CHAPTER 4

Special and differential treatment and developing country status: Can the two be separated?[1]

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Debate on the appropriate relationship between levels of development and the depth of policy commitments undertaken by different members of the GATT/WTO is long-standing and unresolved. In the WTO, members determine their own developmental designation, while special and differential treatment is a matter for negotiation. Most aspects of special and differential treatment (SDT) require cooperative action of one kind or another from others besides the SDT recipients – the scope to invoke unilateral 'flexibilities' in implementing WTO rules is limited. A distinction between regulatory and market access aspects of WTO obligations is important to an understanding of the dimensions of SDT. To move the SDT debate ahead, a useful exercise would be to determine which members are making use of the subset of SDT flexibilities where they have the independent choice of doing so. This would inform governments whether particular flexibilities are used and provide a basis for decisions to indicate they do not intend to do so in the future.

1. INTRODUCTION

The multilateral trading system (MTS) under the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) has always faced the challenge of how to design trade rules and calibrate commitments to market openness among members with differing priorities, needs, and development levels. The task has not become easier over the years. The membership of the GATT and subsequently the WTO has expanded significantly, accentuating diversity. At the same time, interdependency among nations has grown in a rapidly changing world, adding to the complexity of managing trade relations.

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The GATT started out in 1948 with 23 signatories. The WTO came into being at the beginning of 1995 with 76 members, increasing to 112 by the end of that year. Currently, the WTO has 164 members, with another 23 in the process of accession. In terms of increased complexity, the GATT initially focused on tariffs and a range of flanking policies aimed at protecting the value of tariff commitments. The flanking rules have evolved in terms of precision and complexity, and at the same time new agreements have been added, particularly in the Uruguay Round. These developments have taken WTO rules further behind the border and deepened the level of accountability associated with growing international economic integration.

It is against this background that deliberations on links between levels of development and the depth of policy commitments are set. The debate has been a continuing source of contention, often slowing progress in realising opportunities among GATT/WTO members for mutually beneficial cooperation through trade. The need to find accommodation in this area has intensified, as many parties that define themselves as developing countries have become increasingly prominent and influential in international trade.

A defining feature of the debate around the balance of rights and obligations among economies within the MTS has been the absence of agreement about where – whether in economic, socio-economic, or political terms – individual countries should find their place in terms of an appropriate balance of those rights and obligations. The debate on this issue has intensified in recent decades as the centre of economic gravity has both shifted and become less nationally concentrated. The rise of China, along with the country's accession to the WTO in 2001, has been an important factor in intensifying the geopolitical aspect of the discussion.

In short, at the heart of the issue is what SDT should be available to different WTO members? Much of the focus has been on two sets of members – developed and developing countries – and the composition of the two groups. The latter group – variously referred to over the years as third world countries, under-developed countries, less-developed countries and more recently developing countries – were considered eligible for SDT.

An important exception to the lack of clarity about the composition of groups is the least-developed country (LDC) grouping, created through a United Nations resolution in 1971,[3] and adopted by the GATT in 1979 at the close of the Tokyo Round of multilateral trade negotiations. The LDCs, of whom there are currently 46, are identified as those economies with the highest poverty and economic vulnerability levels and greatest weaknesses in terms of human resource indicators (nutrition, health, education, and adult literacy). The composition and size of the group is adjusted over time on the basis of reviews of these

3 UN Resolution 2768 (XXVI) of 18 November 1971.

development indicators. Because the LDCs are a well defined group designated by the United Nations, the debate about access to special treatment in the WTO has not been relevant for this category of members.

No agreement exists on the definition of developing countries in the WTO, and the designation of the status is treated as a matter for individual members. Since SDT provisions are formulated as entitlements for developing countries, they have been considered by definition eligible for SDT, barring selective criteria attached to a few SDT provisions. The combination of self-selection and largely unfettered access to SDT in a world where countries have significantly different development needs is at the centre of disagreement on how to move this issue forward.

The cut-off point between developed and developing countries has been discussed from time to time, and was raised explicitly in early 2019 by the United States with a proposal for a set of technical criteria to determine whether a country may access WTO provisions designed to facilitate the fuller participation of developing countries in the MTS.[4] In other words, the proposal would determine whether members had access to SDT or not. The appropriateness of this binary approach was questioned by many members.

Concerns about the automatic conflation of developing country status and entitlement to SDT need to be assessed, acted upon where necessary, and put to rest. As we shall argue, the way to do this is to break the link between what a country calls itself and what access to SDT should be available. We shall also argue that in practice, developing countries use SDT in varying degrees. Attempts to negotiate data-related thresholds that will define development status are unlikely to succeed. The one notable exception to this is the LDC group, as discussed above.

In what follows, Section 2 of the paper briefly traces the origins and evolution of SDT in the GATT and the WTO that has brought us to where we are today. Section 3 dissects the constituent parts of SDT in the WTO in order to identify where contentious issues could be addressed. A key question to be considered in this analysis is how much 'space' exists or should exist for a country that designates itself as developing to have access to SDT provisions. Section 4 discusses possible approaches to addressing the SDT issue in ways that lessen its impact as a hold-up issue in the work of the WTO. Section 5 concludes.

2. THE EVOLUTION OF THE SDT DEBATE

As discussed in more detail later, we argue that it is useful analytically to distinguish between SDT relating to levels of commitments to market access in goods and services, and SDT relevant to the rules that underpin the GATT/WTO multilateral trading system. When the GATT entered into force in the late 1940s, the core focus of the fledgling institution was to restore trade relationships among major trading nations that had

4 See WTO documents WT/GC/W/757/Rev1 of 14 February 2019, and WT/GC/W/764 of 15 February 2019.

been ravaged by the Great Depression and the Second World War. The main emphasis back then was on removing tariff and non-tariff barriers to trade. It was clear from the beginning that the major trading countries were going to do this selectively.

Tariff-cutting negotiations in successive GATT rounds of from 1947 onwards[5] yielded some appreciable results. But there were exceptions. Developed countries were reluctant to lower tariffs on agricultural products and labour-intensive manufactures. Both of these sectors accounted for small shares of GDP but were backed by strong interest groups. Little domestic opposition to high protection levels in these sectors was apparent, in part for socioeconomic reasons as well as the existence of strong and well organised lobby groups supporting the sectors concerned. Moreover, the products concerned were small items in many consumption baskets.

For their part, the developing countries relied significantly on these products for their exports but lacked the bargaining power to make their case effectively for better market access. At the same time, most developing countries were unwilling to undertake significant tariff cuts of their own, a position they defended on the grounds of developmental and diversification imperatives. A further difficulty related to the request-offer negotiating technique, where bilateral reciprocal exchanges of tariff cuts were made among large countries. The smaller market size of developing countries rendered their offerings less capable of securing the kind of reciprocity to clinch bargains that were to then be multilateralised on a most-favoured-nation (MFN) basis.

