Significance of "Special and Differential Treatment" in the Free Trade System: From the Perspective of the Theory of Plurality of Norms*

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Abstract

This paper examines the significance of "special and differential treatment" (S&D) in the current and future free trade system from the perspective of the theory of plurality of norms. Firstly, it provides an overview of the theory of plurality of norms, which has been used in international law to cross-sectionally analyse the relationship between developed and developing countries across multiple treaty systems. Based on this theory, it clarifies the components and characteristics of S&D in the World Trade Organization (WTO) distinct from the provisions related to developing countries in the General Agreement on Tarrifs and Trade (GATT).

Next, this paper examines the changes in the circumstances surrounding S&D, which has become prominent since the 2000s. After analysing the criticisms against S&D in recent years, it will consider S&D in the WTO Trade Facilitation Agreement, which is attracting attention as a model for the future. Furthermore, it compares S&D under this agreement with the principle of common but differentiated responsibilities (CBDR) in the Paris Agreement on climate change. It analyses the significance and issues of the "double self-election approach" that is perceived as common to both systems.

Keywords: plurality of norms, special and differential treatment, international law of development, World Trade Organization, development, Trade Facilitation Agreement, double self-election approach

JEL Classification: F13, K33

I. Introduction

The failure of the World Trade Organization (WTO) Doha Round, which was launched in 2001, revealed the transformation of the traditional multilateral free trade regime. The background to this transformation is the remarkable change in the composition of the developing country group. Since the 2000s, the developing countries known as BRICS (Brazil, Russia,

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India, China, and South Africa) have shown significant economic growth; as of 2022, China ranked second in the world in nominal Gross Domestic Product (GDP) after the United States, while India ranked fifth after the United States, China, Japan, and Germany. According to the Organisation for Economic Co-operation and Development (OECD),[1] India ranks first and China second in terms of real GDP growth in 2023 and 2024,[2] indicating a drastic change in the composition of the developing country group.

The changes in the positioning of countries in the international economy naturally affect the international legal norms that have governed North-South relations. In particular, the significance of "special and differential treatment"(S&D) in the free trade regime is now attracting renewed attention. Even after the transition to the WTO, S&D has been regarded as one of the essential pillars in understanding the relationship between developed and developing countries. However, since the 2000s, against the background of changes in the composition of the developing country group, developed countries, especially the U.S., have begun to question S&D. In the past few years, the U.S. and other countries have been questioning S&D. Especially in the past few years, the necessity of S&D reform has been openly advocated by the U.S. and other countries, to which developing countries have shown opposition to, and the debate over S&D has become more active.

As the multilateral free trade regime centred on the WTO has come to a standstill, with the failure of the Doha Round and the paralysis of the WTO Appellate Body, what suggestions does the current discussion on S&D provide for the design of the future free trade regime? Has S&D lost its significance in regime transformation after the WTO? Since S&D is a legal expression of North-South relations in the existing free trade regime, a reexamination of the significance of S&D will reveal some aspects of the future free trade regime that is currently emerging.

North-South relations are by no means self-contained in the free trade regime but are an issue that cuts across multiple treaty regimes. Therefore, in reassessing the significance of S&D in the free trade regime, diachronic and synchronic perspectives with other treaty regimes are necessary. However, most current discussions are limited to S&D in the free trade regime, and it is required to take an objective and bird's-eye view to analyse the current situation and design future institutions.

Therefore, this paper relies on the theory of plurality of norms (pluralité des normes), which has comprehensively analysed the different treatments established and applied to the relationship between developed and developing countries in international law. Since the 1960s, this theory has analysed S&D in the General Agreement on Tarrifs and Trade (GATT)

[1] OECD, "Gross domestic product (GDP) (indicator)," < https://data.oecd.org/gdp/gross-domestic-product-gdp.htm#indicator-chart> accessed August 3, 2023.

[2] OECD (2023).

and the WTO and multiple treaty systems such as international environmental law, international labour law, or international law of the sea across the board, mainly in French-speaking countries. By analysing the current discussions and trends surrounding S&D from the viewpoint of the theory of plurality of norms, it will be possible to grasp the significance of S&D in the current and future free trade regime from a broader perspective.

This paper will examine the issues in the following order. First, after confirming the formation and evolution of the theory of plurality of norms in international law, the component constituting the plurality of norms will be examined (II). Then, the characteristics of S&D in the WTO will be clarified from the viewpoint of each component of the plurality of norms (III). Furthermore, S&D in the Trade Facilitation Agreement (TFA) is taken up and analysed as a case that shows the transformation of the plurality of norms in a free trade regime. Finally, by comparing S&D in the TFA with other treaty regimes, we consider the future of S&D in the free trade regime.

II. The Theory of Plurality of Norms in International Law

II-1. Formation and Development of the Theory of Plurality of Norms[3]

The theory of plurality of norms was formed and developed within the international law of development (droit international du développement). The international law of development was proposed in the 1960s by French-speaking diplomats and international law scholars such as André Philip and Michel Virally,[4] and subsequently advocated by international legal scholars around the world, including Japan.[5] According to Maurice Flory, one of the leading exponents of the international law of development, the law can be seen as a "vigorous rereading of international law"[6] from the perspective of the fight against underdevelopment and the quest for genuine independence of developing countries in international relations. In other words, the international law of development is a legal theory that seeks to correct and overcome the inequalities among nations by seeking one of the factors of inequality within the international legal order. In conjunction with the decolonisation movement in the 1960s and the attempt at establishing the New International Economic Order (NIEO) in the 1970s, the law embarked on a thorough rereading of the existing international legal order.

The international law of development is based on the fundamental principles of sover-

[3] For more information on international law of development and plurality of norms, *see* Kodera (2011) at 74-96; Kodera (2016) at 243-246.

[4] Philip (1965); Virally (1965).

