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## Who Are the Developing Countries in the WTO?

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## Abstract

The current world trading system lacks a procedure to identify developing country Members, to whom “Special and Differential Treatment” (SDT) is granted. Based on the analysis of five methods of identifying developing country Members, which are GATT Article XVIII definition, listing, classification, self-designation by SDT grantees, and selection by SDT grantors, we argue that “self-designation,” which is widely claimed as the basic method of identifying developing country Members, gives them little certainty and predictability in their rights and obligations in the world trading system. A procedure that can make precise identification of SDT beneficiaries is indispensable in order to fulfill the WTO’s objective of development.

**KEYWORDS:** World Trade Organization, developing countries, economic development

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## I. INTRODUCTION

Identifying which country is a developing country is always a difficult problem in the world trading system. Neither the WTO agreement nor GATT 1947 regime has made a precise legal definition for the term "developing country".<sup>1</sup> It is widely believed that the basic method of designating a developing country Member in the WTO is "self-designation".<sup>2</sup> The WTO web page titled "Who are the developing countries in the WTO?" states:

There are no WTO definitions of 'developed' and 'developing' countries. Members announce for themselves whether they are 'developed' or 'developing' countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries."<sup>3</sup>

In principle, any WTO Member can designate itself as a developing country Member. Actually, all countries have chosen to do this at least once, with the exception of the European Community (EC), the United States, Canada, Japan, Switzerland, Norway, Australia and New Zealand.<sup>4</sup> Although "self-designation" is considered to be the basic method of designating developing country Members, some other methods are also used, and are often used along with "self-designation", which attract less attention but are also important. In fact, the claim that "self-designation" by "Special and Differential Treatment" (SDT) beneficiaries is the basic method of identifying developing country Members is quite misleading. In practice, SDT grantors have more power than grantees in identifying developing country Members, which derogates from the effect of SDT provisions. No matter which method is applied, certain quantitative criteria need to be used by both the Member claiming it is a developing country and other Members that challenge the claim to support their arguments. This paper discusses the current methods and criteria used by WTO Members to designate developing country Members. Based on this research, the author concludes and proposes that a feasible and unambiguous approach to designate developing country Members should be considered by WTO Members.

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1 Article XVIII of the GATT does provide that members whose economies "can only support low standards of living and is in the early stages of development" may invoke the article. But this can hardly be a precise legal definition. Article XVIII of the GATT does not provide how low the standards of living should be and almost all members can claim that they are in the early stages of development. See below for more discussion.

<sup>2</sup> It is also termed "self-selection" in some literature.

<sup>3</sup> WTO, *Who are the Developing Countries in the WTO?*, available at: <[www.wto.org/english/tratop\\_e/devel\\_e/dlwto\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/dlwto_e.htm)>, accessed 26 March 2008.

<sup>4</sup> H. Horn and P.C. Mavroidis, *Remedies in the WTO Dispute Settlement System and Developing Country Interests*, World Bank Working Paper (Washington, 1999), p. 2.

The next section presents the background of the problem in identifying developing country Members. Section III discusses five different methods of identifying developing country Members. The "self-designation" by developing country Members faces a lot of restrictions, and selection by SDT grantors is actually more common in practice. Section IV discusses different quantitative indicators that are used as criteria of identifying developing country Members. The GNI per capita should be used as the most important criterion and some other indicators should also be considered as complementary criteria. The last section provides a summary of arguments and makes a proposal.

## **II. SPECIAL AND DIFFERENTIAL TREATMENT AND THE DIFFICULTY OF DEFINING DEVELOPING COUNTRIES**

The cornerstone of the GATT/WTO system is the most-favoured-nation (MFN) treatment. The spirit of MFN treatment is non-discrimination: WTO Members have legal obligations to accord the equal benefit to all other WTO Members in principle. An important exception to the MFN principle is the SDT granted to developing countries. This exception has been enshrined by the Enabling Clause.<sup>5</sup> The aim of SDT provisions is to better integrate developing countries into the world trading system and to facilitate development. Given the limited resources available to developing countries, they would be deterred from being involved into the process of trade liberalization without SDT. In order to fulfill the objective of SDT, however, it will be necessary to identify who should be given such treatment. This section first provides a brief discussion on SDT and then discusses the identification issue. The discussion in this section is not a systemic analysis of SDT, but will serve as a background for the discussion in the later sections.

### **A. Types of Special and Differential Provisions**

The WTO secretariat has classified 145 separate SDT provisions contained in the WTO agreements into six categories:<sup>6</sup>

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<sup>5</sup> GATT Contracting Parties, *Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries*, GATT Basic Instruments and Selected Documents (BISD) 26th Supp. (Geneva, 1980), p. 203.

<sup>6</sup> See WTO Committee on Trade and Development, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO doc. WT/COMTD/W/77 (25 October 2000), para. 3.

- (i) provisions aimed at increasing the trade opportunities of developing country Members;
- (ii) provisions under which WTO Members should safeguard the interests of developing country Members;
- (iii) flexibility of commitments, of action, and the use of policy instruments;
- (iv) transitional time periods;
- (v) technical assistance;
- (vi) provisions relating to least developed country Members.

For type (vi) provisions, they can be in the form of any one of type (i) to type (v) provisions, but they only apply to the least developed country Members. One point to note is that SDT does not necessarily mean more trade protection from developing countries. One example is paragraph 2(c) of the Enabling Clause,<sup>7</sup> "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the Contracting Parties for the mutual reduction or elimination of non-tariff measures, on products imported from one another" can be a set-aside of the MFN obligation. This provision can be categorized as a type (i) SDT provision. It is aimed at increasing trade opportunities of developing countries. The result of such provisions is a decrease in overall trade barriers rather than an increase in trade barriers in developing countries, although such a decrease in trade barriers may be discriminatory to developed countries.

## **B. Rationale for Special and Differential Treatment in the WTO**

There is a vast amount of literature discussing why SDT should be given.<sup>8</sup> The discussion of rationale for SDT will lay a foundation for further analysis on the main topic of this paper: who should be given SDT, in other words, who are developing countries in the WTO.

### **1. Underdevelopment and developing countries' involvement in the WTO**

Traditionally, the GATT was dubbed as "the rich men's club", and developing countries were very critical of the GATT. As more and more countries, mostly developing countries, join the GATT/WTO, developing countries now constitute a large majority of the WTO Membership.<sup>9</sup> However, most developing countries

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<sup>7</sup> *Supra* note 5, para 2(c).

<sup>8</sup> See for example A. Keck and P. Low, *Special and Differential Treatment in the WTO: Why, When and How?*, WTO Staff Working Paper ERSD-2004-03 (Geneva, 2004).

<sup>9</sup> M. Matsushita, T. Schoenbaum and P. Mavroidis, *The World Trade Organization: Law, Practice*

have little influence on the world trading system. To attract developing countries to fully integrate themselves into the world trading system, certain SDT need to be given for the following reasons. For instance, poor countries have limited resources to train experts in complex WTO rules. Rich countries may send representatives to sit in all commissions, committees, councils and bodies in the WTO, but small, poor economies just cannot afford it.<sup>10</sup> The lack of resources may also limit developing countries' use of the Dispute Settlement Mechanism (DSM) of the WTO.<sup>11</sup>

To compensate for such a disadvantage of developing countries, type (ii) SDT provisions, which "safeguard the interests of developing country Members", and type (iv) SDT provisions about technical assistance, are important. The WTO Members can help developing countries to train professionals and build up their own trade regulation systems. SDT may also increase the benefits and decrease the costs for developing countries to be involved in the WTO, especially to help them make better use of the DSM.

## 2. The argument in favor of infant industry

Protecting infant industries has long been an argument for trade protectionism policies. The famous 19th century German economist Friedrich List is known as the father of the "infant industry" argument:<sup>12</sup> weaker industries in underdeveloped countries may not survive the competition with imports without governmental intervention, especially tariff protection. Ha-Joon Chang, a Cambridge scholar, possibly is one of the most determined supporters of List's theory in the modern world. In his book, *Kicking Away the Ladder--Development Strategy in Historical Perspective*,<sup>13</sup> Chang casts serious suspicion on the idea that free trade can promote development as well as suspicion on the other Washington Consensus doctrines.<sup>14</sup>

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*and Policy* (Oxford: Oxford University Press, 2003), p.373.

