Introduction

The Marrakesh Agreement establishing the World Trade Organization (WTO) recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share of growth in international trade commensurate with the needs of their economic development." While some 75 percent of WTO members currently are developing countries, the promises of welfare gains from trade liberalization have not materialized for many of them or have been much more modest than anticipated in the 1990s. More recently, the failure of the last several WTO ministerial meetings and the limited progress made in the ongoing Doha Development Round have brought into the limelight the complexity of the relationship between trade liberalization and development in the multilateral system.

To date, there has been no integrated or systematic legal framework to accommodate developing countries' needs in the WTO legal regime. Instead, exceptions to the general rules and disciplines provide some measure of flexibility for developing countries (dubbed "special and differential treatment," SDT). This piecemeal and *ad hoc* approach is now clearly showing its limits. Multilateral negotiations over the past decade have been unsuccessful, with the WTO increasingly becoming associated with public protest rather than with the fruitful steerage of international trade. The regime established by the Uruguay Round is still very much unfinished business. Moreover, developing members have now gained a blocking power, in political terms, at the WTO. Yet members still shy away from the broader issue of the relationship between development and trade liberalization, preferring technical fixes instead. Today, a reconsideration of the legal implications of development issues within the organization is all the more pressing to ensure the continuity of the multilateral trading regime.

The objective of this book is to analyze the nature and content of developing countries' rights at the WTO and to consider whether such rights could evolve from their current status as exceptions to a more coherent system of rules fully integrated in the WTO legal regime that would more effectively address developing countries' demands. Normatively, it argues that a conceptual framework for the trade and development relationship at the WTO needs to emerge if the multilateral regime is to stay relevant for its constituents.

The Current Practice: What Informs the Development Dimension at the WTO?

Until now, development at the WTO has reflected the traditional focus of the General Agreement on Tariffs and Trade (GATT) on macroeconomic growth. WTO

regulation has shifted away from quantitative macroeconomic benchmarks (tariff reductions, etc) and towards qualitative regulation (sanitary and phytosanitary measures, technical standards of all sorts, intellectual property protection, etc), but development considerations have lagged behind and remain hinged on traditional macroeconomic policy factors such as tariffs, preferences, and balance of payments. Why has the diversification of the WTO's regulatory objectives not translated into a corresponding consideration of their development impact?

In some areas, developing members themselves have been resistant. The rejection of any substantive negotiation on labor standards and environmental issues are two examples. Both have bearings first and foremost on the human aspects of development (as well as its economic aspects). As the Brundtland Commission Report aptly put it twenty years ago: "Poverty reduces people's capacity to use resources in a sustainable manner; it intensifies pressure on the environment." Viewed in the extreme, environmental plunder provides subsistence today and impoverishment tomorrow.[1] In many instances, the development debate at the WTO has consisted mostly in an effort by developing countries to maintain the possibility of protecting their domestic markets against unfettered liberalization. Beyond the protectionism versus openness debate, the issue goes to development policies and to what has been called "policy space" to describe the range of domestic economic and industrial policies, in particular, that would be compatible with WTO disciplines. The more such disciplines restrict policy choices, the less "policy space" a country has to shape its economic trajectory.

Should a WTO consideration of development move beyond basic macroeconomic benchmarks such as the balance of payments and incorporate an express understanding on the relationship between development and other regulatory fields? From a legal standpoint the diversification of WTO regulation suggests that if members wish to incorporate a development dimension at the core of the WTO regime, all of the organization's activities should be evaluated for their development impact. For example, a human development approach to development is incompatible with the present method for setting the negotiation agenda, which excludes important development issues such as labor standards. It is also incompatible with considering the human impact of trade disciplines as an afterthought, as exemplified by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) and public health. The current distinction between trade and non-trade issues would need to be reconsidered so that the development impact of a proposed discipline would be a criteria for deciding whether to regulate it at the WTO.

