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OVERHAUL OF THE SDT PROVISIONS IN THE WTO: SEPARATING THE ELIGIBLE FROM THE INELIGIBLE

Md. Rizwanul Islam*

ABSTRACT

The special and differential treatment (“SDT”) provisions have been a recurring feature in the agreements of the World Trade Organization (“WTO”) treaties. However, most analysts would probably agree that the many SDT provisions have been more aspirational than operational. Hence, there is little surprise that even a selective review of the WTO jurisprudence would demonstrate that the SDT provisions have, in most cases, not done enough for their intended beneficiaries. This paper will analyze the limitations of the SDT provisions with reference to the relevant WTO jurisprudence. It will seek to explore two potential avenues of endeavoring to make the SDT provisions engender more tangible outcomes for their intended beneficiaries. This article argues that although the two means discussed here may not seem connected, they indeed are.

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I. INTRODUCTION

Special and differential treatment (“SDT”) provisions in one form or another have been an integral part of most of the World Trade Organization (“WTO”) treaties. According to the estimate of the WTO Secretariat, currently, there are as many as 155 SDT provisions in various WTO treaties.¹ Perceived as a way of helping the economically less developed states to integrate into the global trade, the SDT seems to have hardly met its core objective. The share of the least developed countries (“LDCs”) in the global trade has not increased up to the expected level,² and the same could possibly be said for most of the small developing members of the WTO. This paper argues that two key constraints with the SDT regime have limited its success. One is the aspirational nature of most of the SDT provisions in the General Agreement on Tariffs and Trade (“GATT”) as well as in the WTO regime. The second is the self-declaring nature of developing country status in the WTO regime. And this second issue is intrinsically linked with, and has impacted, the first.

When Organization for Economic Co-operation and Development (“OECD”) members such as Israel, Singapore, or South Korea can declare themselves as developing members, a regime developed to benefit less developed economies gets too stretched.³ This article will explore two ways to improve the state of play to help SDT provisions benefit their intended beneficiaries. And it argues that making the SDT provisions more precise and more directly justiciable and the overhaul of the self-declaratory developing country members, are intrinsically connected with each other. This article does not purport to cover the entire spectrum of challenges with the SDT provisions within the WTO, but rather it wants to contribute to

¹ Committee on Trade and Development, Note by the Secretariat, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, ¶ 1.2, WT/COMTD/W/258 (March 2, 2021).

² U.N. Conf. on Trade & Dev., *The Least Developed Countries Report 2020*, U.N. Doc. UNCTAD/LDC/2020, at 18 (2020).

³ OECD, *Economy: Developing countries set to account for nearly 60% of world GDP by 2030, according to new estimates*, <https://www.oecd.org/dev/pgd/perspectives-global-development-shifting-wealth-press-release.htm> (last visited Nov. 11, 2021).

the ongoing discourse. Some commentators may argue that SDT provisions are actually self-defeating, in that they would often entail less market-oriented measures for their beneficiaries, and that it is in the interest of all WTO members to abide by all core provisions of the WTO.⁴ However, from that point of view, the entire WTO negotiation process would appear to be ironic as members would not have any WTO legal obligation to open their market to foreign competitions. Any observer of the WTO would know that WTO members simply do not follow that trajectory. Thus, an overhaul of the present state of the SDT provisions is an important matter for the WTO regime.

II. ASPIRATIONAL NATURE OF THE SDT PROVISIONS

Some analysts argue that the SDT provisions cannot and should not be legally binding, as they have not been since their inception.⁵ However, it does not seem that textually, there is anything either in the GATT or the Marrakesh Agreements that would lend credence to this view.⁶ Indeed, SDT provisions are just like other GATT/WTO provisions - an integral part of its legal architecture. In essence, SDT provisions are squarely at odds with a core principle of international law: the sovereign equality of states.⁷ They also contradict a cardinal principle of the GATT/WTO: the most favored nation treatment.⁸ With this in mind, they have nonetheless been accepted on the basis of the reality that not all members are capable of performing the same

⁴ Bernard Hoekman et al., *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún*, 27 *WORLD ECON.* 481, 482 (2003); cf. Paul A. Samuelson, *Where Ricardo and Mill Rebut and Confirm Arguments of Mainstream Economists Supporting Globalization*, 18 *J. ECON. PERSPECTIVES* 135, 135 (2004) (explaining the benefit of following the existing WTO rules).

⁵ J. Michael Finger, *Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round*, 31 *WORLD ECON.* 887, 891–92 (2008).

⁶ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 28, WTO Doc. WT/MIN(01)/DEC/1, 41 *ILM* 746 (2002) [hereinafter Doha Declaration].

⁷ See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 *YALE L. J.* 207, 207 (1944) (explaining the importance of the principle of the sovereign equality of states).

