



# Reforming Special and Differential Treatment for Developing Countries in the WTO

Institute for International Trade

## Policy challenge

Special and Differential Treatment (SDT) is a set of legal provisions which give developing countries special rights and allow developed countries to treat the former more favourably than other World Trade Organization (WTO) members.<sup>1</sup> SDT acknowledges that countries at different stages of development need different rules to support economic growth. However, since countries in the WTO self-declare their status as “developing”, SDT has often been a contested matter.<sup>2</sup> Tensions around SDT have more recently increased, with developed members — notably the United States (US) — questioning whether large emerging economies such as China should continue to claim SDT despite having achieved significant economic growth.<sup>3</sup> This raises questions of whether and how to set criteria that delimit access to SDT while accounting for divergent levels of development.

## Policy response

WTO members have three main options. First, they can leave the status quo (self-declaration) unchanged, and rely on bottom-up voluntary graduation of large emerging economies from the developing country category. Second, they can seek to introduce clear-cut criteria in a top-down manner that would delimit who gets access to SDT — as the US has suggested. Third, WTO members could opt for “differentiated differentiation”, and introduce issue-specific criteria that delimit access to differential treatment based on sector-specific capacity- or competitiveness-related indicators.<sup>4</sup> We recommend a layered approach that combines the introduction of sector-specific criteria for access to SDT with a pragmatic push for voluntary graduation. We offer a classification of negotiation issues to assess the likelihood of these different approaches to succeed.

## Introduction: Differential treatment and contested developing country status

Special and differential treatment of developing countries was introduced into the world trade regime in the 1960s and 1970s. At the time, newly independent developing countries pushed for greater recognition of their disadvantaged position in the world economy. More precisely, **they sought exemptions from the principle of reciprocity**, which implies an obligation on each party receiving trade concessions to provide equivalent benefits to the other party. Under SDT, it became possible for developing countries to be exempted from liberalization obligations. Other special rights enjoyed by developing countries under SDT include preferential market access to developed country markets, longer time periods for implementing trade commitments, flexibility of commitments and use of policy instruments, and access to financial/technical assistance.

<sup>1</sup>The views expressed here are the author's alone and not those of the Institute for International Trade.

Developing countries have described current SDT as insufficient and called for its deepening. The use of SDT, however, elicited the debate on whether SDT is a development tool to address the problems of developing countries or a trade tool to support the integration of developing countries into the global trading system.<sup>5</sup> Traditionally, SDT is envisioned to help developing countries to develop their economies through exports, and to enable them to pursue policy options they consider appropriate for their development.<sup>6</sup> This view allowed the adoption of restrictive trade policies by developing countries to help support the development of their domestic industries. A more recent perspective sees SDT as a trade instrument to support developing countries to overcome problems faced in implementing their trade commitments.<sup>7</sup> It envisions SDT as a tool to enable developing countries to take on their WTO treaty obligations to the fullest extent rather than providing them with exemption from rule obligations.<sup>8</sup>

More recently, developed countries have begun to contest the use of SDT. They signalled they would no longer give concessions to all developing countries, without being able to differentiate between different levels of development.<sup>9</sup> At the WTO, **states can self-declare their status as “developing”** and hence become entitled to SDT. This practice has become heavily contested considering the economic rise of many countries that traditionally claim developing status, including China, India, and Brazil.

Thus, it has been no surprise that recent discussions over SDT reform have focused on the question of who counts as a rights-holder. Most prominently, the US tabled a 45-page critique of the status quo in 2019<sup>10</sup>, and called for the **introduction of hard criteria to determine country status** and delimit access to SDT.<sup>11</sup> In a 2018 concept paper on WTO reform, the European Union (EU) also criticized the self-declaration approach, which allows roughly two thirds of the membership to claim SDT.<sup>12</sup> Similar calls for reform mostly come from other developed countries.<sup>13</sup> Developing countries have either remained largely silent on the topic, or actively opposed the suggested reform. A group of states that self-declare as developing country members — including China, India, and South Africa — submitted a 39-page communication to the WTO in which they defended the status quo.<sup>14</sup> They explicitly seek to retain the self-declaration approach.<sup>15</sup>



