

SPECIAL & DIFFERENTIAL TREATMENT: A NEED FOR A HOLISTIC APPROACH

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Abstract

The establishment of GATT in the late 40s marked the beginning of the new era in international trade. It had certain principles which were binding upon members to follow. However, a new reformed GATT was re-established with the name of WTO in 1994 which started its operations in 1995. An important principle along with other domains was the Special and differential treatment (S & DT). It was a set of GATT provisions (GATT 1947, Article XVIII) that exempted developing countries from the same strict trade rules and disciplines of more industrialized countries. The least developed countries were exempted from any reduction commitments. It was a key principle in the multilateral trading system, since the inception of GATT in 1950s. However, it was fully blown with the addition of Part IV to the GATT in 1964, and took a new dimension with the enactment of the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, also known as the Enabling Clause, in 1979. There has been a debate on the Special and Differential treatment accorded to developing or least developed countries. Though some countries have adhered to do away with the special status in terms of S & DT, but some countries have objected to be deprived of such status irrespective of their level of development. The paper has reviewed the S & DT of WTO and infact has urged for the need for a holistic reforms towards an inclusive and equitable memorandum mutually agreed by all its member countries.

Keywords: S & DT, WTO, Advanced Economies, Developing Economies, Development

Introduction

The General Agreement on Tariffs and Trade (GATT - 1948) was the first multilateral free trade agreement between 23 countries aimed to eliminate harmful trade protectionism. Trade protectionism likely contributed to the 66% reduction of global trade during the Great Depression. The GATT helped restored economic health to the world after the devastation of the Depression and World War II. The Basic Principles of the GATT were The Most-Favoured-Nation (MFN) Treatment, Reciprocity, Transparency, Tariff Binding and Reductions in the quantitative restrictions. The details of the GATT principles and other domains were debated and debated in the decades that followed its creation. The main goal of such continued negotiations was to further reduce the tariffs and other quantitative restrictions. In the mid-1960s, the Kennedy round added an Anti-Dumping Agreement. The Tokyo round in the 70s improved other aspects of trade. The Uruguay round lasted from 1986 to 1994 and created the World Trade Organization

Special and Differential Treatment

The status of S & DT has become a subject of debate as it remained static since its inception. The universe of special and differential treatment consists of 145 provisions spread across the different Multilateral Agreements on Trade in Goods; the General Agreement on Trade in Services; The Agreement on Trade-Related Aspects of Intellectual Property; the Understanding on Rules and Procedures Governing the Settlement of Disputes; and various Ministerial Decisions. It has been however a source of discussion; the way S & DT has been opted by the countries voluntarily in terms of their development status based on self-declaration as to their belongingness to the respective groups. This was said to be highly inaccurate, inequitable and inefficient as even the countries which are now industrialised economies are within the preview of S & DT status. It was Inequitable, because the same treatment is offered to countries with very different levels of economic development. It has also proved to be inefficient because it did not serve its purpose of economic development and further it has now become a source of conflict and debate between the emerging and industrialised countries, which is necessary for multilateral negotiations to move forward. A need is felt by most of the countries to update its principles to meet the challenges in the functioning of more than 25 years old institution WTO.

Among the various members, United States has been the front leader in raising various issues to the Dispute Settlement Body since the last 20 years or more. Off late, the Trump administration also had raised various deviations of the Dispute Settlement Mechanism. Further the very negative approach of US in the selection of the new members of the appellate body had led to the temporary shutdown of the Appellate body from December, 2019. Further the Us has also been raising its concerns about the self-declared status of many of the members who have taken undue advantage of the S & DT though they are very much developed. It should be noted that some of the countries however has agreed not to take any such advantage of the developing nations in the forthcoming negotiations and agreements. It should be noted that the developing countries comprise a majority of the WTO membership. There are no WTO definitions of “developed” and “developing” countries. Members announce for themselves whether they are “developed” or “developing” countries. Developing country status in the WTO brings certain rights. There are for example provisions in some WTO Agreements which provide developing countries with longer transition periods before they are required to fully implement the agreement and developing countries can receive technical assistance. However, now WTO has recognised that countries at different levels of economic development will vary in their contributions as some may be still in need of S & DT to participate effectively. During the Uruguay Round, least developed countries as defined by UN were separated from developing countries to receive lesser obligations. Around $\frac{3}{4}$ members of WTO declared themselves to be developing countries or least developing countries. Under the UN criteria. Thus only $\frac{1}{4}$ of the members shoulder the full obligations under the current system. Though the Uruguay Round tried to bring equality/uniformity in the tariffs bindings to WTO,

