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

By:

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One of the longest running debates at the World Trade Organization (WTO) is how to best account for and address the unique needs of developing countries as they become integrated into the world trading system. This has raised a broad range of questions centering around three key issues— what are the specific needs of developing countries, what flexibilities are required to help members meet their commitments, and what support can be given to build capacity where it is needed most? But underlying these considerations that helped frame individual discussions was always the bigger question of whether the approach to special and differential treatment (SDT) was sufficient to account for the diversity of the organization's membership.

It was not until the Doha Declaration that members made a commitment to review SDT with an aim toward making it more “precise, effective, and operational,” and they have yet to succeed at doing so. That is no surprise, given that disagreements among WTO members on SDT date back to the early days of the General Agreement on Tariffs and Trade (GATT). With such long-held positions and beliefs it is a challenge to reframe this contentious subject and build a responsible consensus on a pragmatic way forward. It is against this backdrop that Aniekan Ukpe’s *Special and Differential Treatment Reform in the WTO* is a welcome addition to the literature that has grappled with this topic.

Ukpe begins by acknowledging the views on SDT that have become “polarized by the North-South divide” and, as a result, disrupted the negotiating agenda to address the Doha mandate (4). His book seeks to bridge this divide by proposing a rules-based approach to SDT centered on “the identification of SDT access criteria that are both objective and flexible with respect to differing socio-economic needs,” which he terms “differentiated differentiation” (4). The goal of this new approach is to focus on making SDT “wholly transitional and aimed at full compliance with WTO members’ obligations” (4). Ukpe’s significant contribution is his analysis of what such criteria might look like, with real-world examples that provide much food for thought.

Before getting into the substance of his proposal, Ukpe masterfully compacts decades of history and debate on the nexus of trade and development, providing essential context for understanding why positions on SDT have become so unshakable. He rightly points out that the goal of sustainable development is embedded in the WTO, but that it is not always clear what the institution’s role is in advancing certain aspects of it. For example, he references Pascal Lamy’s suggestion that “sustainable development requires a careful balancing between progress in each of its pillars: policies designed to advance economic development, to conserve the environment, and to ensure social progress,” (27) but asks whether all three should be pursued at the same time, and whether the WTO could simply focus on just one of them? For the WTO, he looks to the preamble, which he argues “unambiguously suggests that the mandate of the WTO should be read in light of the need to contribute to development” (22). While Ukpe takes no issue with the WTO focusing on *economic development*, for which it has a clear mandate, he also underlines the fact that there are many other international institutions that pursue various

aspects of sustainable development. Therefore, enough space exists for all three pillars to be pursued individually, or in complementary fashion, by different organizations.

This emphasis on economic development leads to two specific questions. How can WTO members balance their specific economic constraints with the obligations of membership? And, how can trade rules be crafted to address the varying needs of developing country members while ensuring that SDT does not generate further economic distortions? It is safe to say that WTO members are still attempting to figure this out.

Ukpe highlights how differential treatment sought to tackle these challenges by being sensitive to differences in resources and capabilities during negotiations. This meant that “a temporary legal inequality” was created instead of a permanent exemption in order to address the underlying inequalities among members (48). Of course, for those of us that have studied the evolution of SDT, it is well understood that this state of temporary inequality was in many cases made permanent. Furthermore, it was compounded by a quirk that makes the WTO stand out from other international economic institutions, in that there is no way to differentiate between developing country members unless they are on the United Nations list of Least Developed Countries (LDCs). At the WTO, developing country status is “self-declared,” unless contested (rarely so), meaning that in principle, high-performing developing countries are afforded equal levels of flexibility to their poorer counterparts. Such inequitable differentiation further compounds the development divide at the WTO.

