

WHY THE US PROPOSAL (WT/GC/W/764) WILL AFFECT ALL DEVELOPING COUNTRIES AND UNDERMINE THE MULTILATERAL SYSTEM

22 Feb 2019

I. Introduction

The US kicked off 2019 with two proposals that would affect all developing Members in the WTO and undermine the multilateral trading system:

- *'An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance'* (WT/GC/W/757, 16 January 2019). This paper says that due to 'great development strides', including the decrease in poverty to the lowest level in history, the WTO's construct of North and South or developed and developing countries no longer makes sense. Countries therefore should not be allowed to self-declare themselves as 'developing countries'.

US also notes in the paper that developed countries have been severely disadvantaged in the WTO system due to Special and Differential Treatment (S&D) flexibilities that all developing countries enjoy. *'All the rules apply to a few (the developed countries), and just some of the rules apply to most, the self-declared developing countries'*.

According to the US, self-declaration is making global trade rules applicable only to a small group of countries (developed Members). *'This is untenable'*. It concludes by saying that *'an inability to differentiate among (developing) Members – puts the WTO on a path to failed negotiations. It is also a path to institutional irrelevance, whereby the WTO remains anchored to the past and unable to negotiate disciplines to address the challenges of today or tomorrow'*.

- *'Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO'* (WT/GC/W/764, 15 February 2019). This paper concretises the concepts in the first paper. It provides criteria graduating some developing countries out of Special and Differential Treatment altogether, based on criteria, some of which have nothing to do with trade:
 - o membership or accession to OECD;
 - o membership of G20;
 - o classified as 'high income' by the World Bank; or
 - o a country with 0.5% or more of global merchandise trade.

The draft Decision would also eliminate S&D as an unconditional right for all other developing country Members not covered in the categories proposed by the US. It states: *'Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment'*. What this suggests is that for current and future negotiations, S&D may be provided to some developing Members, but this would have to be negotiated based on criteria that will be devised during the negotiations. I.e. no Member is guaranteed S&D flexibilities.

In response to the US' first paper (WT/GC/W/757), China, India, South Africa and Venezuela came up with a counter-narrative on 18 February (WT/GC/W/765).¹ Using a broad range of indicators, they illustrate the point that the development divide (economic and in human development terms) is still very much present between developed and developing countries. Therefore, the

'self-declaration of developing Member status, a fundamental rule in the WTO, has proven to be the most appropriate classification approach to the WTO. Despite the impressive economic progress made by many developing

¹ WT/GC/W/765 2019 'The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness', Communication by China, India, South Africa and the Bolivarian Republic of Venezuela, 18 February.

Members over the past decades, development divide persists and has actually widened. Further, developing Members continue to confront many formidable challenges, which underscores the continued relevance of S&DT provisions in their favour... Any attempt to dilute S&DT would be in conflict with the fundamental premise of equity and fairness that underpins an international treaty framework in a context of a Membership as diverse as that of the WTO'.

The proponents also note that *'Unless we are willing to properly address the practical demands and specific difficulties of the developing Members as well as the reversed S&DT for developed Members, we will never be able to encourage them (developing Members) to fully participate in and make due contributions to the future negotiations.'* They conclude with a final observation: *'If the promise of taking everyone along is a desirable objective to be fulfilled and if inclusiveness as to be ensured then S&DT for all developing Members is the obvious solution'.*

II. Analysis of US' Proposed 'Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO'

The analysis in this note focuses on the second referred to US paper (WT/GC/W/764, 15 February 2019).

1.S&D is a Critical Part of the WTO System, Without Which Some Developing Countries Would Never Have Become WTO Members

Special and Differential treatment (S&D) is a right given to all developing Members due to the uneven level of development between developed and developing Members. This development divide still exists today (see Annex 1 for per capita GDP). It is also evidenced in the UNDP's Human Development Index (see Annex 2), and as noted above, is covered in the submission by China, India, South Africa and Venezuela (WT/GC/W/765)..

S&D is an integral part of the WTO rules provided to developing countries to adjust to trade rules at their pace and in accordance with their level of development. This choice must be preserved. Many developing countries became WTO Members because S&D was part of the architecture of rules, without which they may never have become Members.

