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The Rule(s) of Trade and the Rhetos of Development:

Reflections on the Functional and Aspirational Legitimacy of the WTO

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THE RULE(S) OF TRADE AND THE RHETOS OF DEVELOPMENT:

REFLECTIONS ON THE FUNCTIONAL AND ASPIRATIONAL LEGITIMACY OF THE WTO

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ABSTRACT

The article critically analyzes the role of development and poverty alleviation in the legal and institutional workings of the World Trade Organization (WTO). By analogy to Joseph Weiler's analysis of the dynamics of internal and external legitimacy in WTO dispute settlement, I suggest the existence of an asynchronicity in the evolution of the WTO, between the marked shift in the organizational rhetoric of "development", and the virtual standstill in the adaptation of the WTO's functional design to its newly trumpeted development goals. One explanation for this suspension of progressive change is an intrinsic conflict within the WTO's legitimation needs, between the *functional* and *aspirational* dimensions of legitimacy. The rhetoric of development strays from the WTO's functional trade heritage and challenges it, to the point of depicting development as a metaright in international economic relations. The article discusses in detail four legal areas in which the dissonance between function and aspiration is most acute, and in which fundamental rethinking and reform are required: (i) The unclear, changing telos of the WTO; (ii) The problem of defining development needs, interests and policies for the purpose of implementing differential treatment; (iii) The dilemmas associated with the identification, classification and differentiation of developing countries; and (iv) The inadequacy of reciprocity as an organizing legal principle in the development context.

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TABLE OF CONTENTS

- I. Introduction
- II. The Heritage and Ethos of the Rule(s) of Trade
 - 1. The Reciprocal Nature of the GATT/WTO
 - 2. The Non-Discriminatory Nature of the GATT/WTO
 - 3. The Opportunity-Oriented Nature of the GATT/WTO
 - 4. The Rules of Trade and the Rule of Traders
 - 5. Birth Defects and Growth Defects
- III. The Packaging Shift – The Rhetos of Development and the Culture of Expectation
- IV. Trade and Development: The Dissonance and its Implications
 - 1. Purpose: Telos and Nomenclature
 - 2. Defining Development: Policies, Needs and Interests
 - 3. Classification and Discrimination: Developing Country Status, Differentiation and Graduation
 - 4. (Im)balance: The Role of Reciprocity and Special and Differential Treatment

I. Introduction

Over the last few years it has become uncommon – indeed almost impossible - to conduct a discussion on any one of the diverse aspects of the law and practice of the World Trade Organization ("WTO")¹ without at least token reference being made to its "Development dimension". To be sure, the importance of international trade to development *qua* economic growth has been recognized for centuries (though never free of theoretical controversy and political contention),² but the present development debate is not about global economic expansion as such but rather about the erasure of economic inequities³ – over the capacity of international trade policy to lift the world's deprived

¹ See Marrakech Agreement Establishing the World Trade Organization, 15 April 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (the "WTO Agreement"), *Legal Instruments—Results of the Uruguay Round*, 6, 6–18; 33 I.L.M. 1140, 1144–1153 (1994).

² For an excellent and comprehensive study on the subject see DOUGLAS A. IRWIN, *AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE* (1996).

³ For a discussion focused on the ethical and moral aspects of transnational inequality, see FRANK J. GARCIA, *TRADE, INEQUALITY AND JUSTICE: TOWARDS A LIBERAL THEORY OF JUST TRADE* (2005). For a critique of the economic policy implications

masses from poverty and to promote the economies of developing countries where the vast majority of the impoverished reside.⁴

The pervasiveness of this sense of the word "Development" in contemporary discussion is such, that one might be tempted to believe that a certain reversal of the respective roles of trade (on one hand) and development (on the other) is taking place within the WTO system, if not a veritable paradigm shift. When the multilateral trading system was established in 1947, the idea of "expanding the production and exchange of goods" was formulated as an end in itself – a blunt call for the overall increase in the volume of trade.⁵ In the GATT's original vocabulary the word "developing" explicitly alluded only to the exploitation of (natural, but also human) resources towards the end of raw economic growth,⁶ not to the advancement of underprivileged people or peoples. In the decades that followed, the encouragement of developing economies was arguably regarded as a natural (side-) effect of trade expansion, with a few development-oriented patches added on to trade liberalizing rules⁷ as an involuntary "afterthought".⁸ In contrast, development today is increasingly portrayed as the overarching goal of international trade policy and regulation, with the "needs and interests" of developing countries now placed "at the heart" of the trade negotiations conducted under a much touted "Doha Development Agenda" ("DDA").⁹ International development and poverty alleviation, once the dusty province of aid agency bureaucracies and starry-eyed activists, are now the *bon ton* in the conference halls of Geneva. It sometimes seems as if "We are all development advocates/economists/experts now". In discourse, at least, development could not appear to be more 'mainstreamed'.¹⁰

proposed by Garcia on the basis of this discussion, see Joost Pauwelyn, *Book Review: Just Trade*, 37 (2005) GEO. WASH. INT. L. REV. 101.

