S&DT Provisions in the WTO: Looking Through the Prism of Graduating LDCs

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This presentation is based on:

• Rahman, M. (2021): Securing Sustainable LDC Graduation: Next Challenges for Bangladesh

Introduction: Setting the Context

- A large number of LDCs are slated for graduation over the next few years
  - If between 1971 and 2021 only six LDCs had graduated, at the 2018 review by the UN-CDP 12 LDCs were recommended for graduation. In the backdrop of the pandemic, at the 2021 CDP review nine LDCs were recommended for graduation
  - Graduation was deferred for some LDCs, for some years, because of the pandemic (e.g. Bangladesh and Nepal were recommended for graduation in 2026, instead of 2004, and Timor Leste and Myanmar were not recommended)
- The discourse on S&DTs has assumed new dimensions because of the graduation of such a large number of LDCs
- There is a significant number of S&DT provisions in the various WTO Agreements. Some of these are specifically targeted for the LDCs
- Number of S&D provisions in the various (16) WTO Agreements: 183
  - S&DTs exclusively for LDCs: 25 (Low, Patrick, 2021)
- S&DTs enjoyed by the LDCs are in the form of:
  - Extended period for Implementation of obligations through granting of transition period (e.g. TRIPS 66.1 transition till end of 2032)
  - Waivers granted to allow offering countries preferences to providers from LDCs (e.g. services waiver to LDCs in GATS)
  - Flexibility of commitment as regards use of policy instruments and obligations (e.g. Category A, B and C Trade Facilitation Agreement)
➢ Flexible requirements (e.g. Voluntary notification requirement under the TRIMS Agreement)
➢ Relaxed discipline as regards, for example, support that can be provided by governments (e.g. AMS in AOA)
➢ Trade related technical, legal and financial assistance (e.g. support under the EIF; Technology Bank)

- LDCs also enjoy preferential market access under autonomous initiatives operated by providing WTO member countries. For example, as part of LDC-specific preferential market access schemes
  ➢ These preferences are allowed and codified under the WTO Enabling Clause of 1979
  ➢ These are offered: bilaterally (e.g. EU-EBA, LDC-specific GSP Schemes). And as part of RTAs (e.g. in SAFTA, India offers DF-QF marker access to all SAARC LDCs)
- Together the above constitutes international support measures (ISMs) for the LDCs
Relevance of G-90 Proposals to Operationalise S&D Provisions

• G-90 Proposal to improve operationalisation of S&DTs is of high relevance and heightened importance to the LDCs and Graduating LDCs from the perspectives of:
  ➢ Meaningful operationalisation of the S&DTs
  ➢ Implementation support to help reap benefits of the S&DTs
  ➢ Extension of S&DT benefits to the graduating LDCs for time-bound period

• LDCs and Graduating LDCs have many concerns as regards the S&DTs

• Many S&DTs favouring the LDCs in the GATT built-in agendas and as part of various WTO decisions have not been implemented. For example:
  ➢ NAMA: Duty-free, Quota-free market access for the LDCs: Hong Kong MC6 decision in 2005 (not many notification as yet as regards the list of 97 per cent items DF-QF Market Access)
  ➢ GATS: Operationalisation of LDC services waiver decision: Geneva MC8 decision in 2011 (while offer and request lists have been submitted, the waiver is yet to be operationalised)
  ➢ Monitoring Implementation: S&D Monitoring Mechanism : Bali MC9 decision in 2013 (however, the decision allows only recommendations to be made to relevant WTO bodies; no enforcement mechanism)
  ➢ RoO: Implementation of LDC-Friendly RoO: Nairobi MC10 decision in 2015 (work still in progress)
  ➢ TRTA: Resource commitment to EIF has been far lower than the support needed for the LDCs (the current phase of EIF ends in 2022)
LDC Graduation and Loss of S&DTs

Chart 1: Graduation and Loss of Preferential Treatment

ISMs for the LDCs (S&DT and PMA)

- As part of S&DTs in WTO Agreements
- Unilateral Schemes for LDCs
- Bilateral and Regional FTAs
- Aid for Trade

Loss of Preferential Treatment on Account of Graduation

- Erosion of Preferences in View of Market Access Provided Unilaterally
- More Stringent Requirements for Rules of Origin
- Loss of Preferences in BFTAs/RTAs Accorded for the LDC
- Loss of Concessional Finance (primarily because of the middle income graduation)