2. US Seeks Fundamental Changes to the S&D / Development Acquis of the Multilateral Trading System

i. With the US language in W764, there are no guarantees of S&D for any country, not even LDCs

With the last sentence in its submission *'Nothing in this Decision precludes reaching agreement that in sector-specific negotiations other Members are also ineligible for special and differential treatment'*, the US seems to aim at effectively destroying the concept of S&D and eliminates it as a right for all developing countries. There are not even guarantees for LDCs.

This is despite the fact that developed countries enjoy a considerable number of flexibilities which have not been granted to developing countries i.e. 'reverse S&D' provisions (a non-exhaustive list is provided below). Section 5.2 of the China, India, South Africa and Venezuela submission also provides a detailed exposé of 'reverse S&D' for developed Members in the GATT/WTO.

ii. Transforming S&D as an Unconditional Treaty Right into a Concession Provided Only Upon Conditions and Which Could also be Time-Limited

The US is suggesting that a fundamental treaty-based right which developing countries are now entitled to -due to the needs they face to improve the living conditions of their populations- be removed and replaced by certain concessions provided only to some developing countries when they have met certain conditions. EU has used the term 'case-by-case' S&D² and Canada has referred to S&D based on 'evidence of need' and 'subject to negotiations'³

² See EU 'Concept Paper: WTO Modernisation – Introduction to Future EU Proposals', September 2018 http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf

³ See Canada's paper, 'Strengthening and Modernizing the WTO: Discussion Paper', JOB/GC/201, 24 September 2018.

This is a major shift - from S&D as an embedded treaty right arising from the fact that a country is in the process of development, to a concession that could be only temporarily provided for, and which is given only when certain conditions have been met.

What are Concessions, Rights, and Entitlements

Concession is something that is allowed or given up, often in order to end a disagreement, or the act of allowing or giving this. It has both an inferior status to and a less permanent existence than rights, being subject to revocation or to the imposition of conditions on its exercise.

The word "right," designates an entitlement that can be asserted affirmatively and which cannot be removed.

An entitlement is a provision made in accordance with a legal framework, for example, of a society. Typically, entitlements are based on concepts of principle ("rights") which are themselves based in concepts of social equality or enfranchisement.

The consequences are that

- The burden of proof will be on the developing country party to provide evidence. A developing Member and LDC will be required to demonstrate with evidentiary proof their need for S&D, and this too is no guarantee. Thus, a developing Member with little negotiating / political capacity could be severely disadvantaged.
- Attaining any flexibility at all will depend on the judgement and goodwill of other WTO partners.
- Invariably, the application of S&D will be much reduced. A case may have to be made by each individual country for flexibility provision by provision, sector by sector.

The best example was the LDCs TRIPS waiver the last time this was negotiated. LDCs were told that not every LDC needed the TRIPS waiver, because some of them were already implementing the TRIPS rules, and not all of them needed it for the entire TRIPS agreement. If case-by-case S&D had become the modus operandi, any provision of S&D would have been very narrow, and individual countries would be pitted against major partners in individual sets of negotiations. LDCs would have lost the ability to negotiate as a group.

iii. **The negotiating dynamics for S&D would change radically** – from developing countries / LDCs negotiating for S&D as a group, to countries making their case individually, putting countries in a less powerful negotiating position.

iv. The language used also suggests that the US could come up with **further conditions in the future** in each set of negotiations. For example,

- middle income countries will also not avail of S&D
- countries with x% of exports in a sector will not avail of S&D. Whilst some small developing countries may not hit the 0.5% of world trade mark, individual countries could have quite high shares of exports in a particular product. Potentially, they could be excluded from S&D for that product e.g. Burkina Faso and Benin have each over 3% of the global cotton export share.

v. **The proposed elimination of S&D as a right would also significantly jeopardize the possibility to arrive at new negotiated outcomes**, especially as some Members have tended to put on the table unrealistic demands and ambitions. A case in point is the on-going fisheries negotiations.