⁸ Craig VanGrasstek, *The History and Future of the World Trade Organization* 237–38, 538 (2013), https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf.

economic or legal obligations as the GATT/WTO regime requires.⁹ Hans Kelsen has stated that “equality does not mean equality of duties and rights, but rather equality of capacity for duties and rights. Equality is the principle that under the same conditions States have the same duties and the same rights.”¹⁰ Thus, economically disparate WTO members should not be expected to be covered by an identical set of rules.¹¹ The role of SDT in the WTO *acquis* also appears to be cemented in the words of the Doha Ministerial Declaration which state that “[w]e reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements.”¹² However, if the SDT provisions are dissected properly, the aspirational nature and hollowness of most of them in practice become evident. This is even so, when the wording in the text of the treaty would, on its face, suggest a mandatory obligation.

To take but one example, Article 12 of the *Technical Barriers to Trade Agreement* (“TBT”) provides that “[m]embers shall give particular attention to the provisions of this Agreement concerning developing country Members’ rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement.”¹³ While the use of “shall” would imply that this is a binding obligation imposed on all members of the WTO, the meaninglessness of the provision is evident from its interpretation by the Panel in *US-COOL*.¹⁴ In this case, Mexico argued that the U.S. acted inconsistently with Article 12.3 of the TBT by not affording Mexico an opportunity to comment on the preparation of the Country of Origin Labelling (COOL) measure.¹⁵ The Panel demurred and observed:

⁹ Doha Declaration, *supra* note 6, ¶ 44 (explaining the use of the provisions for LDCs).

¹⁰ Kelsen, *supra* note 7, at 209.

¹¹ *See id.* at 208–09.

¹² Doha Declaration, *supra* note 6, ¶ 44.

¹³ Agreement on Technical Barriers to Trade, art. 12.2, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1868 U.N.T.S. 120.

¹⁴ Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.756-7.757, 7.789-7.792, WTO Docs. WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter *U.S. COOL Requirements*].

¹⁵ *Id.* ¶ 7.789.

Article 12.3 does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs. Further, we do not interpret the term “take account of” in Article 12.3 of the TBT Agreement as an explicit requirement for Members to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members.¹⁶

The Panel went on to elaborate that:

As explained above, however, we do not consider that the United States had an explicit obligation, enforceable in WTO dispute settlement, to reach out and collect Mexico’s views during the preparation and application of the COOL measure. The United States is merely required under Article 12.3 to “take account of [Mexico’s] special development, financial and trade needs” “in the preparation and application of [the COOL measure]”. This means giving active and meaningful consideration to such needs.¹⁷

Considering the text of Article 12.3, it is very difficult to accuse the Panel of not giving any real substance to the SDT provision here. Indeed, it is the imprecise nature of the text of Article 12.3 that the Panel had to interpret, and it has done so by staying faithful to the text. For the Panel to go beyond this, the Panel could be seen as trying to add to or diminish what the TBT provides for, which it is explicitly prohibited from doing under the Dispute Settlement Understanding (“DSU”).¹⁸ But at the same time, it shows the limited practical value many SDT provisions have. Here, in practice, all that the U.S. needed to do to fulfill its “legal obligation” under Article 12.3 was to *claim*

¹⁶ *U.S. COOL Requirements*, supra note 14, ¶ 7.787.

¹⁷ *Id.* ¶ 7.790.

¹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, 1869 U.N.T.S. 402 (stating “[t]he Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”); *see also id.* art. 19.2 (stating that “[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements”).

that it had taken into account the “special development, financial and trade needs” of Mexico when it developed its COOL regime.¹⁹ To comply with this, the U.S. needed to afford Mexico an opportunity to make deliberations, which was easily achieved.²⁰ Thus, the mere duty to “consider” seems to make a mockery of SDT provisions as rights for its intended beneficiaries.²¹ And it is difficult to see if any WTO member can be found to have violated this so-called “legal obligation” that requires WTO members to simply “take into account” the special needs of developing countries.

In a similar vein, in *EC – Approval and Marketing of Biotech Products*,²² Argentina argued that by adopting and applying a de facto moratorium on approvals of applications for market, genetically modified organisms in its territories, the European Communities (“EC”) did not apply its law in a manner that took into account the needs of developing members as required by Article 10.1 of the *WTO Agreement on Sanitary and Phytosanitary Measures*.²³ The Panel observed that the words “take account of” do not necessitate that a specific result be achieved.²⁴ Or that just because the EC did not afford SDT to a developing country member, there is no prima facie case that the EC refrained from taking into account the developing country’s needs when it adopted its law.²⁵ The Panel reiterated that “the obligation laid down in Article 10.1 is for the importing Member to “take account” of developing country Members’ needs.”²⁶ Relying on the dictionary meaning, the Panel decided that

¹⁹ *U.S. COOL Requirements*, *supra* note 14, ¶¶ 7.738, 7.740.

²⁰ *Id.* ¶ 7.740.

²¹ *See id.* ¶ 7.779 (explaining how the meaning of terms and their implementation differ).

²² Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 4.18, WTO Docs. WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter *EC Biotech Products*].

²³ *Id.* ¶ 7.1605–7.1607; *see* The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), WTO, https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last visited Nov. 12, 2021) (stating “[i]n the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members”).

²⁴ *EC Biotech Products*, *supra* note 22, ¶ 7.1620.

