 IDA-eligible countries on the continent are in debt distress, and 14 are at a very high risk of falling into similar distress.<sup>152</sup> A 2023 IMF report is not so different in outlook to the World Bank. It states that ‘rising food and energy prices are impacting the region’s most vulnerable, and public debt and inflation are at levels not seen in decades.’<sup>153</sup> From the report of UNCTAD, ‘forty-five African economies are commodity dependent. With highly volatile revenue due to price boom and bust nature of the market.’<sup>154</sup> Commodity dependence is when commodities represent more than 60 per cent of total merchandise exports. 83 per cent of African countries are commodity dependent, accounting for 45 per cent of the commodity-dependent worldwide.<sup>155</sup> It further noted the struggle by African countries to diversify their export of goods and services is doable but with a serious challenge.<sup>156</sup>

The UNECA reported that in Africa, approximately 60 per cent of the poor live in acute poverty, and 40 per cent live in temporary poverty. ‘In countries with comparable data, an estimated 33 per cent of poor households live in chronic poverty, with variations across countries. The Democratic Republic of the Congo has more than twice that proportion, and Rwanda, Mozambique, Malawi and Madagascar have 1.5-2 times that proportion.’<sup>157</sup> According

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<sup>149</sup>Brown (2002) pp. 368.

<sup>150</sup>The World Bank, (2023) The World Bank in Africa. Available at <https://www.worldbank.org/en/region/afr/overview>. Accessed: 20 January 2023.

<sup>151</sup> Id.

<sup>152</sup>The World Bank ‘The World Bank in Africa’ Overview: Development News Research, Data/World Bank 14 December 2022 [www.worldbank.org](http://www.worldbank.org). Accessed: 20 January 2022.

<sup>153</sup> International Monetary Fund, Regional Outlook: Sub-Saharan Africa’ IMF Data Access to Macroeconomic and Financial Data. Available at [www.data.imf.org](http://www.data.imf.org). Accessed: 20 January 2023.

<sup>154</sup> UNCTAD (2022), Rethinking the Foundations of Export Diversification in Africa: The Catalytic Role of Business and Financial Services’ (Economic Development in Africa Report 2022). Available at [https://unctad.org/system/files/official-document/aidcafrica2022\\_en.pdf](https://unctad.org/system/files/official-document/aidcafrica2022_en.pdf). Accessed: 20 January 2023 P. 1

<sup>155</sup> UNCTAD (2022), Rethinking the Foundations of Export Diversification in Africa: The Catalytic Role of Business and Financial Services’ (Economic Development in Africa Report 2022). Available at [https://unctad.org/system/files/official-document/aidcafrica2022\\_en.pdf](https://unctad.org/system/files/official-document/aidcafrica2022_en.pdf). Accessed: 20 January 2023 PP. 3-6. UNCTAD, (2001), Trade and Development: From Recovery to Resilience: The Development Dimension. Available at, [https://unctad.org/system/files/official-document/tdr2021overview\\_en.pdf](https://unctad.org/system/files/official-document/tdr2021overview_en.pdf). Accessed: 29 January 2023

<sup>156</sup> Id.

<sup>157</sup>ECA, (2022) Addressing Poverty and Vulnerability in Africa During the Covid-19 Pandemic Economic Report on Africa 2021, 12 May 2022, 4. Available at, [www.uneca.org](http://www.uneca.org). Accessed 20 January 2023.

to the report, the African share of global exports reduced from 2010 to 2019 but increased in other regions. The trade share of the continent fell from 2.48 per cent in 2019 to 2.14. It states, ‘Africa has shown a merchandise trade deficit since 2013, reflecting continued dependence on exports of low-value-added commodities and imports of high-value manufactured goods, reinforcing its vulnerability to external shocks during a crisis.’<sup>158</sup> The HIV/AIDS shocks in the 1990s, and intermittent drought reduced and affected learning outcomes and caused huge losses.<sup>159</sup> However, some progress has been made in reducing poverty in Africa. For instance, Cabo Verde, Gabon, the Gambia, Lesotho, Mauritania, Morocco, Namibia and Tunisia halved poverty and are on track to eradicate poverty as set in the Agenda 2030 for sustainable development. Nevertheless, poverty has increased tremendously in many other countries, such as Angola, Cote d’Ivoire, Sao Tome and Principe, Senegal, etc.<sup>160</sup>