Given that decision-making in the WTO follows the consensus rule, these divisions have hampered SDT reform efforts. The **resulting deadlock** has not only left the already lingering WTO’s Doha Development Round negotiations in limbo but has made subsequent negotiations of development issues unduly costly. As the narrow scope of the fisheries subsidies agreement demonstrates<sup>16</sup>, conflicts over differential treatment have hampered or limited the room for consensus.<sup>17</sup> In other areas of WTO negotiations — such as agricultural subsidies — how to deal with large emerging economies that defend their access to developing country flexibilities remains unresolved and reinforces the deadlock.<sup>18</sup> WTO members are increasingly restricting SDT to the narrow sub-group of Least Developed Countries (LDCs) when new agreements are concluded, a practice that is less costly and less controversial.<sup>19</sup> The deadlock on SDT negotiations, thus, contributes to the WTO’s larger crisis that has gone hand in hand with a rise of discriminatory protectionist market interventions.<sup>20</sup>

### **Policy response: A practical approach to the reform of SDT would be to ease tensions concerning access to SDT**

Three options are conceivable:

**Voluntary graduation.** A first option is to drop any effort to formally reform the self-declaration approach, and to endorse the status quo. This would imply that all self-declared developing countries in the WTO continue to benefit from

SDT provisions in various agreements. Graduation from these benefits would depend on voluntary action, coupled with political pressure on large emerging economies. Recent years show that when it comes to newly negotiated agreements and decisions, this “hand-off” approach can work. The 2022 Decision on the waiver for Covid-19 vaccines, for instance, became possible after China, responding to US pressure, agreed to informally opt out of the Decision’s developing country flexibilities.<sup>21</sup> Similarly, China, Brazil, and other self-declared developing country members voluntarily decided to not make use of most of the flexibilities available under the 2017 Trade Facilitation Agreement.

**Traditionally, SDT is envisioned to help developing countries to develop their economies through exports, and to enable them to pursue policy options they consider appropriate for their development**

Relying on voluntary graduation and political pressure, however, is less likely to work whenever WTO members seek to renegotiate existing developing country flexibilities. Here, large emerging economies that continue to regard such flexibilities as beneficial would voluntarily need to accept higher costs for domestic producers. For instance, attempts to

renegotiate rules on harmful fisheries subsidies contributing to overcapacity and overfishing (i.e. subsidies beyond those covered in the fisheries subsidies agreement) so far failed. China, which is among the five largest providers of these subsidies, continues to claim developing country flexibilities, which makes it difficult to negotiate new rules on SDT on such subsidies.<sup>22</sup> Yet, the US, the EU, and other large subsidizers are only willing to reduce their own subsidies if China does not get to claim greater flexibilities. In such cases voluntary graduation is unlikely to succeed.

**What should be avoided, however, is the top-down designation of criteria that delimit access to SDT, as suggested by the US. Such an approach is neither likely to be politically feasible, nor adequate for capturing the developed/developing country divide.**

**Top-down designation of criteria that delimit access to SDT.** A second option is the US approach, discussed above.<sup>23</sup> The US proposal calls for defining access to SDT on the basis of some objective or measurable criteria, including membership of the OECD, membership of the G20, classification as a high-income country by the World Bank, or accounting for no less than 0.5 percent of global merchandise trade. Countries that fit any of the criteria would not qualify for SDT. Theoretically, this option offers a simple solution to the country categorization conundrum in the WTO and a seeming clear-cut approach to graduation from SDT.

However, the arbitrariness in the selection of the proposed criteria for graduation belie its feasibility. A wholesale adoption of the US proposal poses the danger of ignoring the factual development divide in economic and human development terms between developed and developing countries.<sup>24</sup> Instructively, even the US admits that OECD membership is not indicative of a

country's development status.<sup>25</sup> Hence, an OECD member like Mexico may defend being classified as a developing country in the WTO for purposes of SDT.<sup>26</sup> Lastly, the consensus nature of decision-making in the WTO leaves little chance of the US proposal gaining traction since it is unlikely that "targeted" countries will accede to it.

