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Liminal Spaces: Special and Differential Treatment as an Incompletely theorised agreement

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Abstract

Drawing on earlier work by the author on the application of economic contract theory to preferential treatment in favour of developing countries¹, this article is intended to provoke some reflections on special and differential treatment within the World Trade Organisation (WTO). The concept of special and differential treatment, defined as measures which aim to address developing and least developed countries (LDC) relevant development, financial and trade needs, has the potential for far-reaching impacts within the trading regime, depending upon how it is interpreted. This article seeks to develop a theoretical perspective on special and differential treatment. In developing this perspective, Cass Sunstein's theory of the incompletely theorised agreement is utilised to understand and interrogate the core features of special and differential treatment. Using this analytical lens, the article traces the construction of special and differential treatment as an incompletely theorised agreement and elucidates on the consequences of this for the operation of special and differential treatment as an effective tool to address the development, financial and trade needs of developing countries. The article will then evaluate recent changes to SDT which can be construed as an effort to more completely theorise SDT. The article will conclude by positing that special and differential currently resides within a liminal or transitional space. By tracing the contours of such liminality, this article will use the lens of the incompletely theorised agreement to channel debate on the development of this area of trade law and practice.

INTRODUCTION

There are over 170 provisions of Special and Differential Treatment (SDT) across the WTO covered agreements and various Ministerial, General Council and other relevant decisions.²

* The author thanks Prof. Barry Rodger, Prof. Elizabeth Kirk, Prof. Elisa Morgera and Dr Gregory Messenger for comments on a previous draft. Any errors are the author's own.

¹ See, for example, Stephanie Switzer, 'A Contract Theory Approach to Special and Differential Treatment and the WTO' *Journal of International Trade Law and Policy*, 2017, 15 (3): 126 – 140.

² WTO, Committee on Trade and Development (CTD), 'Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat' (22 September 2016) WT/COMTD/W/219, 4. The Secretariat's note does not include the SDT provisions of the Agreement on Trade Facilitation in its overview. For a fuller analysis of the WTO's SDT measures, see Switzer, *supra* note 1.

Accordingly, SDT represents an ‘integral’³ element of the WTO legal compact. It is generally associated with efforts to address developing countries’ and LDCs’ relevant developmental, financial and trade needs⁴ and includes efforts to, among other things, provide preferential treatment to promote developing country and LDC market access, the provision of technical assistance and capacity building as well as the structuring of looser rules on market protection.⁵ SDT is also a fundamental element of multilateral trade negotiations.⁶ In launching the Doha Round, for example, Members directed that SDT should be an integral element of negotiations on agricultural, ‘so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.’⁷

Despite the prominence of SDT within WTO legal compact, the run up to the launch of the Doha Round of multilateral trade negotiations represented a high water mark in developing country and LDC dissatisfaction regarding SDT.⁸ Such dissatisfaction culminated in the inclusion of a mandate to review the operation of SDT as part of the Doha Round negotiations.⁹ In this article, we utilize Cass Sunstein’s concept of an incompletely theorised agreement to interrogate the cause of developing country dissatisfaction with SDT.¹⁰

³ WTO, Ministerial Conference Fourth Session, ‘Ministerial Declaration’ (20 November 2001) WT/MIN(01)/DEC/1; para. 44.

⁴ See, for example, GATT, ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries’ Decision of 28 November 1979, GATT Doc L/4903, BISD 26S/203 (1980) [hereinafter, the Enabling Clause]; Article 12.3 of the Technical Barriers to Trade Agreement (TBT); Article XXXVI:8 of the GATT.

⁵ Frank Garcia, ‘Beyond Special and Differential Treatment’, *Boston College International and Comparative Law Review*, 2004, 27(2): 291 - 317, at 292. See also John Whalley, ‘Special and Differential Treatment in the Millennium Round’, CSGR Working Paper No 30/99, (1999) http://wrap.warwick.ac.uk/2095/1/WRAP_Whalley_wp3099.pdf accessed 4 July 2017.

⁶ Indeed, the phrase can even be found in the United Nations Sustainable Development Goals in Goal 14.6; ‘by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation.’

⁷ Doha Declaration, *supra* note 3, at paragraph 13. Indeed, as much of 15% of the text of the Doha Declaration is devoted to the grant of special and differential treatment, technical cooperation and capacity building as well as the concerns of least developed countries; Arvind Panagariya, ‘Developing Countries at Doha: A Political Economy Analysis’, *The World Economy*, 2002, 25(9): 1205 – 1233, at 1224.

⁸ See, for example, the comments of the Cuban representative in WTO, General Council, ‘Minutes of Meeting Held on 24 March 1999’, (12 April 1999) WT/GC/M/39, at paragraph 8. See also the statement of the Representative of Morocco in WTO, CTD, ‘Note on the Meeting of 19 June 1998’, (8 July 1998) WT/COMTD/M/21, at 2.

⁹ See generally Doha Round Declaration, *supra* note 3, at paragraph 44. See also WTO, Ministerial Conference Fourth Session ‘Implementation – Related Issues and Concerns: Decision of 14 November 2001’, (20 November 2001) WT/MIN(01)/17, at paragraph 13 (i) [hereinafter Implementation Decision]. A compilation of outstanding implementation issues at the outset of the Doha Round was set out in WTO, ‘Compilation of Outstanding Implementation Issues Raised by Members’, (20 October 2001) Job(01)/152/Rev.1.

¹⁰ Cass R. Sunstein, ‘Incompletely Theorized Agreements’, *Harvard Law Review*, 1995, 108 (7): 1733 – 1772.

Incompletely theorised agreements can be useful to ensure stability in agreements between diverse groups. We don't need to agree on everything to agree on something. Accordingly, such agreements may provide participants with a stable accommodation on a particular issue since it is sometimes unnecessary to secure agreement on all aspects of a particular action or provision. An incompletely theorised agreement can also act as a staging post to further discussions on more contentious issues. In this article, I review numerous provisions of SDT and find that many are incompletely theorised in terms of how they are to be operationalised to meet the relevant developmental, financial and trade needs of developing countries and LDCs. Operationalisation of SDT was often left to the discretion and/interpretation of developed countries. As we will show, such incomplete theorisation did little to promote stability but instead led to accusations of bias and inconsistency in how developing and least-developed country needs were addressed.

Sunstein recognises that there are instances when fuller theorisation of certain agreements is required. By analysing a range of SDT provisions, I offer some suggestions on how and when more complete theorisation of SDT may be useful. In so doing, I pay particular attention to a number of developments within the WTO and also scrutinise the WTO Agreement on Trade Facilitation (TFA). This agreement entered into force in February 2017 and, as outlined in a previous article by this author, contains a range of innovative SDT provisions.¹¹ Some commentators have opined that the TFA could offer something of a model for future negotiations on SDT.¹² In this article, I am perhaps more circumspect than others of the capacity of the TFA to provide a blueprint for the future development of SDT. However, I acknowledge the significance of the TFA for how its SDT provisions have allowed us to move past the traditional approach to such treatment. Indeed, the fresh approach to SDT encompassed under the TFA is demonstrative of how particular understandings of trade law are not self-evident but instead are constructed, and moreover may change, over time.¹³ Accordingly, as I will demonstrate, what the TFA allows us to do is dismantle the existing construction of SDT so that we may 'reimagine' the trade law project as a whole.¹⁴ The article will conclude by positing that special and differential currently resides within what we may call a liminal space. By using the term liminal, I intend to evoke the idea of transition and the stepping onto the threshold of something new but at the same time still ambiguous. In the conclusion to this piece, I offer some thoughts on where SDT may be transitioning to.

¹¹ Switzer, *supra* note 1.

¹² See generally Nicolas Lamp, 'How Some Countries Became 'Special': Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking', *Journal of International Economic Law*, 2015, 18 (4): 743 - 771. see also discussion in Switzer, *supra* note 1.

¹³ See generally Andrew T. F. Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System', *Modern Law Review*, 2007, 70 (4): 523 – 549, at 543.

¹⁴ *Id.*

This article builds on earlier work by the author which sought to frame SDT as akin to an incomplete contract.¹⁵ By utilising the tools of economic contract theory to analyse SDT, I was able to argue for what in effect amounts to a life cycle analysis of SDT. While acknowledging the utility of economic contract theory for analysing SDT, this article attempts to address a particular aspect which economic contract theory cannot address. In essence, contractarian analysis is not particularly sensitive to normative concerns. This article therefore attempts to address this omission in my earlier analysis of SDT.

