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Mike Humphrey

Institute for International Trade

HOW CAN LDCS ENSURE THEY CONTINUE TO BENEFIT FROM SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO?

Executive Summary

As most international-trade observers are aware, debate is currently raging about the World Trade Organization's relevance and role, its need for organisational reform, and the lack of progress in the Doha Round. Special and differential treatment (S&DT) provisions are an important component of this wider debate, and particularly the question of which countries should benefit from them—an issue intimately tied to the matter of self-designation.

Presently, there's still widespread support for granting S&DT to least-developed countries (LDCs) to help their development; doing so for some developing countries is far more contentious. Developed and developing countries self-designate in the WTO, whereas LDCs do not. LDCs are clearly defined using a combination of their gross national income (GNI) per capita, and their rankings in the Human Assets and Economic Vulnerability indices.

Nevertheless, in the current climate even LDCs cannot take S&DT concessions for granted. If they are to retain them, it's essential that they convince other WTO Members that the concessions:

- remain vital for their economic development
- will result in real changes facilitating their further integration into the international trading system
- aren't simply the result of their "entitlements as LDCs"
- aren't being used to avoid implementing rules or commitments undertaken by non-LDC Members.

Many flow-on benefits beckon. By proactively identifying the S&DT provisions they require for their further economic development, LDCs will ensure they're not assuming regulatory commitments they won't be able to implement and enforce. They will also protect their economies from excessive liberalisation, thereby reducing their vulnerability to dispute settlement.

In this policy brief we explore these issues in depth, and conclude with a number of proposed measures LDCs can take to ensure they maximise their S&DT concessions' developmental impact.

S&DT background

The General Agreement on Tariffs and Trade (GATT) effectively began in October 1947, when 23 countries signed a protocol committing them to reducing tariffs on tariff lines covering 20% of world trade. These 23 GATT-founding "contracting parties" (technically they weren't members, as the GATT was a provisional agreement without treaty status) were joined by an increasing number of newly independent countries in the 1950s and 1960s, as European colonial empires broke up. The first six GATT negotiation "Rounds" concentrated on increasing access into developed countries' markets through reducing tariffs and expanding the range of tariffs covered. During this period developing countries were not required to implement these tariff reductions, but this was the only concession made to their specific developmental needs. However, as the number of GATT-contracting parties rose, pressure mounted on developed countries to recognise developing countries' special requirements. As a result, Part IV of the GATT—an Article officially recognising the principle of non-reciprocity for the first time—was agreed in 1965. The seventh, or Tokyo, Round (1973-9) included agreement on the Enabling Clause[1]. This allowed preferential treatment of developing and least-developed countries, thus providing the legal basis for S&DT.

[1] https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm, accessed June 2019.

From this time on, S&DT has been a widely accepted principle of the rules governing international trade. Its basic tenets were recently succinctly summarised by the Chinese ambassador to the WTO as "four 'L's: 'less' in terms of the scope of concessions, 'lower' in terms of the amount of concessions, 'longer' in terms of timeframe for concessions and 'later' in terms of the start date of concessions."[2]

The GATT Enabling Clause, and GATS Articles IV and V

By allowing developed countries to grant developing countries non-reciprocal preferential treatment, the Enabling Clause not only forms the legal basis for S&DT, but also the Generalised System of Preferences (GSP) and the Global System of Trade Preferences (GSTP). Under the GSP, developed countries grant non-reciprocal tariff and other concessions to developing countries' exports, while the GSTP is used by developing countries to grant trade concessions to each other.

Article IV of the General Agreement on Trade in Services (GATS)—an outcome of the Uruguay Round (1986-93)—aims at increasing developing countries' participation in international trade in services. This is primarily achieved by liberalising their market access in sectors and supply modes of interest to them. Article V of the GATS gives developing countries flexibility in regards to eliminating their discriminatory measures, or prohibiting new ones, where they are members of agreements liberalising trade in services.

It's also worth noting that Article XXIV of the GATT allows members establishing a regional trade agreement (RTA) to grant additional S&DT to other members of the same RTA. This is provided that, by the end of any agreed phase-in period, duties and other restrictive commerce regulations are eliminated on substantially all the trade between the RTA members in products originating in their countries.

