Review III of Special and Differential Treatment Reform in the WTO: The Differentiated Differentiation Approach, by Aniekan Ukpe (Routledge, 2024)

By:

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Introduction

Aniekan Ukpe's book on Special and Differential Treatment (SDT) in the WTO is written at an inflection point in the World Trade Organization (WTO) and many other international organizations – one of increasingly deepening polarization between developed and developing countries and their respective coalitions. One of the central issues in the divide has been the non-fulfilment of developmental objectives set out in respective legal frameworks by international institutions, and the inability to reform. Negotiations on redressing SDT under the WTO have now stretched over 20 years in the Doha

Development Round, with no middle-ground reached.

Ukpe’s book is an objective take on a divisive issue. It addresses the controversial aspect of eligibility to SDT by establishing a country-by-country objective criteria employed through measurable and observable standards based on data. The author examines contemporary arguments and literature on the topic, combing through various agreements that contain the principle, consolidating and assessing various propositions advanced to the WTO on SDT, and examining controversies on the subject particularly tensions between US and China’s. The proposals are consistent with the uniform rules, for example, the use of economic indicators in determining eligibility is aligned with the SCM Agreement.

The author advances the “differentiated differentiation” proposal, which eliminates the need for broad country-eligibility currently in practice. Readers are provided a glimpse into an implementation of the proposal which is applied to the WTO Customs Valuation Agreement providing practical insights into its application. The key lies with the objective design, which seeks to depoliticize eligibility on differentiation and graduation, and deliver relevant needs-based results, through provision specific approaches.

Ultimately, the book is a well-balanced, comprehensive and methodical take on an immensely underrated subject which developing countries [particularly LDCs] hinge on in order to improve trade prospects and for their development.

The Book’s Thesis, Methodology and Context

The author begins the book by contextualising fundamental objectives of SDT to the wider developmental aspirations under the WTO in Chapters 1 and 3. Trade liberalization has had minimal impact on reducing world poverty (possibly increasing it), worsening the distribution of income between rich and poor countries. The author underlies that SDT is an acknowledgement by members of the WTO that countries at different stages of development need different rules to support their economic development, which speaks to equity. The primary challenge and paradox of SDT has been eligibility for differentiation. That is, how the multilateral trading system can design trade rules and modulate trade liberalization commitments among members with divergent priorities, needs, and development levels to achieve an appropriate balance of

rights and obligations. The author establishes the delicate balance, and poses this as a central question which is threaded throughout the book.

Chapter 3 identifies shortcomings in SDT, examining priority issues for developing countries such as market access. The book examines the text of key WTO Agreements such as the Enabling Clause and links the legal provision to schemes such as the Generalized System of Preference, making a strong case that, as currently structured, the SDT framework is not designed to respond positively to the development, financial and trade needs of developing countries. This is largely due to the insecure nature of preferences resulting from the unilateral and non-bindingness of GSPs, erosion of preference margins, and low product coverage – all typifying how SDT has been unable to respond to the market access needs of LDCs and developing countries. It should be emphasised that at the heart of this inability of SDT lies the non-bindingness of SDT provisions – a bane that developing countries have raised concern over since the beginning of the Doha round.

The book progresses to solutions and approaches to rebalance trade rules and support development, proposing a country-specific and agreement-specific approach, which eliminates the need for country-eligibility. This is by linking rule implementation to capacity and the development priorities of poor countries. A comparative examination of the Common but Differentiated Responsibility rules under the Montreal Protocol is undertaken, with a robust needs-based system where country plans are developed based on submitted action plans, and annual reporting is undertaken to ensure prioritisation of assistance, efficient resource allocation and compliance through monitoring.

SDT under the WTO Legal Framework and Proposals

The heart of the book delves into how countries access SDT across various WTO Agreements. The book engages in a critical examination of differentiation, transition times, and thresholds for graduation across key agreement such as the SPS and TRIPS Agreements in Chapter 4, which is necessary for WTO academics and practitioners to appreciate the nuanced and inconsistent application of SDT. Each of the two agreements provides for specific rules relating to SDT access and eligibility in very different ways. While the SCM Agreement explicitly differentiates between developing countries on the basis

of a GNP per capita criterion, the TRIPS Agreement takes a subtly approach in generally providing for a number of in-built flexibilities for countries that face implementation constraints, with only a few of such flexibilities qualifying as SDT for developing countries. The book leans towards an approach that is able to objectively differentiate between countries on needs basis rather than simply based on their designated status. Beyond exploring how objective criteria for access to SDT may be defined, the book interrogates how such criteria may be used for the purpose of graduation. It examines the Composite Indicator Approach used by Gonzalez et al. to determine a threshold for exempting countries from the TRIPS Agreement's on patent provisions in the pharmaceutical sector. The book highlights core aspects of this approach, including the identification of four broad constraints that constrain countries in their implementation of provisions of the TRIPS Agreement and the determination of appropriate analytical criteria against which to base a graduation threshold.