On the other hand, the EU, which operates a single market, is comprised of 27 countries.<sup>161</sup> The total value of goods and services, which was produced (Gross Domestic Product) in the EU in the year 2021 amounted to €14.5 billion. The EU 27 accounts for about 14% of the trade in goods—making the region one of the largest trade and player in the global trading system.<sup>162</sup> In the same year, 2021, accounted for €4.3 billion in total world trade. In trading among its members, it was valued at EUR 6 786 billion in 2021.<sup>163</sup> In 2016 Africa’s share of world GDP shrank from 3.3% to 3.1%. In 2006, the EU-28’s share of world GDP was 29.7%, but in 2010, due to the worldwide economic crisis, the share came down to 25.2%; in 2016 EU’s share was 21.7 %.<sup>164</sup> In terms of trade between the continents, the gap is wide. In 2013, the EU reported that the EU recognised these differences in development level and has provided development assistance in the form of aid for many years.<sup>165</sup> Also, it offered non-reciprocal trade arrangements for ACP countries from 1975 until the new Cotonou trade agreement of 2000, which heralded reciprocity between the continents.<sup>166</sup> The motivating force behind aid has been a subject of debate. According to Whitefield,<sup>167</sup> aid is given by the donor for the transfer or projection of its ‘moral values’ or it can be intended to increase the donor’s power or influence.

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<sup>158</sup> Id p. 26.

<sup>159</sup> Id p.30.

<sup>160</sup> Id p. 87.

<sup>161</sup> EU, Facts and Figures on the European Union Economy. Available at, [https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy\\_en](https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy_en). Accessed: 30 January 2023; see, The European Union and the Africa Union (2018): A Statistical Portrait (2018 edition, Luxembourg: Publications Office of the European Union, 2018) p. 14. Available at [https://ec.europa.eu/eurostat/documents/3217494/8999516/KS-GQ-17-007-EN-N.pdf/6d38be9b-60de-44f5-aced-dfb767e500f2?t=1529485136000\\_](https://ec.europa.eu/eurostat/documents/3217494/8999516/KS-GQ-17-007-EN-N.pdf/6d38be9b-60de-44f5-aced-dfb767e500f2?t=1529485136000_) Accessed: 22 January 2023.

<sup>162</sup> Id.

<sup>163</sup> Id. Eurostat, Share of European Union EU27 (From 2020) in the World Trade. Available at [https://ec.europa.eu/eurostat/databrowser/view/EXT\\_LT\\_INTROEU27\\_2020\\_custom\\_3351101/default/bar?lang=en](https://ec.europa.eu/eurostat/databrowser/view/EXT_LT_INTROEU27_2020_custom_3351101/default/bar?lang=en). Accessed: 30 January 2023.

<sup>164</sup> Id.

<sup>165</sup> EU, Europe in the World: The Future of the European Financial Architecture for Development’ Council of the European Union General Secretariat pp. 8-10. Available at [http://www.consilium.europa.eu/media/40967/efad-report\\_final.pdf](http://www.consilium.europa.eu/media/40967/efad-report_final.pdf). Accessed: 22 January 2023.

<sup>166</sup> WTO, The Generalised System of Preferences: A Preliminary Analysis of the GSP Scheme in the Quad’ WT/COMTD/W/93 5 October 2001. Available at [www.docs.wto.org](http://www.docs.wto.org). Accessed: 23 January 2023

<sup>167</sup> Whitefield, (2009) p. 28.

For Carol Lancaster, countries give assistance for the purpose of diplomatic relationships and to advance their mercantile interests, such as better access to raw materials in developing countries.<sup>168</sup> The EU has been criticised for the ‘political conditionality’ of aid. Development assistance has been used to promote human rights and democracy, and there may also be a sanction if there is a breach of the principles mentioned above.<sup>169</sup> The ideas of human rights, good governance and democracy are clearly reflected in the Cotonou agreement.

As mentioned above, many developing and least developed countries have benefitted from preferential access to markets in developed countries. The initial preferential arrangement set up by some countries was the generalised system of preferences (GSP), where an indefinite waiver from the fundamental principle of non-discrimination at the WTO was granted under the Enabling Clause. Other arrangements have included, for example, the African Growth and Opportunity Act (AGOA), the EU’s Everything But Arms (EBA) initiative which was meant for least-developed countries, and the Caribbean Basin Initiative of the United States.