Agreement establishing the WTO[3]

The Agreement establishing the WTO was the Uruguay Round's main outcome. It required that all countries joining the WTO would be bound by the earlier Multilateral and Plurilateral Trade Agreements (Annexes 1 to 4 of this Agreement), including all provisions relating to S&DT.

In October 2018, the WTO Secretariat compiled an updated list of the 155 S&DT provisions contained in the various WTO Agreements for the Committee on Trade and Development (CTD)[4].

General Council meeting, 23 July 2019 © WTO

Within these, there are 35 separate provisions or sub-provisions that relate specifically to LDCs. The table below is compiled from this document.

NUMBER OF DISTINCT S&DT PROVISIONS IN WTO AGREEMENTS

General Agreement on Tariffs and Trade (GATT) 1994	25
Understanding on Balance of Payments of GATT 1994	2
Agreement on Agriculture	13
Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures	6
Agreement on Technical Barriers to Trade	25
Agreement on Trade-Related Investment Measures (TRIMs)	3
Agreement on Implementation of Article VI of GATT 1994	1
Agreement on Implementation of Article VII of GATT 1994	8
Agreement on Import Licensing Procedures	4
Agreement on Subsidies and Countervailing Measures (SCM)	16
Agreement on Safeguards	2
General Agreement on Trade in Services (GATS)	13
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	6
Understanding on Rules and Procedures Governing the Settlement of Disputes	11
Agreement on Government Procurement (GPA)	10
Agreement on Trade Facilitation (TFA)	10
TOTAL	**155**

The WTO Secretariat classifies the various S&DT provisions into the following six categories:

- Provisions aimed at increasing developing-country Members' trade opportunities.
- Provisions under which Members should safeguard developing-country Members' interests.
- Flexibility of commitments, action and policy-instrument use.
- Transitional time periods.
- Technical assistance.
- Provisions relating to LDC Members.

In addition to WTO Agreements' S&DT provisions, additional concessions for developing countries and LDCs may be granted through waivers by the WTO General Council or Ministerial Conferences. For example, in June 1999 the General Council agreed a waiver allowing developing countries to provide preferential tariff treatment to LDCs' products. Similarly, at the December 2011 Ministerial Conference a waiver was agreed to enable developed and developing countries to provide preferential treatment of LDC-delivered services.

In the 2001 Doha Declaration it was agreed all S&DT provisions should be strengthened to make them more effective and operational. As it was expressed at the time, this Declaration, and the Decision on Implementation-Related Issues and Concerns, "mandates the Committee on Trade and Development (CTD) to identify which of those special and differential treatment provisions are mandatory, and to consider the legal and practical implications of making mandatory those which are currently non-binding. In addition,

[2]. February 2019, "Statement by H.E. Ambassador Zhang Xiangchen of China at the General Council Meeting on Communications of Development", http://wto2.mofcom.gov.cn/article/chinaviewpoins/201903/20190302839144.shtml, accessed June 2019

[3]. https://www.wto.org/english/docs_e/legal_e/04-wto.pdf, accessed June 2019.

[4]. October 2018, "Special And Differential Treatment Provisions In WTO Agreements And Decisions", Note by the Secretariat WT/COMTD/W/239 (18-6313)..

the Committee is to consider ways in which developing countries, particularly the LDCs, may be assisted to make best use of special and differential treatment."[5]

In December 2013, the Bali Ministerial Conference established a mechanism to enable Members to analyse and review S&DT arrangements during dedicated CTD sessions. This process also gives them the opportunity to recommend S&DT improvements—either to the provisions themselves or their implementation—to appropriate WTO bodies.

The Trade Facilitation Agreement (TFA), which came into force in February 2017, takes this process further. It stipulates in Article 21 that donor WTO Members will facilitate bilateral and/or multilateral support for developing-country and LDC capacity building to implement the TFA. Various principles are outlined to guide developed countries in carrying out this commitment. The Article also requires the Trade Facilitation Committee (TFC)—open to all WTO members—to hold at least one session per year to review such support's implementation; and Article 22 commits donor countries to report their TFA-implementation support to the committee annually. Where possible, they must supplement this information with 12-month projections. The TFC also invites various international and regional organisations to provide it with similar submissions on a yearly basis.

