

# *On Reforming the Special and Differential Treatment*

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**Abstract:** WTO was created to raise living standards, eliminate trade barriers, and thus ensure peaceful relations among nations. However, since the Doha Round negotiation was forced into an indefinite dormancy, WTO has been experiencing a credibility crisis, and the international community has fully recognized the need and urgency of WTO reform. This crisis is mainly manifested as developed and developing countries' disagreements over WTO's differentiated treatment of the latter, and both camps question WTO's ability ever to bridge the gap. But the difficulty of reaching a consensus on the definition of a developing country has hampered the implementation of SDT and international trade. In this article, the feasibility and need for a clear discriminatory criterion were questioned and revisited. It argues that the distinctions between developing and developed countries in international trade law are outdated. It looks for an alternative structure, envisages the possibility of its application to global trade cooperation, and proposes that individual country-based determination regarding obligation and preference level should be made. Meanwhile, the concepts themselves should be used as something other than factors of legal differences between the nature of countries' obligations.

**Keywords:** WTO, Doha Round negotiation, discriminatory criterion

## 1. Introduction

In the past, international trade was far from being substantially fair due to many problems, such as ambiguous rule provisions, lack of binding force, and lack of criteria for identifying developing members. However, with the growing share of developing countries in the WTO and the global trading system, the institutional deficiencies of the WTO still need to be improved. The rising economic power of developing countries has instead politicized the discussion of revising the structure; the meeting was shifted to a broad battle between the interests of “developing” and “developed” countries, and the conflict was stereotyped as the U.S.-China trade war, which has been speciously conceptualized as the microcosm of the conflict between bifurcated interests collectively.

### 1.1. Special and Different Treatment: Background and Policy Issues at Stake

While the Most-Favored-Nation remains the core principle, WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), legalized exceptions to the Most-favored-nation Treatment (MFN) and adopted “Special and Differential Treatment (SDT).” This gives developing countries special rights and gives developed countries the possibility to treat developing countries

more favorably than other WTO Members [1]. These privileges range from weaker market access commitments to more extended policy implementation periods. For example, Article 27.10 provides countervailing protection for developing members, provided that the developing country does not subsidize more than 2% of the value of the product on a unit basis or that the subsidized imports represent less than 4% of the importing member's total imports of the same product [2]. This applies to any trade area, whether or not it is an area of strength for that country.

Nonetheless, the WTO does not define "developed" or "developing," leaving it to individual members to self-declare their status [1]. There has yet to be a uniform standard for defining these concepts at the global level. Different organizations often use other criteria that are more analysis-friendly. The United Nations uses the Human Development Index as a criterion for classifying a country's level of development, while the World Bank has been producing and using income classifications to group countries for many years [3]. Since 1995, the WTO has grown by more than 50 percent to 164 members. Almost all the new members are "developing" countries, which now make up most of the WTO members [4].

## 1.2. Unmet Ambitions

First, the developing self-declaration structure risks countries abusing the newborn title to gain more trade benefits. Its inability to limit threshold access to the nascent category also means no milestone to hit for the current group members: it is impossible to determine when a country "graduates" from developing to developed. Ironically, it was since 2018 that South Korea's real GDP per capita outstripped Japan, but it didn't recognize itself as a developed country until 2022 [5].

Second, changes in the power structure in the world trading system over the past two decades have yet to be accompanied by changes in GATT/WTO policies aimed at preserving trade fairness. Independent developing countries were relatively few when SDT was prompted and did not represent a significant force to be reckoned with on the global scene [3]. Today, developing countries play a pivotal role world trading system. It has become the world's second-largest economy in purchasing power parity terms and the largest trading partner of 120 countries [5]. An economic entity like China is large enough for its actions to have sizable economic effects in international markets.

As a result, the self-declared developing status of some countries is often criticized as anachronistic and unrecognized by other members today. As the world's largest and richest developing country, China is being denounced by its critics for unfairly enjoying the benefits retained by those "true" developing countries. Charge d'affaires David Bisbee listed China's "unfair trade practices," including preferential treatment for state enterprises, data restrictions, inadequate enforcement of intellectual property rights, and cyber theft [6]. Allegations of market manipulation against China exploiting the lack of regulatory oversight have attracted widespread global attention in the Xinjiang cotton case [7,8]. Unfair competition and market distortion caused by the oligopoly of the Chinese state-owned enterprises is one of the main charges in the E.U [9].

More importantly, the differences between these two groups are becoming so great that the dichotomous classification has become too broad to work. According to The World Bank, "developing countries" are increasingly dissimilar [4]. Countries such as Somalia and Mozambique are grouped as developing countries as China [10]. That is an almost 20-fold difference in GNI per capital within the same group. Meanwhile, although Greece is nominally a developed country, its economic situation is not promising. In 2015, Greece owed €1.6 billion in debt to the International Monetary Fund. It was on the verge of bankruptcy and exit from the Eurozone, which it entered by misrepresenting its debt and finance [11]. It is now facing new economic pressures with one of the highest inflation rates in Europe [12,13].

