



## **THE EU AND DEVELOPING COUNTRIES IN THE WTO: REFORMING SPECIAL AND DIFFERENTIAL TREATMENT**

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**POLICY BRIEF – 03/2024**  
**Studio Europa Maastricht**  
**POLICY BRIEFS**  
**COLLECTION**

By: Studio Europa Maastricht (SEM)



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## EXECUTIVE SUMMARY

### Policy challenge.

Special and Differential Treatment (SDT) is a set of legal provisions that give developing countries special rights and allow developed countries to treat them more favourably than other World Trade Organization (WTO) members.<sup>1</sup> SDT acknowledges that countries at different stages of development need different rules to support economic growth. However, since countries in the WTO self-declare their status as “developing”, SDT has often been a contested matter.<sup>2</sup> Tensions around SDT have more recently increased, with developed members — notably the United States (US) — questioning whether large emerging economies such as China should continue to claim SDT despite having achieved significant economic growth.<sup>3</sup> This raises questions of whether and how to set criteria that delimit access to SDT while accounting for divergent levels of development.

### What is at stake for the European Union (EU)?

The EU has joined the US in calling for a reform of differential treatment in the WTO, complaining that ‘[i]t is not sustainable that two-thirds of the membership - including some of the world's most significant economies - claim special and differential treatment’<sup>4</sup>. More specifically, its 2019 reform proposal on SDT suggests a combination of cross-cutting criteria for graduation from the developing country status with an ‘agreement-by-agreement’ approach that adjusts SDT across negotiation

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<sup>1</sup> WTO. (2016). Committee on Trade and Development, “Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat”, (22 September) WT/COMTD/W/219

<sup>2</sup> Bacchus, J., & Manak, I. (2021). *The Development Dimension: Special and Differential Treatment in Trade* (1st ed.). Routledge.

<sup>3</sup> Ibid.

<sup>4</sup> European Union (2019). *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*. Annex. Brussels, 18.2.2021, COM(2021) 66 final, p. 2.

issues.<sup>5</sup> So far, however, the EU reform proposal has not received the support necessary. Yet, reaching an agreement on differential treatment has become a key part of ongoing efforts to reform the WTO. In a world in which economic heterogeneity of countries is growing and increasingly cuts across ‘North-South’ divides, WTO members need to find new and convincing ways to address economic inequality in global trade governance. At a time when geopolitical tensions are rising, defending and transforming trade multilateralism is inextricably linked to taking the reform of SDT seriously. If the EU is seen to promote a reform approach that a majority of developing members of the WTO oppose, it stands to lose its attractiveness and credibility as a partner of these countries in the Global South.

### **What are the options?**

WTO members have three main options. First, they can leave the status quo (self-declaration) unchanged and rely on bottom-up voluntary graduation of large emerging economies from the developing country category. Second, they can seek to introduce cross-cutting criteria in a top-down manner that would limit who gets access to SDT — as the US (and the EU, in part) has suggested. Third, WTO members could opt for “differentiated differentiation”, and introduce issue-specific criteria that delimit access to differential treatment based on sector-specific capacity- or competitiveness-related indicators.<sup>6</sup> This third approach is consistent with the EU’s proposal for an agreement-by-agreement approach to SDT, one that is needs-driven, more targeted, and focused on helping developing countries overcome capacity constraints to assume their full WTO commitments.<sup>7</sup> Instructively, the EU’s calls for more differentiation between developing countries for the purpose of SDT to be reflective of the capacity needs of these countries.<sup>8</sup>

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<sup>5</sup> Ibid, p. 6.

<sup>6</sup> Ukpe, A. & Khorana, S. (2021). Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development, *Journal of International Trade Law & Policy* 20(2), 83-100; Ukpe, A & Khorana, S. (2023). Differentiated Differentiation in the WTO Customs Valuation Agreement, *Journal of World Trade* 57 (5), 731–762.

<sup>7</sup> European Union (2019). Trade Policy Review, above n 4 at 6.

<sup>8</sup> Ibid.

We offer a classification of negotiation issues to assess the likelihood of these different approaches succeeding. Based on this assessment, we recommend that the EU supports a layered approach that combines the introduction of sector-specific criteria for access to SDT (option 3) with a pragmatic push for voluntary graduation (option 1). For the EU, this would entail compromising and giving up the proposal to introduce cross-cutting criteria for graduation from SDT (option 2).