Complementing the TFA is the Trade Facilitation Agreement Facility (TFAF). The TFAF was launched by the WTO Secretariat in July 2014, and became operational in November 2014. It provides support to developing countries and LDCs to "assess their specific needs and to identify possible development partners to help them meet those needs through a diverse number of activities … [In addition, where] no other funding source is available, the TFAF will offer two types of grants to Developing and LDC Members notifying Category C commitments[6]: project preparation grants and project implementation grants."[7]

So, which countries should qualify for S&DT?

For the past 50 years, the UN's Committee for Development Policy (CDP), a subsidiary body of the Economic and Social Council, has determined which countries are considered LDCs[8]. The committee reviews this list, and its LDC criteria, every three years, with its next assessment due in 2021. Presently there are 47 LDCs—33 in Africa, nine in Asia, four in the Pacific region, and one in the Caribbean—and three main criteria:

GNI per capita

The threshold for LDC status here is determined by the World Bank, which in 2018 set it at US$1,025.

Human assets

This threshold is based on a country's ranking in the UN Capital Development Fund's Human Assets Index (HAI). The HAI takes into account the prevalence of undernourishment, child and maternal mortality ratios, gross secondary school enrolment and the adult literacy rate. Since 2015, the HAI LDC graduation threshold has been set at 66.

Economic vulnerability

This threshold is based on a country's ranking in the CDP's Economic Vulnerability Index (EVI), which considers: agricultural production instability; the percentage of the population affected by natural disasters; export instability; the percentage of the population living in low-lying coastal areas; the share of GDP coming from subsistence farming, hunting, forestry and fishing; population size; and the country's remoteness. Since 2015 the EVI graduation threshold has been 32.

To graduate out of LDC status, a country must exceed the graduation threshold in two of the three criteria in two consecutive triennial review periods. However, if their GNI per capita rises to twice the current threshold, they automatically qualify for graduation regardless of how they've performed in the other two criteria. Since 1994, 10 countries have graduated from LDC to developing-country status; between 2020 and 2024 it's anticipated Angola, Bhutan, São Tomé and Príncipe, Solomon Islands and Vanuatu will follow suit.

Within the WTO framework there are no agreed criteria defining countries as "developing" or "developed". There are also no agreed criteria for when a country graduates from one to the other. As a result, countries self-designate their status if they are not LDCs[9].

There is near universal agreement that LDCs should qualify for S&DT to facilitate their further economic development. There's also a clearly defined and accepted international definition of which countries are LDCs, and how they graduate from LDC status. The debate within the WTO is over which developing countries should also benefit from S&DT. This stems from the already noted convention that developing countries self-designate their status, and thus qualify for the S&DT provisions of WTO Agreements for developing countries that are not specifically for LDCs.

This is not a new issue. In fact, some observers, and even some WTO Members, argue that "this 'self-designation' approach has been a central reason for the lack of progress in the Doha Round negotiations and represents an immense challenge for negotiating new agreements in the WTO." [10] Most contentious is the "developing" status of states at the high-GNI end of the UN's developing-countries list. This includes Singapore, the Republic of Korea, and even China[11]—the world's second-biggest economy since 2010[12].

The debate within the WTO, and many other organisations involved in international economic governance, has become increasingly acute since the advent of the Trump administration in the US (January 2017). This administration has been particularly frustrated with the WTO's workings[13]. It recently declared that the current rules-based international trading system is one in which "[a]ll the rules apply to a few (the developed countries), and just some of the rules apply to most, the self-declared developing countries. The perpetuation of this construct has severely damaged the negotiating arm of the WTO by making every negotiation a negotiation about setting high standards for a few, and allowing vast flexibilities or exemptions for the many."[14]

With respect to S&DT, the US in early 2019 formally proposed that these concessions shouldn't apply to countries that are: members of the Organisation for Economic Cooperation and Development, or

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5. https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm, accessed June 2019.

6. Category C commitments are those that will need additional time and capacity building support to implement.

7. https://www.tfafacility.org/about-the-facility, accessed June 2019.

8. https://www.un.org/development/desa/dpad/our-work/committee-for-development-policy.html, accessed June 2019.

9. In contrast to this, the World Bank classifies countries into four categories based on their GNI per capita in the previous calendar year: low-, lower middle-, upper middle- and high income (see https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classifycountries). As already noted, the UN's Economic and Social Council determines the list of LDCs, while its World Economic Situation and Prospects (WESP) report classifies countries into developing economies, economies in transition, and developed countries. WESP also uses the World Bank's four GNI-based categories to determine their level of development (see https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf). Both accessed June 2019.