²⁵ *Id.* ¶ 7.1621.

²⁶ *Id.* ¶ 7.1620.

taking into account means “consider along with other factors before reaching a decision.”²⁷ The Panel agreed that the EC was legally required to “take account of the interests of developing country Members in applying its approval legislation, [but they may also] at the same time take account of other legitimate interests, including those of its own consumers, its environment, etc.”²⁸ The Panel even went one step further and observed that it is conceivable that the EC actually “took account of” Argentina’s needs when adopting and applying its general de facto moratorium on approvals, but ultimately determined that applications concerning products of export interest to Argentina warranted no special and differential treatment.²⁹ Here too, as was mentioned above, the Panel’s restrained approach in giving any real force to the SDT is not necessarily problematic because it is in line with the text of the Agreement.

Article 15 of the *Anti-Dumping Agreement* provides that “[i]t is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of antidumping measures under this Agreement.”³⁰ In *US – Steel Plate*, the Panel was of the view that no legal requirements for specific action follow from this provision.³¹ Hence, it concluded that WTO members “cannot be expected to comply with an obligation whose parameters are entirely undefined.”³² In this case, India accepted “that the nature of the “special regard” will vary from case to case, but must at least involve some extra consideration of the arguments of respondents in developing countries.”³³ India argued that the U.S. authorities should have considered the second sentence of Article 15 which states that “[p]ossibilities of constructive remedies provided for by this

²⁷ *EC Biotech Products*, *supra* note 22.

²⁸ *Id.* ¶ 7.1621.

²⁹ *Id.*

³⁰ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 15, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1868 U.N.T.S. 201.

³¹ Panel Report, *United States-Anti-Dumping and Countervailing Measures on Steel Plate from India*, ¶ 7.116, WTO Doc. WT/DS206/R (adopted July 29, 2002) [hereinafter *U.S. Anti-Dumping and Countervailing Measures*].

³² *Id.* ¶ 7.110.

³³ *Id.* ¶ 7.104.

Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”³⁴ It claimed the provision required the U.S. authorities to apply a duty lesser than the margin of dumping, although such a possibility did not exist under the relevant U.S. statute.³⁵ The Panel was sympathetic to the view that such a lesser duty was desirable. Nevertheless, it went on to hold that “consideration and application of a lesser duty is deemed desirable [...] but is not mandatory.”³⁶ Therefore, a Member does not need to have the possibility of a lesser duty in its own legislation.³⁷ In this case, despite the seemingly mandatory nature of the wording in the treaty provision, the SDT does not appear to offer anything in practice. And again, it is extremely difficult to question the Panel’s reading of the relevant treaty provision. If anything, the Panel has remained faithful to the text of the treaty.

III. WHAT TO BE DONE?

As the preceding discussion demonstrates, many SDT provisions are aspirational and even when they are couched in seemingly obligatory terms, they offer very little. So, the next question would be what is there to do about it? One avenue would be to re-evaluate the self-declaring mechanism and how it serves more harm than good.

IV. THE ELIGIBILITY LIST OF SDT BENEFICIARIES & SELF-DECLARING DEVELOPING COUNTRY STATUS

Only the LDC status in the WTO is governed by set rules, i.e. all members classified as such by the United Nations are treated so within the WTO.³⁸ However, for the rest of the WTO members, it is a matter of self-declaration, although that self-declaration may or may not be accepted by other members in

³⁴ *U.S. Anti-Dumping and Countervailing Measures*, supra note 31, ¶ 7.109.

³⁵ *Id.* ¶ 7.116.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Marrakesh Agreement Establishing the World Trade Organization, art. XI, ¶ 2, Apr. 15, 1994, 1867 U.N.T.S. 154.

certain cases.³⁹ For example, one may contend that for a scheme such as the Generalized System of Preferences (“GSP”), the self-declaration is of no use for the intended beneficiary, as the conferring state determines who would benefit from its scheme.⁴⁰ However, GSP is just one limb of the SDT provisions. In various WTO agreements, there are many other SDT provisions that may be crippled by the self-declaring status of the developing members. It is also pertinent to remember that when the GATT was founded, only eleven members were developing countries,⁴¹ whereas now, a majority of the WTO members are included in this category.⁴² Thus, it is uncertain whether the SDT provisions can or should apply to all of them, who now outnumber the developed member states in the WTO. Indeed, if the disparate economic developmental stage and lack of capacity to perform on an equal footing are the *raison d’être* of the SDT provisions, it would appear grossly inequitable to think that a majority of the WTO membership are to be treated alike as beneficiaries of the SDT. Of course, some SDT provisions may somehow distinguish between the members eligible for such treatment, but they are few and far between.

One way to bring about a change to the status quo would be to put an end to the current practice of WTO members self-declaring themselves as developing members. A proposal along this line has already been produced by the U.S. at the WTO negotiations.⁴³ At its core, the U.S. claims that since the advent

³⁹ Anabel González, *Bridging the Divide between Developed and Developing Countries in WTO Negotiations*, PETERSON INST. FOR INT’L ECON. (Mar. 12, 2019, 1:45 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/bridging-divide-between-developed-and-developing-countries>.

