

**CONFERENCE ON WTO REFORM: “A WTO FIT FOR THE 21ST
CENTURY”**

**THE DEVELOPMENT ASPECT OF WORLD TRADE: IS IT NECESSARY
TO DIFFERENTIATE AMONG COUNTRIES, AND HOW SHOULD IT BE
DONE?**

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I. The WTO Differentiation and Categorization Conundrum

- The WTO development conundrum revolves around the concept and practice of differentiation amongst Members in a rules- and contract-based system, with a balance of rights and obligations and, an enforceable dispute settlement system. The puzzle is how Special and Differential Treatment (SDT) flexibilities can be granted, based on differentiation of the membership, in a contract-based balance of rights and obligations, so that the flexibilities reflect political and economic reality, do not create uncertainty over negotiated outcomes and, neither trigger a moral hazard nor a perverse system of incentives?
- In this setting, Least Developed Countries (LDCs) are categorized by the Committee for Development Policy (CDP) of the UN Economic and Social Council (ECOSOC),¹ based on agreed criteria.² WTO Members accept this categorization and its *negotiated* application in the WTO.
- *Excluding* the UN defined category of LDCs, squaring the circle of flexibilities, based on differentiation, for non-LDC developing countries, is difficult, but doable. ***The question is what purpose should differentiation serve? Differentiation for the benefit of flexibilities should neither serve to derogate from the coherence and integrity of the rules nor undermine the balance of negotiated rights and obligations, such as pursuant to scheduled commitments.***
- The form and coverage of flexibilities carry risks of black holes of uncertainty and can undermine the discipline required to implement the core provisions in an enforceable, rules-based system, like the WTO, which are ultimately the key development. Unrestricted and unqualified exemptions from core rules, for an undifferentiated block of Members, inevitably creates moral hazard in the contract-based system of rights and obligations. Hence, the design (in content and form) of flexibilities will have effects for the integrity of the system, certainty in negotiations and, negotiated outcomes.
- Three questions have been put to this panel:
 - first, ***whether*** the WTO can differentiate between countries at different stages of development?

¹ <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html>;

² <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html>;

- second, if so, **how** can the WTO differentiate between countries at different stages of development?
- third, what **role** can differentiation play in encouraging growth and poverty reduction?

II. Background

- In Part IV of the GATT '94,³ the rules, as drafted in 1964, acknowledge the economic reality that WTO Members existed at different levels of development. These rules recognize that “*individual*” and “*joint*” action is “essential” to advance the development of the economies of less developed members. Part IV includes a “note” that Members “*may*”, as a best endeavour, “enable” less-developed members use special measures (that is, flexibilities) to promote their trade and development. Part IV of the rules was “*done in 1965*” and came into force in 1966. Since then – over 50 years ago – the membership of the rules-based system has increased to an extremely diverse 164 Members. Furthermore, the economic and development reality of individual Members has also evolved. Some have developed. The condition of some others has deteriorated to that of low income and least-developed developing economies. The reality of the global economy has changed, since then.
- The WTO is faced with the reality of differences in levels of development and in the technical capabilities between developed and developing Members, and among developing countries and LDCs themselves. Special and differential treatment has been and is integral to the rules-based global economy and to WTO Agreements. This is explicitly recognised in Part IV of GATT '94 and in WTO Ministerial Declarations. However, the application of SDT provisions based on differentiation requires modernization to align them with 21st Century realities.

III. The Questions

a. Can the WTO Differentiate between its Members at Different Stages of Development?

- Although positions differ, yes, the WTO **can and does** differentiate amongst its Members, although many would say that it has not been successful in

³ As part of the GATT 1947, Part IV was “done” on 8 February 1965 and entered into force on 27 June 1966. (https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/part4_e.pdf;)

differentiating (excluding LDCs). **Should** the WTO differentiate? Yes, it should, based on a *realist* perspective of international economic and political relations. Differentiation is a standard in key global and multilateral institutions, for example, the United Nations, the World Bank, the IMF, and in regional institutions, such as Regional Development Banks.