## **Introduction: Differential treatment and contested developing country status**

Special and differential treatment of developing countries was introduced into the world trade regime in the 1960s and 1970s. At the time, newly independent developing countries pushed for greater recognition of their disadvantaged position in the world economy. More precisely, they sought **exemptions from the principle of reciprocity**, which implies an obligation on each party receiving trade concessions to provide equivalent benefits to the other party. Under SDT, it became possible for developing countries to be exempted from, or subject to less demanding, liberalization obligations. Other special rights enjoyed by developing countries under SDT include preferential market access to developed country markets, longer time periods for implementing trade commitments, flexibility of commitments and use of policy instruments, and access to financial/technical assistance.

Developing countries have described current SDT as insufficient and called for its deepening. The use of SDT, however, elicited the debate on whether SDT is a development tool to address the problems of developing countries or a trade tool to support the integration of developing countries into the global trading system.<sup>9</sup> Traditionally, SDT is envisioned to help developing countries to develop their economies through exports, and to enable them to pursue policy options they

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<sup>9</sup> Page, S. (2004). The Evolution of Special and Differential Treatment in the Multilateral Trading System, paper presented at International Centre for Sustainable Development (ICTSD) workshop, 6 December 2004, Geneva, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4679.pdf>.

consider appropriate for their development.<sup>10</sup> This view allowed the adoption of restrictive trade policies by developing countries to help support the development of their domestic industries. An alternative perspective that has gained prominence within the context of the ongoing debate on SDT reform sees SDT as a trade instrument to support developing countries in overcoming capacity constraints faced in implementing their trade commitments.<sup>11</sup> It envisions SDT as a tool to enable developing countries to take on their WTO treaty obligations to the fullest extent rather than providing them with exemption from rule obligations.<sup>12</sup> The WTO Trade Facilitation Agreement (TFA), under which the timing of implementation of obligations by developing countries is linked to the receipt of technical assistance to enable their implementation capacities, embodies this latter perspective.<sup>13</sup>

More recently, developed countries have begun to contest unlimited access to SDT by developing countries. They effectively make the case for establishing triggers that would allow and limit access to SDT in all agreements.<sup>14</sup> Developed countries signalled they would no longer give concessions to all developing countries, without being able to differentiate between different levels of development.<sup>15</sup> At the WTO, **states can self-declare their status as “developing”** at the time of joining, and hence become entitled to SDT - unless the SDT is explicitly limited to LDCs as a subset of developing countries. This practice has become heavily contested

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<sup>10</sup> Hoekman, B. (2005). Making the WTO more supportive of development. *Finance and Development*, 42(1), 14-18.

<sup>11</sup> Keck, A. and Low, P. (2004). Special and differential treatment in the WTO: Why, when and how?, p. 6, Staff Working Paper ERSD-2004-03, WTO; Bacchus, J., & Manak, I. (2021). The Development Dimension, above n 2 at 58-59.

<sup>12</sup> Ukpe, A., & Khorana, S. (2021). Special and differential treatment in the WTO, above n 6.

<sup>13</sup> Coppens, D., and Lockhart, N., (2021). Fishing for a solution: using technical assistance and capacity building to unlock a fair and ambitious fisheries subsidies deal, <https://www.sidley.com/-/media/publications/fishing-for-a-solution-using-technical-assistance-and-capacity-building-to-unlock-a-fair-and-ambitio.pdf?la=en&rev=671e20ca6b8147a9982a55cd631662f1>.

<sup>14</sup> See Paugam, Jean-Marie, and Anne-Sophie Novel (2005). Why and how differentiate developing countries in the WTO: theoretical options and negotiating solutions, pp. 4 and 5. Paper Presented at IFRI/AFD *Trade and Development Conference*, Paris. 28 October, available at [www.ifri.org/sites/default/files/atoms/files/novel\\_paugam\\_nov\\_2005.pdf](http://www.ifri.org/sites/default/files/atoms/files/novel_paugam_nov_2005.pdf). Note that some WTO agreements already differentiate between developing countries, such as the Agreement on Subsidies and Countervailing Measures (Article 27) and the Safeguards Agreement (Article 9). Yet, there exists not overall possibility to differentiate developing countries in sub-groups other than the LDCs.