⁴⁰ See VIVIAN C. JONES, CONG. RSCH. SERV., RL33663, GENERALIZED SYSTEM OF PREFERENCES: BACKGROUND AND RENEWAL DEBATE 13–14 (2008) (discussing how a President can choose to remove a developing country because they no longer require GSP benefits).

⁴¹ Hunter Nottage, *Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment*, 6 J. INT’L ECON. L. 23, 25 (2003).

⁴² *Who are the developing countries in the WTO?*, WTO, https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Nov. 12, 2021).

⁴³ WTO General Council, *Procedures to Strengthen the Negotiating Function of the WTO*, WTO Doc. WT/GC/W/764/Rev.1, at 1-2 (Nov. 25, 2019) [hereinafter *WTO - Procedures to Strengthen*]; see also Madeleine Waddoups, *Quantifying “Developing Nation” for International Trade*, 18 NEW PERSPECTIVES IN FOREIGN POL’Y 65, 66 (2019) (discussing the elements of the

of the WTO, the world has witnessed a great reduction in poverty, but the SDT provisions of the WTO, particularly the criteria for being eligible for the SDT provisions, belies the contemporary reality that WTO members states cannot be classified simply as developed and developing.⁴⁴ The U.S. argues that members falling under any of the following criteria would be ineligible for SDT provisions: (i) if it is a member of the OECD or commenced the process of acceding to the OECD, (ii) if it is a member of the Group of twenty (G20), (iii) if it has been classified by the World Bank as a high income country for three consecutive years, and (iv) if it has a share of more than 0.5 per cent of global merchandise trade for three consecutive years.⁴⁵

It is clear that a state with an OECD membership, well-known as a group of developed countries, or a state that has persistently been classified as high-income should not be eligible for SDT. But, the threshold of having a 0.5% share in global trade or being a member of the G20 to be used for complete exclusion from the flexibility of SDT provisions seems too rigid.⁴⁶ More fundamentally, simply having a 0.5% share in global imports may not be an appropriate indicator of economic development.⁴⁷ It may rather mean that the respective WTO member is too dependent on imported products. And simply due to their population size, some WTO members may fall into this category with no nexus to their economic development.⁴⁸ This is where there appears to be a need for more stratified SDT provisions within the WTO rather than an all-inclusive set of SDT provisions, as is often the case in the WTO regime. To make SDT provisions more practical and politically amenable to the

U.S. proposal and its implications).

⁴⁴ See WTO General Council, *An Undifferentiated WTO: Self-declared Development Status Risks Institutional Irrelevance Communication from the United States*, WTO Doc. WT/GC/W/757/Rev.1, ¶ 1.2–1.7 (Feb. 14, 2019) [hereinafter *An Undifferentiated WTO*].

⁴⁵ *WTO - Procedures to Strengthen*, *supra* note 43, at 2.

⁴⁶ See Waddoups, *supra* note 43, at 68 (explaining that the United States should expand its flexibility when considering developing nations as a signal of goodwill towards the WTO).

⁴⁷ See *id.* at 67 (discussing that Indonesia, despite having a share of global imports above 0.5%, could not sustain itself because of its category of imports).

⁴⁸ *OECD-WTO Database on Trade in Value-Added FAQs: Background Note*, OECD, https://www.oecd.org/sti/ind/TIVA_FAQ_Final.pdf, (last visited Nov. 12, 2021) (explaining how it is possible to “overstate” imports and exports).

developed economies, and to make them more meaningful for smaller economies, there could be a two-pronged approach: some SDT provisions may apply to LDCs and small developing members of the WTO, while others may apply to larger developing countries such as those that are members of G20 (but not G7). This is a proposal on which both developed economies and developing members seem to somewhat converge.⁴⁹

The essence of the U.S. proposal, though not necessarily the indicators of reform, also resonates in the position of the EU in the following words:

[The] lack of nuance and its consequences with regard to the special and differential treatment question has been a major source of tensions in the WTO and an obstacle to the progress of negotiations: the demand for blanket flexibilities for two thirds of the WTO membership dilutes the call from those countries that have evident needs for development assistance, leads to much weaker ambition in negotiations and is used as a tool to block progress in, or even at the beginning of, negotiations.⁵⁰

A counter-argument raised by some developing members is that despite the economic progress by many developing countries, there is still a major development disparity between the economically developed and developing members.⁵¹ They claim that since the inception of the WTO until now, the gap in the GDP between developed and developing members has widened.⁵² They also point out that their joining or acceding to

⁴⁹ See *An Undifferentiated WTO*, *supra* note 44, ¶ 4.5 (explaining how self-declaration reduces WTO negotiating power and creates an uneven playing field between global powerhouses, and smaller, poorer nations); see also WTO General Council, *Strengthening the WTO to Promote Development and Inclusivity*, WTO Doc WT/GC/W/778/Rev.3, at ¶ 3.3 (Dec. 4, 2020) [hereinafter *Strengthening the WTO*] (acknowledging how both undeveloped and developed countries agree that SDT provisions give certain member nations unfair advantages over one another).