The next section will provide an introduction to Sunstein's concept of incompletely theorised agreements. This will be followed in section two with an overview of the current provisions on SDT within the WTO. I then marry together the analysis of the previous sections to sketch the contours of SDT as an incompletely theorised agreement. The ramifications of the construction of SDT as an incompletely theorised agreement will be discussed in section three before attention is turned in section four to discussing the likely future of SDT. In this section, I conceptualise SDT as residing within a liminal – in essence, transitional – space. In section five, I conclude and in doing so, argue that there is a pressing need to garner a range of conceptual tools to allow for a robust critique of future SDT proposals to channel debate on the development of this area of trade law and practice. This article begins this quest for new conceptual tools by analysing Sunstein's incompletely theorised agreement which, as we will see, provides a powerful critical framework for analysing such provisions in the future.

Before I begin, a number of caveats must be acknowledged. The first of these is that this article does not provide an exhaustive account of the development of SDT within the multilateral trade regime.¹⁶ Furthermore, this article does not provide a comprehensive analysis of all 170+ provisions of SDT which exist in the WTO legal compact. Instead, I adopt a case study approach to this review of SDT. While the range of SDT provisions chosen for the case studies are intended to represent certain of the main types of SDT 'on offer' within the WTO, as with any case study, a longer word count would have allowed for a broader and

¹⁵ Switzer, *supra* note 1.

¹⁶ This has been done very well by other authors. See, for example, Raj Bhala, 'Theological Categories for Special and Differential Treatment', *Kansas Law Review*, (2002) 50 (4): 635 – 693; Uché Eweluka, 'Special and Differential Treatment in International Trade Law: A Concept in Search of Content', *North Dakota Law Review*, (2003) 79: 831; Edwini Kessie, 'Enforceability of the Legal Provisions Relating to Special and Differential Treatment Under the WTO Agreements', *Journal of World Intellectual Property*, (2000) 3 (6): 955 - 975; William Kerr, 'Special and Differential Treatment: A Mechanism to Promote Development?', *The Estey Centre Journal of International Law and Trade Policy*, (2005) 6 (2): 84; W Kerr, 'Special and Differential Treatment: A Mechanism to Promote Development?', *The Estey Centre Journal of International Law and Trade Policy*, (2005) 6 (2): 84; Edwini Kessie, "The Legal Status of Special and Differential Treatment Provisions Under the WTO Agreements," in *WTO Law and Developing Countries*, George Bermann and Petros Mavroidis, eds. (Cambridge: Cambridge University Press), pp. 15-21; Chang-Fa Lo, 'From S&D Treatment to S&D Agreement Under the WTO: Developing Friendlier Global Governance of Trade for Developing Countries' *Asian Journal of WTO and International Health Law and Policy*, (2006), 1:33.

more comprehensive analysis. In addition, while the framework of the incompletely theorised agreement is adopted as a conceptual lens for our analysis, this is not intended as a call to arms against incompletely theorised agreements in general. Rather, this work is intended to draw attention to how at times; fuller theorisation of agreements and/or understandings may be required to guard against the risk of bias, self-interest and inconsistency. The frame of the incompletely theorised agreement is therefore utilised as both an evaluative and programmatic tool for analysis of future provisions of SDT. Finally, while in the penultimate and concluding sections I comment on the pertinent question of ‘where next’ for special and differential treatment, I am also cognizant that such a question cannot be answered solely by a legal and normative analysis but owes much to the (ever changing) political economy of the trade regime.

SECTION 1 - INCOMPLETELY THEORISED AGREEMENTS

It is clear that ‘well-functioning’ systems of law have a tendency to adopt certain techniques to ensure stability.¹⁷ Implicit in the work of Cass Sunstein is the idea that stability is provided through agreement between disparate parties with a variety of interests.¹⁸ Sunstein details how, ‘(a)rbiter of legal controversies try to produce incompletely theorized agreements.’¹⁹ As contended by Sunstein,

‘[i]ncompletely theorised agreements play a pervasive role in law and society. It is rare for a person, and especially a group, to theorise any subject completely -- that is, to accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion. In fact, people often reach *incompletely theorised agreements on a general principle*. Such agreements are incompletely theorised in the sense that people who accept the principle need not agree on what it entails in particular cases.’²⁰

It is clear that an incompletely theorised agreement may arise at various levels of abstraction. First, as indicated above, such agreements may arise where there is agreement upon a general principle but no consensus upon how the principle applies in particular situations.²¹ People may hence believe that murder is wrong but may disagree on the subject of abortion. Second, agreement may be secured on a so-called mid-level principle but not on the theory which informs the principle or what it entails in individual cases.²²

¹⁷ Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996) at 4.

¹⁸ *Id.*, at 4.

¹⁹ *Id.*, at 4.

²⁰ Sunstein, *supra* note 10, at 1739.

²¹ *Id.*, see generally.

²² *Id.*, at 1739.

Finally, on other occasions, a ‘conceptual descent’ may be appropriate where agreement cannot be formed on abstractions.²³ As such, progress can be made by moving discussion to a more concrete level of particularity.²⁴

Sunstein, while employing the concept of the incompletely theorised agreement in a largely descriptive sense²⁵, notes that in a diverse (constitutional) setting, there may be merit to avoiding theoretical or practical conflicts.²⁶ Thus the incompletely theorised agreement is at times a useful tool in that it makes law and indeed social life possible.²⁷ Silence on an issue which may prove particularly controversial, for example, may help to ease potential conflict and, by extension, reduce the time needed to come to agreement.²⁸ Indeed, one common conception of the ‘purpose’ of law is to either provide for or create the conditions necessary for stability.²⁹ This concept of stability links well with the ‘ideal’ of legal certainty which oftentimes acts as a ‘regulative idea’.³⁰ However, it has been noted that this perception of law has a tendency to lead lawyers to forget about or indeed ignore the ‘political foundations’ of legitimacy.³¹ It is therefore essential that stability is not pursued to the detriment of a legitimate system of law and governance. We will return to this point in due course.

Silence may also allow for learning and the development of consensus at some future date.³² To this end, the very fact of law-making in a diverse society means that it will not always be desirable or indeed possible to fully theorise a particular area of law. This is because fuller theorisation may prove to be overly contentious and may be, in practical terms, impossible. Thus, if a workable agreement can be reached, it should not matter that the ‘grand theory’ which accounts for the agreement is not fully theorised. Hence, for Sunstein, an agreement which is completely theorised may be unable to accommodate changes in values or facts over time.³³ Agreements that are incompletely theorised may therefore be open enough to incorporate future changes in values and facts.³⁴ Indeed, it has

²³ Cass R Sunstein, ‘Incompletely Theorised Agreements in Constitutional Law’, John M. Olin Law and Economics Working Paper No. 322 (2D Series) Public Law and Legal Theory Working Paper No 147, (2007), at 2.

²⁴ *Id.*, at, 2 – 3.

²⁵ Though see Sunstein, *supra* note 10, at 1738.

²⁶ Sunstein, *supra* note 23, at 2 – 3.

²⁷ *Id.*, at 13.

²⁸ *Id.*, at, 2 and 13.

²⁹ *Id.*, at 13. See also generally Robert Post, ‘Theorising Disagreement: Re-conceiving the Relationship between Law and Politics’ (2009) Yale Law School, Public Law Working Paper No. 145, (1999), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434103 accessed 14 July 2017.

³⁰ Stefano Bertea, ‘How Non-Positivism Can Accommodate Legal Certainty’, in George Pavlokas (ed), *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007) 69, at 76.

³¹ Post, *supra* note 29.

³² *Id.* See also Sunstein, *supra* 23, at pp 2 and 13.

³³ Sunstein, *supra* note 23, at 14, to the effect that such agreements allow for ‘moral evolution and even progress over time.’

³⁴ See generally Switzer, *supra* note 1.

been argued that at the heart of every legal system is a tension between legal security and the need for law to be able to accommodate unforeseen cases.³⁵

Incompletely theorised agreements are relatively commonplace within the international legal sphere with, for example, the formation of the Universal Declaration of Human Rights marked by a lack of agreement upon the ‘high-level’ theory behind it.³⁶ However, it provided a framework upon which more progressive understandings could be built.³⁷ By extension, it has been argued that the importance of human rights and associated discourse is that it provides a framework for conversation and dialogue about the values,³⁸ thereby illustrating where there is agreement before going on to try and obtain further agreement at a much lower level of abstraction.

Sunstein provides a similar example in respect of racial equality.³⁹ We may agree on the mid-level principle of outlawing racial discrimination but this will be informed by competing depictions of what is meant by racial equality. Similarly, at a lower level, we may disagree on how to outlaw racial discrimination. Should we, for example, impose a policy of affirmative action to achieve our goal or segregate prisons in the event racial tensions are particularly severe?⁴⁰ Answering such questions requires us to elucidate more fully on our reasons for supporting racial equality. This is an inherently difficult task with many preferring to avoid such questions and transfer their analysis to a level where they are more likely to reach agreement with other relevant parties. Hence, to leave a particular issue unresolved may be meritorious in that it may save a great deal of time negotiating upon an issue in relation to which agreement may never be possible. Accordingly, ‘[w]hat is said and resolved is no more important than what is left out.’⁴¹

Summing up, the incompletely theorised agreement may be a useful device to promote stability where open ended conversations on particular issues are liable to produce tensions. However, it must also be discerned whether any shortcomings are associated with such agreements. In this regard, while there may be benefit to forming an incompletely theorised agreement, at times they can hide the existence of inequality or injustice.