<sup>10</sup> Large developing countries may be in a better position than small ones in participating WTO activities. However, when it comes to the reform and liberalization of their trade regimes, large countries may face more difficulties in making a smooth transition. Section IV provides more discussion on the relevance of country size on the classification of developing countries.

<sup>11</sup> C.P. Bown and B.M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 *Journal of International Economic Law* 4 (2005), 861 *et seq.*

<sup>12</sup> Although it is Alexander Hamilton, the first Treasury Secretary of the USA, who first developed the idea of infant industry protection and put it into American trade policy, it is List who first theorized the argument in his book: F. List, *The National System of Political Economy* (London, Longmans, Green, and Co, 1885).

<sup>13</sup> H.J. Chang, *Kicking Away the Ladder--Development Strategy in Historical Perspective* (London: Anthem Press, 2002), p. 1 *et seq.*

<sup>14</sup> This is a series of policy advice to Latin American countries, first presented by John

The argument in favor of infant industry apparently supports the type (iii) SDT provisions to provide "flexibility of commitments, of action, and the use of policy instruments". It seems that type (iv) SDT provisions on transitional time periods can also be rationalized by this argument.

The infant industry argument is the main argument in favor of Import-Substituting Industrialization (ISI) strategy, which was widely used among newly independent nations in the 1950s and 1960s. However, empirical evidence shows that import restrictions imposed significant costs on Argentina, Chile, Columbia, Egypt, Ghana, India, Israel, Mexico, Pakistan, the Philippines, South Korea, Taiwan and Turkey.<sup>15</sup> The World Bank found that countries with strong inward orientation consistently grew slower than other countries.<sup>16</sup> From the mid-1960s onward, it became more and more apparent that another strategy, i.e., export-oriented industrialization strategy, worked better than ISI strategy. The so-called Asian Tigers such as Hong Kong, Taiwan, Singapore and South Korea, are typical successful examples in favor of export-orientation industrialization. More recently, China has also achieved a high annual growth rate after it adopted "open door policy". However, some economists argue that the Asian Tigers' export-oriented industrialization strategy is not a free-trade strategy, and industrial policy interventions, including an aggressive export subsidy, have played an important role in their development.<sup>17</sup> The infant industry argument is also used frequently as a theoretic foundation for an aggressive export-subsidy policy. However, both Bhagwati and the World Bank analysis of East Asian miracle<sup>18</sup> found that industrial policy interventions did not significantly alter the incentives that would be provided by the world market prices, and Bhagwati found that industrial policy had little to do with East Asia's growth and may have even harmed it.<sup>19</sup>

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Williamson, to tackle financial crises of the 1980s, which reflects some commonly shared themes among policy advice by Washington-based institutions such as the IMF, the World Bank and US Treasury Department. The doctrines include such things as fiscal policy discipline, trade liberalization, openness to foreign direct investment and other neo-classical policies. Not surprisingly, free international labor mobility is not included in the Washington Consensus.

<sup>15</sup> P.H. Lindert and T.A. Pugel, *International Economics* (10th edn, Chicago: Irwin, 1996), p.257.

<sup>16</sup> The World Bank, *World Development Report 1987*, p.84, available at:

<[www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/1987/06/01/000178830\\_98101911073518/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/1987/06/01/000178830_98101911073518/Rendered/PDF/multi0page.pdf)>, accessed 1 February 2008.

<sup>17</sup> See for example A. Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989), p. 11 *et seq.*; and R. Wade, *Governing the Market: Economic Theory and the Role of the Government in East Asian Industrialization* (Princeton: Princeton University Press, 1990), p. 8 *et seq.*

<sup>18</sup> The World Bank, *The East Asian Miracle, Economic Growth, and Public Policy* (New York: Oxford University Press, 1993).

<sup>19</sup> J. Bhagwati, *The Miracle That Did Happen: Understanding East Asia in Comparative Perspective*, mimeo (1996), available at: <[www.columbia.edu/~jb38/East\\_asian\\_miracle.pdf](http://www.columbia.edu/~jb38/East_asian_miracle.pdf)>.

Most economists nowadays tend to hold a suspicious view to the "infant industry" argument: that an industry is new is not a reason convincing enough for it to deserve trade protection. To rationalize trade protection of infant industry, one needs to identify some market failures that can only be rectified by trade protection. Two market failures identified by standard textbooks are imperfect capital markets and the problem of appropriability.<sup>20</sup> When the capital market is not perfect, it is difficult for a new industry to get enough start-up funding although it is likely to be profitable in the long run, which may stifle the growth of the new industry. The imperfection of the capital market may be particularly serious in developing countries and transitional economies. The appropriability argument, also known as dynamic externality argument,<sup>21</sup> says that the pioneering firms in a new industry generate social benefit for which they are not compensated. This problem may exist in developed countries as well but may be particularly serious in developing countries because there is very poor property rights protection for innovators in developing countries.

Although developing countries have more serious market failure problems, which may justify some temporary use of trade protection, the first choice should be to correct the market failures directly by domestic measures rather than trade measures. Trade protection may be used as the second choice, as neither fostering capital markets nor setting up a sound system to protect property rights can be done overnight. Eventually SDT trade protection should phase out after the transitional time period if it is only aimed to protect infant industries.

### 3. Single commodity exporting economies

Low trade barriers imply more trade and more production specialization. When a country specializes in the production of limited types of products, in which it has comparative advantages, efficiency is achieved, and the welfare of this country will be improved. This kind of view on free trade is generally true but it has limits. One of the problems concerns single commodity exporting economies, or single commodity exporters (SCEs), which are those developing countries dependent upon a very small number of commodities for a large portion of their total export income.<sup>22</sup> As world prices of commodities tend to be very volatile, and production conditions such as weather are normally out of human control hence

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accessed 1 February 2008.

<sup>20</sup> P. Krugman and M. Obsfeld, *International Economics* (6th edn, Pearson Education International, 2003), p. 257.

<sup>21</sup> *Supra* note 20, p. 258.

<sup>22</sup> M. Arda, and O. Ostensson, *Commodity Branch, Issues Pertaining to Single Commodity Exporters*, FAO Discussion Paper no. 5 (2002), p. 2.



unpredictable, a developing country's economy can be very vulnerable if it specializes in production of a very limited number of commodities, particularly so for small developing countries.

Measures should be taken to help SCEs to diversify its production. Technical assistance is one method, and the General System of Preference (GSP) to grant more trade opportunities, mainly in the field of manufacturing, is another. Some argue that the SCEs should be differentiated into "perpetual" SCEs and "transitory" SCEs. "Temporary" SDT should be given to the latter and the former may need "permanent" SDT.<sup>23</sup>

#### 4. Inefficiency of domestic labor market and domestic fiscal policy

Even when a country as a whole can gain from the expansion of foreign trade, different population segments in the country may be influenced in different ways. Spain, as a whole, can benefit from inexpensive imports from China, but Spanish shoemakers may lose their jobs. Economists believe that when imports are expanded, normally the benefit enjoyed by consumers dominates the loss suffered by producers and the fiscal loss of government resulted from the decrease of tariff revenue, so there is a net welfare improvement. To have the trade benefits spread more evenly throughout the population, government may need to do two things. The first is to help people in the shrinking industries to find new jobs in the expanding industries, which can be a quite demanding task. It is unlikely to transform shoemakers into software engineers just overnight, even if there are new opportunities occurring in the software industry. Although developed countries face similar difficulties, the labor resource shift across industries can be even more inefficient in developing countries, as they do not have a good professional training system and their labor markets are normally very rigid. When the problem is serious enough, a significant portion of the population may lose their jobs without finding new ones, causing serious social problems. The second thing that a government can do is to use its fiscal policy tools to shift income among different groups, e.g., to shift some income from consumers and exporting industries to people who lose jobs, so the gains from trade can spread throughout the society. But this is also very difficult to be put into practice in developing countries, as their governance capability is poor and social security systems are shabby.

When a country has a rigid labor market and its government is incapable of adjusting people's income through fiscal transfer, trade may bring about some social problems. However, the fundamental cause of those problems is not trade but their domestic market imperfection and low governance capability. Therefore, the most useful SDT should be a longer transitional period (type iv SDT) and

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<sup>23</sup> *Supra* note 22.

technical assistance (type v SDT) to help developing countries cope with possible negative influence after the liberalization of trade.

