



**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 AND THE BOLIVARIAN REPUBLIC OF  
VENEZUELA

*"There is nothing more unequal than the equal treatment of unequal people."  
Thomas Jefferson (1743-1826)*

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**1 EXECUTIVE SUMMARY**

1.1. The persistence of the enormous development divide between the developing and developed Members of the WTO is reflected on a wide range of indicators. It is evident in levels of economic development, industrial structure and competitiveness, such as GDP per capita, poverty levels, levels of under-nourishment, production and employment in agriculture sector, trade in services, receipts from IPR, share of trade in value-added under GVCs, energy use per capita, financial infrastructure, R&D capacity, company profits, and a range of institutional and capacity constraints, among other things. Despite impressive progress achieved by developing Members since the creation of the WTO, old divides have not been substantially bridged and, in some areas, they have even widened, while new divides, such as those in the digital and technological spheres, are becoming more pronounced.

1.2. Against this background, recent attempts by some Members to selectively employ certain economic and trade data to deny the persistence of the divide between developing and developed Members, and to demand the former to abide by absolute "reciprocity" in the interest of "fairness" are profoundly disingenuous. The world has indeed changed in many ways since the GATT and the establishment of the WTO, but in overall terms the development divide remains firmly entrenched. It is therefore of greater concern that some Members would attempt to ignore this reality in an effort to deprive developing Members of their right to develop.

1.3. Capacity constraint remains a serious problem for developing Members at the WTO. Notably, they often lack the requisite human resources, negotiating capacity, well-functioning intra-governmental coordination mechanisms, and the effective participation of social partners in trade negotiating processes. These deficiencies diminish not only the ability of developing Members to negotiate, but also the effectiveness of translating negotiated outcomes into measures for domestic economic growth.

1.4. The multilateral trading system, from the early days of the GATT until the establishment of the WTO, has recognized the differences in levels of economic development and wisely ensured that Special and Differential Treatment (S&DT) would be one of its cornerstone principles. The S&DT principle was understood as a way to ensure that negotiated outcomes would accommodate differences in levels of economic development as well as the capacity constraint of developing Members. It would allow developing Members the space to calibrate trade integration in ways that help them support sustainable growth, employment expansion and poverty reduction.

1.5. The current S&DT provisions in the WTO agreements were established through negotiations and compromises and were not gifts granted by developed Members. Nevertheless, most of the current S&DT provisions are "best endeavour" clauses, lack precision, effectiveness, operability and enforceability. Their actual benefits to developing Members have fallen far short of expectation. In contrast, it is developed Members that have reaped substantial benefits by seeking and obtaining flexibilities in areas of interest to them; a form of "reversed" S&DT. The WTO rules-based system has helped in the growth of trade but has not made it equitable.

1.6. Since 1995, more developing Members have acceded to the WTO pursuant to Article XII of the Marrakesh Agreement. Their accession processes, in which they made tremendous efforts, significantly contributed to upholding the core values of the WTO including free trade, openness and non-discrimination; supporting the rules-based multilateral trading system; and maintaining a transparent, stable and predictable global trade environment.

1.7. The dichotomy of developed and developing Members is frequently used by almost all International Organizations (IOs) to describe the structure of today's global economy. Various indices and classification methodologies may be adopted to determine the constraints and thresholds that divide developed and developing Members but the underlying rationale throughout is twofold: (1) that there are structural features behind the UN classification that distinguish countries in terms of their development challenges; (2) that these features form the basis on which countries classify themselves and are adapted to the various mandates, functions and statistical work of the IOs. For the WTO, the status of developed and developing Members are reflected in the bargaining process, and incorporated into the final rules themselves. The self-declaration approach has proven to be the most appropriate to the WTO, which best serves the WTO objectives.

## 2 DEVELOPMENT DIVIDE

2.1. Many developing Members of the WTO have made significant economic progress over the past decades. However, it is also a reality that despite their efforts, they have not come anywhere near catching-up with the developed Members. Further, the gap between the developed and developing Members appears to have actually widened over time, instead of getting reduced. The development divide, which was taken note of in mid-1960s in Part IV of the GATT, continues to remain relevant today - perhaps even more relevant. Attempts at ignoring the need for S&DT provisions, or diluting it, is fraught with the risk of making future negotiations in the WTO even more difficult than today.

2.2. In spite of significant efforts made by the developing Members, the standards of living in most of these Members fall far behind that in the developed Members. The gap between the developed and developing Members is manifested in two ways. First, with reference to an indicator, the difference in value between the developed and developing Members widens over time; and second, even if the difference in value does not widen over time, the gap between the developed and developing Members during a time period is substantial. In respect of the indicators discussed below, the gap between the developed and developing Members has remained substantially high. In fact, in many cases the gap has considerably widened.

2.3. Besides, the essence of development is the human being. Hence, per capita indicators must be given the top priority when assessing the development level of a country. In WTO agreements, all the indicators used to assess development are based on per capita calculation. For example, in Article 8.2 (b) (iii) of Agreement on Subsidies and Countervailing Measures (ASCM), "income per capita", "household income per capita" and "GDP per capita" are mentioned for the purpose of measuring the economic development of a member.

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

2.4. In 2017, the GDP per capita (Current US\$) of **the United States, Canada, Australia, New Zealand and the European Union** was \$59,531, \$45,032, \$53,800, \$42,941, and \$33,715, respectively, while the GDP per capita of developing Members, including **China, India, South Africa and Brazil**, were all below \$10,000, as shown in Graph 1. With **the United States** as the comparator, the extent to which the developing Members fell further behind the United States can be understood from the fact that, for **Brazil, China, India and Indonesia**, the gap in GDP per capita and that of the United States increased by at least 71% (2014-2016 vs 1994-1996). With

**Germany** as the comparator, the gap for **China, India and Indonesia** with Germany increased by at least 23%. With **the United Kingdom** as the comparator, the gap for **Brazil, China, India and Indonesia**, increased by at least 65%. The trend in widening gap of GDP per capita (Constant 2010 US\$ and PPP) between developed and developing Members is similar to that observed in respect of GDP per capita (Current US\$). In general, the gaps in GDP per capita between developed and developing Members were significant, and have been expanding in absolute terms since 1995 when the WTO was created, as shown in Graph 2.

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

2.6. According to the UN Food and Agriculture Organization, 10 countries with the largest number of the world's under-nourished people are: **India** (195.9 million), **China** (124.5 million), **Pakistan** (39.5 million), **Bangladesh** (24.8 million), **Ethiopia** (21.9 million), **Nigeria** (21.5 million), **Indonesia** (20.2 million), **Tanzania** (17.8 million), **Uganda** (17.2 million) and **Philippines** (14.2 million). The under-nourished people of these 10 developing countries accounts for 62% of the world total, as shown in Graph 3.

## 2.2 Agriculture

2.7. Agriculture is one of the most important sectors of a country, where developed Members enjoy significant advantages over developing ones. In many developing Members, despite agriculture being the largest source of employment, this sector remains characterized by small farm size, but with large number of farmers dependent on it. In contrast, in the United States, agriculture is characterized by extremely large farm size with few farmers dependent on agriculture for their livelihood. Any discussion on agriculture must recognize the reality that in many developing Members agriculture continues to remain mainly non-commercial in nature. Unlike the developed Members where agriculture is commercial, in many developing Members it is for subsistence and mainly for livelihood.

2.8. The difference in the nature of agriculture in developed and many developing Members is further evident when we compare the value-added per worker for Agriculture, Forestry and Fishing. As shown in Graph 4, the value-added per worker for **New Zealand, Australia, the United States, the European Union** and **Japan**, in the period of 1995-1997 and 2015-2017, was \$77,600, \$37,649, \$31,003, \$13,137, \$20,763, respectively; and \$105,115, \$85,858, \$80,040, \$25,952, \$24,009, respectively. In contrast, the figures for **China, Indonesia, India** and **Sub-Saharan Africa** were \$1,073, \$1,975, \$863, \$791, respectively; and \$5,323, \$3,485, \$1,604, \$1,311, respectively. During 1995-1997, the value-added per worker in **the United States** was 36 times that in **India**, 28 times that in **China** and 16 times that in **Indonesia**. During 2015-2017, the gap widened further for **India** (50 times) and **Indonesia** (23 times).

2.9. A high number of subsidies to the farmers in developed Members led to huge competitive advantage of their agricultural products in international market. As shown in Graph 5, in 2016, the domestic support per farmer in **the United States** was \$60,586; the corresponding figures for some other WTO Members were the following: **Japan** (\$10,149), **Canada** (\$16,562), **the European Union** (\$6,762), **China** (\$863), **Brazil** (\$345) and **India** (\$227). Thus, the per farmer subsidy in **the United States** was 70 times that in **China**, 176 times that in **Brazil** and 267 times that in **India**. Per farmer subsidy in **Japan** was 12 times that in **China**, 29 times that in **Brazil** and 45 times that in **India**. Per farmer subsidy in **Canada** was 19 times that in **China**, 48 times that in **Brazil** and 73 times that in **India**. In **the European Union**, per farmer subsidy was 8 times that in **China**, 20 times that in **Brazil** and 30 times that in **India**.

2.10. As shown in Graph 6, the total rural population in **Germany, Japan, the United Kingdom** and **the United States** during 1994-1996 was 121 million, which declined to 99 million during 2014-2016. During the first period, the rural population in the following developing Members exceeded

<sup>1</sup> The Bellagio Initiative on "Poverty in Middle-Income Countries", in November 2011, referring to this part of the world's poor that live in middle-income countries, called this the "new bottom billion" [www.cbm.org/article/downloads/82788/Summary\\_Poverty\\_in\\_MIC.pdf](http://www.cbm.org/article/downloads/82788/Summary_Poverty_in_MIC.pdf), accessed on 25 January 2019.

the total rural population in the four developed Members: **China** (831 million), **India** (704 million) and **Indonesia** (125 million). In China and India, the rural population was around 6 times that the total rural population in the four developed Members. During the second period (2014-2016), the rural population in the following developing Members exceeded the total rural population in the four developed Members: **Bangladesh** (105 million), **China** (610 million), **India** (879 million), **Indonesia** (120 million) and **Pakistan** (121 million). While China's rural population continued to remain around 6 times that of the four developed Members, in India this increased to around 8 times. It is also relevant to note that during 2014-2016, the rural population of **China** was almost thrice the combined rural population in **Australia, Canada, the European Union, Japan, New Zealand and the United States**; while the rural population of India was more than four times the combined rural population of these developed Members. These details highlight the enormity of challenges of rural population confronting some of the larger developing Members.

2.11. As shown in Graph 7, the number of farmers per hectare in most developing Members far exceeds that in the United States. To illustrate, in 2016 Egypt had 145 times the number of farmers per hectare as compared to the United States. Some other developing Members show similar situation of intensive farming. These include Indonesia (97 times), India (81 times), China (70 times) and Pakistan (53 times). Further, Graph 8 highlights that the average farm size in the United States is substantially larger than that in some developing Members - Egypt (216 times), Indonesia (205 times), India (134 times), Pakistan (58 times) and Turkey (30 times). The comparison of number of farmers per hectare and average farm size should leave us in no doubt about the fundamental difference in the nature of farming in some developing Members and the United States.

2.12. Many Members have attempted to shift employment away from agriculture to other sectors. While some movement of the workforce away from agriculture has been witnessed, agriculture continues to be the main source for providing employment in most developing Members, as shown in Graph 9. This contrasts sharply with the situation in **the United States**, where agriculture accounts for less than 2% of the total employment. The figures for many developing Members are substantially higher - **Turkey** (20%), **China** (20%), **Philippines** (29%), **Indonesia** (33%), **Nigeria** (36%), **India** (44%), **Bangladesh** (42%) and **Vietnam** (44%).

### 2.3 Trade: Trade in Services, IPR, GVC Trade in Value-added

2.13. According to UN's *World Economic Situation and Prospects Report 2018*, in 2016, the population of developing economies constituted 85% of the global total, while their share in global services export was less than 30%, and their shares in the export of financial, telecommunication and other high value-added services were even lower, as shown in Graph 10.<sup>2</sup> According to the WTO, the services export per capita of major developing Members was only 10% that of developed ones, as shown in Graph 11.<sup>3</sup>

2.14. Since the creation of the WTO in 1995, in terms of the receipts of charges for the use of intellectual property rights, developed Members have not only maintained a dominant position but also witnessed much higher growth in contrast to developing Members. As shown in Graph 12, in 1995, the IPR receipt of charges of **the European Union, the United States and Japan** was \$14.7 billion, \$30.3 billion and \$6.7 billion, respectively; by 2017, the figures had increased to \$144.1 billion, \$127.9 billion and \$41.7 billion, respectively. The 2017 figures were respectively 30 times, 27 times and 9 times that of **China** (\$4.8 billion); 206 times, 183 times and 60 times that of **India** (\$700 million); 240 times, 213 times and 70 times that of **Brazil** (\$600 million).

2.15. Compared with developed Members, developing Members have a heavier yet fragile reliance on trade. In the process of globalization, thanks to the comparative advantages in labour, some developing Members have been integrated into the global value chain. However, they remain at the lowest end of the "smile curve" by providing raw material, cheap manufacturing or assembling services, with low added-value but high risk, as shown in Graph 13.

### 2.4 Energy Use Per Capita

2.16. As shown in Graph 14, in respect of the indicator of energy use per capita during 2012-2014, the gap between the developed and developing Members remained substantial. The number for **the**

<sup>2</sup> United Nations: *World Economic Situation and Prospects Report 2018*, p.26.