Source: Developed by the author

- On graduation, LDCs will lose LDC-specific S&DTs, with significant adverse impacts on their trade performance
- Although graduated LDCs will be eligible for S&DTs for developing countries, those are significantly narrower and shallower
### Box 1: Implications of LDC Graduation in View of Selected WTO Agreements

<table>
<thead>
<tr>
<th>Provision</th>
<th>LDC Flexibilities</th>
<th>Implications for LDC Graduation</th>
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<tbody>
<tr>
<td><strong>Subsidies and Countervailing Measures (SCM)</strong></td>
<td>Flexibility concerning subsidies contingent on local content requirement for export provided to LDCs has expired in 2002. However, pursuant to Article 27.2 and Annex VII (a) LDCs are exempt from prohibition of export subsidies for non-agricultural products. Annex VII(b) allows countries whose per capita GNI is less than $1000, in 1990 terms, to enjoy flexibilities in this regard.</td>
<td>Many graduating LDCs including those in South Asia provide subsidies for a large number of items in the form of cash schemes (e.g. for new products and new items in case of RMG exports by Bangladesh), export credit support, incentives for backward linkages. Some have subsidies in place contingent on local content requirement in case of export. With regard to subsidies for export of non-agricultural products, the exemption will no longer be available on graduation. LDCs may try to get into the list of Annex VII (b) countries whose per capita GNI (in 1990 terms) is less than 1000 US$. Bangladesh is not expected to benefit from this provision.</td>
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<td><strong>Agreement on Agriculture (AoA)</strong></td>
<td>LDCs are not required to undertake tariff reductions commitments, but only bind tariffs in the WTO. With respect to Export Competition agreed at MC10, LDCs and NFIDCs can provide certain subsidies and are allowed to monetise international food aid. They are also permitted lower frequency of notification. LDCs are required to notify every two years as regards domestic support.</td>
<td>LDCs have bound tariffs for agricultural and manufacturing goods, but not to the fullest extent. These bound tariffs will remain unchanged. However, agri-export subsidies will not be allowable. However, a member can continue to enjoy flexibilities if it is listed as a net-food importing country (NFIDC). Indeed, 42 out of 47 LDCs are NFIDCs. On graduation, LDCs will be subjected to more frequent notifications.</td>
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<td><strong>Trade-related Investment Measures (TRIMS)</strong></td>
<td>TRIMS does not allow local content requirement or value/volume ceiling on import content as per cent of exports. However, LDCs are granted exemption till December 2020.</td>
<td>LDCs have not made any notification to the WTO as regards taking recourse to any TRIMS flexibilities. However, certain sectors do have local content requirements in place. This will no longer be allowable. Industrial Policy and Export Policy of graduated LDCs will need to be made WTO-compliant.</td>
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<td><strong>Trade-related Intellectual Property Rights (TRIPS)</strong></td>
<td>TRIPS Article 66.1 allows LDCs flexibilities in implementing TRIPS provision till July 2021 (latest extension).</td>
<td>At the 29th June 2021 meeting of the TRIPS Council the transition period has been extended for LDCs till July 2023. But an LDC will lose eligibility to enjoy the benefits from the time it will graduate.</td>
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<td><strong>TRIPS and Public Health</strong></td>
<td>TRIPS and Public Health decision allows the LDCs flexibility in areas of patents and licensing requirements (effective till end-2032)</td>
<td>LDCs such as Bangladesh have made good use of TRIPS flexibilities. For example, 20 per cent of Bangladesh’s Pharma industry’s drugs are generic versions of patented drugs. Import restrictions and price regulations are also in place. IP legislations and patent laws will need to be made compatible with TRIPS regime. Price of a common drug like insulin could rise eight-fold.</td>
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### Trade Facilitation Agreement (TFA)

LDCs are allowed to self-determine the process of implementing TFA (categories A, B and C). They have also been granted extra time for notification. Longer grace period for dispute settlement creates flexibility in expending commitments as regards B and C. The LDC-specific timeline for notification as regards definite dates of implementation of category C commitment will expire in August 2022. Thus, graduating LDCs will need to comply with this even before graduation. On graduation, graduating LDCs will lose the flexibilities as regards dispute settlement and extension of B and C categories of commitment.