## 5. Overall imbalance of WTO regime

The WTO negotiations work under a "give and take" rule, and developing countries including new WTO Members take part into the WTO of their own volition. That does not mean they have the equal bargaining power as developed countries. After almost 60 years of evolution of the world trading system, the overall imbalance is rather obvious. The negotiation topics of developed countries' interest get much more attention in the WTO than those negotiation topics that are important to developing countries.

First, in the field of trade in goods, many IT products, in which developed countries have comparative advantage, enjoy zero tariff rates and are subject to basically no distortions, but agricultural sector, in which developing countries have comparative advantage, is still highly distorted by subsidies and tariff quotas. Second, in the field of trade in service, telecommunication and finance sectors, in which developed countries have comparative advantage, have been singled out to be liberalized by the WTO, and developing countries are pushed hard to open their markets. However, no one seems to hold much hope for the negotiations on movement of persons to provide labor. Third, developing countries, in the past used trade-related investment measures (TRIMs) to offset the distortion effects of some multinational companies' restricted business practices (RBPs). For example, the local content requirement can nullify some package selling practice, and the export performance requirement can be used to offset market-segmenting practice. The Agreement on Trade-Related Investments Measures (TRIMs Agreement) has made many TRIMs illegal. Developing countries have found that they are in a worse position to cope with RBPs, but the General Council of the WTO decided in July 2004 that the interaction between trade and competition will not be covered by the Doha agenda.<sup>24</sup> Fourth, the Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs) gives very high protection level to intellectual property rights, but the WTO says almost nothing about the free and fair trade of technology.<sup>25</sup>

GATT Contracting Parties and WTO Members have long realized that such

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<sup>24</sup> WTO, *Decision Adopted by the General Council on 1 August 2004*, WTO doc. WT/L/579 (2 August 2004).

<sup>25</sup> UNCTAD spent more than 20 years working on a Draft International Code of Conduct on Transfer of Technology, but finally decided to suspend the discussion in 1995. See UNCTAD, *Negotiations on an International Code of Conduct on the Transfer of Technology, Report by the Secretary-General of UNCTAD*, TD/CODE TOT/60 (6 September 1995).

unbalanced growth of the world trading system is not sustainable. Since the 1960s, GATT/WTO has introduced more and more provisions to support development in underdeveloped countries. The Doha Round looks so development-orientated that it is dubbed as Doha Development Round and its agenda is called as Doha Development Agenda (DDA). But Hoekman and Kostecki have noted that, "most of the 97 provisions in WTO agreements<sup>26</sup> calling for SDT treatment for developing countries are 'best endeavor' commitments - they are not binding on high-income countries. No dispute settlement cases can be launched by a developing country government on the basis of non-delivery on promises that were made in the various WTO agreements".<sup>27</sup>

### C. Difficulty of Defining Developing Country Members

As we have mentioned in the introductory section, the WTO has no well-defined definition of developing country Members. Some WTO Members have consistently proposed to give developing country Members an operational definition.<sup>28</sup> However, a widely agreed definition has never come out. Why is it so difficult to make such a definition?

#### 1. Heterogeneity of developing countries

Developing countries are different in many aspects. Some countries such as South Korea have GDP per capita close to USD 20,000, but other countries such as East Timor have only GDP per capita as low as USD 400.<sup>29</sup> Some countries are growing very fast: Equatorial Guinea has long been treated as a developing country and its GDP per capita was still below USD 1000 in 1989, but by 2005, its GDP per capita had become USD 50,200, one of the richest in the world.<sup>30</sup> Other countries such as Zimbabwe and Maldives have had negative growth rates. Some developing countries, such as Brazil, India, and China are very big in size while a number of developing countries are tiny. Developing countries are also

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<sup>26</sup> Hoekman and Kostecki said that there were 97 provisions calling for SDT treatment (WTO docs WT/COMTD/W/66, WT/COMTD/W/77 updated WT/COMTD/W/66), and identified 145 SDT provisions, 107 of which were adopted at the conclusion of the Uruguay Round.

<sup>27</sup> B.M.Hoekman and M.M.Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (2nd ed., Oxford: Oxford University Press, 2001), pp. 392-393.

<sup>28</sup> For example, see *Notes on meetings of 7 and 18 October 2002, Seventh Special Session of Committee on Trade and Development*, WTO doc. TN/CTD/M/7 (2002), para. 96.

<sup>29</sup> CIA, *The World Factbook 2006*, available at:

<[www.cia.gov/cia/publications/factbook/index.html](http://www.cia.gov/cia/publications/factbook/index.html)>, accessed 1 February 2008. The GDP per capita cited here is measured in Purchasing Power Parity (PPP).

<sup>30</sup> *Supra* note 29.

different in their social and political aspects. While some developing countries have working democratic regimes, others have questionable sustainability with regard to their economic development, because, even though their economies are growing, their democracies are still very immature.

The significant heterogeneity of developing countries causes difficulty in defining developing country Members not only because it may be difficult to find consistent and sufficient technical criteria for the definition, but also because developing countries in different situations have different or even conflicting interests. When too many countries are treated as developing countries, the countries that really need SDT may not get enough preference to support their development.

## 2. Dynamic change of economic performance

Every country tends to experience ups and downs in its economic development. Sometimes these ups and downs can be so dramatic that a country such as Equatorial Guinea can be changed from one of the poorest countries into one of the richest countries within a period of time as short as 15 years. South Korea, Taiwan, Hong Kong and Singapore also metamorphosed from poor economies into rich economies in a relatively short period of time. South Korea still claims it is a developing country, at least in the agriculture sector, at the Doha Development Agenda negotiations,<sup>31</sup> although its GDP per capita is almost USD 20,000. Some countries, although enjoying healthy growth in some period, may have negative growth in other times. If some threshold criteria of "developing country" are made, some countries may well move on and off the list from year to year.

## 3. The complexity of the concept of "development"

The concept of "development" is as elusive as the definition of "developing country". It is commonly believed that some criteria, other than national income level, should be considered to define "development", but which ones should be included is always a question. Even for national income level, different choices of measures may render different results.

## 4. Intrinsic conflict between MFN and SDT

MFN treatment, based on the principle of non-discrimination, is easy to define without much ambiguity. Most exceptions to MFN treatment in WTO are well

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<sup>31</sup> Yahoo Finance Singapore, *S. Korea Aims to Hold onto Developing Country Status*, available at: <[sg.biz.yahoo.com/060623/16/41p07.html](http://sg.biz.yahoo.com/060623/16/41p07.html)>, accessed 26 March 2008.

defined because they only shrink the coverage of MFN treatment without derogating from its principle. But SDT intrinsically conflicts with MFN treatment. EU holds the view that SDT should be based on the principle of "different needs, different responsibilities".<sup>32</sup> If one holds onto this principle tightly and classifies all the trading countries according to their different needs, and allows a country to grant treatments accordingly, the MFN principle will not be sustained. On the contrary, if all the developing countries, maybe 90% of WTO Members, were to claim that they are developing countries and should be treated equally, hence South Korea and Somalia are treated the same way, the countries that most need SDT will not benefit much from it, as few developed countries will be willing to grant preferential enough treatment to so many developing countries. Finding a middle way is a difficult and subtle job.

### III. METHODS OF IDENTIFYING DEVELOPING COUNTRY MEMBERS

This section discusses five different ways of identifying developing country Members: i.e., i) GATT Article XVIII definition, ii) listing, iii) classification, iv) self-designation by SDT grantees, and v) selection by SDT grantors. All these different methods have their own advantages and disadvantages. In practice, some methods are often combined and used together.

#### A. GATT Article XVIII Definition

Perhaps it is not completely accurate to say that no definition of "developing country" has ever been provided in the GATT/WTO. The drafters of GATT 1947, which has now turned into GATT 1994, did try to give some sort of definition in Article XVIII. Article XVIII states in relevant part, "The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living and are in the early stages of development." Paragraph 4(a) provides, "Consequently, a contracting party, the economy of which can only support low standards of living and is in the early stages of development, shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article."<sup>33</sup>

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<sup>32</sup> EC, *Different Needs, Different Responsibilities: What is the EU Asking from Developing Countries?*, available at: <[ec.europa.eu/comm/trade/issues/global/development/pr141205\\_en.htm](http://ec.europa.eu/comm/trade/issues/global/development/pr141205_en.htm)>, accessed 26 March, 2008.