By the late 1950s and early 1960s, the issue of non-participation of developing countries in tariff negotiations was attracting increasing attention. The establishment of UNCTAD was a galvanising influence. The solution settled upon was for developed countries to introduce non-contractual preferences for developing countries in order to give them access to their major potential markets. The arrangement evolved into the Generalised System of Preferences (GSP). This lesser, unilateral and non-contractual deal was not subject to serious negotiation. As soon as such preferential access became useful to the recipients, they tended to be excluded on the basis of competitive criteria that did not necessarily imply an ability to compete in those same markets on an MFN basis. Political criteria, not linked directly to trade, are also brought to bear under some GSP schemes. At the same time, in those early years developing countries were not pressed by their major trading partners to open their markets. This may be seen as something of a *quid pro quo* for the absence of contractual commitments on the other side of the arrangement.

This setup can be characterised as a minimalist alliance (Low et al. 2018) with mitigated, time-bound benefits for preference-receiving developing countries and of limited economic consequence for developed countries. The arrangements also established a vested interest among preference receivers to oppose MFN market-opening in order to

5 GATT multilateral trade negotiating sessions were launched in Geneva (1947), Annecy (1949), Torquay (1950-51), Geneva (1956), Geneva (1960-61) - also known as the Dillon Round, the Kennedy Round (1964-67), the Tokyo Round (1973-79).

protect their favourable margins. Nevertheless, this state of affairs represented something of an equilibrium in market access matters, more or less until the 1970s. Things began to change in the Tokyo Round (1973-79) and its aftermath. Developing countries were becoming more significant players in international trade and they used the Tokyo Round to press for greater stability and a more wide-reaching set of arrangements to address their development challenges.

It was in the Tokyo Round that the phrase 'special and differential treatment' gained currency. The Enabling Clause[6] gave permanent legal standing to GSP, which had hitherto been granted through waivers. It also provided for SDT under agreements on non-tariff measures, lessened already weak GATT disciplines on preferential trade agreements among developing countries, and introduced additional MFN exemptions for LDCs. While reiterating the non-reciprocity provisions in GATT Article XXXVI:8, the Enabling Clause also introduced 'graduation' language, stating that developing countries were expected to participate more fully in the GATT, along with the progressive development of their economies and improved trade situation.

In the area of non-tariff measures (NTMs), a number of 'codes' were negotiated. With the exception of the Agreement on Government Procurement and one or two smaller and less consequential agreements, the remaining five codes all built on existing GATT provisions.[7] Developing countries were permitted to opt out of these agreements while still enjoying their benefits on an MFN basis.

In the years following the end of the Tokyo Round, it became increasingly apparent that the old suboptimal quasi-equilibrium defining trade relations between developed and developing countries was becoming less stable. Pressure was mounting on both sides for change. Developing countries wanted to see the discontinuation of the virtual exclusion of agriculture from GATT trade disciplines, and the actual exclusion of textiles and clothing through the Multi-Fibre Arrangement. Developed countries wanted greater levels of participation from some developing countries.

The Uruguay Round was launched in 1986, and this was in many ways a turning point in relations between developed and developing countries on the issue of how to define and manage SDT. The GATT was incorporated into the WTO as a result of the Uruguay Round. The agenda of the newly-minted WTO was broadened out in significant ways, with the addition of the GATS and TRIPS Agreements, as well as some revamping of existing NTM Agreements and the introduction of several new agreements.[8]

6 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903).

7 The agreements covered technical barriers to trade, subsidies and countervailing duties, customs valuation, import licensing, and anti-dumping.

8 These included agreements on agriculture, sanitary and phytosanitary measures, textiles and clothing, trade-related Investment measures, pre-shipment inspection, rules of origin, and safeguards.

The Uruguay Round was launched with a Single Undertaking Agreement, which stipulated that nothing was agreed until everything was agreed. The purpose of the undertaking was to ensure that countries could not harvest results that interested them and then disengage from issues on which they had no interest, or did not wish to see included in the final package. As the Uruguay Round progressed, however, and as it became clearer that the GATT would become the WTO, the notion of a single undertaking assumed a quite different meaning. It was that no GATT member could join the WTO in a piecemeal fashion. A single undertaking intended as an instrument to protect all members' interests – especially the less influential among them – had become a precondition for signing up to the WTO. The proposition was that for the agreement to apply, everything must be adopted by all members by way of rights and obligations.

An immediate consequence of this was that the opt-out possibility allowed under the Tokyo Round Codes was swept away. Practically all the Uruguay Round texts did, however, contain STD provisions. As opposed to offering an opt-out, they sought to facilitate convergence to core provisions and standards under each agreement. This approach reinforced the notion that all WTO members would eventually converge around a uniform set of rules. Developing countries that had not signed up to the Tokyo Round codes were thus obliged to 'catch up' and accept many more new agreements and conditions than their more developed counterparts. Many of them expressed concern with the situation, eventually resulting in a process organised in the Committee on Trade a Development to consider proposals from developing countries for STD-related modifications to agreements or associated procedures.

This exercise became known as the Implementation Agenda. At one end of the spectrum it was about a re-examination of certain provisions in some WTO agreements in terms of their suitability from a development perspective. At the other end, it was about technical assistance necessary for developing countries to be able to manage their obligations, many of which had been acquired as a result of the Uruguay Round single undertaking. Unsurprisingly, developing countries tended to emphasise the need for amended rules and procedures in the name of SDT, while the developed countries were more inclined to think of technical assistance as the solution to the difficulties.

This exercise continued with limited results. The Doha Round was launched at the end of 2001. The Implementation Agenda was carried into these negotiations, and the Doha Declaration was replete with language aimed at addressing SDT issues. Paragraph 44 of the Doha Agenda stated that '... all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective, and operational'. This was part of the implementation mandate that was incorporated into the Doha negotiating mandate.

A Doha Ministerial Decision entitled 'Implementation-Related Issues and Concerns'[9] covered some 50 points for action in different agreements.[10] Paragraph 12 of the Doha Ministerial Declaration cross-referenced this Decision and stated 'that negotiations on outstanding implementation issues shall be an integral part of the Work Programme' established under the Declaration.[11] Since the Doha Round has ceased to record progress, in practice the Implementation Agenda has been in abeyance. It is open to question whether this exercise is framed in a manner that can lend itself to further progress.