## 2. A Debate with a “Right” Answer?

Different countries define developing countries by reference to other criteria, thus opening up a debate on the qualification of developing countries. As a preemptive strike aiming to curb the complete SDT application, the U.S. has proposed to limit the practice of self-declaration by developing countries to curb unconditional SDT. It categorized membership in the Organization for Economic Co-operation and Development (OECD), G20, “high-income” countries as defined by the World Bank, or countries that account for 0.5% of global merchandise trade as developed countries [14]. Instead, China insists that per capita indicators must be given priority when assessing development levels [14]. China’s GDP per capita is well below the OECD average, income inequality still exists, and over 30 million Chinese live in poverty [5]. In rebuttal to the U.S. proposal, China, India, South Africa, and other countries submitted their proposals proclaiming their status as developing countries while reiterating that self-declaration is appropriate in the context of the WTO [14].

Nevertheless, the U.S. unilateral protest is skeptical in its rationality. To argue that any country meeting any of these requirements is at the same level of development is to assume that the difficulty of meeting any of these requirements is equal. Nevertheless, not all members of either OECD or G20 are high-income countries by World Bank standards [14]. This means that the U.S. defining criteria are unevenly layered and loosely aligned with each other.

## 3. Ripe for Contention

However, while China has never abandoned its developing country designation, it has begun to take on more obligations. In response to allegations, China has already started opening up its markets by increasing the number of free trade zones (FTZs). In addition, the Chinese government has raised foreign ownership restrictions in manufacturing and services and allowed foreign companies in FTZs to enter the social research sector [14,15].

On June 17, 2022, the WTO adopted Agreement on Fisheries Subsidies. This historical achievement could never have been reached without China’s voluntary obligations - it publishes a document that promises to limit the country’s international fishing fleet to its 2016 level - because China now has the world’s largest industrial fishing fleet and provides the most significant government subsidies [16-19]. It follows that which classification a nation belongs to is only partially connected to the share of obligations it is willing to undertake. The key to advancing the negotiations lies in the initiatives of the game’s key players.

## 4. A Way Forward

Fixing the abovementioned issues requires the SDT system to focus on being more inclusive, enabling developing countries to grow rather than just exempting them from obligations. As a first step, there must be a precise graduation date for the differentiated treatment. Many have argued that SDT has not fulfilled its role of bringing developing countries to the ranks of other countries by giving their infant industries breathing room; the premise for needing such breathing room is flawed at best. This is because, without a precise graduation date, the infant industries adapt comfortably to the differentiated treatment and have no desire to grow out of it. A graduate date can incentivize infant industries to make complex but strategic decisions for the inevitable transition. And even if they did fail in the following competitions, these countries could always rely on national security, or other exceptions carved out of WTO rules to save them.

Second, the developing status should directly tie to a nation’s prestige. It is not a permanent status or something to be proud of. It is only meant to be a transitional phase. Tying it with a country’s national honor encourages countries to be thoughtful in declaring such status and try their

best to move on from it. Prestige has proved to be effective on other occasions. The Paris climate agreement was negotiated to address global warming jointly, and one of the fundamental principles highlighted was “common but differentiated responsibilities.” [20] Therefore, the responsibility of each country in the climate change issue is closely related to the level of development of each country. The Paris climate agreement stipulates the obligation of developed industrial countries to provide climate finance to the lagging countries but also requires developing countries to contribute to climate finance voluntarily. Based on the “principle of transparency” and the provision of appropriate flexibility for developing countries, the agreement also establishes a mechanism to track national commitments to test whether countries’ efforts to reduce emissions are being met [20]. It is national honor on the global stage: each country can choose on its own whether or not to fulfill its commitments, but whatever it chooses will be seen by the world. Therefore, countries driven by honor will actively fulfill their obligations to show that they are a responsible power.

Third, we should dilute the rigid labels of “developing” and “developed” countries. Except for the LDCs, a country should not be automatically grouped into the developing or developed category based on any standard. Instead, we should adopt an industry-specific approach [21,22]. A country may have both advanced and developing industries. For example, the solar industry in China has the world’s most sophisticated supply chain and should not be regarded as creating. But service industries are new and growing and should be given special consideration, especially in light of China’s low GDP per capita.

## 5. Conclusion

WTO itself has institutional defects; its backward law can no longer adapt to the new international relations. The world economy today is much more complex than in the past. The dichotomy of classifying countries as “developed” or “developing” is not enough. Considering the different aspects and stages of a country’s development will help determine the level and type of SDT needed to help it achieve sustainable development. A more nuanced distinction of trade is now required, case by case, product by product, and sector by sector.

If China sticks to its developing title, U.S.-China friction will be hard to dissipate. A dispute between the world’s first and second largest economies would inevitably weaken the rules-based trading system from which they each benefit so much, leading to a gradual stagnation in the development of the global economic system. Therefore, to rehabilitate the plan, China should accept obligations commensurate with its status. The United States should be equally willing to consider reasonable, rather than arbitrary, proposals to reach a lasting solution. Both countries should recognize that it is in their common interest to preserve and strengthen the WTO and that joint efforts are needed. Such measures should not embark on a fixed criterion of a particular name but should be on individual-country-basis determinations. Each country should be committed to having its obligations recognized rather than labeled.

It must be prudent for the WTO to give legal meaning to any term. Minimizing the application of generalized concepts, such as developed and developing countries, to specific areas of negotiations is something that urgently needs to be on the agenda.

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