<sup>33</sup> See the General Agreement of Tariffs and Trade 1994, art. XVIII.

Paragraph 1 and paragraph 4(a) of Article XVIII give two criteria. The first one is "low standards of living", and the second one is "in the early stage of development". But the question is how *low* the standards of living should be, and which stage can be classified as *early* stage of development.

Annex I provides some guidance. As to "low standards of living", the CONTRACTING PARTIES "shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party". As to "in the early stage of development", the Annex I also states that the phrase "is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production." These supplementary provisions make clear that the concepts of "low standards of living" and "in the early stage of development" should be understood in a relatively broad way. But what exact scope is meant by these concepts? No concrete criteria are given, and no definite answer such as a finite list of the countries can be drawn.

Thus paragraph 1 of Article XVIII can hardly be treated as a precise, legally binding definition of "developing country". The criteria given by the provision are too elusive to implement. Nonetheless, Paragraph 1 does give us some guidelines as to the scope of a "developing country".

An early case of identifying "developing country" concerned Ceylon's (now Sri Lanka) application to invoke Article XVIII.<sup>34</sup> Based on the panel report, the CONTRACTING PARTIES decided to give Ceylon certain releases under Article XVIII. Before proceeding with the examination of Ceylon's application, the Panel first considered if Ceylon was eligible under paragraph 4(a) of Article XVIII. As to the first condition "low standards of living", the Panel found that the GNP per capita for Ceylon in 1955 was estimated at USD128, which was higher than the GNP per capita of such countries as Burma and India but lower than that for Greece, Cuba and the Dominican Republic, and very substantially below the figure of industrialized countries in Western Europe. As to the second condition whether Ceylon was "in the early stage of development", the Panel took as a general indication, the share of manufacturing, mining and construction in the gross national product. In the case of Ceylon, this share (including mining which is a primary industry) is about 10%, a figure lower than that of Burma and Greece and very substantially lower than that of industrial countries.<sup>35</sup>

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<sup>34</sup> GATT Panel Report, *Ceylon-Article XVIII Applications*, GATT Doc. L/71 (26 Nov. 1957). Stanford University has scanned much of the GATT 1947 documents and collected them into a database, which can be searched online, available at: <[gatt.stanford.edu/page/home](http://gatt.stanford.edu/page/home)>.

<sup>35</sup> See GATT Panel Report, *Ceylon-Article XVIII Applications*, *supra* note 34, para. 4.

The panel report explained neither why the Panel used GNP per capita rather than GDP per capita or other national income indicators, nor why it included mining in the calculation of the share of certain industries relative to the GNP. It seems that the choice was quite arbitrary, but justified because there was no further provision in the text of GATT Article XVIII to govern these issues.

## B. Listing

If the concept of "developing country" was well-defined and any developing country could be identified without difficulty, any listing would be just a natural corollary of the definition. As there is no such clear definition, listing can be a complementary way to identify developing countries.

The apparent advantage of listing is that it gives the greatest certainty to the identification of developing countries. As long as a country is included into the list, there will normally be no trouble in deciding its status, but this certainty also gives SDT grantors inflexibility resulting in a reluctance to include some developing countries that are competing with them in some sectors. The most widely used list is a list of the Least Developed Countries (LDCs) drawn by the United Nations. Their status as the most underdeveloped countries, which are in the greatest need of SDT, is widely accepted.

The list of LDCs is reviewed every three years by Committee for Development Policy (CDP) under the mandate of the United Nations Economic and Social Council (ECOSOC). In the recent 2006 review, CDP recommends letting Samoa graduate from the list and including Papua New Guinea in the list, which keeps the number of LDCs as fifty. Current criteria for the UN LDCs listing are: low income, weak human assets, and high economic vulnerability.<sup>36</sup> Another requirement is that the country does not have a population over 75 million. The low-income criterion is measured by a three-year average estimate of the gross national income (GNI) per capita. As to human assets, a human assets index (HAI) is compiled. For economic vulnerability, an economic vulnerability index (EVI) is compiled.

The method of listing is also used in the WTO Agreement on Subsidies and Countervailing Measures (SCM hereafter). According to paragraph 2(a) of Article 27, the prohibition of export subsidy does not apply to the LDCs and a list of 20 developing countries, which are identified in the Annex VII. For these twenty countries, they have the same rights as LDCs as long as their GNP per capita is lower than USD 1,000. Once their GNP per capita has reached USD 1,000 per annum, they will be treated the same as the other developing countries.

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<sup>36</sup> UN Committee for Development Policy, *Report on the Eighth Session*, Economic and Social Council Official Records Supplement no. 13 (March 2006).

The method of listing used in the SCM Agreement makes SDT for the weakest small economies become certain but keeps SDT for relatively better-off countries or bigger economies uncertain. There is no doubt that this is a result of political compromise as any other provisions in the WTO. Some countries, such as Pakistan, cannot be treated as an LDC only because it has a population over 75 million, although it is an LDC by the three other measures.

### **C. Classification**

Some WTO Members propose to classify WTO developing country Members in several categories and grant them different SDT. The EU claims that it is fully committed to the principle of special and differential treatment for developing countries "based on their individual needs and vulnerability",<sup>37</sup> i.e., a principle of "different needs, different responsibilities".<sup>38</sup>

Although the Enabling Clause allows WTO Members to deviate from the MFN requirement under certain conditions, the non-discrimination principle does not break down completely even in the preference regime. This is reflected in the GSP system. In Resolution 21 (ii) taken at the UNCTAD II conference, GSP is defined as "the generalized, non-reciprocal, non-discriminatory system of preferences". The three conditions: generalized, non-reciprocal and non-discriminatory, are repeated in footnote 3 of the Enabling Clause. In the *EC Tariff Preferences* case, the Panel found that the term "non-discriminatory" requires that "identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of *a priori* limitations".<sup>39</sup> The Panel interpreted the term "developing countries" in Paragraph 2(a) of the Enabling Clause<sup>40</sup> as all developing countries.

The Appellate Body found otherwise,<sup>41</sup> and reversed the Panel's finding that "developing countries" means all developing countries: the benefits under the Enabling Clause need not be granted to all developing countries, but rather only to those are "similarly situated". By the same reasoning, different developing

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<sup>37</sup> EC, *Different Needs, Different Responsibilities: What is the EU Asking from Developing Countries?*, available at: <ec.europa.eu/comm/trade/issues/global/development/pr141205\_en.htm>, accessed 26 March, 2008.

<sup>38</sup> *Supra* note 37.

<sup>39</sup> See WTO Panel Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO doc., WT/DS246/R (1 Dec. 2003), para. 7.161.

<sup>40</sup> The text of Paragraph 2(a):2. The provisions of paragraph 1 apply to the following: (a) Preferential tariff treatment accorded by developed country Members to products originating in developing countries in accordance with the Generalized System of Preferences.

<sup>41</sup> WTO Appellate Body Report, *European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO doc. WT/DS246/AB/R (7 April 2004).



countries may be given different SDT according to their needs.

This "similarly situated" approach gives some legal support to the voice that proposes to classify developing countries into several categories. In fact, the classification method has been used in the SCM Agreement. All developing countries are classified into four categories. The first category is the least developed countries. The second category is the twenty countries listed in Annex 7 whose GNP per capita is less than USD1000. The third category is those countries "in the process of transformation from centrally-planned into a market, free enterprise economy".<sup>42</sup> The fourth category is the other developing country Members. Each category gets different treatments and different transitional periods.

The World Bank has long used classification as a way to decide its loan policy. The World Bank country classifications are set each year on 1 July. In the current version (1 July 2007-30 June 2008), 185 countries are classified into four categories according to its GNI per capita in 2006. The low-income category are those with USD 905 per capita; the lower middle income category covers those with USD 906-USD 3,595; the upper middle income category includes those with USD 3,596-USD 11,115; countries with GNI per capita higher than USD 11,116 are high income countries.<sup>43</sup>

The WTO does not yet have a classification scheme such as that of the World Bank. In the Doha Development Round, some classification proposals have been put forward. In a proposal for a new approach to SDT in the agricultural negotiations by the International Food and Agricultural Trade Policy Council (the IPC proposal),<sup>44</sup> developing country Members are to be divided into three categories: the Least Developed Countries (LDCs), comprising of the countries with per capita incomes below USD 900, weak human resources and vulnerable economies;<sup>45</sup> the Lower Middle Income Developing Countries (LMIDCs), including countries with GNI per capita between USD 901 and USD 3035; and the Upper Middle Income Developing Countries (UMIDCs), including those countries with GNI per capita between USD 3035 and USD 9385.<sup>46</sup> According to

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<sup>42</sup> See the SCM Agreement, art. 29.

