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## Special and Differential Treatment in the WTO

About two-thirds of WTO members – and therewith the majority – are developing or least-developed countries (LDCs). Contrary to other international organisations,<sup>1</sup> the votes of all members of the WTO – whether LDC or industrialised – have the same weight, and decisions are taken by consensus only.<sup>2</sup> While the political reality of differing economic and political strength certainly impacts on decisions taken by the WTO,<sup>3</sup> it is nevertheless remarkable that the WTO's organisational structure treats developing countries as full members, on equal footing with industrialised members. Consequently, developing countries have a decisive shaping power today in all decisions taken by the WTO.<sup>4</sup>

In balance for the equal rights and treatment, the WTO provides neither financial support nor permanent exemptions from legal obligations to developing countries. Nonetheless, the obligations of developing countries have been eased to some extent in comparison with industrialised members of the WTO. For instance, developing countries are typically offered longer time frames for meeting their legal obligations, in addition to administrative and technical assistance. The WTO treaties reflect their concern about the difficult economic and social circumstances by

<sup>1</sup> E.g. the UN has a two-chamber system with the Security Council and its permanent members; the weight of the vote depends on the money transferred to the organisation both within the IMF and the World Bank, which marginalises the vote of developing countries.

<sup>2</sup> See Agreement Establishing the World Trade Organisation Art. IX.

<sup>3</sup> See for a critical note on the consensus decision making: STEINBERG, RICHARD H. (2002) 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organisation*, vol. 56, no. 2, pp. 339–374.

<sup>4</sup> It has been observed that developing countries used to be reluctant or unsuccessful with respect to shaping the decisions within the WTO in the past. This may have changed, given that developing countries are now organised in interest groups and manage to exert considerable pressure on industrialised countries. See also ISMAIL, FAIZEL AND VICKERS, BRENDAN (2011) 'Towards Fair and Inclusive Decision-Making in the WTO Negotiations', In: Carolyn Deere Birkbeck (ed.), *Making Global Trade Governance Work for Development*, Cambridge University Press, Cambridge, pp. 461–485, p. 478.

providing for the additional flexibility – the aim being to facilitate trade liberalisation in these poorer countries suffering from economic insecurity and a weak institutional environment.<sup>5</sup>

Munin (2010) states that this reflects the principle of teaching developing countries how to fish, rather than sending them the fish.<sup>6</sup> While this is one possible view and conceptual explanation of the legal status of developing countries within the WTO, arguably, the equal treatment as manifested by the WTO is also a strong commitment to the concept of free trade, which in theory should be more efficient in alleviating poverty than any form of foreign aid.<sup>7</sup> Seen this way, demanding equal rights and obligations from developing countries is in their interest: structural adjustment, a trade- and competition-friendly policy and the sheer power of economic activity should have a sustainably positive impact on economic growth in the poorer countries of this world.<sup>8</sup>

The following paragraphs discuss the legal status of developing countries in the WTO. They take a critical look at the legal implications of the concept of self-declaration and explain why there is a legal difference between the status of a developing country and the status of an LDC in the WTO. After providing a general overview of the debate concerning the legal status of developing countries in the WTO, they discuss different avenues for the future of the concept of special and differential treatment of poorer countries in the WTO. The practical consequences of the unspecific legal status of developing countries within the WTO are illustrated well by the search for a meaningful list of developing countries for establishing the sample of PTAs for this study. The part concludes with describing the theoretical framework of this study with respect to the legal definition of South-South and the concept of special and differential treatment of developing countries.

## I. Developing Countries in the WTO

The term ‘developing country’ in WTO law is legally difficult to grasp, because WTO law itself does not provide a definition of ‘developing

<sup>5</sup> See, e.g. KECK, ALEXANDER AND LOW, PATRICK (2004) *Special and Differential Treatment in the WTO: Why, When and How?*, Staff Working Paper ERSD-2004-03, WTO, Geneva.

