SPECIAL AND DIFFERENTIAL TREATMENT IN THE WTO: CURRENT ANXIETIES

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Abstract

Recently, the United States President has threatened to take unilateral trade retaliation, if India continues to avail "special and differential treatment" in the WTO regime. The threat alone has the potential to inhibit the exercise of policy options by India and other developing countries to pursue development objectives. This article highlights the legality of such threat, the significance of "special and differential treatment," non-fulfilment of commitments made by developed countries during Uruguay round negotiations and current WTO-Appellate Body impasse.

I Introduction

UNITED STATES (US) President Donald Trump remarked on August 14, 2019 that India and China are the world's wealthiest countries and they self-designate as developing countries to obtain special and differential treatment (S & DT) under the World Trade Organization (WTO) regime. This is the first time when the US President has pointed out India in this context. He also threatened to withdraw membership from WTO, claiming inequitable treatment toward the US and asked the WTO to define "developing country." Recently, the United States Trade Representative (USTR)[1] has been authorised, through a presidential memorandum to "use all available means" to restrain developing country member states of WTO, from benefiting themselves of flexibilities in WTO rules and negotiations, and not to treat such countries as developing countries.[2]

However, developing member states of WTO insist that the S & DT is a significant cornerstone of the global trade regime and fundamental right for them. The US has

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1 The USTR is part of the US President's executive office. The task of the USTR is to negotiate trade agreements and to conduct reviews of policies of other sovereign nations to aggressively enforce US trade policy by threatening or taking actual retaliatory trade-related measures. The USTR identifies the acts, policies and practices of sovereign trading partners of the US that, in its view, creates a barrier, distorts or burdens the US trade.

2 Presidential Memoranda (2019): "Memorandum on Reforming Developing-Country Status in the World Trade Organization," July, 26, *available at:* https://www.MemorandoAwhitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/.

also been obstructing processes for filling up vacancies to the Appellate Body (AB) of the WTO, expressing displeasure with the decisions of the appellate body which went against the US trade interests. However, the US has never advanced its proposal for changes in the dispute settlement understanding of the WTO. These disputes reflect a fundamental divide within the WTO that has threatened the future of the global multilateral trading system.

II Historical context

In the early years (1948–1955) of the General Agreement on Tariffs and Trade, 1947 (GATT), developing countries took part in tariff negotiations as equal partners. They were governed by the same rules and had to justify the initiation of any trade-restrictive measures.[3] The initiative of granting S & D treatment within the GATT legal framework gained strength after the accession of a few recently independent developing nations to the GATT in the 1950s. Majority of these nations stood against the very foundation on which the GATT was made; *i.e.*, a rule-based, non-discriminatory multilateral trading system. They contended that it was not rational to imagine recently independent nations with weak economies to compete with developed economies at that time. To create a level playing field, developing nations, in the beginning, pushed for rules that would enable them to foster and defend their domestic industries. Their relentless insistence resulted in the redrafting of article XVIII of the GATT at the 1954–1955 GATT Review Session.

Two more provisions expanded the S & D treatment to developing nations; *i.e.*, article XVI:4 and Article XXVIII *bis* of the GATT. Article XVI:4 exempted developing members from the restriction on export subsidies for manufactured goods, and article XXVIII *bis* allowed a more flexible use of tariff protection. These provisions facilitated developing member economies to develop and defend their domestic industries from competition. However, these internal measures were without any complementary external measures. Therefore, after some time, developing members of the GATT demanded preferential access in the markets of their major trading economies. The continuous demand of developing members of the GATT resulted in the adoption of Part IV of the General Agreement; *i.e.,* "Trade and Development." Inclusion of part IV was formal acceptance by developed member nations of the non-reciprocity principle under which they surrender their right to ask developing member nations to reduce or eliminate tariffs and other barriers to trade. Part IV also pushed developed member nations to employ ways to enhance the trading opportunities for developing member states. Finally, adoption of the "Enabling Clause" during the Tokyo Round of Trade

3 WTO, *Developing Countries and the Multilateral Trading System: Past and Present,* Note by the Secretariat 11 (Mar. 17-18, 1999).