<sup>43</sup> See the Data and Research section data, World Bank, available at: <[www.worldbank.com](http://www.worldbank.com)> for the updated version of classifications.

<sup>44</sup> International Food and Agricultural Trade Policy Council, *An IPC Position Paper, A New Approach to Special and Differential Treatment* (15 September 2004).

<sup>45</sup> In the IPC proposal, the LDCs defined include more countries than those under the UN definition of LDCs.

<sup>46</sup> IPC proposed that the eligibility could be based on a country's average level of per capita GDP over a moving-three year period to avoid having countries move on and off the list from year to year because of fluctuations in GDP. The GDP here seems a little confusing as when IPC classifies the developing countries, the concept of "gross national income" is used. The proposal also compares itself with UN LDCs definition and World Bank classification, which also use "gross national income" (GNI) rather than GDP.

the IPC proposal, LDCs do not need to implement WTO tariff and subsidy reduction commitments. Countries that declare themselves as developing countries but no longer meet the new criteria should be phased out over several years. IPC also proposed that "countries should also be able to petition for classification into the next lower income category if their per capita income does not reflect their unique vulnerabilities."<sup>47</sup> The evidence of such vulnerability can be the proportion of population undernourished according to FAO, or if the country is a single commodity exporter.

The outstanding characteristics of the IPC proposal is that it puts the number of GNI per capita as the most important criterion in classifying developing countries. If the GNI per capita of a country falls into a class, it will *prima facie* be treated as a country of that class, unless the country petitions to be classified into the next lower income category with supporting evidence of its vulnerability.

Both the SCM agreement and the IPC proposal's classification schemes only concern certain areas of the WTO negotiations. It seems that the EU's position is for an overall classification of developing country Members, applying to all the areas of WTO negotiations.<sup>48</sup> Although this classification is only used to show that the EU has different offerings and requirements for different developing countries in the negotiations, it may also be extended to a method of classification for all WTO negotiations. In addition to the least developed countries (LDCs), the EU named two categories of developing country Members. One is "small and vulnerable economies"; the other is "advanced developing countries". The EU proposed to apply differentiated SDT to different categories of developing country Members, but the criteria of the classification are neither clear nor well founded. As the EU's method of classification essentially puts the size of economy as a very important factor, the large developing country Members, such as India, China and Brazil, will definitely oppose to it if this method is to be used more than a negotiation strategy of the EU and as an official method of classification in the WTO.

In three of the four classification schemes introduced above, World Bank scheme, IPC proposal and EU proposal, countries are classified into four groups and developing countries are classified into three. In the WTO SCM Agreement, there is an extra category, namely transitional economies. If the issue of transitional economies is just a temporary one, a proposal classifying developing country Members into three categories would seem to get the strongest support. However, an excessively fine classification scheme will make the MFN principle face even more challenges.

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<sup>47</sup> *Supra* note 44, p. 3.

<sup>48</sup> *Supra* note 37.

#### D. Self-Designation by SDT Grantees

Self-designation is the current method of identifying "developing countries" in the WTO. "Members announce for themselves whether they are 'developed' or 'developing' countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries."<sup>49</sup> According to this explanation of the WTO, it seems that Members can declare themselves as "developing countries," and if some other Members want to challenge the claim, the onus of proof is on the Members who challenge the claim.

Self-designation can be restricted in various ways. For instance, the status of the least developed countries cannot be self-designated. In the SCM agreement, a WTO member may designate itself as a developing country Member, but cannot elect to have the treatment of the least developed country Members or the twenty Members listed in the Annex VII.

In some cases, the self-designation of developing country Member's status may be restricted by bilateral or multilateral agreement. On the bilateral level, a Member may declare non-application to a new Member according to Article XXXV of GATT 1994.<sup>50</sup> The Accession Protocol or the Accession Working Party's report of a new Member may also restrict the SDT treatment. An example of that is China's accession into the WTO. The Working Party's report states in relevant part:

Some members of the Working Party indicated that because of the significant size, rapid growth and transitional nature of Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members. Each agreement and China's situation should be carefully considered and specially addressed...<sup>51</sup>

According to this pragmatic approach, China's treatments under the WTO Agreements vary from the same SDT treatment applicable some other developing country Members, to some very special conditions that are even stricter than that of developed countries. The eight-year transitional period treatment granted to other developing countries under the SCM agreement was not granted to China although the eight-year period had not expired when China acceded to the WTO. According to the special safeguard mechanism provided in its accession protocol,

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<sup>49</sup> *Supra* note 3.

<sup>50</sup> See GATT 1994, Article XXXV, *Non-application of the Agreement between Particular Contracting Parties*.

<sup>51</sup> WTO, *Report on the Working Party on the Accession of China*, WTO doc. WT/ACC/CHN/49 (1 October 2001), para 9.

the quota restrictions on Chinese exports to US and EU were not to be eliminated until the end of 2007, although they should have expired according to *the Agreement on the Textiles and Clothing*.<sup>52</sup> So a general recognition of the developing country Member status does not mean the country can get all the SDT.

Theoretically speaking, if two parties dispute over the status of developing country of one Member, it may be solved by arbitrators, panels or the Appellate Body under the WTO's dispute settlement mechanism. However, the WTO dispute settlement body (DSB) has been very cautious about making a judgment on the status of developing country Member. In the *US Safeguard Measures on Steel* case, China made a claim for developing country Member status and complained that it should have received the SDT from US according to Article 9.1 of *the Agreement on Safeguards*. China argued that: "...self-designation should apply and entitle that Member to benefit of the WTO special and differential treatment provisions available for developing countries as long as this right is not challenged specifically by another Member on the basis of an adequate and reasoned explanation."<sup>53</sup> The United States disagreed and cited the "pragmatic approach" argument from the report of the Working Party on China's Accession to WTO. Having already found that the US safeguard measures were not consistent with its WTO obligations, the Panel exercised judicial economy and did not make a judgment on this issue.

Even if the arbitrator or the Panel does not disagree with the self-designation of a developing country Member, the Member may have more burden of proof to meet the requirement of receiving SDT than just to designate itself as a developing country Member. In *Chile Taxes on Alcoholic Beverages* case's arbitration procedure under Article 21.3(c) of *the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"),<sup>54</sup> Chile referred to Article 21.2 of the DSU which provides: "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." Chile submitted that account must be taken of the specific interests of Chile as a developing country Member, so it asked for a longer period of time to implement the rulings of the

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<sup>52</sup> According to a 1997 calculation, if textile and clothing trade were allowed to grow under some quota restriction fast only enough to ensure that quota rents do not increase, the global welfare improvement from Uruguay Round and China's accession would be reduced by USD 44 billion per year by 2005. See K. Anderson, B. Dimaranan, T. Hertel and W. Martin, *Economic Growth and Policy Reform in the APEC Region: Trade and Welfare Implications by 2005*, 3 Asia-Pacific Economic Review 1 (1997), 1 *et seq.* A related analysis can also be found in Kym Anderson, *On the Complexities of China's WTO Accession* 20 *The World Economy* 6 (1997), 749 *et seq.*

<sup>53</sup> See WTO Panel Report, *United States: Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO doc. WT/DS252/R (11 July 2003), para. 7.1886.

<sup>54</sup> WTO Article 21.3 (c) Arbitration Report, *Chile Taxes on Alcoholic Beverages*, WTO Doc. WT/DS87/15 (23 May 2000), para. 18.

DSB. However, the arbitrator observed that "Chile has not been very specific or concrete about its particular interests as a developing country member nor about how those interests would actually bear upon the length of 'the reasonable period of time' to enact necessary amendatory legislation."<sup>55</sup>

### E. Selection by SDT Grantors

SDT grantors sometimes decide which countries are developing country Members, and hence, who will get the SDT. The Members who claim themselves as developing country Members may challenge the decision of the SDT grantors and try to have their developing country Member status recognized, but there is little opportunity of success.

