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A Contract Theory Approach to Special and Differential Treatment and the WTO

Conceptual Paper

Abstract

Purpose

This paper is prompted by the dissatisfaction of developing countries regarding the grant of special and differential treatment (SDT) under the legal framework of the World Trade Organisation (WTO). As a result of such dissatisfaction, the Doha Round of multilateral trade negotiations explicitly called for a review of such treatment with a view to making it more precise, effective and operational. This mandate has not yet been met to the satisfaction of many developing countries. This paper aims to provide an alternative way of examining and evaluating the contestation which exists regarding SDT in the WTO.

Design/methodology/approach

This paper employs the conceptual framework provided by economic contract theory and in particular, the concept of the incomplete contract to provide a scaffold for analysing SDT. This approach is intended to offer insights beyond those elucidated so far in the literature on the topic.

Findings

This paper, by employing an economic contract theory approach, finds that SDT is constructed as an incomplete contract. Furthermore, the suboptimal outcomes associated with incomplete contracts are apparent in the constitution of SDT. This finding is useful in both an evaluative and programmatic sense; providing us with an alternative entry point to explain some of the shortcomings with SDT as well as garnering us with a useful conceptual tool to think upon how SDT can be improved.

Originality/value

The paper contributes to the literature on SDT within the WTO in particular as well as differential treatment in international law in general. Drawing on literature on the WTO as an

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3 incomplete contract, the paper provides an original frame for analyzing SDT and draws
4 attention, in particular, to the utility of economic contract theory as a programmatic and
5 evaluative frame for SDT and differential treatment more generally.
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10 11 **Introduction**

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14 International law has long grappled with how to structure legal obligations in a way that takes
15 account of developing country needs and circumstances (Rajamani, 2006). Within the context
16 of the climate change regime for example, the issue of whether equal obligations are
17 appropriate given developing countries' different historical contributions to climate change
18 has been much contested (McGee and Steffek, 2016, p. 51). Similarly, in the multilateral
19 trade regime, while developing countries were initially subject to the same rules as their
20 developed counterparts, a shift away from such obligational equality occurred in the early
21 years of the General Agreement on Tariffs and Trade (GATT). This was in part a response to
22 equity-related concerns (see generally Lamp, 2015). The practice of providing for a
23 differential legal regime in favour of developing countries continued into the World Trade
24 Organisation (WTO) with such treatment known as special and differential treatment (SDT).
25 While there is no universally recognised definition for SDT, it is generally understood to
26 refer to provisions such as those which permit developing countries to offer, 'less than full
27 reciprocity' in tariff liberalisation negotiations, measures inserted into the legal texts of the
28 WTO to assist developing countries to address certain development, financial and trade needs
29 as well as adjust to the rigours of the WTO legal system (WTO, 2016). SDT is only available
30 to developing countries and least-developed countries (LDCs).ⁱ
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43 Over 170 provisions of SDT currently exist within the WTO legal framework (WTO, 2016)
44 and it is currently conceived of as a central component of ongoing negotiations in a range of
45 areas.ⁱⁱ (Doctrinal) legal analysis has done much to elucidate upon the nature of the WTO
46 legal contract and the place of SDT therein. Much of this literature has been evaluative;
47 finding that developing countries have incurred significant problems in operationalising the
48 SDT component of the WTO contract.
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54 In this analysis, I seek to enrich our understanding of SDT and its operationalisation within
55 the WTO. I use a different lens to that traditionally adopted by legal scholars and instead
56 adopt the analytical lens provided by economic contract theory. Economic contract theory
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3 illuminates the difficulties contracting parties face in designing a contract which is both
4 optimal *ex ante* and one which is optimal *ex post* (Scott and Stephan, 2006, p. 61). These
5 difficulties stem in part from the possibility that some unforeseen event – contingency - may
6 arise during the performance stage of the contract (Scott and Stephan, 2006, p. 61).
7 Accordingly, it is nigh on impossible for parties to design a pareto optimal complete
8 contingent contract which assigns, ‘risks, rights and responsibilities in every possible state of
9 the world’ (van Aaken, 2009, p. 515). Parties to a contract may instead form a contract
10 containing certain gaps; in essence, they may reach what is referred to as an incomplete
11 contract.
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19 Incomplete contracts are not inherently irrational. Trade agreements are in general, ‘highly
20 incomplete contract(s)’ (WTO, 2009a, p. 28). This is because in a ‘dynamic, non-stationary
21 world it is both rational and efficient for contracting parties to deliberately leave contractual
22 gaps in a trade agreement and to refrain from writing a fully contingent contract’ (WTO,
23 2007, p. 117). Contractual incompleteness does, however, leave, ‘ample room for ambiguity,
24 controversial interpretations, misunderstanding, and opportunism’ (WTO, 2007, p. 98).
25 Where contracts are incomplete, a number of shortcomings may arise such as too much
26 discretion being granted to one or other party, ambiguous or vague phrases, ‘resulting from
27 poorly described contingencies and their outcomes’ and finally, a contract which is too rigid
28 (Gantz and Schropp, 2009, p. 170).
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The WTO legal compact has been recognised as an incomplete contract (Shropp, 2009). Such
contractual incompleteness is identifiable across a range of areas. The Dispute Settlement
Understanding (DSU), for example, contains a significant gap in that it does not set out the
burden of proof applicable to parties to a dispute (Hoekman and Mavroidis, 2012). No formal
rule exists under the GATT as to whether a state may prevent the importation of a good due
to the way in which it has been produced if the process or production method does not affect
the final product (Trachtman, 2007, p. 645).ⁱⁱⁱ Similarly many of the GATT’s core provisions
are vaguely phrased such that, the ‘actual ambit of the agreement is (...) left largely to be
determined by adjudicating bodies’ (Horn, Maggi and Staiger, 2006, p. 1).