<sup>6</sup> MUNIN, NELLIE (2010) *Legal Guide to GATS*, Kluwer Law International, Alphen aan den Rijn, p. 323.

<sup>7</sup> See, e.g. MORRISSEY, OLIVER (2006) ‘Aid or Trade, or Aid and Trade?’, *Australian Economic Review*, vol. 39, no. 1, pp. 78–88.

<sup>8</sup> See, e.g. WINTERS, ALAN L. (2004) ‘Trade Liberalisation and Economic Performance: An Overview’, *The Economic Journal*, vol. 114, no. 493, pp. F4–F21.

country'. While WTO law frequently uses the term 'developing country', belonging to the group of developing countries within the WTO officially is a matter of self-declaration: When joining the WTO, countries declare themselves to be either developing or developed. This self-declaration has, however, mainly political implications and is not legally binding. It is up to the rest of the WTO members whether they accept a country as a developing country or not, and the status of 'developing country' does not necessarily force others to provide, e.g. more preferential treatment.<sup>9</sup>

Until recently, the issue of defining the group of developing countries within the WTO was of limited relevance. Members seem to agree that the discussion on the definition and categorisation of developing countries in the WTO has come to a hold because a conclusion of this discussion within the WTO seems unlikely, and because the system of self-declaration seems to be working fairly well, despite its impreciseness.<sup>10</sup> Kennes (2000) points out how challenging introducing new regulation of the definition and treatment of developing countries within the WTO would be:<sup>11</sup>

It should be kept in mind that the developing countries are a very heterogeneous group, often with divergent interests. They range from countries with very small population and economic size to large emerging economies.

In the report of the Panel on Defining the Future of Trade (2013), convened by then WTO director-general Pascal Lamy, the question of the legal status of developing countries and the balance of rights and obligations was, however, prominently brought up:<sup>12</sup>

We believe it is time to embrace a new perspective on managing reciprocity and flexibility. We do not question differentiation and consider it an essential feature of a fair and effective trading system. [ . . . ] But in recognizing the legitimacy of differentiation, we consider that policy effectiveness is crucial. We need a dynamic approach to flexibility, tailor-made for specific needs and supported by appropriate capacity-building programmes.

The panel suggests that flexibilities should in the future be based on needs and capacities, they should target specific challenges, they should be time-specific, and finally, the manner in which flexibilities help countries to

<sup>9</sup> EBERHARD, TORSTEN (2008) *Diskriminierende Gleichbehandlung von Entwicklungsländern in der WTO?*, Mendel Verlag, Witten, pp. 92–93.

<sup>10</sup> EBERHARD (2008, p. 93).

<sup>11</sup> KENNES, WALTER (2000) Strategies for Effective Participation of Developing Countries in the World Trading System, PSIO Occasional Paper, WTO Series No. 06, Geneva, p. 9.

<sup>12</sup> PANEL ON DEFINING THE FUTURE OF TRADE (2013) *The Future of Trade: The Challenges of Convergence*, WTO, Geneva, p. 30.

converge should be monitored. The issue of the legal status of developing countries in the WTO should, thus, be seen rather as a process than as a static categorisation.<sup>13</sup> In sum, Jean (2013) points out that:<sup>14</sup>

The defects of the SDT system are not new, but they are increasingly glaring, up to a point where an update now appears inevitable, if the negotiating capacity of the WTO is to be preserved.

Regardless of the differences among them, developing countries have nevertheless since the 1960s stood together in order to raise their voice and provide their interests with greater weight, given their – still occurring – marginalisation in global trade and politics.<sup>15</sup> Within the WTO, developing countries demonstrated their political weight impressively when their firmness provoked the breakdown of the WTO's ministerial meeting in Seattle in 1999. Ties among developing countries have grown stronger in the meantime and they are organised in mainly three different groups of interest,<sup>16</sup> having also developed a considerable weight in multilateral trade negotiations.

