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

By:

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The book focuses on special and differential treatment (SDT) of developing countries in the World Trade Organisation. It is carefully researched, draws on a breadth of literature and legal analysis, and presents an original argument on for reforming the system of differentiation within the World Trade Organization (WTO). What Aniekan Ukpe calls a 'differentiated differentiation' approach seeks to resolve contentious and deadlocked debates about the rights and obligations of developing country members. It is on this original approach that the rich historical, ideational and legal analysis of the early chapters of the book builds. The proposed evidence-based and case-by-case system adds a new perspective to academic debates on differential treatment. It has real

potential to contribute to ongoing debates in the WTO on reforming differentiation among its members.

What is “differentiated differentiation”, and why do we need it?

Differentiated differentiation is a rules-based method to determine access to SDT within the WTO. Ukpe succeeds in carefully laying out the origins of differentiation within the multilateral trading system and why it is, at its core, about equity: “what system of rights and obligations could be described as equitable?” (p. 53). Equal treatment of WTO members is not considered sufficient, since “prohibiting discrimination is not likely to reduce inequality where all are not equal in their capacity to utilize opportunities” (p. 56). However, as Ukpe points out, the WTO's practice of allowing members to self-declare their status implies that "any country can claim the status of 'developing country' and, once claimed, the country is entitled to SDT regardless of its actual capacity or level of development" (p. 121). This arguably creates a new problem of equity, especially in light of global power shifts. Treating all self-declared developing countries as equal - despite, for example, the differing capacities of China, Mexico and the United States - creates a new problem of equity.

The book's approach of 'differentiated differentiation' offers a solution. It proposes the creation of clear, objective criteria that can be adapted to the unique socio-economic conditions of different countries. These criteria should determine not only eligibility for differential treatment, but also when a country should graduate from such treatment. In particular, Ukpe proposes an "agreement by agreement" approach. Who qualifies as a developing country with access to differential treatment may thus differ across sectors, just as countries may be more or less competitive in different sectors. The argument is that such a more nuanced approach is fairer than the current tendency to treat all developing country members the same - with the notable exception of the least developed countries. It can, Ukpe argues, respond to the real development needs of WTO members. The book then carefully demonstrates how such a more individualised "differentiated differentiation" approach could work in practice, using the WTO Customs Valuation Agreement as an example.

How differentiated differentiation can facilitate WTO reform

The book's proposal for a novel approach to differentiation is timely, as recent years have shown that WTO members remain stuck in irreconcilable positions. On the one hand, the United States (US) and other developed countries have argued that the self-declaration approach is outdated because it continues to allow large economies such as China to claim developing country status. The US has prominently proposed the introduction of four criteria - including OECD membership - to define a threshold at which countries lose access to SDT. However, this suggests a one-size-fits-all approach which, as Ukpe convincingly argues, does not necessarily reflect the real differences in capacity to implement WTO agreements in different sectors (p. 167). On the other hand, developing countries - led by China, India and others - reject the introduction of such clear-cut thresholds and defend the existing approach of self-declaration that arguably works in the favour of larger (self-declared) developing country members. Given that consensus is necessary to adjust the existing approach, the conflict so far remains unresolved.

Ukpe argues that 'differentiated differentiation' has the potential to break the current political deadlock. The introduction of “agreement-by-agreement” solutions rather than the introduction of one-size-fits-all criteria would depoliticise heated debates. Moreover, Ukpe foresees that “countries justify, based on objective criteria, the need for a temporary waiver from rule obligation for a limited period” (p. 132). This would also make it more likely that the outcomes are equitable in the sense that they address real development needs. Finally, I would add that the flexibility built into the institutional design of 'differential differentiation' makes it more likely that such an approach will stand the test of time. As countries' capacities change in the future, they will automatically graduate from differential treatment at some point. However, as Ukpe himself acknowledges, one of the thorniest issues to be resolved remains how and where to set these graduation thresholds in an equitable manner. Here, the suggestion is to use “objectivity as a guiding principle” and to rely on “a statistics-based score procedure to determine a threshold” (book summary). From a social science perspective, however, I would caution against seeing statistics as politically neutral. In the end, an element of arbitrariness will remain inevitable, and where to set a threshold for graduation will ultimately remain a political decision that will create winners and losers. The effort to use criteria that are more nuanced than the one-size-fits-all approach that

underpins the US reform proposal on differential treatment remains, however, laudable.