<sup>15</sup> Weinhardt, C., & Schöfer, T. (2022). Differential treatment for developing countries in the WTO: the unmaking of the North–South distinction in a multipolar world. *Third World Quarterly*, 43(1), 74-93.

considering the economic rise of many countries that traditionally claim developing status, including China, India, and Brazil.

Thus, it has been no surprise that recent discussions over SDT reform have focused on the question of who counts as a rights-holder. Most prominently, the US tabled a 45-page critique of the status quo in 2019<sup>16</sup>, and called for the **introduction of hard criteria to determine country status and** delimit access to SDT.<sup>17</sup> In a 2018 concept paper on WTO reform, the European Union (EU) also criticized the self-declaration approach, which allows roughly two thirds of the membership to claim SDT.<sup>18</sup> Similar calls for reform mostly come from other developed countries.<sup>19</sup>

### **The EU proposal on differential treatment (EU 2019, annex)**

The EU's suggestions for reform strongly support a vision of using SDT as an instrument to address capacity-constraints that developing countries face when implementing liberalization commitments. It's 2019 proposal for WTO reform includes two main elements:

- 1) Agreement-by-agreement approach that tailors SDT to specific negotiation issues. This is coupled with an evidence-based approach: members requesting SDT flexibilities are asked to clearly identify the development objective at stake, and provide an economic analysis of the impact of the requested flexibilities on it's own economy and on other WTO members;
- 2) Cross-cutting criteria that lead to the graduation from developing country status; these criteria are:
  - OECD membership (including OECD accession candidates);

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<sup>16</sup> WTO. (2019). *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*. Communication from the United States. General Council, WT/GC/W/757. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W757.pdf>

<sup>17</sup> WTO. (2019). *Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO*. Communication circulated by the US. [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?CatalogueIdList=251580](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=251580)

<sup>18</sup> European Commission (2018). *WTO Modernisation – Introduction to Future EU Proposals – Concept Note*. Brussels: European Commission, p. 2. [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf)

<sup>19</sup> WTO. (2019). *Pursuing the Development Dimension in WTO Rule-Making Efforts*, Communication from Norway, Canada, Hong Kong, China, Iceland, Mexico, New Zealand, Singapore and Switzerland, WT/GC/W/770/Rev.3, WTO, Geneva, 7 May; WTO (2018), *Strengthening and Modernizing the WTO: Discussion Paper*, Communication from Canada, JOB/GC/201, WTO, Geneva, 24 September.

- Countries classified as ‘high income’ by the World Bank; and
- Countries that represent a sufficiently high share of global exports in general or in the sectors concerned by a particular negotiation (i.e. high export competitiveness).

Developing countries have either remained largely silent on the topic, or actively opposed the suggested reforms on introducing more differentiation.<sup>20</sup> A group of states that self-declare as developing country members — including China, India, and South Africa — submitted a 39-page communication to the WTO in which they defended the status quo.<sup>21</sup> They explicitly seek to retain the self-declaration approach.<sup>22</sup>

Given that decision-making in the WTO follows the consensus rule, these divisions have hampered SDT reform efforts. The **resulting deadlock** has not only left the already lingering WTO’s Doha Development Round negotiations in limbo but has made subsequent negotiations of development issues unduly costly. As the narrow scope of the fisheries subsidies agreement demonstrates<sup>23</sup>, conflicts over differential treatment have hampered or limited the value of any concession given by

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<sup>20</sup> Note that this does not mean that developing countries have not been interested in SDT reform. Yet, they are less focused on questions of eligibility, and instead have demanded to make SDT more precise, effective and operational. See for instance

[https://www.wto.org/english/thewto\\_e/minist\\_e/mc13\\_e/briefing\\_notes\\_e/development\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc13_e/briefing_notes_e/development_e.htm).

<sup>21</sup> WTO. (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.2. [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=251955&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=251955&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

<sup>22</sup> Note that they, moreover, claim that WTO rules tend to be biased in favor of developed countries, especially in the Agreement on Agriculture, which they refer to as “reverse SDT”.