³⁵ See generally, Anne van Aaken, ‘International Investment Law: Between Commitment and Flexibility: A Contract Theory Analysis’, *Journal of International Economic Law*, 2009, 12:2, 507 -538, at 508. See also Switzer, *supra* note 1.

³⁶ Sunstein, *supra* note 23, at 7 – 8.

³⁷ *Id.*

³⁸ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) 217.

³⁹ Sunstein, *supra* note 10, 1739.

⁴⁰ *Id.*

⁴¹ Cass R Sunstein, ‘Practical Reason and Incompletely Theorized Agreements’, *Current Legal Problems*, 1998, 51:1, 267 - 298, at 276.

Accordingly, Sunstein has recognised that the benefits of an incompletely theorised agreement will at times be limited.⁴² As such, ‘fuller theorisation’ of an issue may be of benefit to promote a ‘wider and deeper inquiry into the grounds for judgment’ and prevent ‘inconsistency, bias, or self interest.’⁴³ Furthermore, while one of the central advantages of incompletely theorised agreements is the role they play in promoting stability; such stability should not be at the cost of justice.⁴⁴ Where an agreement provides stability at the expense of, for example, just outcomes in relation to a particular sector of society, the stability provided will be short-term in duration. It is hence clear that stability is not an ‘overriding’ social good to be striven for at the expense of all other goals or values.⁴⁵ Thus Sunstein recognises that certain background ideas are required to act as gate keepers against the threat of unjust incompletely theorised agreements.⁴⁶

As I illustrate in the next section, fuller theorisation of the provisions of SDT is revelatory of the fact that they are tainted by self-interest, bias and inconsistency. Furthermore, it will be argued that the actual construction of the legal provisions of SDT was such as to deny developing countries the ability to articulate their development, financial and trade needs. Given that these provisions are founded upon the notion that they should meet such needs, this is normatively troubling and, as we will see, led to developing country demands for a review of such provisions so as to make them more precise, effective and operational.⁴⁷

SECTION 2 - SDT AS AN INCOMPLETELY THEORISED AGREEMENT

In this section, we utilise the analytical frame provided by the incompletely theorised agreement to interrogate the way in which the provisions of special and differential treatment are constructed.

From the outset of the GATT in 1947, just under half of the organisation’s membership could be termed developing.⁴⁸ The relationship between developed and developing countries in the GATT was one of formal equality based upon the most-favoured-nation [MFN] clause in GATT Article I:1.⁴⁹ As a consequence, there was no special regime in place to

⁴² *Id.*, at 296.

⁴³ Sunstein, *supra* note 10, at 1750

⁴⁴ Sunstein, *supra* note 23, at 19.

⁴⁵ *Id.*, at 20.

⁴⁶ Sunstein, *supra* note 41, at 281.

⁴⁷ Doha Ministerial Declaration, *supra* note 3, para. 44.

⁴⁸ 11 of the 23 original contracting parties to the GATT could be considered to be developing; For more by way of background, see Stephanie Switzer, ‘Environmental protection and the generalized system of preferences: a legal and appropriate linkage?’ *International and Comparative Law Quarterly*, 2008, 57 (1): 113 – 147, from which this section partly derives.

⁴⁹ *Id.*

cater to the development, financial and trade needs of developing countries. Since there were undoubtedly economic differences between developed and developing countries, it was contended in the early years of the GATT that ignoring such differences and treating the two groups equally resulted in a form of inequality. As the representatives of India claimed at the 19th session of the Contracting Parties to the GATT in 1964, 'equality of treatment is equitable only among equals.'⁵⁰ Similar sentiments were expressed in a statement to the United Nations Conference on Trade and Development [UNCTAD] in the same year to the effect that 'no matter how valid the principle of [most-favoured-nation] may be in trade relations between equals, it is not an acceptable and adequate concept for trade among countries with highly unequal economic power.'⁵¹

Throughout the early years of the GATT, developing countries therefore sought differential treatment based upon what they conceived of as their fundamental difference from developed countries.⁵² Legal change would, however, soon come about with amendments to GATT Article XVIII during the 1954-1955 GATT review session to provide, *inter alia*, for developing countries to utilise quantitative restrictions for balance-of-payments difficulties.⁵³ This was followed in 1964 with a further amendment to the GATT to include a new Part IV on Trade and Development.⁵⁴ The new Part IV introduced three new Articles into the GATT, the first of which, Article XXXVI on Principles and Objectives, recognised the need for rapid and sustained expansion of the export earnings of developing countries. This was to be achieved through more favourable market access conditions for products of interest to developing countries and the diversification of the economies of developing countries to avoid excessive dependence upon primary products. Of greater significance was the introduction of the principle of 'non-reciprocity' whereby; '[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.'⁵⁵

⁵⁰ As cited in Americo Beviglia Zampetti, *Fairness in the international economy: US perspectives on international trade relations* (Cheltenham: Edward Elgar, 2006) 169.

⁵¹ Raúl Prebisch, *Towards a New Trade Policy for Development: Report by the Secretary-General of the United Nations Conference on Trade and Development* (New York: United Nations, 1964) 56.

⁵² See generally Gilbert R Winham, *International Trade and the Tokyo Round Negotiations* (Princeton: Princeton University Press, 1986).

⁵³ GATT, 'Reports Relating to the review of the Agreement: Quantitative Restrictions, Report adopted on 2, 4 and 5 March 1955' (1955) BISD 3S/170; GATT, 'Protocol Amending the Preamble and Parts II and III of the GATT' (3 October 1955) GATT Doc. PROT/6, BISD 3S/79 (1955).

⁵⁴ GATT, 'Protocol Amending the GATT to Introduce a Part IV on Trade and Development' (8 February 1965) GATT Doc. PROT/2/62, L/2314; GATT BISD 13S/2, 572.

⁵⁵ GATT Article XXXVI:8; See also GATT, 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' (28 November 1979) BISD 26S/ 203 [hereinafter Enabling Clause], at para 5.

Following this, in June 1971, a waiver was granted by the GATT Contracting Parties to allow non-reciprocal preferential tariff treatment to be granted in favour of developing country imports.⁵⁶ Initially authorised for ten years, such preferential tariff schemes, known by the moniker the generalised system of preferences (GSP), were given a permanent legal basis by way the 1979 Decision on ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries.’ This set out that, ‘notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries without affording such treatment to other contracting parties.’⁵⁷ Intended to provide durable legal authorisation for the GSP, this decision, commonly termed the ‘Enabling Clause’, detailed that such differential and more favourable treatment would apply to preferential treatment accorded by developed contracting parties to products from developing countries under the GSP.

The Enabling Clause contains no time limits and is in force today, having been incorporated into the GATT 1994.⁵⁸ In addition to granting permanent permission for the GSP, the Enabling Clause also authorised tariff preferences between developing countries, more favourable treatment for developing countries with regard to non-tariff barriers to trade and more favourable treatment for the least developed of the developing country group. A ‘graduation clause’ was introduced into the Enabling Clause such that while developed countries would not expect reciprocity from developing countries which would be inconsistent with their development, financial and trade needs, it was noted that the capacity of developing countries to make contributions would improve with their progressive development.⁵⁹ SDT would not, therefore, consist of an open-ended non-reciprocal relationship. As articulated by the former GATT Director General, Oliver Long,

The contention that equality of treatment creates a condition of inequality between developed and developing countries was the main justification and motive for the introduction of preferential treatment. A logical consequence of this precept is that, as the economic situation of developing countries improves, equality should become progressively the rule.⁶⁰

⁵⁶ GATT ‘Generalized System of Preferences, Decision of June 25, 1971’ (1972) BISD 18S/24.

⁵⁷ See Enabling Clause, *supra* note 4.

⁵⁸ Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, para. 1(b)(iv); see also *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report, WT/DS246/AB/R, 7 April, 2004, at para 90 (*EC – Tariff Preferences*).

⁵⁹ Enabling Clause, *supra* note 4, at para 7; “Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.”

⁶⁰ Oliver Long, *Law and its Limitations in the GATT Multilateral Trade System* (Springer, 1987), at 103.