[5] *See, e.g.*, Ago (1980); Ida (1985); Ida (1989); Ida (2015); Takashima (1991); Takashima (1995); Ito (2003); Nishiumi (1992); Nishiumi (2016a); Nishiumi (2016b); Kodera (2011); Kodera (2014); Kodera (2017); Kodera (2021).

[6] Flory (1977) at 31.

eignty, equality, and solidarity, and it rereads the principles on which traditional international law relies on from a development perspective. In particular, the principle of equality characterises the law. While traditional international law has relied on formal equality that discards *de facto* differences among nations, the international law of development emphasises the importance of establishing substantive equality in the international society.[7] In other words, it considers the *de facto* differences between developed and developing countries in the legal sphere. Therefore, it insists on the necessity of compensating and making up for such differences by giving more favourable treatment to developing countries, which are relatively weaker than developed countries.

This idea, which is called compensatory inequality (inégalité componsatrice) in the international law of development,[8] is legally embodied in the duality of norms (dualité des normes). Duality of norms, which is positioned as one of the pillars of international law of development,[9] refers to a legal technique that divides states into developed and developing countries according to their stage of development, establishes and applies a set of norms favourable to developing countries. The duality of norms is analogous to affirmative action or positive action in domestic societies. It attempts to achieve a more equitable international society by ensuring that the law accords favourable treatment to historically disadvantaged developing countries.

However, the duality of the norm had the flaw of discarding the diversity within each group of states by bifurcating countries into developed and developing countries. Ignoring differences within developing countries adversely affects more disadvantaged states, called Least-Developed Countries (LDCs). Furthermore, countries are diverse not only in terms of their stage of development but also in terms of geographical attributes, such as coastal and landlocked countries. Therefore, beyond the dichotomy of developed and developing countries, they should be divided into various categories of states, and more favourable treatment should be given to the relatively weaker categories. Thus, the duality of norms is logically extended to the plurality of norms. [10]

II-2. Components of Plurality of Norms

Maki Nishiumi identifies three components of the plurality of norms: institutional objectives, multiple categories of states, and a set of norms favouring the weak. [11]

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[7] For details on the relation between formal and substantive equality in international law, *see* Kodera (2009a).

[8] *See, e.g.*, Nishiumi (2016a).

[9] Feuer and Cassan (1991) at 34.

[10] Nishiumi (1992) at 5.

[11] Nishiumi (1992) at 6-7; Nishiumi (1995) at 111.

Institutional objectives are the goals to be achieved by introducing the plurality of norms in a multilateral treaty regime. These objectives usually coincide with the ultimate objective of international law of development, such as the economic and social development of developing countries and the narrowing of the economic gap between developed and developing countries.[12] By expanding its scope, the plurality of norms has begun incorporating human rights and environmental protection into its institutional objectives.

Multiple categories of states are the various types of states established according to the different attributes of states. Unlike the duality of norms, subcategories such as LDCs are established within categories of states in the plurality of norms. Furthermore, in addition to the stage of development, geographical and other attributes are also used as criteria for categorisation, and various categories are established,[13] such as land-locked developed countries,[14] land-locked developing countries,[15] geographically disadvantaged developed countries,[16] and geographically disadvantaged developing countries.[17]

A set of norms favouring the weak is a group of favourable norms established and applied to a relatively weaker state category. Unlike the duality of norms, several different groups of norms are established and applied according to the number of state categories in the plurality of norms. These norms favour the weak through various forms, such as granting rights and exemptions from obligations.[18]

II-3. Identification of Developing Countries

The basis for the plurality of norms is the component of multiple categories of states. In terms of this component, the question is how to divide states into each state category. In particular, the issue of "identification" of developing countries, i.e., which countries should be regarded as developing countries, has been discussed.

Although the method of identification of developing countries varies by treaty and international organisation, the international law of development has examined a cross-section of practices in each field and discussed the following three distinctions.[19]

The first is the abstract criteria approach. In this approach, certain criteria are set in advance, and countries that meet the criteria are automatically identified as developing coun-

[12] Nishiumi (1992) at 7; Nishiumi (1995) at 110.

[13] For details on the categorisation within the group of developing countries, *see* Takashima (1995) at 70-93; Cassan, Mercure and Bekhechi (2019) at 65-91.

[14] *See, e.g.*, Article 69.4 of the United Nations Convention on the Law of the Sea (hereinafter referred to as the UNCLOS).

[15] *See, e.g.*, Article 69.3 of the UNCLOS.

[16] *See, e.g.*, Article 70.5 of the UNCLOS.

[17] *See, e.g.*, Article 70.4 of the UNCLOS.

[18] Nishiumi (2016c).

[19] Takashima (1995) at 60-65; Verdirame (1996) at 72-174; Cassan, Mercure and Bekhechi (2019) at 54-63.

tries. The World Bank is a representative example of an international development organisation that uses this method. It currently classifies countries with a gross national income (GNI) per capita of more than $13,846 in 2022 as high-income economies, countries between $4,466 and $13,845 as upper-middle income economies, countries between $1,136 and $4,465 as lower-middle income economies, and countries with $1,135 or less as low-income economies.[20] The lower-middle income economies and low-income economies are generally referred to as developing countries.