**Differentiated Differentiation: defining sector, or provision-specific criteria for SDT.** A third option is resorting to a rules-based approach which allows countries that exhibit similar "differences" regarding a particular rule for which SDT is intended, to receive SDT.<sup>27</sup> This requires successfully defining objective or measurable criteria for SDT eligibility on an agreement-by-agreement [or provision-by-provision] basis.<sup>28</sup> Termed "differentiated differentiation", it espouses an implicit threshold method to differentiation that is amenable to the principle of graduation.<sup>29</sup> A country may graduate from a provision-specific SDT while still remaining eligible for SDT under another provision.

This approach leans on making rule implementation contingent on a bottom-up approach anchored on the existence of implementation capacity rather than on country categorization.<sup>30</sup> Relatedly, the Trade Facilitation Agreement (TFA)

exemplifies how developing countries may set timelines for the implementation of specific TFA obligations: Developing countries can choose from different implementation-related flexibilities, depending on their own assessment of their capacities.<sup>31</sup> Notwithstanding, differentiated differentiation recognizes that a strict application of certain core rules of the WTO, including MFN, national treatment, the ban on the use of quantitative restrictions, and binding tariffs will benefit consumers and enhance welfare in developing countries.<sup>32</sup> Such core rules that promote non-discrimination and reciprocity in negotiations should bind all WTO members. This is despite the existence of weak institutional capacities in developing countries which could justify their pursuit of second-best trade policies.

### **The way forward? There is no one-size-fits all approach**

Our recommendation for WTO members is to adopt a **dual approach to resolve the access to SDT question**: differentiated differentiation as a preferred option whenever possible and voluntary graduation in cases where the former is not feasible. The differentiated differentiation approach has the highest potential to gain support





**specific competitive-related criteria and a push for voluntary graduation**

could be the most promising way forward in such cases that many developing countries perceive as “win-lose” (e.g. without SDT, their firms lose out to developing country firms since there is no level playing field). Allowing countries to self-designate sector-specific needs in a “bottom-up” manner in which they think they do not need SDT flexibilities anymore — as was done under the TFA — increases the political leeway necessary to achieve consensus. Quick breakthroughs, however, cannot be expected. Note, moreover, that many of such sector-specific solutions are likely to come in the form of plurilateral, rather than multilateral agreements.

- In **time-sensitive negotiation issues** where SDT provisions are “zero-sum”, relying on **voluntary graduation** is the best choice. Here, introducing sector-specific criteria that all WTO members can agree to is likely to be too time-consuming. Conversely, voluntary graduation, coupled with political pressure, leaves room for tailor-made political solutions. This is most likely to work in negotiations of new issues not previously negotiated under the WTO. An example is the recently concluded TRIPS waiver on Covid-19 vaccines, where China, under pressure from the US, declared that it would voluntarily opt out from making use of developing country flexibilities.

among WTO members as it comes closest to an “objective” assessment of levels of development, while not undermining WTO member’s political right to self-declare as developing countries. Conversely, voluntary graduation offers political flexibility and can in some cases help to move forward when negotiation deadlocks are too pronounced, or too time-consuming to be resolved. Lastly, acknowledging that there is no one-size-fits all approach adds further flexibility, as it allows for continuity of the different visions of SDT.

What should be avoided, however, is the top-down designation of criteria that delimit access to SDT, as suggested by the US. Such an approach is neither likely to be politically feasible, nor adequate for capturing the developed/developing country divide. Imposing quantification in the WTO – a forum, where decision-making relies on the consensus principle – always allows members to contest the indicators chosen to delimit access to SDT. Given the far-reaching implications of such top-down general criteria (e.g. similar to the country classifications in the World Bank), which would imply that certain larger developing country members graduate immediately from all SDT benefits, political consensus on the introduction of such an approach is unlikely to emerge.

A practical question arises: when is differentiated differentiation likely to work, and when should WTO members push for the voluntary graduation approach?