Another aspect of incorporating a development dimension at the WTO is determining the relevant geopolitical and economic scale. Is the state the appropriate unit of reference? Should it be the only one? The traditional Westphalian assumption of public international law is reflected quite strongly in the nature and form

[1] Although there is no framework agreement on environmental protection and labor standards, a number of legal instruments in the WTO already allow members to take some regulatory actions. For example, the increase of technical standards regulation at the WTO indirectly affects those areas and the recourse to broad provisions such as the GATT's Article XX has allowed some health and environmental regulation.

of WTO rules and processes. The reluctance to open the dispute settlement to submissions by non-state actors is but an illustration. In reality, though, domestic dynamics and actors shape WTO members' positions as much as interstate relations. Should infra-state units be considered? Is the supranational, regional level the best to deal with trade and development issues? A combination of all three? Should it depend on the economic sector at stake? How should we consider countries like Brazil, which have some severely underdeveloped segments of the economy and where the population serving these sectors lives in abject poverty while other sectors might be amongst the most competitive in the world?

The more WTO regulation focuses on specific segments of its members' economy and regulation, the more sovereign states' political decisions are up for multilateral bargaining, and even subject to international adjudication. For example, WTO rules on SPS standards and efforts to harmonize administrative procedures necessarily take away from members some of their autonomy to unilaterally decide what policies they wish to implement in those areas. Although the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) states that members are free to choose the level of protection they see fit, a number of high-profile cases have shown that, in combination with other WTO disciplines, that freedom is now subject to examination by other members and assessment in dispute settlement, if not outright limited in practice. This trend is described by the discourse on the loss of "policy space" as a hurdle to development policies. "Mainstreaming development" is often presented as an antidote that would empower developing members to re-capture the lost "policy space." Yet incorporating development at the WTO is also fraught with difficulties. It might mean shaping development-related rules applicable across the board to all members. How would that affect members' ability to define and implement individual policies as they see fit at the domestic level?

Based on the evolution of the nature of WTO regulation, members pushing for an incorporation of development at the core of the WTO's architecture should consider the possible trade-off in terms of loss of individual domestic autonomy in setting development policies. Similarly, if groups of developing members wish to leverage their collective power they may have to balance their priorities within the group. For instance, Brazil's shifting position from the Cairns Group to the G-20[2] in 2003 in relation to agriculture negotiations reflected its concern that Australia and Canada led the Cairns Group towards reaching a deal with the US and Europe on their demands first before getting any concession of interest to the developing members of the group in exchange.

As a theoretical matter, this study posits two radical paradigms for evaluating how development is or can be integrated in the WTO's legal architecture. These paradigms are meant purely as theoretical constructs, not as descriptive or predictive models. Nor is this book about the fairness of one model or another. An

[2] G-20 in this book refers to the coalition that formed during the GATT and WTO years amongst a number of developing countries. It is distinct from the eponymous Group of Twenty (G-20) Finance Ministers and Central Bank Governors established in 1999 as an extension of the G-8 and that focuses mostly on financial and monetary matters.

extensive literature deals with issues of fairness in international trade, ranging from Rawlsian theories to theological interpretations.[3] Rather, the two paradigms are presented as conceptual benchmarks to assist in situating the legal and institutional nature of current WTO rights and obligations for developing countries, the proposals that have been submitted in the Doha Round, and alternate proposals for reform that will be presented in the last chapter of this book.

The two paradigms represent two legal frameworks corresponding to opposing conceptions of the relationship between WTO disciplines and the constraints experienced by most developing members. They center on a normative query regarding the place that development could occupy at the WTO. Depending how the costs and benefits of trade liberalization and their impact on the development of its poorer (and poorest) members are balanced in the WTO's mandate and ethos, two different directions can be outlined. First, the primary normative focus can be on trade liberalization, and development issues are dealt with on a case-by-case basis, as they arise, with little or no overarching normative reference. This first paradigm, then, embodies an *idiosyncratic approach* to development at the WTO. In practice, it resembles more closely the currently existing framework, with no real normative embedding of development as a core component of the WTO's mandate. Second, development-oriented obligations can be seen as a core of the WTO's legal framework, with development considered as normatively on par with the traditional objective of trade liberalization. In this second paradigm, development and trade liberalization are *normative co-constituents* of the WTO legal framework.