### Trade in Services

Under the WTO GATS, LDCs are allowed to liberalise at slow pace. LDCs are to be given special priority in accessing sectors and modes of supply of export interest to the LDCs. In the context of LDC services waiver, members are to provide preferential treatment to services and service suppliers of LDCs with regard to market access. The waiver is currently valid till end of 2030. 24 WTO members have provided waiver notification that cover a wide range of areas and all four modes of services. However, these are yet to be operationalised. A large number of LDCs will graduate earlier than 2030. Accordingly, they will cease to benefit from current benefits or any benefits to be agreed upon later, accruing from operationalisation of the services waiver.

### Climate Fund

There is a dedicated fund for LDCs for climate related support. Support from LDCF will no more be available. However, graduated LDCs will continue to have access to Special Climate Fund (SCCF) and Green Climate Fund as these are open to all vulnerable developing countries.

### Sanitary and Phytosanitary Measures (SPS) Agreement

SPS Agreement provides for technical and capacity building support to both LDCs and developing countries. However, LDCs are to get preference as regards support from Standards and Trade Development Facility (STDF) and are required to have a lower level of co-financing (10 per cent). Impact of graduation is anticipated to be limited. However, graduating LDCs are likely to receive lower priority in getting support from STDF once they graduate. Their share of financing contribution will rise from 10 per cent to 20 per cent.

**Source:** Compiled by the author on the basis of information in WTO (2020).

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LDC graduation will have implications in four areas involving domestic space and global space:
• Graduating LDCs will need to be guided by Three Perspectives

![Diagram showing Three Perspectives: As an LDC, As a Graduating LDC, As a Future Developing Country]

Source: Author’s elaboration

• However, graduating LDCs will need support of WTO members towards Sustainable Graduation
Support for Graduating LDCs

S&DT and LDC Proposal at WTO-GC

- At the General Council (GC) Meeting of the WTO, LDCs have floated a proposal asking that they be allowed to enjoy LDC-specific ISMs (S&DT and preferential market access) for 12 years after an LDC has graduated from the group

- In view of the above, the following arguments may be put forward:
  - Graduation of current slot of LDCs is taking place under the long shadow of the pandemic
  - The requested support is not being sought by ‘graduated LDCs’ but by LDCs, a group recognised in the WTO, which will be graduating over time depending on meeting certain eligibility criteria.
  - There is already support measures in place within the ambit of the WTO (EIF, Technology Bank) which extend support to LDCs following their graduation. These allow LDCs to enjoy benefits for additional periods (for an additional five years in both the aforesaid cases, following graduation).
  - It is not that WTO does not recognise differentiation among the developing country. For example, the WTO-SCM (subsidies and countervailing measures) Agreement (Annex VIIb) allows for derogation from obligations on grounds of per capita income (US$1000 in 1990 terms). Also the WTO Agreement on Agriculture (AoA) offers flexibility to net-food importing developing countries (NFIDCs).
  - There is precedence in the WTO as regards support to graduating LDCs: Maldives LDC graduation: Deferment of TRIPS implementation by 3 years.
  - At the least, currently graduating LDCs should be allowed to enjoy the flexibilities that are already in place, for a time-bound period (e.g., TRIPS patent waiver till 2032; GATS Services Waiver till 2030)
  - The scores for HAI and EVI (which were moving averages earlier) have been fixed in 2012 (at 66 and above and 32 and below) leading to many LDCs being eligible for graduation
  - The EU has already offered that LDCs will be allowed to enjoy preferential market access under the EBA for three years following their graduation from the group. Other countries can offer similar extension

- The LDC proposal can be agreed upon in the form of a Waiver. The Plan B is to constitute a Working Group to discuss the LDC proposal and make concrete recommendation for subsequent decision
Upcoming WTO MC12, S&DTs and Support Towards LDC Graduation

• UN Resolution: Graduation is not a destination but a milestone in the journey of LDCs

• There is a need for support towards Smooth Graduation, Graduation With Momentum and Sustainable Graduation

• There is a need for a new set of ISMs for graduating LDCs in support of the Cause of Sustainable Graduation of Graduating LDCs

• WTO MC12 must give due importance to the WTO-GC proposal submitted by the LDCs and take concrete initiatives that meets their expectations

• Concerns of LDCs and Graduating LDCs must be embedded in S&DT provisions in ongoing negotiations (For example, Agreements on Fisheries, AoA)

• MC12 decision should include concrete modalities for operationalisation of the various S&DT provisions in the WTO Agreements targetted for the developing country members of the WTO. This is important for graduating LDCs which are also future developing countries
Thank You