Keet (2006) wrote the following about memberships in more than one group of developing countries and about the general implication of this new form of cooperation among developing countries within the framework of multilateral trade negotiations:<sup>17</sup>

Such cross-cutting memberships, co-operation and mutual support could, more significantly, contribute towards gradually shifting the overall balance of power within the WTO, and possibly more widely.

However, with multilateralism having stalled since 2008, these new pressure groups of developing countries in the WTO have not yet achieved

<sup>13</sup> Ibid., p. 31.

<sup>14</sup> JEAN, SÉBASTIEN (2013) WTO: Rethinking the Special and Differential Treatment Granted to Developing Countries, CEPII, le blog, 8 October 2013.

<sup>15</sup> See for instance Agreement on the *Global System of Trade Preferences among Developing Countries*, UNCTAD, GSTP/MM/BELGRADE/10 (12 April 1988), which takes advantage of the GATT Enabling Clause and is a direct result of the grouping of developing countries referred to as 'G-77+China'.

<sup>16</sup> The G-20, which emerged in 2003, consists of mainly Latin American countries in addition to China, India, Egypt and South Africa. The G-20 presses for the removal of agricultural tariff barriers in the North. The second group is called G-33, which has a main focus on agricultural export dumping and its damage to small producers in LDCs. And finally, the Group of 90, which is a larger group of developing countries spanning all global regions, which insists on the full recognition of development needs in WTO agreements.

<sup>17</sup> KEET, DOT (2006) *South-South: Strategic Alternatives to the Global Economic System and Power Regime*, Transnational Institute, Amsterdam, p. 22.

their goals,<sup>18</sup> other than preventing additional imbalances in the multi-lateral trading system. The Bali Ministerial Conference in December 2013 was, thus, concerned with the demands from developing countries and supposed to revive the Doha round through a new decision involving special treatment of LDCs and developing countries.<sup>19</sup>

At the Bali Ministerial Conference in December 2013, WTO members adopted the Bali Package,<sup>20</sup> which covers measures to simplify customs procedures, including assistance for developing countries and LDCs to update their infrastructure and for implementing the agreement.<sup>21</sup> Furthermore, an interim solution was adopted in the area of food security, which allows developing countries to pursue trade-distorting domestic support through public stockholding programmes for food security.<sup>22</sup> With a focus on LDCs, the Bali Package also includes decisions on duty-free and quota-free access for LDCs to richer countries' markets,<sup>23</sup> simplified rules of origin for LDCs<sup>24</sup> and a 'services waiver', which allows LDCs preferential access to richer countries' services markets.<sup>25</sup> Finally, with respect of developing countries, a 'monitoring mechanism' was adopted, which is targeted at monitoring special treatment given to developing countries.<sup>26</sup>

Nearly all the decisions of the Bali Package are targeting improved integration of developing countries and LDCs in the global market and have a development objective. While this illustrates the strength of developing countries and LDCs in the WTO, the decisions adopted arguably are of

<sup>18</sup> See also ISMAIL, FAIZEL (2011) 'Rediscovering the Role of Developing Countries in the GATT', In: Y-S. Lee, G. N. Horlick, W-M. Choi and T. Broude (eds.), *Law and Development Perspective on International Trade Law*, Cambridge University Press, New York, pp. 130–160, p. 132.

<sup>19</sup> See WTO (2013b) Ninth WTO Ministerial Conference.

<sup>20</sup> WTO (2013a) 'Days 3, 4 and 5: Round-the-Clock Consultations Produce, Bali Package', Ninth WTO Ministerial Conference, 5–7 December 2013.

<sup>21</sup> Agreement on Trade Facilitation, WT/MIN(13)/36 – WT/L/911.

<sup>22</sup> Public Stockholding for Food Security Purposes, Ministerial Decision, WT/MIN(13)/38 – WT/L/913.

<sup>23</sup> Duty-Free and Quota-Free (DFQF) Market Access for Least-Developed Countries, Ministerial Decision, WT/MIN(13)/44 – WT/L/919.