<sup>23</sup> While largely being seen as a success, the agreement on fisheries subsidies has, for instance, been criticized for being limited to subsidies for illegal, unreported, and unregulated fishing – which excludes most subsidies on fisheries, including the category of harmful capacity-enhancing subsidies. Other subsidies are to be covered in future negotiations. Moreover, the agreement continues to rely on self-notification of subsidies – which often remains unreliable. Hoekman, B. M., Mavroidis, P. C., & Sasmal, S. (2023). Managing Externalities in the WTO: The Agreement On Fisheries Subsidies. *Journal of International Economic Law*, 26(2), 266-284.



developing countries during negotiations.<sup>24</sup> In other areas of WTO negotiations — such as agricultural subsidies — how to deal with large emerging economies that defend their access to developing country flexibilities remains unresolved and reinforces the deadlock.<sup>25</sup> WTO members are increasingly restricting SDT to the narrow sub-group of Least Developed Countries (LDCs) when new agreements are concluded, a practice that is less costly and less controversial.<sup>26</sup> The deadlock on SDT negotiations, thus, contributes to the WTO's larger crisis that has gone hand in hand with a rise of discriminatory protectionist market interventions.<sup>27</sup>

### **Main policy options for the reform of SDT:**

Three options, as discussed below, are conceivable. The first – voluntary graduation – is preferred by a number of (not all) developing countries. The second option – top-down designation of criteria – is based on the US proposal and is partly reflected in the EU's own proposal. A similitude of the last proposal – differentiated differentiation – has been put into practice in a limited number of WTO decisions and agreements already, but so far it does not apply across the board.

**Voluntary graduation.** A first option is to drop any effort to formally reform the self-declaration approach, and to endorse the status quo. This would imply that all self-declared developing countries in the WTO continue to benefit from SDT provisions in various agreements. Graduation from these benefits would depend on voluntary action, coupled with political pressure on large emerging economies. Recent years show that when it comes to newly negotiated agreements and decisions, this “hand-off” approach can work. The 2022 Decision on the waiver for

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<sup>24</sup> The Guardian. (2022). ‘First WTO deal on fishing subsidies hailed as historic despite ‘big holes’’, by Karen McVeigh, 21 June 2022, <https://www.theguardian.com/environment/2022/jun/21/first-wto-deal-on-fishing-subsidies-hailed-as-historic-despite-big-holes>.

<sup>25</sup> In particular, high nominal subsidy levels of China and India have received criticism from WTO members, including the US, the EU, but also members of the negotiation coalition “Cairns group” that comprises agricultural exporters such as Brazil or Australia. Compare Schöfer, T., & Weinhardt, C. (2024), Conflicts over special and differential treatment in agriculture, in: *The Unmaking of Special Rights: Differential Treatment of Developing Countries in Times of Global Power Shifts*, by Dingwerth, K., Weinhardt, C., Eckl, J., Schöfer, T. und Herr, S., pp. 134-166, Edward Elgar Publishing.

<sup>26</sup> Weinhardt, C., and Schöfer, T. (2022). Differential treatment for developing countries in the WTO, above n 15..

<sup>27</sup> See <https://www.globaltradealert.org>.

Covid-19 vaccines, for instance, became possible after China, responding to US pressure, agreed to informally opt out of the Decision's developing country flexibilities.<sup>28</sup> Similarly, China, Brazil, and other self-declared developing country members voluntarily decided not to make use of most of the flexibilities available under the 2017 Trade Facilitation Agreement.<sup>29</sup>

Relying on voluntary graduation and political pressure, however, is less likely to work whenever WTO members seek to renegotiate existing developing country flexibilities. Here, large emerging economies that continue to regard such flexibilities as beneficial would voluntarily need to accept higher costs for domestic producers. For instance, attempts to renegotiate rules on domestic support – including flexibilities available to developing countries so far failed. China, which is in nominal terms the largest provider of these subsidies in agriculture continues to claim flexibilities that are not available to developed countries, which makes it difficult to negotiate new rules on SDT on such subsidies.<sup>30</sup> Yet, the US, the EU, and other large subsidizers are only willing to reduce their own subsidies further if China does not get to claim greater flexibilities. In such cases, voluntary graduation is unlikely to succeed.