While the above elucidation of the development of differential treatment in favour of developing countries in the GATT would seem to indicate that developed Members of the GATT were supportive of the grant of such treatment, this was not the case.⁶¹ Rather, developed countries agreed to developing country demands for differential treatment provisions for pragmatic reasons related to a desire for the ‘bicycle club’ of the GATT to stay upright.⁶² Accordingly, one commentator has pointed out that with regard to industrialised countries;

[W]hile self-interest surely explains many of the inconsistencies and exceptions that riddle multilateral trade agreements that resulted largely from (industrialised countries’) leadership of the international trade regime, other explanations seem also to carry at least partial weight... They may have pragmatically conceded to political pressures in particular contexts in order to keep the larger progressionist model on course.⁶³

It has been similarly contended that the, ‘goal of (the) GSP was to obtain support of the developing countries for the GATT system.’⁶⁴ During the 1960s and 1970s, the developing country group dominated UNCTAD was deemed as a threat to the existence of the GATT, prompting a resigned acceptance on the behalf of the developed countries that ‘something would have to be done’ about the preference issue.⁶⁵ Such ‘formal prescriptive differentiation’ to ensure developing country support was not only a fundamental element of the trade regime but also existed in other areas of international law such as the 1990 London Amendments to the 1987 Montreal Protocol on Substances that deplete the Ozone Layer.⁶⁶

Within the trade regime, there may have been acceptance of the notion of differential treatment as a ‘response’ to developing country needs but the extent to which such acceptance implied a normative commitment is questionable. Ochieng argues that the ‘lackluster’ [sic] history of SDT in the GATT/WTO can be traced, at least in part, to ‘different

⁶¹ See generally N Lamp, ‘How Some Countries Became ‘Special’: Developing Countries and the Construction of Difference in Multilateral Trade Lawmaking’ (2015) 18 *Journal of International Economic Law* 743, 750

⁶² See generally Peter Lichtenbaum, ‘“Special Treatment” versus “Equal Participation”: Striking a Balance in the Doha Negotiations’, *American University International Law Review*, 2002, 17 (5): 1003 - 1044.

⁶³ Chantal Thomas, ‘Developing Countries and Multilateral Trade Agreements: Law and the Promise of Development’, *Harvard Law Review*, 1995, 108 (7): 1715 - 1732, at 1731.

⁶⁴ Beth V Yarbrough and Robert M Yarbrough, ‘Institutions for the Governance of Opportunism in International Trade’, *Journal of Law, Economics, & Organization*, 1987, 3 (1): 129 – 139, 132.

⁶⁵ On the influence of UNCTAD more generally, see Jeffrey McGee and Jens Steffek, ‘The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law’, *Journal of Environmental Law*, 2016, 28 (1): 37 - 63, at 47 – 50.

⁶⁶ *Id.*, at 38 – 39.

epistemic and/or ideological visions of development⁶⁷ between developed and developing countries. Accordingly, in order to ‘create a rule-based multilateral trading system in which both parties could participate, compromises were made, most notably on the dual principles of reciprocity and non-reciprocity.’⁶⁸ Indeed, in agreeing to the construction of differential treatment as ‘exceptions’, developed countries were able to construct the trade regime they wanted since developing country demands were conceptualised as ‘different’ and outside the normal trade regime system.⁶⁹ The provisions of differential treatment for developing countries agreed to under the GATT thus constituted in the main ‘an agreement to disagree’ but failed to act as a staging post to more engaged discussions. This set the scene for attempts under the Uruguay Round of multilateral trade negotiations to commence with the eradication of such difference with developing countries expected to subscribe to a trade regime largely shaped by developed country interests.⁷⁰

The Uruguay Round negotiations which led to the formation of the WTO would continue to subscribe to the principle of differential treatment in favour of developing countries but the tools used to effect such treatment would undergo a change. Under the GATT, measures of differential and more favourable treatment focused upon granting developing countries special rights to protect their markets and offered them enhanced access to the markets of developed countries,⁷¹ summarised elsewhere as the right-of-access and the right-to-

⁶⁷ Cosmas Milton Obote Ochieng, ‘The EU-ACP Economic Partnership Agreements and the ‘Development Question:’ Constraints and Opportunities and Opportunities Posed by Articles XXIV and Special and Differential Treatment Provisions of the WTO’, *Journal of International Economic Law*, 2007, 10 (2): 363 - 393, at 388.

⁶⁸ *Id.*

⁶⁹ See generally Lamp, *supra* note 12, at, 744; who posits that, “during key episodes in the history of the trading system, the developing countries did not seek ‘to be excepted from the obligations in the GATT’s code of behaviour,’ but rather sought to shape those obligations themselves. In these circumstances, granting exemptions and ‘special’ treatment to developing countries was a tool for developed countries to preserve their preferred design of the trade regime, and to stick to their preferred method of making trade law, while keeping developing countries within the system.” See also Charalampos Efstathopoulos and Dominic Kelly, ‘India, developmental multilateralism and the Doha ministerial conference’, *Third World Quarterly*, 2014, 35 (6): 1066- 1081, at 1067 arguing that India’s objection to the launch of the Doha Round can be conceptualised as a form of ‘developmental multilateralism,’ that is, ‘the pursuit of both substantive and procedural fairness in multilateral economic institutions, and its aim is to promote economic growth through international rules that take seriously cultural and historical sensitivities. It is not against freer trade per se. Developmental multilateralism appears negative only when set against the steady push towards small government, more open markets and freer trade championed under the neoliberal approach to development.” See also in general terms, Daniel K. Tarullo, ‘Beyond Normalcy in the Regulation of International Trade’, *Harvard Law Review*, 1987, 100 (3): 546 – 628, and McGee and Steffek, *supra* note 65.

⁷⁰ According to former WTO Director General Pascal Lamy, ‘I think that the Uruguay Round was perhaps the last time we addressed the problem by simply writing a new set of rules the way we, the Northern countries, wanted them, and then extending a transitional period to developing countries by way of “special and differential treatment”, http://europa.eu/rapid/press-release_SPEECH-02-25_en.htm, accessed 14 September 2017.

⁷¹ Whalley, *supra* note 5, at 24.

protect.⁷² However, the formation of the WTO ushered in a new era of special and differential which largely replaced such concerns with an emphasis on the special problems developing countries may incur in implementing the Uruguay Round agreements.⁷³ This emphasis upon ‘implementation’ and by extension compliance, together with the formation of the WTO as a single undertaking, is representative of a linear movement towards progress with progress being measured as the ability of countries to undertake the same legal commitments. Deborah Cass, however, noted that a linear presentation of history tends to bury inequalities which may lie at the foundational heart of some doctrinal developments.⁷⁴ Indeed, critical legal scholarship on the subject of international law has tended to emphasise how international law ‘constantly reiterates its own history so as to present the field as a narrative of inevitable progress and modernisation.’⁷⁵

Drawing on the above, a central tool employed in the WTO provisions on SDT to facilitate implementation of the Uruguay Round agreements was the grant of transition periods to developing countries.⁷⁶ These would have the effect of giving developing countries extra time to implement their commitments under the Uruguay Round agreements. These transition periods were set in an arbitrary way and were not linked to the particular needs of developing countries or based on any substantive calculation of the difficulties developing countries would face in implementation.⁷⁷ In this respect, the construction of SDT in the form of transition periods granted to developing countries such as to assist in the implementation of their trade commitments reveals an intrinsic belief that each of the WTO’s agreements was suitable for each Member country. Under this account, it is not the agreement itself that is the problem; it is the capacity constraints of the individual developing country that are problematic.⁷⁸

⁷² John Whalley, ‘Non-discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries’, *The Economic Journal*, 1990, 100 (403): 1318 - 1328, at 1319.

⁷³ See generally Uché Eweluka, ‘Special and Differential Treatment in International Trade Law: A Concept in Search of Content’, *North Dakota Law Review*, 2003, 79: 831; and Whalley, *supra* note 5. See also WTO General Council ‘Proposal for a Framework Agreement on Special and Differential Treatment (19 September 2001) WT/GC/W/442, para 7.

⁷⁴ Deborah Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’, *Nordic Journal of International Law*, 1996, 65 (3): 341 - 383, at 358.

⁷⁵ *Id.*, at 354.

⁷⁶ WTO, *supra* note 2.

⁷⁷ See generally Seung Wha Chang, ‘WTO for Trade and Development Post-Doha’, *Journal of International Law*, 2007, 10 (3): 553 - 570, at 554.

⁷⁸ See discussion Sheila Page and Peter Kleen, ‘Special and Differential Treatment of Developing Countries in the World Trade Organization’, *Global Development Studies*, no.2, 2005, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3320.pdf>, accessed 1 September 2017, at p 34, to the effect that one view of developing country difficulties in implementing the Uruguay Round is that ‘members agreed to the new rules (as, by consensus, they did), then we must assume that they do consider them beneficial (or, at least, worth incurring in return for some other benefits

Indeed, a particular characteristic of the SDT provisions agreed to during the Uruguay Round was that they were transacted on an agreement specific⁷⁹ and ad hoc basis⁸⁰ with little by way of an underlying normative framework. The rationale provided by the WTO Secretariat for the construction of special and differential treatment in this way was that '[r]ather than operating as a general principle, the relevant provisions are tailored to the needs in accordance with each Agreement.'⁸¹ What is interesting about this statement is that it does not focus upon the individual needs which a country may have in terms of benefiting from membership of the WTO as a whole. Rather, the concept of 'needs' mentioned in the Secretariat note is to be understood as relating to a country's ability to implement individual agreements.