- However, there must be clarity as to the *purpose* and *criteria* for differentiation, in the absence of which the functioning of such multilateral and regional institutions would be severely impaired, disorderly with uncertainty in relationships. Also, differentiation in the membership should neither mean nor be interpreted to mean exemption from the integrity of the rules in a system of balance of rights and obligations for any block of Members.
- The WTO, as a rules- and contract-based multilateral trading system has not been very successful with the task of differentiating amongst its Members at different levels of development, *with the exception of LDCs and Article XII Members*. For the latter, *development needs and requirements were determined via negotiations for the vast majority on a case-by-case basis*. This means that the Protocols of completed accessions were based on “*terms agreed by members*”, with due regard to the needs and requirements of individual accessions.
- In 1964, the Committee on Legal and Institutional Framework of the GATT held an exchange of views on the *problematique* associated with “*identifying*”⁴ the “*less-developed contracting parties*” and *defining* the term “*less-developed contracting party*”. Then, as now, the positions were divergent.
- At the time, in 1964, some Contracting Parties considered that it was neither necessary nor feasible, at that stage, to attempt a definition of a *less-developed contracting party*. In their view, if a problem emerged on identification, such a problem could be dealt with at that time. On the other hand, some Contracting Parties felt that it was possible with a systematic identification of either less-developed contracting parties or developed contracting parties to resolve the matter at a later stage.⁵ Fifty-four years (54) later, the reality shows that differentiation is a necessity. For instance, individual members, like Chinese Taipei, have judged it a necessity to re-differentiate (re-categorize) themselves proactively.

⁴ Synonymous with the terms categorizing or differentiating.

⁵ [L/2195/Rev.1, para.7](#): Interim Report of the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries.

- Currently at the WTO, in 2018, the developing country status is “*self-defining*”. This status quo of self-designation is no longer tenable because there are no objective criteria. Also, the proliferation of groups, *qua groups*, requesting differentiated treatment, is a Pandora’s box, or, as I noted earlier, a black hole. This situation is unworkable. It creates uncertainty both with regard to negotiations, negotiated outcomes and implementation of results, which can only lead to friction and mis-matched expectations.
- SDT provisions now require adjustment and updating to align them with a changing reality, on a case-by-case, based on objective statistical criteria with certainty that SDT provisions are non-derogatory to the core provisions of the system, except as legal waivers. The question at this moment, therefore, for the WTO reform process is how to resolve the conundrum posed by SDT provisions, based on the specificity of “differentiation”, in a rules- and contract-based system with an enforceable balance of rights and obligation, so as to ensure the full and disciplined integrity of the rules.
- **Automaticity in invoking special and differential treatment rights in a rules- and contract-based system of balance of rights and obligations, based on a self-designated status, is unworkable.**
- A non-static differentiation that reflects changing economic reality is necessary and key to unlocking the pathway to WTO reform and modernization. Differentiation of the membership and case-by-case treatment for SDT provisions are not contradictory.

b. The Options: How can the WTO can differentiate between members at different stages of development?

- How would members be differentiated in a manner that neither causes uncertainty for negotiations nor undermines the balance of rights and obligations in a rules- contract-based system and which reflects the changing reality of the global economy. The current practice and the suggestions by some are summarized hereunder:
 - **Self-Designation:** This is the *status quo*. This practice is no longer tenable. It has created uncertainty, encouraged a perverse system of incentives with the proliferation of moral hazard.
 - **Graduation:** This is a useful and necessary component of a modernized system to update the practice of differentiation, provided graduation is

implemented on an objective set of non-discretionary economic and statistical criteria.

