March 2026

ISSUES RELATED TO SPECIAL AND DIFFERENTIAL TREATMENT (S&DT)

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Table of Contents

1. Introduction 1

2. The attack on S&DT in some submissions 2

3. Closing economic gaps as legal underpinning of Special and Differential Treatment provisions 3

4. Economic gaps between developed and developing countries have widened 3

5. Why needs-based S&DT approach does not work? 3

6. Why sector-specific graduation from S&DT does not work? 4

7. Why criteria-based graduation from S&DT does not work? 5

8. If larger developing countries graduate out of S&DT, will other developing countries secure more effective S&DT? 5

9. The TFA approach to S&DT needs strengthening 6

10. Self-designation for access to S&DT provisions remains best option 7

11. Conclusions 7

1. Introduction

Over the past few years, the developed countries have raised questions regarding the WTO's approach to Special & Differential Treatment provisions (S&DT), especially self-determination of development status for access to these provisions.[1] The US had in the past strongly advocated that the following categories of Members will not avail themselves of special and differential treatment in current and future WTO negotiations: OECD membership; G20 membership; classified as a "high income" country by the World Bank; or accounts for no less than 0.5 per cent of global merchandise trade.[2] The arguments made by the US in favour of graduation and differentiation were effectively and repeatedly refuted by some developing countries especially in the submission WT/GC/W/765 dated 18 February 2019 (See annex on positions presented by developing countries on S&DT). While the developed countries seek graduation and differentiation among developing countries for having recourse to S&DT as one of the key issues for discussion/decision, the approach of many developing countries is to strengthen the existing provisions and make them more precise, effective and operational.[3] In

[1] Mohamadieh's contributions focused on the trade facilitation agreement.

another development, China has voluntarily opted out of having recourse to S&DT in current and future negotiations.[4] Some WTO Members have recently made submissions on WTO reform, which includes their approach to S&DT.

In the context of the forthcoming Ministerial Conference of the WTO to be held in Cameroon during 26-29 March 2026 (MC14), this brief note discusses some of the recent proposals on S&DT. Thereafter, it provides the legal underpinning of S&DT provisions and examines whether the socio-economic realities in most developing countries have changed so as to warrant new approaches to S&DT. Subsequently, it proposes arguments against some of the approaches to graduation and differentiation. In the concluding section, the note suggests the way forward for developing countries.

2. The attack on S&DT in some submissions

Some of the recent submissions by certain WTO Members on WTO reform include specific suggestions and approaches to S&DT. In its submission the US is of the view that "it may be appropriate for least-developed countries (LDCs) to benefit from certain flexibilities"; and that reform in the area of "development" must focus on "transitioning all Members to follow the same rules, regardless of their economic differences".[5] The message of the US is clear – S&DT would be available only for LDCs, and it would be confined merely to transition periods.

After noting that "developing countries have had different experiences in terms of reaping the benefits of global economic integration", the European Union suggests that "more granular, targeted and differentiated approaches are needed going forward to ensure that the most vulnerable developing countries can unlock the benefits of global trade".[6] The EU is further of the view that "pragmatic approaches as well as objective and transparent criteria should be considered when it comes to differentiation between developing countries", and that reform work should be "based on factual analysis of the effectiveness of the S&DT provisions in WTO agreements". As some of the key S&DT provisions do not include any articulation of specific objectives that they seek to pursue, it remains unclear how "effectiveness of S&DT provisions" would be determined.

In its submission, Paraguay is of the view that "the current self-classification system, without objective criteria or graduation criteria, makes it difficult to achieve consensus on formulating new rules".[7] As a solution, it has proposed the following: "Special and differential treatment must be ***needs-based, precise, effective and operational***, so that it helps to address the particular difficulties of each Member and leads to the application of the negotiated rules, ensuring that the benefits of trade extend to everyone".