The second is the list approach. This approach identifies and lists developing countries that qualify for favourable treatment. It is divided into a positive list approach and a negative list approach. The positive list approach is to list the developing countries that will be the beneficiaries. For example, the International Development Association (IDA) distinguishes between Part I members, which are developed countries, and Part II members, which are developing countries, and the latter are eligible for IDA loans.[21] The negative list approach is a method of identifying and listing countries that will not be beneficiaries. For example, the United Nations Conference on Trade and Development (UNCTAD) defines developing economies as Africa, Latin America, the Caribbean, Asia (excluding Israel, Japan, and Korea), and Oceania (excluding Australia and New Zealand). [22]

Third is the self-election approach. In this approach, a country itself claims the status of a developing country and, as a result, qualifies as a beneficiary of favourable treatment. It was proposed in the context of the establishment of the Generalized System of Preferences (GSP).[23] The principle of self-election for GSP beneficiaries was initially proposed by the OECD's Preferential Sub-Group and subsequently confirmed in the agreed conclusions adopted by UNCTAD's Trade and Development Council in 1970.[24] However, even with the self-election approach, the discretion of preferential treatment donors is not entirely eliminated. In fact, since the GATT era, developed countries granting GSP have decided on developing countries according to the criteria they set themselves, and the hollowing out and possible deformation of self-election have been pointed out.[25]

This section reviews the theory of plurality of norms. Based on this theory, the next section will examine the characteristics and significance of S&D in the WTO and its transforma-

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[20] World Bank, "World Bank Country and Lending Groups" < https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed July 19, 2023.

[21] As of January 30, 2023, there were 75 Member States of Part II. See International Development Association, "Borrowing Countries," <https://ida.worldbank.org/en/about/borrowing-countries> accessed July 19, 2023.

[22] UNCTAD, "Classifications," <https://unctadstat.unctad.org/en/classifications.html> accessed July 19, 2023. Other examples where the negative list approach has been used include the identification of countries eligible for special preferential treatment in the cost-sharing of the UN Emergency Force in Suez (UNEF-I) and the UN Forces in Congo (ONUC). See Takashima (1995) at 62.

[23] For details, see Takashima (1995) at 63-65; Cassan, Mercure and Bekhechi (2019) at 60-63.

[24] UNCTAD, Trade and Development Board, Decision 75 (S-IV) (October 13, 1970) (TD/B/332).

[25] Takashima (1995) at 64-65.

tion in recent years.

III. Plurality of Norms in the WTO

III-1. S&D in the WTO agreements

Special provisions for developing countries also existed in the GATT, such as Article XVIII on protecting infant industries, Part IV that stipulates non-reciprocity, or the enabling clause that made the GSP permanent,[26] but they were limited in number.[27] In the WTO, however, those special provisions are inserted in almost all WTO agreements to provide S&D for developing countries.

The S&D provisions in WTO agreements are generally typified by the following six categories: (i) provisions aimed at increasing 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 use of policy instruments, (iv) transitional time periods, (v) technical assistance, and (vi) provisions relating to least-developed country Members.[28] According to the 2023 report by the Director-General of the WTO,[29] the WTO Agreements contain 157 S&D provisions, as shown in Table 1.

[26] GATT, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903), adopted November 28, 1979.

[27] For more information on the preferential treatment for developing countries in the GATT, *see, e.g.*, Verdirame (1996); Hudec (2011); Hart and Dymond (2003) at 398-404.

[28] WTO, Committee on Trade and Development, "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions", Note by Secretariat, WT/ COMTD/W/77 (October 25, 2020) at 3. For more information on other attempts at the typology of S&D provisions, *see* Hedge and Wouters (2021) at 554-555.

[29] WTO, Committee on Trade and Development, "Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions", Note by Secretariat, WT/COMTD/W/271 (March 16, 2023) at 4.

Table 1: S&D provisions in the WTO Agreements

	(i)	(ii)	(iii)	(iv)	(v)	(vi)	Total by Agreement
1994 GATT	8	13	4				25/25
Understanding on BOP			1		1		2/2
Agriculture	1		9	1		3	14/13
SPS		2		2	2		6/6
TBT	3	10	2	1	9	3	28/25
TRIMs			1	2		1	4/3
Anti-Dumping		1					1/1
Customs Valuation		1	2	4	1		8/8
Import Licensing Procedures		3		1			4/4
SCM		2	10	7			19/16
Safeguard		1	1				2/2
TFA			3	7	7	9	26/10
GATS	3	4	4		2	2	15/13
TRIPS				2	1	3	6/6
DSU		7	1		1	2	11/11
Government Procurement		5	6		1	3	15/12
Total	15	49	44	27	25	26	186/157

Source: WT/COMTD/W/271 at 5-6

Note: There are also S&D provisions in the Agreements that span multiple categories (i) to (vi). The figures to the left of "Total by Agreement" are calculated by duplicating those S&D provisions, while the figures to the right are calculated as one.

Table 1 demonstrates that the most common S&D provisions in the WTO Agreement are (ii)provisions under which WTO Members should safeguard the interests of developing country Members. For example, Article 12.1 of the TBT Agreement falls into this category. It provides that "Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement".

III-2. Identification of Categories of States and Developing Countries in the WTO

In the GATT, it has been permitted to establish sub-categories within developing countries according to their stage of development, for example, there is a special provision on LDCs in the Enabling Clause.[30] In this regard, in the WTO's Article 11.2 of the Agreement Establishing, the WTO stipulates that "the least-developed countries recognised as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities". Thus, even in the WTO, LDCs are identified according to a list published every three years by the Committee on Development Policy, a subsidi-

[30] GATT, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903), adopted November 28, 1979, para. 8.

ary body of the UN Economic and Social Council.[31]

The problem is the identification of other developing countries. Since there is no provision for the definition of developing countries in the WTO Agreements, it has been said that the beneficiary countries of the S&D provisions have been identified based on the self-election approach. However, certain reservations should be made about such an evaluation. It has been pointed out that developing countries and LDCs joining the WTO may be partially restricted from applying the S&D provisions during accession negotiations.[32] Such restrictions can be evaluated as part of the self-election since they are ultimately based on the consent of developing countries seeking WTO accession. However, it should be noted that self-election by developing countries is always under the power relationship between developed and developing countries.