<sup>24</sup> Preferential Rules of Origin for Least-Developed Countries, Ministerial Decision, WT/MIN(13)/42 – WT/L/917.

<sup>25</sup> Operationalisation of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, Ministerial Decision, WT/MIN(13)/43 – WT/L/918.

<sup>26</sup> Monitoring Mechanism on Special and Differential Treatment, Ministerial Decision, WT/MIN(13)/45 – WT/L/920.

limited effect for economic growth in poor countries: most concessions to developing countries depend on the readiness of richer countries to offer preferences,<sup>27</sup> are introduced as interim solution<sup>28</sup> or are non-binding.<sup>29</sup> Given that developing countries and LDCs have an imminent interest in reviving multilateralism, they have to carefully balance the pressure they apply in the WTO. While demanding more flexibility and technical assistance, they should keep in sight of their strong interest in the WTO remaining the most influential forum for global trade policy and regulation. It remains to be seen whether the Bali Package can serve as a stepping-stone in this direction.

The role of developing countries in the WTO – both on the legal and the political side – is matchmaking for the future of world trade. It is said that, if the Bali Ministerial Conference had failed to foster an agreement, WTO members would have lost interest in multilateral trade negotiations and turned towards preferentialism. More than for industrialised countries, such a development would not have been in the interest of developing countries.<sup>30</sup> In particular, the so-called mega-regionals, such as the Transatlantic Trade and Investment Partnership (TTIP) and the Transpacific Partnership (TPP) are a considerable challenge to trade policy in poorer economies.

A general turn to mega-regionals by industrialised countries would weaken the impact of developing countries on global trade policy quite dramatically as decision-taking would be shifted away from the WTO in which developing countries currently have the advantage of being a majority. A shift to mega-regionals would also negatively impact on the level of inequality among WTO members, given that mega-regionals cover substantial shares of total global trade, and that therefore trade distortion and potential spill-over effects for countries outside of the agreements are considerable. While industrialised countries will likely benefit from

<sup>27</sup> E.g. the Operationalisation of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, Ministerial Decision, WT/MIN(13)/43 – WT/L/918.

<sup>28</sup> E.g. the Public Stockholding for Food Security Purposes, Ministerial Decision, WT/MIN(13)/38 – WT/L/913.

<sup>29</sup> E.g. the Monitoring Mechanism on Special and Differential Treatment, Ministerial Decision, WT/MIN(13)/45 – WT/L/920.

<sup>30</sup> See, e.g. MURPHY, SOPHIA (2013) 'The Road to Bali: The WTO's Ninth Ministerial', IATP; HELBLE, MATTHIAS AND WIGNARAJA, GANESHAN (2013) 'Bali Ministerial a Turning Point for the WTO?', East-Asia Forum; PRIYADARSHI, SHISHIR AND RAHMAN, TAUFUQUR (2013) 'Build Up to the Ninth WTO Ministerial Conference: Issues of Interest to LDCs', *Commonwealth Trade Hot Topics*, no. 98, Commonwealth Secretariat, London.

spill-over effects of mega-regionals through voluntary regulatory alignment and access to larger markets with a single standard,<sup>31</sup> it is probable that developing countries will suffer from both trade distortion based on discriminatory tariffs and rules of origin and from the fact that they cannot benefit from spill-over effects through voluntary regulatory alignment like industrialised third countries.<sup>32</sup> Additionally, because of the share in global trade covered by mega-regionals, decisions taken by the industrialised partner countries of mega-regional trade agreements on WTO-plus regulation may eventually have to be incorporated in WTO law as well. With respect to regulatory convergence and trade liberalisation in general, multilateral negotiations are, thus, likely to be negatively affected by mega-regionals. Sheer practical need could force developing countries to accept – and potentially even implement – regulation established in mega-regionals if multilateralism is not catching up quickly enough with the new regulatory dynamics emanating from them. Therefore, contingent on the reaction of WTO members to mega-regionals, again, developing countries are currently at risk of substantial restrictions to their potential impact on international trade regulation in the future.