#### **4.1 SDT in the EU-ACP Economic Partnership Agreement**

Special and differential treatment (SDT) refers to measures taken to recognise the unique needs and challenges developing countries face in negotiating and implementing international trade agreements.<sup>170</sup> These measures are intended to ensure that these countries are not disadvantaged and can fully participate in and benefit from the WTO Agreements.<sup>171</sup> Common or community interest refers to the shared goals and objectives of a group of countries that are not disadvantaged by the agreements. This can include provisions for longer implementation periods, special flexibilities, and technical assistance to help these countries implement the agreements, as mentioned above.<sup>172</sup>

In 1996, an EU green paper recommended the replacement of non-reciprocal trade arrangements in the Lomé Convention between the EU and African Caribbean and Pacific (ACP) countries with a reciprocal free trade agreement.<sup>173</sup> The Cotonou Partnership Agreement clearly defines the new framework for relations between the EU and ACP countries.<sup>174</sup> During

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<sup>168</sup> Lancaster (2007) p. 15.

<sup>169</sup> Hurt (2003) p. 171. see Crawford (1997), P. 70.

<sup>170</sup> Stevens, (2002) pp. 1-3, 6. see, Ornelas, (2016).

<sup>171</sup> Id.

<sup>172</sup> WTO, Special and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision 28 November 1979 (L/4903). Available at, [www.wto.org](http://www.wto.org). Accessed: 28 January 2023.

<sup>173</sup> Commission of the European Communities, ‘Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership’ 20 November 1996, COM (96) (570 Final.) pp. iii. Available at <https://eu-lex.europa.eu/legal-content/EN/TXT/pdf/?uri=CE>. Accessed: 26 June 2020.

<sup>174</sup> Article 95 (1), Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the other Part, (23 June 2000) (hereinafter Cotonou Agreement). Available at [https://eur-lex.europa.eu/resource.html?uri=cellar:eebc0bbc-f137-4565-952d-3e1ce81ee890.0004.04/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:eebc0bbc-f137-4565-952d-3e1ce81ee890.0004.04/DOC_2&format=PDF). Accessed: 3 April 2023.

the preparations for the EPA negotiations and at the time it was formally launched in West Africa in September 2002, the attention was on reciprocity and how common interest beyond reciprocal arrangements could be achieved.<sup>175</sup> The concerns were centred on the development dimension of the EPAs and their impact on poverty, as well as the strengthening or weakening of the integration of the regions in Africa.<sup>176</sup> Addressing these issues in the context of EPA negotiations proved to be difficult—due to the complexity of African challenges.<sup>177</sup> Notwithstanding the complex nature of the African problem, such as lack of capacity to assess and manage their challenges, administrative dysfunctionality and challenges of governance, poverty and poor infrastructure.<sup>178</sup> African exports like many other developing countries since independence has been focused on raw material.<sup>179</sup> special treatment was included in the EPAs.

Regarding the protection of infant industry, it provides that tariffs may increase due to a significant surge in the quantity of EU imports. Before this can apply, it must be shown that the EU import surge caused or threatened to cause serious injury, and safeguards may apply if the disturbance continues. The period of time that safeguards may apply is limited at first to eight years. For example, the SADC-EU EPA limits this to eight years within the first 12 years,<sup>180</sup> CARIFORUM limits the application of safeguards to eight years within the initial 10 years, Ghana is eight years within the first 10 years, with the option of an extension for Ghana.<sup>181</sup> Finally the EAC EPA with the EU provides for eight years of infant industry protection within the first 10 years.<sup>182</sup>

It has been argued that the scope of the safeguards measures is limited.<sup>183</sup> The position of the EU is that the limited flexibility on safeguards is to meet the requirement of ‘substantially all trade.’<sup>184</sup> It was further noted in critiques that the definition of ‘serious injury’, was borrowed

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<sup>175</sup>Supra, Hurt (2003) p. 173.

<sup>176</sup>Id. Mandelson P European Commissioner for Trade, ‘Economic Partnership Agreements: progressive trade policy into practice’ SPEECH/05/241 ACP – EU Joint Parliamentary Assembly Bamako, Mali, 19 April 2005, p.5. Available at, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_05\\_241](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_241). Accessed 27 October 2021.

<sup>177</sup>Stevens et al (2008) pp. 1-9. Lui and Bilal (2009).

<sup>178</sup> Malik and Teal, (2008) PP.248-252. Commission of the European Communities, ‘Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership’ 20 November 1996, COM (96) (570 Final,) xii, <https://eu-lex.europa.eu/legal-content/EN/TXT/pdf/?uri=CEL...> Accessed: 26/6/2020.

<sup>179</sup> Wilkinson (2014), p. 32.