<sup>3</sup> WTO, *World Trade Statistical Review 2018*, p.127 and p.131.

**United States** was 11 times that of **India**, 8 times that of **Indonesia**, 5 times that of **Brazil** and 3 times that of **China**, respectively.

## 2.5 Finance

2.17. Commercial banks play a crucial role in financial system and the overall economy of a country by providing formal channels for saving money, securing loans and transferring money. Low indicator of banks per hundred thousand shows lack of formal financing and more reliance on informal channels, which are often costly and unreliable. This adversely affects entrepreneurship, income generation and growth of agriculture, industry and services sector in an economy. Number of commercial bank branches per 100,000 of adult population is a useful indicator of availability of banking facilities. As shown in Graph 15, most of the developing Members lag far behind the developed Members. While there were 32.68 commercial bank branches per 100,000 of adult population in **the United States**, the figures for some of the developing Members are the following: **Brazil** (20.74), **Indonesia** (17.69), **India** (13.49) and **China** (8.43).

2.18. The study of McKinsey Global Institute shows that two billion individuals and 200 million small businesses in the developing world (such as China, India, Brazil and South Africa) lack access to secure savings and credit, a financing gap estimated at \$2.2 trillion.<sup>4</sup> They have to resort to non-formal channels. Graph 16 shows that the number of unbanked adults is 1.7 billion globally, while 930 million of them are from the 10 largest developing Members, 55% of the total.<sup>5</sup>

## 2.6 Research and Development (R&D) Capacity

2.19. As shown in Graph 17, only 4 of the world's top 100 universities are located in developing Members (2 in **China** and 2 in **Singapore**), while the rest 96% are located in developed Members (48% in **the United States**). Only 12% of the world's top 200 universities are located in developing Members, while the rest 88% are located in developed Members (36% in **the United States**). Graph 18 shows the number of researchers in R&D (per million people, 2017). The number of **the United States**, **the European Union** and **Japan** was 4,313, 3,639 and 5,173, respectively; while the number of **China**, **India** and **South Africa** was only 1,159, 216, 473, respectively. If we look at the number of Standard Essential Patents (SEPs) from ISO, IEC and ITU, most of them come from developed Members: **the United States**, **the European Union** and **Japan** took the dominate position with 3,790, 3,660 and 1,517 SEPs, respectively, accounting for 87.49% of the total, as show in Graph 19.

## 2.7 Digital Divide

2.20. The rapid development of digital economy brings challenges to developing Members, who generally lack relevant infrastructure and technologies. In terms of internet users, as shown in Graph 20, the percentage in the developing world was only 8%, 21% and 41.3% in 2005, 2010 and 2017, respectively; while for the developed world, it was much higher, 51%, 67% and 81%, respectively. As shown in Graph 21, in terms of broadband subscriptions, the percentage of fixed broadband in the developing world was only 2%, 4% and 8.2% in 2007, 2010 and 2016, respectively, while for the developed world, it was much higher, 18%, 24% and 30.1%, respectively; the percentage of mobile broadband was 1%, 4%, 40.9% for developing world and 19%, 43%, 90.3% for developed world. The difference therefore has increased from 18 percentage points in 2007 to almost 50 percentage points in 2017. Graph 22 indicates that the skill of processing electronic files, installing and configuring software and processing data are generally lower in developing Members than in developed Members.<sup>6</sup>

<sup>4</sup> James Manyika and Rodger Vohries, *What digital finance means for emerging economies*. See: <https://www.mckinsey.com/mgi/overview/in-the-news/what-digital-finance-means-for-emerging-economies>, accessed on 25 January 2019.

<sup>5</sup> World Bank, *Gains in Financial Inclusion, Gains for a Sustainable World*. May 18, 2018. See: [http://www.worldbank.org/en/news/immersive-story/2018/05/18/gains-in-financial-inclusion-gains-for-a-sustainable-world?cid=ECR\\_TT\\_worldbank\\_EN\\_EXT](http://www.worldbank.org/en/news/immersive-story/2018/05/18/gains-in-financial-inclusion-gains-for-a-sustainable-world?cid=ECR_TT_worldbank_EN_EXT), accessed on 21 January 2019.

<sup>6</sup> ITU, *Measuring the Information Society Report*, Volume 1 2018 p.32.



## 2.8 Company Efficiency

2.21. The Fortune Magazine ranks the "Fortune Global 500" by companies' total revenues, and it also displays the profits of these companies. As shown in Graph 23, the average profit of "Fortune Global 500" manufacturing companies in **the United Kingdom, the United States, Germany and Japan** in 2017 was \$7.38 billion, \$5.2 billion, \$3.78 billion and \$3.14 billion, respectively, while the number of their counterparts in **China and Brazil** was only \$891 million and \$1.519 billion. The profit of "Fortune 500" manufacturing companies in **China and Brazil** are only 12%, 17%, 24% and 28%, or 21%, 29%, 40% and 48% that of the above four Members, respectively. Most other developing Members have few or no Fortune 500 companies.

## 2.9 Benefits from Globalization

2.22. The Bertelsmann *2018 Globalization Report - Who Benefits Most from Globalization* took into account the economic, political and social aspects of the worldwide network to calculate the globalization index of each economy. The Report concluded that, among the 42 economies under the study, the bottom five that benefit the least from globalization are **India, Argentina, Brazil, China and Mexico**, as shown in Graph 24.

## 3 CAPACITY CONSTRAINT

3.1. Amartya Sen, the 1998 Nobel Prize winner in Economics, rejected the narrow argument of measuring growth only by means of GDP, and broadened the development measurement from promoting economic growth to "expanding people's capabilities". He argued that the ultimate goal of development should focus on the individual's freedom of choices, *i.e.* to improve the "capabilities" of individuals to choose to live lives that they have reason to value.<sup>7</sup>

3.2. As stated on the WTO website, the multilateral trade rules, the negotiating forum and the dispute settlement system of the WTO are not policy goals in themselves. Rather, they should be translated into the negotiating and participating capacity for developing Members.<sup>8</sup> Thus, it is of vital importance to strengthen capacity building.

3.3. The OECD divides the level of negotiating capacity into five folds: (1) the negotiating skills and performance of negotiators; (2) the management capacity and potential of the institutional mechanisms; (3) the capacity of intra-governmental policy coordination; (4) the regulatory framework and public governance; and, (5) social norms and public awareness.<sup>9</sup>

3.4. Based on relevant research and case studies of international organizations, the capacity constraint of developing Members in the WTO is reflected in the following aspects:

- a. The lack of negotiating capacity at human resources level: From the GATT to the WTO, developed Members have been in a dominant position in the initiation of negotiations, the design of rules, the assertion of rights, and even the "flexible use of rules". However, developing Members, due to lack of resources are usually short of negotiators (especially experienced ones) and thus they are unable to achieve their objectives in the negotiations, as well as manage negotiation outcomes. Furthermore, the government budget is so limited that it is often the case that negotiation officials are not able to participate in negotiations in a systematic way.
- b. The lack of coordinating capacity at institutional level: Multilateral trade negotiations involve governmental agencies of foreign affairs, economy, industry, trade and other agencies of a member, which require overall coordination, speedy response and flexible adaptation. However, developing Members usually lack a unified policy across different departments and have difficulties in fully assessing and accurately analyzing the impacts

<sup>7</sup> Amartya Sen, *Development as Freedom* (New York, NY: Knopf 1999). See also Michael J. Trebilcock & Mariana Mota Prado, *Advanced Introduction to Law and Development* (2014).

<sup>8</sup> WTO, *Building trade capacity*, See: [https://www.wto.org/english/tratop\\_e/devel\\_e/build\\_tr\\_capa\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm), accessed on 21 January 2019.

<sup>9</sup> OECD (2003a), *The DAC guidelines: Strengthening Trade Capacity for Development, International Development*, available at [www.SourceOECD.org](http://www.SourceOECD.org), accessed on 21 January 2019. OECD (2003b), Stéphane Willems and Kevin Baumert, *Institutional Capacity and Climate Actions*.

of multilateral trade negotiations on the economic system, industrial development, among others; and formulating the national trade negotiation strategies and tactics accordingly. Such incapability leads to deficiencies in the leadership, stability and continuity of trade negotiations.

- c. The lack of negotiating and supporting capacity at social level: Think tanks and experts have insufficient foresighted visions and suggestions on trade negotiations, and thus failing to provide sufficient academic support to the government's engagement in the global governance. The business community has not fully recognized the benefits of the trade negotiations and lacks an awareness of cooperation with negotiation officials. The popularization and advocacy of knowledge of multilateral trade negotiations are also insufficient.
- d. The former Chairperson for Group of 77, Ambassador Luis Fernando Jaramillo from Colombia, stated that "...in many instances translating these multilateral trade rights into concrete trade advantages requires action by governments with active support of the business community. Many developing Members have found themselves poorly equipped in terms of institutions, human and financial resources dedicated to this objective."<sup>10</sup>

3.5. In a word, the fact is that, for the multilateral trade negotiations, developed Members are usually well and proactively prepared, while developing Members often rush to respond in a reactive manner. There is a big asymmetry between the two in formulating multilateral trade rules due to the capacity constraint. The formal "*de jure*" equality cannot mask the "*de facto*" inequality in reality.

#### 4 TREMENDOUS CONTRIBUTIONS BY NEW MEMBERS

4.1. Since the creation of the WTO in 1995, developing Members, newly acceded ones in particular, have made great contributions in integrating into and strengthening the multilateral trading system. Compared to the original Members, Article XII Members made more extensive commitments when acceding to the WTO.

4.2. On agriculture domestic support, developed Members have reserved more subsidy tools and policy space. Such disparity becomes even more evident in the market access area. Graph 25 indicates that the average bound rate of developed Members (39%) is 2.4 times that of the Article XII Group (16.4%).

4.3. On Non-Agricultural Market Access (NAMA), the average tariff rate of original Members is three times that of the Article XII group. Article XII Group has 100% bound coverage, while many original Members are still lagging behind with only 74.5% bound coverage average and only 37 of the original Members have 100% coverage.

#### 5 S&DT AND SELF-DECLARATION

##### 5.1 S&DT that Applies to Developing Members is an Integral Part of the WTO Agreements

5.1. In 1947, 11 developing Members acceded to the GATT based on the same conditions and obligations as developed Members. To help developing Members better benefit from the multilateral trading system, the concepts of "less than full reciprocity" and "non-reciprocity" gradually emerged during 1960s, gaining an acceptance which gave birth to Part IV of the GATT. The issue of development was explicitly addressed in that part for the first time in history. *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* ("Enabling Clause") adopted in 1979 provided a permanent legal basis for S&DT Clause.<sup>11</sup>

5.2. In 1986, developing Members agreed to launch the Uruguay Round, with S&DT being an integral part of the negotiations as stated in the Ministerial Declaration. However, the negotiation outcomes were far less than expected. A prominent expert observed that, "most of the concessions

<sup>10</sup> Strengthening the Participation of Developing Countries in World Trade and the Multilateral Trading System, UNCTAD/WTO Report, 1996.

<sup>11</sup> Alexander Keck and Patrick Low, *Special and Differential Treatment in the WTO: Why, When and How*, 2004.

and commitments have come from developing countries and very few from industrialized countries."<sup>12</sup> In 1994, all developing GATT Contracting Parties joined the WTO, adopting the results of the Uruguay Round as a single-undertaking. In Article XXXVI: 1(c) of GATT 1994, the Contracting Parties noted that "there is a wide gap between standards of living in less-developed countries and in other countries". Provisions in paragraph 3 of the article specified the following: "There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development". What could constitute positive efforts was specified in paragraph 8 of the article, which states that "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties".

5.3. As assessed by UNCTAD, developed Members' obligations to developing Members exist only in the form of "best endeavour clauses"<sup>13</sup>. It is also the reason for the Paragraph 44 of Doha Ministerial Declaration adopted in 2001, calling for Members to "review all provisions with a view to strengthening them and making them more precise, effective and operational". Until the 2017 Eleventh WTO Ministerial Conference in Buenos Aires, minimal progress had been achieved on development. In the meantime, developing Members' legitimate rights to utilize S&DT has been challenged. However, history has shown that, without the strengthened S&DT stipulation and enforcement, there is no way to achieve the objectives of the multilateral trading system as stated in the Marrakesh Agreement. This should be taken serious account of in the WTO reform process.

## 5.2 "Reversed" S&DT

5.4. The claim by the United States that "all rules apply to a few (developed countries)" totally ignores the 70 plus year history of GATT/WTO. First, "Being carried along" due to capacity constraints is a factual description of the relationship between most developing Members and the multilateral trading system. A phenomenon of "rules deficit" and "development deficit" widely existed in the Uruguay Round as a result of the lack of capacity of developing Members and the dominant role developed Members played in those negotiations. Second, there were many instances wherein the developed Members secured exceptions and failed to adhere to even the fundamental principles of the multilateral trading system. Some of these exceptions were in place for decades, thereby undermining the rules and disciplines under the GATT/WTO. And during the Doha Round, many developed Members had secured country-specific carve-outs from rules that would have been generally applicable to them, for example country-specific carve-outs for some developed Members provided in the Draft Agriculture Modalities Text Rev.4, such as paragraphs 42 and Annex A of the Draft Modalities Text providing the United States an exception from the provision applicable for calculating product-specific limits on Blue Box, which gave the United States higher limits in product-specific support under Blue Box, particularly for corn, wheat, cotton and rice. In addition, exceptions for developed Members are also contained in the Nairobi Decision on Export Subsidies. While these were not labelled as S&DT provisions, it does not hide the reality that in effect these were S&DT provisions for some of the developed Members, which is usually referred to as "reversed S&DT". Such reserved S&DT has led to the long-lasting imbalances in the multilateral trading system as well as distortions in the international trade. It is, thus, inaccurate and disingenuous of the United States to assert that all rules have applied only to a few (developed countries).