3i. This General Council draft decision is contrary to the provisions in the WTO Agreements and to the existing mandates, including that of the Doha Development Agenda (DDA)

The proposed GC Decision is in contradiction with Part IV of the GATT (Art XXXVI – XXXVIII) which embeds S&D as a fundamental acquis for developing countries in the GATT; it is also contrary to GATS Art IV, as well as all the 148 S&D provisions in the WTO Agreements.

It is also fundamentally in contradiction with the Doha mandates on development and all other mandates which have affirmed S&D and its importance for developing countries. This of course includes the mandate in Para 44 of

the DDA regarding reviewing and strengthening existing S&D provisions. This is still an integral part of the ongoing negotiations to rebalance the WTO system to better respond to developing countries' special situation and needs in the area of trade.

Notably, as recently as the 11th WTO Ministerial Conference (MC11), in the Ministerial Decision on Fisheries Subsidies, Ministers had agreed to the following:

'recognizing that appropriate and effective special and differential treatment for developing country Members and least developed country Members should be an integral part of these negotiations.' (Para 1, WT/MIN(17)/64, 18 December 2017)

3ii. Contradictions between the existing S&D provisions in WTO Agreements and the proposed GC Decision in the Context of Negotiations

The US submission says that

'the following categories of Members will not avail themselves of special and differential treatment in current and future WTO negotiations'.

It is very likely that future negotiations (on services or goods) will touch upon existing WTO Agreements. Yet there are specific articles in these Agreements mandating S&D for developing countries.

It would seem therefore that the proposed GC Decision would conflict with and could not be applied to negotiations that pertain to existing Agreements without an amendment of certain provisions in those Agreements. For instance, Art IV of the GATS says:

'The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement...'

4. The US' conditions are arbitrary - there is no justifiable basis for the conditions they have listed

G20: G20 is not a trade grouping but a summit-level conference that was originally conceived to develop a collective response to the global financial crisis rather than to solve trade issues. G20 includes countries with major differences in their levels of development measured by a variety of socio-economic and human development indicators.

Level of income: Income level does not determine the level of development. Development necessarily means, *inter alia*, economic transformation/ diversification, sustainability, food security, access to health care, absence of or reduced poverty levels. This is not the case for several of the high income developing countries.

Trade share: Being a major importer and/ or exporter could be due to population size. It makes no sense to compare trade shares between a country with over a billion in population and another with a few hundred thousand. Further, dependence on imports does not necessarily indicate the level of development.

5. The Proposed GC Decision Is a Clear Attempt to Bring About Institutional Changes that Divide Developing Countries

The suggested GC Decision is highly divisive. This could be intended to set the stage for the WTO reform package proposed by some developed countries to be rolled out. At the heart of the WTO Reform agenda seems to be:

- for developed countries to maintain their dominant economic position including under new modalities of trade (e.g. e-commerce)
- an attempt to slow down technological catching-up and economic development, through the adoption of further WTO rules, such as on industrial subsidies, state owned enterprises and technology transfer.

- to enable proponents to adopt new WTO disciplines bypassing the consensus rule. This will undermine the very basis on which the *multilateral* trading system has been built up and, if implemented, may affect all Members big or small.

This reform agenda seems to be intended to fine-tune the WTO as an instrument that mandates a convergence of economic models, which would straightjacket developing countries' choice of strategies and policy instruments for industrial transformation, despite that developed countries themselves made their own choices and did not follow any particular policy prescriptions.

As noted by Harvard professor Dani Rodrik, *'our trade rules have overreached. A fair world trade regime would recognise the value of diversity in economic models. It should seek a modus vivendi among these models, rather than tighter rules'*.⁴

6. Removing S&D as an Entitlement will have ramifications beyond the WTO (e.g. UNFCCC negotiations, ODA, Development Financing)

Removing S&D in the WTO for some developing countries altogether, and for others, removing it as a right and making it condition-dependent rather than available on the basis of a country's self-ascription as a developing country will set an important precedent. For example, it could water down the principle of 'common but differentiated responsibility', a foundational principle in the UNFCCC for developing countries, so that this principle only applies upon fulfilment of certain criteria.