⁵⁰ European Commission Concept Paper, WTO modernisation, ¶ 31 (Sept. 18, 2018).

⁵¹ WTO General Council, *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*, WTO Doc. WT/GC/W/765/Rev.2, ¶ 1.1 (Mar. 4, 2019) [hereinafter *Special and Differential Treatment in Favour of Developing Members*]; see generally EC Biotech Products *supra* note 22, ¶ 4.493 (emphasizing that despite economic development, European communities have ignored the special needs of developing countries in areas of trade and financial expansion).

⁵² *Special and Differential Treatment in Favour of Developing Members*,

the WTO was on the basis of a negotiated treaty right that gives them the option to self-declare as a developing member.⁵³ Both of the claims are likely to hold factually. But at the same time, treating large developing WTO members with a very high per capita income, such as Hong Kong, South Korea, Singapore, or Israel, and those of vulnerable economies in Sub-Saharan Africa or in Asia alike seems irrational.⁵⁴ And for both of these sets of WTO members to be eligible for SDT flexibilities under the same WTO rules seems to be untenable and a travesty of equity.

Another pertinent question could be whether this practice of self-declaring as a developing member is a customary practice or not. Looking at the GATT panel and working party reports, scholarly commentary persuasively opines that in some cases, the GATT panels have tested the invocation of developing country status by contracting parties implying that it was not entirely self-declaratory.⁵⁵ Thus, it argues that the practice of self-declaration may not suffice in itself as a customary practice under Article XVI:1 of the *Marrakesh Agreement establishing the WTO*.⁵⁶ However, academically, and also from the point of the dynamics of future WTO negotiations, it is a critical question. But from a policy point of view, there is a more pressing question: are the SDTs in their current form desirable? If the continuation of the existing practice is inimical for the SDT provisions to be sufficiently effective, then customary practice notwithstanding, it needs to evolve.

It may be pertinent to note here that Article XXXVI:8 of the GATT provides that “[t]he 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.”⁵⁷ A crucial phrase here is “less-developed contracting parties.”⁵⁸ It seems plausible

supra note 51, ¶ 2.1-2.2.

⁵³ *Id.* ¶ 5.10.

⁵⁴ *Id.* ¶ 6.2.

⁵⁵ Sparsha Janardhan, World Trade and ‘Customs’: Is Self-Declaration of Development Status a ‘Customary Practice’ at the WTO?, Paper Presentation at the 7th SIEL Conference (July 9, 2021) (on file with the author).

⁵⁶ *Id.* at 20.

⁵⁷ General Agreement on Tariffs and Trade, art. 36, ¶ 8, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter General Agreement on Tariffs and Trade].

⁵⁸ *Id.*

to think that the drafters of the Article did not think that less-developed contracting parties are necessarily synonymous with developing contracting parties. Thus, arguably, at the inception of the development, as a priority in the GATT regime, no recognition seems to exist that SDT provisions would extend to all developing country members. However, a difficulty with this conclusion is that the term “developing contracting party” did not find a place in the GATT 1947, and the “less-developed contracting parties” in Article XXVIII or Part IV of the GATT 1947 simply referred to economically backward states.⁵⁹ However, even that expression would not appear to apply to many of the large developing members of the WTO.⁶⁰

Even if the overall gap in GDP between developed and developing members may have widened, it does not necessarily follow that this is evenly applicable to all developing members, including a very diverse group of WTO members today. The same lack of specificity applies to the claim of developing members that most of the world’s poor, around 61.8%, live in non-LDCs.⁶¹ While the number may be real, it does not show what percentage of them live in large developing countries. This fact does not explain the percentage of the developing states’ population in this category or the percentage of poor people in LDCs. More importantly, it does not indicate how many of these people live in the OECD members or high-income members. Again, there is already a practice of using per capita income as a criterion for the use of export subsidies in the *WTO Agreement on Subsidies and Countervailing Measures*.⁶² Where exactly to

⁵⁹ See *Facts about World Economy*, SWAPDIAL, <https://www.swapdial.com/public/knowledge-contents/industrial-data/facts-about-world-economy/> (last visited Nov. 13, 2021) (defining “economically backward states” as “Developing nations” and distinguishing them from “Developed Nations” because of their comparatively lower income, manufacturing, and HID numbers).

⁶⁰ See generally Lynge Nielsen, *Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done* 41 (Int’l Monetary Fund, Working Paper 11/31, Feb. 2011) (explaining the lack of rational and in turn inaccuracies in the current system determining whether a country is developed or developing).

⁶¹ *Strengthening the WTO*, *supra* note 49, ¶ 3.2; *Special and Differential Treatment in Favour of Developing Members*, *supra* note 51, ¶ 2.5.

⁶² Agreement on Subsidies and Countervailing Measures, art. 27, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex IA, 1869 U.N.T.S. 14 (listing the developing countries referred to

draw the line is a complex matter beyond the scope of this article. But it would appear that because the self-declaring of developing member status is a negotiated right in itself, it cannot be a justification for its perpetual existence.