On the other hand, concerning GSP, the beneficiary developing countries have been identified by developed countries, which are preferential treatment donors.[33] Such identification by developed countries using the list approach leads to a deformation of the self-election, and its consistency with the WTO Agreement is highly debatable. For example, in the *EC-Tariff Preferences* case, the Appellate Body held that while allowing different treatment according to the needs of developing countries, distinguishing developing countries with identical needs violated the Enabling Clause which is the basis of GSP.[34] Although the Appellate Body noted that the needs of developing countries must be assessed in light of "objective" criteria,[35] it did not specify the specific criteria or the method of application. However, at the very least, it indicates that concerning GSP, it may be permissible under the Enabling Clause to establish sub-categories into developing countries by their needs.

III-3. Plurality of Norms as Grace Period

It has already been pointed out that the institutional objectives and functions of S&D have changed with the transition from the GATT to the WTO. Some authors argue that the preferential treatment for developing countries in the GATT fulfilled the function of positioning developing countries as exceptions to the GATT's free trade regime, while S&D in the WTO was transformed into a means to allow developing countries a grace period to adapt to

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[31] As of July 20, 2023, there were 46 states identified as LDCs. United Nations, Committee for Development Policy, "List of Least Developed Countries (as of November 24, 2021)," <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf> accessed July 20, 2023.

[32] Rolland(2012) at 84-87.

[33] Islam (2021) at 10.

[34] European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R (April 7, 2004), para. 173. For details on this case, *see, e.g.*, Kodera (2009b).

[35] WT/DS/246/AB/R, para. 163.

the WTO regime.[36]

In fact, the transformation of institutional objectives with the transition from the GATT to the WTO can be confirmed from the wording of S&D provisions in the WTO Agreements. Among the S&D provisions in the WTO Agreements, only temporary deferments or deviations are allowed to developing countries, which are expected to be implemented by developed countries. According to Hedge and Wouter, only 21% of the total S&D provisions impose specific obligations on developed countries, and most S&D provisions, except those for LDCs, allow only temporary relief from the obligations of the WTO Agreements.[37]

Of course, there is room for doubt as to whether the institutional objective of the preferential treatment of developing countries in the GATT was to permanently position developing countries as exceptions to the free trade regime. For example, the Enabling Clause provides that "less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement".[38] Therefore, it is possible to regard the gradual transition to a free trade regime as one of the institutional objectives of the preferential treatment of developing countries in the GATT.

However, what is different from the GATT is that in the WTO that adopted the single undertaking as a principle, developing countries were, in principle, subject to the same obligations as developed countries.[39] In the GATT, developing countries could voluntarily choose their obligation under the GATT Codes. In contrast, no reservation to the WTO Agreements was allowed in principle (Article 16.5 of the Agreement Establishing the WTO), and developing countries were fully integrated into the free trade regime. Under such changes, the institutional objective of S&D in the WTO can be evaluated as a means to grant developing countries a grace period while assuming a free trade regime.

IV. Transformation of Plurality of Norms in Free Trade System

IV-1. Criticism of S&D in the WTO

Since the GATT era, questions have been raised about the significance of preferential

[36] Yoo (1998a); Yoo (1998b); Yoo (2000a); Yoo (2000b); Garcia (2004) at 296-297; Yanai (2007).

[37] Hedge and Wouters (2021). *See also* Kessie (2007).

[38] GATT, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (L/4903), adopted November 28, 1979, para. 7.

[39] Yanai (2007) at 66-71.

treatment for developing countries,[40] and even after the establishment of the WTO, S&D has been the subject of various discussions. On the one hand, developing countries criticised that S&D has not brought the expected results. The 2001 Doha Declaration showed the frustration of developing countries, which stipulates that "all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational".[41] On the other hand, developed countries and some commentators have argued for a fundamental review of S&D on the grounds that S&D does not contribute to the development of developing countries or ignores the current diversity within a group of developing countries.[42]

The debate over S&D has further accelerated since 2019. In February 2019, the United States proposed S&D reform in the WTO as a General Council resolution,[43] which reignited the debate over the significance of S&D in a free trade regime. A particular focus of this debate was identifying developing countries as beneficiaries of S&D. The draft resolution proposed that the following four categories of countries should not be S&D beneficiary countries.[44]

(i) A WTO Member that is a Member of the OECD or a WTO Member that has begun the accession process to the OECD.
(ii) A WTO Member that is a member of the Group of 20 (G20).
(iii) A WTO Member that the World Bank has classified as a "high income" country for the three consecutive years immediately prior to the date of this decision or classifies as a "high income" country for a third consecutive year or any three consecutive years thereafter.
(iv) A WTO Member that accounts for no less than 0.5 per cent of global merchandise trade (imports and exports) for the three consecutive calendar years immediately prior to the date of this decision or for a third consecutive year or any three consecutive years thereafter.

The countries that appear to be specifically covered here are the following states. Namely, (i) Chile, Israel, Turkey, Mexico, and South Korea; (ii) China, India, Brazil, Mexico, South Africa, South Korea, Indonesia, Saudi Arabia, Turkey, and Argentina; (iii) Argentina, Bahrain, Brunei, Chile, Hong Kong, Macau, Israel, Kuwait, the Monaco, Oman, the Philippines,

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[40] *See, e.g.*, Hudec (2011) at 120-121.

[41] WTO, Ministerial Declaration, WT/MIN(01)/DEC/1 (November 14, 2001), para. 44.

[42] *See* Yanai (2014); Lee and Kim (2022) at 144-148.

[43] WTO, "Procedures to Strengthen the Negotiating Function of the WTO," Draft General Council Decision, WT/GC/W/764 (February 15, 2019).

[44] WTO, "Procedures to Strengthen the Negotiating Function of the WTO, Revision," Draft General Council Decision, WT/GC/W/764/Rev.1 (November 25, 2019).