The proposed drastic changes in S&D in the WTO may also lead to new conditionalities in other arenas – ODA, development financing, climate financing and lending etc. There could be unintended consequences which we may not now have contemplated. The result could be not only the loss of economic benefits but also policy space in various multilateral regimes, making the achievement of SDGs and development priorities more difficult.

7. The issue of LDCs and Developing Countries

There is no question that LDCs deserve the maximum flexibilities in the WTO system and that they should continue to do so. However, this does not mean that developing countries do not require flexibilities. They too have developmental challenges and require flexibilities.

8. Developed countries have enjoyed 'reverse S&D' with a large impact on their economies

Developed countries have used their economic power to negotiate 'reverse S&D' for themselves. By doing so, they have enjoyed significant policy space and flexibilities in important areas. There are numerous examples of 'reverse S&D' in the UR Agreements which developed countries continue to benefit from. In fact, these 'reverse S&D' have proven even more operational and impactful than the S&D provided to developing countries. The Aggregate Measurement of Support (AMS) entitlements in agriculture is only one example. The following is a non-exhaustive list:

- AMS entitlements allowing for enormous amounts of product-specific subsidies including for products which are exported;
- the Green Box (Annex 2 of the Agreement on Agriculture) on agriculture subsidies was tailored especially to developed country farm programmes where unlimited subsidies can be provided for. Today US provides \$119 billion in the Green Box (88% of their total domestic supports) and the EU 61 billion Euros (81% of their total domestic supports).
- the Special Safeguard Provision (SSG) available to developed Members is not available to most developing Members. This is still being actively used today (e.g. US use of SSG for the entire year of 2015 against EU milk).

⁴ Rodrik D 2018 'The WTO Has Become Dysfunctional', Financial Times, 5 August.

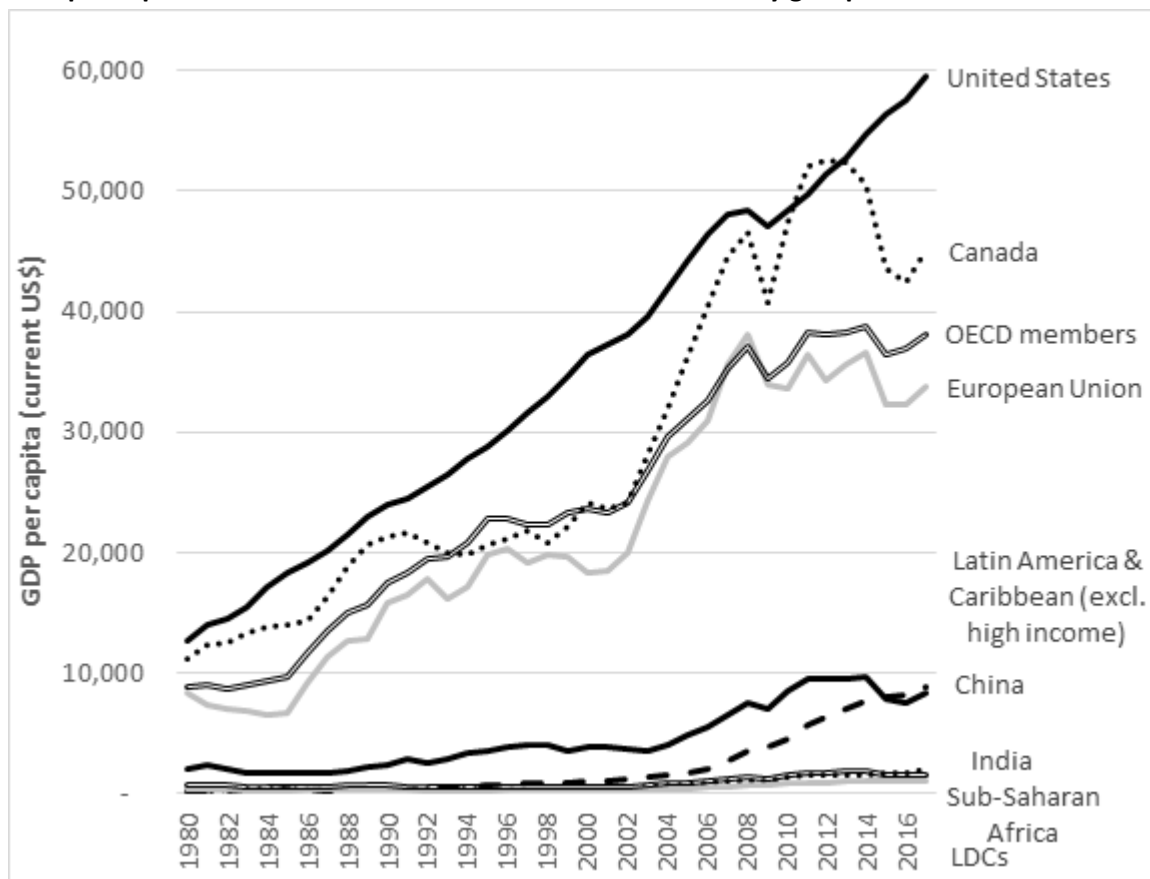
- tariff peaks and escalations;
- the types of subsidies developed countries use under the Agreement on Subsidies and Countervailing Measure (ASCM) enjoy more flexible treatment than the subsidies developing countries would tend to use;
- the GATS Agreement where concessions in the Uruguay Round went much further in Mode 3 (commercial presence) than in Mode 4 (movement of natural persons); and sectoral rules e.g. on telecommunications where developed countries had major interests
- The Nairobi Decision on Export Competition under which export subsidies had to be eliminated with immediate effect, provided flexibilities for some developed Members (see footnote 4, WT/MIN(15)/45, 19 Dec 2015).