10. Brandi, C and Cheng, W 2019, "The disputed status of developing countries in the WTO", German Development Institute, https://blogs.die-gdi.de/2019/03/14/the-disputed-status-of-developing-countries-in-the-wto/, accessed June 2019.

11. All three countries are listed as developing countries by the UN in 2018. "World Economic Situation and Prospects 2018", United Nations, https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2018_Annex.pdf, accessed June 2019.

12. https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/CHN, accessed June 2019.

13. See for example: Stoler, A 1 March 2019, "Crisis in the WTO appellate body and the need for wider WTO reform negotiations", Policy Brief, Institute for International Trade.

14. February 2019, "An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance", Communication from the United States, WT/GC/W/757/Rev.1, accessed June 2019.

Group of 20; classified as a high-income country by the World Bank; or that generate more than 0.5% of global merchandise trade.[15] Two weeks later, three BRICS members—China, India and South Africa—together with Venezuela, Laos, Bolivia, Kenya and Cuba, responded with a joint communication reaffirming their support for 'self-designation'[16]. They argued that, while their economies may contain some similarities with those of developed countries, such as when measuring per capita income or percentage of international trade, large areas remain underdeveloped. These, they said, required time and dedicated resources and policies to ensure their transformation. Furthermore, they argued, "actual [S&DT] benefits to developing Members have fallen far short of expectation. In contrast, it is developed Members that have reaped substantial benefits by seeking and obtaining flexibilities in areas of interest to them; a form of 'reversed' S&DT. The WTO rules-based system has helped in the growth of trade but has not made it equitable." [17]

In a recent article, former World Bank Senior Director on Trade and Competitiveness Anabel González points out that while the literature and data on S&DT's impact is inconclusive, developing countries will probably want to continue benefitting from their provisions. She notes that the US proposal "would result in some 30 countries—countries as diverse as Colombia, Indonesia or Vietnam—no longer being able to self-designate developing status, even when most clearly are." She extrapolates:

> "Agreeing on a formal categorisation of developing countries in the WTO context can turn into a byzantine negotiating exercise that, although not impossible, is unlikely to succeed."[18]

It's notable that Brazil's new president, Jair Bolsonaro, on a state visit to the US, recently stated that his country would no longer require S&DT treatment. As the Bolsonaro administration has only recently been elected, and is yet to announce its international trade policies, it remains to be seen if this commitment is followed through. If it is, and Brazil's move is supported by other developing countries on the cusp of becoming fully developed, there could be an interesting shift towards supporting the US position.

Norway (with the support of Iceland, New Zealand, Singapore and Switzerland) in its communication on this S&DT debate, argues: "Aiming at consensus on a negotiated set of criteria for when a developing Member should have access to S&D is neither realistic nor necessarily useful. The question should rather be how S&D could be designed to address the development challenges Members are facing. It is the negotiated result that matters, not the categorization of Members. However, the special treatment of LDCs should be maintained."[19]

What should LDCs do to ensure they obtain maximum benefit from S&DT?

In light of ongoing debate about how the WTO can retain its centrality with regards to international trade issues, it's very important for LDCs that the next Ministerial Conference reaffirms a commitment to placing development at the centre of the WTO's work. To ensure this, it's vital that LDCs proactively demonstrate that their S&DT proposals aren't simply: repeats of past requests, based on previous ministerial decisions that may no longer be supported by all WTO Members; the result of their "entitlements" as LDCs; or a means to avoid implementing rules or commitments undertaken by non-LDC Members.

Rather, LDCs will need to show in concrete terms how the S&DT provisions they request will result in real changes that will facilitate a clearly defined positive international trade outcome, and that this will in turn contribute to their economic development. This will only be possible by ensuring requested provisions are identified from a process of detailed consultation with their own domestic private sector, existing and potential foreign investors and other interested stakeholders. More specifically, this could include the following (suggestions structured around the WTO Secretariat's S&DT typology):

Increasing LDCs' international trade opportunities

LDCs would need to show that any S&DT provisions requested will feed into a detailed national plan to help their current and potential exporters take advantage of the opportunities they provide.

Safeguarding LDCs' interests

These interests—and the manner in which they could best be safeguarded—would need to be clearly articulated by the LDC governments requesting the S&DT provisions, and informed by a detailed stakeholder consultation process.