**Top-down designation of criteria that delimit access to SDT.** A second option is the US approach, discussed above.<sup>31</sup> The US proposal calls for defining access to SDT on the basis of some objective or measurable criteria, including membership of the OECD, membership of G20, classification as a high-income country by the World Bank, or accounting for no less than 0.5 percent of global merchandise trade. Countries that fit any of the criteria are not eligible for SDT. The EU's less prominently discussed suggestion to introduce cross-cutting criteria is similar, except for the omission of G20 membership. Theoretically, this option of top-

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<sup>28</sup> Mercurio, B., & Upreti, P. N. (2022). From necessity to flexibility: A reflection on the negotiations for a TRIPS waiver for COVID-19 vaccines and treatments. *World Trade Review*, 21(5), 633-649.

<sup>29</sup> Brazil and China classified 95.8 per cent and 94.5 per cent of TFA requirements as "category A", which does not contain developing country flexibilities. India notified 27.7 per cent as "category B" with some developing country flexibilities. See Schöfer, T. & Weinhardt, C. (2022). Developing-country status at the WTO: the divergent strategies of Brazil, India and China. *International Affairs* 98:6, 1937–1957.

<sup>30</sup> Schöfer, T. & Weinhardt, C. (2022) Developing-country status at the WTO, above n 29.

<sup>31</sup> WTO. (2019). *An Undifferentiated WTO*, above n 16.

down criteria offers a simple solution to the country categorization conundrum in the WTO and a seeming clear-cut approach to graduation from SDT.

However, the consensus nature of decision-making in the WTO leaves little chance of the proposal on top-down criteria gaining traction since it is unlikely that “targeted” countries will accede to it. Moreover, the arbitrariness in the selection of the proposed criteria for graduation – in both the US and the EU proposals – belies its feasibility. A wholesale adoption of either proposal poses the danger of ignoring the factual development divide in economic and human development terms between developed and developing countries.<sup>32</sup> Instructively, even the US admits that OECD membership is not indicative of a country’s development status.<sup>33</sup> Hence, an OECD member like Mexico may defend being classified as a developing country in the WTO for purposes of SDT.<sup>34</sup>

### **Differentiated Differentiation: defining sector, or provision-specific criteria for SDT.**

A third option is resorting to a rules-based approach which allows countries that exhibit similar “differences” regarding a particular rule for which SDT is intended, to receive SDT.<sup>35</sup> This approach requires successfully defining objective or measurable criteria for SDT eligibility on an agreement-by-agreement [or provision-by-provision] basis.<sup>36</sup> Termed “differentiated differentiation”, it espouses an implicit threshold method to differentiation that is amenable to the principle of graduation.<sup>37</sup> A country may graduate from a provision-specific SDT while still remaining eligible for

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<sup>32</sup> See WTO. (2019). The continued relevance of special and differential treatment, above n 21.

<sup>33</sup> Ukpe, A. & Khorana, S. (2023) Differentiated Differentiation in the WTO Customs Valuation Agreement, above n 6.

<sup>34</sup> Ibid.

<sup>35</sup> Hoekman, B. et al (2003), More Favourable and Differential Treatment of Developing Countries: Towards a New Approach in the WTO, Policy Research Paper 3107, the World Bank. Available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3107>.

<sup>36</sup> See Stevens, C. (2002), The Future of Special and Differential Treatment (SDT) for Developing Countries in the WTO”, Working Paper No. 163, Institute of Development Studies, Sussex England, 1 January, available at <https://www.ids.ac.uk/publications/the-future-of-special-and-differential-treatment-sdt-for-developing-countries-inthe-wto/>.

<sup>37</sup> Ukpe, A. & Khorana, S. (2023) Differentiated Differentiation in the WTO Customs Valuation Agreement, above n 6.

SDT under another provision. The EU's proposal on the agreement-specific introduction of differential treatment that is guided by economic analysis reflects a similar approach. Also, we can find similar provision-specific SDT in some current WTO agreements like that on Subsidies and Countervailing Measures, which categorizes developing countries based on export competitiveness and prohibits those whose Gross National Product (GNP) per capita is yet to reach US\$1000, from the application of the prohibition on export subsidies.<sup>38</sup> Another, is under the Agreement on Agriculture, which provides for Net Food-Importing Developing Countries (NFIDC), a new sub-category of food insecure developing countries, and entitles them to food aid and other financial and technical assistance.