In reapproaching how to improve the current system, three main collieries of thought are proposed. First, increase differentiation utilising objective data, to ensure rules are fairer, such that countries deserving of SDT receive preferential treatment. Second, define developing countries, which may be to expand or clarify Paragraph 4(a) of Article XVIII of the GATT thereby removing arbitrariness. Third, rework rules on self-designation to level the playing field between developing countries themselves.

In providing a remedy to the convoluted and challenging issues of differentiation, the book examines a number of approaches, building on proposals tabled by trade scholars over the past few decades. The first through a country-based approach focused on geographic and socio-economic indicators. This approach speaks to previous points of aligning with developmental and possibly regional needs, in order to respects the diverse nature of countries, whether landlocked, Small Island Developing Countries and countries undergoing droughts. Another approach is based on Hoekman *et al's* approach of adopting a rule of thumb approach focused on countries with weak institutional capacities, and focus on capacity and relaxed obligations to ensure WTO rules do not hinder their development. The third approach, is a rule-based approach of defining objective criteria for eligibility on an agreement-by-agreement (or provision-by-provision) basis, which requires criteria for access

to SDT and graduation.

The author finally proposes “differentiated differentiation” as an approach to reform SDT in the WTO. The proposal makes a case for defining SDT eligibility criteria on an agreement-by-agreement basis, justified on an objective basis. Politically, this is the most plausible solution, based on the generally broad agreement of WTO members from prior proposals to accommodate different levels of development. It offers a solution to the stalemate following China’s rejection of hard economic criteria to redefine the developing country category in the WTO as proposed by the US and the EU. The author goes further to make useful proposals for implementing the “differentiated differentiation” approach, through identifying constraints developing countries are likely to face in implementing a particular rule, and then attributing targeted SDT (such as derogating from the provisions). He also advances a progressive proposal to implement the composite indicator approach, with monitoring and review of SDT for enhanced effectiveness and accountability.

A valuable contribution to literature on the subject lies in chapters 6, where the hypothesis developed in the main body of the book is tested, not the least, by an application of the “differentiated differentiation” proposal to the WTO Customs Valuation Agreement. The use of objective criteria to differentiate between potential SDT beneficiaries, allows countries with demonstrable needs to received appropriate preferential treatment, enhancing effectiveness and improving fairness.

Conclusion

The WTO’s relevance [to developed and developing countries alike] and role in facilitating trade has been questioned over the past decade following the appellate body crisis, and questions on its ability to effectively improve the situation of its developing members. It’s failure to adequately grant a TRIPS waiver during the Covid-19 pandemic, exacerbating existing global health inequalities in vaccine production, distribution, and pricing further worsened perception of the trade body. Many years have lapsed since the development of SDT, which primarily exist in Uruguay Round Agreements. Power-dynamics have shifted, coalitions have developed, emerging economies have grown stronger, and LDCs have weakened in share of trade, yet SDT rules largely

remain unchanged.

Over time, fundamental issues regarding SDT has largely been side-lined or patched-up in progressive agreements such as the WTO Trade Facilitation agreement. As the debate on the reform of the current SDT regime hums on, this progressive book brings key issues surrounding the principle of SDT in the WTO back into the spotlight. The book methodically explores current and pressing controversies and areas of discontent with the SDT framework – specifically, rules on categorisation of developing-developed countries, eligibility, and on graduation rules. At the heart of the debate is the self-designation of status.

The differentiated differentiation proposal, in its simplified form, is one that advances the use of an objective and flexible criteria, which respects differing socio-economic needs, to differentiate between developing countries – a robust and practical approach to differentiation. In order to balance rights and obligations between members, the solution posits to rework rules on a provision-by-provision basis. Ultimately Ukpe posits breaking away from arbitrariness by the progressive application of single and uniform rules in a manner that takes into account different levels of social and economic development.

The book offers strong lessons on underlying rational and legal basis behind SDT, shortcomings and progressive interventions to reform the principle. It is a great asset to trade and development law scholars and practitioners, and will also benefit the international law fraternity a time where other international institutions such as the tax and environmental law regimes are introducing and re-configuring preferential treatment in their respective regimes.

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