First Paradigm: Development as an Idiosyncrasy

The first paradigm treats development as a second-order normative consideration that does not fundamentally displace the objective of trade liberalization as the primary mandate of the WTO. In this framework, the needs of developing members arising out of their economic, social, and political constraints are

[3] See eg, R. Bhala, "Theological Categories for Special and Differential Treatment" 2002 *Kansas Law Review* 50(4) 635; B.S. Chimni, "Alternative Visions of Just World Order: Six Tales from India" 2005 *Harvard International Law Journal* 46(2) 389; B.S. Chimni, "The World Trade Organization, Democracy and Development: A View from the South" 2006 *Journal of World Trade* 40(1) 5; J.L. Dunoff, "Is the World Trade Organization Fair to Developing States?" 2003 *American Society of International Law Proceedings* 97 153; G. Feuer, "Libéralisme, mondialisation et développement: à propos de quelques réalités ambiguës" 1999 *Annuaire Français du Droit International* 99 148; F.J. Garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade* (Ardsley: Transnational Publishers, 2003); J.T. Gathii, "Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made?: Re-characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis" 2001 *Widener Law Symposium Journal* 7 137; F. Ismail, "Mainstreaming Development in the World Trade Organization" 2005 *Journal of World Trade* 39(1) 11; J.E. Stiglitz and A. Charlton, *Fair Trade for All* (Oxford: Oxford University Press, 2005); J.P. Trachtman, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid' " 2003 *Journal of International Economic Law* 6(1) 3.

dealt with on a case-by-case basis rather than at a systemic level. Exceptions and carve-outs dealing with development issues, whether in general agreements or in individual members' schedules of commitments and accession protocols, are idiosyncratic—*ad hoc* solutions rather than instantiations of an overarching normative principle.

The key feature of the idiosyncratic paradigm is the absence of a principled approach to incorporating development at the WTO. Of course, that does not mean that no development issues will be included in WTO rules, but simply that there will be no systematic or coherent approach, no overarching legal obligation, or, at best, only a very loose and soft one, such as the statements in the preamble to the Marrakesh Agreement.

Absent an overarching legal obligation to take into account development factors, the scope and nature of development-related rules are mostly left to members to negotiate on a case-by-case basis when a country encounters or foresees a particular difficulty. Members could undertake such negotiations as part of the accession package of a new developing member, or in the course of multilateral rounds of negotiations as part of new individual or collective commitments.

An important advantage of this framework is that it allows a dynamic understanding of members' development needs: As their needs evolve, they can, in principle, negotiate appropriate exceptions or derogations without having to comply with the constraints of a pre-defined notion of development. The open-endedness of this framework apparently gives members the maximum flexibility from a legal perspective. In this model, the incorporation of development-oriented provisions in WTO rules remains primarily a political bargaining exercise. Because developing members are not constrained by a common legal framework, those that do not wish to avail themselves of development provisions would not have to pay the political price currently associated with SDT, in terms of negotiations and credibility of their concessions.

In theory, the absence of a pervasive or overarching legal framework for development at the WTO means that there is no principle limiting the adoption of rules that favor developing countries, in addition to specific *ad hoc* provisions. If, for instance, newly powerful middle-income developing countries have the political clout to impose a general discipline that caters primarily to their interests, there would be no legal impediment to such a "mainstreaming" of development.

The idiosyncratic model gives more weight to the procedural framework for considering and addressing the development constraints of WTO members. Because of the absence of overarching norms regarding development, there is no guarantee that any substantive regulatory result will ensue for developing members. In that sense, the idiosyncratic model is more of a procedural model: It may determine how and when development-oriented rules can be produced and implemented. While apparently neutral because it does not favor particular development objectives or rules over others, the idiosyncratic paradigm might still assume some sort of normative consensus on the nature of the trade and development relationship. Absent such an assumption, the *ad hoc* treatment of development issues is purely

arbitrary and is governed by power plays, rather than anything recognizable as the rule of law.