Negotiations to have a legal basis for allowing preferences to developing member states put the concept of S&D treatment at the heart of the GATT legal system.[4]

The Ministerial Declaration of September 1986 launched the Uruguay Round reiterating that S&D treatment is given to the developing nations as per the terms of the I979 Framework Agreement. The Uruguay Round agreements continued to be directed by the general principles agreed in earlier negotiating rounds, which were expanded in many ways.[5] The Uruguay Round records reveal that during the negotiations, several developing countries without formally giving up S&D principle eschewed past practices and took part more actively in the exchange of reciprocal liberalisation in goods and service.[6] The agreements negotiated in the Uruguay Round not only retained the existing S&D provisions in GATT but also introduced many more such provisions and recognition of the special needs of developing nations in the new agreements. At the request of the Committee on Trade and Development, the WTO Secretariat has prepared a note collecting several S&D provisions in the WTO agreements.[7]

III Developing country status and S & DT

The designated status of "developing country" is based on self-selection because WTO does not provide any definition of "developed" and "developing" country. However, it is not necessary that the status will automatically be accepted in all WTO bodies. Flexibilities of self-declaration approaches provide opportunities to a member state to adopt the alternative ways through which WTO obligations can be transposed into national law so that national interests are accommodated and yet WTO principles are complied with. The WTO Agreement (Article XVI:1) recognises customary practices of GATT as guiding principle of WTO.[8] Self-declaration of a member as a "developing country" has been an established practice under the GATT, 1947; hence, it becomes a customary practice to be followed by the WTO. India is categorised as a developing country in the WTO, which affords it to get S&DT.

As stated, the existing S&DT provisions in the WTO agreements were an integral part of the Uruguay Round negotiations. Therefore, India and other developing countries

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4 George A. Bermann and Petros C. Mavroidis (eds.), *WTO Law and Developing Countries* 16-18 (Cambridge, New York, 2007).

5 Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* 14 (World Bank, Working Paper No. 2388, 2000), *available at*: <http://documents.worldbank.org/curated/en/908021468766770206/pdf/multi-page.pdf (last visited on Dec. 29, 2019).

6 *Ibid*.

7 WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, Note by the Secretariat, WT/COMTD/W/77(Oct. 25, 2000).

8 WTO Art. XVI:1 states as: "the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947."

see S&DT provisions as part of the bargain for which they have agreed to accede in the WTO. Furthermore, paragraph 44 of the Doha Ministerial Declaration, 2001 mandates that, "all [S&DT] provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational."[9] The S&DT is considered, "as a way to ensure that negotiated outcomes would accommodate differences in levels of economic development as well as the capacity constraint of developing members."[10] It allows developing member states the policy space to calibrate trade integration in the new world economic order in a way that facilitates them to assist in their sustainable development. This entitlement aims an increased trade opportunity through market access; requires other members of WTO to protect the interest of a developing member state; flexibility in rules and disciplines governing trade measures; longer transitional period; and provisions for technical assistance.[11]

The capacity constraint of developing countries also contributes to making them unable to apply all WTO rules in one instance. Therefore, India, which has declared itself as a developing country is allowed to gradually meet the terms of WTO and integrate into the multilateral trading system with a permitted degree of policy space to make more sustained economic growth. It requires continuous policy experimentation for institutional reforms, structural transformation, technology transfer; technical cooperation to overcome human resources and negotiating capacity coupled with beneficial access to the global market. However, India is currently facing stiff opposition and political pressure from the US to forgo the use of this flexibility. Any attempt to deprive India to avail S&DT is in contravention to the basic principles of justice and fairness in international rules-based governance. The US is not supposed to expect reciprocity from India for reduction or removal of tariffs and other barriers to the trade because opening up the economy cannot be the sole decisive factor to reach sustained economic growth. The claim of the US that India is a developed country is

9 Doha Ministerial Declaration, 2001 para 44 states as, "We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns." See, WTO, *Ministerial Declaration*, WTO Ministerial Conference WT/MIN(01)/DEC/1 (Nov. 20, 2001).