5.5. Article XI:1 of GATT prohibits import restrictions and import duties exceeding those bound in a Schedule of Concessions in Article II:1(b). In 1955, pursuant to a request made by the United States<sup>14</sup>, the Contracting Parties, acting under Article XXV:5 of the General Agreement, decided to waive the obligations of the United States under Articles XI and II to the extent necessary to prevent a conflict with these provisions in the case of action required to be taken by the Government of the United States under Section 22 of the Agriculture Adjustment Act. Pursuant to the Waiver, the United States was free to impose quantitative restrictions on imports of agricultural products, otherwise not permitted under provisions of Article XI:1 of GATT. While the Waiver was supposed to be "temporary"

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<sup>12</sup> Bhagirath Lal Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes*, Chapter 1, 1998.

<sup>13</sup> UNCTAD, *The Outcome of the Uruguay Round: An Initial Assessment*, 1994.

<sup>14</sup> GATT Document L/315, dated 28 January 1995. United States request, for waiver in connection with Section 22 of the Agriculture Adjustment Act.



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in nature, the United States benefitted from the exception from the generally GATT provisions for almost 40 years.

5.6. In violation of provisions of Article XI of GATT, through a series of arrangements commencing 1 October 1961, including Short Term Arrangement (1961-1962), Long Term Arrangement (1962-1973), the Multi-Fibre Agreement (1973-2004) and eventually Agreement on Textiles and Clothing (1995-2004), the United States and some other developed Members started imposing restrictions on imports of textile and clothing products. The quotas were initially confined to cotton textiles, then enlarged to cover textile products made of wool and man-made fibres from 1974, to include products made of vegetable fibres and silk blends from 1986, and eventually encompassed the whole area of textile products of all fibres. The United States used the exception from generally applicable GATT rules for a period of 43 years and 3 months. Some other developed Members also benefitted from the exception with slightly shorter duration.

5.7. Agriculture has remained one of the most contentious issues in the history of GATT/WTO. The 1955 Waiver for the United States was followed by a spate of measures by the developed Members, which enabled them to protect their markets and distort trade. Further, the Agreement on Agriculture negotiated during the Uruguay Round perpetuated many of the distortions. Developed Members currently enjoy the tremendous benefits of being able to provide as much as nearly \$160 billion of Aggregate Measurement of Support (AMS) to their domestic agricultural producers, representing more than 90% of global AMS entitlements, while most developing Members have the access to none of such measures. The policy space thus available to developed Members includes: (1) providing significantly high number of subsidies compared to the value of production of the products concerned; (2) concentrating the subsidies in a few key products (e.g. cotton for the United States, dairy and poultry for the European Union, etc.); and (3) shifting the products in which the subsidies are concentrated. Detailed numbers can be found in the joint submission by China and India, titled "Elimination of AMS to Reduce Distortion in Global Agricultural Trade" (JOB/AG/102). Developed Members also retained trade-distorting tariff barriers, such as tariff peaks and tariff escalation, that significantly affect the export interests of developing Members on some of their competitive products including major agricultural products, fruits, vegetables, and fishery products, etc. In addition, some Members - again mainly the developed ones - secured the right to further insulate their agriculture markets through Special Safeguards (SSG). It is now recognized by many experts that despite some S&DT provisions in favour of the developing Members, the Agreement on Agriculture has a large number of asymmetries and imbalances. This has tilted the playing field against the interest of most developing Members. Any move to dilute the existing S&DT provisions in agriculture would have severe adverse consequences for hundreds of millions of farmers in developing Members.

5.8. Developed Members played a dominant role in high-tech industries in the 1990s. To retain such advantages, they strongly pushed and successfully ensured that in the ASCM, the subsidies for research and development activities are classified as non-actionable subsidies in the transition period. In fact, these kinds of subsidies were mainly utilized by developed Members at that time. Developing Members were very often at an extreme disadvantage in such areas and did not possess resources to provide such subsidies, which further exacerbated the imbalance in the competition between developing and developed Members, as shown in Graph 26. When developing Members started to have the capability to do so, such subsidies which are important for the industrialization and modernization have become actionable. As emphasized by a renowned expert, developed Members have created "a multilateral order which best suits their own development trajectory - one that diminishes space for promoting industries critical to climb up the development ladder, while increasing scope for sponsoring the technology-intensive sectors now critical to securing their national prosperity"<sup>15</sup>.

5.9. The TRIPS Agreement is considered "grossly deficient", providing for the protection of the interests of IPR-holders only, "without any significant balancing factors to protect the interests of the consumers of intellectual property". Bhagirath Lal Das noted that "the TRIPS Agreement is to seek maximum possible gain for the established patent-holders."<sup>16</sup> This imbalance is especially manifested by the huge IPR royalties received by developed Members. As shown in Graph 27, the

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<sup>15</sup> Linda Weiss, *Global Governance, National Strategies: How Industrialized States Make Room to Move Under the WTO*, School of Economics & Political Science of University of Sydney, 2005.

<sup>16</sup> Bhagirath Lal Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes*, Third World Network, 1998.

United States is the largest beneficiary in the trade of cross-border IPR-based transactions with its royalties and license fees receipts in 2012 amounted to \$85 billion, even much higher than many developed Members. In other words, the United States is the biggest IPR exporter while developing Members are basically on a downward trend.

### **5.3 Self-declaration**

5.10. The WTO Agreement (Article XVI:1) provides that "WTO shall be guided by decisions, guidance, procedures, customary practices followed by the contracting parties to GATT 1947." Self-declaration of developing Member status had been a long-standing practice with recognized legitimacy under the GATT 1947, hence it becomes part of the customary practices to be followed by the WTO established in 1995.

5.11. This practice has served to allow developing Members to gradually comply with GATT/WTO disciplines and to integrate themselves in the multilateral trading system with a negotiated degree of policy space. It is an instrument to render their economic integration more sustainable.

5.12. As stated in the Marrakesh Agreement, the WTO was created with the multiple objectives of raising standards of living, ensuring full employment, expanding the production and trade, promoting sustainable development, etc. rather than just maximizing trade per se. Moreover, the WTO Members agreed in Marrakesh that WTO would adopt an approach to trade policy consistent with Members' respective needs and concerns at different levels of economic development.

5.13. For developed Members, ample evidence has demonstrated that they have the economic structure and related capabilities to reap the benefits from enhanced market access and lower trade barriers. However, for developing Members, structural constraints and weak capabilities continue to put them in a different position. It is widely agreed that trade policy or opening up the economy cannot be the sole decisive factor to reach sustained economic growth. Successful integration into the global economy and achieving high and sustained economic growth require a combination of beneficial access to the global market; the policy space to undertake domestic institutional reforms, structural transformation, technological upgrading and know-how sharing; and strengthened productive capacity. This is the common feature for all self-declared developing Members in the WTO, which also differs fundamentally from developed Members.

5.14. The economic history, including that of today's self-declared developed Members, has shown that such domestic transformation, either institutional reform or productive capacity enhancement, requires the knowledge and understanding of local circumstances and continuous policy experimentation. Developing Members do need same policy space when opening up to the global market to push forward their domestic reform and transformation agenda, which is exactly the reason why the WTO adopts the self-declaration approach. Depriving developing Members of policy space and flexibilities would be a gross violation of the basic tenets of justice and fairness in international governance, and would strike at the very legitimacy of the rules-based system. The WTO, in serving its multiple purposes, should build a development-friendly trade regime, which encourages and supports its developing Members to conduct domestic reform and transformation according to their local situation while being integrated into the global economy.

5.15. It should also be well noted that, though the self-declared developing Members have the right to utilize S&DT, they always make their contribution as much as they can. A number of developing Members' utmost commitments on Trade Facilitation Agreement implementation is a good demonstration to show that the self-declaration approach does not paralyze the WTO negotiations, but rather, plays a key role for successful negotiation and feasible implementation of the WTO agreements.

## **6 CONCLUSION**

6.1. The real threats to the relevance, legitimacy and efficacy of the WTO are the proliferation of WTO-inconsistent protectionism and unilateralism, the blockage of Appellate Body member selection process and the impasse of the Doha Development Round, not the self-declared development status of developing Members.

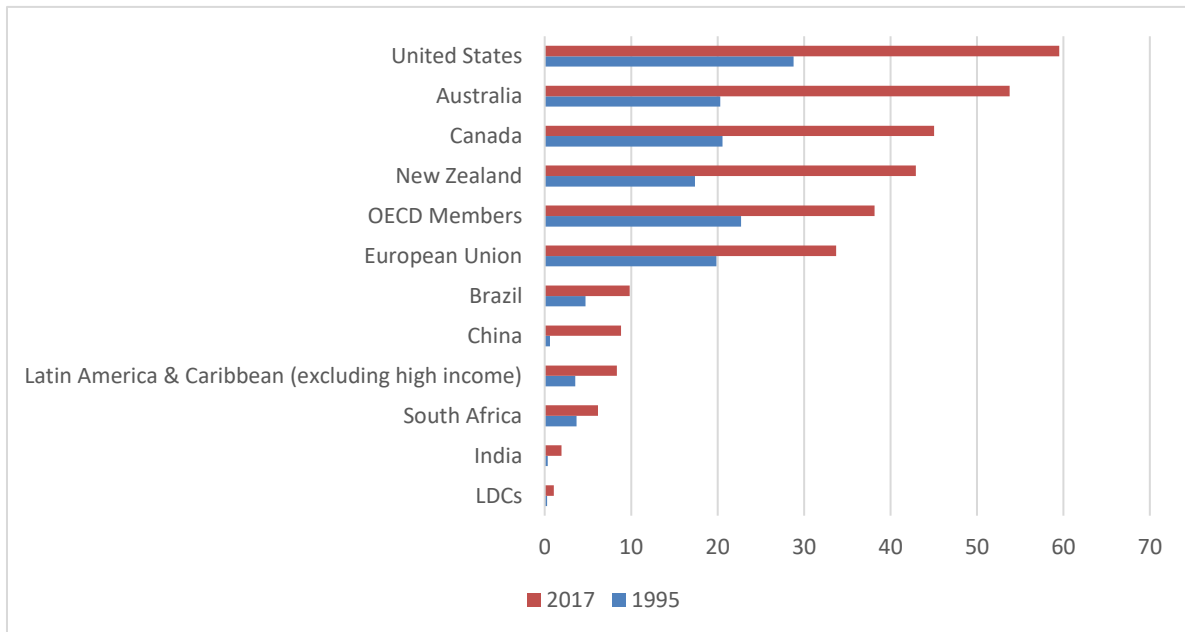
6.2. S&DT is an integral part of the multilateral trading system, and self-declaration of developing Member status, a fundamental rule in the WTO, has proven to be the most appropriate classification approach to the WTO. Despite the impressive economic progress made by many developing Members over the past decades, development divide persists and has actually widened. Further, developing Members continue to confront many formidable challenges, which underscores the continued relevance of S&DT provisions in their favour. As a fundamental right granted to all developing Members, each developing Member shall, based upon its own particular situation, make the decision by itself on whether, when, where and how to use S&DT, and to what extent as well. No other members are entitled to interfere with such a self-declared decision. If this had not been the case, the WTO would not have been able to expand to today's scale and formulate such a comprehensive rules-based system through rounds of multilateral negotiations. Any attempt to dilute S&DT would be in conflict with the fundamental premise of equity and fairness that underpins an international treaty framework in a context of a Membership as diverse as that of the WTO.

6.3. To date, the common mission of development for developing Members is far from being accomplished, and capacity constraint remains the distinct feature of developing Members. In our joint endeavour toward a more relevant, effective and authoritative WTO, Members shall fully take into account the capacity constraint factor in formulating any negotiation structure including its scope, ambition and steps. Unless we are willing to properly address the practical demands and specific difficulties of the developing Members as well as the reversed S&DT for developed Members, we will never be able to encourage them to fully participate in and make due contributions to the future negotiations.

6.4. If the promise of taking everyone along is a desirable objective to be fulfilled and if inclusiveness has to be ensured then S&DT for all developing Members is the obvious solution.