Qatar, Singapore, Ukraine, Uruguay, etc.; (iv) the UAE, Hong Kong, Malaysia, the Philippines, Saudi Arabia, Singapore, Thailand, Turkey, Vietnam, South Africa, etc.[45]

On July 26, 2019, U.S. President Donald Trump issued a memorandum to the United States Trade Representative (USTR) entitled "Reforming Developing-Country Status in the WTO".[46] The memorandum made particular reference to China and directed the USTR to "no longer treat as a developing country for the purposes of the WTO any WTO Member that in the USTR's judgment is improperly declaring itself a developing country and inappropriately seeking the benefit of flexibilities in WTO rules and negotiations".

Such criticism of S&D by the U.S. was met with various reactions from other WTO member countries.[47] On the one hand, developed countries agree with the U.S. on the necessity of S&D reforms but differ in their direction and specific proposals. For example, the U.S. proposal can be regarded as an abstract criteria approach since it automatically identifies developing countries based on certain criteria. In contrast, the EU proposes a list approach to identify S&D beneficiary countries on a case-by-case basis.[48] Besides, the joint proposal by Norway et al. in 2019 refers to S&D in GATS and TFA as a pragmatic approach.[49] In any case, what developed countries have in common is that they acknowledge the necessity of S&D for LDCs but advocate the need for differentiation in a group of other developing countries.

On the other hand, developing countries strongly opposed the U.S. proposal. A few weeks after the U.S. submitted the resolution to the General Council, China, India, South Africa, Venezuela, Laos, Bolivia, Kenya, and Cuba issued a joint statement. Their statement asserted that S&D has not lost its significance and that self-election remains the most appropriate identification method.[50] In July 2019, Bolivia and others also issued a joint statement that insisted that S&D is a "treaty-embedded and non-negotiable right" of all developing WTO members and that further preservation and strengthening of the S&D provisions is necessary.[51]

Since the draft resolution by the U.S. in February 2019, more active discussions on S&D

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[45] Ministry of Economy, Trade and Industry of Japan (2022) at 217; Bacchus and Manak (2021) at 9-10.

[46] The White House, Memorandum for the United States Trade Representative, Reforming Developing-Country Status in the World Trade Organization (July 26, 2019).

[47] *See* Islam (2021), pp. 10-13.

[48] European Commission for Trade, *WTO Modernisation: Introduction to Future EU Proposals* (European Union, 2018); Hedge and Wouters (2021) at 570.

[49] WTO, "Pursuing the Development Dimension in WTO Rule-Making Efforts," Communication from Norway; Canada; Hong Kong, China; Iceland; Mexico: New Zealand: Singapore; and Switzerland, WT/GC/W/770/Rev. 3 (April 26, 2019).

[50] WTO, "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.1 (February 26, 2019).

[51] WTO, "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 (July 11, 2019), para. 4.1.

have been conducted among WTO member countries, and similarly, discussions on S&D have also become more active in academic circles.[52] Among them, the S&D provision in the TFA, which was mentioned in the joint proposal by Norway and others mentioned above, is attracting attention as a new model of S&D in the future.[53] Therefore, the contents of S&D in the TFA are discussed below.

IV-2. S&D in the TFA

IV-2-1. Institutional Objectives

The TFA is an agreement adopted by the WTO General Ministerial Council in November 2014 and entered into force in 2017. Trade facilitation was identified as one of the areas for negotiation in the 2001 Doha Round, culminating in an agreement reached at the 9th Ministerial Conference in 2013.[54] The TFA is the first agreement drawn up with all members' participation since the WTO's establishment. As of July 22, 2023, 154 of the 164 WTO Members have ratified the TFA (Protocol on Amendments to the WTO Agreements). As of July 22, 2023, 154 of the 164 WTO Members had ratified the TFA (Protocol on Amendments to the WTO Agreement).[55]

The TFA aims to improve the transparency of trade rules and to simplify and expedite customs procedures. Countries that accede to the TFA have obligations to improve transparency, such as publishing information (Articles 1-6), and to take measures to simplify and expedite trade procedures (Articles 7, 9, 10, and 11). The TFA also provides for cooperation among the border agencies (Article 8) and among customs authorities of the Member states (Article 12).

In its preamble, the TFA recognises “the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area” and “the need for effective cooperation among Members on trade facilitation and customs compliance issues”. The TFA provides for S&D in Section 2, Articles 13-22 to meet these needs. Of particular note is the linkage of the timing and extent of implementation of the TFA to the capacity of developing countries and LDCs.[56] Article 13, paragraphs 2 and 3 provide as follows:

> Article 13.2
> Assistance and support for capacity building (note 1) should be provided to help

[52] *See* Ukpe and Khorana (2021); Bacchus and Manak (2021).
[53] Lamp (2015); Peterson (2020); Almodarra (2022); Sekine (2023).
[54] For more information on the history of the FTA, *see* Wu (2019) at 63-87.
[55] WTO, Trade Facilitation Agreement Facility, “Ratifications List,” < https://www.tfafacility.org/notifications-ratifications/ratifications-list> accessed July 22, 2023.
[56] Sekine (2023) at 56.

developing and least-developed country Members implement the provisions of this Agreement, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of this Agreement shall be related to the implementation capacities of developing and least-developed country Members. Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.
(note 1). For the purposes of this Agreement, "assistance and support for capacity building" may take the form of technical, financial, or any other mutually agreed form of assistance provided.

Article 13.3
Members may also include information on national trade facilitation implementation plans or projects, the domestic agency or entity responsible for implementation, and the donors with which the Member may have an arrangement in place to provide assistance.

As shown in these articles, the S&D in the TFA has been fully characterised as a grace period until a developing country or LDC gains the capacity to implement it. As already mentioned, with the transition from the GATT to the WTO, the institutional objective of S&D provisions has changed from exception to grace, but the TFA is unique in that it is linked to the ability of developing countries to implement the agreement and explicitly stated as a general principle.