China's approach to S&DT is that these provisions should be implemented in a "more precise and effective manner to better facilitate the full integration of developing members into the multilateral trading system".[8] The basis on which China links S&DT to facilitating full integration of developing countries into the multilateral trading system is unclear. Instead, it may have been appropriate to link S&DT provisions with "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".[9]

Based on his consultations with WTO Members, the Facilitator for WTO reform has articulated the following perspective on S&DT: "Reform should ensure inclusive integration of developing Members and Least Developed Countries (LDCs), balancing the need for effective flexibilities aimed at common rules applicable to and adherence to rules. Pragmatic, widely acceptable approaches are required to maintain legitimacy while advancing development objectives."[10] This perspective does not capture the positions that developing countries have taken regarding S&DT, and could be utilized to promote approaches that divert from current practices, including reliance on criteria to govern access to S&DT. Due to this imbalance in the summary provided by the facilitator, it is important that the facilitator's report does not get adopted as such to provide guidance for further discussions and negotiations on this issue at MC14 and beyond.

3. Closing economic gaps as legal underpinning of Special and Differential Treatment provisions

In Article XXXVI: 1(c) of GATT 1994, the Contracting Parties noted that "there is a *wide gap* between standards of living in less-developed countries and in other countries" (emphasis added). Provisions in paragraph 3 of the article specified the following: "There is need for *positive efforts* designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development" (emphasis added). What could constitute positive efforts was specified in paragraph 8 of the article, which states that "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". Over the past six decades, this has formed the basis for the concept of special and differential treatment provisions and less than full reciprocity under GATT/WTO, including less than full reciprocity in tariff negotiations.

4. Economic gaps between developed and developing countries have widened

While many developing countries have made impressive progress in addressing issues related to hunger and poverty, they have actually fallen behind the developed countries in the standards of living as seen from calculations using per capita Gross Domestic Product. A comparison between the gaps in per capita GDP of US and about 119 developing country members for whom the data is available, shows that during 1994-1996 and 2022-2024 the gap has widened for 118 developing countries. Even if Portugal is taken as the comparator country, the results do not change significantly, as 107 developing countries fell behind Portugal in terms of the gap in per capita GDP during the same two periods.[11] Thus, the rationale for S&DT continues to remain relevant and in fact has become stronger now as compared to 1995. It is, thus, incorrect to focus on the value of GDP of some of the developing countries to argue for their exclusion from S&DT provisions in current and future negotiations.

5. Why needs-based S&DT approach does not work?

It has been argued by some countries that instead of permitting developing countries to have recourse to S&DT in current and future negotiations on the basis of self-determination of development status, any member desirous of seeking recourse to S&DT must demonstrate why

its circumstances require it to need S&DT. This approach is riddled with pitfalls for most developing countries. The following arguments could be made against this approach:

- Many developing countries, especially the smaller economies and LDCs, may not have the technical expertise and human resources to demonstrate their need for S&DT, despite their circumstances warranting the need for such provisions.
- As in the past, especially in the context of addressing Implementation Issues, proposals of interest to the developing countries often face a web of technical questions aimed at impeding their progress;
- Given the current lack of trust among WTO Members, it is apprehended that the developed countries are extremely unlikely to allow developing countries to have recourse to S&DT even after the latter have demonstrated why their circumstances compel them to do so.
- ***Need-based approach to S&DT is likely to become an exercise in bargaining, whereby the developed countries would seek to extract concessions in other areas.***
- As most developing countries would not be able to negotiate collectively under this approach, their negotiating leverage would get substantially diminished.

6. Why sector-specific graduation from S&DT does not work?

It is the view of some Members that in individual negotiations, some sectors may have dominant players who are developing Members or LDCs. This may raise questions about "incentives for competitors to commit to certain rules or grant flexibilities". This hints at adopting an approach whereby developing countries which are presently dominant in certain sectors may not have recourse to S&DT in those sectors. Following arguments could be made to counter this approach:

- Countries that are competitive in some sectors today, could face significant economic and social disruption, if new and path-breaking innovations subsequently emerge in that sector. S&DT provisions, say in the form of the flexibility to maintain high bound rates, would help them make the transition from old to new technologies less disruptive.
- In the absence of suitable S&DT, even the developing countries that are competitive today would not be able to implement policies to catch-up with those countries at the new technology frontier. In such a situation, developing countries would not be in a position to generate income and create jobs in the sectors deploying new technologies.
- Using the share of a county in international trade, especially exports, or global production as the indicator of sector-level competitiveness can yield outcomes harmful to most developing countries. Negotiations in respect of fisheries subsidies that contribute to over-capacity and over-fishing (OCOF) pillar provides a good illustration of this reality. Under the most-recent negotiating text, developing countries whose share of the annual global volume of marine capture production exceeds the negotiated threshold of 0.8%, would not be able to create a vibrant industrial fishing fleet as they would be deprived of the ability to provide capacity-enhancing subsidies. It is apprehended that sector-specific graduation in negotiations in other areas, apart from Fish 2, would have similar perverse implications for most developing countries.