There is hence a wealth of literature utilizing economic contract theory as powerful analytical
frame to better understand and explain the constitution of WTO law (Schropp, 2009, chapter
one). No comprehensive analysis has yet, however, been undertaken applying this frame to
SDT. In this article, I posit that economic contract theory is useful for enriching our

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3 understanding of SDT. I find that SDT is very much constructed as an incomplete contract
4 and that the suboptimal outcomes associated with incomplete contracts are apparent in the
5 constitution of SDT. This is useful in both an evaluative and programmatic sense; providing
6 us with an alternative entry point to explain some of the shortcomings with SDT as well as
7 allowing us to think upon how SDT can be improved.
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12 This study is particularly apposite due to the appearance of a new type of SDT offered under
13 the recently entered into force WTO Agreement on Trade Facilitation (TFA). This agreement
14 has been heralded as marking a sea change for SDT; for the first time in WTO legal history,
15 the legal obligations of developing and least developed countries are tied to the receipt of
16 implementation assistance. The innovation of the TFA has encouraged some commentators to
17 posit that it could provide, ‘a model for future WTO Agreements’ (Eliason, 2015, p. 662). In
18 this article, I seek to interrogate whether the TFA is able to offer a strengthened and effective
19 approach to SDT that addresses the needs of developing and LDC Members.
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27 In the first section of this article I set out the conceptual and theoretical background to my
28 investigation. SDT is introduced and its place within the legal framework of the WTO is
29 elucidated upon. This is followed by a short introduction to economic contract theory with
30 particular attention paid to the frame of the incomplete contract. I then apply the analytical
31 framework of economic contract theory to a number of provisions of SDT, finding that the
32 examined provisions of SDT are contractually incomplete and suffer from the deficiencies
33 noted above. In section two, the analysis turns to the TFA with the lessons of contract theory
34 once again applied to deepen our understanding of the SDT provisions therein. In this
35 section, I seek to address whether the TFA is capable of offering a new model of more
36 complete contractual arrangements addressing the differential needs of developing and least
37 developed countries. I find that the TFA offers a much improved balance between *ex ante*
38 commitment and *ex post* flexibility than that available under the Uruguay Round agreements.
39 In the final section, I conclude by drawing attention to SDT as a core component of the
40 ‘developmentification’ of the WTO. Given this and going forward, it is clear that much
41 benefit would be derived from employing contract theory as a programmatic tool which can
42 operate alongside more traditional forms of legal analysis to both warn of and remedy
43 obligational defects in the operationalization of differential treatment.
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Section One – The operation of Special and Differential Treatment as an Incomplete Contract

SDT in a nutshell

Differential treatment in favour of developing countries is commonplace within the international legal regime (Cullet, 1999). Within the multilateral trade regime, SDT comprises a range of provisions under the Agreements and Decisions which together comprise the multilateral trade regime (WTO, 2016). It is inherently linked to the ‘development dimension’^{iv} of the WTO though the precise nature of this connection is contested.^v Developing countries have long expressed two concerns regarding SDT; that its encompassing provisions have not met their needs and that SDT’s lack of efficacy stems from the nature of its legal construction;

The challenge was that the S&D (SDT) regime had not assisted developing countries, in particular, LDCs, SVEs, and low-income developing countries, to participate effectively in the multilateral trading system (MTS), mainly because most of the S&D provisions were couched in hortatory and best endeavour language and had not been fully operationalized.^{vi}

Disappointment with SDT prompted developing countries to request that its encompassing provisions be reviewed under the auspices of the Doha Round of multilateral trade negotiations. The mandate for this review was included under paragraph 44 of the 2001 Doha Declaration. Pursuant to this, Members agreed that, *all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational* (emphasis added).^{vii}

Given the link, however contested, between SDT and development, questions as to SDT’s effectiveness inevitably bring to the fore, ‘the credibility of the WTO system’ (WTO, 2015).^{viii} Despite this, the paragraph 44 mandate has not yet been fully met (South Centre, 2017)^{ix}. In part, the failure to meet this mandate stems from a lack of agreement between Members as to the problem the paragraph 44 review mandate is trying to address. Indeed, the representative of the EU in a recent meeting of the WTO Committee on Trade and Development, questioned in respect to the paragraph 44 review of SDT, ‘Are we trying to tackle real problems?’ (WTO, 2015a)^x

