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The Development Dimension

What to Do about Differential Treatment in Trade

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EXECUTIVE SUMMARY

Rethinking developing country status at the World Trade Organization (WTO) is essential for the institution's modernization and survival. The Trump administration has recognized this challenge and is seeking changes to the flexibilities provided to developing countries. Referred to as "special and differential treatment" (SDT), 183 provisions in the WTO agreements give developing countries special rights. These include more time to implement obligations, preferential tariff schemes, and technical support from developed countries. SDT was meant to help the poorest WTO members meet their obligations to the fullest extent possible. But, today, when rapidly growing markets with significant global reach lay claim to these special rights, does it serve this purpose?

The Trump administration thinks it does not. A reform proposal from the United States claims that SDT reflects an outdated dichotomy between developed and developing countries and that the ability of countries to "self-declare" their developing country status amplifies this problem. Without a clear definition of what special rights SDT

provides, the United States' proposal argues, it is difficult to ascertain objectively who should receive those benefits and for how long. Many other developed countries have come out in support of reform, and their discussions highlight the need to establish a path forward. For their part, most developing countries continue to defend the current approach to SDT.

This paper argues that the basic flaw in the WTO's current approach is that it is founded on seeking exemptions from WTO obligations instead of enabling developing countries to meet these obligations and thus integrate them fully into the multilateral trading system. The United States is correct in pointing out the inherent unfairness in the application of SDT, which does not differentiate between levels of development *among* developing countries. As a result, the poorest countries are made worse off, while those that are economically better off receive a "free ride" from the rest of the multilateral trading system. Adopting a new evidence-based, case-by-case approach to SDT could ensure both that the concerns of the poorest countries are addressed and that advanced developing countries carry their weight in the organization.

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INTRODUCTION

On July 26, 2019, President Trump tweeted the following complaint about the WTO: “The WTO is BROKEN when the world’s RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment. No more!!! Today I directed the U.S. Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA!”¹ Trump was referring to special and differential treatment (SDT), which gives developing country members of the WTO greater flexibility in meeting their WTO obligations. The WTO, however, has no definition for what a developing country is, and as a result, members practice self-declaration, whereby they alone decide their development status. This has led to a situation where more-advanced countries receive similar treatment to those that are much poorer, undermining the initial rationale for SDT to help those in most need with the transition to full compliance.

U.S. politicians have been registering variations of this complaint for decades. And it’s not just the United States that has complained. To different degrees concerning different sectors of trade, other developed countries have expressed concerns that developing countries are getting a “free ride” in the multilateral trading system and that they should be made to comply with more WTO obligations more quickly. In the view of developed countries, the presumed “free ride” that developing countries take through their receipt of SDT undermines the growth of trade and the overall health of the trading system.

At the same time, developing countries in the WTO have long said that they are the ones disadvantaged by the structure of the world trading system. For nearly seven decades, developing countries have contended that the United States and other developed countries are unfairly advantaged by the rules of the multilateral trading system and that developed countries’ commitments to providing SDT have rung hollow. Developing countries have routinely complained that they have not received the benefits that they thought they had

negotiated in the Uruguay Round, which established the WTO in 1995. And, since the launch of the Doha Development Round of multilateral trade negotiations in 2001, they have lamented, time and again, about how WTO trade negotiators have failed to reach a consensus on rules to advance “development” through trade.

These long-standing divisions over how developing countries should be treated under WTO rules have deepened over time. Since 1995, the WTO has grown by more than 50 percent to 164 members. Almost all the new members are developing countries, which now make up a large majority of WTO membership. During that same time, there has also been a substantial integration of the world economy and of world trade.

Adding greater tensions to the traditional differences between developed and developing countries over the nature and legitimacy of SDT is the historic rise of several developing countries as serious economic rivals and competitors of the United States and other developed countries. Since 2017, exports from developing countries have represented almost half of all global exports, with the largest 15 developing countries accounting for about three-fourths of those exports.

Most of all, these divisions have deepened with the rise of China and with its increasingly significant role in the multilateral trading system. Trump mentioned several countries in the memorandum to the U.S. trade representative to which he referred in his tweet, including Mexico, Turkey, South Korea, Singapore, Kuwait, the United Arab Emirates, and Qatar. But, of all those countries that continue to receive “special treatment” due to their self-declared developing status, Trump emphasized: “China most dramatically illustrates this point.”² Increasingly an economic rival of the United States but steadfast in its assertion that it is a developing country, China is the main source of Trump’s angst over the grant of SDT. With its rise, China has become the world’s leading exporter, and its growth increasingly distinguishes it from many other developing countries. As Anabel González,

nonresident senior fellow at the Peterson Institute for International Economics and former senior director of the World Bank's Trade and Competitiveness Global Practice, has said, there is "a strong rationale to have all larger economies abide by multilaterally agreed and applied disciplines because their policies affect international markets."³

There is no empirical evidence that the U.S. economy has been victimized in any significant way from the grant of SDT to China or any other developing country. The victims of the WTO's current SDT approach are those who live in developing countries, because such treatment has often prevented them from pursuing a path that leads to development.

The issue of SDT among WTO members at different levels of development is long overdue for reconsideration. With developed and developing countries alike firmly persuaded that they are being treated unfairly, there is an increasingly urgent need for consensus on a solution. Amid the current chaos afflicting the trading system, common ground on this issue will surely be difficult to achieve. But success here is key to resolving long-standing differences and could lay the foundation for deeper cooperation on other divisive trade problems.

This paper begins by describing the United States' proposal for SDT reform and the responses the proposal has received from other WTO members. It examines these proposals in the context of the historical evolution of SDT and finds that recent assertions by the United States are well founded. The lack of differentiation among developing members presents a significant obstacle to current and future negotiations. The WTO should move toward an evidence-based, case-by-case approach to SDT, with the goal of making it wholly transitional and aimed at full compliance with WTO obligations.

THE U.S. PROPOSAL ON DIFFERENTIAL TREATMENT

In February 2019, the United States circulated a proposal in the WTO calling for SDT

reform.⁴ The United States argues that SDT has damaged the WTO's negotiating arm because it has been used in ways that are inconsistent with what the United States sees as a foundational ambition of the WTO: concluding "reciprocal and mutually advantageous arrangements."⁵ In a communication to all other WTO members, the United States makes three main assertions in support of its case for SDT reform: first, that the world economy has fundamentally changed since the establishment of the WTO in 1995; second, that the act of "self-declaration" of developing country status is problematic and open to abuse; and third, that, because it lacks a precise definition, the WTO concept of SDT does not distinguish as it should between different stages of development.⁶

On the first of these assertions, the United States is right in pointing out that the world economy has fundamentally changed since 1995. The World Bank says that there are 1.1 billion fewer people living in extreme poverty today than in 1990 and that, from 1990 to 2015, the percentage of the global population living in poverty declined from 36 percent to 10 percent.⁷ Increased trade, in particular, has contributed to development by increasing economic opportunity and reducing poverty.⁸ As more countries have reduced barriers to trade, the concentration of global trade also has shifted. Where the United States, Europe, and Japan once held undisputed leadership in world trade, other countries, such as China, Singapore, South Korea, and India, have gradually grown in importance and have surpassed the leaders in some respects.

According to the United States, though, this shift in the global economic landscape means little when the institution at the center of the international trade regime does not even define what it means to be a developing country or specify what type of SDT should be afforded to developing countries. Except for least-developed countries (LDCs), the WTO also does not distinguish between different levels of development, which the United States argues keeps the WTO "stuck in a simplistic and clearly outdated construct of 'North-South'

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division, developed and developing countries. Each is a seemingly static set, regardless of economic, social, trade, and other indicators.”⁹ This is a reasonable criticism.

