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Country Classification Reform and Stalled Negotiations in the World Trade Organization – How to Break the Stalemate?

Lara Nachkebia

PhD Student, Faculty of Law, Caucasus International University, Georgia

Abstract

WTO law does not offer definitions of "developed" and "developing" countries and the status of its members is determined on the basis of self-selection. As a result, there are countries with diverse levels of economic development that are considered "developing" in the WTO. Unsurprisingly, this causes discontent among developed country members, most notably the USA, who are now unwilling to extend Special and Differential Treatment (S&DT) provisions to all self-declared developing countries (DCs) and therefore, call for bifurcation among developing WTO members. In contrast, developing countries, most notably the upper layer of DCs like China and India, support current status quo. For any change to happen within the WTO, it is of utmost importance that the member states come to a consensus through negotiations. With this in mind, in this paper I explore the grounds for possible trade-offs that could serve as bargaining chips in the negotiations for a rearrangement of the existing country classification and the power structure that comes with it.

Keywords: country classification, developing countries, negotiation, S&D treatment, WTO

I. Introduction

There is an undeniable inequality in economic development among World Trade Organisation (WTO) member states.[1] As a response, WTO law has created Special and Differential Treatment (S&DT or S&D treatment), a mechanism enabling advanced developed countries to provide assistance to poorer countries to tackle domestic commitment issues in trade liberalization.[2] The rationale behind this assistance is that developing countries (DCs) have a disadvantaged position in international trade as they lack either institutional development or relevant resources to overcome obstacles to trade.[3] Thus, the WTO offers many ways to address the needs of DCs through preferential access to the markets of DCs, phase-in periods, financial assistance and technical aid.[4]

In a situation where many WTO agreements contain advantages, it is odd that the WTO does not officially provide any list of DCs. Instead, at the WTO, countries classify themselves in three groups. Most economically advanced countries classify themselves as "developed," while poorest ones fall in the category of "least-developed countries" (LDCs), based on objective measurements devised by the United Nations (UN)[5] that the WTO accepts. The rest of the countries classify themselves as "developing countries." Hence, WTO law does not offer definitions of "developed" and "developing" countries as their status is determined on the basis of self-selection, which is subject to a challenge.[6]

As a result of self-selection, there are countries with diverse levels of economic development that are considered "developing" in the WTO. For instance, both Singapore and Georgia have declared themselves "developing." It means that, theoretically, on the one hand, Singapore that had a per capita income of $65,233 in 2019 and, on the other hand, Georgia with a per capita income of $4,769.2 are all entitled to same benefits.[7] Unsurprisingly, this causes discontent among developed country members, most notably the United States,[8] who are now unwilling to extend S&DT provisions to all self-declared DCs and therefore, call for further bifurcation into additional classifications among developing WTO members.

Even though developed countries (or at least, the United States) seem to be invested with the idea of further bifurcation of DCs, for a change to happen it is essential that all country groups are on the same page, which does not seem to be the case considering the overwhelming opposition on behalf of the upper layer of developing countries (e.g. India and China).[9] By demanding the same flexibilities as the lower layer of DCs, advanced DCs create a situation where it is unlikely to find mutually agreeable trade-offs. Hence, S&D treatment negotiations remain essentially deadlocked.[10]

In order to break a stalemate, member countries need to return to negotiation table and come to a consensus through making concessions. In this light, this paper argues that there exists a number of trade-off possibilities that could convince DCs to change their current stance. With this in mind, Part II below illustrates the benefits of pre-determined objective criteria for enabling further bifurcation of DCs and their potential as possible trade-offs. Part III emphasizes the importance of determining the enforceability of S&DT clauses in exchange for country classification reform. Part IV demonstrates that provision of advanced technical assistance to tackle the developing countries' capacity constraints in negotiations could induce developing countries to agree to the reform.