IV-2-2. Multiple Categories of States

These characteristics of the institutional objectives of S&D in TFA also affect the identification of developing countries and LDCs.

The TFA establishes three categories of states in its text: developed countries, developing countries, and LDCs. Developed countries are required to fully and immediately implement their obligations under the agreement while developing countries and LDCs are allowed flexibility in implementation. For this flexible implementation, separate provisions and procedures are provided for developing countries and LDCs.

On the one hand, developing countries designate which of the following categories, A to C,

applies to each provision.[57] For Category A, implementation is obligatory immediately after the entry into force of the Agreement.[58] For Category B, upon entry into force of the Agreement, the designated provisions and the indicative dates for implementation shall be notified to the Trade Facilitation Committee (TFC) established under Article 23.1 ; the definitive dates for implementation shall be notified no later than one year after entry into force (however, developing countries Members may request an extension of time to the TFC).[59] For Category C, upon entry into force of the Agreement, the designated provisions and indicative dates for implementation shall be communicated to the TFC, including information on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation.[60] In addition, within one year after entry into force, developing countries and relevant donor Members shall provide information on the assistance and support for capacity building required to implement.[61] Within 18 months after the provision of information on the arrangements, donor Members and developing country Members shall inform the TFC of the progress of their assistance and support, and developing country Members shall notify the TFC of the definitive dates for implementation.[62]

On the other hand, LDCs also designate which of the following categories, A to C, applies to each provision in the Agreement.[63] For Category A, LDCs are obliged to implement the provisions within one year after the entry into force of the Agreement.[64] For Category B, no later than one year after the entry into force of the Agreement, LDCs shall notify the designated provisions and their indicative dates for implementation to the TFC. The definitive dates for implementation shall also be notified to the TFC no later than two years after the notification of indicative dates.[65] However, LDCs may request an extension to the TFC. For Category C, one year after the entry into force of the agreement, LDCs shall notify the designated provisions to the TFC.[66] One year after the notification, they shall notify information on the assistance and support for capacity building that they require in order to implement.[67] No later than two years after the information is notified, LDCs and relevant donor Members

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[57] Article 14.2 of the TFA. It should be noted that the shift between Category B and C is permitted (Article 19). As of 1 August 2023, 20 countries (8 developing countries and 12 LDCs) had shifted from Category B to C and 24 states (15 developing countries and 9 LDCs) had shifted from Category C to B. WTO, Trade Facilitation Agreement Facility, "Shifting between categories B and C," < https://tfadatabase.org/en/notifications/category-shifts> accessed August 1, 2023.

[58] Article 14.1 (a) and Article 15 of the TFA.

[59] Article 14.1 (b) and 16.1 (a)(b) of the TFA.

[60] Article 14.1 (b) and 16.1(c) of the TFA.

[61] Article 16.1(d) of the TFA.

[62] Article 16.1(e) of the TFA.

[63] Article 14.2 of the TFA.

[64] Article 14.1(a) and Article 15 of the TFA.

[65] Article 14.1(b) and Article 16.2(a)(b) of the TFA.

[66] Article 16.2(c) of the TFA.

[67] Article 16.3(d) of the TFA.

shall provide information to the TFC on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation.[68] At the same time, LDCs will notify the TFC of the indicative dates for implementation. No later than 18 months after the provision of information on the arrangements, relevant donor Members and LDCs shall inform the TFC of the progress in providing assistance and support for capacity building, and LDCs shall inform the TFC of the definitive dates for implementation.[69]

Table 2 summarises the above. In three categories, more flexibility is recognised for LDCs than for developing countries. The details of S&D for developing countries and LDCs are discussed in the next section, but it should be noted here that the TFA does not include a definition for developing countries. In other words, a Member state may self-select to become a beneficiary country of S&D by notifying the designated provisions under the TFA. 125 countries have notified the designated provisions to the TFC in accordance with Section 2 of the Agreement, 35 of which are LDCs, and the other 90 countries have self-selected themselves as developing countries.[70]

Although the TFA stipulates only two categories of states, namely, developing countries and LDCs, each category is actually subdivided into smaller categories according to each country's needs. This is made possible by the mechanism whereby developing countries themselves “self-select” the designation of provisions and the dates for implementation of each provision. In the next section, the contents of S&D provisions will be examined in the TFA in more detail.

Table 2: Categorization of the Provision in the TFA

	Developing Countries	LDCs
Category A	Immediately implemented.	Implemented within one year after the entry into force of the TFA.
Category B	Definitive dates for implementation shall be notified no later than one year after entry into force of the TFA.	Definitive dates for implementation shall be notified no later than three years after entry into force of the TFA.
Category C	Implemented based on assistance and support. Definitive dates for implementation shall be notified within two and a half years after entry into force of the TFA.	Implemented based on assistance and support. Definitive dates for implementation shall be notified no later than five and a half years after entry into force of the TFA.

Source: Modified from Sekine (2023) at 56.

IV-2-3. A Set of Norms Favouring the Weak

Developing countries and LDCs shall notify the TFC whether the provisions under the

[68] Article 16.3(e) of the TFA.

[69] Article 16.3(f) of the TFA.

[70] WTO, Trade Facilitation Agreement Database, “Global status of notification,” <https://tfadatabase.org/en/notifications/implementation/global-status> accessed July 22, 2023.

TFA fall under any of the categories A through C and shall notify their definitive dates for implementation for each category of provisions. Under this framework, the grace period for obligations under the TFA may be chosen by the developing country or LDC itself. In addition, the implementation of the provisions designated under Category C is subject to the provision of assistance and support from other countries or international organisations as provided for in Article 21.

