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

By:

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8 October 2024

The "Special and Differential Treatment Reform in the WTO" by Aniekan Ukpe offers a thorough exploration of the complexities of trade law within the World Trade Organization (WTO), with a particular emphasis on the concept and reform of Special and Differential Treatment (SDT). Ukpe's work is both timely and relevant, addressing some of the most contentious issues in the multilateral trading system. At its core, the book focuses on the critical theme of reforming SDT provisions and practices within the WTO, offering a detailed examination of the current challenges and shortcomings inherent in these provisions. Ukpe conducts a thorough review of existing reform proposals, critically analysing their effectiveness and identifying gaps that have impeded

meaningful progress. A central element of his work is the introduction of a unique, rules-based approach he terms "differentiated differentiation." This method advocates for defining agreement-specific or provision-specific criteria for SDT, ensuring that eligibility is based on objective and measurable factors related to a country's capacity to implement specific rules, rather than on broad country categorization. The book goes beyond conceptual discussion by demonstrating the practical operationalisation of the approach, using the WTO's customs valuation agreement as a case study.

Reflecting on Ukpe's Analysis

To begin my reflection on Ukpe's work, it is important to echo the assertion that SDT remains vital for global trade governance. It has long been a foundational pillar of the WTO framework, specifically designed to accommodate the diverse economic realities of its member nations. By granting developing countries greater flexibility in implementing WTO obligations, SDT provisions play a pivotal role in leveling the playing field. These provisions—including extended implementation periods, preferential tariff schemes, and technical assistance from developed nations—are not just regulatory tools; they serve as crucial means for developing countries to successfully integrate into and reap the benefits of the multilateral trading system. This integration is vital for fostering global economic growth and promoting more equitable development across nations, as evidenced by the increased and more active participation of developing countries in global trade. The significance of SDT is further highlighted by recent findings from a global opinion survey conducted by the Institute for International Trade (IIT), where an overwhelming 76% of respondents from various country categories affirmed that SDT provisions are essential for helping developing countries successfully navigate and participate in the global trading system. This sentiment is even stronger among respondents from Least Developed Countries (LDCs), with 82% agreeing that SDT is crucial for their integration into the global trading system.

Challenges and Criticisms of the Current SDT Framework

However, as global trade governance evolves, particularly with the rise of several developing countries--notably China, India and Brazil-- as new centres of economic influence, concerns have arisen about the fairness and

effectiveness of the current SDT mechanisms. There is growing reluctance among developed countries to grant special rights to these economically powerful nations, as many believe the existing SDT provisions fail to account for the growing heterogeneity within the developing country group and do not adequately reflect the economic disparities among them.

More specifically, critics, including those cited in Ukpe's analysis and other prominent voices like Bacchus and Manak (2020), argue that the current SDT framework is plagued with significant flaws. A major point of contention is the lack of differentiation among developing countries. The WTO relies on a binary distinction between 'developed' and 'developing' countries as the foundational legal principle for determining eligibility for SDT. This classification is further complicated by the 'practice of self-declaration,' where members independently declare themselves as developing, without adhering to any clear, objective criteria. As a result, more economically advanced developing countries can continue to claim SDT benefits, which becomes increasingly difficult to justify given their significant economic strength. This misalignment allows these stronger nations to exploit the system, undermining the original intent of SDT and diverting resources away from LDCs that genuinely need support. Ultimately, this failure to distinguish between the diverse needs and capabilities of developing nations weakens the effectiveness of SDT, undermining its core objective of fostering meaningful development and integration for the world's most vulnerable economies.

Proposals for Reforms: U.S. and EU Perspectives

The United States has been particularly vocal about this flaw and has proposed stringent criteria to determine a country's status and restrict access to SDT. According to the U.S. proposal, countries would be ineligible for SDT if they meet any of the following conditions: being an OECD member, a member of the Group of 20 (G20), classified as a high-income country by the World Bank, or accounting for 0.5% or more of global merchandise trade. Similarly, the European Union (EU) has also criticized the self-declaration approach, advocating for a more refined and differentiated method for determining SDT eligibility. The EU proposes moving away from the binary classification of 'developed' and 'developing' countries and instead adopting a needs-based framework that targets SDT provisions based on specific development

indicators. Unlike the U.S. criteria-based approach, the EU's proposal emphasizes flexibility, suggesting a "graduation" mechanism that would encourage countries to gradually phase out of SDT benefits as they achieve certain development milestones. This approach aims to ensure that SDT benefits are more accurately directed towards countries that genuinely need support, reflecting the diverse economic realities among WTO members.

