

Rethinking Special and Differential Treatment in the WTO*

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Debates on Special and Differential Treatment (S&DT) at the WTO seem to have largely shifted from the effectiveness of provisions to the eligibility of WTO members for availing S&DT. Today, there is no consensus among WTO members on fundamental aspects of S&DT. There is no real way to measure whether a level-playing field exists after 27 years of the WTO's existence - either between the developed and developing countries or within the group of developing countries.

Least-developed countries (LDCs) have faced significant challenges in effectively utilising S&DT flexibilities to integrate into the global trading system better. While S&DT is a cross-cutting issue, it is only one of the WTO's many challenges. Any reform of S&DT is only likely to succeed if addressed as a part of larger trade negotiations. Finally, any rethinking of S&DT must ensure that development concerns remain at the core of the WTO.

Introduction

We will present some thoughts on the debates on Special and Differential Treatment (S&DT) at the WTO, and what "rethinking" S&DT may look like.

In the early years of the WTO, the discussion was about the *effectiveness* of S&DT provisions. Historically, many S&DT

provisions for the developing Members have remained couched in unenforceable, best endeavour language. In contrast, developed Members have often been unintended beneficiaries of "reverse S&DT" – enjoying enforceable, sectoral flexibilities not available to developing countries.

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If China's industrial subsidies are condemned as trade-distortive today, are they much different from what the advanced WTO members pursued in their agricultural subsidy programmes and under the textiles agreement until it expired in 2005? Nobody is above board, and a better-designed system is required to attack all trade-distortive subsidies, for equity, and in emerging contexts like climate change – which Members cannot bend as per their liking.

Even when it comes to sustainable development, we need to recognise that for the developing world, sustainable development goes much beyond only environmental concerns - socio-economic factors, economic development and employment generation are the key sustainable development priorities. S&DT, which realistically facilitates the achievement of these goals, is, therefore, an imperative.

While the effectiveness debates rage on, there is today greater discussion on the *eligibility* of WTO members for availing S&DT.

What is the state of play in S&DT debates involving developing countries at the WTO?

As we all know, the WTO has been following a practice of self-certification of developing country status, wherein a country can self-declare itself as a developing country under the WTO framework.

Since 2019, there have been concerted efforts to highlight the need for more objective criteria for certification

of development status instead of blanket self-certification. The U.S.'s proposals seek to use parameters such as the membership of certain groupings (G20, OECD) and global trade participation levels to "objectively" determine a WTO Member's development status.

Counter-proposals contest any such efforts to differentiate between developing countries and emphasise that S&DT is a treaty-embedded right, which should be preserved and only strengthened.

The picture is certainly a lot more complicated.

First, we must recognise that S&DT is seen as a vital component of the grand bargain and a negotiated outcome of the Uruguay Round for developing countries. S&DT has always been rooted in political economy concerns, and the "developing country" tag is too politically fraught to give up entirely. On the other hand, for developed members, S&DT is seen only as a transient tool. For them, developing countries' graduation from availing S&DT benefits is only a question of *when* not *if*.

Empirical data, such as that of HDI, GNI per capita, poverty levels, etc., can shed some light on how the development divide has been bridged over the past 27 years of the WTO's existence. For example, trade may have played an important role in Bangladesh's transition into a developing country from its erstwhile least-developed status, particularly in textiles and clothing (Bangladesh has been recently rivalling India in terms of exports of garments and

its per capita GDP). However, such data cannot quantify the political and institutional value of the “developing nation” tag.

There is no real way to measure whether or not a level playing field exists between developed and developing countries or within the group of developing countries. Further, macro-level objective criteria cannot fully appreciate the different levels of constraints in different sectors.

Overall, it will be challenging to arrive at a consensus in the WTO on *which* objective criteria will best capture levels of development and integration into the trading system.

The Trade Facilitation Agreement (TFA) is often suggested as a model for tailor-made S&DT for different agreements and situations. Yet, it must be kept in mind that even the TFA allows Members a degree of self-designation – in terms of the extent and category of obligations they wish to undertake. Even the General Agreement on Trade in Services allows members to voluntarily opt for negotiations in any sector without any reciprocity.

Since 2019, South Korea and Brazil have voluntarily given up their self-declared developing country status and the associated S&DT flexibilities. Interestingly, China has said that it will “remain” a developing country at the WTO but begin to forego many of the S&DT benefits.

What is the way forward?

In recent sectoral negotiations, a clear trend towards greater differentiation *between* developing countries is evident, based on objective parameters and economic data. For example, in the fisheries subsidies negotiations, some options that have been considered for S&DT involve looking at percentage shares of Members’ marine catch.

If we look at the draft of the TRIPS waiver solution agreed upon two weeks ago, it also differentiates between eligible developing countries. It provides that only those developing WTO Members that exported less than 10 percent of world exports of COVID-19 vaccine doses in 2021 will be eligible Members for the TRIPS waiver solution. Again, we see a differentiation based on quantitative parameters. Interestingly, India is a part of the four countries (EU, USA, India and South Africa) among whom this outcome was first agreed upon. It remains to be seen if this indicates a change in India’s overall stance towards S&DT, in terms of its strident opposition to any dilution of blanket S&DT.

These trends align with the EU’s proposal of having a case-by-case, sector-specific, negotiated S&DT.

Now, the question is - Is it possible to retain both the political symbolism of self-declaration of development status and make S&DT more targeted?

Arguably, yes.

An overall solution can look something like this – don't alter the existing practice of self-declaration of *overall* development status in the WTO, primarily for political reasons. However, for *operational* S&DT flexibilities in new negotiations, look for tailor-made, sector-specific parameters.

Thus, it could be the case that a self-declared developing country (in the overall WTO sense), could be eligible for availing S&DT in, say, agriculture negotiations but ineligible for availing S&DT in fisheries negotiations. A combination of qualitative and quantitative indicators for availing S&DT may be the most viable option in the future under an overall politically acceptable solution to all Members.

Such a model can also potentially be extended to the negotiations under the JSI tracks, such as electronic commerce and investment facilitation.

This would adequately address both concerns - varying levels of development and technical capacity among developing members, and retain the political symbolism in the form of self-declaration.

For LDCs, the concerns are entirely different. For LDCs, the question is not about designation, but about implementation capacity and technical expertise. They need significant capacity building to effectively utilise WTO

flexibilities and better integrate into the world trading system. No matter how much of a handicap (advantage) you grant in a boxing bout, would the weaker person ever have been able to take on Muhammad Ali in the ring?

We also need to ask ourselves – Is S&DT reform the most important priority before the WTO today? While it is a cross-cutting issue, S&DT is only one of the many challenges facing the WTO – including existential crises in a stalled rule-making function and the prolonged Appellate Body stalemate. It will be sensible to address S&DT only as a part of larger negotiations, not independently.

Any discussions on S&DT by itself are unlikely to get any negotiation traction, especially if the focus is on replacing self-declaration with the establishment of objective criteria. Similarly, there can be no one-size-fits-all criteria for graduation. Imaginative thinking is required, and any rethinking of S&DT must reinforce that development concerns remain at the core of the WTO.

Ultimately, developing countries need to be convinced that better-targeted S&DT measures, including technical capacity, instead of blanket S&DT, will only help them achieve their trade and developmental goals.