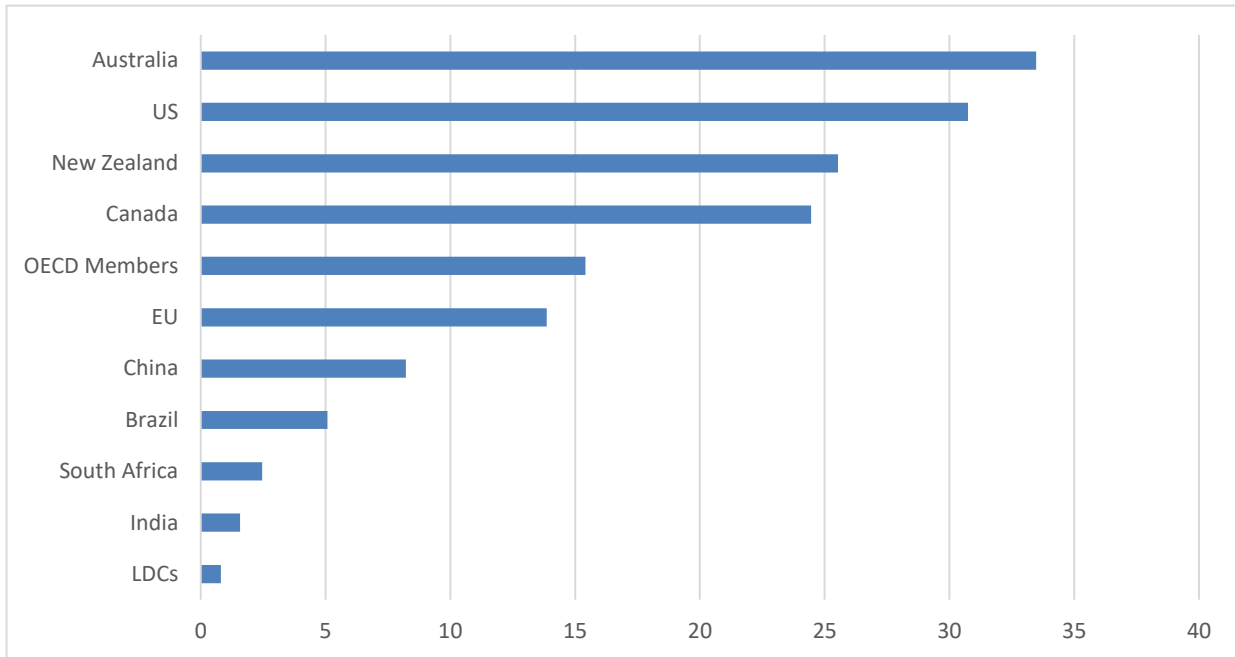
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## APPENDIX

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

Source: World Bank WDI.

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



Source: World Bank WDI.

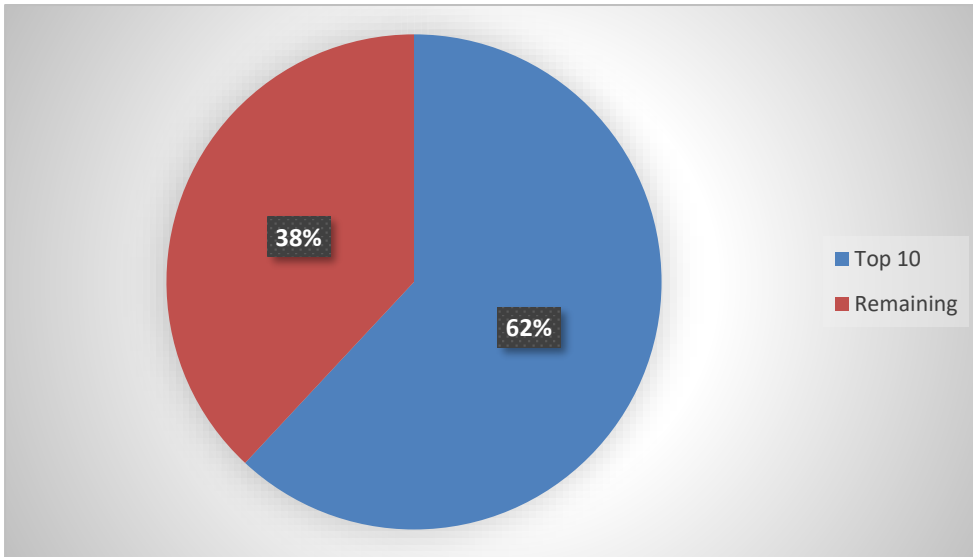


**Table 1: Top 10 countries with the Largest Proportion of the World's (MPI) Poor, 2017-2018**

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

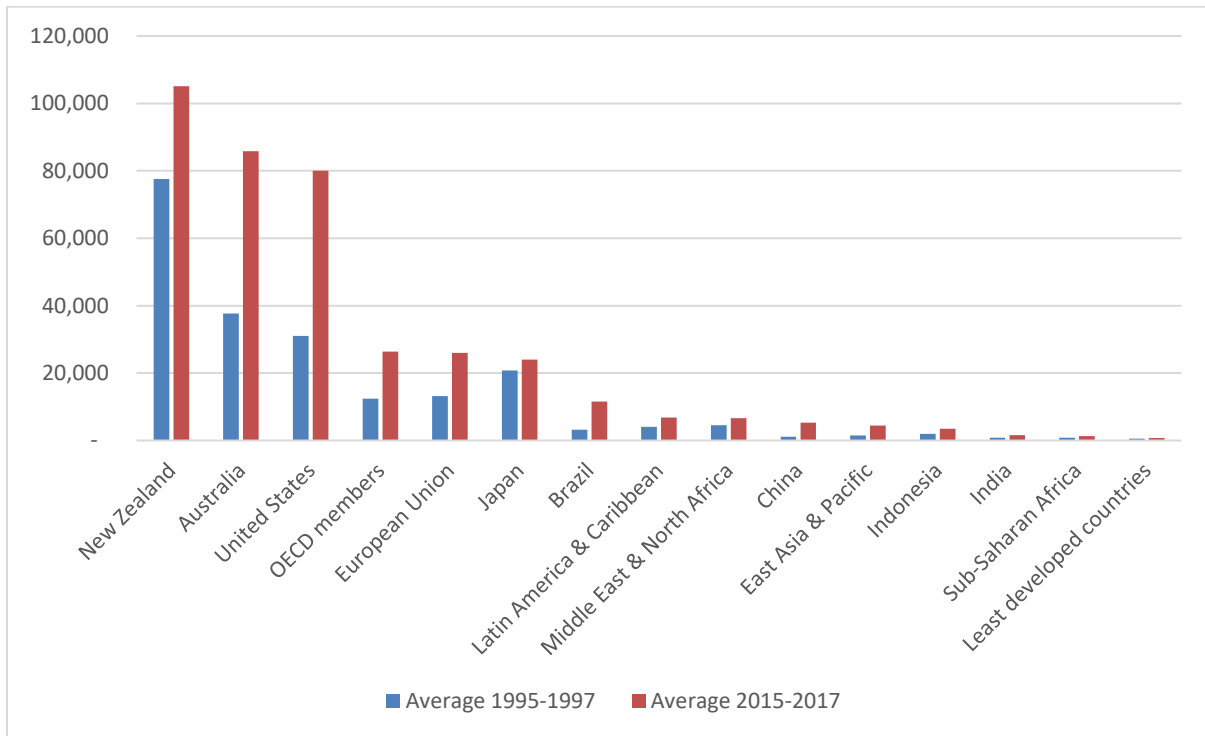
Source: Oxford Poverty and Human Development Initiative Global Multidimensional Poverty Index (2017-2018), University of Oxford, see: <http://ophi.org.uk/multidimensional-poverty-index/global-mpi-2017/>, accessed on 25 January 2019.

**Graph 3: Distribution of Under-nourished Population, Average 2015-17**



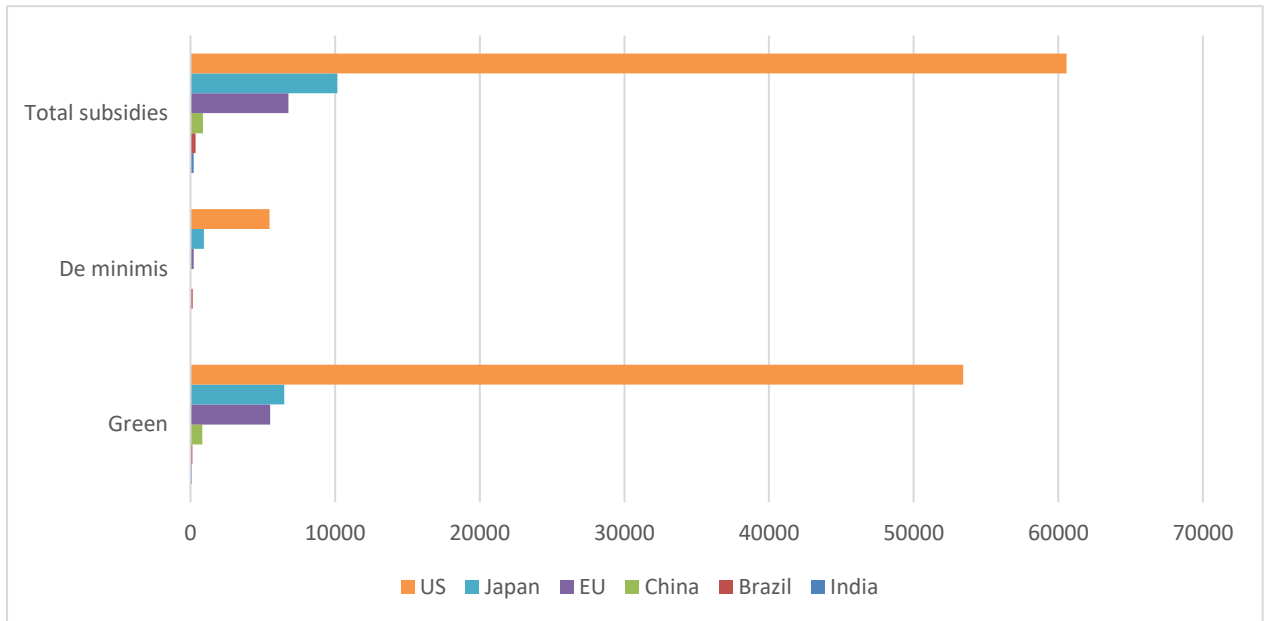
Source: UN Food and Agriculture Organization.

**Graph 4: Agriculture, Forestry and Fishing, Value-Added Per Worker (Constant 2010 US\$), Selected WTO Members and Groups, 1995-1997 vs 2015-2017**



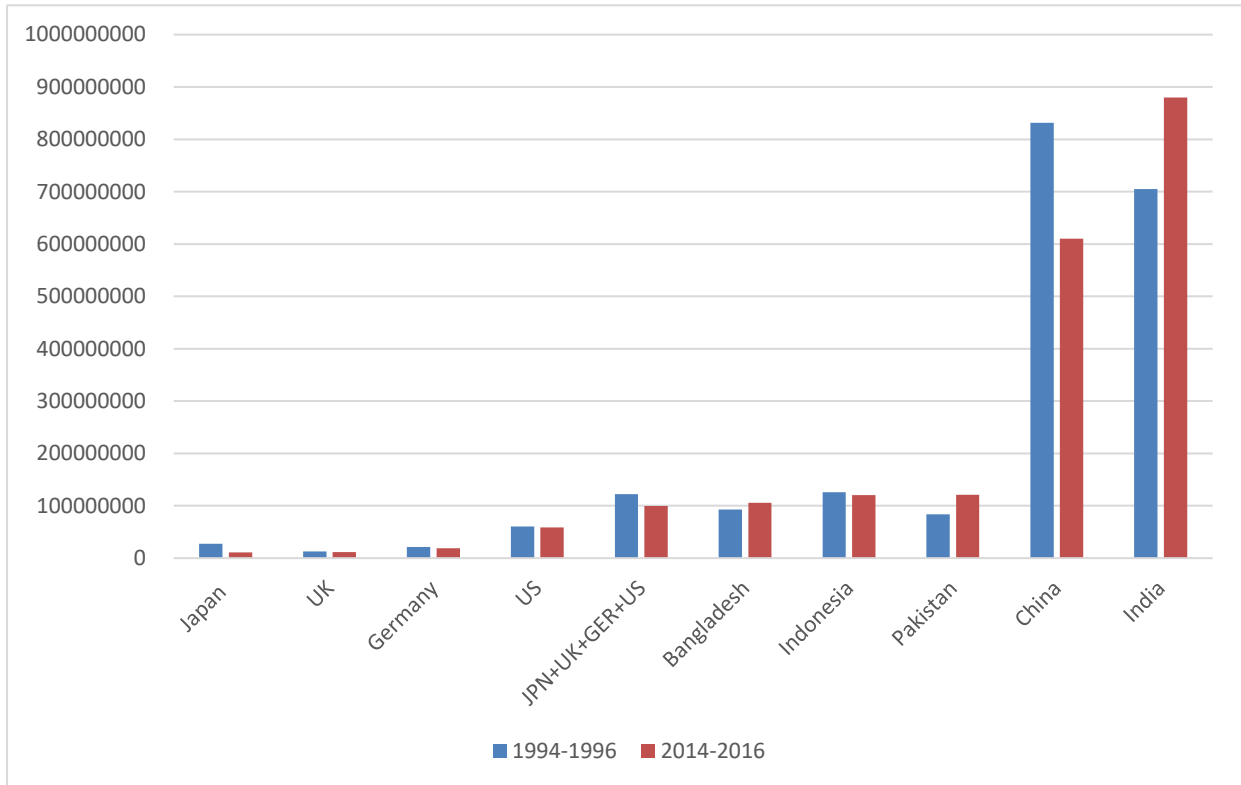
Source: World Bank WDI.