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3 The lessons of economic contract theory allow us to better position and understand
4 constitution of SDT within the legal order of the WTO itself as well as conceptualise the
5 ‘problem’ the paragraph 44 review mandate is trying to address. As we know, the WTO is
6 generally conceived of as an incomplete contract, containing gaps which leave, ‘ample room
7 for ambiguity, controversial interpretations, misunderstanding, and opportunism’ (WTO,
8 2007, p. 98). Many of the provisions of SDT are similarly incomplete. This is evident from
9 the very wording of the paragraph 44 review mandate with its attendant focus upon making
10 SDT more precise, effective and operational.
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17 We can therefore conceptualise the paragraph 44 review mandate as an attempt to address the
18 contractual incompleteness of SDT. Contract theory may therefore be useful in an evaluative
19 sense to enrich our understanding of *how* SDT is incomplete. In the next subsection, I provide
20 some useful background on economic contract theory while at the same time applying it to
21 SDT in order to elaborate more fully on how SDT is incomplete. This is accompanied by
22 commentary on the implications of such incompleteness for the operationalisation of SDT.
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28 *Contract theory and asymmetric information, vagueness and ambiguity*

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31 Contract theory teaches us that for any mutually beneficial collective activity, a separation
32 may exist between the costs of an activity for which each party is responsible on an
33 individual basis, and the benefits of the activity in question which are collective and which
34 the parties hence share (Scott and Stephan, 2006, p. 18). As a consequence, each party may
35 have much to gain from opting out of their commitments as they will still share in the
36 collective benefits (Scott and Stephan, 2006, p. 18). However, if everyone was to do this, the
37 anticipated benefits from the contract would erode. This tension between collective and
38 individual benefit creates what is known as a moral hazard (Scott and Stephan, 2006).
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45 Situations of moral hazard can arise under situations of asymmetric information during the
46 performance stage of the contract. This is because informational asymmetries may present
47 difficulties in monitoring contractual performance (Scott and Stephan, 2006, pp. 71 – 72). If
48 the party to whom an obligation is owed incurs difficulties in monitoring contractual
49 performance, then the contracting party owing the obligation may effectively abuse this
50 position and attempt to escape their commitments (Scott and Stephan, 2006, pp. 71 – 72).
51 Devices such as ‘contractual mechanisms that induce revelation of private information with
52 formally enforceable rules’ (Scott and Stephan, 2006, p 76) may be required.
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3 Informational asymmetries abound under both the WTO Agreements and indeed SDT. A
4 prominent example may be found in the Agreement on Sanitary and Phytosanitary measures
5 (SPS). Article 10.1 SPS mandates that, 'in the preparation and application of sanitary or
6 phytosanitary measures, members shall take account of the special needs of developing
7 country members.' This measure clearly requires developed countries to, 'take account' of
8 developing country needs. However, in the run up to the launch of the Doha Round,
9 developing countries noted that their 'special needs' had only rarely been considered (WTO,
10 2000, para. 4). In 2002, it was further noted that there was only limited information available
11 on whether the obligation under Article 10.1 had actually been met (WTO, 2002a, pp. 21 –
12 22; Author, 2012, p. 228).

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21 Using the lens of contract theory, one difficulty arising from a provision such as Article 10.1
22 SPS is the ability to observe whether a party has performed their obligation under it. The
23 party who possesses information as to whether developing country needs have indeed been
24 taken into account is the importing – developed – country (WTO, 2002a, pp 21 - 22. The
25 developing exporting country which the provision is meant to favour thus faces significant
26 difficulties in observing whether their needs have been taken into account since no procedure
27 for assessing performance was specified under the Agreement.

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33 In regard to the above concerns, the SPS Committee has taken steps improve the operation of
34 Article 10.1 SPS. Following on from proposals by Egypt (WTO, 2002b) and Canada (WTO,
35 2002c) a procedure was adopted to enhance the transparency of SPS notifications in favour of
36 developing country Members (WTO, 2004). Under this procedure, and following notification
37 of an SPS measure, the developing exporting country would have the opportunity to contact
38 the importing country to discuss any concerns it may have regarding the proposed measure.
39 Upon receipt of such a request, the importing country *will* contact the exporting country and
40 enter into discussions to consider how best the special needs of the exporting member may be
41 taken into account. This could include a change in the measure at issue to be applied on an
42 MFN basis or the provision of technical assistance to the exporting developing country. SDT
43 may also be applied in relation to the measure although such treatment would have to be
44 available to all developing countries on a MFN basis (WTO, 2004, p. 2). Finally, when a
45 measure was adopted, the importing member was required to amend its original notification
46 to reflect this (WTO, 2004, p. 3).