Second Paradigm: Development as a Normative Co-constituent

In this paradigm, development constraints are balanced against the trade liberalization objective of the WTO. Unlike the more pragmatic underpinning of the idiosyncratic model, this paradigm has an explicit normative underpinning. As a result, the need for derogations, safeguards, and escape clauses should be reduced because the mainstream rules are designed to account for development concerns. The issue then is how the WTO legal architecture would be redrawn if development were to be on par with trade liberalization.

The normative co-constituent model accounts for the development needs of the WTO membership because rules are tailored to members' different objectives as a matter of principle, rather than as a matter of derogations, as is the case with the *ad hoc* model. In this model, mechanisms can allow members to continue participating in the system while not undertaking commitments that are too burdensome or exacting to them, and conversely, it provides members wishing a higher level of commitments to undertake such deepened liberalization. Such a variable geometry of obligations and commitments may take various forms:

- allowing each member to opt in or out of each agreement, or
- integrating all members in all agreements but differentiating each member's obligations under the agreements.

The first option conjures up ghosts of the Tokyo Round where the lack of a single undertaking resulted in a patchwork of agreements with varying (and generally low) membership. Additionally, non-reciprocity in the Tokyo Round resulted in developing members not being able to obtain valuable concessions. A revised opt-out approach, however, may provide a more successful outcome in terms of meaningful participation by a large number of members.

The second option evokes the controversial formulation of the Appellate Body (AB) in the *EC–Tariff Preferences* case[4] on "differentiation," where developing countries took exception to what they perceived as an attempt by the AB to do away with the unifying legal category of "developing members." However, there is a major conceptual difference between differentiation in the *EC–Tariff Preferences* case, and differentiation in the normative co-constituent paradigm. In the context of the *EC–Tariff Preferences* case differentiation does away with the unifying category of

[4] AB Report, *EC–Tariff Preferences*. The AB found that it could be permissible, under the Enabling Clause, for the EU, as a preference grantor, to differentiate between developing members based on their trade, financial, and development needs. India had complained that it did not have access to certain preference programs that had been granted to other developing countries, and argued that the different treatment was in violation of the non-discrimination requirement of the Enabling Clause.

"developing countries," which would erode their ability to exercise collective political leverage through that common identification. By contrast, in the normative co-constituent paradigm, the basic proposition is that development becomes a core normative pillar of the WTO supported by a legal mandate for addressing development considerations throughout the organization's activities in exchange for developing countries accepting a general differentiation of their commitments.

The normative co-constituent paradigm fundamentally displaces the mercantilist ethos of the WTO where liberalization results from the exchange of equally valuable concessions in absolute terms. But perhaps, the GATT and WTO's mercantilist strategy is not the only way to bring about trade liberalization, and other mechanisms might be more adequate to current challenges. For instance, valuing concessions relative to each member's trade capacity would enable the measuring of trade liberalization commitments in a way that would not marginalize or disenfranchise developing members.

Dispute settlement operates at several levels to support and enforce a development dimension at the WTO in the normative co-constituent paradigm. First, the dispute settlement system expounds the normative mandate and uses it as a guide informing the interpretation of each provision of the covered agreements. Second, it plays a part in the enforcement of specific provisions and members' rights and obligations.

General differentiation relies perhaps even more heavily on the overarching codification of development as a norm of the first order than the opt-out system. As discussed above, general differentiation entails a credible *quid pro quo* between giving up the "developing country" designation (and blanket access to SDT) and gaining a real opportunity for development to be considered as a core part of the WTO mandate. The dispute settlement system would have a heavy burden in ensuring that the *quid pro quo* is upheld and that the differentiated obligations are truly cognizant of members' needs and vulnerabilities.

General differentiation also entails a radical change in the understanding of what constitutes reciprocity and non-discrimination. So far, with the exception of SDT, WTO members are treated as formally equal and hence subject to formally equal obligations. Formal equality and formal reciprocity reflect the Talion-like underpinnings of public international law (an eye for an eye). Although proportionality in countermeasures was perceived as a major progress in international relations, notably in the area of the use of force, it may be that the international community should now consider how the legal culture of formal equality may itself be a source of inequity. Should the WTO system become one where the unequal situation of members is recognized through formally unequal obligations, it could become a challenge to the traditional underpinnings of public international law and an inspiration for the development of legal philosophy.