Opposition and the Need for Consensus

Unsurprisingly, a group of developing countries including China, India and South Africa have actively opposed the suggested reforms and defended the status quo, while several other developing countries have remained largely silent on the debate. Despite this resistance, there is a growing tendency among WTO members that urgent reform is necessary. This urgency is highlighted by the submission of over 30 proposals aimed at addressing the deficiencies of the current system. Although these proposals differ in perspective and approach, they all share a common objective: to make SDT more targeted, equitable, and effective. This growing call for reform is extensively discussed in Ukpe’s book, particularly in Chapter 5, where he analyses the existing proposals for SDT reform within the WTO. Through a comprehensive literature review, Ukpe evaluates these proposals against key benchmarks such as clarity, relevance, effectiveness, justiciability, and enforceability—standards that are crucial for any rules-based regulatory approach. His analysis not only underscores the need for a more targeted and equitable SDT framework but also contributes to the ongoing dialogue about how best to achieve meaningful and effective reform within the WTO.

The Global Consensus on SDT Reform

Support for reform is also strongly echoed in the global community. The global opinion survey reported by Draper, Ebrahim and Hunt (2021) reveals that 78% of respondents agree that SDT mechanisms need to be reformed to better address the evolving economic landscape. This sentiment is even more pronounced among respondents from LDCs, with 85% advocating for reforms that ensure SDT benefits are more precisely aligned with their specific challenges. Building on this widespread consensus for the need for reform, the survey also provides valuable insights into which forms of SDT are considered

most effective by different groups of respondents. About 82% of respondents across all categories identified technical assistance to support the implementation of SDT provisions as the most effective form of support. This was closely followed by provisions aimed at increasing trade opportunities and safeguarding the interests of developing countries, with 65% of respondents emphasizing these as critical. Additionally, flexibility in commitments and transition periods leading to full implementation were viewed as effective by 63% of respondents.

Introducing “Differentiated Differentiation” Approach

Given these compelling arguments and the broad support for change, it is evident that reforming SDT is not merely about updating trade rules; it is about genuinely empowering the most vulnerable economies to participate fully in and benefit from the global trading system. Building on this foundation, I will now turn to Ukpe’s proposal for reform, which he refers to as "differentiated differentiation." This approach is grounded in the idea that not all developing countries face the same challenges or require the same types of support. Therefore, access to SDT should be determined more precisely, taking into account the unique circumstances of each member.

The method proposes establishing clear, objective criteria for SDT eligibility on an agreement-by-agreement or provision-by-provision basis, moving away from the practice of applying blanket exemptions. This tailored approach aims to ensure that SDT benefits are allocated based on the unique needs and development levels of each country, rather than a one-size-fits-all classification. A key component of this proposal is the introduction of a "graduation" mechanism, which would allow countries to phase out of SDT benefits as they reach specific development milestones. This mechanism is designed to prevent economically advanced developing countries from continuing to access benefits that are no longer justified by their economic status, thus addressing a major criticism of the current SDT framework. Furthermore, the concept of "differentiated differentiation" emphasizes a bottom-up approach to rule implementation. It focuses on providing support based on a country’s actual capacity to fulfill specific WTO obligations, rather than relying on a broad classification as a developing country.

Benefits and Challenges of the “Differentiated Differentiation” Proposal

While the "differentiated differentiation" proposal offers a novel and potentially effective approach to SDT reform, it's important to evaluate its benefits alongside its challenges. One of the primary advantages of this proposal is its emphasis on tailoring SDT provisions to the unique needs and development levels of individual countries, which could make SDT more targeted and effective. However, the practicality of implementing this approach poses significant challenges. Developing and enforcing agreement-specific criteria for SDT eligibility could be administratively complex and resource-intensive, potentially overburdening the WTO’s existing capacities. This approach could also lead to increased bureaucracy, slower decision-making, and heightened administrative overhead due to the necessity of conducting detailed assessments of each country's specific circumstances and capacities. Additionally, reaching a consensus on such a differentiated system could be politically challenging, given the historical disagreements among WTO members over criteria for development status.

The Need for Political Will and High-Level Negotiations

Before concluding, it is essential to underscore the importance of political will and high-level negotiations among all WTO members to advance the discussion on SDT reform, a point emphasized by Bacchus and Manak (2020). Meaningful progress in reforming SDT cannot be achieved without the active engagement, commitment and willingness to compromise from both developed and developing countries. High-level negotiations are necessary to drive the conversation forward and establish a clear foundation for evaluating SDT reform, ensuring that any changes made are both fair and effective.

Wrapping Up

In conclusion, this book is a valuable resource for policymakers, scholars, and WTO members, prompting a reconsideration of how SDT can be reshaped to better support the world's most vulnerable economies and foster a more inclusive global trading environment. As discussions on SDT reform progress, Ukpe's insights provide a thoughtful perspective that could help guide efforts toward achieving a more balanced and equitable international trade system.

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