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3 In 2009, the procedure was revised to incorporate Member comments as to its efficacy
4 (WTO, 2009b). This new procedure introduced a further transparency requirement whereby
5 '[w]hen an importing Member decides on whether and how special and differential treatment
6 may be provided in response to a specific request, that Member should inform the SPS
7 Committee.' The report is mandated to provide a summary of whether SDT was provided and
8 if not, why not (WTO, 2009b, p. 3).^{xi}
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14 At a broad level of generality, the construction of the above reporting mechanism comports
15 with the lessons of economic theory which instructs that a contractual mechanism which
16 induces or encourages the revelation of information can, if properly specified, 'eliminate the
17 incentive to exploit party vulnerability while retaining the flexibility to adjust to new
18 information arising during the course of contract performance' (Scott and Stephan, 2006, 79).
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23 While, however, a reporting mechanism will be a suitable tool to employ where the substance
24 of the obligation is agreed but observing performance is difficult, this may prove a
25 suboptimal remedy where the obligation is not agreed upon. This is because what is reported
26 may ultimately reflect a unilateral construction of the obligation. In essence, even if a party to
27 whom an obligation is owed can observe the outcome, if that is *all* they can do, it is clear they
28 cannot force the party owing the obligation to choose a particular action to meet the
29 designated outcome (Salanié, 1997, p. 107). Accordingly, the G90 has proposed a number of
30 improvements to the operationalisation of Article 10.1 SPS such as the introduction of a
31 'consultation mechanism' between exporting developing countries and importing developed
32 countries (South Centre, 2015, p. 24).
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41 Even if a review or consultation mechanism is in place^{xii}, contractual enforcement may also
42 nevertheless be difficult where the obligation is written in ambiguous or vague language
43 (Scott and Stephan, 2006, pp. 71 – 78). Gantz and Schropp (2009) give examples of 'catch-all
44 phrases,' such as 'best effort,' 'gross inequity,' and 'serious injury' (p. 170) as coming within
45 this category (see also Maggi and Staiger, 2008, p. 2), with the ambiguity of such terms
46 presenting potential enforcement problems for the party relying on a vague provision (Gantz
47 and Shropp, 2009, pp. 169 – 172; Scott and Stephan, 2006, p. 71). To resolve these
48 contractual gaps, 'proxies' for performance may be required in order to assist in the task of
49 enforcement (Scott and Stephan, 2006, p. 72).
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3 Many SDT provisions are phrased using vague terms. Examples include phrases such as the
4 'fullest extent possible' (GATT, Article XXXVII:1), 'special regard' (GATT, Article
5 XXXVII:3 (b)), and, 'monitor, as appropriate' (Agreement on Agriculture, Article 16.2). In
6 the absence of proxies, dispute settlement could of course be utilised to 'complete' the
7 contract. There are, however, constitutional issues associated with the dispute settlement
8 system 'gap filling' the incomplete WTO contract (Author, 2012). In addition, this strategy
9 has not met with great success where developmental issues are concerned with Rolland
10 (2012) articulating, '(w)here the wording of SDT clauses was ambiguous, adjudicators have
11 often shied away from rigorous treaty interpretation exercises and have not attempted to
12 develop tests, standards or methodologies that would be useful for future cases' (p. 139). Set
13 in the context of a lack of routes to 'gap fill' such contractual completeness, the contractual
14 frame allows us to identify the paragraph 44 mandate as a normal response to the presence of
15 contractual incompleteness. This capacity of contract theory to normalise particular demands
16 is further explored below in our elucidation on flexibility mechanisms.
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26 27 *Contract theory and too much flexibility* 28