With a moribund Doha Round and minimal advances in addressing SDT issues, the membership once again finds itself at an impasse. Agreement remains elusive on what constitutes an equitable balance of rights and obligations among members of the WTO. In the meanwhile, the dynamics of the discussion have changed, not least following the accession of China to the WTO in 2001. The Chinese authorities made it clear during accession negotiations, and in the Protocol of Accession, that they considered China a developing country. China had already enjoyed rapid growth beginning in the 1980s, and it picked up in the 2000s after WTO accession. Against the background of its economic success, some WTO members have questioned the appropriateness of China's developing country status.

China's size and growing influence on outcomes in the world economy has placed it in the spotlight in relation to the SDT debate. China's fundamental argument is that the development process is far from complete. While certain sectors and areas of the country have modernised and become internationally competitive, many development challenges remain to be addressed. While all countries are entitled to determine whether they consider themselves developing countries, this choice does not signal a specific positioning in respect of the multiple elements that constitute SDT in the WTO.[12]

3. DISSECTING SDT

At the beginning of Section 2 we alluded to a distinction between 'regulatory SDT' and 'market access SDT'. While the distinction may not always be entirely clear-cut, we believe that there are enough differences between these two aspects of SDT to warrant an analysis along these lines. We shall also briefly consider the GATS approach to development issues, as well as procedures adopted in the TBT and SPS Committees that can be effective in addressing development needs.

9 WT/MIN(01)/17, 20 November 2001, Decision of 14 November 2001.

10 These included the GATT and agreements covering agriculture, sanitary and phytosanitary measures , textiles and clothing, technical barriers to trade, TRIMS, anti-dumping, customs valuation, rules of origin, subsidies and countervailing measures, and TRIPS.

11 Doha WTO Ministerial Declaration 2001. WT/MIN(01)/DEC/1, 20 November 2001. Paragraph 12.

12 See WTO document WT/GC/W/773, date 13 May 2019, a submission by China. Part of Paragraph 2.34 reads: '…encourage developing Members to actively assume obligations commensurate with their levels of development and economic capability'.

Regulatory SDT

I start with regulatory SDT. Regulatory SDT involves provisions relating to trade rules. As indicated in the previous Section, links between trade rules and SDT became a more important issue when the GATT members started to negotiate a strengthening of non-tariff measure disciplines, beginning in the Kennedy Round (1964-67), and especially from the Tokyo Round (1973-79) onwards. The WTO Secretariat has helpfully produced and periodically updated a document that systematically identifies all SDT provisions in GATT/WTO texts.[13] The document uses a taxonomy to describe measures in terms of their purpose. The categories include:

1. Provisions aimed at increasing the trade opportunities of developing country members
2. Provisions under which WTO members should safeguard the interests of developing country members
3. Flexibility of commitments, of action, and use of policy instruments
4. Transitional time-periods
5. Technical assistance
6. Provisions relating to LDC members

I have slightly adjusted the taxonomy for the purposes of this chapter. Since one of the objectives is to determine the 'wiggle room' that exists for developing countries to autonomously make use of SDT provisions, I have bundled categories 1) and 2) together to capture their shared character as best-endeavours undertakings.

Table 1 summarises SDT provisions contained in WTO Agreements, of which there are a total of 183. The vertical axis identifies the WTO Agreements containing SDT provisions and the last column indicates the total and percentage shares of these provisions in each agreement. The last column of the horizontal axis shows the number and the percentage share of each kind of SDT provision (items 1-5 in the Key to Table 1) contained in the agreements.[14]

The only regulatory SDT provisions included in Table 1 where a beneficiary member can unilaterally decide to make use of SDT is under the *Flexibilities* column. What Table 1 tells us, then, is that developing countries can act unilaterally to garner SDT benefits in respect of only 24% of the total number of regulatory SDT provisions in WTO agreements. One might argue that transitional timeframes can also be accessed independently, but these are negotiated time-bound options and in any case many of them have expired. The

13 WT/COMTD/W/239, 12 October 2018.
14 Annex 1 to this paper includes a number of illustrative examples of provisions relevant to the first four of these categories.

SDT provisions listed as flexibilities allowing unilateral action are fairly concentrated, with some 60% of them contained in three agreements – the Agreement on Subsidies and Countervailing Measures, the Agreement on Agriculture and the Government Procurement Agreement.

TABLE 1 SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN WTO AGREEMENTS

AGREEMENT	1	2	3	4	5	TOTAL	
General Agreement on Tariffs and Trade 1994	21	4				25	14
Understanding on Balance of Payments of GATT1994		1		1		2	1
Agreement on Agriculture	1	9	1		3	14	8
Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures	2		2	2		6	3
Agreement on Technical Barriers to Trade	13	2	1	9	3	28	16
Agreement on Trade-Related Investment Measures (TRIMs)		1	2		1	4	2
Agreement on Implementation of Article VI of GATT 1994	1					1	1
Agreement on Implementation of Article VII of GATT 1994	1	2	4	1		8	4
Agreement on Import Licensing Procedures	3		1			4	2
Agreement on Subsidies and Countervailing Measures (SCM)	2	10	7			19	10
Agreement on Safeguards	1	1				2	1
General Agreement on Trade in Services (GATS)	7	4		2	2	15	8
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)			2	1	3	6	3
Understanding on Rules and Procedures Governing the Settlement of Disputes	7	1		1	2	11	6
Agreement of Government Procurement (GPA)	3	6		1	2	11	6
Agreement on Trade Facilitation (TFA)		3	7	7	9	26	14
TOTAL	62	44	27	25	25	183	100

Note: 1. Best-endeavours provisions, 2. Flexibilities, 3. Transitional Timeframes, 4. Technical Assistance, 5. Least-Developed Countries.

Source: Committee on Trade and Development, WT/COMTD/W/239, 12 October 2018.

In all other cases, the nature of the measures does not permit a developing country to independently access SDT provisions. Best-Endeavours Measures are in the gift of the party providing the treatment, not the party receiving it. The same applies to Technical Assistance and in the case of measures for LDCs, the group of developing countries with access is pre-selected through a third-party process.

We do not present a detailed analysis of each SDT measure presented here, but many of them are either not used in practice by various developing countries or provide relatively little by way of differential treatment. The Agreements that one might wish to analyse here are the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures in terms of the number of SDT provisions contained in these two agreements.

In addition to the special and differential treatment (S&D) provisions in the 16 WTO Agreements identified in Table 1, a further 32 decisions taken by ministers and the General Council over the years also contain STD provisions.[15] Some 60% (19) of these decisions relate exclusively to LDCs. Of the remaining 13, half of them (seven) deal with aspects of the Agreement on Agriculture, two concern the Transparency Mechanism for Preferential Trade Agreements, and the remaining four relate to the 1979 Enabling Clause, customs valuation, the 2005 TRIPS Amendment, and fisheries subsidies.