but majority of the members had very high tariffs in their bindings, while developed countries had low tariff rates bound. That a WTO member announces itself as a developing country does not automatically mean that it will benefit from the unilateral preference schemes of some of the developed country members such as the Generalized System of Preferences (GSP). In practice, it is the preference giving country which decides the list of developing countries that will benefit from the preferences.

After 25 years of operations and the levels of economic growth and development of the WTO members, there have been questions on the continuation of the S & DT provisions to the members who had opted for the S & DT status and their trade liberalisations. As per the United States some countries like India, China, Mexico, South Korea, Turkey, Indonesia, Argentina, Brazil do not qualify for the special differential treatment. Though some countries have agreed to the same, but India along with China and South Africa have opposed the idea of giving up the status irrespective of their level of development and growth. India along with 51 countries opposed the US presidential memorandum which denied the special and differential treatment (S & DT) to developing countries in current and future trade agreements. The countries like China, India and South Africa to forego S & DT within three months ending 24th October, 2020 by US, otherwise which to be named and shamed on the White House and the US trade representative websites. It was also held that future trade agreements may not be feasible in the absence of self-withdrawal of S & DT safeguards by advanced developing countries. However, India Charged at US of its attempt to divide the developing economies in the name of S & DT provisions. It should also be noted that the Marrakesh agreement implies that international trade is not an end in itself, but a means of contributing to the economic development. Further, S & DT is a treaty embedded along with other core principles of WTO such as MFN and National Treatment. The level of development of the members is not uniform and as such S & DT benefits the developing economies to reap economies from international trade which helps them to reduce poverty, reduce unemployment and integrate effectively in the global trading system which will be more inclusive, equitable and facilitate the developing economies to meet their sustainable Development Goals.

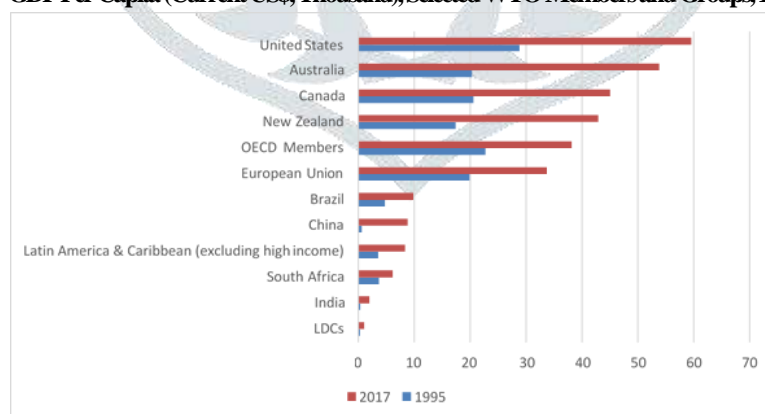
Need for Continuation of S & DT Safeguards