Summing up what we have discussed so far, it is argued that the provisions of SDT under the GATT and latterly the WTO were incompletely theorised. In relation to certain measures of special and differential treatment such as the GSP, there was agreement for differential treatment to be included but the reasons for such treatment were incompletely theorised with developed countries agreeing to such special treatment largely on pragmatic grounds. As we will see, how such treatment would operate in practice would also remain incompletely theorised. Other measures of SDT were incompletely theorised with agreement secured at a lower level. In respect of transition periods, for example, there was agreement at a very low level of abstraction on the period of time applicable to transition periods. What was incompletely theorised was the higher order principles of why such treatment should be granted in the first place with, as acknowledged by the Secretariat, SDT failing to operate as a general principle. This lack of incomplete theorisation led to a failure to enquire as to the suitability of such measures to address developing country needs. In the abstract, and as articulated above, incompletely theorised agreements can provide stability but as we will see, SDT instead came to be associated with bias, inconsistency and self-interest. We explore this in the next section.

SECTION THREE - THE PROBLEM(S) WITH INCOMPLETE THEORISATION

In this section, we utilise a number of case studies to explore the problems associated with incomplete theorisation of SDT. A case study approach is adopted due to the very large number of SDT provisions which exist under the legal framework of the multilateral trade regime and the limited word count available. While the scope of the case study is by

negotiated), and therefore only some of the costs are 'excessive'. The excess could be because developing countries are required to catch up unduly quickly or to incur costs relatively early in their history.'

⁷⁹ UNCTAD Commercial Diplomacy Programme 'Training Tools for Multilateral Trade Negotiations: Special and Differential Treatment' (2000) UNCTAD/DITC/MISC.35,29.

⁸⁰ See generally Whalley, *supra* note 5.

⁸¹ WTO, CTD 'Regulatory Obligations and Other Implications of the Uruguay Round Agreements' (13 June 1995) WT/COMTD/W/6, at 4.

necessity limited, it is nevertheless intended to discuss the main types of SDT available under the WTO.

We have already introduced the GSP and it is posited that this serves as a paradigm example of the incomplete theorisation of SDT. To expand, the legal construction of the GSP under both the 1971 waiver decision and the Enabling Clause represents an agreement upon the mid-level principle of preferential tariff treatment in favour of developing countries without consequent agreement on what such treatment entails in particular cases. There is, for example, no direction given in either the 1971 waiver decision or the Enabling Clause as to whether it is permissible to exclude countries *ab initio* from the grant of tariff preferences. Furthermore, while the Enabling Clause lists the mid-level principle that preferential tariff treatment should serve as a response to developing country development, financial and trade needs,⁸² no direction is given as to the sort of preferential tariff treatment likely to achieve these aims or indeed, the definition that should be accorded to such needs. This compromise, reflected as an incompletely theorised agreement, had the capacity to hide or disguise the existence of certain abstractions such as the fact that under the GSP, developed country ‘donor’ states were able to articulate a unilateral construction of developing country needs.⁸³

Linking the above point with the commentary so far on the GSP, it is notable that discussion on tariff preferences has referred to the legal status of the grant of preferences as constituting a conditional gift.⁸⁴ In contrast to the obligation contained in Article I.1 GATT that requires MFN treatment to be extended unconditionally to all other Member countries, there is no provision in the Enabling Clause to the effect that the grant of preferences must be ‘unconditional.’ Certain donor countries have thus felt free to attach certain conditions to the receipt of tariff preferences under the GSP.⁸⁵ By conditioning the receipt of preferences upon the fulfilment of certain conditions, donor countries were able to extract certain benefits from the recipient states. In other words, the offer of tariff preferences was in certain instances tantamount to a ‘conditional gift’⁸⁶.

The legal framework of the GSP was examined in the WTO dispute of *EC-Tariff Preferences*.⁸⁷ A central issue in the dispute was whether it was permissible for a state with a GSP tariff

⁸² Enabling Clause, *supra* note 4, para 3 (c).

⁸³ See discussion in Stephanie Switzer, ‘The public-ness of development at the World Trade Organisation’ in C Michelon, G Clunie, C McCorkindale and H Psarras, (eds) *The Public in Law: Representations of the Political in Legal Discourse*. (Farnham: Edinburgh/Glasgow Law and Society Series, 2012) 219.

⁸⁴ See discussion Gene M. Grossman and Alan O. Sykes, ‘A preference for development: the law and economics of GSP’, *World Trade Review*, 2005, 4 (1): 41 – 67.

⁸⁵ See further Switzer, *supra* note 48.

⁸⁶ Peter M. Gerhart and Archana Seema Kella, ‘Power and Preferences: Developing Countries and the Role of the WTO Appellate Body’, *North Carolina Journal of International Law and Commercial Regulation*, 2005, 30 (3): 515 - 576, at 539.

⁸⁷ WTO, *EC – Tariff Preferences – Appellate Body*.

preference scheme to differentiate between developing country recipients of such preferential tariff treatment. In seeking to answer this question, the Appellate Body looked to the history and objectives of the Enabling Clause. In doing so, it noted that Members are *encouraged* to deviate from their MFN commitments in the pursuit of special and differential treatment in favour of developing countries.⁸⁸ In so doing, Members may differentiate between GSP beneficiaries in a way that responds *positively* to the ‘needs of developing countries.’⁸⁹ However, in allowing for such differentiation, ‘even if constructed in accordance with the notion that it should act as a positive response to a relevant need, the Appellate Body in effect sanctioned the ability of developed countries to put forward a unilateral construction of ‘need’ – albeit within defined limits – in the grant of preferential tariff treatment.’⁹⁰ Accordingly, the original aims of the GSP to promote growth and development have not been delivered upon.⁹¹

Another provision of SDT which illustrates the points made above in relation to the GSP is Article 15 of the WTO Antidumping Agreement (ADA) which directs that, ‘special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.’ Again, we may posit that this direction is incompletely theorised; there is agreement on the mid-level principle that special regard should be had to developing country Members but not on the low level principle of what such regard actually requires or indeed, on the more abstract reasons for the grant of such treatment. Article 15 ADA has been reviewed by a WTO dispute settlement panel in *US — Steel Plate* which held that the provision did not impose a ‘specific or general obligation on Members to undertake any particular action.’⁹² As such, ‘Members cannot be expected to comply with an obligation whose parameters are entirely undefined.’⁹³ Under the first sentence of this Article, to the extent that ‘special regard’ should be given to developing countries, such regard need only be had in relation to the ‘final decision whether to apply a final measure, and not intermediate decisions concerning such matters as investigative procedures and choices of methodology during the course of the investigation.’⁹⁴

The second sentence of Article 15 ADA states that, ‘[p]ossibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties

⁸⁸ *Id.*, para. 111.

⁸⁹ *Id.*, para. 157.

⁹⁰ See Switzer, *supra* note 83, 225

⁹¹ See discussion Grossman and Sykes, *supra* note 84.

⁹² WTO, *United States: Anti-Dumping and Countervailing Measures on Steel Plate from India*, Panel Report, WT/DS206/R, , 28 June 2002, at para 7.110.

⁹³ *Id.*

⁹⁴ WTO, *United States: Anti-Dumping and Countervailing Measures on Steel Plate from India*, Panel Report, WT/DS206/R, 28 June 2002, at para 7.111.

where they would affect the essential interests of developing country Members.’ With regards to the operation of this second sentence, the Panel in *EC-Bed Linen* has held that;

In our view, while the exact parameters of the term are difficult to establish, the concept of ‘explore’ clearly does not imply any particular outcome. We recall that Article 15 does not require that ‘constructive remedies’ must be explored, but rather that the ‘possibilities’ of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the ‘exploration’ of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.⁹⁵

The obligation set out in the second sentence of Article 15 is that Members should ‘consider’ the possibility of constructive remedies where the imposition of anti-dumping remedies would affect the essential interests of a developing country Member. Beyond such consideration, there is no obligation to, for example, grant a particular remedy or reach a particular outcome. As such, it is incompletely theorised in terms of the outcome it calls for but also in terms of the principles which inform the obligation. The fact Article 15 ADA does not impose upon Members any hard obligations beyond ‘consideration’ of the possibility of ‘constructive remedies’ should not have come as any great surprise. This is because the provision in question is identical to Article 13 of the GATT Tokyo Round Code on Antidumping, in relation to which developing countries had expressed concerns prior to the formal commencement of the Uruguay Round of multilateral trade negotiations that the normative obligation therein was not being adhered to.⁹⁶

The relative ineffectiveness of Article 13 of the Tokyo Code was underlined by a subsequent GATT Panel in *Brazil – Cotton yarns*⁹⁷ which considered any obligation therein to be something of a ‘dead letter.’⁹⁸ While the Panel in *EC-Bed Linen* undoubtedly departed from

⁹⁵ WTO, *European Communities: Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* – Panel Report, WT/DS141/R, 30 October 2000, para 6.233.