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30 Economic contract theory teaches us that moral hazard may also arise from the use of flexible
31 standards which permit subsequent *ex post* readjustment to take account of new situations
32 (Scott and Stephan, 2006, p. 77). Flexible standards are not in themselves problematic.
33 Indeed, where the transaction costs of agreeing to 'harder' terms are particularly high, parties
34 to a contract may opt to allow the contracting parties *ex post* flexibility to adjust to deal with
35 uncertain events (Scott and Stephan, 2006, pp 77 – 79). Moral hazard may, however, arise
36 where, 'contracting parties (are given) too much discretion or manoeuvring space' which
37 allows for 'opportunistic abuse' and reduces joint welfare (Gantz and Schropp, 2009, p. 170;
38 see also Wu, 2015, p. 108). In order to deal with this threat, devices which in effect 'police'
39 the use of such flexibility may help to ameliorate this risk (Scott and Stephan, 2006, p. 79).
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47 Flexibility is at the core of SDT with three forms of flexibility existent; flexibility of
48 commitments, flexibility of action and flexibility regarding the use of policy instruments
49 (WTO, 2001c, p. 7). The first class of flexibility essentially allows for a 'modulation' of
50 commitments in very rough accordance with the development status of the member
51 concerned (IISD, 2003, p. 1). The other two categories relating to flexibility of action and use
52 of policy instruments includes provisions such as GATT Article XVIII: A which allows
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3 developing countries to modify and withdraw negotiated concessions subject to adherence
4 with the procedure set out therein.
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7 The Doha Round saw a series of requests by developing countries that they be given greater
8 freedom to use certain tools otherwise prohibited.^{xiii} There is significant debate as to the
9 acceptability of certain flexibility mechanisms which developing countries claim are
10 necessary due to the inappropriateness of 'traditional' flexibility mechanisms to meet their
11 particular requirements.^{xiv} Opponents of the use by developing countries of tools such as
12 TRIMS in essence fear that moral hazard could result if developing countries were given
13 'free reign' to utilise such instruments for developmental purposes (Hertel et. al, 2002, pp.
14 126 – 127).^{xv} In response to the risk of moral hazard posed by overly flexible provisions 'in
15 favour' of developing countries, a 'development policy review mechanism' has been
16 proposed which could scrutinise the application or non-application of WTO law by
17 developing countries (for example Trachtman, 2003, p. 20). One of the difficulties of creating
18 such a mechanism is arbitrating upon what constitutes permissible as well as impermissible
19 behaviour.
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30 Regardless of the practical difficulties of discerning the difference between permissible and
31 impermissible behaviour, it is nevertheless the case that the WTO contract as a whole
32 contains various *ex post* flexibility mechanisms. There are, for example, a number of escape
33 clauses which, in principle, permit 'efficient breach' of the WTO contract in the event that
34 unforeseen developments render compliance with the original contract inefficient or
35 impossible (Mahlstein and Schropp, 2007, p. 2). Relatedly, some have posited that the
36 rationale behind the introduction of escape clauses such as that found under Article XIX
37 GATT is that at times, the political costs of compliance outweigh the benefits and so it may
38 be optimal to allow non-performance (Schwartz and Sykes, 2002, p. 7).
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46 Accordingly, while numerous developed countries have sought to depict requests for
47 additional flexibility as outside the WTO system, flexibility is in fact a 'normal' part of the
48 trade regime. It is, however, the case that contestation remains over the grant to developing
49 and least developed countries of differentiated flexibility mechanisms. We can see this in a
50 number of areas, not least in the contestation which surrounded the institution of a special
51 safeguard mechanism (SSM) for agriculture. What arguably lay at the heart of contestation
52 on the likes of the SSM was a fundamental difference of opinion in respect of the
53 'philosophical' purpose of such mechanisms (Wolfe, 2009, p. 518). Contract theory cannot
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3 answer such philosophical or indeed normative debates. What contract theory is useful for,
4 however, is in elucidating on the interplay between the purpose of such flexibility and the
5 need for some sort of mechanism to differentiate between permissible and opportunistic
6 actions. Debates on the grant of flexibility mechanisms such as the SSM have not always
7 given full consideration to this interplay and have therefore neglected the need to deliberate
8 upon the principles informing such treatment, with a (premature) focus on designing a
9 mechanism to operationalise it (see generally Wolfe, 2009). Indeed, more generally, there has
10 been a tendency to transpose SDT as a set of 'tools' with little by way of philosophical
11 reflection upon their conceptual underpinnings (WTO, 1995, p. 4). We see this more clearly
12 in our discussion of *ex post* regret below.

20 *Contract theory and Ex post regret*

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23 Economic contract theory teaches us that problems may arise in respect of a contract where
24 the language is too rigid. Such a contract may, 'wrongly prohibit(...) non-performance in
25 situations where a complete contingent contract would mandate welfare-enhancing *ex post*
26 adjustment' (Gantz and Schropp, 2009, p. 170). Accordingly, while the use of hard(er)
27 contractual terms may allow for more 'credible' upfront commitments (van Aaken, 2009, p.
28 515) they may serve to create *ex post* regret amongst signatories once certain unanticipated
29 contingencies have come into being (Mahlstein and Schropp, 2007, p. 170). While overly
30 rigid provisions may be renegotiated, this is often costly and the parties involved will not
31 necessarily share similar interests in renegotiation (Scott and Stephan, 2006, p. 77).

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34 Of course, *ex post* regret may also be prevented by allowing parties flexibility in the
35 implementation of their commitments. In this vein, during the negotiation of the Uruguay
36 Round agreements, it was recognized that developing countries could incur performance
37 difficulties in implementing their WTO commitments. Accordingly, a total of twenty
38 transition periods across eight of the covered agreements were made available to developing
39 and least developed countries (WTO, 2016, p. 5). These granted time bound exceptions from
40 legal obligations although the vast majority of these have now elapsed.

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43 The rationale for granting countries additional time to meet their WTO commitments was
44 detailed in a Secretariat note as reflecting the, 'recognition that the process of implementation
45 of WTO, and accompanying reforms, could give rise to transitional costs' (WTO, 2001c, p.
46 8) While transition periods may be utilized to support commitments made and grant countries

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3 space to meet political and administrative adjustment costs, it is also the case that granting
4 countries ‘breathing space’ in respect of commitments which do not address their respective
5 needs merely delays the inevitable rise of *ex post* regret. In this sense, transition periods were,
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7 ‘no more than a temporary aberration from the norm derived from developed countries’
8 practices’ (Lamp, 2015, p. 766). The construction of ‘delayed implementation’ as a form of
9 SDT inherent in the Uruguay Round hence did little to contribute to substantive, as opposed
10 to procedural, differential treatment (Cullet, 1999, p. 552).
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15 **Summations**