There is a sense in which the Agreement on Agriculture and accompanying texts provide varying degrees of 'special' treatment for all WTO members. This subject is a source of considerable contention, but we would argue that the underlying market access issues go beyond a straightforward matter of developing countries uniquely enjoying special and differential treatment. The agricultural sector offers special provisions for all WTO members and the analysis of how to assess the mix of tariff and domestic subsidy support measures for each member is a complex exercise.

As for the other Decisions that are not limited to LDC considerations, fisheries subsidies are currently the most contentious issue badly in need of a negotiated resolution. This particular negotiation does not fall neatly into the distinction we have made between regulatory and market access SDT. This is because the negotiation turns on subsidisation levels, and subsidies are neither tariffs nor simply regulations, but they are about which countries can use subsidies, to what extent, and for what purpose. This issue clearly divides countries in terms of perceptions of the development imperatives claimed by the parties concerned. This makes it a challenging negotiation.

15 WT/COMTD/W/239, 12 October 2018.

A final point to make here relates to the extent to which developing countries actually use regulatory SDT provisions even if they are putatively entitled to do so. This is an empirical question to which we do not have an answer, but it is an important one that we believe should be brought into the reckoning.

In the case of China, two examples where SDT has not been relied upon to the fullest extent permitted are in the Agreement on Agriculture (AoA) and the Trade Facilitation Agreement (TFA). Under the AoA, domestic subsidies were capped at 10% for developing countries, as opposed to 5% for developed countries. China agreed to a cap of 8.5%. Under the TFA, member-specific commitments in relation to the entry into force of the Agreement were divided into three categories – immediate implementation (Category A), implementation with a phase-in period (Category B), and implementation conditional upon technical assistance and without a specified implementation date (Category C). China and a number of other developing countries have foresworn any commitments under Category C.[16] It should also be noted that China only included four Category B entries upon signature of the Agreement. All the rest of the commitments are in Category A.[17]

In addition, it may be noted that notwithstanding the country's self-declared status as developing, China joined the other signatories of the second iteration of the Information Technology Agreement (ITA II) in eliminating import duties and other charges from a range of key inputs and finished products in the IT sector. This is an illustration of how being a developing country does not need to define the extent to which a party resorts to SDT.

Unfortunately, no data exist that systematically identify where members are resorting to available SDT flexibilities, reducing their use of them, or refraining altogether. It may make sense to launch an exercise to establish which members are relying on SDT measures and consider undertakings in respect of future use. This could be the basis of a meaningful negotiation that would promote certainty without undermining economic interests, and would target specific needs rather than rely on blanket categorisations.

Market access SDT

As noted in Section 2, market access SDT was a primary focus of attention in the early years of GATT. The story here is mixed, in that non-contractual preferences were enjoyed by some developing countries on the one side, while on the other until the 1990s agricultural policies and the Multi Fibre Arrangement (MFA) practically took these sectors out of GATT contention altogether. Even when the Agreement on Agriculture came into being

16 See Trade Facilitation Agreement Facility at https://www.tfafacility.org/notifications. Other developing countries that have no Category C reservations include, for example, Argentina, Brazil, Chile, India, Indonesia, Korea, Malaysia, Mexico, Singapore, Thailand, and Uruguay.

17 The Category B entries related to the Establishment of Publication and Average Release Time (Article 7.6); Single Window (Article 10.4); Temporary Admission of Goods and Inward and Outward Processing (Article 10.9); and Customs Cooperation (Article 12).

and the MFA was phased out after the Uruguay Round, tariffs against these products remained high. The basic point here is that all countries have high tariffs, at least in some sectors, and in the case of the developed countries these tend to be sectors of particular interest to many developing countries.

The central question is whether it makes sense to see market access through the narrow lens of SDT when virtually all countries maintain measures that amount to considerably less than free trade. Socio-economic and political imperatives drive this reality and it is common to the entire WTO membership. The question then, is what more can be exchanged in terms of market opening among members, be they designated developed or developing, to the mutual advantage of the parties involved. There will always be limitations that stop short of free trade. Unlike with regulatory SDT, there is no presumption of eventual convergence when it comes to market access.

A point worth making here is that the GATT/WTO has sought over the years to promote market-opening, but with mitigated success. Perhaps the most significant success story was the reduction by developed countries over several decades from 1948 onwards of tariffs on most but not all manufactures. This exercise was aimed at undoing much of the protectionism of the previous two to three decades in a concerted manner that would avoid terms-of-trade losses that might otherwise have resulted from unilateral market-opening. The GATT played a coordinating role in an exercise that the parties involved wished to carry forward.

Other than this, there have been some successes such as the two Information Technology Agreements. Much less has been accomplished in agriculture and labour-intensive manufactures. As far as developing countries are concerned, very few examples can be found of binding reductions being made to applied MFN tariffs on the altar of a GATT/WTO round of negotiations. Contributions in the form of reduced bindings have generally kept the MFN rates above the applied rates, and considerable water remains in the tariff schedules of many developing country members across a wide range of products. As with regulatory SDT, this is an area where greater certainty could be imparted without changing conditions of market access.

If the WTO has generally proven not to be an especially effective vehicle for market-opening, which would seem to be the case in comparison with unilateral market-opening initiatives and preferential trade agreements, perhaps the institution could focus more on what it has done much better, which is to establish rules for the conduct of trade. When a tariff or some other scheduled market access commitment is bound, it still reflects a certain level of market access but in the form of a rule than maintains the access constant. The role of the WTO could be more that of a consolidator and keeper of policy consistency and certainty rather than that of a pioneer in liberalising markets.

Returning to the question of how far SDT is reflected in market assess, the attached table and accompanying graphs provide some indication. Table 2 summarises the total binding coverage of 26 selected countries, their simple average agricultural and non-agricultural

bound and unbound rates, their *non-ad-valorem* duties expressed as a percentage share of the relevant HS6 subheading, and the maximum duty recorded on the national schedules of the listed countries.