⁴ For statistics on the global distribution of poverty and extreme poverty, see Shaohua Chen and Martin Ravallion, *How Have the World's Poorest Fared since the Early 1980's?*, 19(2) (2004) WORLD BANK RES. OBSERVER 141.

⁵ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 (the "GATT"), second preambular recital.

⁶ *Ibid.*

⁷ For a survey of the development-related provisions of the GATT, see MICHAEL J. TREBILCOCK & ROBERT L. HOWSE, *THE REGULATION OF INTERNATIONAL TRADE*, 3rd. ed. (2005), 472-477.

⁸ See Faizel Ismail, *Mainstreaming Development in the WTO*, 39(1) (2005) J. WORLD T. 11 at 12.

⁹ See WTO, *Ministerial Declaration*, adopted on 14 Nov., 2001, WTO Doc. WT/MIN(01)/DEC/1, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited: Dec. 7, 2005).

¹⁰ On 'mainstreaming development' in the WTO (shifting development concerns from the periphery of trading system to its core) see Ismail *supra* note 8. One may also speak of the

This trend, the "developmentification" of the WTO, is in fact not so surprising, given the recent history of the WTO. The Uruguay Round results were achieved as a "North-South Grand Bargain"¹¹ in which developing countries acquiesced to the extension of the substantive coverage of multilateral trading disciplines to areas of concern to developed countries, such as trade in services and intellectual property protection, with the tacit understanding that development concerns, including increased access to developed markets, would be next in line. In the succession of biennial WTO Ministerial Conferences held since the establishment of the WTO in 1995 – Singapore, Seattle, Doha, Cancún and most recently, Hong Kong - developing countries have amply demonstrated their political resolve to see this understanding carried through, with respect to the development problems that emerge regarding every one of the WTO's covered agreements and beyond.¹² Developing countries have also not shied away from deploying the WTO dispute settlement system not only to their targeted economic advantage but in the pursuit of strategic development policy goals.¹³ In the WTO, "Development" now seems to translate into a flurry of diplomatic and legal activity, as if in ascendance in relation to the traditional trade dynamics of the old GATT. In fact, on the glossy backdrop of the annual United Nations Millennium Development Goal ("MDG") reports¹⁴ and similarly sobering documents on living conditions in the less developed world,¹⁵ and with Bono and friends vocalizing for international debt-relief for

opposite imperative, of 'mainstreaming trade into development', *see, e.g.*, UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, E/ECA/CM.37/2, *Mainstreaming Trade into National Development Strategies – An Issues Paper*, 8 April, 2004, available at http://www.uneca.org/cfm/2004/issues_paper.htm (last visited Nov. 20, 2005).

¹¹ *See* Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 285 (edited by D.L.M. Kennedy & J.D. Southwick, 2002). *See also* Don McRae, *Developing Countries and 'The Future of the WTO'*, 8(3) J. INT. ECON. L. (2005) 603, at 603: "The Uruguay Round is often portrayed as a betrayal".

¹² For a stylized description of the pre-Hong Kong WTO Ministerial Conferences, including reference to Cancún representing "a triumph for developing countries", *see* Jagdish Bhagwati, *From Seattle to Hong Kong*, 84(7) (2005) FOREIGN AFFAIRS.

¹³ *See, e.g.*, United States – Subsidies on Upland Cotton (2005), WTO Doc. WT/DS267/AB/R (Appellate Body Report); and European Communities – Export Subsidies on Sugar (2005), WTO Doc. WT/DS255/AB/R, WT/DS256/AB/R, WT/DS283/AB/R (Appellate Body Report).

¹⁴ *See* UNITED NATIONS SECRETARIAT, *THE MILLENNIUM DEVELOPMENT GOALS REPORT 2005* (2005).