### A. Self-declaration

When joining the WTO, members have the right to declare whether they wish to belong to the group of developing countries or not. This self-declaration, however, cannot be made entirely without basis: the country in question has to provide a reasonable justification, and the definition as a developing country within the WTO may come with consequences in other international organisations, such as the OECD.<sup>33</sup>

During negotiations over accession to the WTO, a country normally establishes the commitments it is ready to accept in its schedule of commitments, which includes the decision on its status as developed or developing country. If the proposal is accepted, the country will then receive

<sup>31</sup> See, e.g. COTTIER, THOMAS, EGGER, PETER, FRANCOIS, JOSEPH, MANCHIN, MIRIAM, SHINGAL, ANIRUDH AND SIEBER-GASSER, CHARLOTTE (2014) *Potential Impacts of a EU-US Free Trade Agreement on the Swiss Economy and External Economic Relations*, Rechtsgutachten erstattet Staatssekretariat für Wirtschaft SECO, available at: [www.wti.org](http://www.wti.org).

<sup>32</sup> Impact of TTIP on third countries, see SIEBER-GASSER, CHARLOTTE (2016), 'TTIP and Swiss Democracy', In: M. Bungenberg, C. Herrmann, M. Krajewski and J. P. Terhechte (eds.), *European Yearbook of International Economic Law 2016*, European Yearbook of International Economic Law, vol. 7, 2016, Springer, Basel.

<sup>33</sup> MUNIN (2010, p. 319).



the corresponding treatment. Until today, only in the case of China, a proposal by a country to classify itself as developing country was not fully accepted.<sup>34</sup>

Aside from the differentiations in the schedules of commitments, WTO law also knows additional preferences for developing countries granted by developed countries. These preferences – although linked to the term ‘developing country’ – neither provide substantially more clarification regarding the definition of the term ‘developing country’ nor do they depend on the self-declared status alone. For instance, an indication for the profile of developing countries within the GATS may be found in GATS Art. XVIII:1, which refers to members as developing countries if their economies ‘can only support low standards of living and are in the early stages of development’.<sup>35</sup> However, given the lack of a general definition of the term ‘developing country’, it is in fact up to developed countries to decide on a case-by-case basis whether or not they will grant the preferences for developing countries to a particular member.

Preferences for developing countries are listed in the Generalised System of Preferences (GSP) or may be found in bilateral agreements. Complementing the WTO, the United Nations Conference on Trade and Development (UNCTAD) collects the list of beneficiaries of the GSP on the basis of country-schemes submitted to UNCTAD.<sup>36</sup> In 2011 schemes of Australia, Belarus, Canada, the EU, Japan, New Zealand, Norway, Russia, Switzerland, Turkey and the US were collected. Table 1 shows a selection of donors and beneficiaries and illustrates well how relative benefits under the GSP are.

The list of beneficiaries includes countries, which have declared themselves as developing countries at different occasions under WTO law. Following the general logic of WTO law, they may, thus, also benefit from preferential treatment. However, even though all of them could be considered as developing countries under WTO law, by far not all of these beneficiaries are actually treated as such by developed members of the WTO under the GSP.

<sup>34</sup> KASTENG, JONAS, KARLSSON, ARNE AND LINDBERG, CARINA (2004) *Differentiation between Developing Countries in the WTO*, Swedish Board of Agriculture, International Affairs Division, Jönköping, p. 12.

<sup>35</sup> GATS Art. XXVIII:1.

<sup>36</sup> See UNCTAD (2011) *Generalised System of Preferences: List of Beneficiaries*, UNCTAD, Geneva.