**Graph 5: Subsidies Per Capita to Farmers (US\$), Selected WTO Members and Groups**



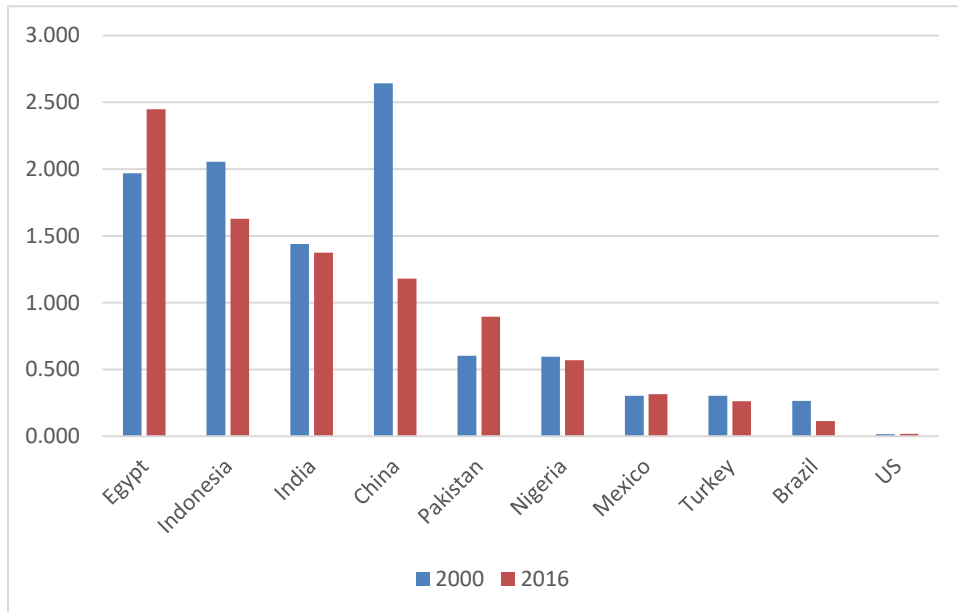
Source: Notified data from WTO Members and groups.

Note: Data from US 2016, from EU 2015/2016, from Japan 2014, from China 2016, from India 2015, from Brazil 2015/2016.

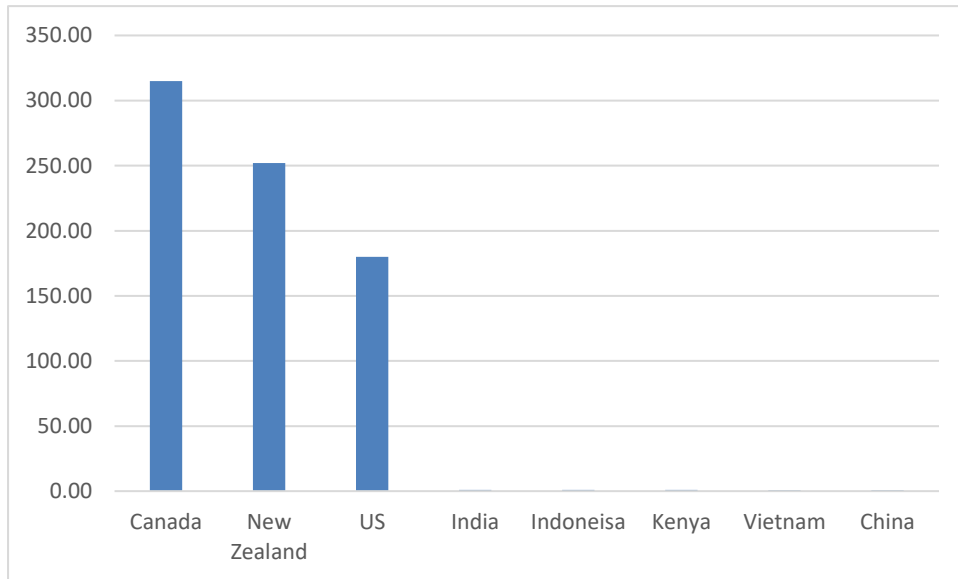
**Graph 6: Rural Population, Selected WTO Members, Average 1994-1996 vs 2014-2016**

Source: Calculations based on World Bank WDI.



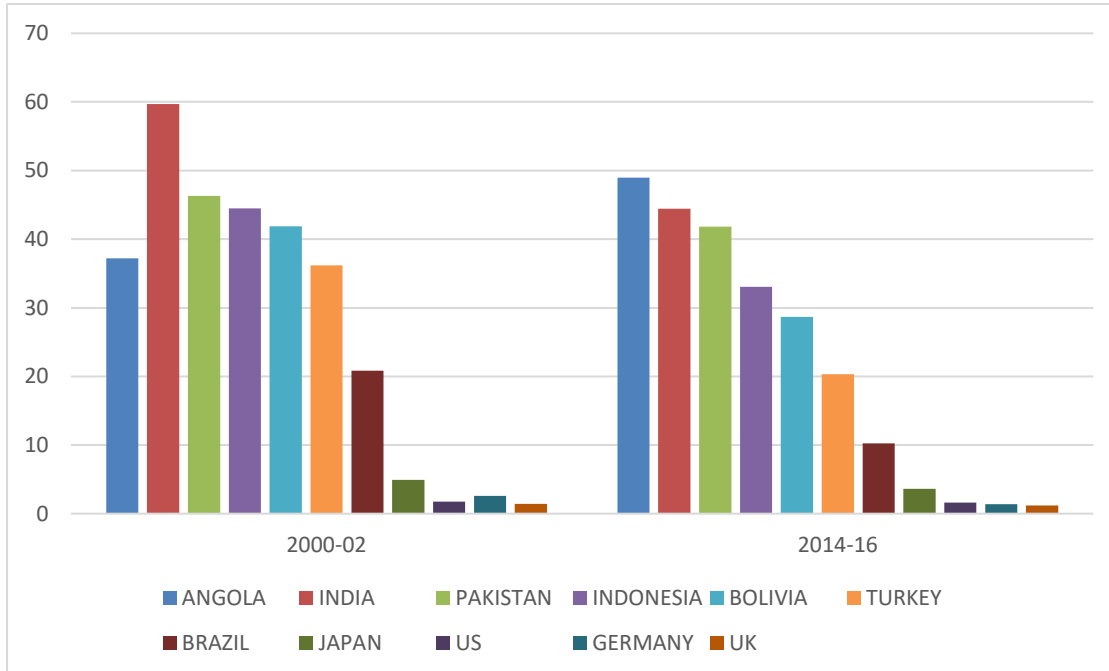
**Graph 7: Farmers Per Hectare, Selected WTO Members, 2000-2016**

Source: Calculation based on World Bank WDI and ILOSTAT.

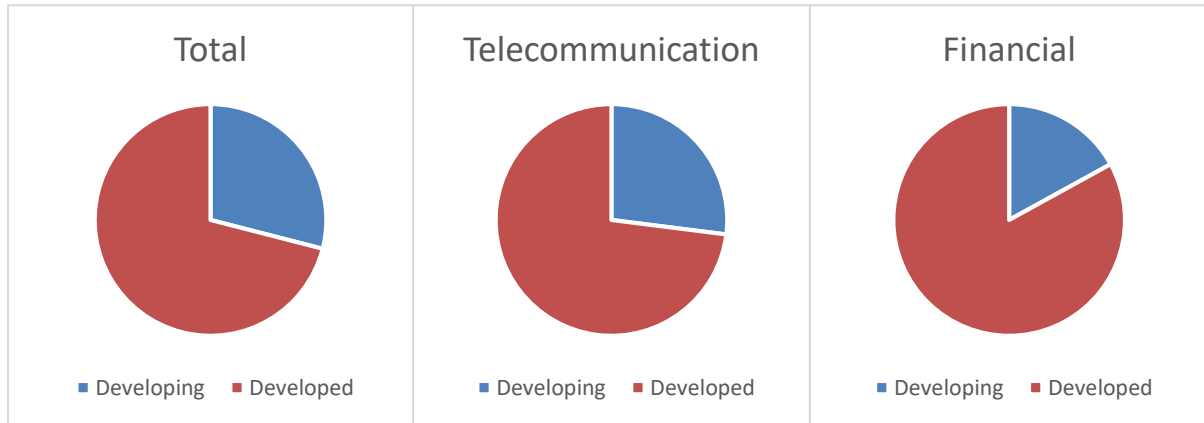
**Graph 8: Average Land Holdings, Selected WTO Members**

Source: Estimation based on UN Food and Agriculture Organization and competent authorities.

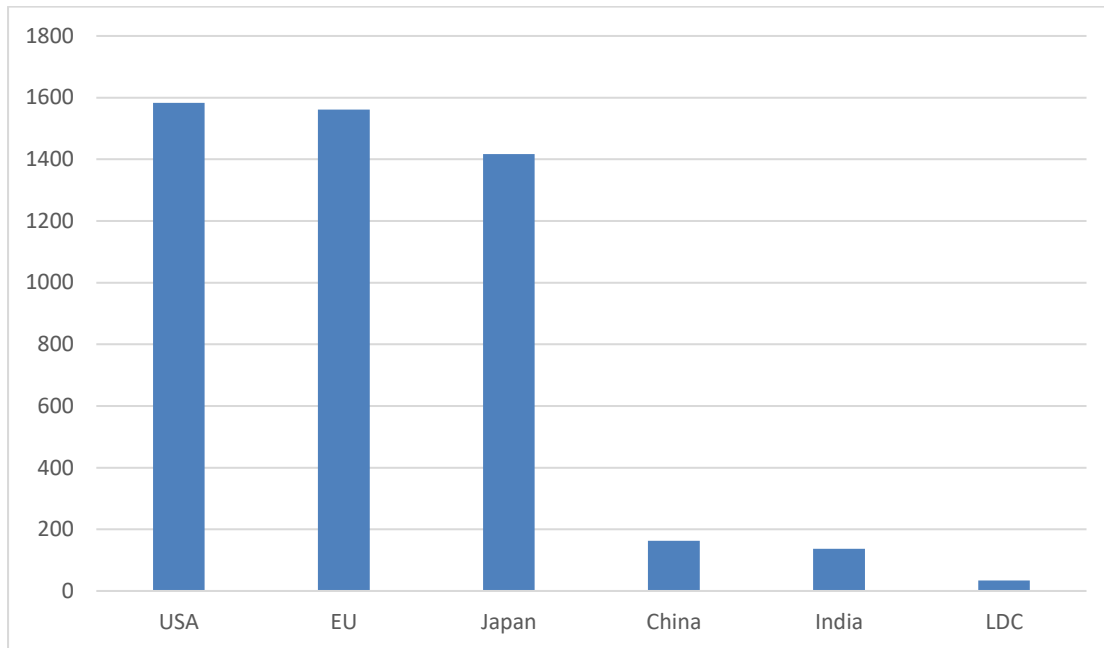
**Graph 9: Share of Agriculture in Total Employment, Selected WTO Members, 2000-2002 vs 2014-2016**



Source: World Bank.

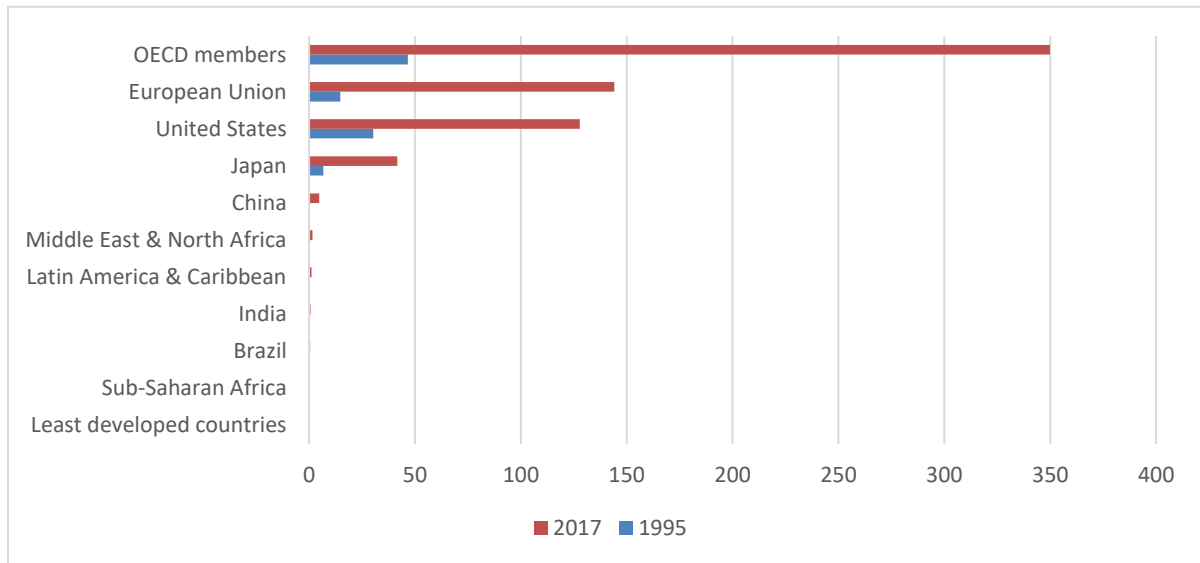
**Graph 10: Share of Services Export, Developing and Developed Members (%), 2016**

Source: United Nations, World Economic Situation and Prospects Report 2018, p.26.