⁹⁶ See for example statement of the representative of India in GATT ‘Report of the Sub-Committee on Protective Measures’ (20 October 1983) COM.TD/SCPM/6, para 16 and GATT, ‘Draft Proceedings of the Fifty-Seventh Session – Note Prepared by the Secretariat’ (25 October 1985) GATT Doc. Spec(85)57, p 10.

⁹⁷ GATT, *European Communities: Imposition of anti-dumping duties on imports of cotton yarns from Brazil*, GATT Panel Report, GATT Doc. ADP/137, adopted 30 October 1995, para 595.

⁹⁸ Edwin Vermulst, *The WTO Anti-Dumping Agreement: A Commentary* (, Oxford, Oxford University Press: 2005) at 215 – 216.

the view of the GATT Panel in *Brazil – Cotton yarns* in terms of operationalising the duty to consider the possibility of constructive remedies, it could not read into the text of the Article an obligation that is simply not there; that is, an obligation to accept or impose a particular remedy. Again, in relation to such provisions, it is apparent that it is for the Member imposing anti-dumping duties to decide what is meant by the term ‘constructive remedies’ in respect of providing a response to developing country needs. Under such a narrative, the identification of developing country needs becomes a construct of the developed country donor and not the recipient of such ‘special’ treatment.

Article 15 ADA was flagged for review under the Doha Round.⁹⁹ The specific review mandate directed that ‘while Article 15 of the Agreement on the Interpretation of Article VI of the General Agreement on Tariffs and Trade is a mandatory provision, the modalities for its application would benefit from clarification.’¹⁰⁰ Accordingly, the Committee on Anti-Dumping Practices (ADP) was instructed, through its working group on Implementation, to ‘examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision.’¹⁰¹ Pursuant to this, the ‘Friends of Anti-dumping’ group proposed that a procedural element be added to give better effect to the development provisions of Article 15¹⁰² while the African Group put forward a more detailed proposal which set out a more comprehensive procedure as well as a seemingly exhaustive list of ‘constructive remedies’ developed countries should consider before applying anti-dumping duties.¹⁰³ Of the three Implementation Issues the Committee on Anti-Dumping Practices was tasked to discuss, Article 15 has undoubtedly been the most difficult with the ADP Chairman reporting the existence of ‘substantially divergent views’ on the issue as well as a lack of ‘any significant basis for consensus.’¹⁰⁴

As we know, while there was agreement under Article 15 ADA that ‘special regard’ should be had to the situation of developing countries, the component of the provision which relates to ‘how’ such needs should be taken into account was left incompletely theorised. Leaving this aspect of the ADA incompletely theorised has not provided the stability

⁹⁹ Paragraph 7.2 of the Doha Ministerial Decision of 14 November 2001 on Implementation-Related Issues and Concerns states that the Ministerial Conference.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² WTO, Negotiating Group on Rules ‘Fourth Contribution to the Discussion of the Negotiating Group on Rules on Anti-Dumping Measures - Paper by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Korea; Japan; Mexico; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey’ (24 January 2003) TN/RL/W/46.

¹⁰³ WTO, Negotiating Group on Rules ‘Special and Differential Treatment and Technical Assistance in Trade Remedies - Submission by the ACP and African Groups’, (25 February 2008) TN/RL/GEN/154.

¹⁰⁴ WTO, Committee on Anti-Dumping Practices ‘Chairman’s Report on the Committee’s Views and Recommendations Pursuant to the Mandate to the Committee and its Working Group on Implementation in the Decision on Implementation in the Decision on Implementation-Related Issues and Concerns Adopted on 14 November 2001 at the Doha Ministerial Conference’ (18 December 2002) G/ADP/1.

associated with such agreements. This is because underlying the lack of agreement on how to operationalise the provision was the existence of significant inequality whereby developed countries were able to articulate *unilaterally* a 'suitable response' to the concept of developing country needs.

The trend identified above may also be seen in respect of other provisions of the WTO covered agreements which direct that technical assistance be granted to developing and least-developed countries. An example can be found in TRIPS Article 67 pursuant to which developed countries were tasked to provide on request and on mutually agreed terms technical and financial assistance to developing and least developed countries to meet their implementation needs. The vagueness of the direction under Article 67 has resulted in the provision of assistance which at times did more to favour the interests of the developed country grantor than the specific needs of the developing country at issue.¹⁰⁵ The relatively voluntary nature of technical assistance, despite frequent use of the verb 'shall' in regard to the direction to provide such assistance, became a particular bone of contention by developing country beneficiaries. The lack of a binding and justiciable commitment on the part of developed countries to provide technical assistance to their developing counterparts was particularly troubling given the high cost of implementing certain of the WTO agreements such as the TRIPS agreement.¹⁰⁶ Thus, as is oft quoted, '[d]eveloping countries accepted bound commitments to implement [and] received unbound promises of assistance to do so.'¹⁰⁷

What is perhaps most interesting about certain of the provisions for technical assistance is their negotiating heritage. The Secretariat note cited earlier in this article contended that the special and differential treatment provisions of the WTO covered agreements are 'tailored' in accordance with the needs under each of the Agreements.¹⁰⁸ The cogency of this contention is somewhat reduced when one considers the phrasing of such treatment in comparison with that found under earlier GATT Tokyo Round codes. We can see this in the WTO Technical Barriers to Trade Agreement (TBT) which drew on earlier experiences with technical barriers to trade in the Tokyo Round Standards Code. The earlier Standards Code contains essentially identical provisions on technical assistance and special and differential treatment to those found in the Uruguay Round Agreement on Technical Barriers to

¹⁰⁵ See generally Duncan Matthews and Viviana Munoz-Tellez, 'Bilateral Technical Assistance and TRIPS: The United States, Japan and the European Communities in Comparative Perspective', *Journal of Intellectual Property*, 2006, 9 (6): 629 – 653.

¹⁰⁶ J. Michael Finger, 'The Uruguay Round North-South bargain: Will the WTO get over it?' in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge University Press, Cambridge: 2002) at p. 301 with regard to the high costs of implementing the Uruguay Round agreements.

¹⁰⁷ J. Michael Finger, 'Implementing the Uruguay Round Agreements: Problems for Developing Countries', *The World Economy*, 2001, 24 (9): 1097 - 1108, at 1102 footnote omitted.

¹⁰⁸ WTO, CTD 'Regulatory Obligations and Other Implications of the Uruguay Round Agreements' (13 June 1995) WT/COMTD/W/6, 4.

Trade.¹⁰⁹ The similarity between the provisions for special and differential treatment in the Tokyo Round Code and Uruguay Round Agreement is such that even the same numbering is used with Article 11 in both documents making provision for the grant of technical assistance while Article 12 sets out the availability of special and differential treatment for developing countries. The difference, of course, between the Tokyo Round Codes and the Uruguay Round Agreements is that while the former were voluntary plurilateral agreements, the latter were multilateral and mandatory for all Members.

The problem with the Uruguay Round TBT Agreement utilising essentially the same provisions of assistance to those found under the Tokyo Round Code is that prior to the formation of the WTO TBT Agreement, concerns were raised that the provisions of the GATT Standards Code may not be appropriate in meeting developing country needs. According to one commentator, 'Article 12 ... although no doubt drafted with a view to the special problems of developing countries, may in practice result in exacerbating these problems.'¹¹⁰ The reason given for this pronouncement was that, '[m]ost of the provisions of this Article are of a hortatory nature ...'¹¹¹ Accordingly, in a 1985 Special Meeting of the Committee on Technical Barriers to Trade held to review the effectiveness of the Code as well as any obstacles to acceptance developing countries may have faced, it was acknowledged that developing countries had experienced particular administrative difficulties in the implementation process.¹¹² It was similarly recognised that, 'Parties considered that any action to make the implementation of the provisions of the Agreement on technical assistance more effective would also be of value in improving decision-making processes and in facilitating the establishment of efficient information exchange systems in developing countries.'¹¹³ While several countries received technical assistance to help in their implementation of Code and expressed their gratitude for this help, others were more circumspect in their praise and called for 'special efforts' to be made to improve the operation of its provisions.¹¹⁴

Given that the Tokyo Round Standards Code was signed by less than forty countries, the overwhelming majority of which were industrialised, the logic of transplanting its provisions of assistance into the Uruguay Round Agreement, particularly given the more extensive coverage of the latter Agreement is somewhat questionable. The question therefore has to be raised as to why the provisions of special and differential treatment in the Uruguay Round TBT Agreement were constructed in this way. In part, the answer appears to be that while it was recognised in certain quarters that developing countries may have struggled in

¹⁰⁹ Articles 11 and 12 in both Agreements.