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18 It is clear the shortcomings associated with incomplete contracts are apparent in the operation
19 of SDT. The lens provided by economic contract theory helped illustrate the paragraph 44
20 mandate as a normal response to the contractual completeness. We were also able to identify
21 flexibility as a normal part of the trade regime, despite the contestation that remains over the
22 grant to developing and least developed countries of differentiated flexibility mechanisms.
23 Economic contract theory was also used to articulate how overly rigid provisions can result in
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25 *ex post* regret with arbitrary transition periods doing little to guard against this. The
26 possibility of *ex post* regret underlines the importance of the contract formation stage in that
27 ‘when setting the optimal level of protection for international entitlements, one must be
28 careful what one wishes for ...’ (Pauwelyn, 2006, p. 64).
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36 Having evaluated through the lens of economic contract theory some of the deficiencies
37 associated with what we may think of as ‘traditional’ SDT, we now turn to review the
38 potential of the TFA as offering a new, and more effective form of SDT. In essence, does the
39 TFA suffer from the same contractual incompleteness that has plagued earlier incarnations of
40 SDT or is it capable of offering a new model of more complete contractual arrangements
41 addressing the differential needs of developing and least developed countries?
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49 **Section Two – The Trade Facilitation Agreement**

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52 The TFA aims to reduce bureaucratic barriers, speed up the movement of goods and provide
53 a range of disciplines for the domestic administration of trade. The Agreement also seeks to
54 implement, among other things, rules on transparency and border and customs agency
55 cooperation.^{xvi} While the economic benefits predicted from the TFA have been valued at
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3 between US\$ 750 billion and US\$ trillion (WTO, 2015b, p. 83) its SDT provisions are of
4 greatest interest to us. In short, under the auspices of SDT, the TFA allows developing and
5 LDC Members to self-designate all the substantive obligations of the TFA into one of three
6 categories. Category A obligations are those that the respective developing Members agree to
7 implement from the date at which the Agreement enters into force (TFA, Article 15).
8 Category B measures are those that the developing or LDC member agrees to implement but
9 after a transition period which again is self-determined (TFA, Article 16). Category C
10 measures are those which a developing country or LDC would require technical assistance
11 and capacity building in order to implement (TFA, Article 14.1 (c)). Developing countries
12 were required to notify the Committee upon the entry into force of the Agreement its
13 Category C measures as well as the type of assistance required for implementation (TFA,
14 Article 16.1 (d)). Together with relevant donor countries, developing countries then have a
15 further year to notify arrangements entered into or maintained to facilitate implementation of
16 category C measures (TFA, Article 16.1 (d)). Non-member donors are also to be invited at
17 this juncture to provide information on support (TFA, Article 16.1 (d)). 18 months after the
18 initial notification of support, donor Members and respective developing country Members
19 are required to update on progress towards implementation and developing country Members
20 are required to provide a definitive date for implementation of their designated Category C
21 commitments (TFA, Article 16.1 (e)). A similar procedure is applicable to LDCs albeit with a
22 more generous timescales (TFA, Article 16.2 (c) – (f)).
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37 Where implementation capacity is lacking in respect of category C measures and an
38 extension has not been granted or is not possible, developing and LDC Members are required
39 to notify the TFA Committee. (TFA, Article 18). The Committee is directed under the TFA
40 to convene an Expert Group of five independent experts to make a determination in respect of
41 implementation capacity (TFA, Article 18.2).^{xvii} In respect of LDC Members, the Expert
42 Group may, ‘as appropriate’, take action to facilitate the required implementation capacity
43 (TFA, Article 18.4).
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50 **Summations**