There has been enormous development divide among the member countries of WTO. It is seen in differences in levels of economic development, industrial structure and competitiveness, such as GDP per capita, poverty levels, levels of under-nourishment, production and employment in agriculture sector, trade in services, receipts from IPR, share of trade in value-added under GVCs, energy use per capita, financial infrastructure, R&D capacity, company profits, and a range of institutional and capacity constraints, among other things. Despite impressive progress achieved by developing Members since the creation of the WTO, old divides have not been substantially bridged and, in some areas, they have even widened, while new divides, such as those in the digital and technological spheres, are becoming more pronounced (WTO, 2019). The current S&DT safeguards were established through negotiations and compromises and were not gifts of developed Members. Nevertheless, their actual benefits to developing Members have fallen far short of expectation. In contrast, it is developed Members that have reaped substantial benefits by seeking and obtaining flexibilities in areas of interest to them; a form of "reversed" S&DT. The WTO rules-based system has helped in the growth of trade but has not made it equitable. The gap between the developed and developing countries has been widening over time, since the emergence of WTO. Some of the indicators of development clearly explain as to why India along with 51 countries have rejected the US memorandum of doing away with S & DT,

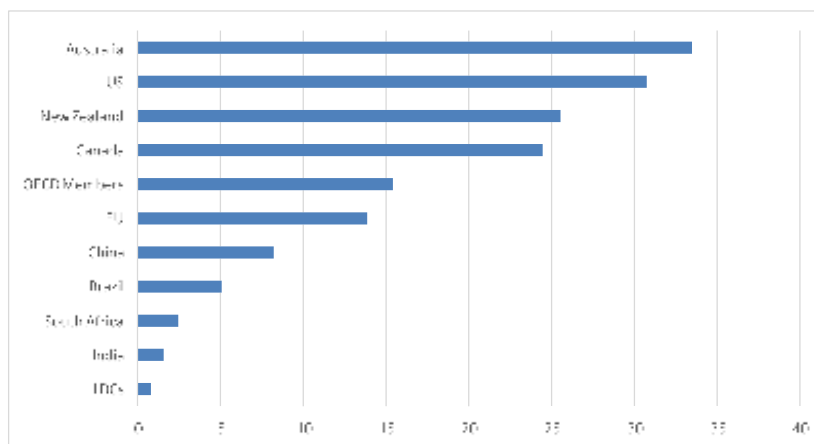
Economic Indicators: GDP Per Capita, Poverty Population, Under-nourished Population

In 2017, the GDP per capita (Current US\$) of the United States, Canada, Australia, New Zealand and the European Union was \$59,531, \$45,032, \$53,800, \$42,941, and \$33,715, respectively,

Graph 1 - GDP Per Capita (Current US\$, Thousand), Selected WTO Members and Groups, 1995-2017



while the GDP per capita of developing Members, including China, India, South Africa and Brazil, were all below \$10,000, as shown in Graph 1. With the United States as the comparator, the extent to which the developing Members fell further behind the United States can be understood from the fact that, for Brazil, China, India and Indonesia, the gap in GDP per capita and that of the United States increased by at least 71% (2014-2016 vs 1994-1996). With Germany as the comparator, the gap for China, India and Indonesia with Germany increased by at least 23%. With the United Kingdom as the comparator, the gap for Brazil, China, India and Indonesia, increased by at least 65%. The trend in widening gap of GDP per capita (Constant 2010 US\$ and PPP) between developed and developing Members is similar to that observed in respect of GDP per capita (Current US\$).

Graph 2- Absolute Increment of GDP Per Capita (Current US\$, Thousand), Selected WTO Members and Groups, 1995-2017

In general, the gaps in GDP per capita between developed and developing Members were significant, and have been expanding in absolute terms since 1995 when the WTO was created, as shown in Graph 2.