- Differentiated differentiation is particularly likely to be uncontroversial in negotiations where the demand for differential

treatment stems from **capacity-related constraints with regard to resource intensive agreements that concern “behind the border” obstacles to trade like the Customs Valuation Agreement and the TFA**. Here, SDT comes primarily in the form of *longer transition periods* or *access to technical and financial assistance*. It allows countries to develop bottom-up capacities for implementation before taking on rules obligations or liberalization commitments. Ultimately, trade liberalization becomes a “win-win” for all as poor countries are able to benefit from the opportunities created by globalization in the same way as developed countries. Note that such a “win-win” scenario is less likely in market access negotiations in which gains result primarily from reciprocal concessions.

- In other negotiations, including those on market access and domestic subsidies, SDT provisions guarantee developing countries *de facto* **competitive advantages** vis-à-vis developed countries. For instance, developing countries may be allowed higher thresholds with regard to agricultural subsidies or fisheries subsidies, or allowed to opt-out from specific liberalization obligations in market access negotiations. **In such ‘zero-sum’ situations**, self-declared developing country members have an incentive to defend existing flexibilities. Such SDT issues – which require a re-negotiation of existing rules – are most difficult to reform. Self-declared developing countries can veto any new proposal. Hence, **a combination of sector-**

### About the authors

**Aniekan Ukpe** (Lex Mercatoria Solicitors, Abuja). Aniekan Ukpe is a partner at Lex Mercatoria Solicitors, an Abuja-based international trade law & policy consultancy, and a researcher in the field of International Economic Law.

**Clara Weinhardt** (Maastricht University). Clara Weinhardt is Assistant Professor in International Relations at Maastricht University, and a Non-Residential Fellow at the Global Public Policy Institute in Berlin.<sup>33</sup>

## Endnotes

1. WTO. (2016). Committee on Trade and Development, "Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat", (22 September) WT/COMTD/W/219
2. Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade* (1st ed.). Routledge.
3. Ibid.
4. Ukpe, A. & Khorana, S. (2021). Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development, 20(2) *Journal of International Trade Law & Policy* 83-100; Ukpe, A & Khorana, S. (2023). Differentiated Differentiation in the WTO Customs Valuation Agreement. *Journal of World Trade*, Vol. 57, No. 5, 731–762.
5. Page, S. (2004). The Evolution of Special and Differential Treatment in the Multilateral Trading System, paper presented at International Centre for Sustainable Development (ICTSD) workshop, 6 December 2004, Geneva, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4679.pdf>.
6. Hoekman, B. (2005). Making the WTO more supportive of development. *Finance and Development*, 42(1), 14-18.
7. Keck, A. and Low, P. (2004). Special and differential treatment in the WTO: Why, when and how?, p. 6, Staff Working Paper ERSD-2004-03, WTO.
8. Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO, above n 4.
9. Weinhardt, C., & Schöfer, T. (2021). Differential treatment for developing countries in the WTO: the unmaking of the North–South distinction in a multipolar world. *Third World Quarterly*, 1-20 at 14.
10. WTO. (2019). *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance. Communication from the United States*. General Council, WT/GC/W/757. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W/757.pdf>
11. WTO. (2019). *Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO*. Communication circulated by the US. [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?CatalogueIdList=251580](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=251580)
12. European Commission (2018). *WTO Modernisation – Introduction to Future EU Proposals – Concept Note*. Brussels: European Commission, p. 2. [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)
13. WTO. (2019). *Pursuing the Development Dimension in WTO Rule-Making Efforts*, Communication from Norway, Canada, Hong Kong, China, Iceland, Mexico, New Zealand, Singapore and Switzerland, WT/GC/W/770/Rev.3, WTO, Geneva, 7 May; WTO (2018), "Strengthening and Modernizing the WTO: Discussion Paper", Communication from Canada", JOB/GC/201, WTO, Geneva, 24 September.
14. WTO. (2019). *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*/GC/W/765/Rev.2. [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=251955&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=251955&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).
15. Note that they, moreover, claim that WTO rules tend to be biased in favor of developed countries, especially in the Agreement on Agriculture, which they refer to as "reverse SDT".
16. While largely being seen as a success, the agreement on fisheries subsidies has, for instance, been criticized for being limited to subsidies for illegal, unreported, and unregulated fishing – which excludes most subsidies on fisheries, including the category of harmful capacity-enhancing subsidies. Other subsidies are to be covered in future negotiations. Moreover, the agreement continues to rely on self-notification of subsidies – which often remains unreliable. Hoekman, B. M., Mavroidis, P. C., & Sasmal, S. (2023). Managing Externalities in the WTO: The Agreement On Fisheries Subsidies. *Journal of International Economic Law*, 26(2), 266-284.
17. The Guardian. (2022). 'First WTO deal on fishing subsidies hailed as historic despite 'big holes'', by Karen McVeigh, 21 June 2022, <https://www.theguardian.com/environment/2022/jun/21/first-wto-deal-on-fishing-subsidies-hailed-as-historic-despite-big-holes>.
18. In particular, China and India's high nominal subsidy levels have received criticism from WTO members, including the US, the EU, and members of the negotiation coalition "Cairns group" that comprises agricultural exporters such as Brazil or Australia. Compare Schöfer, T., & Weinhardt, C. (forthcoming), "Conflicts over special and differential treatment in agriculture", in: *The Unmaking of Special Rights: Differential Treatment of Developing Countries in Times of Global Power Shifts*, by Dingwerth, K., Weinhardt, C., Eckl, J., Schöfer, T. and Herr, S., Edward Elgar Publishing.
19. Weinhardt, C., and Schöfer, T. Differential treatment for developing countries in the WTO, above n 10..
20. See <https://www.globaltradealert.org>.
21. Mercurio, B., & Upreti, P. N. (2022). From necessity to flexibility: A reflection on the negotiations for a TRIPS waiver for COVID-19 vaccines and treatments. *World Trade Review*, 21(5), 633-649.
22. National University of Singapore. (2023). *The World Trade Organization Fisheries Subsidies Agreement: A Critical Assessment on the Impacts to Developing Fishing Nations and the Way Forward*, Blog post by Trung Nguyen, 17 January 2023. <https://cil.nus.edu.sg/blogs/the-world-trade-organization-fisheries-subsidies-agreement-a-critical-assessment-on-the-impacts-to-developing-fishing-nations-and-the-way-forward/>
23. WTO. (2019). *An Undifferentiated WTO*, above n 11.
24. See WTO. (2019). *The continued relevance of special and differential treatment*, above n 15.
25. Ukpe, A. & Khorana, S. (2023). Differentiated Differentiation in the WTO Customs Valuation Agreement, above n 4.
26. Ibid.
27. Hoekman, B. et al (2003), *More Favourable and Differential Treatment of Developing Countries: Towards a New Approach in the WTO*, Policy Research Paper 3107, the World Bank. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3107>.