¹¹⁰ R. W. Middleton, 'The GATT Standards Code', *Journal of World Trade Law*, 1980, 14 (3): 201 - 219, at 215.

¹¹¹ *Id.*

¹¹² GATT, 'MTN Agreements and Arrangements: Special and Differential Treatment for Developing Countries – Note by Secretariat' (4 May 1987) MTN.GNG/NG8/W/2, 9.

¹¹³ *Id.*, at 10.

¹¹⁴ *Id.*

meeting their obligations under the Tokyo Round Code, negotiators in the Uruguay Round had only a limited knowledge of developing country expertise and experience in this and other ‘new’ areas.¹¹⁵ Furthermore, the formulation of these provisions was undoubtedly underpinned by the narrative that ‘one size fits all,’ a narrative which to a large extent was a ‘central pillar of the Uruguay Round.’¹¹⁶ To this end, the focus of negotiations was to identify specific rules which could be implemented across the board, as opposed to finding an accommodation which suited individual country needs.¹¹⁷ It is hence apparent that the provision of technical assistance was mandated¹¹⁸ to assist countries to meet their implementation commitments, thereby underlining the progressive linearity inherent in the Uruguay Round agreements.

Expanding on the above, by agreeing to the construction of SDT under the GATT as a set of exceptions to the normal rules of the trade regime, developed countries were able to construct the trade regime according to their own vision. This, in the words of Lamp, ‘allowed them to preserve their preferred design of the trade regime... while keeping developing countries within the system.’¹¹⁹ Hence, developing country demands under the GATT for a different kind of trade regime were conceptualised as outside what has been termed the ‘normal’ trade regime. This therefore set the scene for the eradication of such difference under the Uruguay Round with the SDT provisions therein designed to assist in implementation the WTO agreements rather than offer an alternative vision for the multilateral trade regime.

What the differential treatment provisions of the GSP, Article 67 of the TRIPS Agreement, Articles 11 and 12 of the TBT and, Article 15 ADA have in common is their construction as incompletely theorised agreements. Like many of other SDT provisions, they illustrate agreement on mid/low level principles such as that developing countries should be provided with technical assistance, that their needs should be taken into account in certain situations or that they should be granted additional time to implement their obligations. However, the ‘theory’ which accounts for these principles is incompletely theorised as, in many respects, is the outcome these principles call for. Accordingly, it may be stated that agreement exists in respect of the principle that Members ‘shall’ facilitate, for example, the trade opportunities of developing countries but the theory which accounts for such treatment is under-theorised and there is little direction given as to ‘how’ this principle may be

¹¹⁵ Thomas W. Hertel, Bernard Hoekman and Will Martin, ‘Developing Countries and a New Round of WTO Negotiations’, *The World Bank Research Observer*, 2002, 17 (1): 113 - 140, at 129.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ This was the case even in respect of technical cooperation efforts provided by WTO bodies; see WTO, CTD ‘Guidelines for WTO Technical Cooperation’ (8 October 1996) WT/COMTD/8, 1, to the effect that such assistance should ‘assist in the implementation of commitments in the multilateral trading system and full use of its provisions, including the effective use of the dispute settlement mechanism.’

¹¹⁹ Lamp, *supra* note 12, at 743.

operationalised. Indeed, as we have seen, many of the provisions under this categorization allow for bias and self-interest; that is, a unilateral articulation to be advanced of how such provisions should be operationalised. We drew attention to provision of technical assistance which at times did more to favour the interests of the developed country grantor than the specific needs of the developing country at issue.¹²⁰ The self-interest associated with such incomplete theorisation did little to promote stability but instead led to normatively troubling accusations of bias and inconsistency in how developing and least-developed country needs were addressed¹²¹ and also prompted a review of SDT under paragraph 44 of the Doha Round mandate.

As articulated by Sunstein, ‘fuller theorisation’ of an issue may be of benefit so as to promote a ‘wider and deeper inquiry into the grounds for judgment’ so as to prevent ‘inconsistency, bias, or self interest.’¹²² In the next and penultimate section of this article, we look to the future of SDT and ask whether such fuller theorisation of its provisions is possible before positing that SDT is currently in a transitional or liminal state.

SECTION 4 - LIMINAL SPACES: SDT GOING FORWARD

In the above section, we drew attention to the incompletely theorised nature of SDT. We also elucidated upon the ramifications of this, detailing how the provisions became tainted with self-interest, bias and inconsistency. The normatively troubling aspects of the legal construction of SDT in this way were alluded to, as were some of the efforts under the Doha Round to more fully theorise SDT. In this penultimate section, we seek to draw upon the lessons learned in the above section to ponder the question, what next for SDT? Is more complete theorisation possible such as to reduce or even eradicate the more normatively troubling aspects of SDT?

The above question(s) is particularly pertinent given the continuing prominence of SDT for the trade regime. This continuing prominence manifests in a number of ways; the review process of SDT initiated in 2001 has not as yet concluded¹²³ and SDT still forms an ‘integral’ element of the bread and butter of the multilateral trade regime, that is, ‘traditional’ market access negotiations. Beyond this, SDT is also to the fore in current negotiations on fisheries subsidies which aim to, ‘prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and

¹²⁰ See generally Matthews and Munoz-Tellez, *supra* note 105.

¹²¹ For an example of such a critique, see Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford: OUP, 2011)

¹²² Sunstein, *supra* note 23, at 44.

¹²³ South Centre, ‘The WTO’s Special and Differential Treatment Negotiations (Paragraph 44)’, 2017, SC/AN/TDP/2017/3

refrain from introducing new such subsidies.¹²⁴ These negotiations recognize that, ‘appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations.’¹²⁵

More pertinently, SDT is very much to the fore in the WTO Trade Facilitation Agreement (TFA) which entered into force in February 2017. The TFA is the first new multilateral trade agreement to be agreed this century. It aims to reduce barriers to the movement of goods across borders by, among other things, reducing bureaucracy.¹²⁶ The economic benefits of the TFA are such that it is estimated to expand trade by \$1 trillion.¹²⁷ Perhaps of greater significance, at least for our purpose, is the approach taken to SDT under the TFA. In this respect, under the TFA, developing and least developed countries are able to tie implementation of its provisions to the receipt of technical assistance and capacity building.¹²⁸ From a WTO perspective, this is a unique feature of the agreement and demonstrates more complete theorisation of SDT at a number of levels.¹²⁹ There is agreement not only that SDT should be a fundamental component of the Agreement but the low level principles or in effect, the operationalisation of SDT is more completely theorised through, among other things, needs based assessments, thereby representing ‘a new type of fine-tuned’¹³⁰ differentiation.

Some commentators have opined that the TFA could offer something of a model for future negotiations on SDT.¹³¹ The SDT provisions under it certainly have evolved from merely ‘perfunctorily addressing the genuine concerns of developing country members to recognising the need to provide structured and mandated support...’¹³² Perhaps, however, of greater significance is the overturning of the notion of ‘special’ treatment under the TFA. To expand, and drawing on the work of Nicolas Lamp, developing countries have participated in the trade regime since its inception and now represent the majority of

¹²⁴ SDG 14.6, *supra* note 6.

¹²⁵ WTO, Hong Kong Declaration, Annex D, para 9.

¹²⁶ 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.

¹²⁷ https://www.wto.org/english/thewto_e/acc_e/TJKDDGSHARKTICTFASTATEMENT.pdf accessed 14 July 2017, p 2.

¹²⁸ Switzer, *supra* note 1.

¹²⁹ For commentary on such arrangements outside of the WTO, see generally Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford: OUP, 2006), at 115 – 118.

¹³⁰ Joost Pauwelyn, ‘The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes’, *Review of European Comparative and International Environmental Law*, 2013, 22 (1): 29 - 41, at 30.

¹³¹ See Lamp, *supra* note 12. See also discussion in Switzer, *supra* note 1.