Flexibility in commitments, actions and policy use

The nature and specificity of the flexibility requested would be an integral part of the required S&DT provisions identified by the LDCs in their consultation and resulting policy development process. These flexibilities would be identified as necessary to achieve the LDCs' detailed plans to maximise their benefit from the anticipated enhanced trade opportunities.

Transitional timeframes

Any requested transitional timeframes would be built into LDCs' S&DT implementation plans. This will ensure they're fully justified, and result in a specific set of detailed outcomes by the end of the transition period. Where these transitional timeframes are offered to LDCs by all other WTO Members, the transitional period would be linked to each LDC's graduation trajectory; where the S&DT provisions are offered to LDCs acceding to a WTO-compliant FTA (or customs union), the transitional timeframes would be agreed by all parties to the agreement.

Technical assistance

Given many LDC governments' capacity limitations and resource constraints, it's likely that specific technical assistance and capacity building will be needed to carry out the various consultation and/or policy development processes suggested here. The process of providing this will be facilitated greatly if requests for assistance are highly detailed and the result of targeted needs analysis.

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15. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=251580&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanish, accessed June 2019.
16. 26 February 2019, "The Continued Relevance Of Special And Differential Treatment In Favour Of Developing Members To Promote Development And Ensure Inclusiveness", WT/GC/W/765/Rev.1, accessed June 2019.
17. Ibid.
18. González, A March 2019, "Revisiting 'special and differential treatment' in the WTO", EastAsia Forum.
19. April 2019, "Pursuing The Development Dimension In WTO Rule-Making Efforts", Communication from Norway.

Specific LDC-related provisions

Once LDCs have taken all the above steps, they will be in a very strong position to proactively negotiate for any required specific provisions related to LDCs.

This entire process will have the added benefit of ensuring LDCs don't assume regulatory commitments that they won't be able to implement and enforce, thereby protecting their economies from excessive liberalisation and reducing vulnerability to dispute settlement.

As mentioned, capacity building and technical assistance will be essential in many instances to help LDCs identify their S&DT requirements. They may also need support in building a coherent implementation and monitoring plan, to ensure the S&DT provisions benefit their economy as envisaged. This is in the interests of both assistance providers and recipients: providers need to ensure their assistance makes a real and sustainable impact; recipients need to ensure the assistance builds their internal capacity to develop and implement policies that maximise their economic benefit from international trade.

The Next WTO Ministerial Conference

At the next Ministerial Conference (MC12 due to be held in Astana, Kazakhstan, in mid-2020) it's likely that ongoing issues for discussion will include rules and other provisions governing agriculture, e-commerce and fisheries subsidies. In each of these, a number of LDCs will have significant interests and may need specific S&DT provisions applied to them should any agreements be reached. In the lead up to the conference, LDCs should ensure their S&DT issues—and possible capacity building and other assistance requirements—are well articulated. This will ensure their voices are clearly heard in the (likely noisy) discussions about which countries should benefit from any proposed S&DT provisions in the wider debate about agriculture, e-commerce and fisheries subsidies.

ABOUT THE AUTHOR

Mike Humphrey is currently the Senior Trade Advisor at the Institute for International Trade at the University of Adelaide. He has over 30 years working experience in the areas of regional integration policy and capacity building, regional and international trade negotiations and trade promotion. He has designed, evaluated or implemented programs in various countries for most of the major donors supporting trade issues including AusAID/DFAT, DANIDA, DfID, EU, GIZ, NORAD, SIDA and USAID.

He ran the EU support program for the seven SADC countries negotiating an Economic Partnership Agreement with the EU for over 5 years, was a full-time trade advisor to the Government of Swaziland during 2009 and 2010, has been actively involved in supporting both the African Tripartite and the Continental Free Trade Area trade negotiations, and has provided capacity building support to the AU, COMESA, EAC, and SADC Secretariats. He has worked as an advisor to most governments in Eastern and Southern Africa, and with a number of private-sector organisations and their members. He also ran a series of workshops on the EU rules of origin for the private sector in six South Asian countries.

FOR FURTHER ENQUIRIES

Institute for International Trade
The University of Adelaide
Level 5, 10 Pulteney Street SA 5005 Australia

TELEPHONE +61 8 8313 6900

EMAIL iit@adelaide.edu.au

WEB iit.adelaide.edu.au

SOUTH AUSTRALIA