- It is likely that the indicator and its threshold for determining competitiveness may not reflect the prevailing economic realities in the relevant sector in many developing countries.
- Small economies, many countries in Africa and LDCs do not have a diversified production base. These countries are competitive in just a handful of products. These countries would be hit hard if they are graduated out under a sector-specific graduation approach and are unable to have recourse to S&DT provisions in sectors of their competitiveness.

7. Why criteria-based graduation from S&DT does not work?

As mentioned in Section 3 above, the gaps in standard of living between the developed countries and most developing countries have widened since the establishment of the WTO. This reinforces the need to have precise and more effective S&DT in favour of developing countries, instead of the larger among them being compelled to give up recourse to S&DT in current and future negotiations. It is difficult to understand how a criteria-based graduation would take into account this stark reality in most developing countries. It is relevant to mention that three out of the four criteria specified by the US as the basis of graduation – OECD membership, G20 Membership and share in international trade – have little nexus with the standards of living. Membership of OECD and G20 are based on a complex web of geopolitical considerations delinked from standards of living. Further, share in international trade or global production has little to do with the standards of living. To take the US criteria to its logical conclusion, all the African countries which are members of the WTO would have to be graduated and hence would not be able to have recourse to S&DT in current and future negotiations as the African Union is now a member of the G20.

8. If larger developing countries graduate out of S&DT, will other developing countries secure more effective S&DT?

A narrative is sought to be created that if the larger developing countries cannot have recourse to S&DT, this would improve the prospects of other developing countries to secure effective S&DT. There is little evidence in support of this narrative. On the other hand, it is likely that some of the smaller developing countries may eventually get graduated and thereafter be compelled to give up their recourse to such provisions. Further, it is a reality that in some of the negotiations over the past 2-3 decades, in order to split the developing countries, smaller developing countries were offered greater flexibilities as compared to those developing countries who could provide competition to the exports of the developed countries. S&DT provisions in NAMA negotiations under the Doha Round and the negotiations on OCOF Pillar under Fish 2 provide relevant illustrations of this trend. Given this reality at the negotiating table, it is unlikely that the developed countries would have the strategic incentive to provide more effective S&DT provisions to smaller developing countries if the larger developing countries get graduated. It is apprehended that after the larger developing countries get graduated, the prospects for the remaining developing countries to secure effective S&DT may actually get diminished.

9. The TFA approach to S&DT needs strengthening

Section II of the Trade Facilitation Agreement (TFA) was hailed as a new approach to S&DT, that would provide a template for the future. Indeed, the experiment of designing section II is proof that developing countries and LDCs have been open to assessing and reviewing the approach to S&DT. However, it is important to note that Section II of the TFA did not meet the initial proposition of developing countries and LDCs when negotiating the TFA, and its limitations are increasingly clearer as implementation advances.

- Developing countries agreed to start negotiating a TFA in 2004 based on the premise that (1) they would be able to self-designate the provisions that they can immediately implement (Category A), those that require a transition period (Category B) and those for which they need a transition period plus technical and financial assistance (Category C) and (2) that the obligation to implement the latter would be conditional on their acquisition of capacity through provision of technical and financial assistance by developed country Members, and after a self-assessment of their capacity to implement.
- Yet, the negotiations resulted in a significant dilution of the main S&DT concepts that were supposed to under-pin Section II- namely ‘self-assessment’ and ‘conditioning implementation on acquisition of capacity’.
- The procedural requirements under Section II ended up to be a burdensome, imposing narrow timelines and complex notifications on developing countries and LDCs. Extension of implementation timeframes beyond 18 months are subject to approval of the TFA committee. Moreover, the TFA does not capture any binding obligation for provision of financial and technical assistance by developed country Members, which was dropped from the text except for a weak and non-binding reference in a footnote.
- In light of the financial constraints recently facing the Trade Facilitation Fund, it is not clear what would be the fate of implementing obligations for which developing countries or LDCs had requested a transition period and financial and technical assistance (i.e. Category C), if the latter does not materialize but the identified transition period ends.
- If the future of S&DT is to be inspired by Section II of the TFA, it is important to ensure:
    - Clear and mandatory rules to operationalize the conditioning of implementation by developing countries and LDCs on the effective acquisition of capacity through technical and financial assistance;
    - Procedural rules (including timeframes and notification requirements) are not burdensome on developing countries and LDCs in a way that dilutes their S&DT rights;
    - Safeguarding the self-assessment in determining the acquisition of capacity by the developing countries and LDCs, and allow extension of implementation dates of provisions in line with this assessment, based on a ‘notification’ procedure rather than a ‘request’ from the Committee overseeing the agreement;
    - Establish clear mandatory rules regarding the obligation of developed country members to provide the resources needed to deliver on the required financial and technical support, together with an effective process to monitor and annually report on the compliance with this obligation.