10 WTO General Council, *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*, Communication from China, India, South Africa, the Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya and Cuba WT/GC/W/765/Rev. 12 (Feb.28, 2019) at 2.

11 *Supra* note 4 at 21.

based on a very selective use of economic and trade data.[12] There is a wide range of indicators through which a country's development level is measured and opting few cannot give a holistic picture of the development level of India.[13] The attempt by the US ignoring development divide between US and India can best be described as an effort to deprive India of its right to development.

The varying needs and goals of a state require S&DT. Therefore, it is not necessary that all rules of WTO should apply to all states in the same manner or that every rule must have universal application within the WTO system irrespective of different capacity and development level of a member state. S&DT provisions of WTO postulates application of the same rule alike and without discrimination to all states similarly situated. Therefore, mechanical equality before the WTO, demanded by US may result in gross injustice. The act of the US based on selective data and ignoring other factors to determine a country's level of development is unreasonable in itself, and it must be considered arbitrary. The developed nations should strive to bring a more balanced and equal world economic order. To remove the status of India as a developing country in the WTO and treating the same can only be possible in an equal world economic order. However, the fact remains that all member states are not equal by economic development, technological capacity and skilled human resources. Application of same rules of WTO to India despite of the difference in circumstances or conditions in all development parameters would result in unlike treated alike.

IV Capacity constraint and technical assistance

Cooperation by the developed member states to remove the capacity constraint of developing member states by providing technical assistance is one of the cornerstones of S&DT. However, WTO still struggles to make developed members liable for not fulfilling their promises in real spirit. For example, technical cooperation to developing member states is an important mechanism to facilitate adequate integration into the multilateral trade regime and to explore the flexibilities intrinsic in the WTO-Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[14] Despite of a significant amount of technical cooperation, concerns have been raised that these cooperation have not always been appropriately tailored to the need of the developing

12 WTO General Council, *An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance*, Communication from the United States WT/GC/W/757, 1-11 (Jan. 16, 2019).

13 WTO General Council, *The Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness*, Communication from China, India, South Africa, the Bolivarian Republic of Venezuela, Lao People's Democratic Republic, Plurinational State of Bolivia, Kenya, Cuba, Central African Republic and Pakistan WT/GC/W/765/Rev.2. 2-7 (Mar. 4, 2019).

14 TRIPS, 1995, art. 67.

countries concerned. The guidance provided does not adequately take into consideration all flexibilities and possible options to serve technological and other development objectives. The technical cooperation providers focus primarily to support the interest of intellectual property rights (IPR) owners and do not integrate comprehensive development concerns. In this context, technical cooperation by the developed member states should not only focus on the implementation of the obligations of developing country members, but also be demand-driven, unbiased, and accountable and must consider the special needs of developing member states. Moreover, the cooperation commitments of developed member states should be development-directed and contribute to a balanced implementation of rights and obligations to further the objectives and principles of the TRIPS. Fundamentally, it must help developing member states to formulate legitimate use of the flexibilities of the TRIPS as well as of its provisions related to technology transfer and the prevention of IPR abuses.[15]

V Legality of United States Trade Representative

As stated, the US President has empowered the USTR to take unilateral action against self-declared developing countries to prevent the use of S&DT provisions. USTR has been mainly focused on protecting the interests of US-based multinational corporations (MNCs). USTR, especially after the WTO, through its reports, gives the feeling that the trade rules and practices of the member countries are under constant surveillance and unilateral trade sanctions may be used against them applying section 301 of the Trade Act, 1974.[16] Interestingly, in 1999, a WTO Dispute Settlement Panel reviewed the use of section 301 of the Trade Act, 1974 and held that the US could not use section 301 to impose unilateral trade sanctions without going through the WTO dispute settlement process.[17] The WTO panel observed that the "threat alone" of unilateral actions would disrupt the stability and equilibrium of the equal protection principle to all members through the application of rules and procedures. WTO panel observed that:[18]

> Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced

15 B.N. Pandey and Prabhat Kumar Saha, "Technical Cooperation under TRIPS Agreement: Flexibilities and Options for Developing Countries" 53 *JILI* 652-662 (2011).

16 Trade Act, 1974, s. 301 of the US prescribes mandatory action by authorising USTR to initiate cases and retaliate against dissenters countries to protect trade interest of US MNCs in foreign countries. Findings of the USTR using s. 301 are unilateral findings to put pressure on countries by threatening or punishing with the removal of trade preferences or by cutting development aids. These actions violate US commitments and duties under the WTO.

17 WTO, *United States – Sections 301–310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, 99-5454 (Dec. 22, 1999), *available at*: <https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf> (last visited on December 30, 2019).

18 *Id.,* para. 7.89.

> to give in to the demands imposed by the Member exerting the threat ... To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick.

Therefore, any threat to take unilateral action appears to be in clear violation of the WTO agreement. To keep a developing member state perpetually under threat of unilateral action on trade issues by any member country ultimately discredit the WTO regime.

VI Appellate body in troubled water

The US has repeatedly blocked the process for filling up vacant positions in the AB. It has been insisting on fundamental reforms to deny S&DT to certain countries including India. The US is also claiming that its concerns about the functioning of the AB have not been addressed.[19] From December 11, 2019, the AB has become non-functional because it has reduced to one member from its existing strength of three members. The AB is not able to take up new cases and decide unless it has at least three sitting members. This situation has an effect of neutralising any possible challenge to unilateral trade policies and bilateral asymmetric trade deals of the US. This situation may lead to uncertainty in international trade rules and regulations. A functioning and independent dispute settlement system is vital for protecting the rights and duties of all members concerned and for assuring that the rules are enforced fairly and impartially. Without such a system, there would be no reason to negotiate new rules or to accept reforms. Therefore, the resolution of the AB deadlock needs to precede other reforms.[20]

VII Concluding observations

S&DT provisions in the WTO are not gifts granted by developed country members to other members. They are justiciable right of a developing member state in the multilateral trade regime to safeguard its development interests. It cannot be taken away by any super-power nation. Despite the remarkable economic vibrancy shown by many developing members of WTO in recent years, significant imbalances concerning the level of development persist. Any threat of superimposition of section 301 of the Trade Act, 1974 by the US against any country to dilute S&DT would conflict with the fundamental principle of equity and fairness to developing members of WTO. Any blackmail game to take away the collective voice within WTO disregarding inclusiveness would widen the development deficit existing in developing countries. Propagation of

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19 While blocking consensus for filling up the AB vacancies, and articulating its own grievances with the decisions, recommendations and the functioning of the AB, the US has not so far put forward any suggestions or proposals of its own for reform.

20 WTO General Council, *Strengthening the WTO to Promote Development and Inclusivity*, Communication from Plurinational State Of Bolivia, Cuba, Ecuador, India, Malawi, Oman, South Africa, Tunisia, Uganda and Zimbabwe, WT/GC/W/778/Rev.1, 3 (July 22, 2019).

protectionism and unilateralism inconsistent with WTO are real threats to the significance, legitimacy and effectiveness of the WTO. It is unlikely that the US will withdraw from WTO because in that case, the US and its MNCs would lose more in terms of intellectual property and trade in goods and services. Therefore, any reform in WTO must reaffirm the treaty-embedded, non-negotiable right of S&DT to nurture and protect development goals of developing countries within WTO permitted flexibilities.