However, any sectoral classification of LDCs, small developing countries, any product-by-product approach based on their respective share in the global market, or any closely analogous criterion as suggested in the literature⁶³ would probably be unworkable for most LDCs as they tend to have a limited export basket.⁶⁴ For example, in the case of Bangladesh, a very high percentage of its export earnings is concentrated on garments and textile products.⁶⁵ Similarly, if it becomes ineligible to be treated as an LDC for the garments and textile products, it would lose the benefits of SDT to a substantial degree.⁶⁶ The simple categorizations as developing and LDC should not matter either. The difference between the two types of members in some cases may be inconsequential.⁶⁷ So, they should be treated alike. In the WTO, through the decision on net food-importing developing countries, there seems to be a recognition of this as Article 16 of the *WTO Agreement on Agriculture* calls on the developed members to take “Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries”⁶⁸ as opposed to only LDCs or all developing members.

in Paragraph 2(a) of Article 27).

⁶³ James Bacchus & Inu Manak, *The Development Dimension: What to Do about Differential Treatment in Trade*, 887 CATO INST. 1, 17 (Apr. 13, 2020), <https://www.cato.org/policy-analysis/development-dimension-what-do-about-differential-treatment-trade>.

⁶⁴ Society of International Economic Law, *SIEL Conversations April 2021: Special and Differential Treatment under the WTO*, YOUTUBE (Apr. 22, 2001), <https://www.youtube.com/watch?v=MQB25mUAfk4>.

⁶⁵ Sanjay Kathuria, *Bangladesh Is Clothes-Minded*, FOREIGN POL’Y (Oct. 7, 2021, 9:33 AM), <https://foreignpolicy.com/2021/10/07/bangladesh-garment-industry-economy-development-exports-trade-growth/>.

⁶⁶ Peter Kleen & Sheila Page, *Special and Differential Treatment of Developing Countries in the World Trade Organization*, OVERSEAS DEV. INST., at x (2005), <https://cdn.odi.org/media/documents/3320.pdf>.

⁶⁷ *Id.*

⁶⁸ Agreement on Agriculture, art. 16, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture].

Detractors may argue that many of these criteria do not have any direct correlation with trade. However, development is a vexed and relative term and associating the eligibility for SDT to some of the objectively verifiable criteria along the lines mooted in the U.S. proposal at the WTO seems to be rational. It would be difficult to argue that OECD member states or even large developing members such as Brazil, Russia, India, China, and South Africa are not differently situated from LDCs and small developing members. Just as there is a reason for differentiating between the developed and developing economies, there is a cogent case for differentiating between the very high number of WTO membership: the developing countries. Thus, the developing countries that are quite disparate in terms of their economic development should be differentiated. There should be LDCs and possibly some small developing members who should be differentiated from large developing members or economically rich members self-declaring as developing members.

As eloquently observed by the Permanent Court of International Justice in Advisory Opinion on *Minority Schools in Albania* that from a formal point of view, there should be no discrimination of any kind but “equality in fact may involve the necessity of different treatment *in order to attain a result* which establishes an equilibrium between different situations.”⁶⁹ Thus, SDT provisions are not an end in itself; rather they are a means to an end of achieving benefits to their recipients so that they can participate in international trade more fully. Unless the SDT provisions can attain any tangible benefits for their intended beneficiaries, then the efficacy of having them in place is questionable. The SDT provisions are never mentioned within the preamble of the WTO Agreements, rather in the main text, which would further reinforce that despite the aspirational wordings, they have only been designed as an ornamental tool for interpretation of the basic treaty provisions.⁷⁰

Textually too, there seems to be some implicit recognition of the disparity among the beneficiaries of SDT and the concomitant need for differential treatment. The preamble to

⁶⁹ *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64, at 19 (Apr. 6) (emphasis added).

⁷⁰ Agreement on Agriculture, *supra* note 68, art. 15.

the *Marrakesh Agreement Establishing the WTO* states the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.”⁷¹ Thus, it is clear that despite recognizing the special need for both developing and least developed members, the need is more acute for LDCs. Article IV:7 of the Marrakesh Agreement also stipulates that “the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of *the least-developed country Members* and report to the General Council for appropriate action.”⁷² The Agreement does not contain any such concrete requirement of periodic review for provisions applicable to the developing countries. Thus, it would seem that the drafters of the WTO Agreement have not viewed the LDCs and developing members alike.

However, despite its overall merit, there are problems with the U.S. proposal on the SDT reform. A particularly problematic aspect of the U.S.’s proposal is that if it is followed, it may eventually wipe out SDT for not just large or economically strong developing members, but for all members of the WTO. The proposal reads that “[n]othing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment.”⁷³ While it is not explicitly stated, this means that even a small developing country or LDC can, in future negotiations, be excluded from the benefits of the SDT flexibilities. Unless this concern is effectively addressed, likely all existing beneficiaries will strongly oppose the U.S. proposal.