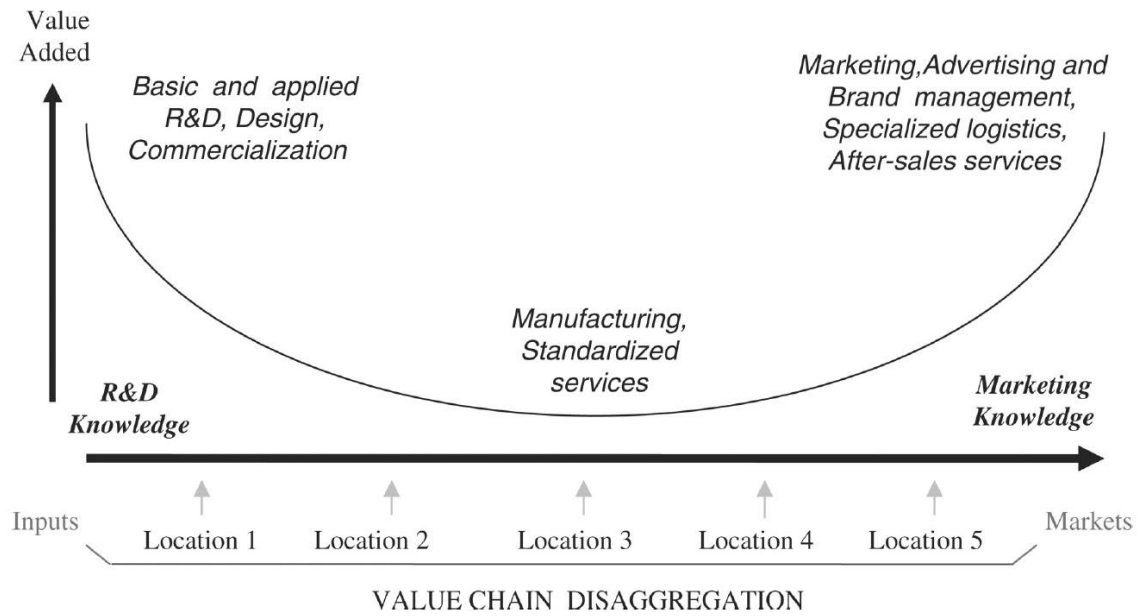
**Graph 11: Services Export Per Capita (US\$), Selected WTO Members, 2017**

Source: World Trade Organization.

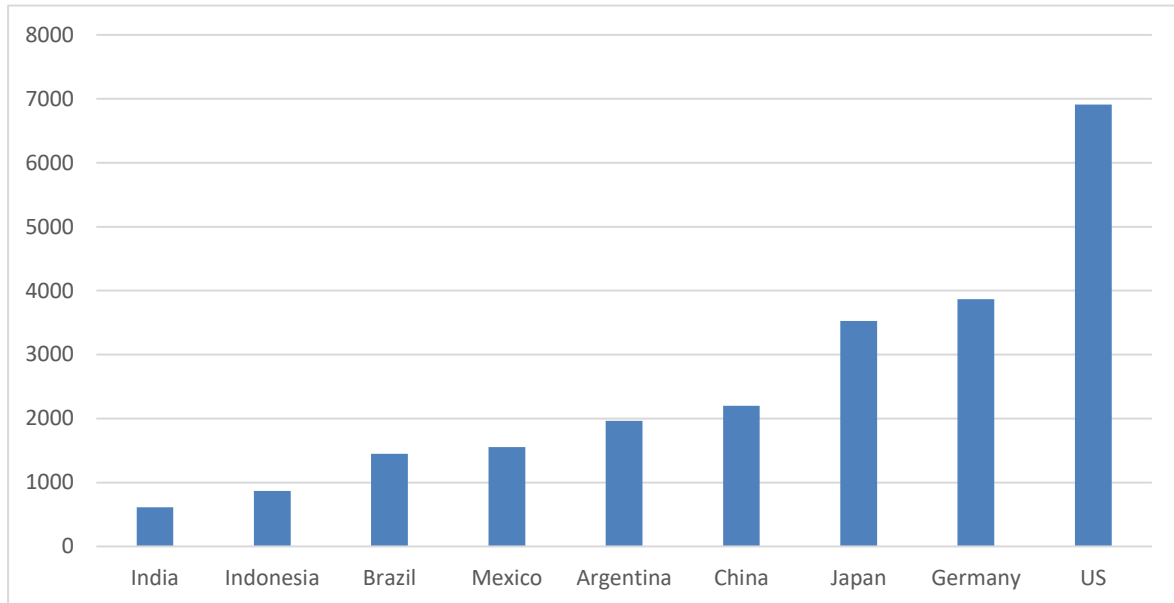


**Graph 12: Intellectual Property Rights Receipts, (US\$ Billion)**

Source: World Bank WDI.

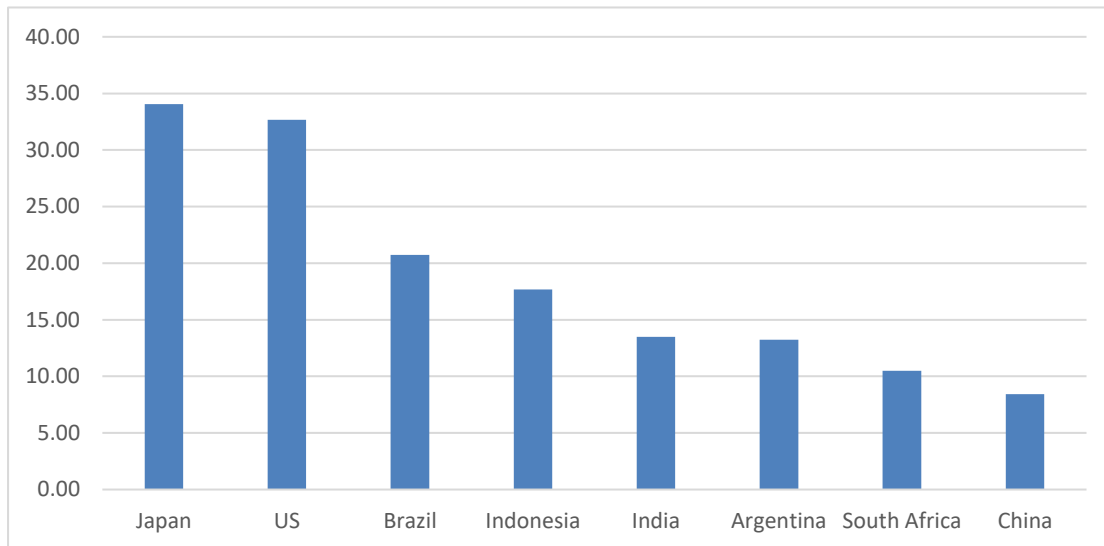
**Graph 13: Conceptual Framework of the Smile Curve**

Source: M. YE et al. *Measuring Smile Curves in Global Value Chains*, IDE Discussion Paper No. 530, Aug. 2015, p.3.

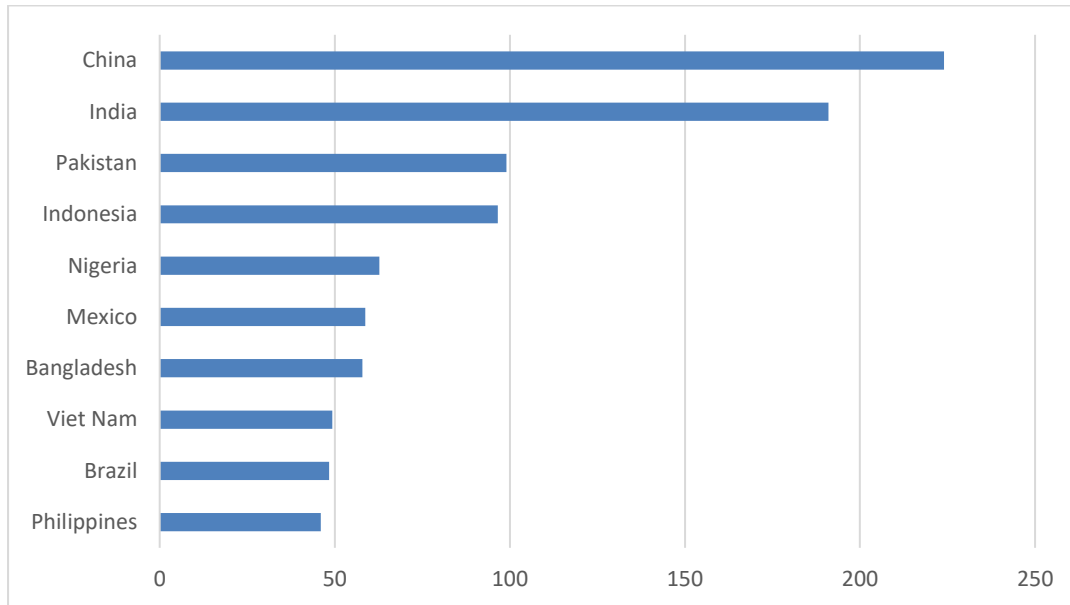
**Graph 14: Energy Use Per Capita, Selected WTO Members, Average 2012-2014**

Source: Calculations based on World Bank WDI.

**Graph 15: Commercial Bank Branches Per 100,000 Persons, Selected WTO Members, Average 2014-2016**



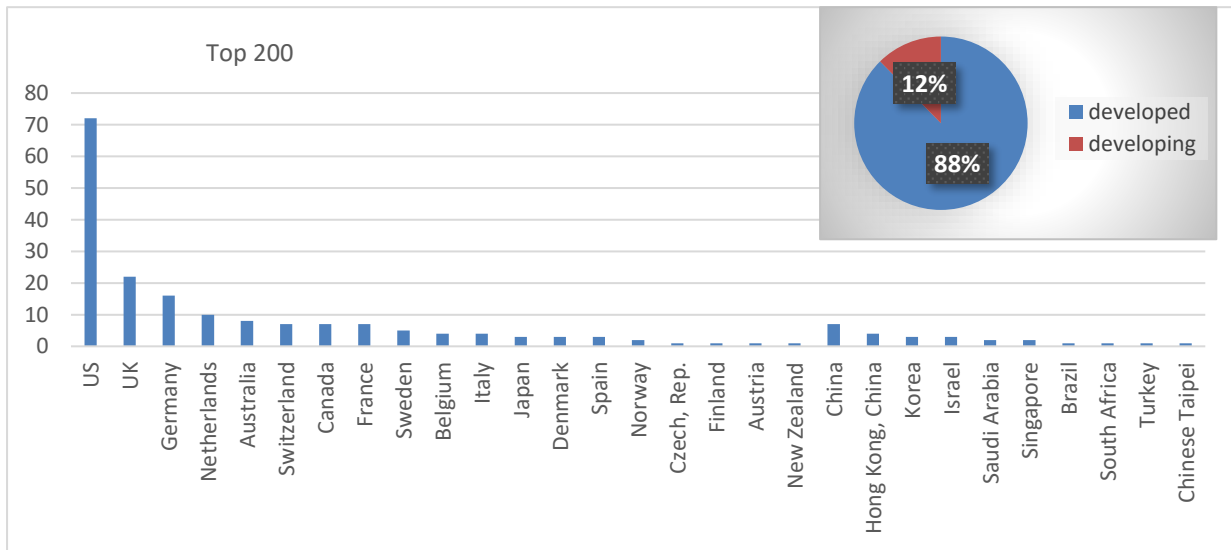
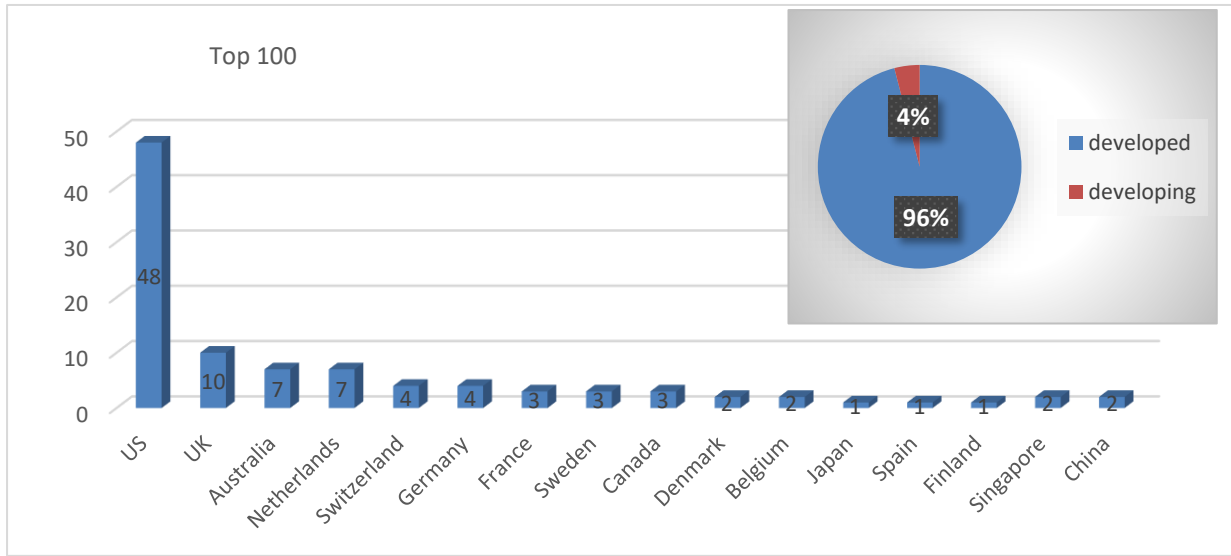
Source: World Bank.