"Differentiated differentiation" leans towards making rule implementation contingent on a bottom-up approach anchored on the existence of implementation capacity rather than on country categorization.<sup>39</sup> Relatedly, the TFA exemplifies how the timing of rule implementation may be successfully linked to countries' implementation capacities.<sup>40</sup> Notwithstanding, differentiated differentiation recognizes that a strict application of certain core rules of the WTO, including MFN, national treatment, the ban on the use of quantitative restrictions, and binding tariffs will benefit consumers and enhance welfare in developing countries.<sup>41</sup> Hence, these core rules that promote non-discrimination and reciprocity in negotiations should continue to bind all WTO members without any exemptions. This is despite the existence of weak institutional capacities in developing countries which could justify their pursuit of second-best trade policies.

## **The way forward? There is no one-size-fits all approach**

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<sup>38</sup> SCM Agreement, Article 27.

<sup>39</sup> Ukpe, A. & Khorana, S. (2021) Special and Differential Treatment in the WTO, above n 6.

<sup>40</sup> Ayoki, M. (2018). Special and Differential Treatment of Developing Countries in the WTO Agreement on Trade Facilitation: Is there a cause for optimism? p. 5. (No. 87592). University Library of Munich, Germany, available at <https://mpra.ub.uni-muenchen.de/87592/>. See also Coppens, D., and Lockhart, N., (2021). Fishing for a solution, above n 13.

<sup>41</sup> Hoekman, B., Michalopoulos, C., & Winter, L. A. (2004). Special and differential treatment of developing countries in the WTO: Moving forward after Cancun. *World Economy*, 27(4), 481-506 at 490-491. The authors distinguish between core rules and non-core rules. The latter being described as regulatory policy disciplines whose implementation may be resource-intensive and not a priority for low-income countries.

The way forward needs to be built on the recognition that more differentiation among developing countries is needed in the WTO to reflect new realities. In times of global power shifts, differences among developing countries in development status are increasing. To address this, our recommendation for the EU is to promote a **dual approach to resolve the access to SDT question**: differentiated differentiation as a preferred option whenever possible and voluntary graduation in cases where the former is not feasible. The differentiated differentiation approach has the highest potential to gain support among WTO members as it comes closest to an “objective” assessment of levels of development, while not undermining WTO member’s political right to self-declare as developing countries. It allows for more differentiation between developing countries without altering the current country categorization in the WTO and takes a needs-based and more targeted approach to SDT. Conversely, voluntary graduation offers political flexibility, and its key advantage is that it is pragmatic and agreement-specific. In some cases, it thus helps to move forward when negotiation deadlocks are too pronounced, or too time-consuming to be resolved. In recent negotiations on fisheries subsidies, for instance, China agreed to forego developing country flexibilities under certain conditions.<sup>42</sup> Lastly, in acknowledging that there is no one-size-fits all approach to SDT reform, our recommended dual approach adds further flexibility, as it allows for continuity of the different visions of SDT.

This recommendation implies that the EU needs to compromise more. It needs to be accepted that some emerging economies may use political flexibility to defend their developing country status on specific negotiation issues – even if development objectives related to these flexibilities remain contested. Yet, wide-spread resistance among developing country members of the WTO to the introduction of cross-cutting criteria makes a pragmatic approach more beneficial, even if it does not close all loopholes. The higher likelihood of succeeding with such a more moderate proposal

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<sup>42</sup> Politico (2024). US encouraged by China move in WTO fish subsidy talks. By Dough Palmer, 28 February 2024, <https://subscriber.politicopro.com/article/2024/02/us-encouraged-by-china-move-in-wto-fish-subsidy-talks-00143815>.

offsets these costs. Reforming SDT in a manner that finds consensus among WTO members is essential for defending and transforming trade multilateralism.

What should be avoided, however, is the top-down designation of criteria that delimit access to SDT, as suggested by the US and to some extent by the EU. Such an approach is neither likely to be politically feasible, nor adequate for capturing the developed/developing country divide. Imposing quantification in the WTO – a forum, where decision-making relies on the consensus principle – always allows members to contest the indicators chosen to delimit access to SDT. Given the far-reaching implications of such top-down general criteria (e.g. similar to the country classifications in the World Bank), which would imply that certain larger developing country members graduate immediately from all SDT benefits, political consensus on the introduction of such an approach is unlikely to emerge.