II Necessity of Pre-determined Objective Criteria

The current deadlock in S&D treatment discussions leads to failed negotiations. One of the reasons lies in the lack of clarity regarding where the states stand in terms of development. Unfortunately, the case of *EC–Tariff Preferences* is of no help in this regard, because the Appellate Body (AB) ruling still gives donor countries discretion to determine how the beneficiary's financial, development and trade needs are to be ascertained.[11] Thus, the absence of pre-determined objective criteria enabling further bifurcation of DCs creates uncertainty with regard to negotiations, its outcomes and subsequent implementation of results.

The above-mentioned uncertainty is detrimental to developing countries. The absence of pre-determined objective criteria leads to manipulation of special treatment as donor countries can change the "rules" for application of their assistance anytime the change serves their interests. This particular shortcoming is especially problematic and evident where preferences are granted under Generalized System of Preferences (GSP) programs, during which GSP grantors get to decide who the beneficiaries of S&D treatment are. In the absence of clear-cut criteria, the inclusion of a country in their GSP list can depend on factors not related to the actual level of development. Political factors may play a decisive role. This way developed countries get the right to exclude certain self-selected DCs from particular types of preferential treatment. For example, the United States has used its GSP scheme as *"a tool to penalize and pressure...those developing countries, whose domestic, trade or international policies conflict with the policies or interests of the USA."*[12]

The GSP system is not abused solely by the United States. Even the case of *EC–Tariff Preferences* was subject to political manipulation. Namely, back in 1998, the European Community (EC) granted special preferences to developing countries that undertook effective programs to combat illicit drug production and trafficking (the Drug

Arrangements). As a result, in absence of any procedural transparency or any defined review criteria, the EC simply designated upfront a list of country beneficiaries, which included Pakistan on political grounds. The EC's decision to include Pakistan in the list was a response to Pakistan's strong support and cooperation with the West against the Taliban and Al Qaeda following the 9/11 terrorist attacks on the United States.[13] As a sign of "gratitude," the EC's scheme put Pakistan's textile product exports into the EC market in a privileged position to the detriment of its competitors, such as India. Therefore, the case of *EC–Tariff Preferences* evidences the fact that the absence of pre-determined objective criteria and transparent procedures enabling bifurcation of DCs creates uncertainty and distrust. Hence, it should be in the interests of DCs, regardless of their development level, to receive more clarification regarding where they stand in terms of development, so that they are not subject to political manipulation and abuse of power by the developed countries.

One might argue, that if, theoretically speaking, a dispute over the status of developing member country can be challenged and, therefore, solved by the Dispute Settlement Body (DSB), then there is no harm in retaining current system and letting countries self-select the status.[14] The key problem with this argument is that in order to deal with status challenges, a demanding appeals procedure should be proposed.[15] A demanding appeals procedure is out of the question currently considering the recent course of events in the WTO. The so-called Appellate Body (AB) crisis, initiated by Obama administration and continued by Trump administration, culminated on 11 December 2019, when the terms of two of the remaining three members of the AB came to an end. With only one member left, the AB could no longer meet the 3-member quorum required to review appeals, hence bringing the WTO's dispute resolution mechanism to a grinding halt.[16] Noteworthy, the core reason of the crisis relates to the United States' reported charges of judicial "overreaching," suggesting that the AB goes against its obligations under Articles 3.2 and 19.2 of DSU, which prescribes refraining from creating or abolishing rights and obligations of WTO members.[17] In this state of affairs, I believe further burdening of DSB with developing status challenges is not an optimal option.

Furthermore, having challenges to development status lodged with the DSB would be especially disadvantageous for small-market developing countries. It is a well-known fact among scholars that a number of DCs have trouble accessing dispute settlement procedures and/or defending their interests through recourse to such procedures, *inter alia,* due to the high costs of litigation.[18] The general cost of WTO litigation in a relatively simple case is believed to amount to total fees anywhere between US$100,000 to over US$1,000,000.[19] To make matters worse, WTO litigation

is more expensive for small developing countries because, unlike advanced DCs like China or India, due to less frequent participation in litigations, these countries do not have ready access to experts. As a result, they have to obtain these experts on an *ad hoc* basis, which raises the "start-up costs" for each particular case.[20] Hence, it is submitted that small-market developing DCs cannot afford to engage in long-term litigations with the aim to proving their developing country status in particular situations.