Some may point to the tradition of conducting trade policy reviews at the individual WTO member level, which has been well-entrenched in the WTO practice, and argue that this same analysis should determine the SDT eligibility of a member.⁷⁴ But it is unclear how that would play out. Firstly, the WTO Secretariat conducts the trade policy review, which is more of a

⁷¹ Marrakesh Agreement Establishing the World Trade Organization, PmbL., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

⁷² *Id.* at 157 (emphasis added).

⁷³ *WTO - Procedures to Strengthen*, *supra* note 43, at 2.

⁷⁴ Kleen & Page, *supra* note 66, at 80.

stocktaking exercise of reviewing the trade-related laws, policies, and practices of a WTO member state.⁷⁵ Conducting a similar process would appear to be administratively challenging. Secondly, it would also mean that most of the smaller WTO members would feel more pressure from their counterparts.⁷⁶ The fact of GSP being used as a means for pressurizing the intended beneficiaries to the demands of the benefit-giving, developed state is well-known.⁷⁷

Another challenge with the potential implementation of the approach discussed in this article would be that even many LDCs and developing members may not be too enthusiastic about a radical change in SDT eligibility. It is more or less common knowledge that the economically less developed members in the WTO prefer collective negotiations over individual ones.⁷⁸ Being endowed with little individual economic clout, it is natural for them to try to pull their weight collectively.⁷⁹ Thus, they will likely oppose this type of reform of SDT provisions. However, the presence of multiple formal and informal groups involving LDCs and developing members and the divergence of interests on various matters brings into question the extent to which there is a strong alliance on various areas. More importantly, even the change in the list of beneficiaries would still mean that the eligible beneficiaries of the SDT provisions are not left to bargain alone; instead, they would still be able to bargain collectively. Furthermore, it is not improbable that when there would be a significant review and overhaul of the unenforceable SDT provisions that many members may be more enthusiastic in embracing the changes.

V. HOW MORE CONCRETE SDT PROVISIONS WOULD

⁷⁵ *Trade Policy Reviews: ensuring transparency*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (last visited Nov. 13, 2021).

⁷⁶ VanGrasstek, *supra* note 8, at 94.

⁷⁷ See MD. RIZWANUL ISLAM, ECONOMIC INTEGRATION IN SOUTH ASIA: CHARTING A LEGAL ROADMAP, 116–17 (2012) (explaining how prevalent it is for a beneficiary to bend to the requirements of a developed state); see also Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 338 (2000) (describing the use of countermeasures to induce compliance).

⁷⁸ *Id.* at 112.

⁷⁹ *Id.*

HELP

The value of more specific SDT provisions is evident when we contrast the above cases from a case under Article of 9.1 the WTO *Agreement on Safeguards*.⁸⁰ This Article states that

[s]afeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.⁸¹

The WTO Panel in *Dominican Republic – Safeguard Measures* held that a WTO member opting to apply for any safeguard measures is “obliged to adopt *all reasonable measures* available to them to exclude all developing countries that meet the requirements in Article 9.1 of the Agreement on Safeguards.”⁸² The Panel accepted that the adopting state party might enjoy some flexibility in applying this provision, but “[i]rrespective of the way in which each Member complies with this provision, however, the Member concerned must show that it has made the efforts it can to exclude all those Members covered by the provision in Article 9.1 of the Agreement on Safeguards.”⁸³ Thus, armed with SDT provisions that go beyond imprecise words, there is a distinct prospect that the provision would bring about tangible outcomes for the intended beneficiaries.

Regard may also be given to Articles 27.10 and 27.11 of the *Agreement on Subsidies and Countervailing Measures*.⁸⁴ Article 27.10 provides that a countervailing duty investigation of a product originating in a developing country shall be terminated

⁸⁰ Agreement on Safeguards, art. 9.1, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 33 I.L.M. 1125 [hereinafter Agreement on Safeguards].

⁸¹ *Id.*

⁸² Panel Report, *Dominican Republic - Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, ¶ 7.393, WTO Docs WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R (adopted Jan. 31, 2021).

⁸³ *Id.* ¶ 7.396.

⁸⁴ Agreement on Subsidies and Countervailing Measures, art. 27.10–27.11, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1869 U.N.T.S. 14 [hereinafter Agreement on Subsidies and Countervailing Measures].

as soon as the investigating authorities determine that: (a) the overall level of subsidies granted does not exceed two per cent, or three per cent in some cases, of its value calculated on a per unit basis; or (b) the volume of the subsidized imports represents less than four percent of the total imports of the like product unless imports from developing country members collectively account for more than nine percent of the total imports of the like product in the importing member.⁸⁵ One could naturally expect that these specific provisions would be literally and strictly interpreted by the WTO Panels and Appellate Body (AB). And the practice conforms to that expectation. The AB interpreted these provisions in *US – Carbon Steel*, in the following words:

Articles 27.10 and 27.11 of the *SCM Agreement* require termination of a countervailing duty *investigation* with respect to a developing country Member whenever “the overall level of subsidies granted does not exceed” 2 or 3 percent, depending on the circumstances. These provisions require authorities, in a countervailing duty investigation, to apply a higher *de minimis* subsidization threshold to imports from developing country Members.⁸⁶