Methodology and Organization of the Book

The pragmatic and empirical concerns that infuse the present work are constrained by the difficulty of accessing non-public sources within the WTO. This research

relies mostly on public documents and publicly documented practices. Yet, some WTO specialists have argued that the practice often bears little resemblance to the mandated procedures and that the public face of the organization (including its legal work-product) widely differs from its actual operation. Nonetheless, an analysis based on publicly available information is warranted for a number of reasons.

First and foremost, political science has long demonstrated that formal rules and procedures affect actors' behavior even when they do not abide by the rules. Linguistics philosophy also has demonstrated the operational power of language and discourse. Here, language encompasses legal rules, WTO members' declarations and proposals tabled during negotiations, WTO Secretariat statements, and other statements by members' spokespersons. Even when practice circumvents or ignores the rules, it is still shaped in relation to the rules and to the public discourse. Second, if the legal rules and procedures are not followed, it is important to understand why. The present study devotes considerable attention to understanding how and why particular rules came about, what they strive to achieve, whether they are successful in that endeavor, and if not, what is being done in response. Virtually all the information needed to conduct this analysis may be found in publicly available sources, directly or by deduction. Third, doctrinal analysis, which constitutes an important contribution of this book, relies on treaties and case law, which are publicly available. Fourth, WTO members' efforts to change the rules prospectively (much of the work undertaken in the current Round of negotiations) serve to document what some problems with the current rules may be. In other words, proposals for amendment of the rules offer clues as to how the rules are actually being used or ignored. Fifth, even if practice eventually disproves some of the present analysis, the latter will have shed some light on the possible effects of the law and, as such, may offer some alternative ways of thinking to WTO insiders. There is value in an external analysis that is relatively immune from the perspective of those concerned with immediate decision-making. Indeed, a number of WTO delegates interviewed for this research have expressed an avid interest in the findings of academic research. Last, a certain amount of non-public information does filter outside of the organization and has been used as a check in the present research. Direct discussions with WTO insiders as well as personal interviews conducted with a number of WTO Secretariat members and delegates from member states have been used to support this research.

As a result, the methodological problems arising from non-public and informal practices within the WTO have been mitigated to an extent sufficient to validate the balance between empirical and pragmatic concerns, and theoretical research.

This book is divided into four parts. Part I asks who decides what development means. It proposes a theoretical and historical construct of development in international law, showing how development concerns have been progressively captured by international economic law and its institutions to the detriment of general public international law. This shift is critical because it constrains the substance and type of development-oriented provisions that eventually emerged at the GATT and WTO. Part II frames development at the GATT and WTO, surveying the

emergence of development-oriented provisions in GATT and WTO law, but also considering developing countries' position within the WTO as an institution. In particular, the evolution of developing country participation in negotiations and their accession process informs this analysis. Part III focuses on the doctrinal analysis of development provisions in the WTO agreements and their interpretation in dispute settlement. It proposes a dynamic interpretation of SDT provisions that could help members implement their commitments in a way that is mindful of development policies. A comparative perspective on special and differential treatment in other trade and non-trade treaties provides context for this analysis. Similarly the adjudication of development in dispute settlement at the WTO is compared to the treatment of development arguments in other international fora. Leaving aside development-specific provisions, this Part then assesses the role for developing members of facially neutral procedural and decision-making rules that govern the WTO as an institution. Finally, Part IV offers a forward-looking perspective on the trade and development relationship at the WTO. It takes stock of the limited advances of the Doha Development Round and assesses the legal and institutional challenges for addressing development at the WTO. It ultimately proposes a menu of options for addressing the needs and concerns of developing members more effectively, with a view to improving the WTO's relevance, legitimacy, and practical ability to deliver the benefits of free trade for its members.