It goes beyond the scope of this paper to determine what method shall be used to determine the development level of DCs (for instance, an agreement-specific and/or provision-specific approach); however, in light of the above-mentioned hurdles DCs face today, the paper argues that both lower layer and advanced developing countries could potentially benefit from the introduction of pre-determined objective criteria that would ascertain members' economic development level. Noteworthy, that potential reform would be especially advantageous for lower layer of developing countries. Advanced developing countries are in a situation where they cannot fully benefit from S&DT clauses yet do not give an opportunity to lower layer developing countries to enjoy benefits that address their specific circumstances and development needs. Therefore, the latter might be losing the most because without further bifurcation of S&DT beneficiaries, developed countries are likely to offer only shallow S&D treatment to them.[21] This way, poorer DCs lose the benefit they could have enjoyed if their specific needs were tailored to the relevant discipline.[22] As a result, they cannot enjoy the benefits given to LDCs and instead, they have the same obligations as advanced developing countries.

If developing countries made a concession and agreed on a country classification reform though, developed countries would have to compromise as well. For instance, within reasonable limits, it would only be right to give developing countries an upper hand in deciding what the objective criteria determining their development status could potentially be. This is important, because the reform should not be detrimental for future development of the developing countries. While it would be more beneficial for the developed countries to argue the advanced development levels of China and India based on their GDP measurements solely, it should be borne in mind that development is a multi-dimensional concept encompassing economic, social and political dimensions.[23] There are many diverse criteria and indicators used that seek to identify and rank them according to their levels of development and the DCs, regardless of their development level, should be guaranteed to have a strong say in determining the criteria that best target their real needs. Such a compromise would also guarantee that developed countries would not exploit the process, giving yet another incentive to the DCs to agree on the reform.

III Enforceability Issue of Special and Differential Treatment Clauses

One of the complaints about the current system is that most S&DT provisions are unenforceable and that they represent "best endeavour" commitments.[24] Indeed, DCs have long been arguing for the legal enforceability of S&DT provisions, whereas developed countries have mostly been very resistant. Even though Doha Ministerial Declaration notes that they aim to strengthen S&DT provisions and make them more "precise, effective and operational," to this day "best endeavour" clauses lack all three elements, plus enforceability.[25]

The unenforceable nature of S&DT clauses derives from the imprecise language they are expressed in.[26] In its notes of 2001 and 2002, the WTO Secretariat classified then existing S&DT clauses as either mandatory or non-mandatory. The Secretariat stipulated that the mandatory provisions are often formulated in "shall" language, whereas non-mandatory provisions use "should" language. Nevertheless, this is not always the case – some S&DT clauses expressed in "shall" language *"might … not necessarily be effective,"* meaning they may still allow flexibility in their implementation (e.g. Article XXXVII:1 of GATT).[27] The very language of the S&DT clauses are used as an argument by the developed countries to prove that the formulation of provisions do not display the intention of the drafters that they should create justiciable rights; in their view, the act of providing S&DT clauses to the DCs shall be viewed as nothing more than altruism.[28] On the other hand, developing countries argue that S&DT clauses, being an integral part of the WTO agreements, are enforceable similarly to the rest of the provisions. Had the intention been to the contrary, the drafters would not have inserted S&DT clauses in the first place, or they would have referred to them as "best-endeavour'' clauses, incapable of enforcement.[29]

At the time being, since S&DT provisions are treated as political rights, their effectiveness is not dependent on the obligations of a developed member country to enforce the rule; instead, it relies on the will of individual governments whether to enforce a particular measure or not.[30] As a result, due to the lack of enforceability, S&DT's actual benefits to DCs have not lived up to the expectation.[31] Thus, it is desirable that in the future, legally enforceable S&DT provisions are identified. However, the chances are that it will not be done in the absence of a set of objective criteria differentiating between developing countries. This idea is in line with scholarly writing of Constantine Michalopoulos, who argues that it is unlikely that meaningful, legally enforceable commitments favouring all DCs can be implemented, unless DCs opt for further differentiation in their treatment.[32] Fan Cui further argues that a set of objective criteria differentiating between developing countries is so important that

without it, even giving binding effect to more "best endeavour" provisions will not make much improvement that is for the benefit of the DCs.[33] Hence, solution for enforceability issue boils down to the change of current country classification and introduction of objective criteria for this purpose.