- **Self-Withdrawal:** This is a useful complement to the dynamic aspects of differentiation, but is limited by discretion and hence insufficient.
- The position to differentiate with unqualified flexibilities for Member blocks, at variance with income levels and trade shares, creates uncertainty in implementing systemic core rules. It is difficult to reconcile with a contract-based balance of rights and obligations. It will stall progress on WTO reform. This approach is not tenable. Negotiated rules and commitments require certainty of implementation.
- In a rules-based system with a balance of rights and obligations, Members across the board have an obligation to schedule their commitments, and may also schedule limitations to their commitments and obligations, for the system to function, legally, contractually, and politically. Members must trade, pursuant to their schedules – contracts – and the rules and disciplines of the trading system.
- A number of key multilateral institutions have differentiated their membership in workable ways that provide useful examples. Comparator institutions would include the World Bank, the IMF and Regional Development Banks. These institutions use objective economic and statistical criteria that include, inter alia, shares of global GDP, trade, etc.
- To be successful, Members would have to embark on this exercise, pragmatically, realistically, flexibly and with goodwill, within a coherent trade and development framework, so as to ensure a WTO that remains relevant.

c. [what role differentiation can play in encouraging growth and poverty reduction?](#)

- The role that *differentiation per se* can play in encouraging growth and poverty reduction is minimal. While Special and Differential Treatment benefits such as preferential market access can spur *increase in exports* of specific product sectors and tariff lines, the overall effect for growth and poverty reduction is negligible. High quality and sustained growth and poverty reduction depend, largely, on domestic policy reforms such as trade facilitation measures, Ease of Doing Business, including transparency, rule of law, and associated structural reforms to boost productivity and competitiveness, for instance, in the digital economy, female empowerment and platforms to support Micro- Small and Medium Enterprises (MSMEs). Also, of importance are progressive taxation policies and domestic social safety nets, including those designed for trade

adjustment assistance. Members should not ignore these economic fundamentals.

IV. The Challenge of the Development Dimension

- An argument often stated is that the development dimension in the rules-based multilateral trading system would be fostered by derogations from rules and disciplines. Put differently, the proponents of such an approach argue that high quality, robust and sustained growth is possible behind high protectionist barriers. Economic history does not lend support for this position, and the opposite has been the case. Trade and open markets are critical to high quality sustained growth. Trade is an engine for growth and central to any strategy for development. Disciplined implementation of predictable rules is good for trade, is required for development, and is essential for markets to function. While it is true that flexibilities may be required in some cases, in a rules- and contract-based system, such flexibilities should be negotiated on a case-by-case basis and applied sparingly and not as a matter of course.
- Multilateral rules and disciplines matter significantly for development. At the same time, they must neither inhibit nor constrain sound domestic policy judgement and priorities. The evidence from real economic management is that the critical differences for trade development are based on domestic structural and institutional policy reforms. The purpose of these reforms is geared to improving the Ease of Doing Business, constantly improving productivity and competitiveness, predictability and transparency. The domestic environment should be constantly measured for competitiveness in an increasingly open and inter-dependent global economy.

V. Conclusion

- Several points are underscored in conclusion. First - *la primauté de droit est fondamentale* - the rule of law is fundamental - and the rules must apply to all, both under domestic and public international law, for the stability, certainty and predictability of the system and negotiated outcomes. Unqualified and unrestricted exceptions from the rules and disciplines will create uncertainty, undermine the predictability of the contract-based system and risk disorderly relations in the balance of rights and obligations. Commitment to the rule of law is even more important where, as in the case of the WTO, the rules are

formulated in the best manner we know of to increase trade and economic development.