The TFA also provides for an early warning mechanism (Article 17) in case a developing country or LDC has difficulty fulfilling its obligations by the definitive date for implementation. Under this mechanism, if a developing country or LDC experiences difficulty in implementing a provision designated under Category B or C by the definitive date, it may notify the TFC,[71] and additional time will be granted. However, beyond a certain period (18 months for developing countries and 3 years for LDCs), the granting of additional time must be approved by the TFC (Article 17.2, 17.3 and 17.4). As of July 26, 2023, 30 countries had applied for an extension of the definitive dates for implementation for 146 measures, of which 23 had not been approved by the TFC[72].

As described above, although there are two categories of states in the TFA, developing countries and LDCs, the grace period for the implementation under the Agreement will be differentiated according to the capacity of each country to implement within each category. For example, the most common measure designated in Category C is establishing a single window under Article 10.4,[73] and the definitive date for its implementation varies within each group.[74] Among the developing country groups, Côte d'Ivoire, Grenada and Saint Lucia ratified the TFA on the same date (8 December 2015), but the definitive dates for implementation of Article 10.4 are different among them; 31 December 2025 for Côte d'Ivoire, 30 June 2030 for Grenada and 31 December 2023 for Saint Lucia. In the LDC group, Myanmar and Zambia have the same ratification date (26 December 2015), but the definitive date for implementation of Article 10.4 is 31 December 2028 for Myanmar and 31 December 2030 for Zambia. Thus, there are differences between the two countries even if they are both LDCs.

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[71] For developing countries, the notification must be made at least 120 days before the definitive date for implementation and 90 days before for LDCs (Article 17(1)(a)).

[72] WTO, Trade Facilitation Agreement Database, "Status of Notification by Measure," <https://tfadatabase.org/en/notifications/categorization-by-measure> accessed August 1, 2023.

[73] WTO, Trade Facilitation Agreement Database, "Global status of notification," <https://tfadatabase.org/en/notifications/implementation/global-status> accessed July 22, 2023.

[74] The definitive dates for implementation of Category C in each country can be found at the following website. WTO, Trade Facilitation Agreement Database, "Member Profiles," < https://tfadatabase.org/en/members> accessed August 1, 2023.

IV-3. Deepening the Plurality of Norms

IV-3-1. Double Self-Election Approach

How can S&D in TFA, which was discussed in the previous section, be evaluated within the theory of plurality of norms?

S&D in TFA may be viewed as a complicated version of the self-election approach. Its characteristics lie in the self-election at each stage of the multiple categories of states and a set of norms favouring the weak. A Member may self-select to be a developing country or a LDC by notifying the designated provisions under Article 14.2. Based on the first self-election, a Member may self-select, to the extent allowed for each group, the definitive date for implementation of each measure in the context of its own capacity to implement. Such a double self-election approach in the TFA can be evaluated as going beyond the conventional dichotomy of developed and developing countries or developing countries and LDC. It can be regarded as an expression of a further logical extension of the plurality of norms.

It should be noted, however, that self-election by the Members is not unlimited. In other words, in addition to the framework of developing countries and LDCs stipulated in the TFA, self-election by each country is subject to a certain degree of control based on the institutional objectives of the TFA. This limitation was demonstrated by the fact that there were cases where extensions of the definitive dates were not approved by the TFC. In this respect, it can be said that the TFA responds to a certain extent to the criticisms of S&D in the WTO and can be evaluated as a very well-balanced institutional design.

IV-3-2. Comparison with Other Treaty Regimes

This tendency to differentiate obligations in relation to States' capacity to implement and to subject them to the control of institutional objectives of the treaty can be seen in the principle of common but differentiated responsibilities (CBDR) in recent international environmental law.[75]

In international environmental law, where the conflict between developed and developing countries is as intense or more intense than in the trade regime, the following three methods of "differential treatments"[76] to embody CBDR have been conventionally adopted.[77] The first is to set categories of states, such as developed and developing countries, and establish and

[75] Outside the framework of the theory of plurality of norms, researchers have made various attempts to compare S&D in international economic law with different treatment in international environmental law. Some research, like this paper, also compares S&D in the TFA with the different treatments in the Paris Agreement and points out the similarities between the two. See Ismail and Bhagat (2023).

[76] In international environmental law, the categorisation of states and differentiation of obligations to embody CBDR is commonly referred to as "differential treatment" rather than S&D. See Halvorssen (1999); Cullet (2003); Rajamani (2006).

[77] Takamura (2016) at 237-238.

apply different obligations to each category.[78] A typical example is the 1995 amendment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In the amendment, Member states are categorized into developed countries listed in Annex VII and developing countries, and different obligations are established and applied to two categories of states. Second, the obligations are in principle the same, but there are differences in timing and deadlines for implementation. For example, the Montreal Protocol, which regulates ozone-depleting substances, allows developing countries that fall under Article 5.1 to delay implementation for ten years.[79] The third is a method that imposes the same obligations on all parties but allows each party discretion in fulfilling its obligations and differentiates *de facto* obligations by taking into account its own implementation capacity and other factors. An example of this is Article 8 of the Convention on Biological Diversity. It grants broad discretion to its parties by providing that "Each Contracting Party shall, as far as possible and as appropriate".[80]

On the other hand, the Paris Agreement, adopted at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change on December 12, 2015, adopts a new approach that goes beyond the conventional approach. Reflecting criticism of the dichotomy of developed and developing countries, the Paris Agreement adds the phrase "in the light of different national circumstances" to the CBDR in the Agreement. For example, Article 2.2 of the Agreement states, "This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".

The reformulated CBDR in the Paris Agreement is embodied in a method called voluntary differentiation. The Paris Agreement includes various categories of states, such as developed countries, developing countries, least developed countries, and developing island countries, but it does not specify the specific identification method, leaving it to each country to make its own choice in principle.[81] In contrast to the Kyoto Protocol, which set numerical targets for developed countries, the Paris Agreement requires each party to prepare, communicate and maintain successive "nationally determined contributions to the global response to climate change" (Articles 3 and 4.2).