On the second of its assertions, the United States warns that continuing to rely on self-declaration and failing to differentiate between members’ development status has “put the WTO on a path to failed negotiations” as well as “institutional irrelevance.” The United States observes that, although some self-declared “developing countries” view SDT as a transitional means toward integrating fully and effectively over time into the multilateral trading system and ultimately “graduating” out of developing country status, others see SDT as a way for countries to escape full compliance with WTO rules under the guise of maintaining space for discretionary domestic policymaking. As a result, when more-advanced developing countries demand the same flexibility as LDCs, it creates “asymmetries that ensure that ambition levels in WTO negotiations remain far too weak to sustain viable outcomes” in addition to diluting the benefit to LDCs and poorer countries.¹⁰

On its main assertion, the United States notes that distinguishing between and among developing countries is not unusual and that other international organizations have used various criteria to differentiate between stages of development. The Organisation for Economic Co-operation and Development (OECD) and the United Nations Development Program’s Human Development Index each measure development according to per capita income and similar measures. The World Bank customarily uses income classification by dividing countries on the basis of their gross national income (GNI) per capita into four classifications: low income (\$995 or less), lower middle income (\$996 to \$3,895), upper middle income (\$3,896 to \$12,055), and high income (\$12,056 and higher). These thresholds are adjusted annually. The United States is correct that the WTO needs such categorical distinctions, because lumping countries that truly need help in the same category as those that do not risks

harming less-developed countries.

The United States argues that the absence of a formal WTO definition of “developing country” or of other objective measures to identify which countries would qualify for developing status leads to abuse of the multilateral trading system. The Americans note that “some of the wealthiest WTO members—including Singapore; Hong Kong, China; Macao, China; Israel; the State of Kuwait; the Republic of Korea; United Arab Emirates; Brunei Darussalam; and Qatar—insist on being considered developing Members and can avail themselves of [SDT] provisions at their discretion—just like Sub-Saharan Africa.”¹¹ In practice, this means that some countries are making fewer trade commitments and assuming less responsibility for meeting their WTO obligations than they are able.

With these issues in mind, the United States has put forward a draft decision for consideration that states that WTO members “will not avail themselves of special and differential treatment in current and future WTO negotiations”¹² if they fit any of the following:

- are an OECD member or have begun the accession process to become one
- are a member of the Group of 20 (G20)
- are classified as a “high income” country by the World Bank
- account for 0.5 percent or more of global merchandise trade (imports and exports)

The proposal adds: “Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment.”¹³ In effect, the proposed decision would amount to a definition of a “developing country” under WTO rules, with the possibility of expanding that definition in situations where countries that would otherwise be seen as “developing countries” have significant economic sway in particular sectors of trade (such as, for example, Brazil in soybeans and India in sugar).

More than 30 countries fall into one of these categories. Table 1 shows the countries that would meet at least one of these criteria.

RESPONSES TO U.S. PROPOSAL

Not surprisingly, some “developing country” WTO members oppose the reforms that the United States proposed for granting SDT. Developing countries have not given an inch on their long-held view that the current approach to providing SDT is best for the world trading system. Their statements in defense of the current approach demarcate more fully their differences with the United States and other developed countries over the WTO’s development dimension.

Developing Countries Weigh In

Soon after submission of the U.S. proposal, 10 developing countries, led by China, filed a communication at the WTO that raised arguments to refute the U.S. proposal. Besides China, the developing country signatories included India, South Africa, Venezuela, Laos, Bolivia, Kenya, Cuba, Pakistan, and the Central African Republic.¹⁴ Notably absent were Brazil, South Korea, and Singapore, which have since indicated bilaterally to the United States that they will forgo SDT in current and future WTO negotiations.¹⁵

China and the other nine signatories argue that “recent attempts by some Members to selectively employ certain economic and trade data to deny the persistence of the divide between developing and developed Members, and to demand the former to abide by absolute ‘reciprocity’ in the interest of ‘fairness’ are profoundly disingenuous.” They claim SDT is one of the “cornerstone principles” of the WTO, made up of fundamental rights that have been granted through negotiations. They also maintain that the United States’ attempt to erase the dichotomy between developed and developing members through specific economic indicators glosses over the extent to which there are genuine development gaps. And they contend that “despite impressive progress achieved by

some developing country Members since the creation of the WTO, old divides have not been substantially bridged and, in some areas they have even widened, while new divides, such as those in the digital and technological spheres, are becoming more pronounced.”¹⁶

As these 10 countries perceive it, “the status of developed and developing country Members” is not only “reflected in the bargaining process” but is also “incorporated in the final rules themselves.” Furthermore, in their view, “each developing Member shall, based upon its own particular situation, make the decision by itself on whether, when, where and how to use differential treatment, and to what extent as well.” To them, “the self-declaration approach has proven to be the most appropriate to the WTO, which best serves the WTO’s objectives.”¹⁷

As a further justification for their continued receipt of SDT, these 10 countries contend that capacity constraints, such as the lack of “human resources, negotiating capacity, well-functioning intra-governmental coordination mechanisms, and the effective participation of social partners in trade negotiating processes . . . diminish not only the ability of developing Members to negotiate, but also the effectiveness of translating negotiated outcomes into measures for domestic economic growth.”¹⁸ Without question, these are all valid concerns.

They continue: “The essence of development is the human being. Hence, per capita indicators must be given the top priority when assessing the development level of a country.” They point to the still gaping chasm between the gross domestic product (GDP) per capita of the United States and other developed countries with even such advanced developing countries as China, India, Indonesia, and Brazil. They note that the top 10 countries with the largest number of the world’s poor and the largest number of the world’s undernourished include, among others, China, India, and Indonesia.¹⁹

In stressing the human dimension of development, China and its nine cosigners endorse the broad view of development consistent with

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Table 1

Countries covered by U.S. proposal

Economy	OECD member	G20 member	World Bank high income	Share in global merchandise trade
Antigua and Barbuda			X	0.00%
Argentina		X	X	0.35%
Bahrain			X	0.07%
Barbados			X	0.01%
Brazil		X		1.06%
Brunei Darussalam			X	0.03%
Chile	X		X	0.37%
China		X		11.58%
Colombia	X			0.25%
Costa Rica	X			0.07%
Hong Kong			X	3.23%
India		X		2.01%
Indonesia		X		0.89%
Israel	X		X	0.39%
Kuwait			X	0.25%
Macao			X	0.03%
Malaysia				1.13%
Mexico	X	X		2.37%
Oman			X	0.17%
Panama			X	0.10%
Qatar			X	0.29%
Saint Kitts and Nevis			X	0.00%
Saudi Arabia		X	X	1.04%
Seychelles			X	0.00%
Singapore			X	1.95%
South Africa		X		0.54%
South Korea	X	X	X	2.88%
Thailand				1.27%
Trinidad and Tobago			X	0.05%
Turkey	X	X		1.07%
United Arab Emirates			X	1.69%
Uruguay			X	0.05%
Vietnam				1.09%

Sources: "Member Countries," Organisation for Economic Co-operation and Development; "G20 Participants," G20 Saudi Arabia 2020; "World Bank Country and Lending Groups," World Bank; and "WTO Data," World Trade Organization.

Note: Share in global merchandise trade calculated as the annual average from 2015 to 2017.

Nobel Prize-winning economist Amartya Sen's concept of "development as freedom."²⁰ As they explain, "Sen . . . rejected the narrow argument of measuring growth only by means of GDP, and broadened the development measurement from promoting economic growth to 'expanding people's capabilities'. He argued that the ultimate goal of development should focus on the individual's freedom of choices, *i.e.* to improve the 'capabilities' of individuals to choose to live lives that they have reason to value."²¹ (It is especially noteworthy that China appears to be endorsing the view that human freedom is essential and that it should be defined by the ability of people to make free individual choices.)