In light of the above-mentioned, the paper notes that the issue of the enforceability of S&DT clauses could serve as a potential trade-off between developed and developing member countries. Precisely, in return for agreeing on further bifurcation of developing countries' group, developed members should attest their willingness to extend meaningful and enforceable S&D treatment to those vulnerable countries that are in need for it. In this light, existing S&DT clauses shall once again be overlooked, those creating justiciable rights shall be identified and, where applicable, the language of S&DTs shall be amended so that their enforceability is not put under question in the future.

IV Capacity Constraint

Critics tend to challenge further bifurcation of DCs on the grounds that if the single developing country group breaks up and countries start making their cases individually, the bargaining power will be drastically swung in favour of developed countries, putting all DCs (*i.e* advanced and the lower layer of developing countries) in a less powerful negotiating position.[34] As a matter of fact, poor countries tend to be poor negotiators. Since the establishment of the WTO, it remains a fact that developing and developed countries do not enjoy a level playing field with regard to either power or negotiating capacity when it comes to negotiations at the organization. It also holds truth that, theoretically speaking, each member is entitled to one vote and when it comes to consensus decision-making, they further enjoy the veto power. This strengthens the idea that WTO decision-making is on the basis of equality, whereas, in reality, power and capacity imbalances between the members cement the sad Orwellian truth set forth by former WTO Director-General Michael Moore: *"…some members are more equal than others when it comes to influence."*[35]

As set forth by the South Center, an intergovernmental policy research and analysis institution of developing countries, there are a number of criteria to be met in order for a country to be effectively prepared for trade negotiations. The essentials, *inter alia*, include:

- well-organized and coordinated institutional mechanisms, able to provide negotiating experience;
- technical expertise, policy research and analytical preparation and support;
- technical resources;
- actual physical negotiating presence at the negotiating table, etc.[36]

Unfortunately, developing countries are severely disadvantaged in meeting above criteria due to their capacity constraints. Their lack of negotiating capacity means that they do not have the power to adequately promote their interests and to influence the outcome of negotiations. Thus, in reality, small, resource-constrained negotiating teams cannot take full advantage of their right to participate in the WTO negotiations and decision-making processes. As a result, the negotiating field is left to those delegations, usually those from developed countries, that have sufficient negotiating capacity to participate in trade negotiations.[37]

1. Capacity Constraints Trade Negotiations

It is of utmost importance for a country to have a pool of experts with sufficient technical knowledge to determine, first, the domestic impact of potential policy outcomes associated with trade negotiations and, second, the strategy that ensures that the outcome of trade negotiations is in line with the country's interests. Unfortunately, most developing countries lack negotiating capacity in terms of the required human resources – either they do not have, or fail to identify, nationals with wide-ranging practical experience and/or training in the area of international trade.[38] Due to a shortage of experienced negotiators, developing countries usually fail to influence the outcome of trade negotiations and achieve their objectives. Additionally, because of budgetary constraints, more often than not, delegations of certain DCs are not even able to be physically present at negotiations in a systemic way.[39]

Due to the reasons mentioned above, most developing countries find it extremely difficult to participate in the WTO negotiations unless support is provided from external sources that include but are not limited to the provision of research, information, and assistance in preparations for meetings and negotiating sessions. In many cases, however, such external support and advice may not necessarily be compatible with the developing country's own developmental needs and objectives. This leads us to the second substantial problem facing the DCs – the quality of technical assistance that is being provided to them.