Although preferences granted under GSP programs are recognized by the multilateral framework of the WTO through the Enabling Clause, GSP programs themselves are unilateral trade policy tools. Notification is given to the UNCTAD and the WTO, but a specific GSP program does not need to be approved, nor need to be agreed upon by the beneficiaries. Therefore, granting SDT under GSP programs is not an obligation under the WTO, but rather an option under the WTO disciplines because the Enabling Clause permanently exempts it from the MFN principle. The lists of beneficiaries are decided by GSP grantors with full discretion. The designated beneficiaries and those who think they are eligible to be beneficiaries have almost no say at all. The only way to challenge the exclusion decision is to argue that the exclusion violates Article I of GATT 1994's MFN principle and is not justified by the Enabling Clause. This is exactly what India did in the *EC Tariff Preferences* case. If the Panel's decision had gone through, the room for preference grantors to impose any sorts of conditions on the eligibility of beneficiaries would have been narrowed. However, according to the decision of the Appellate Body, the mere fact that the preference is *not* provided to some countries is not a violation of MFN principle. The key is "availability". If there are "objective criteria" in the GSP schemes, and countries fulfilling the criteria are able to receive the preferences, then the preferences are *available* to those countries, and there will be no violation. The decision of the Appellate Body makes it much easier for the GSP grantors to impose conditions on the grant of preferences.

But how about the case when the SDT is an obligation under the WTO agreements? For example, according to Article 9.1 of the *Safeguards Agreement*, "*Safeguards Agreement* shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that

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<sup>55</sup> *Supra* note 54, para. 44.

developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned." If the United States initiates a safeguard procedure, and according to the *de minimis* stipulation in the Article 9.1 it should give SDT to developing country Members, does it have the right to select SDT grantees? This is part of the dispute in *US Safeguard Measures on Steel* case.

In the safeguard measures of the United States, the developing country Member status referred to in Article 9.1 of *the Safeguard Agreement* was decided according to the United States' GSP list of beneficiaries. China argued that this link was arbitrary, as the US GSP scheme included criteria for country eligibility that were unrelated to the level of development. Therefore, the application of criteria in its GSP scheme would exclude some country Members from the SDT, which would otherwise have been treated as developing country Members and have the right of the developing country Member treatment in the Article 9.1.

Another argument China raised is that "it is not possible that a single Member be considered a developing country by, say the United States and not the European Communities and others in respect of the same dispute or the same provision. To proceed otherwise would deprive WTO developing country Members of all legal certainty as far as their rights and obligations under WTO agreements are concerned".<sup>56</sup>

The United States argued that it is possible for a single Member to be considered as a developing country by the United States, and not the European Communities. The United States listed a series of countries, which were treated as developing countries in the safeguard measures of the United States, but not in the safeguard measures of the European Communities. The United States also argued that this difference was because the text of Article 9.1 did not indicate how a Member must comply with its obligations under the Article. "Since it is an obligation relating to application of a safeguard measure, it falls to the Member applying a measure to identify, in the first instance, Members eligible for treatment as developing countries for the purpose of Article 9.1."<sup>57</sup>

Both China and the United States have their points. From China's point, Article 9.1 is about the right of developing country Members and the obligation of the countries that apply safeguard measures. If it is up to the Member that applies safeguard measures to identify who are developing country Members, the right of the developing country Members will be very uncertain. It is also very possible that the Member that applies safeguard measures will circumvent Article 9.1 by selecting eligible developing countries discretely by selecting countries with less than 3 per cent import share, but which collectively account for more than 9 per

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<sup>56</sup> See WTO Panel Report, *United States: Definitive Safeguard Measures on Imports of Certain Steel Products*, para. 7.1863.

<sup>57</sup> *Supra* note 56, para. 7.1864.

cent of total imports of the product concerned. Therefore, China believed that it is "in contradiction with the need for a multilateral approach of the 'special and differential treatment' provisions within the WTO."<sup>58</sup>

On the other hand, the United States' argument also has a point. It is true that the text of Article 9.1 does not indicate how a Member should comply with its obligations under the Article. The fact is that no WTO agreement includes provisions on how to identify developing country Members precisely.<sup>59</sup> Therefore, the implication is that as long as a measure of a Member is applied, no matter that it is a safeguard measure, an antidumping measure or a countervailing measure, this Member will always have discretion, in the first instance, to identify who are the developing countries which can be granted SDT in the application of the measure. The obligation has turned into a right. It is almost impossible for some developing countries, except for the least developed countries, to argue that a Member fails to grant SDT to fulfill its WTO obligations. Therefore, according to the WTO law, the United States' argument is correct. However, it is a loophole of the WTO law big enough that many countries will find it difficult to resist the temptation of taking advantage of it.

The self-designation mechanism illustrated on the WTO website is almost a myth. It is not only subject to many restrictions as we discussed in section III.D, but also difficult to implement in practice. It always ends up letting the obligatory party decide how much obligation it needs to meet, leaving most developing countries in complete uncertainty. Therefore, the WTO Members should design a method with legal binding effect to identify the developing country Members who are eligible to receive SDT. In order to fulfill that objective, it will be necessary to look at some possible quantitative criteria, which can be used in the identification of developing country Member.

#### **IV. CRITERIA FOR IDENTIFYING DEVELOPING COUNTRY MEMBERS**

Using objective criteria to identify developing country Members is not impossible. The experience of the review mechanism for identifying LDCs implemented by Committee for Development Policy (CDP) under the mandate of UN Economic and Social Council (ECOSOC) may be useful in the identification of developing country Members in the WTO. To design commonly acceptable objective criteria, especially numerical thresholds, is difficult, but it is necessary for any mandatory SDT to be operational. This section discusses some criteria that may be used in the identification of developing country Members.

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<sup>58</sup> *Supra* note 56, para. 7.1863.

<sup>59</sup> Although the SCM Agreement gives a clear scope of the least developed countries and twenty developing countries in its Annex VII, the scope of the other developing country Members is not clear.

## **A. National Income**

Probably nothing is a better measurement of the degree of development than the money value people can produce or can earn every year. National income indicators are normally calculated according to the United Nation's System of National Accounts (SNA). The latest version of SNA is that of 1993, with a series of update afterwards. The most commonly used national income indicators are Gross Domestic Production (GDP) and Gross National Income (GNI).<sup>60</sup>

In identifying developing countries, GNI (previously GNP) per capita has often been used. In the early case of Ceylon's invocation of Article XVIII of the GATT, the GNP per capita data were used by the Panel to show Ceylon's low degree of development.<sup>61</sup> In the World Bank classification and UN's LDCs definition, GNI per capita is also used. It seems that the IPC proposal has also used GNI per capita rather than GDP per capita although its author sometimes mixes up the two concepts. GNI per capita is better than GDP per capita in the identification of developing countries because GNI per capita is a better measure of wealth. Normally a country with a high GDP per capita will also have a high GNI per capita, but sometimes the difference can be significant. A typical example is Luxembourg, which has a higher GDP per capita than GNI per capita, as more than 90,000 people working in Luxembourg commuting everyday across the border from neighboring countries contribute to its GDP but not to its GNI by the same amount, as they are not residents of Luxembourg.

GNI and GDP calculated according to SNA 1993 are measured in market price and compared between countries using market or official foreign exchange rates. People may argue that it is more proper to use the Purchasing Power Parity (PPP) exchange rate to convert national GNI or GDP if one wants to accurately measure the degree of development. This argument is correct in theory, but in practice, PPP exchange rate itself is very difficult to measure. IMF, World Bank, US Central Intelligence Agency (CIA) World Factbook and the OECD Economic Outlook all publish GDP per capita data measured by the PPP exchange rate for most countries, but the results from different sources for the same country tend to differ, sometimes substantially.

Although GNI or GDP per capita converted by market exchange rates and those converted by PPP exchange rates have different values, the ranking of

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<sup>60</sup> GDP is a measure of the total value of production of all residents producing units of a country in a specified period. The production activities measured by GDP are those within the territory of the country, and hence it is a measure of the size of economy. GNI is a measure of total income earned by residents of an economy irrespective of whether the economic activities are carried on within the territory or not, hence it is a measure of economic welfare of residents. Gross National Production (GNP) is identical to GNI, but GNP was used widely before SNA 1993, and GNI is the contemporary term.