¹³² Antonia Eliason, ‘The Trade Facilitation Agreement: A New Hope for the World Trade Organization’, *World Trade Review*, 2015, 14 (4): 643 - 670, at 659.

members.¹³³ Why then, is accommodating the needs of developing not conceptualised as ‘the ‘normal’ approach, the default option, in multilateral trade lawmaking?’¹³⁴

If the TFA can be said to offer a new paradigm for trade law making, it is in the move towards developing country and LDC concerns being treated as part of the normal routine of multilateral trade negotiations rather than through the lens of exceptions and opt outs from the ‘normal’ trade regime defined by developed country interests.¹³⁵ It also allows us to move beyond the Uruguay Round conceptualisation of SDT as concerned with the adjustment of developing countries to the developed world’s vision of ‘normalcy.’¹³⁶ The problem with the lens of abnormal/normal is its tendency to, ‘deprive the regime of insights into alternative possibilities for international economic co-operation.’¹³⁷

In this regard, what the seismic shift to SDT apparent under the TFA evokes is the idea that particular understandings of trade law are not self-evident but instead are constructed over time.¹³⁸ Dismantling such constructions may allow us to ‘reimagine’ the trade law project.¹³⁹ Indeed, in the words of Neufeld, ‘(i)t will be difficult, for instance, to define S&D treatment in future WTO Agreements without at least considering the TF model. The inclusive, de-centralized way of conducting the talks is also likely to set new standards in the trade negotiating business.’¹⁴⁰ What remains to be seen, however, are the mechanics of such normalisation. Whether the complexity involved in the TFA under which developing and least developed countries have highly individualised commitments can be replicated across other disciplines is, for example, questionable.¹⁴¹

¹³³ Lamp, *supra* note 12, at 769.

¹³⁴ *Id.*

¹³⁵ See generally, *id.* See also discussion generally Amrita Narlikar and Shishir Priyadarshi, ‘Empowering the poor? The successes and limitations of the Bali Package for the LDCs’, *Third World Quarterly*, 2014, 35 (6): 1051 - 1065, at 1056 – 1057.

¹³⁶ See Tarullo, *supra* note 69 and Andrew T. F. Lang, ‘Beyond Formal Obligation: The Trade Regime and the Making of Political Priorities’, *Leiden Journal of International Law*, 2005, 18 (3): 403 – 424, See also Lamp, *supra* note 12.

¹³⁷ Lang, *id.*, at 422.

¹³⁸ *Id.*, at 543.

¹³⁹ *Id.*, at 543.

¹⁴⁰ Nora Neufeld, ‘The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement’, WTO Staff Working Paper ERSD-2014-06, 7 April 2014, at 12.

¹⁴¹ For an interesting discussion on this, see Ben Czapnik, ‘The Unique Features of the Trade Facilitation Agreement: A Revolutionary Approach to Multilateral Negotiations or the Exception Which Proves the Rule?’, *Journal of International Economic Law*, 2015, 18 (4): 773 - 791, noting at 793, that ‘It may be tempting to assume that the TFA’s unique mechanisms could also be applied to unblock other stalled negotiating areas. However, the TFA’s innovations need to be considered on a case-by-case basis to determine the specific negotiating contexts where they could be used effectively to help reach a deal.’

Therefore, in answering the question of ‘where or what next’ for SDT, a tension may be identified. The negotiations on the TFA, for example, point to a more inclusive manner of conducting trade negotiations whereby developing country needs, as encapsulated in SDT, were very much to the fore in the final text of the Agreement. SDT is more completely theorised under the text of the TFA but whether this approach will be replicated in future areas of trade law making is uncertain. What is clear, however, is that the under/incompletely theorised approach to the traditional form of SDT examined above was a choice. The TFA hence demonstrates that it is possible to make another choice; to reimagine the trade regime¹⁴² so that developing country needs are more completely theorised and in the words of Lamp, are considered as a ‘normal’ part of negotiations.¹⁴³

I therefore posit that SDT is currently in a liminal space with use of the term liminal intended to describe a state of transition. While it is clear that the TFA provisions on SDT are more completely theorised than those which pertain to what I have referred to as traditional SDT, questions marks remain over the higher order principles which inform the grant of special and differential treatment on a general level. These question marks are of considerable consequence as the political economy of the trade regime is likely to see seismic shifts in the coming years stemming from, among other things, the uncertainty surrounding the U.S. administration’s trade policy. Some, for example, have questioned whether the U.S. withdrawal from the Paris Agreement on climate change marks a ‘first salvo against the Special and Differential Treatment?’¹⁴⁴ Accordingly, while SDT will remain an integral part of the trade regime for many years to come, its liminality is very much in evidence.

CONCLUSIONS

My analysis suggests that the traditional form of SDT under the multilateral trade regime can be conceptualised through the lens provided by Sunstein’s construct of the incompletely theorised agreement. In this regard, we reviewed a range of SDT provisions and found that that they were constructed as an incompletely theorised agreement; that is, there was agreement on principles such as non-reciprocity or preferential tariff treatment but what these principles entail in individual cases or the theory which informs such treatment was left incompletely theorised. The benefit of the incompletely theorised agreement set at this

¹⁴² Lang, *supra* note 13, at 543.

¹⁴³ Lamp, *supra* note 12, at 769.

¹⁴⁴ Marc Benitah, ‘Is the US Withdrawal from the Paris Agreement a First Salvo against the Special and Differential Treatment?’, 7 June 2017, <http://worldtradelaw.typepad.com/ielpblog/2017/06/is-the-us-withdrawal-of-the-paris-climate-agreement-a-first-salvo-against-the-special-and-differenti.html>, accessed 8 September 2017.

level is that it allowed special and differential treatment to be granted while avoiding contestation on the related questions of ‘why’ and ‘how.’ In the abstract, this should have provided the system with much needed stability but, as we have seen, such stability may be lost if the incomplete theorisation serves to hide the existence of certain abstractions such as inequality or injustice, resulting in an erosion of the stability underlying the agreement. This was indeed the case as we demonstrated in our review of a range of SDT provisions which permitted a unilateral construction of developing country needs to be put forward by developed country donors. We further identified transition periods as a type of incompletely theorised agreement. What was incompletely theorised was the higher order principles of why such treatment should be granted in the first place with, as acknowledged by the Secretariat, SDT failing to operate as a general principle. This lack of incomplete theorisation led to a failure to enquire as to the suitability of such measures to address developing country needs.

The conceptual frame provided by the incompletely theorised agreement also allowed us to interrogate the failings of SDT and how the incompletely theorised construction of these provisions led to accusations of bias, inconsistency and self-interest. In this regard, we are reminded by Sunstein that the benefits of an incompletely theorised agreement will at times be limited. As such, ‘fuller theorisation’ of an issue may be of benefit so as to promote a ‘wider and deeper inquiry into the grounds for judgment’ so as to prevent ‘inconsistency, bias, or self interest.’

It is clear that fuller theorisation of SDT is required in order to address its deficiencies. As we discussed above, a review process of SDT was initiated under the Doha Round though its results are still pending.¹⁴⁵ In contrast to this rather stalled negotiating mandate, we examined the provisions of the new Trade Facilitation Agreement, elucidating upon how SDT forms a central component of the Agreement’s provisions. We evaluated how the type of SDT offered under the TFA is more completely theorised and, as such, has the potential to act as a new paradigm for multilateral trade law making whereby developing and least-developed country needs are more completely theorised and, in the words of Lamp, become a normal part of negotiations.¹⁴⁶ The extent that this potential new paradigm is adopted depends largely on the political will of the WTO membership. It was therefore stated that SDT resides within a liminal state with the term liminal intended to evoke the idea of transition.

While the end point of SDT’s liminality is not yet known, we can make two points at this juncture; the *first* relates to the idea(l) set by the TFA whereby SDT *can* be subject to more complete theorisation such as to avoid the risk of bias, self-interest and inconsistency. The fact that the SDT provisions examined above were left incompletely theorised was a political

¹⁴⁵ Doha Declaration, para. 44

¹⁴⁶ Lamp, *supra* note 12, at 769.

choice rather than an inevitability. This idea(l) represented by the TFA points to a realm of possibility whereby SDT is not merely *ad hoc* or ‘tokensequē’,¹⁴⁷ but rather is more completely theorised so as to address the needs of developing and least-developed countries as part of the ‘normal’ course of multilateral trade law making.¹⁴⁸

The *second* point relates to the liminality of SDT; it is likely helpful to think of GATT differential and more favourable treatment as a type of first generation SDT and the Uruguay Round agreements provisions on differential treatment as a second generation SDT.¹⁴⁹ It may therefore be the case that we are entering a third generation of SDT, represented by the collaborative and inclusive efforts to trade law making apparent in the construction of the TFA. If we really are embarking upon a third generation of SDT – and this very much depends upon political will – then there is a pressing need to sketch the contours of this new generation of differential treatment. In pursuing this research agenda, we need to garner a range of conceptual tools to allow for a robust critique of future SDT proposals so as to channel debate on the development of this area of trade law and practice. This article begins this quest for new conceptual tools by analysing Sunstein’s incompletely theorised agreement which, as we have seen, provides a powerful critical framework for analysing such provisions in the future.

¹⁴⁷ Whalley, *supra* note 5, at 26.

¹⁴⁸ Lamp, *supra* note 12.

¹⁴⁹ Whalley, *supra* note 5.