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## **PURSUING THE DEVELOPMENT DIMENSION IN WTO RULE-MAKING EFFORTS**

### **COMMUNICATION FROM NORWAY, ICELAND, NEW ZEALAND AND SWITZERLAND**

*Revision\**

The following communication, dated 6 May 2019, is being circulated at the request of the delegations of Norway, Iceland, New Zealand and Switzerland.

## **1 INTRODUCTION**

1.1. In establishing the WTO, Members recognized the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development."<sup>1</sup> This emphasis was reaffirmed in 2015 by all WTO Ministers in Nairobi, who stated that "[T]he majority of WTO Members are developing country Members. We seek to place their needs and interests at the centre of the work in the WTO. We reaffirm the centrality of development in the WTO's work..."<sup>2</sup>

1.2. Reflecting the development priority, Special and Differential Treatment (S&D) for developing Members has been part of the system since GATT times, and it is present across the range of WTO Agreements. However, polarized views about S&D have become part of a broader challenge to find an appropriate negotiated balance of rights and obligations amongst WTO Members. The proper functioning of the trading system and an equitable sharing of its benefits require that this challenge is met. Our ability to achieve multilateral outcomes would be significantly enhanced by a more solution-oriented approach to the issue of trade and development. Furthermore, by improving the chances of success in our rule-making efforts, a more pragmatic approach to S&D is also an important element in the broader efforts to safeguard and strengthen the multilateral, rules-based trading system.

1.3. The purpose of this paper is to contribute to a constructive conversation among Members about how the development dimension, including Special and Differential Treatment, can best be pursued in WTO rule-making efforts.

## **2 ENABLING DEVELOPMENT THROUGH TRADE**

2.1. An underlying objective of the multilateral trading system is to enable all Members to contribute to the full extent of their capabilities to a set of disciplines that permits them to benefit fully from cooperation among trading partners. It is this cooperation on the basis of multilaterally agreed rules that makes trade a positive-sum game, creating opportunities for growth and development. At the same time, Members are highly diverse in terms of their levels of development, their sensitivities

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\* This revision is to add Iceland, New Zealand and Switzerland as co-sponsors to the submission.

<sup>1</sup> Marrakesh Agreement Establishing the World Trade Organization, Preamble, paragraph 2.

<sup>2</sup> Nairobi Ministerial Declaration: WT/MIN(15)/DEC, 19 December 2015, paragraphs 6 and 7.

and priorities. These differences must be adequately addressed to ensure that the benefits of the multilateral trading system are shared in an equitable manner.

2.2. While S&D as a principle is well established, S&D is not a single, clearly defined and operational modality. Development concerns have been addressed in multiple ways throughout the GATT/WTO's negotiating history. This experience offers a rich menu of lessons on how to address development challenges. Other innovative approaches may be found in the future. We need to deploy creative techniques in a spirit that recognizes the shared responsibility of the WTO membership to make the system work in the interests of all.

2.3. To focus on the status of Members in binary terms – as either developed or developing – complicates the search for an appropriate balance of rights and obligations. It also hampers the effectiveness of S&D as an enabler of development through trade and as a means of ensuring balanced and inclusive participation in multilateral negotiations.

2.4. Negotiating criteria for designating Members' access to S&D is unlikely to be productive. What matters is responding adequately to the specific development needs of Members. In other words, S&D should be adapted to the particular situations faced by developing Members in different areas of economic activity and appropriately adjusted as those situations evolve.

2.5. Least-developed country (LDC) status is determined by the UN through a set of internationally agreed criteria. The composition of the group changes over time as Members' economies evolve. The special treatment of LDCs was adopted by the GATT in 1979 in the context of the results of the Tokyo Round and should continue to be maintained in the WTO.

### **3 S&D TAKES MANY FORMS AND COVERS THE ENTIRE RANGE OF WTO AGREEMENTS**

3.1. A useful summary of S&D measures and a typology, indicating the extent and coverage of these arrangements, has been produced by the WTO Secretariat.<sup>3</sup> This document identifies 155 S&D provisions in WTO Agreements, not including a plethora of others in more than 30 Ministerial and General Council Decisions. Some of these provide flexibility of commitments, action and use of policy instruments. Others are "best endeavour" undertakings intended to increase trading opportunities or safeguard the trade interests of developing Members. Still others relate to transitional time periods, technical assistance, and special provisions for LDCs.

3.2. Special and differential treatment accommodates different situations and needs of individual developing Members by enabling fuller participation in the multilateral trading system. This can be reflected in scheduled commitments, time-bound departures from mainstream provisions and through the provision of technical assistance and capacity building. Examples of such provisions abound in WTO Agreements<sup>4</sup>, though it should be noted that Members have differing opinions about the value of some existing S&D provisions.

3.3. The notion of non-reciprocity for developing countries in relation to market access commitments was introduced in GATT Article XXXVI:8, contained in Part IV of the General Agreement.<sup>5</sup> The text and an accompanying interpretative note state that developing countries are not expected to make market access commitments inconsistent with their individual development, financial and trade needs. These sentiments are reproduced in the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, also known as the Enabling Clause, which also registers the expectation that developing countries will assume greater obligations as their development, financial and trade situation evolves.