Table 1- Top 10 countries with the Largest Proportion of the World's (MPI) Poor, 2017- 2018

No.	Countries	Number of MPI poor people (thousands)	Share of population that is MPI poor
1	India	515,044	35.6%
2	Nigeria	91,497	6.3%
3	Ethiopia	85,213	5.9%
4	Pakistan	78,592	5.4%
5	Bangladesh	65,783	4.5%
6	China	56,101	3.9%
7	Congo, DR	53,551	3.7%
8	Indonesia	38,493	2.7%
9	Tanzania	30,507	2.1%
10	Uganda	24,537	1.7%

Source: Oxford Poverty and Human Development Initiative Global Multidimensional Poverty Index (2017- 2018), University of Oxford, see: <http://ophi.org.uk/multidimensional-poverty-index/global-mpi-2017/>, accessed on 25 October 2020.

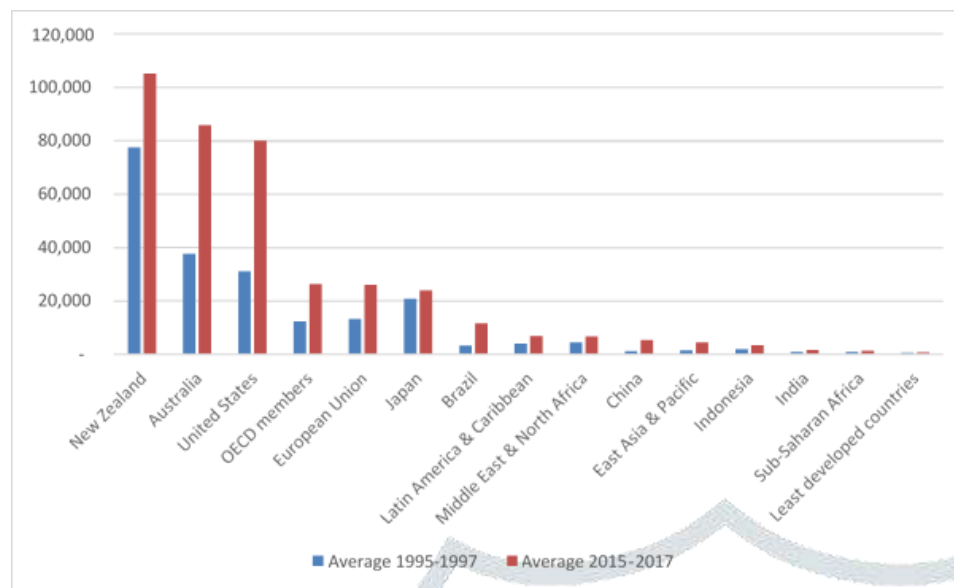
Further as shown in Table 1, the top 10 countries with the largest proportion of the world's poor are: India (35.6% of world's poor), Nigeria (6.3%), Ethiopia (5.9%), Pakistan (5.4%), Bangladesh (4.5%), China (3.9%), DR Congo (3.7%), Indonesia (2.7%), Tanzania (2.1%) and Uganda (1.7%). 38.2% of the world's poor are in LDCs, and 61.8% live in non-LDC developing Members who are called the "new bottom billion".

According to the UN Food and Agriculture Organization, 10 countries with the largest number of the world's under-nourished people are: India (195.9 million), China (124.5 million), Pakistan (39.5 million), Bangladesh (24.8 million), Ethiopia (21.9 million), Nigeria (21.5 million), Indonesia (20.2 million), Tanzania (17.8 million), Uganda (17.2 million) and Philippines (14.2 million). The under-nourished people of these 10 developing countries accounts for 62% of the world total.

Agriculture:

Agriculture is said to be the backbone of many of the developing country members and it is of non-commercial in nature unlike that of US. Further, it is characterised by small farms and many farmers depend on it for their livelihood. Empirically, the value-added per worker for Agriculture also shows lots of disparity between the developed and developing members of WTO as shown in Graph 3

Graph 3- Agriculture, Forestry and Fishing, Value-Added Per Worker (Constant 2010 US\$), Selected WTO Members and Groups, 1995-1997 vs 2015-2017