Part of the challenge, of course, is agreeing on what SDT is supposed to address. Ukpe offers a clear overview of the various positions of different groupings within the WTO. For instance, there are developing countries that want to have existing inequalities addressed and argue that equity in obligations writ large limits their development goals. They view high standard obligations as undercutting economic development, not fostering it. This, in my view, is the loudest group of developing countries in the WTO. On the other hand, there are those developing countries that see their grant of SDT as a way to “facilitate their economic development” through market access (51). In this latter group there is an overlap with some developing countries that want to preserve some degree of flexibility to advance national priorities, which they

see as the primary objective of SDT. This is the “policy space” argument that also finds support from the first category, though to be clear, there is a major distinction between those arguing for policy space for protectionist purposes and those wanting it to support specific development priorities.

Over the years, developed country members have become more vocal about reforming SDT to meet the mandate set out in Doha, though even among this group there is substantial variation in what they think those reforms should be. In 2019, the United States, for instance, proposed a set of economic indicators to determine eligibility for SDT. Unsurprisingly, this proposal was met with significant consternation among the membership. Other members, such as Canada, the European Union, and Norway, have put forward ideas for a country-specific approach, tailored to more granular development needs. While neither approach was perfect, they marked an important point of evolution in the debate on SDT, which generated a vibrant conversation about where SDT failed and how it could be improved. Ukpe’s proposal was undoubtedly inspired by these renewed debates, and his call for differentiated differentiation lays out a practical, rules-based, and development-centric vision for how SDT can be thoughtfully reformed. In an earlier chapter, Ukpe reflects on the generalized system of preferences (GSP), highlighting the “insecurity of preferences” these schemes create by nature of their being unilateral, voluntary, and non-binding (67). I raise this not only to draw the reader to his excellent overview of the subject, but to also emphasize the ways in which some forms of differentiation that have been used to fill the gaps in WTO rules create different sets of problems. These preference programs have been shown to have positive economic effects, but they do not help address the fundamental challenge of fully integrating developing countries into the trading system and providing them with the support to access the scale of development they seek.

Ukpe provides detailed case studies of how differentiation has been successfully employed both outside (Montreal Protocol) and inside the WTO (ASCM, Safeguards). He also provides a novel analysis of how the WTO Customs Valuation Agreement could be used to examine differentiation and aid in the creation of a composite indicator to measure country-level capacity. Looking at three general constraint categories in the Global Competitiveness Index (GCI) (legal and regulatory constraints, customs infrastructure capacity constraints, and valuation capacity constraints) he provides a country ranking that sheds

light on how to conceptualize differences in development needs in the context of this specific agreement. A similar analysis of other agreements using a composite indicator fit for identifying relevant capacity constraints would be a useful area of future research.

This analytical exercise yields four key recommendations from Ukpe. First, the SDT debate needs to move away from the simple recategorization of countries. This approach is too blunt, and depending on the indicators used, could end up treating non-similar members similarly. Second, there should be a clearer linkage between rule implementation and capacity. This largely supports the approach embedded in the Trade Facilitation Agreement (TFA), but perhaps more finely tuned. Third, he calls for financial and technical assistance to support capacity building. Some exist, but more is needed. And finally, and perhaps most strongly, Ukpe argues for a "credible graduation mechanism" that could support a "needs-driven and evidenced-based approach" to SDT that moves countries across categories of specific obligations after meeting threshold criteria tailored to that member (175). Ukpe's recommendations focus not just on how negotiations can be better tailored to address inequities in the trading system, but also how developing countries can reap the full benefits of WTO membership, as it was intended—to support sustainable development so that members could eventually do without differential treatment entirely.

In our own research (The Development Dimension: Special and Differential Treatment in Trade. Routledge, 2021), James Bacchus and I argue that the current approach to SDT has denied many developing countries both the necessary assistance and incentives to achieve full development, and that one of the most painful ironies is that some continue to cling to it. Ukpe's research offers a new way of thinking about this problem, and I hope that many will read this book, reflect on his insightful contribution, and continue to build on this research agenda in the hope that we can finally make SDT more precise, effective, and operational. Much of today's trade discussion focuses on perceptions of fairness, some real, others imagined. A data-driven, and evidence-based approach to SDT could help us refocus our attention on those that need the most help, and create the conditions for a more just and sustainable trading system.

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