TABLE 2 TARIFF PROFILES OF SELECTED COUNTRIES

	Total binding coverage (%)	Simple average duties (%)		*Non-ad-valorem* duties (HS 6-digit subheadings in %)		Maximum duty	
		Bound	MFN applied	Bound	MFN applied	Bound	MFN applied
Argentina	100						
Agricultural Products		32.4	10.3	0	0	35	35
Non-Agricultural Products		31.7	14	0	0	35	35
Australia	97.1						
Agricultural Products		3.5	1.2	1.7	0.9	29	21
Non-Agricultural Products		10.7	2.6	0.2	0	55	5
Brazil	100						
Agricultural Products		35.4	10.1	0	0	55	35
Non-Agricultural Products		30.8	13.9	0	0	35	35
Canada	99.7						
Agricultural Products		14.3	15.1	18.6	11.1	540	511
Non-Agricultural Products		5.1	2.1	0.3	0	20	25
Chile	100						
Agricultural Products		26.1	6	0	1.1	98	6
Non-Agricultural Products		25	6	0	0	25	6
China	100						
Agricultural Products		15.7	13.9	0	0.3	65	65
Non-Agricultural Products		9.1	6.5	0	0.3	50	50

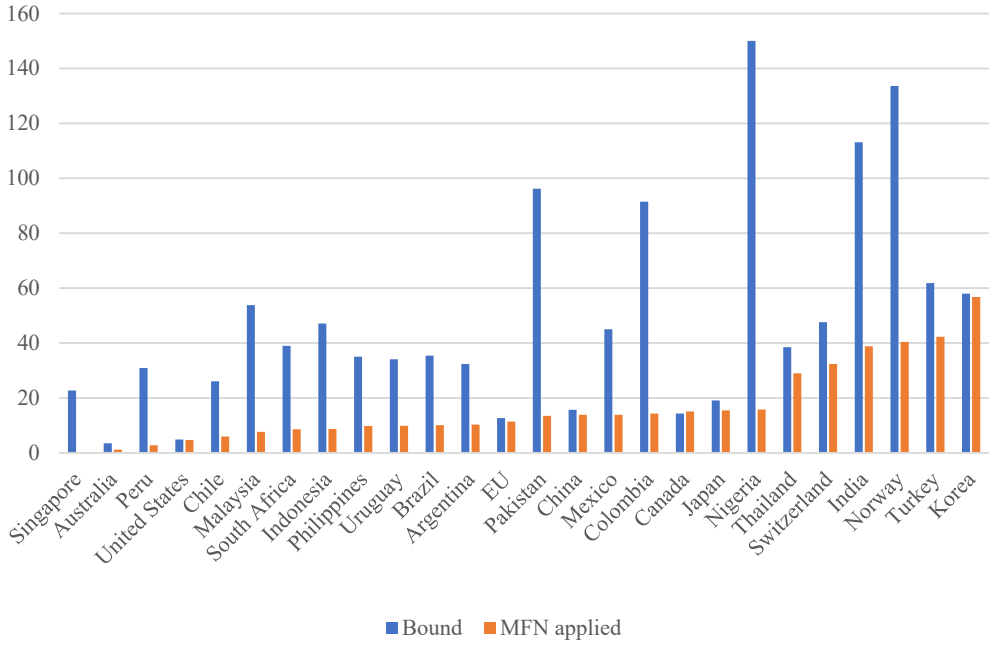
Colombia	100						
Agricultural Products		91.5	14.3	0	15.6	227	98
Non-Agricultural Products		33.5	4.1	0	5.2	104	35
EU	100						
Agricultural Products		12.7	11.4	31.7	32.3	405	261
Non-Agricultural Products		3.9	4.2	0.6	0.5	26	26
India	74.3						
Agricultural Products		113.1	38.8	0.3	0.3	300	150
Non-Agricultural Products		36	14.1	5.7	5.5	150	125
Indonesia	96.3						
Agricultural Products		47.1	8.7	0	1.4	210	150
Non-Agricultural Products		35.5	8	0	0	60	150
Japan	99.7						
Agricultural Products		19.1	15.5	15.1	13.2	716	716
Non-Agricultural Products		2.5	2.5	1.7	1.9	465	315
Korea	94.9						
Agricultural Products		58	56.8	5.2	3.1	887	887
Non-Agricultural Products		9.8	6.6	0.1	0	87	104
Malaysia	84.3						
Agricultural Products		53.8	7.7	21.1	4.8	1000	1000
Non-Agricultural Products		14.9	5.3	0.1	0	62	60
Mexico	100						
Agricultural Products		45	13.9	7.3	4.7	254	75
Non-Agricultural Products		34.8	6	0	0.1	156	50
Nigeria	20.1						

Agricultural Products		150	15.8	0	0	150	35
Non-Agricultural Products		49.7	11.5	0	0	150	35
Norway	100						
Agricultural Products		133.6	40.4	66.7	43.3	1000	1000
Non-Agricultural Products		3	0.4	2.3	0.1	100	100
Pakistan	98.7						
Agricultural Products		96.2	13.5	0.1	4.4	200	200
Non-Agricultural Products		55.1	11.9	0	0.1	100	100
Peru	100						
Agricultural Products		30.9	2.8	0	0	68	11
Non-Agricultural Products		29.3	2.3	0	0	30	11
Philippines	66.9						
Agricultural Products		35	9.8	0	0	60	65
Non-Agricultural Products		23.4	5.5	0	0	50	50
Singapore	72						
Agricultural Products		22.7	0.1	3.5	0.2	1000	96
Non-Agricultural Products		6.2	0	0	0	10	0
South Africa	94.3						
Agricultural Products		39	8.6	0	13.7	597	110
Non-Agricultural Products		15.7	7.6	0	0.9	50	754
Switzerland	99.7						
Agricultural Products		47.6	32.4	78	69.7	1000	1000
Non-Agricultural Products		1.9	1.7	78.9	75.7	59	58
Thailand	75.2						
Agricultural Products		38.5	29	44	27.8	712	226

Non-Agricultural Products		25.6	7.2	14.9	6.4	220	143
Turkey	50.5						
Agricultural Products		61.8	42.3	0	3.4	225	225
Non-Agricultural Products		17.3	4.5	0.1	4.5	100	82
United States	100						
Agricultural Products		4.9	4.7	41.3	42	350	350
Non-Agricultural Products		3.2	3.1	3.3	3.1	56	56
Uruguay	100						
Agricultural Products		34.1	9.9	0	0	55	3.5
Non-Agricultural Products		31.2	10.4	0	0	35	35

Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

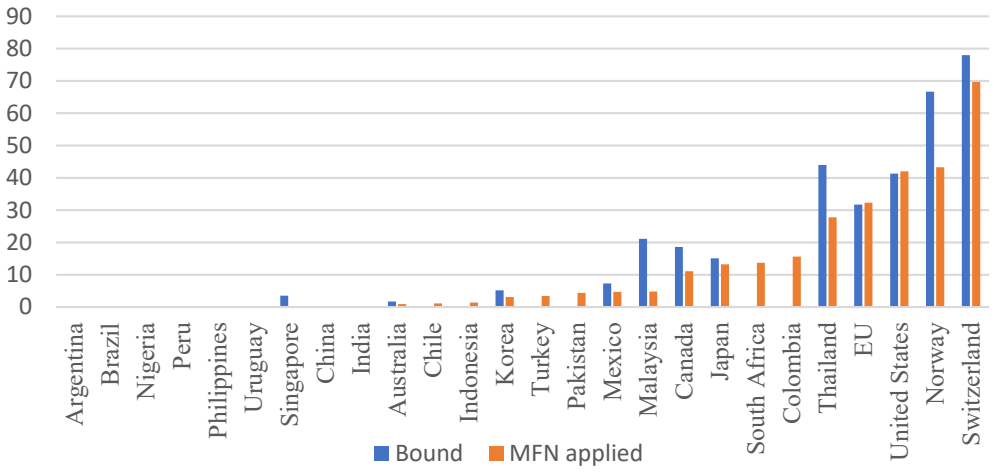
FIGURE 1 AGRICULTURE - SIMPLE AVERAGE BOUND AND APPLIED TARIFFS (%) - 2019



Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

Figure 1 highlights two notable features of agricultural tariffs for the countries shown in the figure. First, many developing countries have significantly higher bound than applied tariffs, leaving room for reductions in the bindings without affecting MFN applied rates. Second, when looking at the countries represented there is considerably less variance in applied rates among countries than bound rates. The outliers with high MFN applied rates include Thailand, Switzerland, India, Norway, Turkey, and Korea. After that, a number of countries have quite similar MFN applied rates, with little difference, between China and the EU in this regard.

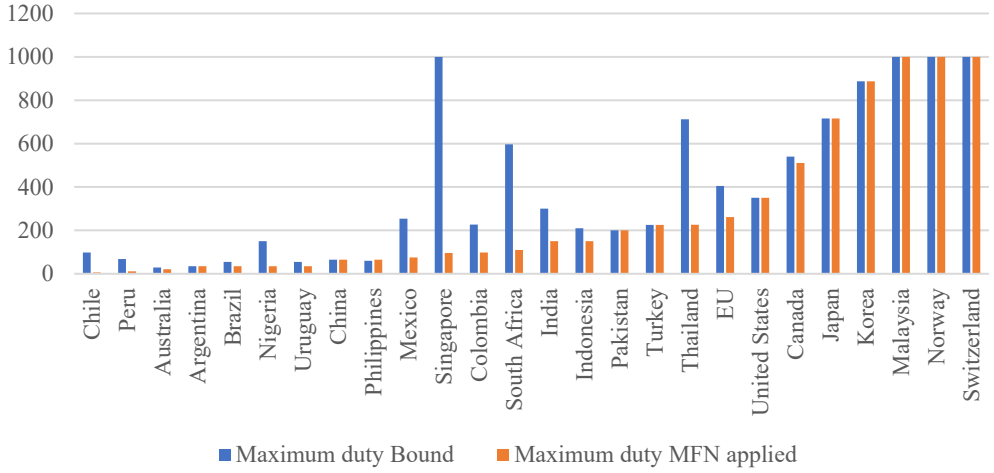
FIGURE 2 AGRICULTURE - NON AD-VALOREM DUTIES BOUND AND APPLIED TARIFFS (HS 6-DIGIT SUBHEADINGS IN %)



Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

Figure 2 looks at the use of specific duty rates for the same group of countries, showing the *ad-valorem* duty equivalents of the specific rates as a percentage of the relevant 6-digit sub-heading. Many of the countries in the sample are using very few specific rates, while others rely on them, in many cases as a way of hiding high *ad valorem* equivalents. The most intensive users of specific duties include Switzerland, Norway, the US, the EU, Thailand, Cambodia, South Africa, Japan, and Canada. On the basis of the data presented, it is notable that in both Figures 1 and 2, there is no clear dividing line between developed and developing countries in terms of actual market access when it comes to agriculture.

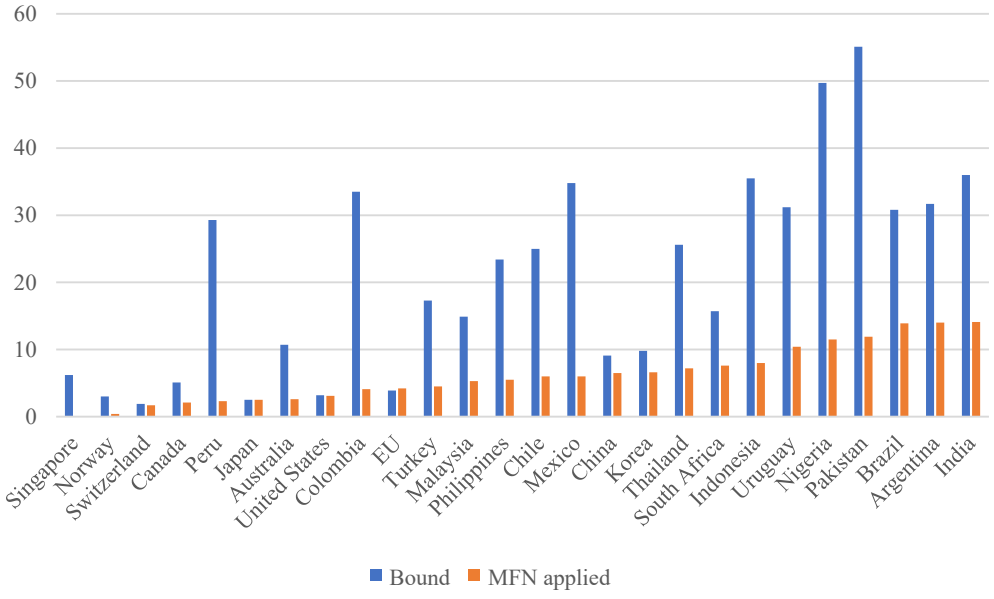
FIGURE 3 AGRICULTURE - MAXIMUM DUTY BOUND AND APPLIED TARIFFS (%)



Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

Figure 3 simply identifies the highest single bound and applied tariff in each country's schedules. This is a crude indicator of the likelihood that the highest single tariff will not be standing alone in the wilderness. It is probable that other high tariffs are to be found in the relevant schedules.

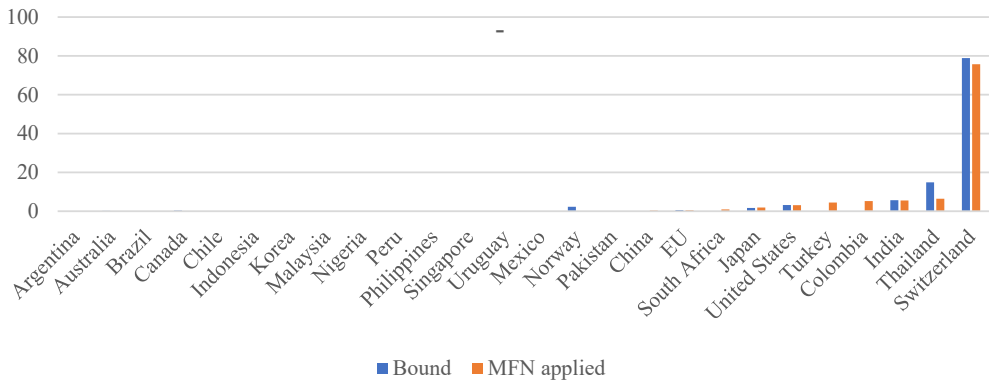
FIGURE 4 NON AGRICULTURE - SIMPLE AVERAGE BOUND AND APPLIED TARIFFS (%)



Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles (2).