<sup>180</sup> Articles 33, 34, 35 and 36 SADC-EU EPA. Available at, [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153915.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf). Accessed: 24 January 2023.

<sup>181</sup>Articles 25 (8) and (7) (b), 16; Ghana-EU EPA Ghana-EU EPA Annex 2. Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A1021\(01\)&rid=4](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22016A1021(01)&rid=4). Accessed: 3 April 2023. Berthelot, (2016).

<sup>182</sup> Articles 50 (5) (b), 49, Economic Partnership Agreement Between the East African Community Partners States, and the European Union, (hereinafter EAC-EU EPA) Available at, <http://repository.eac.int/bitstream/handle/11671/1699/EAC%20-%20EU%20EPA%20AGREEMENT.pdf?sequence=1&isAllowed=y> Accessed: 24 January 2023. Article 21 ESA-EC Interim EPA.

<sup>183</sup> Rajan and Gupta, (2018), PP. 20-48.

<sup>184</sup> Article XXIV: 8 GATT.

from WTO rules. This has resulted in some countries in the ACP fearing that its meaning could be influenced by GATT Article XIX, the WTO Safeguards Agreement,<sup>185</sup> and the Appellate Body's strict interpretation of this concept.<sup>186</sup> The phrase 'serious disturbance' seems to have been imported from EC GSP.<sup>187</sup> In the same way the EPA included the WTO idea of 'such increased quantities' which 'cause or threaten to cause' without a specific reference to the volume or price that could trigger this effect.<sup>188</sup> For instance, data on import volumes may be collected with much less rigour in developing countries. Safeguards may be hard for ACP countries to make use of effectively, which could hamper their effectiveness without, among other things, advances in observing trade flows and new rules.<sup>189</sup> As a result of a lack of capacity in these areas, it has been observed that many African countries cannot take advantage of the safeguard measures as provided for in the agreement's text.<sup>190</sup>

However, it should be noted that the EU is bound by international obligations, such as the WTO agreements, which determine the extent to which the EU could take action to a large degree. The EU, for instance, is obligated to observe its WTO obligations in a variety of areas including MFN tariffs, safeguards, technical barriers to trade (TBT), sanitary and phytosanitary (SPS) measures, the GATT (1994), and the General Agreement on Trade in Service (GATS) all of which constrain the scope of EU policy. The Commission has argued extensively that GATT Article XXIV constrains the scope of its flexibility towards ACP countries.<sup>191</sup> Nevertheless, Woolcock observed that EU policy towards African countries is shaped by 'normative factors' such as the EU debate on policy space and institutional factors that move the focal point of EU policy-making between the EU Director General for Trade and the EU Director General for Development (DG INTPA today).<sup>192</sup> Normative issues and trade rules, no doubt, shape market access.<sup>193</sup>

It is important to note that the kernel of EU trade policy is provided in the Common Commercial Policy (CCP). Article 206 of the Treaty on Functioning of the European Union (TFEU) states: 'the EU shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'.<sup>194</sup> This CCP must comply

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<sup>185</sup> Supra, Rajan and Gupta note 169.

<sup>186</sup> Argentina-Safeguard Measures on Imports of Footwear WT/DS121/AB/R 14 December 1999 para. 96. Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R Para. 86 14 December 1999.

<sup>187</sup> Article 22 Council Regulation (EC) No 980/2005 of 27 June 2005 Official Journal of European Union (27 June 2005). Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R0980&from=EN>. Accessed: 3 April 2023

<sup>188</sup> Sykes, (2003) PP. 2-6. Trebilcock and Howse (2005), pp. 330-1. See Article XIX, of the WTO Agreement on Safeguard Measure. Available at [https://www.wto.org/english/tratop\\_e/safeg\\_e/safeint.htm](https://www.wto.org/english/tratop_e/safeg_e/safeint.htm). Accessed: 24 January 2023.

<sup>189</sup> Id, Trebilcock and Howse (2005), pp. 334.

<sup>190</sup> Agbo-Ejeh, (2022) p. 103.

<sup>191</sup> Koroma and Ford (2006) pp. 25-30.

<sup>192</sup> Woolcock (2014) pp. 36-48.

<sup>193</sup> Woolcock (2014) pp. 36-48.