¹⁵ *See, e.g.*, FOOD AND AGRICULTURE ORGANIZATION, *THE STATE OF FOOD INSECURITY IN THE WORLD 2005* (2005), available at <ftp://ftp.fao.org/docrep/fao/008/a0200e/a0200e.pdf> (last visited Nov. 20, 2005).

poor countries, it would have been more surprising had the WTO, the world's foremost inter-governmental economic organization, not thus embraced development.

From this perspective, one could well attribute the current "Development trend" in the WTO to the organization's continued and frustrating quest for legitimacy, the elixir of political governance¹⁶ that is especially elusive in international politics. Perceptions of the "asymmetrical" rules of the GATT/WTO and their failure to promote development have fueled complaints about the "legitimacy gap" in the WTO¹⁷ - serious complaints that are substantive, relate directly to the legal and economic functions of the WTO and transcend the usual claims of procedural unfairness in political or judicial determinations.¹⁸ With developing countries today making up the majority of the WTO's "constituency" not only by Member count but also in terms of population (overwhelmingly so since the accession of China to the WTO in 2001, if one regards China as a developing economy), this alleged deficit in legitimacy – indeed, the popular perception that the WTO "is there to help the big fish eat the little fish"¹⁹ - is certainly not one to be taken lightly, however unjustified it may be, in whole or in part.

This article reflects on the theme of legitimacy as impacted upon by the tensions between the increasing demand from the WTO for "Development performance", on the one hand, and the strictures of multilateral trade regulation mechanics and reflexes, on the other. It takes its paraphrasal, methodological and structural (but not substantive) inspiration from a celebrated article by Prof. Joseph Weiler,²⁰ in which he lucidly identified and explained the discord between the diplomatic traditions of the GATT/WTO system and its then-still new legalized dispute settlement system, and the effect of that dissonance upon the legitimacy-building project of the WTO. With at least

¹⁶ See Inis L. Claude, *Collective Legitimation as a Political Function of the United Nations*, 20 INT. ORG. (1966) 367, at 368: "Politics is not merely a struggle for power but also a contest over legitimacy".

¹⁷ See Rubens Ricupero, *Rebuilding Confidence in the Multilateral Trading System: Closing the 'Legitimacy Gap'*, in THE ROLE OF THE WTO IN GLOBAL GOVERNANCE (edited by Gary P. Sampson, 2001).

¹⁸ For a survey of the legitimacy debate in the WTO, see TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION (2004) 57-66.

¹⁹ Thai woman, quoted by Kevin Watkins, OXFAM, *Is the World Trade System Rigged Against the Poor?*, address to seminar held on May 21, 2002, available at: <http://www.maketrade-fair.com/en/assets/english/KevinWatkinsGeneva.pdf> (last visited: Dec. 2, 1005).

²⁰ See Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Some Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35(2) (2001) J. WORLD T. 191.

one significant distinction,²¹ I wish to argue that an analogous dissonance has emerged in the WTO between the rule(s) of trade, both formal and informal, and the rhetoric (or rhetos) of development, with similarly potential disruptive effects on the legitimacy of the WTO.

Like Weiler's classic exposition of the "asynchronous development in the transition of GATT to WTO",²² my argument follows two intertwined threads. Under the first thread, I suggest the existence of another asynchronicity in the ongoing evolution of the WTO. Despite the marked and highly publicized shift in the rhetoric surrounding the WTO towards "Development" rather than trade alone, there has been a considerable lag – one might even say, an absolute standstill - in the adaptation of the WTO's *functional* design to its newly trumpeted development goals, a halt reflected in the inability or unwillingness of WTO Members to rethink, propose and discuss, fundamental changes in the legal architecture of the multilateral trading system. The logic of the rule(s) of trade established in the GATT 1947 and inherited by the WTO remains unmoved, if not immovable, in both the form and practice of WTO law, despite the changes in what is demanded from the organization, at times in a discourse of rights, by many of its Members and other stakeholders.

Under the second thread I argue that one explanation for this suspension of progressive change in the WTO, beyond raw economic self-interest and simple power politics, is an intrinsic conflict within the WTO's legitimation needs, between the *functional* and *aspirational* dimensions of legitimacy. On one hand, the WTO basks in its *functional* legitimacy – the legitimacy gained through its proper functioning, by being good at what it *does*. In the trade arena, the GATT/WTO has proven itself beyond reasonable doubt as a regime highly suited to the task of trade liberalization that it was designed to perform, even in the face of structural and political threats – considerably better at this task than other international regimes are at theirs - and this impressive effectiveness

²¹ An important strand of Weiler's article is the difference in the legitimacy of a judicialized dispute settlement system as assessed by the *internal* organization of the WTO – delegations, Secretariat and adjudicators, on one hand, and the *external* context – the "'Real World' of States and their constitutional organs such as Parliaments, Governments and Courts as well as the world of multinational corporations, of NGOs, of the media and of citizens". In the present context the distinction between "internal" and "external" legitimacies seems less clear, and less relevant. What is more evident in the relation between trade and development, in my view, is the gap between *function* and *aspiration*.