Figure 4 turns to non-agricultural products, showing the simple average bound and applied tariffs on these products in the 26 countries included in the table. Once again, there is a considerable gap between the bound and applied tariff rates for developing and developed countries. But as far as applied tariffs are concerned, there are some similarities in applied MFN rates, with Indonesia and all countries to its left having simple average applied tariff rates at below 10% *ad valorem*. The overall pattern in Figure 4 is of countries with reasonably similar MFN rates, but a clear tendency for the developed country simple average applied tariffs to be lower than those of the developing countries.

FIGURE 5 NON AGRICULTURAL - NON AD VALOREM BOUND AND APPLIED TARIFFS (HS 6-DIGIT SUBHEADINGS IN %)

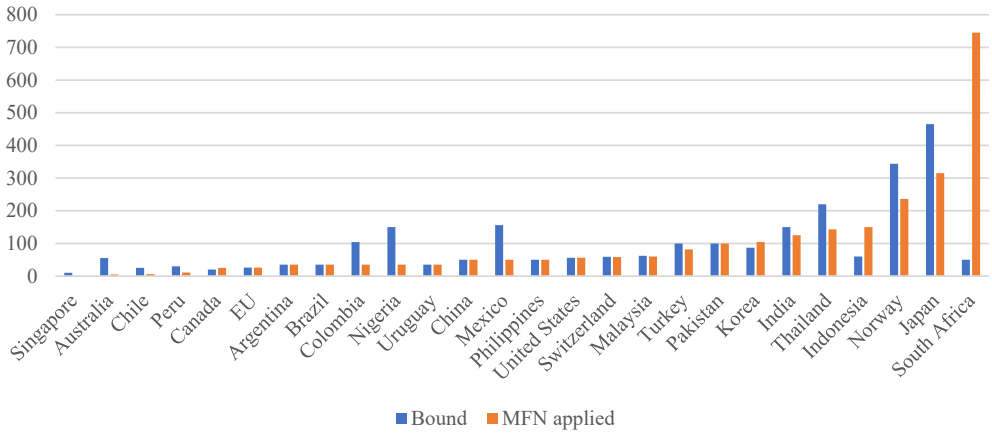


Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

Figure 5 looks bare, indicating that countries represented in the graph do not tend to rely extensively (in relation to their total trade) on specific duties to conceal high rates *ad valorem*. However, to the extent that there are some hidden high *ad-valorem* equivalents behind specific rates, these are likely to be on products of interest to developing countries. Switzerland is an outlier in all these tables because the country maintains its entire tariff schedule with duties expressed in specific rather than *ad valorem* terms. Other countries that have a smattering of specific duties include Thailand, India, Cambodia, Turkey, United States, and Japan.

Figure 6 does for non-agricultural products what Figure 3 did in identifying the single highest tariff in each schedule. The highest tariff for many countries are quite low, with a maximum applied MFN rates of below 10% in *ad valorem* equivalents. Those with applied rates above 10% include Pakistan, Korea, India, Thailand, Indonesia, India, Japan, and South Africa. Again, there is no clear dividing line between developed and developing countries using this metric.

FIGURE 6 NON-AGRICULTURAL - MAXIMUM DUTY BOUND AND APPLIED TARIFFS (%)



Source: WTO, ITC, UNCTAD (2020), World Tariff Profiles.

Finally, while the discussion above has focused on trade in goods, trade in services would merit a similar analysis. Such an analysis is beyond the scope of this paper. Suffice it to say, however, that the EU's position on audio-visual services illustrates the point. The EU has consistently declined to open up this sector to international competition. A similar situation applies in relations to maritime transport cabotage in the US. The Jones Act restricts waterborne cargo transport withing the US to shipping that is built, owned, and operated by US suppliers. This is not to argue that these sectors should be opened up – that is a matter for the governments concerned. Rather, it is merely to point out that most if not all countries maintain some high or prohibitive barriers to imports. There is no binary distinction – but rather a continuum – in relation to market access conditions between developed countries and those that call themselves developing.

Beyond SDT: other ways of addressing development needs

This subsection briefly considers alternative approaches to addressing development needs that do not necessarily require explicit distinctions between those members who are entitled to SDT and those that are not.

The GATS approach

Negotiations under the GATS have not taken off since the end of the Uruguay Round, when the Agreement came into existence. The only exceptions are the post-Uruguay Round negotiations on financial services and the telecommunications in the late 1990s. In this sense, we have a limited basis on which to assess whether the architecture of GATS makes it easier to navigate the developed-developing country divide than it has been on the goods side.

A polarising bifurcation between developed and developing members is largely avoided by relying on a generally applicable notion of progressive market opening though market access (Article XVI), national treatment (Article XVII), and additional commitments (Article XVIII) as circumstances and national interests allow. There is no reference to SDT in the GATS text. More levers are available for changing the conditions of competition within a market than in the case for goods, where a single data point, the tariff, is the sole focus of attention.

Another feature of the GATS that may smooth the path to cooperation is the link between specific commitments in schedules and the level of regulatory obligations assumed under Article VI of the GATS. Linking access to regulatory disciplines reflects the GATS approach to incremental opening through a combination of policy levers.

There is, however, acceptance of the notion that increased participation by developing countries is dependent on increased levels of specific commitments. But the language in paragraph 1 of Article IV clearly carries the implication that the capacity to engage more fully depends also on the actions of other members in opening up their markets, making fuller participation a shared endeavour. This is an important nuance relevant to the earlier discussion of market access SDT in goods sectors.

Specific trade concerns in the TBT and SPS Agreements

The Committees responsible for these Agreements have a standing agenda item dealing with Specific Trade Concerns (STCs). The permits members – developed and developing alike – to raise particular problems with their counterparts that they have encountered in standards-related actions. This is a practical way of defusing issues without recourse to formal dispute procedures and without invoking any form of SDT. These procedures are simpler, less costly, faster and more transparent than dispute settlement. The procedures have been used extensively, often with positive results, and are generally regarded as a good way of proceeding. A question arises as to whether such approaches could be adapted for use in other areas of the WTO's work.