Table 1 *Selected GSP donors and beneficiaries*<sup>a</sup>

GSP beneficiaries	GSP donors							
	Australia	Canada	EU	New				US
				Japan	Zealand	Norway	Switzerland	
Albania				x	x	x		x
Armenia		x	x	x			x	x
Belarus			x	x			x	
Brazil		x	x	x	x	x	x	x
Chile		x	x	x	x			
China		x	x	x	x	x	x	
China, Hong Kong		x				x		
China, Macao		x	x		x	x	x	
Taiwan (Province of China)								
Kosovo							x	x
India		x	x	x	x	x	x	x
Occupied Palestinian Territories				x	x			x
Russia		x	x					
South Africa		x	x	x		x		x
Turkey		x		x	x			x
West Bank and Gaza Strip								x

<sup>a</sup> Derived from UNCTAD (2011).

Whether benefits are granted may depend on country-level policy,<sup>37</sup> on political ties<sup>38</sup> or on the perceived level of economic development in the respective country.<sup>39</sup> The system seems to work in an unpredictable way: for instance, the BRIC countries are not treated the same as other countries in terms of GSP benefits. Additionally, while Chile is a member of the OECD and still benefits from GSP, the West Bank and Gaza Strip, clearly a poor region, is more or less excluded from GSP benefits. Not even LDCs are given the same treatment by all GSP donors, even if such

<sup>37</sup> Without further looking into this, it is interesting that Australia grants benefits mainly – but not exclusively – to LDCs.  
<sup>38</sup> Close political ties between Switzerland and Kosovo might explain why Switzerland grants benefits to Kosovo, while most others do not.  
<sup>39</sup> This may be read into the fact that the number of countries granting benefits to China and its neighbours is decreasing if GDP per capita is increasing.

discrimination seems strongly counter-intuitive and might contradict commitments made by developed countries under WTO law.<sup>40</sup>

Therefore, while countries have the right to self-declaration under WTO law and therewith have the means to adjust their own schedules of commitments, this declaration remains of little consequence as long as other countries do not adapt their schedules of preferences accordingly.

### *B. Conceptual Issues of Self-Declaration*

The principle of self-declaration has paradoxical consequences. In general, one would assume that countries desire to become 'developed countries', but WTO members seem to prefer remaining within the group of 'developing countries'. This can be illustrated by compiling lists of all WTO members who drew the 'developing country'-card at some point recently.<sup>41</sup>

In these lists, some – undoubtedly developed countries – appear as developing countries under the WTO institutions, when other international organisations or authorities list them as 'developed countries'. In addition, the fact that relatively rich countries under certain circumstances belong to the group of 'developing countries' contributes to increasing the heterogeneity of the 'developing country' group in the WTO: for example, Israel (with a GDP per capita of 32,800 USD), Singapore (with a GDP per capita of 61,400 USD) and the United Arab Emirates (with a GDP per capita of 49,600 USD) are all listed as developing countries under WTO law, together with countries such as Honduras (with a GDP per capita of 4,700 USD) or Tunisia (with a GDP per capita of 9,900 USD).<sup>42,43</sup>

The heterogeneity of the group of developing countries under WTO law poses a problem for the effectiveness of special and differential treatment (SDT) rules: developed countries are in general not prepared to offer substantial preferences to the entire group of developing countries, because they point out that some of the countries belonging to this group are well off and do not depend on special treatment. Developed countries are, thus, reluctant to agree on embedding general, substantial preferences for the group of developing countries in the legal body of the WTO.<sup>44</sup>

<sup>40</sup> See UNCTAD (2011, pp. 1–11).

<sup>41</sup> See e.g. BOSCO, DAVID (2011) 'Who's a "Developing Country"? You'd be Surprised', 18 February 2011, FP Voices.

<sup>42</sup> GDP per capita as provided by the World Bank. <sup>43</sup> See KASTENG ET AL. (2004).

<sup>44</sup> See, e.g. IPC (2004) A New Approach to Special and Differential Treatment, 15 September 2004, IPC Position Paper, Washington and Brussels.