2. Quality of Technical Assistance Provided to Developing Countries

Trade-related technical assistance (TRTA) and trade-related capacity-building (TRCB) initiatives provided to the developing countries suffer from some major shortcomings. To start with, the donor-driven character of TRTA/TRCB has long been raising eyebrows among developing country members. To be precise, the assistance tools where

the content and nature of assistance essentially reflects the economic and negotiating interests of the donors involved (e.g. developed countries or institutions dominated by developed countries such as the WTO, the World Bank, and the IMF) are labelled as donor-driven. In these instances, TRTA/TRCB programs are designed in a way that meets the specific interests of the donors rather than the beneficiaries themselves.[40] This means that the beneficiaries have little to no say in relation to the design, implementation, and outcomes of externally-designed TRTA/TRCB initiatives, which is especially troubling if we perceive TRTA/TRCB as developmental assistance tools.[41]

Unsurprisingly, it is argued that developed countries take advantage of the promise of technical assistance and use it as the "carrot" in trying to secure acceptance by developing countries on issues that reflect their interests in negotiations.[42] There are examples to support this argument. For instance, implementation of intellectual property protection does not constitute a priority for the developing countries, especially in a way envisaged by the developed countries; nevertheless, ironically, the World Intellectual Property Organization ("WIPO") was the first organization with which the WTO signed a "Cooperation Agreement" for the provision of technical assistance.[43] Further, prior to the Cancun Ministerial Meeting in 2003, the vast majority of TRTA/TRCB priorities communicated to the WTO Secretariat concerned so-called "Singapore issues" (competition policy, investment, transparency in government procurement and trade facilitation), which also happened to be primary demands of the EU.[44]

3. Possible Initiatives Offsetting Developing Countries' Capacity Constraints

In return for further bifurcation of developing countries, the latter can demand improvements in technical assistance, some of which are suggested in this paper. According to the WTO website, the aim of Technical Assistance 2020-2021 is to strengthen trade capacity in the following areas:

- trade policy formulation and implementation;
- compliance with WTO obligations;
- the exercising of WTO rights and
- WTO-related trade negotiations.[45]

None of the above-mentioned aims, not even trade policy formulation and implementation aspect of the assistance, assist DCs at better defining their own trade objectives. For instance, policy formulation is the development of effective and acceptable courses of action for addressing what has been placed on the policy agenda.[46] The trouble for many DCs, however, is in determining exactly what their policy agenda

should be so that it reflects the country's interests. Therefore, the paper argues that the primary goal of the WTO capacity-building initiatives should include, *inter alia*, enabling developing countries to better define their own trade objectives and interests, integrating these objectives into internal regulatory policies and development plans, and advancing them in international trade negotiations. In this way it is less likely for TRTA/TRCB to reflect donors' priorities and their perceptions as to what beneficiary countries need. Further, in order to address country-specific concerns and circumstances, an adequate Implementation Needs Assessment and Post-implementation Impact Evaluation should be introduced. While the former would ensure that the TRTA/TRCB providers tailor their initiatives to respond to the beneficiaries' identified development needs, trade objectives and priorities, the latter would reflect how effectively TRTA/TRCB initiatives address the development needs and priorities of the beneficiary countries.[47] Should TRTA/TRCB programs not adequately respond to development needs of the DCs, Post-implementation Evaluations will further ensure that future TRTA/TRCB initiatives are more responsive to the needs and demands of the beneficiaries.

The pool of recipients for TRTA/TRCB initiatives is yet another obstacle. If the relevant governments established a coordinating mechanism that involved relevant domestic stakeholders for the identification of the country's trade and economic needs and priorities, it is more likely that national development objectives would be better determined; also, it would ensure that the interests of those stakeholders are effectively promoted during trade negotiations.[48] Correspondingly, trade-related capacity building could potentially be more effective if it also responded to the demands of the private sector, academics, and other civil society groups.[49] In view of this, at a first glance, the aims of Technical Assistance Plan 2020-2021 displayed at the WTO webpage seems to conform with the demonstrated suggestion; namely, the package aims to assist, *inter alia,* government officials, members of parliament, journalists, civil society, students, academic institutions and etc.[50] However, if we have a look at the technical assistance archive of 2020, it becomes clear that the vast majority of the assistance packages are designed for the government officials only; those activities aimed at journalists and civil society are merely aimed at raising awareness regarding WTO activities and can hardly be used as a means to identify strategic national developmental policies and priorities.[51] With this in mind, it is suggested that resources should be allocated in developing countries to support the development of a national pool of experts through institutional links and training programmes among relevant government agencies and local constituents.[52]