The book also argues persuasively that 'differentiated differentiation' may not be as radical a break with the past as it might first appear. This is because, within the WTO's legal agreements, self-declaration is the main - but not the only - approach to differential treatment. Chapter 4 of the book discusses several precedents, including the Agreement on Subsidies and Countervailing Measures and the existing rules on safeguards. The book does not mention the WTO's 2018 Trade Facilitation Agreement, which also introduced a novel and divergent approach that allowed for greater individualisation among developing countries. For example, while China and Brazil could in principle have requested a longer transition period for the implementation of the agreement, they declared that no additional delays were needed for most provisions.

All in all, the book's proposal for reforming differential treatment deserves much praise, as it manages to avoid many of the (political) problems that caused the US's more rigid reform proposal to fail.

What the book's novel approach to differentiation cannot (yet) solve

But for all the promise and merit of "differentiated differentiation", I would argue that it cannot fully resolve the conflicting interests over differential treatment in the WTO. This is because it limits the potential need for differential treatment within the WTO to cases where countries lack the capacity to (immediately) implement WTO agreements and decisions. In the words of Ukpe, the proposed “case-by-case approach to SDT in the WTO … will ensure that the poorest countries get support to implement their trade obligations and that the advanced developing countries carry their own weight in the organization” (p. 116, emphasis added). But what if the differences in capacity among WTO members are not only related to implementation, but also to the actual level of competitiveness of their economies in a given sector?

Many developing countries are disadvantaged when it comes to reaping the benefits of WTO trade liberalisation not only because of unequal implementation capacities. The extent to which countries benefit from integration into world trade also depends on how they are integrated into global value chains. Do they primarily provide unprocessed inputs such as raw

materials, or do they add value through processing or even innovation? The WTO recognises such different positions in the global economy to some extent through existing differential treatment. For example, there are sector-specific rules on the provision of subsidies that include differential treatment. In agriculture, the WTO Agreement on Agriculture (1995) grants all developing countries a de minimis exemption of 10 per cent of the value of production for the provision of domestic support, while developed countries have only a 5 per cent de minimis exemption. Similarly, several developing countries have access to the so-called development-oriented "SDT box subsidies" (AoA 1994: Article 6.2), which are reserved for developing country members only. However, as in other sectors, existing WTO rules have been challenged because, in addition to creating some advantages for developed countries, they do not allow for differentiation within the group of developing countries. For example, China's role as one of the main providers of agricultural subsidies has become contested.

In principle, however, a system of 'differentiated differentiation' could also help to introduce a fairer notion of equity. It is not just a question of trying to limit market distortions by setting a threshold for the maximum amount of subsidies that countries can provide relative to their production levels. It would also make sense to link differential treatment to the actual level of competitiveness of agricultural sectors. Thus, developing countries with highly competitive agricultural sectors should not be given additional flexibility to provide more subsidies than developed country Members with similar capacities. While the choice of specific indicators and thresholds would need to be carefully discussed, such a more individualised approach would arguably create a fairer system than relying on countries' self-declaration.

Finally, this points to a major difficulty with the introduction of the book's novel approach to differentiation: it would have to be negotiated and, given the WTO's consensus principle, all countries - including those that might lose out - would have to agree to it. This may only be politically feasible if the current stalemate over differentiation - and the current round of WTO negotiations - becomes too costly. Then it will be invaluable to be able to rely on the well-considered and legally sound proposal for "differentiated differentiation" that this book offers.

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