Thus, the Paris Agreement also adopts a double self-election approach under the feature of voluntary differentiation. The background of adopting the voluntary differentiation method is said to reflect that developed and developing countries could not agree on the criteria for

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[78] Takamura (2016) at 237.

[79] *Ibid*.

[80] *Ibid*. A similar method can be found in the flexibility of norms in the conventions and recommendations of International Labour Organisation. *See* Kodera (2022).

[81] *Ibid.,* at 245; Maljean-Dubois (2016) at 154-156.

identifying national categories and that the list approach, such as the Kyoto Protocol, could not cope with rapid changes in the situation of countries.[82] On the other hand, as a defect of voluntary differentiation, there is a risk that the institutional fairness and effectiveness of the Agreement may be impaired by arbitrary voluntary differentiation by the parties.[83] In addition, criticisms have been raised against voluntary differentiation in the Paris Agreement, saying that it is a product of pragmatic agreement among sovereign states, and that it may damage the legitimacy of the treaty regime by foregrounding the equity considerations that the CBDR was originally equipped with.[84] All these points seem to apply to some extent to S&D in a free trade regime, although there are differences between free trade regimes and international environmental protection regimes.

From the above comparison with the Paris Agreement, the following four points can be suggested for S&D in the future free trade regime. First, in the free trade regime and the future multilateral treaty system, it is necessary to go beyond the dichotomy between developing countries and LDCs and to further consider the differences within each state category. Second, given the rapid changes in the situation surrounding states and the difficulty of reaching an agreement among states, a self-election approach, rather than an abstract criteria approach or a list approach, would have to be adopted to identify developing countries. Third, this self-election approach needs to have a double nature, which means that developing countries themselves determine not only the national category but also the content of obligations in relation to their implementation capacity. Fourth, to ensure the fairness and effectiveness of the system, a certain degree of institutional control over self-election by developing countries is required, and at the same time, from the viewpoint of legitimacy, it is necessary to pay attention to the element of equity among countries.

V. Conclusion

This paper has examined the significance of S&D in the WTO-centered free trade regime from the perspective of the theory of plurality of norms. First, it overviewed that while the preferential treatment for developing countries in the GATT was intended to position developing countries as exceptions to the free trade regime, the institutional objective of S&D in the WTO has been transformed into a grace period for developing countries to smoothly transition to the free trade regime. Furthermore, it discussed that the draft resolution by the United States at the General Council in 2019 has rekindled the debate on S&D between developed and developing countries and clarified that the background of the debate was the

[82] Takamura (2016) at 245.
[83] *Ibid*., at 246.
[84] *See* Toi (2019) at 88-93.

significant changes in the situation surrounding the countries, including the rise of China. Then, it analyzed the TFA, which is attracting attention as a new model for S&D, and showed that the agreement adopts a double self-election approach to reflect the diversity within the developing country group. Finally, it compared with the Paris Agreement and confirmed that the double self-election approach has been introduced in other treaty regimes in recent years, leading to some suggestions for S&D in the future free trade regime.

Some authors point out that the uniqueness of the TFA enabled it to adopt a new model of S&D, and the applicability of the model to other international economic agreements is limited.[85] In addition, there is a concern that making distinctions within developing countries may lead to the collapse of the developing country bloc.[86] Thus, it may be too early to evaluate whether the S&D of TFA is the best model for the free trade regime in the future.[87] However, considering the changes in developing country groups, more flexible consideration of diversity within developing country groups is required in the design of future treaties, and it seems undeniable that a double self-election approach such as the TFA and the Paris Agreement is one of the promising models.

Finally, it is important to identify the significance of S&D in the future free trade system in terms of the three functions of plurality of norms in treaty regimes.[88] First is the function of compensating inequality. S&D corrects or alleviates the gap of development among nations by granting favourable treatment to the weak. Second is the function of ensuring universality. Like reservations to a multilateral treaty, S&D allows as many states as possible to be included in a multilateral treaty system by granting different treatment to each state category. Third is the ideological function. If the multilateral treaty system itself is unfair, S&D can be a device to anchor developing countries in the unfair structure and maintain it.

The focus of the criticism by developed countries is that S&D does not contribute to the economic development of developing countries. From the viewpoint of the function of the plurality of norms, they argue that S&D does not fully perform the function of compensating inequality. However, even if the criticism by developed countries is valid, this criticism does not deny its function of ensuring universality and the raison d'être of S&D. Rather, it can be said that S&D is an indispensable legal technique in the future legislation of international economic treaties at the present time when the composition of the international community is dynamic. Therefore, it is important to revise the legal technique to flexibly reflect the diversity of countries. For this purpose, it is necessary to seek a way of S&D suitable for the free trade regime in comparison with other treaty regimes. At the same time, it is also indispens-

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[85] *See, e.g.*, Sekine (2023) at 60

[86] Hedge and Wouters (2021) at 568. See also Pauwelyn (2013) at 39-41.

[87] For details on other models of future S&D other than the TFA, *see, e.g.*, Sauvé (2022) at 891-896.

[88] For details on the functions of plurality of norms in multilateral treaty regimes, *see* Kodera (2011) at 107-113.

able to constantly critically examine the legitimacy of the existing international economic treaty regime to prevent S&D from becoming an ideological device of developed countries to hide the unfairness inherent in the free trade regime.

In this paper, we could not examine the transformation of GSP, which has been one of the core elements of S&D in the GATT and the WTO. The GSP system has undergone significant transformation in recent years, including the expiration of GSP in the US from the end of 2020 to the present. In the future, we would like to discuss GSP considering the analysis in this paper on another occasion to attempt a more comprehensive examination of S&D in the free trade regime.

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