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52 The SDT provisions under the TFA are a significant departure from those found under other
53 WTO Agreements (Lamp, 2015). The very structure of the TFA, with one of its three
54 sections devoted solely to SDT, is testament to this. In particular, rigid transition periods, the
55 cause of such *ex post* regret under the Uruguay Round Agreements, are nowhere to be found
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3 under the TFA. In the words of Neufeld (2008), the emphasis of the TFA is upon ‘enhanced
4 capabilities as opposed to mere temporary carve-outs’ (283).
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7 Drawing on what we learnt so far, the design of the TFA clearly attempts to strike a balance
8 between *ex ante* commitments and *ex post* flexibility. Technical assistance has been provided
9 by a range of bodies such as the WTO, UNCTAD, the World Bank and the WCO to assist
10 developing and LDC members to conduct needs assessments in allocating their obligations to
11 particular categories (Czapnik, 2015, p. 785; Eliason, 2015). This ‘tailor-made approach’ to
12 trade law making, accompanied as it is by the provision of assistance in respect of category C
13 measures has been hailed by Lamp (2015) as potentially ‘signal(ing) a revival of the
14 cooperative approach to trade lawmaking’ (p. 771).
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21 Where additional *ex post* flexibility is required to be exercised; that is, additional time is
22 needed to notify or implement obligations, an Expert Group of five may be appointed (TFA,
23 Article 18). Using the lens of contract theory, the implicit task of this group is to make a
24 distinction between so-called efficient breach and opportunistic breach. The Trade
25 Facilitation Committee is also tasked to take a proactive role in supporting countries to meet
26 their implementation commitments and monitor any problems which may arise in this regard.
27 In this vein, Cho (2014) likens the TFA to a framework agreement which leaves room for talk
28 in that, ‘implementation requires WTO members to fill in a number of unknown details’ (p.
29 710).
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37 In respect of technical assistance and capacity building under Category C measures, this is
38 not a binding commitment entered into by the WTO. Instead other countries – so-called
39 ‘donor’ countries’ as well as non-Member bodies are expected to fulfil this role. However, if
40 countries do not receive the required assistance to implement category C measures, they are
41 not required to implement them (TFA, Article 13.2).^{xviii} The grant of technical assistance for
42 category C measures therefore operates as something of a ‘pre-condition for the respective
43 obligations of developing countries to take effect’ (Lamp, 2015, p. 768). This addresses
44 certain of the problems inherent in the grant of technical assistance under several of the
45 Uruguay Round covered agreements whereby competence lay predominantly with the donor
46 country to identify what assistance should be provided (Lamp, 2015, p. 768). By the same
47 token, it is anticipated that the proactive oversight role likely to be provided by the Trade
48 Facilitation Committee as well as the transparency obligations applicable to Donor countries
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3 may go some way to overcome the risk of moral hazard in the shadow of informational
4 asymmetries.
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7 So do the SDT provisions address the concerns regarding implementation which the contract
8 theory analysis entered into in the previous section? It is certainly the case that the TFA is
9 significant. It represents, 'a break from the business-as-usual model of SDT previously
10 embraced by the WTO' (Eliason, 2015, p. 662). The ability of developing and LDC Members
11 to unilaterally determine when to implement each of the TFA's provisions as well as the
12 tying of implementation to the receipt of technical/ implementation assistance is unique under
13 WTO law. Technical assistance requirements are determined by the recipient country itself
14 on the basis of a needs based assessment. Furthermore, numerous transparency obligations
15 exist in respect of Donor Members with the TFA Committee likely to play an important
16 oversight role. Therefore, the verification and monitoring problems associated with so-called
17 traditional SDT are less likely to arise under the TFA. There is, however, no obligation for
18 so-called Donor Members to provide assistance under the TFA.
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28 Concerns therefore remain as to the absence of a mechanism to hold Donor Members
29 accountable for any failure to provide assistance in respect of Category C measures (Eliason,
30 2015, p. 661). While the transparency provisions mentioned above in relation to Category C
31 measures may be useful for 'moral suasion', (Finger, 2014, p. 1283) Finger, for example, has
32 excoriated the category C provisions of the TFA as being akin to those of the more traditional
33 type of SDT discussed earlier. He categorises category C measures as, 'another exercise in
34 form without legal substance' (Finger, 2014, p. 1284). In a similar vein, it has been argued
35 that the TFA 'perpetuates the pattern of asymmetrical bargains struck in previous rounds of
36 WTO negotiations' (Wilkinson, Hannah and Scott, p. 1039) with the burdens of
37 implementation remaining disproportionately with developing countries and LDCs
38 (Wilkinson, Hannah and Scott, p. 1041).
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48 The TFA clearly offers a much improved SDT offering but it is also apparent that the success
49 or otherwise of its system of SDT depends upon the willingness of Donor Members to grant
50 appropriate technical assistance and capacity building. However, in the absence of the
51 provision of assistance, measures identified by developing and least developed countries as
52 category C measures do not require implementation. The absence of an enforceable standard
53 for the grant of technical assistance and capacity building, combined with the tying of
54 obligations to the receipt of assistance serves to avoid *ex post* regret on the part of developing
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3 and LDCs. The overt rigidity of certain of the Uruguay Round covered agreements is thus
4 avoided under the TFA and in this respect, it offers a fundamentally improved balance
5 between *ex ante* obligation and *ex post* flexibility.
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10 11 **Conclusions**