3.4. The GATS approach, stated in Articles IV and XIX, similarly seeks to ensure appropriate flexibilities through progressive market-opening measures agreed in successive negotiations. It also encourages all Members to emphasize the facilitation of access in service sectors and modes of

<sup>3</sup> WT/COMTD/W/239, 12 October 2018

<sup>4</sup> A recent study funded by the Government of Sweden contains a more detailed analysis of some of these issues: Patrick Low, Hamid Mamdouh and Evan Rogerson, "Balancing Rights and Obligations in the WTO – A shared Responsibility" (downloadable at <http://bit.ly/wtoReport>).

<sup>5</sup> Part IV, entitled "Trade and Development" was added to the General Agreement in 1965.

supply of export interest to developing countries, in a similar way to Part IV of the GATT in the case of goods.

3.5. Sometimes it will be possible to attain enabling objectives and provide the necessary flexibility to Members at different levels of development with no explicit reference to S&D. In effect, the GATS does not mention S&D at all, relying instead for adequate flexibility on a gradual process of market opening and regulatory commitments that is determined by individual Members in the course of negotiations.

3.6. The Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) have established procedures for examining Specific Trade Concerns brought to the attention of the respective Committees. These are then discussed and acted upon by the Members concerned. These arrangements would appear to have achieved a measure of success in amicably managing trade frictions among Members, regardless of their respective levels of development. They have been resorted to by a wide spectrum of Members. This approach could be explored and perhaps extended to other domains.

3.7. One expression of S&D-related flexibility can be through the establishment of minimum baseline approaches to setting and managing standards. This is a feature, for example, of the TBT Agreement and of GATS. Over time, Members can assume greater levels of obligation consistent with their capacity and development needs.

3.8. A novel feature of the GATS in this regard is that where particular services are subject to market access commitments, they are accompanied by higher levels of regulatory discipline. In addition, under GATS regulatory commitments themselves may also be the subject of negotiation and subsequent scheduling. The additional commitments on telecommunications scheduled under GATS Article XVIII are an illustration of such an approach. The same approach could be considered in respect of goods-related regulation under GATT Article II.

3.9. As Members shape and manage their policies in compliance with their WTO obligations, there is no imperative to adopt identical approaches. Alternative pathways can lead to common objectives. Comparable outcomes can be achieved through distinct approaches. An illustration of this kind of flexibility is the TRIPS Agreement, where the emphasis is on the interoperability of domestic systems for the protection of intellectual property.

3.10. An important innovation in the application of S&D was introduced in the Trade Facilitation Agreement (TFA). Based on each developing Member's assessment of its own capacity to implement the agreement's obligations, each developing Member scheduled its commitments using three categories. The first was for immediate implementation, the second for time-bound phase-ins of obligations and the third for later implementation with technical assistance. Involving Members in directly defining the implementation of their obligations through these categories facilitated acceptance from all concerned and enhanced accountability.

3.11. In various WTO agreements, phase-in periods are an important element of S&D. In other cases thresholds must be triggered before commitments kick in. Time-bound and threshold provisions are useful flexibility mechanisms that clearly imply a commitment towards increased engagement in the multilateral trading system.

3.12. Technical assistance and capacity-building are vital components of an enabling approach to balancing the rights and obligations of Members. To be effective, it needs to be well designed and implemented in order to meet real needs. This means that it should be demand-driven, and both provided and utilized as a positive incentive in recognition of a common interest.

#### **4 CONCLUSIONS: A PRAGMATIC APPROACH TO SPECIAL AND DIFFERENTIAL TREATMENT**

4.1. The contribution of trade to sustainable development is at the heart of the multilateral trading system. S&D is an important tool for enabling development and greater participation in the multilateral trading system. It forms part of the context of negotiations across the range of policy areas where the WTO is engaged.

4.2. Aiming at consensus on a negotiated set of criteria for when a developing Member should have access to S&D is neither realistic nor necessarily useful. The question should rather be how S&D could be designed to address the development challenges Members are facing. It is the negotiated result that matters, not the categorization of Members. However, the special treatment of LDCs should be maintained.

4.3. The tools already exist for a creative and effective approach to flexibilities that respond to the development needs of Members. Such an approach would enable fuller participation and at the same time contribute to an appropriate balance of rights and obligations among WTO Members.

4.4. Development concerns have been addressed in many ways in the past. This should inspire us to explore how the development dimension, including S&D, can best be pursued in a pragmatic and creative manner in current and future negotiations. S&D enables developing Members, and especially the LDCs, to secure a share in the growth in international trade commensurate with the needs of their economic development. What is important is the contribution in terms of binding commitments that each Member is able to make within each area of current and future negotiations. Implementing our shared commitment to S&D in a more flexible and effective way can help to make the most of these contributions, facilitating the greater integration of developing Members into international trade and the multilateral trading system.

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