Source: World Bank WDI

The value-added per worker for New Zealand, Australia, the United States, the European Union and Japan, in the period of 1995-1997 and 2015-2017, was \$77,600, \$37,649, \$31,003, \$13,137, \$20,763, respectively; and \$105,115, \$85,858, \$80,040, \$25,952, \$24,009, respectively. In contrast, the figures for China, Indonesia, India and Sub-Saharan Africa were \$1,073, \$1,975, \$863, \$791, respectively; and \$5,323, \$3,485, \$1,604, \$1,311, respectively. During 1995-1997, the value-added per worker in the United States was 36 times that in India, 28 times that in China and 16 times that in Indonesia. During 2015-2017, the gap widened further for India (50 times) and Indonesia (23 times).

A high number of subsidies to the farmers in developed Members led to huge competitive advantage of their agricultural products in international market. The domestic support per farmer in the United States was \$60,586; the corresponding figures for some other WTO Members were the following: Japan (\$10,149), Canada (\$16,562), the European Union (\$6,762), China (\$863), Brazil (\$345) and India (\$227). Thus, the per farmer subsidy in the United States was 70 times that in China, 176 times that in Brazil and 267 times that in India. Per farmer subsidy in Japan was 12 times that in China, 29 times that in Brazil and 45 times that in India. Per farmer subsidy in Canada was 19 times that in China, 48 times that in Brazil and 73 times that in India. In the European Union, per farmer subsidy was 8 times that in China, 20 times that in Brazil and 30 times that in India. There are many areas in which the developed nations have shown their dominance since the inception in 1995 till date. Some of these areas are as follows:

1. The services export per capita of major developing Members was only 10% that of developed ones.

2. Intellectual Property Rights

3. Energy use Per capita: The number for the United States was 11 times that of India, 8 times that of Indonesia, 5 times that of Brazil and 3 times that of China, respectively.

4. Finance: As per the McKinsey Global Institute, two billion individuals and 200 million small businesses in the developing world (such as China, India, Brazil and South Africa) lack access to secure savings and credit, a financing gap estimated at \$2.2 trillion.

5. Research and Development (R&D) Capacity: only 4 of the world's top 100 universities are located in developing Members (2 in China and 2 in Singapore), while the rest 96% are located in developed Members (48% in the United States). Only 12% of the world's top 200 universities are located in developing Members, while the rest 88% are located in developed Members (36% in the United States).

6. Digital Divide

7. The Bertelsmann 2018 Globalization Report found that among the 42 economies under the study, the bottom five that benefitted the least from globalization were India, Argentina, Brazil, China and Mexico.

Besides this, there are many facets which makes it quite logical for the developing countries to claim S & DT safeguards.

Conclusion:

The very existence of WTO has been threatened in terms of its relevance, legitimacy and efficacy revolving around in terms of inconsistent protectionism and unilateralism, the blockage of Appellate Body member selection process and the impasse of the Doha Development Round, not the self-declared development status of developing Members.

S&DT is an integral part of the multilateral trading system, and a fundamental rule in the WTO. Despite the economic progress made by many developing Members over the past decades, development divide persists and has actually widened. Further, developing Members continue to confront many formidable challenges, which underscores the continued relevance of S&DT provisions in their favour. As a fundamental right granted to all developing Members, each developing Member shall, based upon its own particular situation, make the decision by itself on whether, when, where and how to use S&DT, and to what extent as well. No other members are entitled to interfere with such a self-declared decision. If this had not been the case, the WTO would not have been able to expand to today's scale and formulate such a comprehensive rules-based system through rounds of multilateral negotiations. Any attempt to dilute S&DT would be in conflict with the fundamental premise of equity and fairness that underpins an international treaty framework in a context of a Membership as diverse as that of the WTO. There is a need for a holistic approach on behalf of the developed members and the developed developing country members of WTO to be more pragmatic and proactive in their future trade negotiations in the interest of the world global economy. One cannot prosper at the cost of others. This further widens the gap between the haves and hav nots. There is a need for an inclusive approach rather than exclusive.

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