10. Self-designation for access to S&DT provisions remains best option

As mentioned in this note new approaches to S&DT, including needs-based approach and criteria-based approach, are likely to be divisive, fraught with considerable uncertainty and technically complex. It is unclear whether a developing country would have to demonstrate its need for S&DT provisions during the negotiation for a new agreement or modification of an existing agreement on the one hand, or during the implementation of the relevant agreement on the other. It is also apprehended that needs-based approach, as well as a criteria-based approach, would diminish the incentive and opportunity for developing countries to strike coalitions in negotiations. This would have negative consequences for negotiating dynamics from the perspective of developing countries. Further, in the absence of effective coalitions of developing countries for seeking generally applicable S&DT provisions, these countries may find it onerous to counter provisions that are aimed at benefiting mainly the developed countries. ***Overall, continuing with the present approach of self-designation for access to S&DT provisions appears pragmatic and less beset with problems that afflict other approaches.***

11. Conclusions

Despite the impressive economic progress made by many developing countries over the past 2-3 decades, the gaps in the standards of living in most developing countries as compared with the developed countries persists and has actually widened. Further, developing countries continue to confront many formidable socio-economic challenges, which provides a strong argument for the continued relevance of Special and Differential Treatment provisions in their favour. If future negotiations at the WTO do not fully consider these challenges and the developing countries fail to secure S&D provisions, then they would be compelled to participate in a multilateral system from which they would not be able to benefit from the rules. Such a system would not serve the overall objective of economic development in a large number of developing countries. If the multilateral trading system is unable to respond to their needs and development imperatives, some of the developing countries may not retain a high stake in the system. To accept the proposition that the large developing countries should take on same obligations as the developed countries in future multilateral trade negotiations would be a travesty of equity and fairness. Instead, in ongoing and future negotiations at the WTO, developing countries must have access to effective and precise S&DT on the basis of self-determination. Any debate on harmonising the obligations among developed and some developing countries must start with removing the asymmetries and imbalances in various agreements at WTO, particularly the Agreement on Agriculture and the ASCM, which contain many provisions that provide a substantial advantage mainly to the developed countries.

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Endnotes

[1] WT/GC/W/757 dated 16 January 2019.
[2] WT/GC/W/764 dated 15 February 2019.
[3] Strengthening of S&DT provisions and addressing implementation issues have been core to reforms in WTO rules that developing countries have called for since 1996 and have been incorporated into the Doha Development Agenda in 2001 (See WT/GC/W/778/Rev.3). The Doha Ministerial Declaration provided a clear mandate (in paragraph 44) to review all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational.
[4] WT/GC/274 dated 24 September 2025.
[5] WT/GC/W/984 dated 15 December 2025.
[6] WT/GC/W/986 dated 21 January 2026.
[7] WT/GC/W/987 dated 3 February 2026.
[8] WT/GC/W/989 dated 18 February 2026.
[9] Preamble to the Marrakesh Agreement Establishing the WTO.
[10] WTO Restricted document JOB/GC/483, dated 12 December 2025, WTO Reform, Written Report by Facilitator to the General Council *H.E. Mr Petter Ølberg (Norway) – Facilitator on WTO Reform*.
[11] Das, Abhijit and Paavni Mathur, Development Dimension – The Forgotten Pillar: Special and Differential Treatment Provisions, RIS Policy Brief, 2026 (forthcoming).