- Second, there is a logic for differentiation that exists within the rules-based system, and in other multilateral and regional institutions. Differentiation does not necessarily prejudice a case-by-case approach to SDT. In differentiating and categorizing, however, the criteria and purpose for differentiation must be clear and be subject to periodic dynamic review and negotiation. Different multilateral and regional institutions use a range of objective economic and statistical criteria. These include the UN, World Bank, IMF, Regional Development Banks, etc. The objective criteria for **IMF/WB country classification** - and Regional Development Banks, reflect contributions / shares in the global economy. These could, *inter alia*, form the basis for legal and economic differentiation amongst Members, with the continued retention and use of the LDCs' Category established and managed by the UN ECOSOC. In any scenario, the development status of members should not be based on self-declaration.
- Third, it is critical to agree on the **purpose** of differentiation. In a number of multilateral institutions, the purpose of differentiation has tended to be, *inter alia*, for: contribution of assessed contributions; decision-making; growth and poverty reduction targets, etc. In no case does differentiation serve the purpose of creating block exemptions of Members from core rules, in an enforceable contract-based system of balance of rights and obligations.
- A class system, excluding the case for LDCs, is impractical and unworkable. Having regard to the significant development diversity amongst the category of developing countries, a strategy to move forward as a single developing country block, on practical trade and investment obligations, levels of commitment and limitations thereof, will result in deadlock. The calculus would be unsolvable. Under such an outcome, the WTO would be irrelevant and suffer damage, perhaps, irreparably. This situation is to be strenuously avoided for an indispensable public good.
- The riddle of the block is that it is light on the adjustments that are to be made, domestically, within individual Members and weighs more on the external adjustments to be made to support the individual Member, although both adjustments matter. The futuristic ideal is to envision the day when all members are at the same level of commitment. Before then, obligations and special treatment in what is received will increasingly have to be tailored, as a practical

matter, to the requirements and needs of individual Members, as has been the case with regard to the successful 36 WTO accessions.

- Fourth, there is a *development value for differentiation* of members, in a rules-based system. This value is best served and maximized within a coherent legal and policy framework for trade development. A number of such frameworks lend themselves for enhancement, such as the:
 - *Enhanced Integrated Framework (EIF)*: This is the model for providing development assistance, based on which the development community (of bilateral and multilateral partners) act, collectively, to address specific development challenges of LDCs. Conceptually and practically, this model could be extended to non-LDCs that may require such assistance;
 - *WTO Trade Policy Review (TPR)*: This was one of the more innovative developments in the WTO. It can be further improved with the full implementation of the recommendations from TPR reviews and with a more frequent periodicity for reviews;
 - *United Nations Conference on Trade and Development*: UNCTAD has a number of important mechanisms and programmes to support trade development.
- Many serious practitioners have made the point that the current headwinds faced by the WTO have created an environment (and urgency) that could assist the modernization and update of the organization, so as to strengthen it. As stated, recently by WTO DDG Alan Wolff:

“.... I can nevertheless see some opportunities for progress in what otherwise would seem a dystopian landscape. In fact, there are now the beginnings of some positive reactions”.
- DDG Wolff takes this position further by launching a timely appeal for Members’ investment in the WTO and for net positive contributions to maintain the system. Obviously, the nature and substance of the contributions will differ by Member. For instance, some have paid more than others through lower average tariff bindings. Others through deeper liberal commitments in services. For others, like Benin, Burkina Faso, Chad and Mali – the C4 - they have contributed, positively, through technical proposals on cotton for the elimination of trade distortions in agriculture and with designed projects to support cotton

development assistance. Overall, such approaches to investing in the system, through scheduling commitments and obligation, and limitations, thereof, point the way, *inter alia*, to a reformed and modernized WTO. The strategy of creating block exemptions from rules and commitments that are intended to support development is not credible or effective. It has not worked in the past, is blocking progress in the present, and is unlikely to work in the future.

- One way or another, a new world trading order will emerge. This is a critical moment. A risk that developing countries must strategically avoid is that the emerging world trade order becomes one that they cannot and do not participate in shaping, with the consequences and dangers of irrelevance. And but for the benefits derived generally from world economic growth, in which **We**, developing countries, share, albeit, unequally, the system is also irrelevant. What is required is a positive agenda for WTO reform and modernization, which developing countries will benefit from to the extent of their contributions and commitments.

Thank you.

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