The 10 developing countries provide an intellectual justification for SDT that is marshalled to support their view that development status should continue to be self-declared and that self-declared developing countries should continue to be allowed to comply gradually with WTO disciplines. But their proposals do not clearly explain how the status quo serves to improve individual human capabilities, the central component of Sen's thesis. Instead, they claim that developing countries need "policy space when opening up to the global market to push forward their domestic reform and transformation agenda, which is exactly the reason why the WTO adopts the self-declaration approach."²² Yet "policy space" is a vague term and can be understood as a blank check permitting developing countries to decide when, if ever, they will assume further trade obligations.

That is also a broad reading of what the concept of less than full "reciprocity" means in the context of SDT. The so-called Enabling Clause adopted in 1979, which permits trade discrimination for the purpose of providing SDT to developing countries, states that developing countries should not be required to make "concessions that are inconsistent with the latter's development, financial and trade needs."²³ But in no way does the Enabling Clause cite a need for policy space as a reason for excusing developing countries

from complying with the same WTO obligations that bind developed countries.

China and the other nine countries also point to the process within the WTO that has supposedly been working on ways to improve SDT by making it "more precise, effective and operational" since the launch of the Doha Development Round in 2001.²⁴ In reality, though, little has been achieved through this process. In 2013, an SDT monitoring mechanism was established at the Bali Ministerial Conference to operate as a special session within the WTO Committee on Trade and Development;²⁵ but, as of the 10th session of this monitoring mechanism, held in January 2019, not a single written submission had been put forward by any WTO member, including developing countries. If SDT needs reform, there has been scant evidence of any appetite to take concrete action toward such reform, apart from the efforts of the United States.

Furthermore, there is a decided lack of concrete examples from supporters of the status quo that show how SDT improves development outcomes. Even in the lengthy proposal by China and others, not a single SDT provision is identified as having improved development outcomes.

In a separate communication, Bolivia, Cuba, Ecuador, India, Oman, and the African members of the WTO express similar concerns but, notably, place their developmental ambitions within the context of the United Nations (UN) Sustainable Development Goals (SDGs), saying, "The SDGs articulate important development challenges still confronting developing countries, including overcoming poverty and hunger. WTO rules must be supportive, rather than a constraint to these efforts."²⁶ While the countries that signed this communication are firm in their defense of SDT, describing it as a "treaty-embedded and non-negotiable right for all developing Members," they acknowledge that SDT is not an end in itself. In fact, in criticizing calls by the United States and other developed countries for enhanced transparency obligations, they state that their "non-compliance is not willful" but is rather a matter

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of not having sufficient capacity to ensure compliance.²⁷ Implicitly, these developing countries seem to be signaling that they would be willing to assume additional WTO obligations if they had the sufficient capacity to do so and if developed countries were willing to help provide them with the resources, technology, and know-how they lack.

This communication provides further evidence of the need for greater differentiation between developing countries to ensure that those countries that need help are the ones receiving it. In addition, the fact that China was not a signatory to this proposal suggests that others may not share China’s dismissive attitude to reform. These voices should not be drowned out of reform efforts and are essential to bridging the gap between developed and developing country members.

Other Developed Countries Push for Balance and Pragmatism

Other developed countries have contributed to this emerging debate with suggestions for pragmatic approaches to bridge the current divide in the WTO. Norway submitted a communication on April 26, 2019, calling for a “constructive conversation . . . about the development dimension” that has since been endorsed by Canada, Hong Kong, Iceland, Mexico, New Zealand, Singapore, and Switzerland.²⁸

In what seems a critique of the crux of the U.S. proposal, Norway disagrees about the efficacy of using eligibility requirements and concludes that “aiming at consensus on a negotiated set of criteria for when a developing Member should have access to [SDT] is neither realistic nor necessarily useful,” with the exception of LDCs for which criteria are well defined. Norway contends that a binary approach that focuses on members as developed or developing is not helpful. Instead, it recommends that WTO members seek alternative pathways to reach their common objectives and maintains that these pathways could be tailored to fit particular needs in particular situations.²⁹

In elaborating, Norway insists that the

tools for such an approach already exist. For example, the Norwegians point to how the WTO Agreement on Technical Barriers to Trade and the WTO General Agreement on Trade in Services have established “minimum baseline approaches” to both setting and managing standards. A common starting point, Norway says, can help facilitate the acceptance of greater commitments by developing countries over time. Pointing to the WTO Trade Facilitation Agreement (TFA) concluded in 2013, Norway notes how this latest multilateral trade agreement allows developing countries to pick their own paths toward implementing their obligations.³⁰ But the TFA is a departure from past agreements in that signatories have specifically identified short- and long-term implementation timelines, as well as noting those provisions for which they will require technical assistance in order to implement.³¹ This approach is novel in that it links SDT to an identified need, as opposed to a general opt-out on certain commitments.

Canada voiced similar sentiments in a communication on September 24, 2018, which broadly addresses many aspects of potential WTO reform. Much like Norway, Canada advises that a new approach to the development dimension is needed—one that strikes a balance between reciprocity and flexibility. The Canadians argue that “not all countries need or should benefit from the same level of flexibility,” and they also suggest that the TFA is a good example of how SDT should be approached. In particular, Canada notes that the following considerations may inform a new approach: while transitional periods may be necessary, the long-term goal should be convergence and full implementation; differentiated treatment should be based on evidence of need; and the most burdensome obligations, at least for those countries with the least capacity, should be linked with capacity building supported by developed countries.³²

The European Union (EU) released a concept paper on WTO reform on September 18, 2018, which includes its suggestions on SDT. It agrees with the United States that some

developing country members are better placed to assume more obligations than others. To address this gap in capacity, the EU offers three suggestions. First, it proposes that developing countries should be encouraged to “graduate” from SDT and that, when electing to employ such treatment, they should explain how they intend to use it to advance their development and also provide a target date for when they would fully assume all WTO obligations. Second, the EU states that for future agreements, SDT should be both needs driven and evidence based, meaning that as a starting point, all parties should acknowledge universal implementation of WTO obligations as the goal, that additional commitments require flexibility, and that flexibility be proportional to the number of members party to the agreement in question. Third, and lastly, although the EU maintains that existing provisions for SDT should not be changed, it recommends that any requests for additional SDT should require the specification of a clearly identified development objective; an economic analysis of the measure’s impact, including an analysis of its impact on other WTO members because the obligation has not been met; and a specified period for which the developing country would need flexibility.³³

EVOLUTION OF DIFFERENTIAL TREATMENT

The development dimension has been an unstated part of the multilateral trading system since the General Agreement on Tariffs and Trade (GATT) was agreed to in 1947. Ten of the original 23 GATT contracting parties could have been classified at the time as developing countries, including (pre-communist) China.³⁴ However, the original GATT made no formal distinction between developed and developing countries. In part, this initial textual absence can be attributed to the underlying assumption about trade negotiations (which prevailed then as now) that a decision by one country to lower its tariffs or other trade barriers to the goods of another country is a “concession” to that other country. Almost all economists will be quick to

note that this is a political and not an economic assumption.³⁵ It is based on the fundamental fallacy that opening one’s market involves “concessions” that need to be “paid” for—that tariffs and other barriers to trade are national assets that should be relinquished only in exchange for improved market access abroad. Economically, this makes no sense, as a country generally benefits from reducing its barriers to trade with other countries, regardless of what those other countries do.

Nevertheless, proceeding from this assumption, from its inception the GATT sought to create a balance of “concessions” in which all countries could claim back home that they got at least as much as they gave in negotiated agreements. Still underlying trade negotiations today, this internationally agreed architecture of multilateral trade negotiations is called “reciprocity.” A trade agreement is seen as “reciprocal” if every country that has negotiated the agreement believes that the agreement contains a “balance of concessions”—that the “concessions” it has obtained through the agreement match the “concessions” it has made.

In adherence with this principle of “reciprocity,” generally all countries were treated equally in the give and take of the first several postwar GATT rounds of multilateral trade negotiations, which focused mainly on liberalizing trade by lowering tariffs. But, of course, in their stages of development, all countries were far from equal. In the first few decades following World War II, the United States, emerging economically unscathed and fully mobilized from the global conflict, was by far the leading force in the global economy. The economies of Europe and Japan gradually recovered (thanks in no small part to the generosity of the United States). Meanwhile, the poorer countries, including dozens of the newly independent countries freed from colonialism, at first composed only a small slice of the global economy.