²² See Weiler *supra* note 20.

supports its international reputation and its functional legitimacy. On the other hand, the WTO's recently acquired veneer of "Development" serves the *aspirational* legitimacy of the WTO – the legitimacy gained by having goals that are consonant with the declared desires and aspirations of its constituencies. The persistence of the "rule of trade" and the accompanying institutional and judicial practices and interpretations which support them maintain the working stability of the WTO system. Yet this comforting functional legitimacy is bought at a high price: it obstructs the (r)evolution that would redirect the functionality of the WTO more effectively towards international development, poverty alleviation and increased international economic equality that would also fulfill its aspirational legitimacy. This contradiction accounts for much of the inability of the WTO to make significant progress in the current Doha round towards the fulfillment of its declared development goals. The WTO is in a kind of identity crisis: a Janus-faced mid-lifer, clinging to its primal urges and the techniques that satisfied them in the past, however unsuited to the requirements and limitations of the present.

Notably, this article will attempt to skirt the primarily economic (and political) debate on the role of trade liberalization in international development and poverty alleviation. It acknowledges the two divergent, general paradigmatic approaches to the economic policy question, namely, (i) that trade liberalization as prescribed by classical economic theory is in itself an unqualified progressive agent of development and poverty alleviation; and (in contrast) (ii) that development is in fact a non- (or supra-) trade interest, that can be either served or hindered by trade-liberalization. To be sure, by 'boxing in' the diversity of existing economic approaches to trade and development in this way I do a grave injustice to many thoughtful and nuanced contributions to the debate, but my intention is to describe a different dimension of the trade and development nexus relating to legal workings and institutional legitimacy that in my view can be framed and subscribed to without *relying* on the validity of one economic approach or another. By no means does the article aim to endorse one of these positions or to resolve the differences between them, but rather to highlight and explain the strain placed upon the WTO as we know it and on its legitimacy by the dissonance between trade rules and development rhetoric.

Moreover, it should not be read in isolation from the growing understanding that the development benefits of the Doha Round will be empirically disappointing.²³ In suggesting that by not being adaptive enough to its new calling the legitimacy of the legal system of the WTO will be depleted, the article can be seen as a mere footnote to the work of economic luminaries such as Dani Rodrik, Jeffrey Sachs and Joseph Stiglitz, who have each suggested ways in which the multilateral trading system can be substantially reformed to better serve development goals.²⁴ In the wake of economic analysis such as this, it must be emphasized that trade policy is only one component of development policy, that must be complemented by others, such as aid, investment, governance, social and environmental policies; but it is a central, self-proclaimed component at that.

The article will also try to avoid the seemingly intractable (though critically important) moral-ethical questions of fairness in international trade, except where they appear incidentally in the gaps between the legal functions of the WTO, and what is expected of it. Most of the article should therefore be understood as an essentially descriptive essay with historiographical ambitions, not a normative one, although policy prescriptions should certainly be extractable from it, particularly from its final section.

II. The Heritage and Ethos of the Rule(s) of Trade

There is, of course, a degree of simplification and exaggeration in depicting the contemporary expectations for "Development dividends" from trade as new in the GATT/WTO system. The GATT 1947, so easily banded as a precursor and agent of insensitive "neo-liberal" international economics, has in fact devoted explicit attention to developing countries since the 1950s.²⁵ The Generalized System of Preferences ("GSP"),

²³ See Frank Ackerman, *The Shrinking Gains From Trade: A Critical Assessment of Doha Round Projections*, Global Development and Environment Institute, Tufts University, Working Paper No. 05-01, October 2005, available at: <http://ase.tufts.edu/gdae/Pubs/wp/05-01ShrinkingGains.pdf> (last visited: Feb. 25, 2006).

²⁴ See DANI RODRIK, *THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK* (1998); JEFFREY SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* (2005); and JOSEPH STIGLITZ AND ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* (2006).