<sup>61</sup> See Section III.A.



countries by either measure should, in theory, give us the same result. The empirical evidence shows that the GNI converted by the market exchange rate tends to be lower than that converted by the PPP exchange rate for poor countries, but higher for rich countries. Therefore, the GNI per capita converted by market exchange rates tend to show a higher degree of income dispersion than the GNI per capita converted by PPP exchange rates. However, the ranking of countries will remain the same. International economists term this phenomenon as the Balassa-Samuelson effect.<sup>62</sup> Hence, for the purpose of identifying developing countries, it is not necessary to use GNI per capital converted by PPP. Nominal GNI per capita will do.

Using GNI per capita as a measure to define the numerical thresholds for country classification may not be absolutely accurate, but it is the most accurate and proper measure we currently have. It is simple, straightforward and relatively precise. GNI per capita is not an overall measure of development, but it captures the most important aspect of development. In the IPC proposal, GNI per capita is used as the foremost criterion for country classification, which we think makes sense.

## **B. Social Aspect of Development**

One way to answer the question: "Who are the developing countries?" may be to look at another one: "What is development?" Amartya Sen, in his book *Development as Freedom*, defines development as freedom. Especially it is freedom to engage in economic exchange as well as political freedom and social opportunities.<sup>63</sup> For the WTO, an international organization focusing on trade, Sen's definition of development seems too broad. But GNI per capita alone cannot fully reflect the degree of development, even if only economic development is to be considered.

One may also consider human life quality and the capability of building up human assets. In the UN criteria of the least developed countries, the Human Assets Index (HAI) is constructed to reflect this aspect. The components of HAI include the calorie intake by the average person as a percentage of nutritional requirements, child mortality (under age five), secondary school enrollment, and adult literacy. In the UN's human development reports, the widely recognized Human Development Index (HDI) also includes information such as life expectancy at birth, adult literacy rate, combined gross enrollment ratio for primary, secondary and tertiary schools, and GDP per capita.<sup>64</sup>

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<sup>62</sup> *Supra* note 20, p. 409.

<sup>63</sup> A. Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999), p. 1 *et seq.*

<sup>64</sup> See UNDP, *Human Development Report 2005*, available at: <hdr.undp.org>, accessed 1

The second aspect we may consider is the economic structure. In the UN criteria of the least developed countries, the Economic Vulnerability Index (EVI) is constructed to reflect this aspect. The indicators entering the formulation of EVI include: share of manufacturing and modern services in GDP, merchandise export concentration index, agricultural production instability index, and goods and services export instability index. UNIDO publishes the competitive industrial performance (CIP) index, which can reflect the degree of industrialization and industrial competitiveness. The components in the CIP index are: manufacturing value added (MVA) per capita, manufactured exports per capita, industrialization intensity, and export quality.<sup>65</sup>

The third aspect is the sustainability of development. The Friends of Earth and New Economics Foundation have compiled "the Happy Planet Index", which is designed to reflect human well-being and environmental impact.<sup>66</sup> In the Happy Planet Index's ranking of countries, rich industrialized countries are systematically ranked lower than many poor courtiers, just because they consume more natural resources and thus have a worse impact on the environment. This index might be a good measure of sustainability of development, but it is not quite a relevant measure for the degree of development itself.

There are also many other indicators and indices compiled by international organizations and NGOs. Besides HDI, the UN also publishes such indices as the Gender Related Development Index (GDI), the Gender Empowerment Measure (GEM), the Human Poverty Index (HPI), the Technological Achievement Index (TAI) and many others. Specifically, UNCTAD compiles the Trade and Development Index (TDI) to reflect the performance of countries in trade and development.

The compilation of these indices will be a complex process. Each of them reflects one or more aspects of development. In the calculation of indices, some other indices may be included as a component. Sometimes, the choice of weights of different components can change the result by a great degree. Therefore, these indices may be useful for their own purposes, but for the identification of developing country Members of the WTO, it seems that they are not all trade-related. In the IPC proposal, the prevalence of undernourishment and the status of single commodity exporting countries, both published by FAO, are used in the classification of countries, but the role of these two indicators is subsidiary to the GNI per capita. Countries are able to petition for classification into the next

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February, 2008. A technical note of how to calculate HDI is provided in *id.* at p. 340.

<sup>65</sup> See UNIDO, *Industrial Development Report 2002/2003*, available at: <[www.unido.org/doc/24397](http://www.unido.org/doc/24397)>, accessed 1 February 2008.

<sup>66</sup> New Economics Foundation, *The Happy Planet Index: An Index of Human Well-Being and Environmental Impact*, available at: <[www.neweconomics.org/gen/z\\_sys\\_PublicationDetail.aspx?PID=225](http://www.neweconomics.org/gen/z_sys_PublicationDetail.aspx?PID=225)>, accessed 1 February 2008.

lower income category if these two indicators show that their per capita income does not reflect its economic vulnerability.

### C. Country Size

In the UN definition of least developed countries, countries with a population of more than 75 millions are excluded. Should the factor of country size be included as a criterion of defining developing country Members? There is no empirical evidence to show that country size has any correlation with the degree of development. However, country size does have a negative correlation with trade openness.<sup>67</sup> Economists have found that small countries cannot afford to be closed and have more incentives to be open. Large countries can rely more on their domestic labor division and goods exchange. At the same time, using a tariff or a quota can give large countries the possible benefit of increasing their terms of trade.<sup>68</sup>

However, these economic findings have contradictory implications with regard to the effect of SDT. An argument is raised that small countries should not be given SDT to lower their WTO obligation of opening trade, because such exemptions will do no good for their economic development and social welfare. Another argument is also possible that large countries should be more disciplined as they have more incentives to use SDT to protect domestic markets, which will do harm with regard to the benefit of other countries.

If a small developing country needs SDT, it should be given more of type iv (technical assistance) SDT, rather than type iii (flexibility in commitment) SDT. This is because its vulnerability lies in its lack of resources to manage the full panoply of WTO rules, but a high level of openness of the economy is likely to be good for it in the end. It seems that large developing countries have higher adjustment costs when they open trade, hence they are the ones that should be given a longer transitional time. When a country is large, it may enjoy a benefit of the economies of scale in supplying public goods including participating in WTO activities, but it may also have a higher cost of managing cultural and ethnic heterogeneity.<sup>69</sup>

Large developing countries' capability of influencing their terms of trade may also increase their adjustment costs of opening trade. Rodrik has found that terms of trade risk is a very important factor to influence the relationship between

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<sup>67</sup> A. Alesina and R. Wacziarg, *Openness, Country Size and Government*, 69 *Journal of Public Economics* (1998), 305-321.

<sup>68</sup> *Supra* note 20, p. 230.

<sup>69</sup> *Supra* note 66.

openness and governmental consumption.<sup>70</sup> When a country opens trade, governmental consumption<sup>71</sup> will increase as "more open economies have greater exposure to the risks emanating from turbulence in world markets".<sup>72</sup> This is especially true when a country faces higher external risk. Rodrik uses two measures for external risk in his empirical study, one is the terms of trade effect and the other is export concentration. Rodrik has found that the terms of trade risk is much more important than export concentration in influencing the relationship between openness and governmental consumption.<sup>73</sup>

Another problem of small economies is that sometimes they are very remote from large markets. Geographic remoteness may not be a serious issue for big economies, but it can be for small economies. Recognizing this problem, the UN uses an unofficial list of Small Island Developing States (SIDS) to analyze the difficulties faced by these countries.<sup>74</sup> How to use SDT to address such geographical difficulties has not been fully studied.

When small countries or small economies are considered, different measures are often used: GDP is one, and population is another. However, it does not make much economic sense to use population as a criterion to identify a country's degree of development or to judge their need of SDT. In the UN's definition of the least developed countries, countries with a population higher than 75 millions are excluded. Why not use the total GNI or GDP as a measure of the size of the economy? A country with a large group of poor population may have more domestic difficulties, and it may be even more difficult for the country than those with a small population, to "take off" economically. As Hoekman has pointed out:<sup>75</sup>

From a poverty reduction point of view—and in light of the Millennium Development Goals—a good case can be made that preferences should focus on the poor, wherever they are geographically located, and not on a limited set of

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<sup>70</sup> D. Rodrik, *Why Do More Open Economies Have Bigger Governments?*, 106 *Journal of Political Economy* 5 (1998), 997-1032.