But, one by one, many of these poorer countries, often with the sponsorship of their previous colonial masters, joined the GATT. Gradually, their numbers grew, and before the first decade following the agreement on the

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initial GATT, developing countries succeeded in exacting from the developed countries two changes in the GATT that instilled the concept of SDT for developing countries in the legal text of the multilateral trading system.

First, in 1955, the GATT contracting parties adopted a substantial revision of GATT Article XVIII, which was rewritten to give clear authorization to developing countries to enact measures to protect infant industries and to afford them additional ease in imposing trade restrictions when facing balance of payments difficulties.³⁶ In addition, the GATT contracting parties introduced GATT Article XXVIII bis, which formally introduced the concept of “non-reciprocity” into the legal text. It did so by stating that multilateral trade negotiations should take into account “the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and . . . all other relevant circumstances, including the fiscal, developmental, strategic and other needs of the contracting parties concerned.”³⁷ With this change in the GATT, the multilateral trading system’s original rigid adherence to “reciprocity” was relaxed, and its previously implicit distinction between developed and developing countries in the trading system became more explicit.

But which countries were entitled to SDT? The revised GATT made no attempt to provide a definition of a “developing country,” and each country was therefore left to choose for itself whether it wished to be treated as one. The identification process became (and remains) one of self-selection, in which “developing countries” justify their “developing” status simply by announcing it.

One aspect on which all countries have agreed from the beginning is that LDCs must be treated differently and so are not expected to provide “reciprocity” in trade agreements. The WTO recognizes LDCs as countries that the UN has designated as such.³⁸ There are 47 such countries on the UN’s list. To date, 36 of these countries have become WTO members.

In contrast to all other “developing countries,” classification as an LDC requires a country to meet established criteria. The UN classifies a country as an LDC if it is determined to have human resource weakness, economic vulnerability, and a GNI per capita of less than \$1,025.³⁹

Yet, for all those countries that are not LDCs but that nevertheless claim “developing country” status, the practice of self-selection has prevailed. By the 1960s, developing countries made up most of the GATT contracting parties, and they sought further recognition of their “developing” status in the trading system. Desirous of additional SDT, they used their newfound majority as negotiating leverage to secure the adoption of Part IV of the GATT, on “Trade and Development,” which took effect in 1966.⁴⁰ Part IV added three articles—XXXVI, XXXVII, and XXXVIII—to the GATT. Most notable by far is Article XXXVI:8, which recognizes the notion of “non-reciprocity,” stating: “The developed country parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”⁴¹ But the fact that these three articles of Part IV of the GATT have no legal force has “led to resentment among developing countries” and hardened the division over development status in the trading system.⁴²

With developed countries still firmly committed to an ultimate goal of “reciprocity” and with developing countries equally committed to “non-reciprocity,” multilateral trade negotiations in the succeeding decades gradually became, for almost all countries—and for developing countries especially—more and more a matter of seeing how little they could “give” in trade concessions in exchange for what they “got.” The concept of “non-reciprocity” sowed the seeds of resentment over being unfairly treated by the trading system, a sense that today grips developed and developing countries alike. Both believe they are giving too much and getting too little under the multilateral rules of trade.

Along the way, additional efforts have been

made to afford more substantial privileges to those with “developing country” status. In 1971, the GATT approved for 10 years the establishment of trade preferences for developing countries that would have otherwise violated the basic obligation of “most favoured nation” treatment, which forbids trade discrimination between and among imported like products.⁴³ This preferential arrangement is known as the “Generalized System of Preferences” (GSP).⁴⁴ Between 1971 and 1976, about 20 developed countries, including the United States, implemented tariff preferences for developing countries. In 1979, GSP approval was extended permanently through the adoption of the Enabling Clause, which permits developed countries to adopt discriminatory tariff arrangements that favor imports from developing countries.

It was in the 1970s that the United States first began to express the antecedents of the view on SDT now given voice by Trump. This was about the same time when the products of developing countries first began to compete with those of the United States. In response, the United States began “insisting that at some stage some of the developing countries should ‘graduate’ and be counted among the developed contracting parties” of the GATT.⁴⁵ Confronted by mounting domestic resistance to giving developing countries SDT, and continuing to hold economic reservations about the efficacy of such treatment, developed countries undermined GSP privileges even as they granted them. GSP preferences usually omitted the labor-intensive, and therefore politically sensitive, products in which developing countries could have been most competitive in the domestic markets of developed countries. Furthermore, GSP was discretionary and therefore less than certain, which undermined investments in the production of GSP-traded products by developing countries.

In addition, in what amounted to reverse discrimination, developed countries began to impose quotas, voluntary export restraints, and other forms of managed trade to protect their domestic producers from competition

from the products of developing countries in sectors in which developing countries enjoyed a comparative advantage and could benefit significantly from freer access to the domestic markets of developed countries. Most notably, these protectionist arrangements have limited the trade of developing countries in textiles, clothing, footwear, and agriculture. Through actions such as these, developed countries have implied to developing countries that their support for SDT is “only a political gesture.”⁴⁶

Questions surrounding the development dimension were on display throughout the eight years of the Uruguay Round of multilateral trade negotiations that concluded with the Marrakesh Agreement in 1994. Each of the negotiating countries was required to agree to all 17 multilateral agreements before any agreement could take effect. This legal requirement amounted to a movement away from “non-reciprocity” that many developing countries resented. Yet diminishing the extent of this resentment was the fact that many of these agreements contained provisions that promised SDT to developing countries.

The WTO Secretariat has listed 183 provisions for SDT contained in the WTO-covered agreements—a sum that does not include the additional subsequent provisions for such treatment found in the decisions of the WTO Ministerial Conference and the WTO General Council and in the new TFA.⁴⁷ Some of these provisions give flexibility to developing countries in the fulfillment of their trade obligations and in the domestic measures and other actions they take. Some are simply “best efforts” undertakings that lack any binding legal force. Others provide transitional periods for phasing in WTO legal obligations. Still others relate to delivery of technical assistance to developing countries by developed countries. And a number are special provisions exclusively for LDCs.

The Uruguay Round effected a pivotal change in the provision of SDT by shifting the focus from different levels of trade obligations for developing countries to the time that these countries would need to *adjust* to and therefore comply with WTO rules.⁴⁸ Since

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this change when the GATT transformed into the WTO in 1995, and despite the numerous provisions for SDT in the WTO-covered agreements, many developing countries have complained repeatedly that they have not received the economic benefit of the bargain that they thought they had struck with developed countries in the Uruguay Round.

Soon after 9/11, WTO members gathered in Doha, Qatar, to launch the Doha Round of multilateral trade negotiations, the first full round of negotiations since the establishment of the WTO six years earlier. One of the Doha Round's clearly stated purposes was to promote the further “development” of developing countries by granting them enhanced market access, balanced rules, and well-targeted, sustainably financed technical assistance and capacity-building programs.⁴⁹ But obstacles to success in the negotiations were their lack of specificity on what constituted a developing country and on what precise rules and programs would augment their development.

One of the principal underlying reasons for the collapse of the Doha negotiations was the utter lack of anything approaching a consensus over the meaning of Paragraph 44 of the Doha Declaration, which mandated a review of all existing SDT provisions. This lack of consensus contributed much to the prolonged stalemate in multilateral trade negotiations and to the eventual demise of the ill-fated round at the WTO Ministerial Conference in Nairobi, Kenya, in 2015.⁵⁰ The Doha Round was a huge missed opportunity for all WTO members, developed and developing countries alike. By failing to forge a consensus to fulfill the Doha Development Agenda, the WTO members also failed to make any progress on advancing development. In the aftermath of these failures, the issue of SDT has become even more divisive.