28. See Stevens, C. (2002), The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO, Working Paper No. 163, Institute of Development Studies, Sussex England, 1 January, available at <https://www.ids.ac.uk/publications/the-future-of-special-and-differential-treatment-sdt-for-developing-countries-inthe-wto/>.
29. Ukpe, A. & Khorana, S. Differentiated Differentiation in the WTO Customs Valuation Agreement, above n 4.
30. Ukpe, A. & Khorana, S.(2021) Special and Differential Treatment in the WTO, above n 4.
31. Ayoki, M. (2018). Special and Differential Treatment of Developing Countries in the WTO Agreement on Trade Facilitation: Is there a cause for optimism? p. 5. (No. 87592). University Library of Munich, Germany, available at <https://mpra.ub.uni-muenchen.de/87592/>.
32. Hoekman, B., Michalopoulos, C., & Winter, L. A. (2004). "Special and differential treatment of developing countries in the WTO: Moving forward after Cancun." *World Economy*, 27(4), 481-506 at 490-491. The authors distinguish between core rules and non-core rules. The latter being described as regulatory policy disciplines whose implementation may be resource-intensive and not a priority for low-income countries.
33. Clara Weinhardt acknowledges that her contribution to this policy brief draws on findings from a research project on WTO politics funded by the German Research Foundation (project number WE 6012/2-1). She also acknowledges funding from the Studio Europa call for policy briefs.



## Further enquiries

The University of Adelaide SA 5005 Australia  
**enquiries** [iit01@adelaide.edu.au](mailto:iit01@adelaide.edu.au)  
**phone** +61 8 8313 6900  
**web** [iit.adelaide.edu.au](http://iit.adelaide.edu.au)