<sup>71</sup> This is also true for tax/GDP ratios, or governmental employment as a ratio of total labor force.

<sup>72</sup> *Supra* note 69.

<sup>73</sup> *Ibid.*

<sup>74</sup> The list is available at: <<http://www.un.org/special-rep/ohrlls/sid/list.htm>>, accessed 1 February 2008.

<sup>75</sup> B. Hoekman, C. Michalopoulos and A. Winters, *More Favorable and Differential Treatment of Developing Countries: toward a New Approach in the World Trade Organization*, The World Bank Policy Research Working Paper Series no. 3107 (Washington, 2003), p. 6. This paper suggests a new approach to make SDT more effective which puts more emphasis on non-discriminatory liberalization of trade in goods and services in which developing countries have an export interest, and consideration of mechanisms to allow for greater differentiation across WTO members in determining the reach of WTO disciplines. However, this new approach does not dispense with the necessity of identifying developing country Members in the WTO.

countries. In absolute terms, most poor people live in countries that are not LDCs—especially China and India. Limiting preferences to LDCs or concentrating on a specific geographic region such as sub-Saharan Africa—while appropriate in light of limited institutional capacity and infrastructure weaknesses in these countries—ignores the majority of the poor in the world today."

Using country size as a criterion to classify or identify developing country Members is not well founded; this is especially true if population is used as a measure of country size. The supporters for using country size as a criterion to classify or identify developing country With respect to SDT, Members mainly worry about export competitiveness and market influence of large exporters. This worry can be dealt with by introducing some sector graduate mechanism as below.

#### **D. Sector Competitiveness**

A criterion can be devised to enable a developing country to "graduate from" SDT in limited sectors but to remain as a developing country Member in other sectors. In SCM Agreement, "export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years."<sup>76</sup>

While such a sector graduate mechanism is necessary to make sure SDT is granted to countries that mostly need it, two problems of such a provision may need to be addressed. The first one is that a developing country's large share in the world market for a single product may be its symptom as a single commodity exporting country. As subsidy for this product may need to be discouraged, some other kinds of SDT such as technical assistance may be needed for its transition.

Another problem is that a simple share of export relative to world trade is not a good measurement of export competitiveness. A 3.25 per cent share may have a totally different meaning for a big economy such as Brazil than it does for a small economy such as Cameroon. Economists normally use "revealed comparative advantage" (RCA) to measure export competitiveness. This is a measure created by Balassa.<sup>77</sup> It is defined as a country's share of world exports of a good divided by its share of total world exports. So the difference between RCA and a simple export share of a good is that RCA is adjusted by a country's share of total world exports.

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<sup>76</sup> See the SCM Agreement, art. 27.6.

<sup>77</sup> B. Balassa, *Trade Liberalization and Revealed Comparative Advantage*, 33 Manchester School (1965), 99-123.

## **E. Identification and Classification Criteria**

Many indicators are possible candidates when one chooses criteria to identify and classify developing country Members. One may construct an overall composite index just like HDI to combine all possible indicators together. However, it is not easy to find a commonly accepted methodology to conduct such construction. The choice of weights for various components of the composite index may be arbitrary. Even the widely known HDI faces considerable criticism. For example, Srinivasan condemns the HDI as being "conceptually weak and empirically unsound".<sup>78</sup>

In the IPC proposal, the national income indicator, GNI per capita in its case, is used as the foremost criterion for country classification. Although national income indicators do not directly include all the information on social aspects of development, they tend to have a high correlation with social measures of development: a high-income country tends to have a high degree of social development. Ram showed a very high Spearman rank correlation of 0.93 between GDP per capita measured by PPP exchange rates and HDI, and additionally showed that HDI has one-seventh to one-eighth the intercountry inequality measured by GDP per capita. Hence, national income indicators can capture most information on development, while intercountry inequality in HDI "might appear so small as to be virtually negligible".<sup>79</sup>

While national income indicators may be used as the foremost criterion, other indicators may reflect a country's specific need of SDT, and those indicators should be used as subsidiaries to national income indicators. The choice of such indicators should be based on a sound rationale of granting SDT and should reflect the WTO's scope and mandate. Some indicators may well reflect certain aspects of development, but maybe they are not "trade-related" and inclusion of them in country classification may subject the process to a wider debate on how the WTO should extend its scope of rules.

## **V. CONCLUSION**

One of the stumbling blocks of WTO negotiations is the relationship between trade and development. Developing countries argue that the SDT should be "mandatory and legally binding through dispute settlement system of the WTO".<sup>80</sup>

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<sup>78</sup> T.N. Srinivasan, *Human Development: A New Paradigm or Reinvention of the Wheel?*, (1994) 84 *American Economic Review* 2 (1994), 238-243.

<sup>79</sup> R. Ram, *International Inequalities in Human Development and Real Income*, 38 *Economics Letters* (1992), 354.

<sup>80</sup> *Proposal for a Framework Agreement on Special and Differential Treatment*, WTO doc.

To make SDT provisions legally binding rather than just "best endeavor" provisions, a clear, predictable definition of "developing country Members" should be made.

Although some relatively advanced developing country Members may not be happy with it, the classification of developing countries into several categories is necessary. Classification is compatible with the rationale of SDT. If relatively underdeveloped countries should be given more favorable treatment than developed countries, the most underdeveloped countries should be given the most favorable treatment. But too fine a classification may be infeasible and will destroy the non-discriminatory principle, which is more or less kept with GSP. The application of the SCM Agreement has made a progress in the identification of developing country Members. The IPC proposal for the agricultural negotiations and the EU's position on SDT also justifies the classification of developing countries. However, classification without a precise definition of developing country Members will invite considerable resistance to the classification proposal. Both the SCM method and the EU's method have not set an upper limit of income level for the definition of developing country Members, and developing country Members still rely on the self-designation mechanism. Hence, while the LDC's right to receive SDT becomes certain and predictable under such proposals, many other developing countries still face uncertainty and ambiguity.

The IPC proposal, which is designed for the agricultural negotiations, has many advantages. First, the classification makes SDT more accessible to countries that mostly need it. Second, the possibility of petitioning into the next lower income category provides flexibility. Third, the indicators used are simple and the criteria used are precise and easy to implement.

With modifications, the IPC proposal may be extended to apply to all WTO negotiations. The main points of an extended version of the IPC proposal may include:

- 1) A standing body should be set up, perhaps under the Committee on Trade and Development, to review the status of developing country Members every three years.<sup>81</sup>

- 2) Developing countries should be classified into three categories: Least Developed Countries (LDCs), Lower Middle Income Developing Countries (LMIDCs), and Upper Middle Income Developing Countries (UMIDCs). The

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WT/GC/W/442 (19 September 2001).

<sup>81</sup> Such a standing body may be best set up under the WTO rather than the UN. The reasoning for this is because the purpose of the classification is for trade negotiations and it should be done under the mandate of the WTO. However, such a standing body may cooperate with the Committee for Development Policy (CDP) of UN, which is responsible for defining the LDCs. According to *Marrakesh Agreement Establishing the World Trade Organization* Article III.5, this standing body in the WTO may also cooperate, as appropriate with the IMF and the World Bank.

criteria of classification should be certain and precise, primarily based on GNI per capita. The thresholds of the classification should be updated in the three-year review. The classification will apply to all sectors in the WTO.

3) Petition into the next lower income category is possible. The Member who makes such petition should raise evidence of its unique economic vulnerability based on socio-economic indicators. Such indicators may reflect its low human life quality, imbalance of economic structure, and special geographical disadvantages.

4) When a Member is relocated into a higher income category of developing country Members, or into the developed country Members, a three-year transitional period should be given to mitigate any shocks.

5) Countries may graduate from certain sectors if its sector competitiveness is strong enough.

Some large developing country Members of the WTO such as India, Brazil and China oppose classification of developing country Members and want to stick with the "self-designation" mechanism. However, as we discussed in Section III, this mechanism does not work for the benefit of developing countries including large ones. Developing country Members should negotiate for a precise definition of their status. By agreeing with classification, they can get more support and face less resistance in their endeavor for a precise definition. Without it, even changing more SDT provisions from "best endeavor" provisions to binding ones will not make much improvement for the benefit of developing country Members.