²⁵ Article XVIII of the GATT 1947, entitled "Governmental Assistance to Economic Development" was significantly amended after the 1955 review of the GATT (*see* Trebilcock & Howse *supra* note 7 at 473).

the GATT/WTO's main development project, has legally been in place since 1971,²⁶ and the thread of "Special and Differential Treatment" runs to varying extent through all the 1994 WTO agreements.²⁷ Indeed, some might even consider current "trade and development" discourse as no more than a modern reincarnation of the sentiment that translated into the 1974 UN General Assembly Declaration on a "New International Economic Order" ("NIEO"),²⁸ this time around more vigorously infused into the GATT/WTO, but essentially nothing new under the sun.

And yet, just as Weiler deemed it "not inappropriate to think of that "old" dispute settlement process as *diplomacy through other means*" (original emphasis), it would be no less inappropriate to think of the "old"/current development provisions of the GATT/WTO system as *trade-liberalization through other means*. The trade-liberalizing pressures and "enlightened mercantilist"²⁹ ethos promoted by the general rules and practices of trade of the GATT 1947, as carried over to the WTO, are in themselves focused on the expansion of trade, not on "Development" in the contemporary, equalizing sense presented above. These are the self-same elements that have earned the GATT/WTO its functional legitimacy. No less importantly, however, these (qualified) trade-liberalizing elements may stand in the way of far-reaching, development-focused reform that could satisfy the aspirational legitimacy of the GATT/WTO.

²⁶ See Waiver Decision on the Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972), superseded by Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, para. 1, GATT B.I.S.D. (26th Supp.) at 203, 203 (1980) (the "Enabling Clause").

²⁷ See WTO, Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat, WTO Doc. WT/COMTD/W/77, Oct. 25, 2000, available at <http://docsonline.wto.org/DDFDocuments/t/WT/COMTD/W77.doc> (last visited: Dec. 30, 2005).

²⁸ See UNGA, *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974). A comparison between the NIEO idea and contemporary development thinking would transcend the scope of this article. Moreover, the analogy may be supportive of this article's argument, in that the NIEO included ideas for structural changes in the trading system that contradicted GATT tenets; but ultimately the project failed completely, leaving behind it a wake of disappointment, if not disruption.

²⁹ See KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2005) at 60-61, referring to Paul R. Krugman, *The Move Towards Free Trade Zones*, in *Policy Implications of Trade and Currency Zones, A Symposium Sponsored by the Federal Reserve Bank of Kansas City*, Jackson Hole, Wyoming, August 22-24, 1991.

The following characteristics of the existing GATT/WTO system justify this depiction, to my mind. Some of them are well known attributes of the system and so may be disposed of quite briefly; others may be more controversial. In any case, the justification for their rehearsal is in couching them as pillars of the functional legitimacy of the WTO, serving as the anvil against which the hammer of further arguments on development may strike.

1. The Reciprocal Nature of the GATT/WTO

As only befits an organization preoccupied with the regulation of international commerce, everything, including normative progress, is bought and sold for a price at the WTO. "TANSTAAFL"³⁰ is the driving force of the organization's dynamics. Even when a "round for free" is offered, one does not realistically anticipate *not* being charged for it, and indeed one might even be charged for *offering* it.³¹ The justification for this reflexive routine is "Reciprocity", the informal foundational principle of the GATT/WTO under which in return for reductions in the trade protection made by its trading partners, a Member is expected to reduce the level of its own trade protection, to an equivalent extent.³² However one explains it in economic or political economy terms, Reciprocity is the unbridled expression of the mercantilist Id of the organization and its Members. Reciprocity echoes through several of the GATT's historical provisions and those of the WTO Agreements, including some of those related to development,³³ but more

³⁰ "There ain't no such thing as a free lunch", see ROBERT HEINLEIN, *THE MOON IS A HARSH MISTRESS* (1997, original ed. 1966), p. 162.

³¹ "Round for free" was originally a European negotiating stance whereby Least Developed Countries would not be required to make tariff cuts in the Doha Round (see *EU Conditional Negotiating Proposals*, Statement by Peter Mandelson at the WTO Doha Round Informal Ministerial, Zurich, Oct. 10, 2005, available at http://europa.eu.int/comm/commission_barroso/mandelson/speeches_articles/temp_icentre.cfm?temp=sppm058_en (last visited: Dec. 30, 2005)). The term was later reversed when used by developing countries to criticize the EC's positions as self-serving (see *Rich Countries Seeking 'Round for Free', Say Nine Developing Countries*, 9(41) BRIDGES WEEKLY TRADE NEWS, Nov. 30, 2005, available at <http://www.ictsd.org/weekly/05-11-30/story2.htm> (last visited: Dec. 30, 2005)).