Finally, another reason why identifying ones own strategic national developmental policies, priorities, and negotiating interests are of great importance is that they can serve as the basis for a developing country's individual engagement in coalitions and groupings for the WTO negotiations that could potentially improve DCs' negotiation capabilities.[53] Indeed, most developing countries are small. Thus, these countries will never have the capacity to advance their interests effectively in the WTO system by acting alone because of the power imbalances in WTO negotiations. Therefore, as rightly suggested in the literature, developing countries should invest more in building up not only regional groupings, but also issue-based alliances and coalitions with one another prior to engaging with their developed counterparts in trade negotiations.[54] Without any doubt, elaboration and articulation of common positions will require significant resources and political will from the DCs. No matter what means of coordinating they adopt, it should facilitate regular interaction among various groups and alliances of developing countries in the WTO. This is essential as regular discussions will resolve major differences between them, raise awareness as to their individual positions, their collective negotiating objectives as well as individual/group "walk-away" negotiating positions.[55] From this perspective, in exchange for a country classification reform, developing countries should insist on technical assistance programs that could facilitate such coordination.

In conclusion, it is suggested that in return for agreeing on further bifurcation of the developing countries' group, the WTO and possible member donors should attest their willingness to extend meaningful technical assistance to the developing countries which experience capacity constraints. This trade-off could be of great advantage to the DCs, because targeting the actual needs of developing countries through S&DT clauses, in this case technical assistance clauses, would encourage and improve their capacity to be involved in negotiations.

IV Conclusion

As Joost Pauwelyn rightly noted, nowadays *"too many differences exist between developing countries for all of them to be treated the same."*[56] Bearing this in mind, this paper has highlighted the problematic country classification system existing in the WTO and suggests possible trade-offs that could lead to the solution to the problem. Pauwelyn rightly argues that the time will come when a WTO member contests self-declared developing country status of another member and the WTO panel or the AB will need to assess it, instead of exercising judicial economy as it has previously when considering this matter.[57] Blind acceptance of self-selection is unlikely, which means the DSB will have to check member's status with reference to certain objective

criteria.[58] This, I believe, can serve as a trigger for further discussions about the much-needed reform of classification system in the WTO, leading to essential compromises from all sides so long as they aim to finally end the stalemate.

Endnotes

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[48] South Centre, *supra* note 36, at 5.

[49] Shaffer, *supra* note 43, at 671.

[50] World Trade Organization, *'WTO technical assistance and training,'* < https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm#:~:text=WTO%20technical%20assistance%20and%20training,more%20effectively%20in%20global%20trade> (last visited 2 June 2021)

[51] World Trade Organization, *Technical assistance news archive*, <https://www.wto.org/english/news_e/archive_e/tct_arc_e.htm> (last visited 2 June 2021)**;** World Trade Organization, *Factsheet on trade related technical assistance*, <https://www.wto.org/english/tratop_e/devel_e/teccop_e/ta_factsheet_e.htm> (last visited 2 June 2021)

[52] South Centre, *supra* note 36, at 19.

[53] *Id.* at 18.

[54] Luisa E. Bernal et al., *South-South Cooperation in the Multilateral Trading System: Cancun and Beyond* (South Centre TRADE Working Paper No. 21, 29-30 (2004).

[55] *Id.*

[56] Joost Pauwelyn, *'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes'* 22(1) Review of European Community and International Environmental Law, 29, 30 (2013) [hereinafter: Pauwelyn].

[57] *Id.* at 32; *see also, US – Steel Safeguards*, *supra* note 15, para. 10.714.

[58] Pauwelyn, *supra* note 59, at 32.