Special and Differential Treatment in GATT/WTO Texts

The discussion so far in Section 3 has focused on questions regarding the nature and incidence of SDT once it has been partly unpacked into its constituent parts. More detailed analysis, beyond the scope of this paper, could throw further light on some of the issues we have raised. However, it is important not to lose sight of the fact that SDT is recognised as an integral part of the WTO Agreements.

GATT Article XXXVI:8, along with an interpretative note, states:

> The developed contracting 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

> *Ad note:* It is understood that the phrase 'do not expect reciprocity' means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

The Tokyo Round Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (otherwise referred to as the Enabling Clause), paragraphs 6 and 7:

> **6.** Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.
>
> **7.** The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

Finally, GATS Article XIX.2 states that:

> The process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

These quotations from the WTO texts make it clear that SDT is an integral part of the Agreements, and this proposition has not been put at issue by members. In different ways, the above texts also indicate that SDT is not an unchanging state of affairs as far as those members that benefit from it are concerned. In other words, SDT must be attuned to

circumstances. Those circumstances do not necessarily embrace entire economies, which is why SDT needs to be customised both among and within developing countries on the basis of development needs. This is particularly the case when it comes to regulatory SDT.

At the same time, accommodation on this issue entails recognition among members that especially in the domain of market access, where all members espouse particular interests and priorities, there is no simple correlation between openness and the distinction between developed and developing countries. Market access commitments will always fall short of unfettered trade, and addressing this is not simply a matter of adjusting developing country access to SDT. While the assumption of convergence over time underpins regulatory STD, there is no assumption of convergence to free trade among members when it comes to conditions of access to one another's markets.

4. CONCLUSIONS

No WTO member questions the legitimacy of SDT as an integral part of the WTO Agreements. The challenge is to design SDT provisions that serve the members who need the breathing space and/or support in order to participate in, and benefit more from the WTO. SDT should be focused on enabling beneficial participation in international trade, not exempting countries in ways that inhibit participation.

No unassailable nexus exists between being classified as a developing country and access to SDT. The two must be separated. It is up to members to characterise their development status, and it is up to the membership collectively, with the full participation of all members, to determine the design and content of SDT. This cannot be something that is determined by the major players and handed down to the rest of the membership.

Much of what is regarded as SDT, both in relation to regulations and market access, is of a best-endeavours nature. Only a subset of SDT is available to potential beneficiaries on a unilateral basis. This suggests that the possible abuse of SDT options by developing countries is more circumscribed than some discussions of the subject might suggest.

Progress will not be made in this debate unless members are willing to unpack SDT instead of treating it as a monolithic phenomenon that members either have access to, or do not. Such an unpacking exercise would explore the constituent parts of SDT, how they operate, who has access to SDT, and why.

The distinction between regulatory SDT and market access SDT is essential to an understanding of the true nature and purpose of SDT. Regulatory SDT is largely about time-bound or circumstance-bound flexibilities, with the aim of enabling members to advance development and converge towards a common set of rules. Technical assistance is a key element in this process. In other words, there is a clear and measurable end-game. Regulatory SDT therefore needs to be customised to specific country and sectoral needs if it is to be relevant and purposeful. But key here is the process by which needs and use are determined – the beneficiaries must have a voice in this process.

A useful exercise would be to determine which members are making use of SDT flexibilities where they have the independent choice of whether to do so. This would only concern a subset of SDT, bearing in mind how much of such treatment must be triggered by third party actions in order to become operational. Perhaps an exercise of this nature could lead to a situation where governments announce that they are no longer using particular flexibilities and do not intend to do so in the future.

As for market access, fully free trade is not the end-game, and this should be factored into any discussion of market access SDT. Virtually all members have sectors and economic activities they will not give up to the free trade standard, and as we saw from our preliminary analysis in Section 3, there is no clear developing/developed divide in terms of degrees of committed market access in a range of product areas. All countries have their reservations about free trade, and these respond to political, socio-economic and developmental needs. The way forward here is for members to negotiate market opening possibilities aimed at teasing out mutual benefits. As already noted, it would seem that market opening, at least in recent years, has resulted more from unilateral actions or through preferential trade agreements.

Much of this paper is concerned with how SDT has operated up to now. What matters is how members decide to address this matter in future negotiations. In addition to our analysis of how to manage measures and provisions that fall under the rubric of STD, we included a short subsection in Section 3 about other possible mechanisms. These would mostly be of a procedural nature, such as the Specific Trade Concerns process in the TBT and SPS Committees, that would adequately address development needs without directly implicating SDT. The TFA approach, with its self-declaration mechanism, is also worth a closer look when negotiating future agreements.

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ANNEX 1[18]

Illustrative List of SDT Provision in WTO Agreements

Category 1. Best-Endeavours Provisions (requires third-party action to trigger benefits).

18 These are all citations from WTO legal texts.

1. Articles 10.6 of TBT agreement: 'The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them'.

2. Article 4.2 of GATS: 'Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

- Commercial and technical aspects of the supply of services;
- Registration, recognition and obtaining of professional qualifications; and
- The availability of services technology'.

3. Article 12.10 of TBT: 'The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members'.

4. Article 8.10 of DSU: 'When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member'.

Category 3: More flexibilities in making commitment and using policy tools (Exist as stand-alone provisions in agreements and/or can be triggered by beneficiaries).
1. Article 6.4 of the Agriculture Agreement: 'For developing country Members, the de minimis percentage under this paragraph shall be 10%'.

2. Article 12.2 of the Agriculture Agreement: 'Disciplines on Export Prohibitions and Restrictions The provisions of this Article shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned'.

3. Para 3 of Annex 2 (footnote) of the Agriculture Agreement: 'For the purposes of paragraph 3 of this Annex, governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS'.

4. Article 5.3 of GATS: 'Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors'.

5. Article 19.2 of GATS: 'The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV'.

6. Article 5 (g) of the Telecommunication Annex of the GATS: 'Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services'.

Category 4: Phase-in period for developing members (Written into agreements and can be used independently by beneficiaries).

1. Article 15.2 of the Agriculture Agreement: 'Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.'

Category 5: Technical Assistance (in the hands of the provider).

1. Article 9.1 of SPS agreement: 'Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations'.

2. Article 12.7 of TBT agreement: 'Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members.'

3. Article 25.2 of GATS: 'Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services'.

4. Article 67 of TRIPS Agreement: 'In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members'.

ABOUT THE AUTHOR

Patrick Low is a consultant on trade matters. He was an Adjunct Professor at the University of Hong Kong (2016-19), and Vice-President for Research at the Fung Global Institute (2013-2015). He worked at the secretariat of the World Trade Organization (WTO) from 2005 and was Chief Economist from 1997 to 2013.