A practical question arises: when is differentiated differentiation likely to work, and when should WTO members push for the voluntary graduation approach?

- Differentiated differentiation is particularly likely to be less controversial in negotiations where the demand for differential treatment stems from **capacity-related constraints with regard to resource-intensive agreements that concern “behind the border” obstacles to trade like the Customs Valuation Agreement and the TFA.**<sup>43</sup> Here, SDT comes primarily in the form of *longer transition periods or access to technical and financial assistance*. It allows countries to develop bottom-up capacities for implementation before taking on rule obligations or liberalization commitments. Ultimately, trade liberalization becomes a “win-win” for all as poor countries are able to benefit from the opportunities created by globalization in the same way as developed countries. Note that such a “win-win” scenario is less likely in market access negotiations in which gains result primarily from reciprocal concessions.

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<sup>43</sup> Ukpe, A. & Khorana, S. (2023) Differentiated Differentiation in the WTO Customs Valuation Agreement, above n 6; Ukpe, A. (2024). Special and Differential Treatment Reform in the WTO: the Differentiated Differentiation Approach. Routledge, UK. (forthcoming in June 2024).

- In other negotiations, including those on market access and domestic subsidies, SDT provisions guarantee developing countries *de facto* **competitive advantages** vis-à-vis developed countries. For instance, developing countries may be allowed higher thresholds with regard to agricultural subsidies or fisheries subsidies, or allowed to opt-out from specific liberalization obligations in market access negotiations. In **such ‘zero-sum’ situations**, self-declared developing country members have an incentive to defend existing flexibilities. Such SDT issues – which require a re-negotiation of existing rules – are most difficult to reform. Self-declared developing countries can veto any new proposal. Hence, **a combination of a sector-specific competitive-related criteria and a push for voluntary graduation** could be the most promising way forward in such cases that many developing countries perceive as “win-lose” (e.g. without SDT, their firms lose out to developed country firms since there is no level playing field). Allowing countries to self-designate sector-specific needs in a “bottom-up” manner in which they think they do not need SDT flexibilities anymore — as was done under the TFA — increases the political leeway necessary to achieve consensus. Quick breakthroughs, however, cannot be expected. Note, moreover, that many of such sector-specific solutions are likely to come in the form of plurilateral, rather than multilateral agreements.
- In **time-sensitive negotiation issues** where SDT provisions are “zero-sum”, relying on **voluntary graduation** is the best choice. Here, introducing sector-specific criteria that all WTO members can agree to is likely to be too time-consuming. Conversely, voluntary graduation, coupled with political pressure, leaves room for tailor-made political solutions. This is most likely to work in negotiations of new issues not previously negotiated under the WTO. An example is the recently concluded waiver on Covid-19 vaccines, where China, under pressure from the US, declared that it would voluntarily opt out from making use of developing country flexibilities.

## **Final remarks**

The EU has been promoting a reform of SDT at the WTO – most notably as part of its overall 2019 reform proposal. Yet, so far, the suggested route has not found enough support. The EU and its member states need to reconsider how they can best achieve their goals. Reforming differential treatment in a manner that allows for greater differentiation among developing country members of the WTO is key for future-proofing the multilateral trading system. The pragmatic, dual approach we recommend would make it more likely for WTO members to move forward on SDT reform, which is particularly salient in times in which the multilateral trading system is threatened by geopolitical tensions and the rise of economic nationalism.

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Note: The findings on which this policy brief draws stems from two research endeavors: first, Clara Weinhardt draws on findings from the German Research Foundation-funded project on 'The Rise of Emerging Powers: A Challenge to Norms of Differential Treatment for Developing Countries?' (2019-2022) (grant number WE 6012/2-1). Second, Aniekan Ukpe draws on the research conducted for his PhD



(2022) on “Differentiated differentiation: Using progressive regulation as a framework for special and differential treatment in the WTO” at Wageningen University. This policy brief draws on an earlier version published with the Institute of Trade at Adelaide University, see: <https://iit.adelaide.edu.au/news/list/2023/12/19/reforming-special-and-differential-treatment-for-developing-countries-in-the>.

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