Ordinarily, WTO members might look to the WTO's formal avenues for dispute settlement to clarify their mutual obligations. But on this issue, in the absence of a definition of SDT in the legal text of the WTO-covered agreements, panels and the appellate body have not been able to clarify the distinction between

“developed” and “developing” countries. Jurists in WTO trade disputes have assumed that WTO members are “developing countries” when they say they are. Nor has there been any clarification in 25 years of WTO dispute settlement of how, if at all, SDT should apply to specific WTO obligations. The limited WTO case law has mainly dealt with the details of GSP treatment under the Enabling Clause.⁵¹ In the absence of any definitive guidance from the WTO agreements on a legal definition of SDT, panels and the appellate body have rightly sought to avoid taking an interpretive approach that would arbitrarily add to or subtract from the rights and obligations provided in the covered agreements. Instead, panels and the appellate body have found that SDT can only exist through a specific WTO obligation—and only to the extent that it is specified by that obligation. Thus, the issue has been largely left to further negotiations.

FAILURES OF THE CURRENT APPROACH TO DIFFERENTIAL TREATMENT

Why has the current approach to SDT failed? It has failed because it is based on the faulty premise that the growth of developing countries will be hastened if they postpone opening their markets to freer trade for as long as they can. The logic behind this premise is that, in affording more time and more room for developing countries to erect and maintain trade barriers that protect their domestic producers and products from foreign competition, SDT can help those countries climb more quickly up the ladder of development. But this premise is mistaken. Protectionism never works for long—not for developed countries and not for developing countries. Without the spur of competition that comes with freer trade, without the innovations that freer trade brings and evokes, and without the domestic reforms that freer trade and a general openness to the wider world often inspire, the climb up the development ladder becomes steeper and longer.

Michael Hart and Bill Dymond have explained the shortcomings of the current premise as follows:

Proponents of special and differential treatment argue that developing countries, in the early stages of economic development, are not well placed to take full advantage of the opportunities created by liberalization and the rules, and should thus be allowed to shelter their economies, at least initially, from the full application of the rules. Tempting as this argument may be, it is also more likely to retard than aid economic development. It is little more than a variant on the seductive, but much discredited, argument in favor of protecting infant industries, which continues to appeal to politicians and humanitarians, despite its failure both in practice and in gaining theoretical support. The benefits of an open economy, and the cost of a closed economy, are now among the most widely shared canons of economic orthodoxy, and yet discussion of special and differential treatment proceeds as if the issue remains an open question.⁵²

The noble intent of those who seek SDT for developing countries in trade is “to support the marginalized and to make them less unequal.” SDT is envisaged as a form of “affirmative action” for narrowing the development divide.⁵³ Yet there is scant evidence that SDT serves this intent. Indeed, this intent has been undermined by how SDT has been conceived and implemented over time. One of the few economic studies on the effectiveness of SDT in promoting development is by economist Emanuel Ornelas. His 2016 study elaborates on the effects of the current approach to SDT in impeding development.⁵⁴

SDT must be a means to achieve development and not an obstacle preventing it. Human, natural, and capital resources are everywhere and always limited. A decision to provide what economists call “rents”—through

granting trade protection to politically favored domestic industries challenged by more efficient foreign competitors—is also a decision to deny resources to other domestic industries that may have greater potential. Resorting to protectionism by imposing barriers to trade allocates these resources inefficiently and impedes the pursuit of more productive opportunities for economic growth.

In many respects, developing countries have indeed been “free riders” in the current WTO trading system. The United States and other developed countries have, time and again, made tariff cuts and other binding trade concessions, which they have extended to all WTO members—including developing countries—under the WTO’s most-favored-nation principle. (When tariffs and nontariff trade barriers are lowered for one, they must be lowered for all.) Meanwhile, developing countries receive the benefits of these generalized concessions but often are not required to make comparable concessions of their own.

Consequently, developing countries do not have the leverage in multilateral trade negotiations to secure the concessions they need to compete more effectively in their strongest sectors, such as agriculture and clothing. In this way, “the expansion of their export sectors has been severely constrained by the lack of their own liberalization.”⁵⁵ Ultimately, SDT may best be described as a “minimalist bargain” that leaves all sides worse off.⁵⁶ In fact, the limited empirical evidence on this topic strongly suggests that SDT has done little to improve development outcomes.⁵⁷

Seeds of Compromise

A memorandum from Trump to the U.S. trade representative on July 26, 2019, summarizes the essence of the United States’ complaint about SDT: “When the wealthiest countries claim developing country status, they harm not only other developed economies but also economies that truly require special and differential treatment. Such disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue

“The limited empirical evidence on this topic strongly suggests that SDT has done little to improve development outcomes.”

“The great economic transformations that have occurred in the developing world cannot be overlooked; nor can the very real differences among developing countries be denied.”

to go unchecked.”⁵⁸ The U.S. SDT reform proposal stems from the concerns raised in this memorandum—concerns that past U.S. officials have raised prior to Trump’s presidency.

China’s criticism of the United States’ cherry-picking of certain statistics in making its case is fair, as the general debate over how best to measure poverty remains much contested. In fact, United Nations Conference on Trade and Development research released in June 2019 shows that China still has much work to do to eliminate poverty and that multiple economic, social, and environmental factors play a role in areas where China has attained limited development.⁵⁹ The categories of indicators that the United States advocates in its proposal are but one set of factors that can be used to differentiate between countries’ levels of development.

At the same time, the great economic transformations that have occurred in the developing world cannot be overlooked; nor can the very real differences among developing countries be denied. Although China concedes that there are differences among developing country members of the WTO, it maintains that what unites all developing countries is the absence of “full and balanced development, [which] significantly outweigh[s] their differences.”⁶⁰ China thus argues not only for the preservation of the status quo on self-declaration but also for strengthening SDT by fulfilling the call included in the Doha Ministerial Declaration in 2001 to review all SDT measures to ensure they are “more precise, effective and operational.”⁶¹ The Chinese state that, as a legal matter, SDT is “an exception from the general trade rules,”⁶² even though SDT was intended to be case specific rather than a blanket exception to the trade rules.⁶³

The crux of China’s argument is that there remains a stark development divide between the developed and developing worlds. This general point is irrefutable. But it poses two issues. The first is that China’s comparison between developed and developing countries does nothing to counter the United States’ reform proposal, which is concerned with variations

among developing countries. The second is the appropriateness of the variables China uses to explore the development divide.

China uses GDP per capita to support its assertion that a development divide persists between developed and developing countries. In contrast, the United States uses GNI per capita to support its claim that this divide is narrowing and that different developing countries are at different stages of development. The main difference between these two metrics is that GNI is essentially GDP *plus* net receipts of compensation of employees and property income abroad and net taxes less subsidies on production. This means that the use of GNI adjusts for the income generated by a country’s residents regardless of where that income is generated. In contrast, GDP only measures value added within a country. Given the global reach of the strongest economies, GNI tends to do a better job of capturing the state of a country’s economic health. For this reason, GNI is used in the World Bank’s calculation of country classifications for the purpose of issuing loans. Reasoning likewise, the OECD has noted that GDP is not a good measure of a country’s well-being because “GDP is primarily a gross measure of economic activities on the economic territory of a country, and the income generated through those activities;” therefore, “high levels of GDP thus do not necessarily mean high levels of the (net) income flowing to the residents of an economy.”⁶⁴

There was a marked growth in GDP per capita, especially for the poorest countries, between 1995 and 2017, as shown in Table 2. This growth, however, is better illuminated by using GNI per capita, as the United States suggests. In terms of GNI, the interesting data point to note is the narrowing gap between OECD members and the 33 developing countries mentioned in the U.S. proposal. GNI per capita for OECD members was \$28,648 in 1995 and \$40,037 in 2017. For the 33 developing countries captured in the U.S. proposal, GNI per capita was \$17,156 in 1995 and grew by more than 110 percent to \$36,420 in 2017. This is the equivalent of the average GNI per capita for an