**Graph 16: Number of Adults Without A Bank Account (million), 2017**

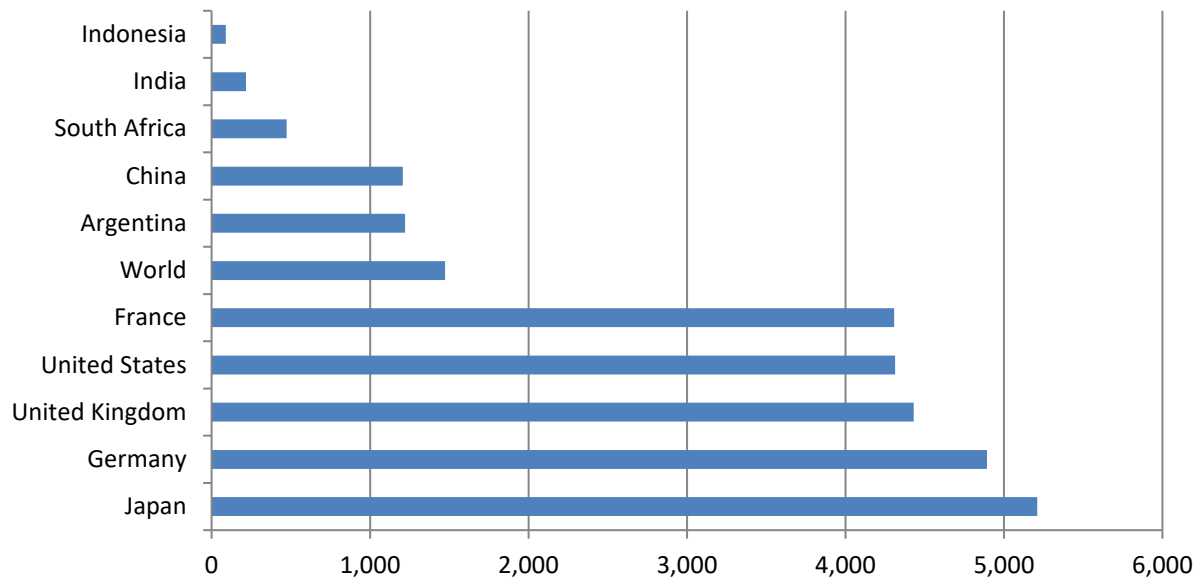
Source: Forbes.

See: <https://www.forbes.com/sites/niallmccarthy/2018/06/08/1-7-billion-adults-worldwide-do-not-have-access-to-a-bank-account-infographic/#c1056f64b011>, accessed on 25 Jan. 2019.

**Graph 17: Best Global Universities, 2018**

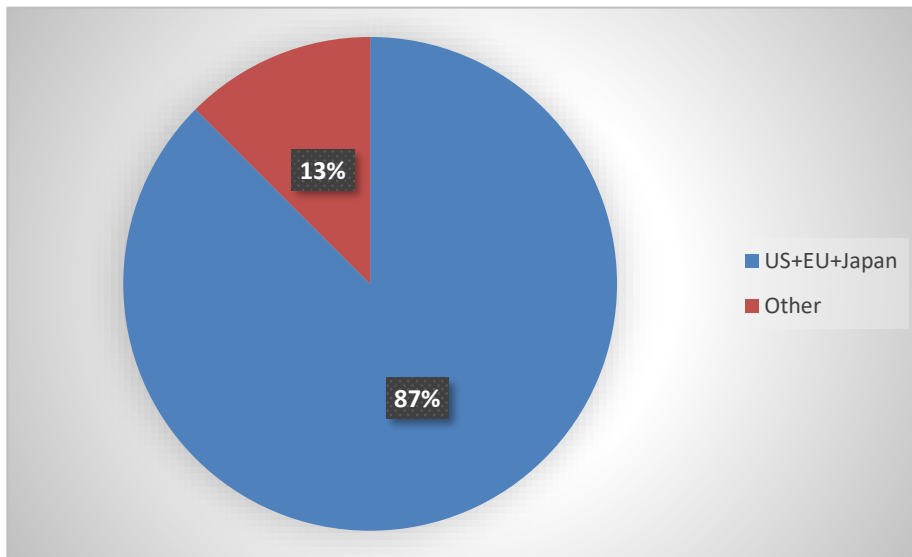
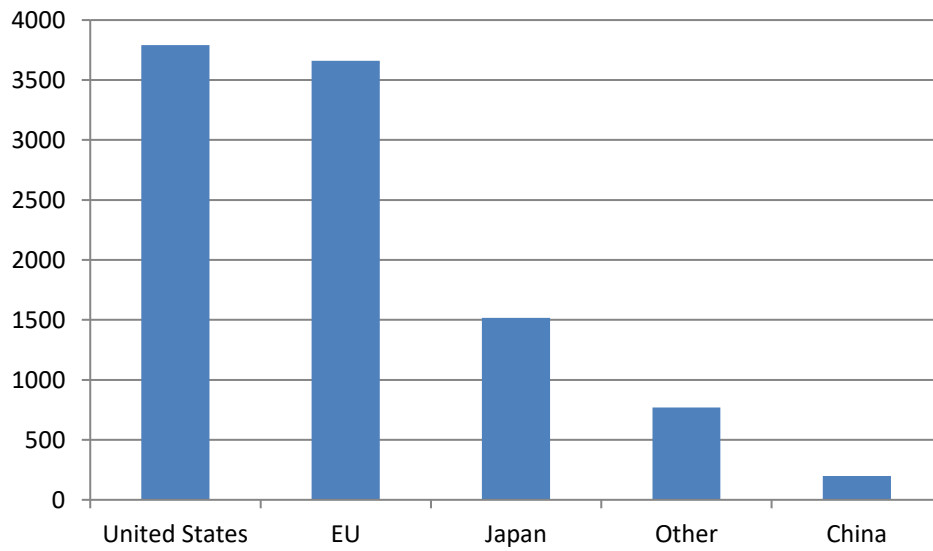


Source: US News – Best Global Universities Rankings, among which, (1) EU Member States are automatically taken as developed countries; (2) there are 202 universities out of top 200 as some are scored at the same level. <https://www.usnews.com/education/best-global-universities/articles/slideshows/us-news-best-global-universities>. accessed on 25 January 2019.

**Graph 18: Full-time Researchers Equivalent Per Million People, 2005-2016**

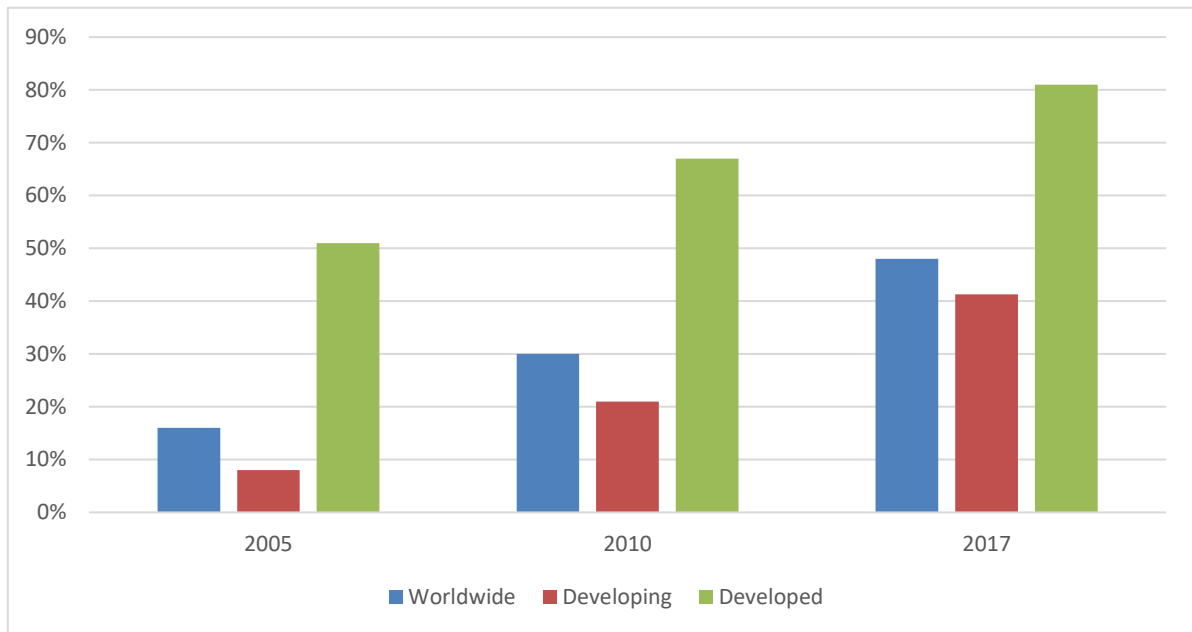
Source: World Bank.

**Graph 19: Standard Essential Patents (SEPs) Numbers, Selected WTO Members**



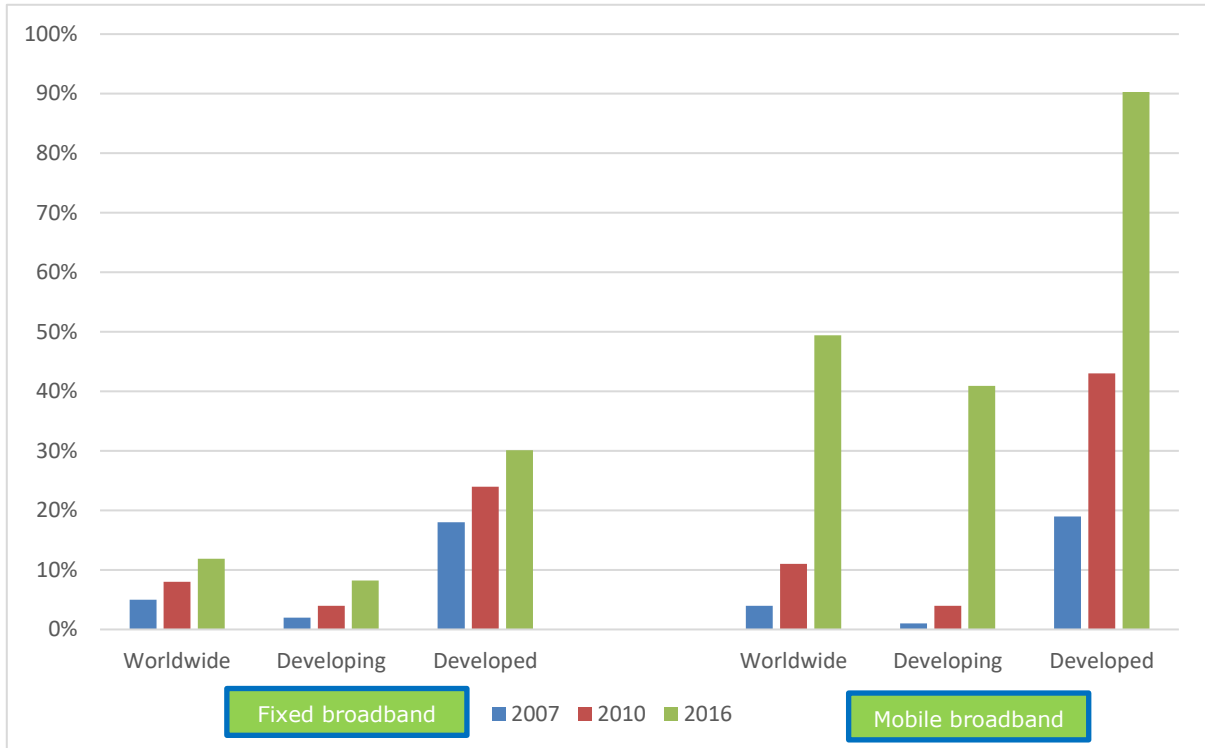
Source: International Organization for Standardization, International Electrotechnical Commission and International Telecommunication Union.



**Graph 20: Worldwide Internet users**

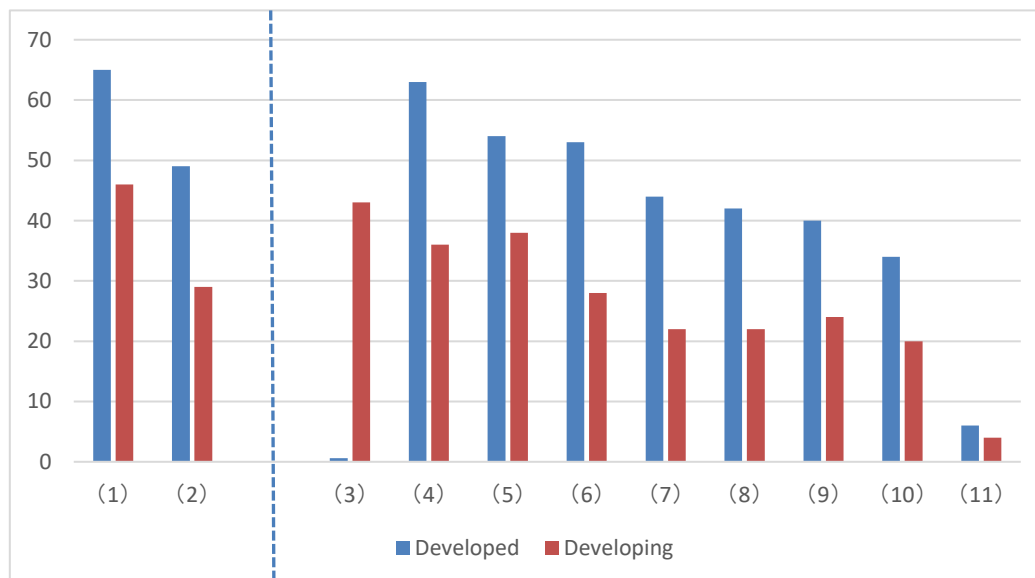
Source: International Telecommunication Union.

**Graph 21: Worldwide Broadband Subscriptions**



Source: International Telecommunication Union.