VI. RENEGOTIATING THE ASPIRATIONAL OR ORNAMENTAL SDT PROVISIONS

Based on the foregoing, merely changing the eligible beneficiaries of the SDT from all developing members to only the LDCs and some smaller developing members would not suffice to meet the needs of the smaller economies. It would have to be in conjunction with reforming the imprecise and aspirational words contained in most of the SDT. This has been recognized by some developing members of the WTO in that they urged in September 2001 that “all the existing S&D provisions in various WTO agreements should be fully operationalized/implemented. The implementation should go beyond technicalities and include operationalization of provisions that presently lack operational

⁸⁵ Agreement on Subsidies and Countervailing Measures, *supra* note 84, art. 27.10–27.11.

⁸⁶ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 82, WTO Doc. WT/DS213/AB/R (adopted Nov. 28, 2002).

modalities.”⁸⁷ In one way, the proposal reflects an understanding that these members recognize that the SDT provisions have not worked, and it is ambitious that it seeks to implement all SDT provisions. However, it is doubtful, without any thorough re-examination and amendment of the SDT provisions, any meaningful outcome is at all possible. Thus, there may be a commission of experts unaffiliated with the governments of WTO members who may review the SDT provisions in various WTO agreements.⁸⁸ Based on the findings of the proposed commission, the text of SDT provisions can be negotiated for implementation by members.⁸⁹

The benefit of a dedicated commission can be two-fold. One, that it may work independently. And also, because at the Bali Ministerial Conference, the WTO members had set up a monitoring mechanism to act as a focal point within the WTO for analyzing and reviewing the implementation of SDT provisions.⁹⁰ However, until now, no written submissions from WTO members have been made in this regard. The exact reason for this inertia is a matter of guesswork. In one sense, it may imply a lack of interest, but given that the developing and LDC members have expressed the view that SDT provisions have not done enough for them, this is quite a remarkable inertia.

One possible explanation could be that the leading developing WTO members who have the resources to influence negotiation have not been convinced that the SDT reform would really benefit them and so, somehow sought to maintain the status quo. The LDCs and smaller developing members may be dissatisfied with the breadth and scope of the existing SDT provisions, but they may lack the resources to put meaningful reform proposals to the WTO. The focus of the developed countries, as would be epitomized from the position of the U.S. and E.U., seem to concentrate on limiting the list of countries who would be eligible to benefit from the SDT provisions, rather

⁸⁷ *Proposal for a Framework Agreement on Special and Differential Treatment*, ¶ 12, WTO Doc. WT/GC/W/442 (Sept. 19, 2001).

⁸⁸ See Bacchus & Manak, *supra* note 63, at 17, 20 (arguing that the current SDT provisions on the term “developing country” are ambiguous, requiring a new approach that properly classifies nations and provides pathways to economic development).

⁸⁹ See *id.* at 17–18.

⁹⁰ *Monitoring Mechanism on Special and Differential Treatment*, ¶ 3–4, WTO Doc. WT/MIN(13)/45, WT/L/920 (Dec. 11, 2013).

than any systemic reform of SDTs geared at conferring more tangible gains for the beneficiaries.⁹¹ Thus, solely a member-centric reform may not be easily forthcoming. In any case, when the reform mechanism driven by members has not succeeded in bringing about any change, a systematic review by a dedicated body could be useful in that at least it could provide a detailed outline for the WTO members to consider. However, it still begs the question where the impetus to conduct such a review would come from. Possibly, NGOs and scholarly writings may play a role on this front. But of course, the influence of these actors would be limited in comparison to that of the members, but it may bring about some momentum.

VII. CONCLUSION

SDT provisions should not be treated any differently from the rest of the GATT/WTO *acquis*. But at the same time, preserving the concept of SDT as immutable is open to serious questions. Whether the SDT provisions can be more effective is not necessarily a question of redistributive justice, but it is about making the negotiated provisions of the GATT/WTO to achieve their expected outcome. And the benefits of the global trade rules to reach all members of the WTO. The WTO cannot forever remain laggard in taking the SDT beyond the realm of aspirations appearing to offer something to their beneficiaries, but in practice meaning nothing. Even beyond the question of the plight of the intended beneficiaries of the SDT, this is a question of the broader legitimacy of the WTO.

The WTO law simply cannot be half-awake to the organic inequality of its members (i.e., providing for SDT provisions for helping economically backward members), but at the same time be half asleep when it comes to how the laws operate in practice. It is not the claim of this article that all pressing challenges of the SDT would be untangled by following the steps discussed here, or that even following the points raised here would be easily attainable. However, there should be some beginning of the end of the status quo with SDT in the WTO. A step in the right direction would be to set up a commission for undertaking a thorough review of the SDT provisions and an overhaul of the

⁹¹ Bacchus & Manak, *supra* note 63, at 13.

current long list of beneficiaries of the SDT provisions.