<sup>194</sup> Article 206, TFEU, <https://knowww.eu/nodes/5c35a63bc76ed6738667ee38>

with the external objectives of the EU provided in Article 21 of the Treaty on EU.<sup>195</sup> The general aims include the promotion of democracy, the rule of law and human rights, the preservation of peace and good governance, trade and investment ‘and fostering of sustainable economic, social and environmental development of developing countries to eradicate poverty and also ‘to encourage the integration of all countries into the world economy’, including prevention of barriers to trade liberalisation. The EU also acknowledged a common interest in its CCP to promote developing countries’ welfare. However, it remains to be seen the extent to which this special treatment will truly benefit African countries.

## 5 Conclusion

This paper addressed common interest against a backdrop of special and differential treatment in the GATT/WTO law and the EU-African relationship including EPAs and the renewed vision for the EU-Africa Partnership, agenda 2030. This limited assessment demonstrated attenuated reciprocity in the WTO. It is recognised that reciprocity remains the key principle of the world trading system.<sup>196</sup> Fundamentally the focal point is the balance of rights and obligations of each member as well as among all WTO members.<sup>197</sup> However, to enable less developed countries to trade and level up with more advanced economies, they were allowed to deviate from the non-discrimination principle and given allowances based on SDT.

Thus, this work recognised the positions from which scholars<sup>198</sup> view common interest: first considered was reciprocity and non-discrimination with a view to advancing the interests of all WTO members through mutual tariff reduction. The second is the gains that accrue as a result of trade negotiation in ‘terms of rights and obligations’ benefitted by or ‘owed to any member’. The third debatably is the idea that where a system is put in place by states, justness and equity is implied, as such the relationship can no longer be based purely on bilateral exchange.<sup>199</sup> The provision of SDT is a recognition of developing countries’ current lack of capacity to compete effectively with advanced countries. Hence such concerns become a common interest of all members. As such, it is reflected in the SDT to enable these countries to level up. This chapter explored the various provisions of SDT and found that developing countries have benefitted from SDT but not sufficiently to solve their problems. As noted by Lamp, there is no benefit in the SDT provisions that is the intention, but any gain by the developing countries is ‘accidental’ or incidental because the arrangement was made for a different purpose: to keep developing countries within the system. SDT is perceived as the ‘second best solution, and it turns developing countries ‘quest for market access into a begging operation’.<sup>200</sup>

An examination of some provisions of the Economic Partnership Agreement between the EU

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<sup>195</sup> Id

<sup>196</sup>Stoll *supra*, pp. 181-2.

<sup>197</sup>Id.

<sup>198</sup> *Supra* Rao note 3; *supra* Stoll, note 4, *supra* Simma, note 26.

<sup>199</sup> *Supra*, Stoll, pp. 182-3.

<sup>200</sup> *Supra*, Lamb note 81 p. 765.

and various African groups revealed minimal flexibility; indeed, the flexibilities granted to the African countries run both ways because they are extended to the EU. This is not to say there are no other flexibilities provided for the African countries in the EPA, but fundamentally, there are widespread beliefs that these countries have no capacity to take advantage of the special treatment provisions or deviations from the core agreement.<sup>201</sup> As noted Jones, maintains that EU leaders should put aside ‘grand plans and framework’ to give relevant and significant strategy.<sup>202</sup> The focus, according to her should be ‘alliance’ and not ‘partners of equals’ because of the realities faced by African countries.<sup>203</sup>

Since SDT does not yield the desired outcome for the targeted countries, per se, should it be discarded? As noted in the conceptualisation of common interest, the ability of developing countries to participate or take advantage of the provisions of WTO law should indeed be a common concern. This should encompass a substantial commitment being made by advanced economies with a view to attaining the objectives and respecting the principles underlying SDT. However, it is important to note that SDT is not the only solution. The common interest expressed in the African Continental Free Trade Area provides a great opportunity for moving Africa forward to trading more robustly with the rest of the world.<sup>204</sup>

The global trading system can adopt a well-informed plan of action to accommodate many of its developing members to reduce disparities in global living standards. This should be genuinely made a common interest to curb and eliminate acute poverty and all forms of lack of capacity in Africa and other parts of the world; this can only be achieved by moving away from a hortatory declaration concerning SDT. Efforts must be made to reconcile competing interests at different levels of development for equity in the world order.<sup>205</sup>

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<sup>201</sup>Lopes (2020) Why Africa Should Revise its Agreement with the EU <https://www.cnbcfrica.com/media/6178041844001/>. Accessed 31 January 2023.

<sup>202</sup>Jones (2020) p. 7. See Ismail and Grunder (2019), p. 19,

<sup>203</sup>Id.

<sup>204</sup>Supra note 129.

<sup>205</sup>Rao supra note 3 PP 336-7.

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