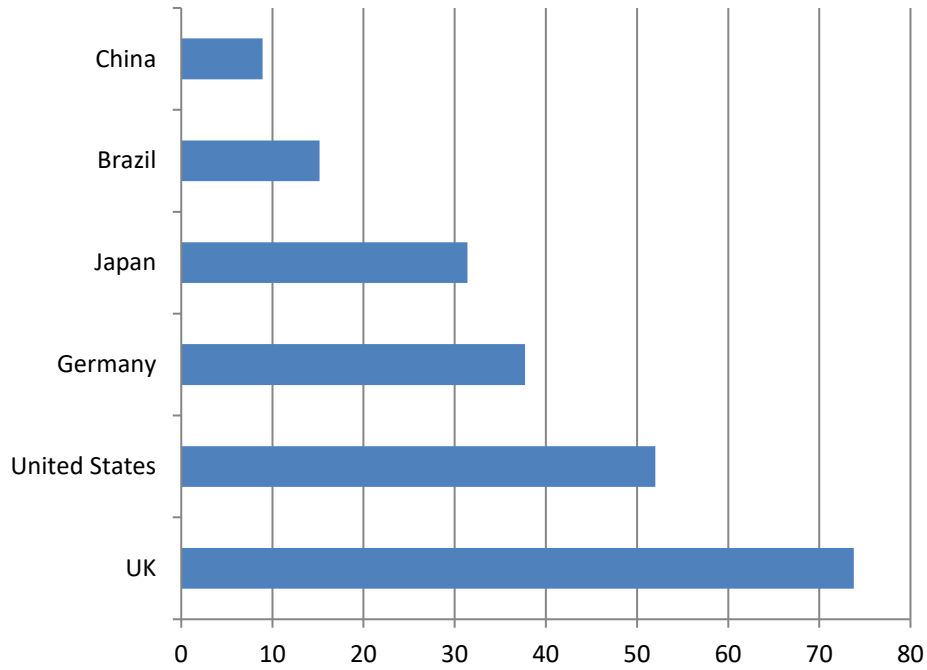
**Graph 22: Digital Skills in Developed and Developing Members, (% Average Proportion of Individuals), 2017**



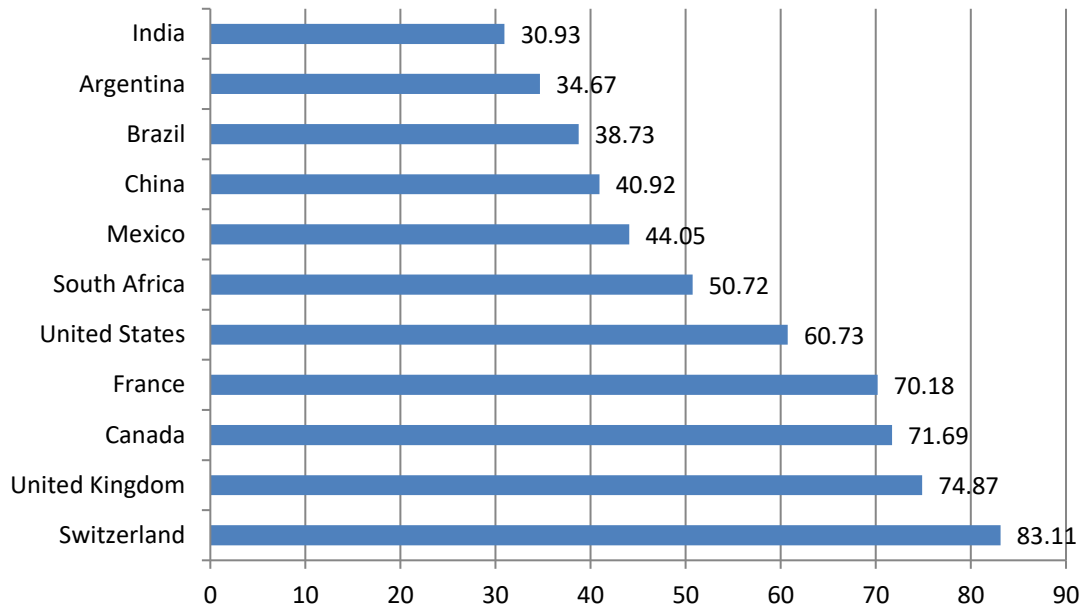
Notes: (1) Basic skills; (2) Standard skills; (3) Copying or moving a file or folder; (4) Sending e-mails with attached files; (5) Using copy and paste tools; (6) Transferring files between a computer and other devices; (7) Finding, downloading, installing and configuring software; (8) Connecting and installing new devices; (9) Using basic arithmetic formulas in a spreadsheet; (10) Creating electronic presentations; (11) Writing a computer program.

Source: International Telecommunication Union. *Measuring the Information Society Report 2018*. Volume 1, p.32.

**Graph 23: Average Profit of Manufacturing Companies of Fortune Global 500, Selected WTO Members (100 million\$), 2017**

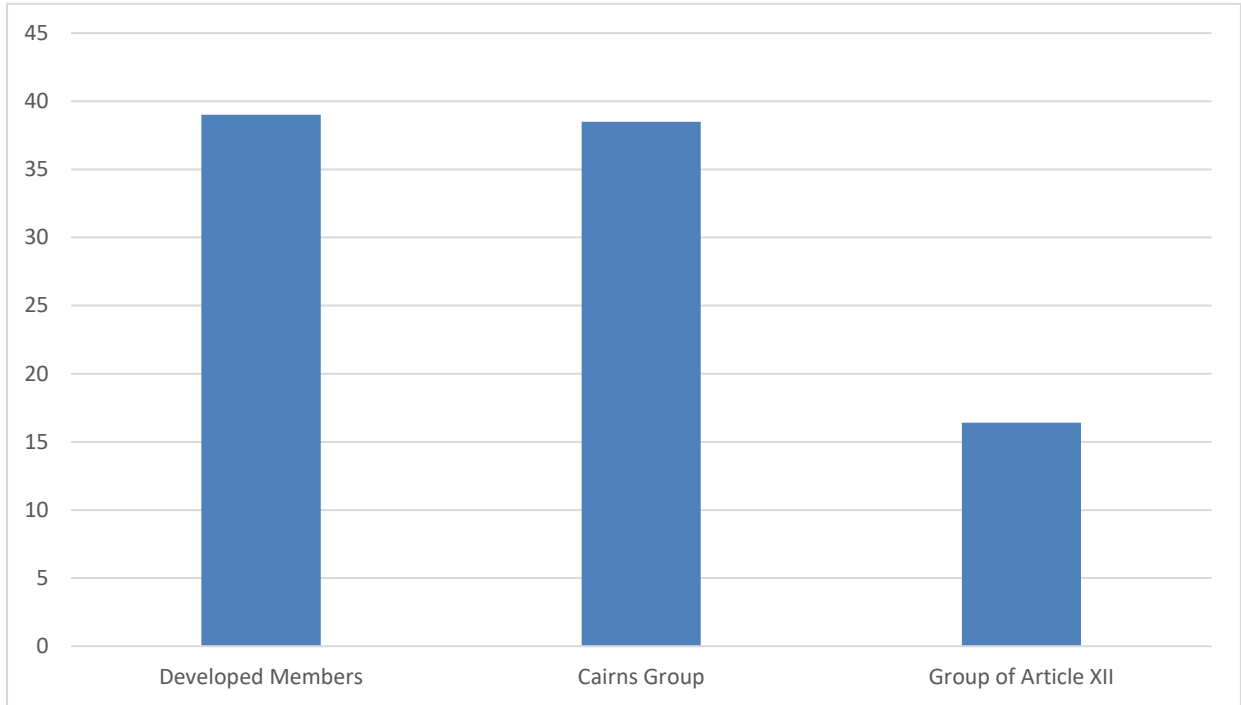


Source: Fortune Global 500, <http://fortune.com/global500/>, accessed on 25 January 2019.

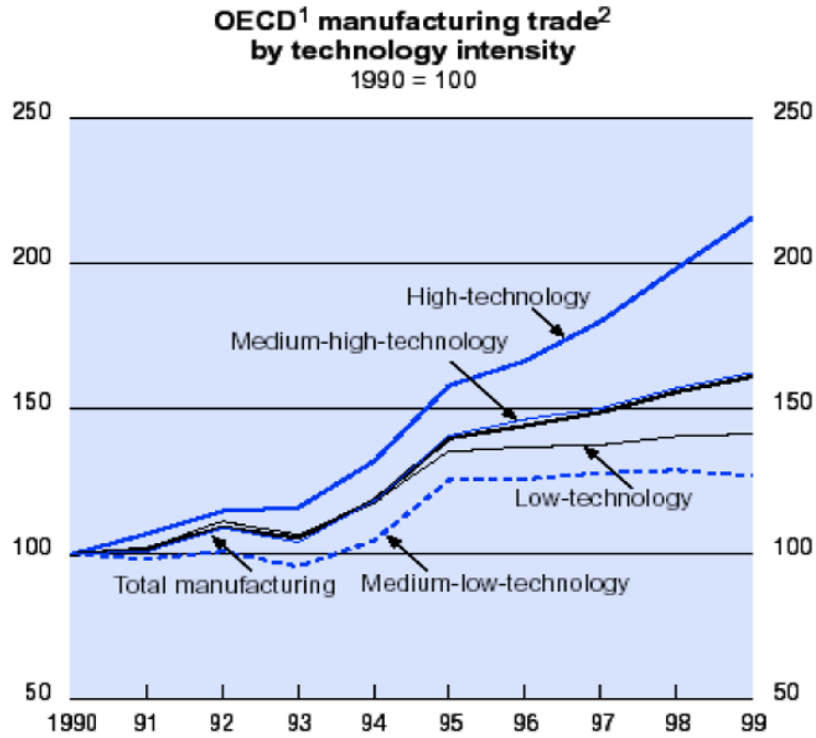
**Graph 24: Globalization Index for 2016**

Source: Bertelsmann Stiftung. 2018 Globalization Report - Who Benefits Most from Globalization? p.9.

**Graph 25: Average Bound Tariff on Agricultural Goods (%)**



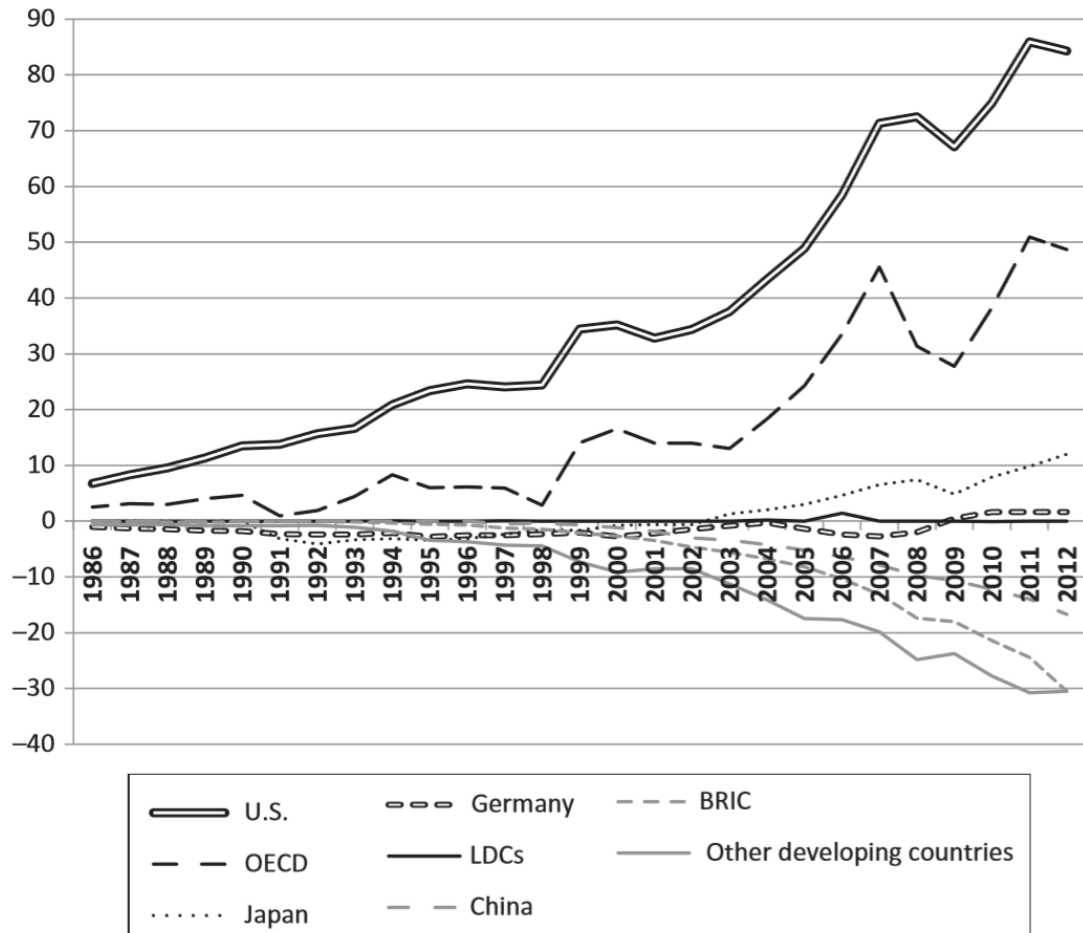
Source: World Trade Organization.

**Graph 26: The Dominant Position of the OECD Countries in High-tech Industry, 1990s**

Note: 1. Czech Republic, Hungary, Korea, Poland and Slovak Republic excluded.  
2. Average value of exports and imports.

Source: OECD and Linda Weiss. *Global governance, National Strategies: How Industrialized States Make Room to Move Under the WTO*, 2005.

**Graph 27: The Trend of Annual Net Incomes from Licensing Fees and Royalties of All Technologies, Selected WTO Members and Groups (in current billion US dollars), 1986-2012**



Source: Calculations based on World Bank WDI.