³² See Robert W. Staiger, *NBER Research Summary: The Economics of GATT*, available at: <http://www.nber.org/reporter/spring99/staiger.html> (last visited: November 27, 2005); and Kyle Bagwell and Robert W. Staiger, *Reciprocal Trade Liberalization*, NBER Working Paper No. 5488, March 1996, available at: <http://www.nber.org/papers/w5488.pdf> (last visited: January 25, 2006).

³³ For example, references to "compensatory adjustments" (Article II:5 and XXVIII:2 and (with respect to developing countries) Article XVIII:7 GATT), release from obligations due to GATT-

significantly, it is highly apparent in GATT/WTO negotiating practice, very much so in the current Doha Round.³⁴ The reciprocal nature of the trading system is a keystone of its success in achieving progressive reductions in trade restrictions, the source of the GATT/WTO's functional legitimacy. Of course, there are exceptions to the rule of reciprocity, most importantly Special and Differential Treatment and the GSP, but the effect of these instruments in promoting development is highly indeterminate and controversial, in purely economic terms;³⁵ and there is little question that direct and indirect prices are in fact extracted for them, despite the language and spirit of the "Enabling Clause",³⁶ in both economic senses and through non-economic "political conditionality".³⁷

2. The Non-Discriminatory Nature of the GATT/WTO:

It is doubtful that non-discrimination, famously one of several 'mantras' of the GATT/WTO,³⁸ was ever truly "sacrosanct in its purity".³⁹ If it was, that is evidently not the case anymore. The Sutherland Report made clear that "Most Favored Nation (MFN) is no longer the rule; it is almost the exception".⁴⁰ Nevertheless, and the chiding tone of the same Report leaves no doubts about this, derogation from MFN is still regarded as a

inconsistent balance of payments restrictions (Article XII:4(d) GATT), and tariff negotiations on a "reciprocal and mutually advantageous basis" (Article XXVIII*bis*:1 GATT).

³⁴ See, e.g., the EC's pre-Hong Kong Offer on Market Access in Agriculture (European Commission, *EU Tables New Offer in Doha World Trade Talks: Calls for Immediate Movement on Services and Industrial Goods*, Brussels, 28 October, 2005, available at: http://europa.eu.int/comm/trade/issues/newround/doha_da/pr281005_en.htm (last visited: January 25, 2006), made expressly contingent upon progress in Non-Agricultural Market Access ("NAMA") and Services, as well as being "strictly conditional on equivalent concessions from our WTO partners in agriculture and in other areas of the Round" (*Id.*).

³⁵ See Bernard Hoekman, *Making the WTO More Supportive of Development*, March 2005, FINANCE & DEVELOPMENT 14, at 14-15; see also See WTO, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, 2004, available at: http://www.wto.org/English/thewto_e/10anniv_e/future_wto_e.pdf (last visited: January 25, 2006)(the "Sutherland Report") at 24-26.

³⁶ Article 5 of the Enabling Clause (*supra* note 26), states that developed countries do not "[E]xpect reciprocity for commitments made by them in trade negotiations"; *a fortiori*, they should not expect reciprocity for preferential tariff treatment granted by them under Article 2(a) of the Enabling Clause.

³⁷ On the legality and legitimacy of such conditionality, see Amy M. Mason, *The Degeneralization of the Generalized System of Preferences (GSP): Questioning the Legitimacy of the U.S. GSP* 54 DUKE L.J. (2005) 513.

³⁸ John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4(1) J. INT. ECON. L. (2001) 67, at 72-73.

³⁹ *Id.*

⁴⁰ See the Sutherland Report, *supra* note 35 at 19.

sin (if not a violation of the law) in the WTO, however commonly committed. The MFN obligation as specified in Article I GATT and emulated in a several other provisions in the WTO Agreements⁴¹ is indeed an article of faith, but one whose valid claim for a central part in the success of the trade-liberalizing role of the GATT/WTO can be cogently explained in formal economic terms,⁴² as many teachers of international trade and law tirelessly do. Nevertheless, discrimination abounds in practice, in preferential trade agreements and in the application of GSP and Special and Differential Treatment. The non-discriminatory nature of the GATT/WTO should therefore be taken as a relative matter rather than an absolute one. The question has (of course) never been whether non-discrimination should be abolished as a guiding or organizing principle, but rather, under which circumstances should discrimination be condemned and under which should it be absolved. In the main, this has been regarded as a question of trade economics: in blunt lay terms, when does discrimination create more trade than it diverts?⁴³ In this sense, digressions from "pure" MFN do not detract from the functional legitimacy of the GATT/WTO. They are in fact a part of it, as long as they are conducted under one of the headings perceived as potentially trade increasing, such as regional integration.