Table 2

Gross domestic product (GDP) and gross national income (GNI) per capita, by select economic groups

Economy	GDP per capita, 1995	GDP per capita, 2017	GDP per capita, % change, 1995–2017	GNI per capita, 1995	GNI per capita, 2010	GNI per capita, 2017	GNI per capita, % change, 1995–2017
Organisation for Economic Co-operation and Development members	29,029.40	39,295.09	35.4	28,648.44	36,368.37	40,037.25	39.8
Average economies in U.S. proposal	15,367.57	20,099.80	30.8	17,156.15	33,177.00	36,420.43	112.3
High income	31,309.26	42,784.88	36.7	31,304.25	40,239.73	44,364.56	41.7
Upper middle income	3,302.98	8,241.59	149.5	6,147.40	12,174.33	16,141.44	162.6
Middle income	2,185.45	5,021.18	129.8	4,507.00	8,405.93	11,015.90	144.4
Lower middle income	1,000.82	2,170.40	116.9	2,759.13	4,901.08	6,471.50	134.5
Low income	466.87	715.99	53.4
Least developed countries	492.13	936.21	90.2	1,314.50	2,073.75	2,598.64	97.7

Sources: “GDP per capita (constant 2010 US\$),” World Bank; “GNI per capita (constant 2020 US\$),” World Bank; “GDP per capita, PPP (constant 2011 international \$),” World Bank; and “GNI per capita, PPP (constant 2011 international \$),” World Bank.

Notes: GDP per capita, 1995 is missing data for Qatar. GNI per capita is missing low-income data for all years for Antigua and Barbuda, Barbuda, Saint Kitts and Nevis, Seychelles, and Trinidad and Tobago and for 1995 for Bahrain, Indonesia, Kuwait, Macao, Oman, Qatar, Saudi Arabia, and United Arab Emirates.

OECD member in 2010.

While it is true that many countries in the other categories of the World Bank’s income classification may trail the richest countries in per capita terms, data show that this is not the case for China and the other rapidly emerging economies that most concern the United States. For example, in 1995, South Korea had a GNI per capita of \$16,482 (in 2011 international dollars), and by 2017, this number had grown to \$35,944. By means of comparison, in 1995 the United Kingdom and France had a GNI per capita of \$28,410 and \$30,836, respectively, and \$39,216 and \$39,935 in 2017.⁶⁵ Whereas the United Kingdom and France saw their GNIs per capita grow by 38 percent and 30 percent, respectively, from 1995 to 2017, South Korea experienced a 118 percent increase in GNI per capita over that same period. It should, therefore, not be surprising that South Korea recently agreed not to avail itself of SDT in future WTO negotiations.⁶⁶

China’s critique of the U.S. proposal also points to the high levels of poverty within many developing countries. While this is true on average, the grim reality is that 33 percent of the world’s poorest (those living on less than \$1.90 a day) live in Sub-Saharan Africa, and half of the world’s poorest are concentrated in just five countries—India, Nigeria, the Democratic Republic of Congo, Ethiopia, and Bangladesh.⁶⁷ India is the only one of these five countries that falls within one of the four categories set out in the U.S. proposal for eliminating eligibility for SDT.

By looking at the poverty headcount of the three largest developing countries—Brazil, China, and India—it becomes clear that there is significant differentiation among them. In 2011, the last year of complete data, the poverty headcount ratio (the percentage of the population living on less than \$1.90 a day at 2011 international prices) was 4.7 percent in Brazil, 7.9 percent in China, and 21.2 percent in

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India. For Brazil, this figure slightly increased to 4.8 percent in 2017. For China, the poverty headcount dropped to 0.7 percent in 2015.⁶⁸ While there is no recent data for India, it is notable that its poverty headcount dropped from 38.2 percent in 2004 to 21.2 percent in 2011—a 45 percent decrease in seven years. These changing numbers reveal that lumping all developing countries together is misleading. India’s level of poverty in particular is higher than that of the two other countries. This is further evidence in support of the United States’ argument that there is a need to differentiate among developing countries when considering their eligibility for SDT.

A broader point made in China’s response to the United States’ proposal is that “though the self-declared developing Members have the right to utilize SDT, they always make their contribution as much as they can.”⁶⁹ They point to the Trade Facilitation Agreement (TFA) as an example of how SDT does not imperil multilateral trade negotiations, since it gives countries the flexibility to decide implementation timelines based on three general categories.⁷⁰ Although the TFA could serve as one model for dealing with developing country members of the WTO, it is unlikely to satisfy U.S. demands for an overhaul of SDT since the TFA approach still relies on self-declaration.

Lastly, many are rightly skeptical that WTO members can ever reach an agreed upon definition of a “developing country” as a means of identifying which countries should be eligible for SDT. The United States and other developed countries may propose all the statistical categories they wish for identifying legal lines that demarcate the difference between developed and developing status, but achieving consensus on this issue is likely to be impossible. Furthermore, such an effort is unlikely to yield comprehensive SDT reform. That said, developing countries may ultimately be willing to support a proposal that distinguishes countries based on their stages of development. But to date, no developing country has indicated any genuine support for such a proposal. It is, however, possible that the voices of larger emerging

economies such as China and India are obscuring those of other developing countries that may see the virtue in making such finer distinctions, since increasingly, many developing countries are struggling to compete not only with the goods and services of the United States and other developed countries but also with emerging competition from China and India.

AN ALTERNATIVE APPROACH TO DIFFERENTIAL TREATMENT

Promoting trade promotes development. Restricting trade restricts development. When defending differential treatment in trade, developing countries speak volumes precisely in what they do *not* say. In particular, they do not cite any concrete examples of how their development has been advanced by SDT in general or by the way that it is currently structured in the WTO agreements. Could this be because there are no examples? To be able to identify examples of how SDT can advance development, and not impede it, we must have a broader understanding of the meaning of development, and we must design an alternative approach to SDT that proceeds from that understanding as well as from the goal of helping humanity to flourish through trade.

Unquestionably, the full development of all the members of the multilateral trading system is a goal of the WTO. In the preamble to the Marrakesh Agreement, the members of the new WTO agreed on the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development.”⁷¹ WTO members have long agreed upon the centrality of development to the multilateral trading system.

The Marrakesh Agreement elaborated further on the member countries’ shared commitment to conduct “trade and economic endeavor . . . with a view to . . . allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.”⁷² The UN SDGs, included in its agenda for 2030,⁷³

set out 17 global goals and 169 targets consistent with its definition of “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁷⁴ The preamble to the agreement that established the WTO suggests this more comprehensive goal of sustainable development, which views development as an empowering process for individual humans. And it is this view that should be the lodestar of WTO members’ ongoing efforts to promote development. This broader view of development includes the various traditional measurements of economic advancement, but it also encompasses other dimensions, as outlined in the SDGs, such as ending poverty and hunger, promoting quality education, and fostering innovation, which further the full flourishing of individual human freedom. In this more expansive view, trade is a path toward engaging with the instructive challenges and the boundless opportunities of the wider world. In doing so, it becomes a means for achieving freedom and promoting the broadest fulfillment of both individual and national potential.⁷⁵

The WTO’s approach to SDT must be framed through the lens of this broader view of what development means. It is partly for this reason that considering the varied aspects and stages of a country’s development would help determine the level and type of SDT required to help it achieve sustainable development. Therefore, a dichotomous classification of countries as either “developed” or “developing” is insufficient.

Today’s world economy is vastly more complicated than that. There is now a need for making more nuanced distinctions on trade, case by case, product by product, and sector by sector. With the multilateral trading system increasingly threatened on numerous fronts and with some of its most steadfast supporters worried that it may soon be sidelined into irrelevance, there is an urgent need for the WTO to design an approach to SDT that is reflective of the current economic shape of the world and flexible in the frameworks it uses to aid development.