III. Conclusions

1. The very concept underpinning the commented GC draft decision is unacceptable as a basis for any further discussion in WTO. Engaging in a discussion on the proposed categories would be futile.
2. A change in S&D to the model suggested by the US (no S&D for some; S&D for others based on conditions and supply of evidence) would remove developing countries' treaty-unconditional right to S&D. It would be contrary to fundamental provisions in the Marrakesh Agreement, and to existing mandates including those in the DDA. This contradiction also poses legal questions regarding current and future negotiations, especially where they contradict standing articles in the WTO agreements.
3. S&D as an entitlement for all developing countries is a fundamental *acquis* to the multilateral trading system, without which many developing Members may not have joined the WTO. There is still a significant development (human and economic) divide between developed and developing Members (as evidenced in the China, India, SA, Venezuela paper WT/GC/W/765). All developing countries must be able to decide the pace of their adjustment to trade rules. Trade rules should not attempt to over-reach and constrain developing countries into economic models which are not of their own choice and adapted to their societies and governance models. The WTO must not undermine each country's right to development. This is 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized' (Article 1.1, UN Declaration on the Right to Development -1986).

Annex 1

GDP per capita in current US\$ of selected countries and country groups 1980-2017



Source: World Bank, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD>

Annex 2:

Table 2. Human Development Index Trends, 1990-2017

HDI rank	Country
76	Sri Lanka
77	Bosnia and Herzegovina
78	Venezuela (Bolivarian Republic of)
79	Brazil
80	Azerbaijan
80	Lebanon
80	The former Yugoslav Republic of
83	Armenia
83	Thailand
85	Algeria
86	China
86	Ecuador
88	Ukraine
89	Peru
90	Colombia
90	Saint Lucia
92	Fiji
92	Mongolia
94	Dominican Republic
95	Jordan
95	Tunisia

Table 2. Human Development Index Trends, 1990-2017

HDI rank	Country
113	South Africa
115	Egypt
116	Indonesia
116	Viet Nam
118	Bolivia (Plurinational State of)
119	Palestine, State of
120	Iraq
121	El Salvador
122	Kyrgyzstan
123	Morocco
124	Nicaragua
125	Cabo Verde
125	Guyana
127	Guatemala
127	Tajikistan
129	Namibia
130	India
131	Micronesia (Federated States of)
132	Timor-Leste
133	Honduras
134	Bhutan

Source: <http://hdr.undp.org/en/composite/trends>