That other tenet of non-discrimination, the National Treatment principle of Article III GATT (as echoed, *mutatis mutandis*, in other WTO agreements)⁴⁴ is more staunchly upheld in the GATT/WTO than MFN. Quite simply, there is no readily conceivable *trade*-based justification for violations of National Treatment. Where National Treatment or MFN are at risk due to potentially discriminatory national regulatory concerns, the central judicial test applied by WTO dispute settlement Panels and the Appellate Body does not lose sight of the goal of trade expansion - the "least trade-restrictive measure" test⁴⁵ - further contributing to the functional legitimacy of the WTO.

⁴¹ See, e.g., Article II GATS and Article 4 TRIPS.

⁴² See Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* (edited by Jagdeep S. Bhandani & Alan O. Sykes, 1997); and see Bagwell & Staiger *supra* note 29 at 71-94.

⁴³ For a survey and discussion of literature on this topic, see Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 38 J. ECON. LIT. (2000) 287.

⁴⁴ See, e.g., Article 3 TRIPS and Article XVII GATS.

⁴⁵ See, e.g., United States--Import Prohibition of Certain Shrimp and Shrimp Products (2000), WTO Doc. WT/DS58/AB/R (Appellate Body Report)("Shrimp-Turtle").

3. The Opportunity-Oriented Nature of the GATT/WTO:

It is traditionally well established in WTO jurisprudence that the WTO Agreements do not protect a Member's expectations relating to the Agreements' economic results, but only expectations relating to the "competitive conditions" established by them.⁴⁶ This holds true even in the murky territory of "non-violation complaints" under Article XXIII:1(b) GATT, that protect from measures that "nullify or impair a Member's legitimate expectations of benefits from tariff negotiations":⁴⁷ the protected benefits involved are merely "expectations of improved market access", not economic results.⁴⁸ No WTO Member, developing or otherwise, may set claim to a *right* to economically benefit in practice from multilateral trading rules.⁴⁹ In thus delimiting its actual promise, GATT/WTO law eschews the achievement of positive economic results in favor of the more abstract concept of economic "opportunity". Plausibly, this approach is an expression of the flexibility of the GATT/WTO system. Under this view, the GATT/WTO is simply the antithesis of a centralized "five-year plan", that would dictate who shall trade with whom and at what price. The GATT/WTO only sets in place a mechanism for trade liberalization, an environment whose conditions may be of "security and predictability"⁵⁰ but whose precise ultimate workings and effects are inherently unforeseeable. If the competitive relationship established in the Agreements is protected, and nevertheless does not translate into export volumes, or indeed if increased trade does not translate into enhanced welfare, then surely this is the result of intervening factors that are beyond the ambit of the agreements, such as domestic inefficiency, corruption and so forth. In other words, unfulfilled expectations from trade opportunities are the fault of the malcontents themselves, not of the trade regime.

⁴⁶ See, e.g., GATT, United States – Taxes on Petroleum and Certain Imported Substances, Report of the Panel adopted on June 17, 1987, p. 16; WTO, EC – Regime for the Importation, Sale and Distribution of Bananas (1997), WTO Doc. WT/DS27/AB/R at para. 253 (Appellate Body Report).

⁴⁷ See Japan – Measures Affecting Consumer Photographic Film and Paper (1998), WTO Doc. WT/DS44/AB/R (Appellate Body Report), para. 10.62.

⁴⁸ *Ibid.*, paras. 10.64-10.66.

⁴⁹ See Sutherland Report *supra* note 35 at 16: "The WTO is about providing opportunities – it does not provide guarantees nor does it provide all the conditions for participation in the global economy".

⁵⁰ See Article 3.2 of the Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr 15, 1994, app. 1 in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 ILM 1226 at 1244 *et seq.* (the "DSU").