As a starting point, the focus of SDT should not be on more exclusion. It should be on more inclusion; it “should enable rather than exempt.”⁷⁶ The basic flaw in the WTO’s current approach to SDT is that it revolves around exempting developing countries from WTO obligations instead of helping them to comply with WTO obligations and thus integrate fully into the multilateral trading system. This approach limits the ability of individuals in developing countries to attain true freedom by preventing them from having access to much of what they need from the wider world to enable their personal development.

Therefore, to encourage a broader view of development in the way SDT is approached, we make two suggestions. First, a country’s self-declared development status should have no specified or automatic effect at the outset of trade negotiations. WTO members must no longer be divided into two opposing camps along the single line of a stunted view of the meaning of development. Except for LDCs, the countries that make up the WTO-based trading system must no longer be labeled solely as either “developed” or “developing” countries. Second, SDT should be awarded on a case-by-case, product-by-product, and sector-by-sector basis. There would thus be no need for the WTO to adopt any all-purpose definition of the content of SDT. Rather, SDT should be defined as each alleged need for it arises in trade negotiations.

How should WTO members determine a country’s eligibility for SDT? The United States’ proposal lists four criteria for classifying a country as developed and therefore ineligible for SDT: membership in the OECD, membership in the G20, classification as a “high income” country by the World Bank, and accounting for a share of global trade that exceeds 0.5 percent.⁷⁷ But China, India, South Africa, Indonesia, and other developing countries that have spoken in opposition to the U.S. proposal rightly contend that these four criteria are indicative of some aspects of development but not all. They are correct that there are other indicators that create a fuller picture

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“High-level negotiations are necessary to move the discussion forward and provide a clear basis for evaluating the use of SDT.”

of a country’s development status. One of these is the Human Development Index (HDI), which captures—in addition to economic conditions—measurements of health, educational attainment, and other social categories that reflect quality of life and living standards.

Compromise requires agreement on metrics, perhaps in the form of guidelines, for determining, broadly, a country’s development needs. These could serve as an analytic tool for determining a country’s eligibility for SDT, striking a balance between the United States’ proposal and developing countries’ concerns. For example, Anabel González recommends that eligibility for SDT should depend, first, on a country’s share of world trade in a particular sector and, second, whether that share affects world prices in that sector.⁷⁸ In her view, a country might be “developed” in one sector of trade while it is still “developing” in another. We support this approach, which reflects the reality of the new shape of the global economy.

This new, case-by-case approach to SDT should center on the development of human capabilities. It should focus on the concrete actions that developing countries must take to enable their citizens to achieve better economic outcomes. The proposal from China and nine other developing countries acknowledges Amartya Sen’s broader approach to development but does not explain how this approach could inform new thinking on SDT. Sen’s approach, which emphasizes expanding the capabilities of individual people, is predicated on his conviction that “development can be seen . . . as a process of expanding the real freedoms that people enjoy” to make individual choices.⁷⁹ Surely this is a conviction with which the United States and the other developed countries must agree. It could also be integrated into new criteria for evaluating requests for SDT.

The metrics this new approach should employ are hardly elusive. In addition to the HDI, the WTO should also determine a country’s eligibility for SDT using the global indicators that the UN has developed for measuring a nation’s progress toward the fulfillment of its SDGs.

These indicators gauge progress toward achieving the full range of all 17 SDGs, including ending poverty and hunger, promoting health and education, promoting inclusive and sustainable growth, and fostering innovation and job creation. All WTO members have participated in developing these indicators, and all have agreed on them as well as on the goals and targets of the SDGs.⁸⁰

High-level negotiations are necessary to move the discussion forward and provide a clear basis for evaluating the use of SDT. In these negotiations, all WTO members will need to agree on the metrics for gauging development status and these metrics’ weights relative to one another. There may be a path to a negotiated compromise within the proposals made thus far. Such a compromise could be adopted as a set of nonbinding but illustrative guidelines, agreed upon by all WTO members in the form of a ministerial declaration. These guidelines could serve as a resource for guiding future negotiations on SDT without becoming obstacles to appreciating the nuance necessary to find common ground for consensus.

Ultimately, WTO members will have to decide the circumstances under which countries will be eligible for SDT. This decision can best be made on a case-by-case basis. A case-by-case approach to SDT would eliminate much of the consternation over self-declaration. If decisions on SDT are made case by case, then the value of declaring oneself a “developing country” would be much reduced; for, whatever a country’s claimed status, the eligibility for and the content of SDT would be determined during negotiations by the facts and the circumstances of each case.

An Alternative Approach in Practice

How would this alternative approach work in practice?

Throughout the more than seven decades of the rules-based trading system, there has never been a single, all-encompassing rule identifying the content of SDT. It has instead been identified anew on each occasion when it has been sought, based on the context of each discrete

trade agreement and the specific obligations it entails. The most practical solution for future negotiations would be to continue this longstanding practice of determining the content of SDT case by case. There is no need in the WTO for any all-purpose definition of the content of SDT. Thus, there is also no need for what would most likely be futile negotiations trying to reach consensus on its definition.

A novelty in the alternative approach we propose is its focus on individual countries. In the past, the case-by-case approach to SDT has largely made all self-declared developing countries eligible for the same carefully negotiated type of SDT. Our case-by-case approach would focus on each developing country individually and would make distinctions on that country's eligibility for, and the content of, SDT based on the facts and circumstances of that particular case involving that particular country. As in the past, certain categories of SDT with respect to certain WTO obligations might be predetermined in WTO negotiations. But, in the future, each country should have to convince other countries during negotiations that it should receive a specific form of SDT for a specific time, product, or sector. Essentially, any country that requested SDT would have to make its case and provide evidence to support it.

The general provision of SDT to LDCs should continue. LDC status is already determined by economic criteria, including a clear metric for graduation. Furthermore, given the heavier negotiating burden imposed by our new approach, LDCs would not have the immediate capacity to negotiate their need for SDT on a case-by-case basis. And yet, the trading system should place much more emphasis on helping LDCs escape their current need for SDT with measures such as technical assistance and capacity building. In this respect, the TFA offers a good starting point. The goal for LDCs must not be consignment to a permanent underclass of nondeveloped states. Rather, the goal must be eventual graduation from their current LDC status to developing country status, at which point they should be fully integrated into the WTO and expected to meet all commensurate

obligations as soon as possible. Upon integration, they could begin to negotiate each of their requests for SDT on a case-by-case basis, just like other developing countries.

With this new approach, self-declared developing countries would not automatically receive all forms of SDT. They could conceivably receive one form of SDT for a particular time for a particular product or sector but not for another. The burden would be on the country requesting special treatment to provide evidence that such treatment is needed. Under this new approach, when WTO members claim developing country status in relation to a particular traded product or trade sector, their eligibility for SDT would be determined, in part, by the impact of their production, sale, and export of that product or in that trade sector on the worldwide market prices and distribution of shares in that product or sector. Under this alternative approach, if a request for SDT were made for product A or sector A, it would be of no significance in the negotiations whether the country seeking SDT was competitive in product B or Sector B. The negotiations would focus entirely on A.

This approach would allow ample space for the nuances that characterize the global economy. Brazil can have a pivotal impact in the global soybean market while millions of Brazilians are still mired in poverty in favelas. The spires of skyscrapers can shine in the Shanghai sun while hundreds of millions of Chinese remain immiserated in the countryside. As a result, shipments of soybeans from Brazil or certain services provided from Shanghai may not warrant SDT. At the same time, SDT may well be justified for other Brazilian and Chinese goods and services if it would advance the continued development of their people. Nuances such as these should figure into making determinations about both eligibility for and the content of SDT.