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14 SDT is not a niche area of the law of the multilateral trade regime. It goes to the very heart of
15 developing and least developed countries' legal settlement within the trade regime and is
16 intrinsically tied to the legitimacy of the trade regime. It is part of the 'package deal' of
17 Membership. The present study was prompted by an interest in the continuing contestation
18 which exists on how to improve the operationalisation of SDT (see, for example, South
19 Centre, 2017). It employed the conceptual framework provided by economic contract theory
20 and the incomplete contract to provide a scaffold for analysing SDT to offer insights beyond
21 those in the literature. The benefit of a contract theory analysis was that it helped us
22 understand *how* SDT is incomplete and allowed us to identify and understand the
23 consequences of such incompleteness; enriching our understanding of why vague or
24 indeterminate SDT provisions are difficult to enforce and, by extension, why informational
25 asymmetries present difficulties in monitoring compliance with SDT obligations.
26 Accordingly, the contractual frame allowed us to identify the paragraph 44 mandate as a
27 'normal' response to the need to contractual incompleteness. It further allowed us to evaluate
28 the TFA which we found offered a much improved approach to SDT under the WTO.
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40 What this study was unable to do was to engage with more normative questions. In this sense,
41 contract theory cannot answer questions of why SDT was left contractually incomplete or
42 explore the normative underpinnings of SDT. However, normative analysis may find an entry
43 point in a contract theory analysis of SDT. This is because contract theory helps to throw
44 light on a fundamental dilemma within the trade regime and elsewhere in international law;
45 how do parties ensure an efficient set of obligations given the uncertainty about the future?
46 This tension was revealed in the design and operation of SDT with this study demonstrating
47 how requests for flexibility should be conceived of as a fundamental component of the WTO
48 system. Accordingly, while contract theory cannot resolve the more normative contestation
49 which exists over SDT, it clarifies that such requests are not outside the WTO system and
50 provides a powerful riposte to critiques in this vein. To the extent that the tension between
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3 commitment and flexibility is at the forefront of all contractual negotiations, the insights
4 derived from this study are also capable of offering insights for differential treatment within
5 international law more generally.
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9 This study also demonstrates the utility of contract theory as a programmatic tool which can
10 operate alongside more traditional forms of legal analysis to both warn of and remedy
11 obligational defects. In this vein, however, we should be cognizant not to, 'treat all forms of
12 incomplete contracts as if they were nails to be hit with the same contracting hammer: when
13 examining and incomplete contract situation, the researcher should be conscious of the type
14 of underlying incompleteness that his/her subject of research is affected by' (Schropp, 2009,
15 p. 75). If SDT is a core component of the 'developmentification' of the WTO, more research
16 is needed to fully evaluate the incompleteness at play across the full array, rather than the
17 snap shot provided here, of SDT provisions within the WTO.
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54 on self-selection; see The World Trade Organisation ‘Development: Who are the Developing Countries?’
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56 ⁱⁱ This tally of SDT does not include the recently entered into force WTO Agreement on Trade Facilitation and
57 so the figure is certainly greater than 170.
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ⁱⁱⁱ The allocation of jurisdiction on this issue has been left incomplete or ‘muddy’ to encourage countries to reveal information to each other in order to bargain; (Trachtman, 2007, p. 646).

^{iv} See comments of the representative of India, (WTO, 2015a, at para. 54).

^v See comments of the representative of United States, (WTO, 2015a, at para 52)

^{vi} See comments of the representative of Barbados, (WTO, 2015a, at para 22)

^{vii} At the same time as the promulgation of the Doha Ministerial Declaration, Members adopted a Decision on Implementation Related Issues and Concerns; WTO, 2001b.

^{viii} See comments of the representative of Nepal, (WTO, 2015a, para 51).

^{ix} See also Third World Network (TWN, 2017) which provides a useful overview of a July 2017 proposal from the ACP, African Group and LDC Group (JOB/DEV/47) which, ‘expressed sharp concern over the manner in which attempts to improve the existing S&DT provisions as per the decision on implementation issues and concerns as well as on paragraph 44 of the Doha Ministerial Declaration - “which mandates to review all special and differential provisions with a view to strengthening them and making them more precise, effective, and operational” - have been jettisoned time and time again”

^x See comments of the representative of the European Union, (WTO, 2015a, para 55)

^{xi} Other proposals have been raised to bring about the ‘effective operationalization’ of Article 10.1 SPS; see G/SPS/35 and JOB(07)/99

^{xii} It should be noted that the 2013 Bali WTO Ministerial meeting saw Members adopt a significant Decision authorising the introduction of a Monitoring Mechanism for special and differential treatment (WTO, 2013). Unfortunately, however, the Monitoring Mechanism, while praised in numerous quarters at the time of its promulgation, has proven to be a resolute failure, an empty tool box spurned by the very Members it was designed to assist. In a recent meeting of the WTO Committee on Trade and Development, the representative of Ecuador noted that, “she wished to share some thoughts as to why the MM had not been made operational. She said that the MM did not have a negotiating mandate, and could only make recommendations. The objective of the Mechanism was to monitor the implementation of S&D provisions that were identified to be strengthened in the context of the negotiations under paragraph 44 of the Doha Declaration” (see WTO, 2017. P. 2).

^{xiii} In this context, see for example paragraph 10.2 of the Implementation Decision (WTO, 2001b) regarding the proposal that ‘developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies’ and tiret 40 of the compendium on outstanding implementation Issues such that in relation to TRIMS, ‘Specific provisions shall be included in the Agreement to provide developing countries the necessary flexibility to implement development policies (intended to address, among others, social, regional, economic, and technological concerns) that may help reduce the disparities they face *vis-à-vis* developed countries.’

^{xiv} For a summary of recent proposals from the ACP, African Group and LDCs for additional flexibilities in areas such as TRIMS, see TWN (2017).

^{xv} Indeed, according to the representative of Japan, ‘Finding realistic solutions to [SDT] was a tough challenge because some of the proposed solutions could undermine the basic concepts of the WTO,’ (WTO, 2015a, para 14)

^{xvi} For a useful summary of the TFA, see WTO, ‘The Trade Facilitation Agreement: An Overview’ https://www.wto.org/english/tratop_e/tradfa_e/tradfatheagreement_e.htm (accessed 22 June 2017)

^{xvii} In respect of Article 18.2 TFA – note the operative word ‘shall’ in the direction for the Committee to establish an Expert Group

^{xviii} The relevant provision directs that, “Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.”

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