This approach would also be unprecedented in its emphasis on the concrete actions that developing countries would need to take to fully meet their obligations and development goals. Whenever a WTO member requested SDT

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“Technical, financial, and capacity-building assistance remain indispensable to helping the WTO’s developing members meet their WTO obligations and thereby advance individual human freedom through development.”

for trade in a product or in a sector, the central concerns of negotiators would be whether granting SDT in that instance would assist the requesting member in meeting its WTO commitments more fully in the future and, if not, how that member could meet those obligations without SDT. This raises the critical issue of how much, and what sort of, assistance WTO members should provide to developing countries in fulfilling their WTO obligations. Technical, financial, and capacity-building assistance remain indispensable to helping the WTO’s developing members meet their WTO obligations and thereby advance individual human freedom through development.

Some of the tools for carving the content of SDT according to this new case-by-case approach are familiar. This approach applies different levels of expectation for developing countries’ compliance with new obligations. It provides time frames allowing for gradual implementation of these obligations. But it is unique in that it replaces the goal of exemption from obligations with the goal of enablement to fulfill them. Doing so would change the mentality of WTO members when making determinations on SDT. For the first time, trade negotiations would consider how to make SDT a *transitional* form of treatment aimed at full compliance with WTO obligations. With this aim in mind, negotiations would turn more and more toward how to make certain that developing countries have the resources they need to make the transition to full compliance.

Many still assume there is a strong case for the current, exemption-focused approach to SDT, despite its “less-than-stellar record.”⁸¹ We contend that there is a strong case for SDT, only if it facilitates the transition toward development. The right approach to SDT will embrace an objective assessment of human needs and will not try to isolate and insulate individuals in developing countries from foreign trade. The right approach will help empower the individual citizens of those countries to reap the full benefits of integration into the global trading system so they can

flourish within the wider world.

By contrast, further weakening the multilateral trading system by accommodating additional ill-conceived SDT measures will not help developing countries but will harm them by postponing or even preventing their development.⁸² What is more, providing too many exemptions from WTO trade obligations for too many wrong reasons will undermine the basic principle of nondiscrimination in international trade—which is the very foundation of the multilateral trading system—while accomplishing little or nothing in the way of achieving sustainable development.

CONCLUSION

In no uncertain terms, the United States has voiced its desire for change in the ways the WTO affords SDT. Other countries, developed and developing alike, have added their voices to the debate. SDT in the WTO is undefined and self-declared. As this emerging debate has revealed, there is little agreement among WTO members on what SDT should entail, on where it is appropriate, or on what its purpose should be in the multilateral trading system. And there is little evidence that SDT has furthered the aim of development that is central to the mission of the WTO.

A new method is needed that will approach SDT within the context of its capacity to further development. Assailed on all sides, the WTO is in existential crisis. There are various aspects to this crisis. Yet it cannot be resolved unless and until the role of the development dimension in trade is resolved. This resolution can only come through new multilateral negotiations. An alternative framework for determining the eligibility for, and content of, SDT must be placed on the WTO negotiating agenda. This framework must become part of a new “grand bargain” by the 164 WTO members that will renew the multilateral trading system, restore it as the center of world trade, and reaffirm its mission to foster human freedom through global development spurred and enhanced by trade.

NOTES

1. Donald Trump (@realDonaldTrump), “The WTO is BROKEN when the world’s RICHEST countries claim to be developing countries to avoid WTO rules and get special treatment. NO more!!! Today I directed the U.S. Trade Representative to take action so that countries stop CHEATING the system at the expense of the USA!” Twitter post, July 26, 2019, 2:29 p.m., <https://twitter.com/realdonaldtrump/status/1154821023197474817?lang=en>.
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3. Anabel González, “Should Developing Countries Get Preferential Treatment on Trade?” *Trade and Investment Policy Watch* (blog), Peterson Institute for International Economics, August 27, 2019.
4. “Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO,” World Trade Organization, WT/GC/W/764, February 15, 2019.
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6. “An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance: Communication from the United States,” World Trade Organization, WT/GC/W/757/Rev. 1, February 14, 2019.
7. “Poverty Overview,” World Bank, last updated October 2, 2019.
8. World Bank Group and World Trade Organization, *The Role of Trade in Ending Poverty* (Geneva: World Trade Organization, 2015).
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10. “An Undifferentiated WTO,” paras. 4.5 and 5.2.
11. “An Undifferentiated WTO,” para. 4.4.
12. “Procedures to Strengthen the Negotiating Function of the WTO.”
13. “Procedures to Strengthen the Negotiating Function of the WTO.”
14. “The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness: Communication from China, India, South Africa, the Bolivarian Republic of Venezuela, Lao People’s Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan,” World Trade Organization, WT/GC/W/765/Rev. 2, March 4, 2019, para. 1.2.
15. Donald J. Trump and Jair Bolsonaro, “Joint Statement from President Donald J. Trump and President Jair Bolsonaro,” presidential statement, March 19, 2019; Jane Chung and Joori Roh, “South Korea to Give Up Developing Country Status in WTO Talks,” Reuters, October 24, 2019; and David Shea, “Statement by Ambassador Shea at Davos Informal WTO Ministerial Gathering,” U.S. Mission to International Organizations in Geneva, January 27, 2020.
16. “The Continued Relevance of Special and Differential Treatment,” paras. 1.1, 1.2, and 1.4.
17. “The Continued Relevance of Special and Differential Treatment,” paras. 1.7, 6.2.
18. “The Continued Relevance of Special and Differential Treatment,” paras. 1.3.
19. “The Continued Relevance of Special and Differential Treatment,” paras. 2.3–2.6.
20. Amartya Sen, *Development as Freedom* (New York: Random House, 1999).
21. “The Continued Relevance of Special and Differential Treatment,” para. 3.1.
22. “The Continued Relevance of Special and Differential Treatment,” para. 5.14.
23. “Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries,” World Trade Organization, https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.
24. “Ministerial Declaration: Adopted on 14 November 2001,” World Trade Organization, WT/MIN(01)/DEC/1, November 20, 2001.
25. “Monitoring Mechanism on Special and Differential Treatment: Ministerial Decision of 7 December 2013,” World Trade

Organization, WT/MIN(13)/45, WT/L/920, December 11, 2013.

26. “Strengthening the WTO to Promote Development and Inclusivity: Communication from Plurinational State of Bolivia, Cuba, Ecuador, India, Malawi, Oman, South Africa, Tunisia, Uganda and Zimbabwe,” World Trade Organization, WT/GC/W/778/Rev.1, July 22, 2019, para. 4.5. An updated version, WT/GC/W/778/Rev.2, from August 7, 2019, includes the African Group, which consists of all African WTO members.

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29. “Pursuing the Development Dimension in WTO Rule-Making Efforts,” paras. 2.3–2.4 and 4.2.

30. “Pursuing the Development Dimension in WTO Rule-Making Efforts,” para. 3.10.

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39. “LDC Identification Criteria & Indicators,” United Nations Department of Economic and Social Affairs.

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45. Hart and Dymond, “Special and Differential Treatment,” pp. 402–3.

46. Kishore, “Special and Differential Treatment in the Multilateral Trading System,” p. 375.

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68. "Poverty Headcount Ratio at \$1.90 a Day (2011 PPP) (% of Population)," World Bank.
69. "The Continued Relevance of Special and Differential Treatment," para. 5.15.
70. Category A provisions require immediate implementation of all obligations (and within one year for least developed countries); Category B provisions are phased in over a specified period of time; and Category C provisions are conditioned on the receipt by the developing country of technical assistance.
71. "Marrakesh Agreement," para. 2.
72. "Marrakesh Agreement," para. 1.
73. Because all the members of the World Trade Organization are also members of the United Nations (UN), presumably what they envisage as "sustainable development" in the Marrakesh Agreement is consistent with what they have agreed is "sustainable development" in the UN Sustainable Development Goals.
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77. “Procedures to Strengthen the Negotiating Function of the WTO.”
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81. Hart and Dymond, “Special and Differential Treatment,” pp. 398, 404–5.
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