At least one equally plausible alternative reason for this 'opportunity oriented' approach emerges, however, one that is somewhat less flattering to the GATT/WTO. Perhaps the drafters and executioners of the GATT/WTO, did not (and still do not) have sufficient confidence in the capacity of the rule(s) of trade to deliver welfare dividends to *all* Members, on an at least equitable basis, let alone in a manner that would advance the poor and underdeveloped among them? After all, it would be a disservice to the trade-liberalizing functions of the GATT/WTO to set too high a bar for their performance. Rather than promote the hope that enhanced welfare results will be achieved, in these circumstances it is far more prudent to limit expectations to new "opportunities". Any vigilant lawyer would advise as much, preferring a best-efforts commitment to a fixed-commitment on results.⁵¹ *Ex abundante cautela*, of an excessive caution, the opportunity-oriented nature of the GATT/WTO regime has avoided being mistaken for a results-oriented one, safeguarding its functional legitimacy.

4. The Rules of Trade and the Rule of Traders:

In the GATT/WTO, the rules of trade have always brought with them the rule of traders. The organization may be "Member driven", but it is ultimately directed at traders' interests. As articulated in one important (unappealed) WTO Panel report, in its functioning the WTO is designed to provide security and predictability for the multilateral trading system, which is composed "not only of states but also, indeed mostly, of individual economic operators";⁵² Members' enjoyment of the benefits of the WTO system is achieved through the provision of "improved conditions for these private operators".⁵³ This is further reflected in the political economy of WTO negotiations, that are driven by the interests of private operators. Importantly, these are not all or just *any* private operators. The GATT may have transformed into a "trade

⁵¹ When investment banks are unsure of the success of a future Initial Public Offering of securities, they will prefer to undertake a best-efforts offering method over a fixed-commitment one. This choice is not without cost, of course, as reflected in lower investment bank compensation, but this is offset by the indirect costs reduced by the softer form of commitment (see Craig G. Dunbar, *The Choice between Firm-Commitment and Best-Efforts Offering Methods in IPOs: The Effect of Unsuccessful Offers*, 7(1) J. FINANCIAL INTERMEDIATION (1998) 60).

⁵² See WTO, United States – Sections 301-310 of the Trade Act of 1974 (1999), WTO Doc. WT/DS152/R (Panel Report) at 321.

⁵³ *Id.*

stakeholders model",⁵⁴ but the stakeholders that matter most in the process are exporters, and their correlated agents in export markets: "...the consumer gain that comes from freer trade is not the liberalizing force that has been harnessed by the GATT/WTO. Instead, the GATT/WTO is driven by exporter interests".⁵⁵

This is an important precept of the functional legitimacy of the "old" GATT/WTO: success is essentially measured by the increase in market access opportunities accorded to exporters. This increase may in turn be expected to lower consumer prices and enlarge the amount of product choice accorded to consumers, and possibly even impact upon development or on poverty alleviation, but for the achievement of these additional results, export interests must first be served.

5. Birth Defects and Growth Defects:

The establishment of the WTO famously cured most of the GATT's institutional "birth defects".⁵⁶ It is now afflicted by what may be termed "growth defects", defects related to the manner in which the WTO regulates changes in its rules. The refurbished dispute settlement system was running before anyone was sure it could even crawl, but in contrast the political rule-making process of the WTO simply refuses to mature. The central defect is that the Membership stubbornly clings to the rule of consensus decision-making across the board, a practice that makes politically sanctioned progress on a variety of vexing issues virtually impossible,⁵⁷ leaving the floor open to judicial intervention. This "political capitulation" is itself a source of deficient legitimacy in the WTO, and although the eradication of the consensus requirement is neither possible nor desirable, there is cause to consider the abolition of the "taboo of majority decision-making" and the adoption of new ways to invigorate the political mechanisms of the

⁵⁴ G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT. ECON. L. 359 (1996).

⁵⁵ See Bagwell and Staiger *supra* note 29 at xi-xii. This is substantiated thus: "The fact is that virtually every tariff that has been lowered by a government as a result of a GATT/WTO negotiation ... has been lowered for a simple reason: some exporters somewhere in the world valued the market access, and as a result their governments were willing to offer something of value to that government in return".

⁵⁶ See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

⁵⁷ For a discussion of WTO decision-making procedures, see Claus-Dieter Ehlermann and Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and 'Plurilateral' Rules*, in *REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE* (edited by Ernst-Ulrich Petersmann, assisted by James Harrison, 2005) 497.

WTO.⁵⁸ The other side of this coin, a growth defect in its own right, is the formalistic and legalized nature of the WTO's dispute settlement system. Lashed to an almost static political norm-making system, the judicial branch of the WTO is extremely careful not to stray from the boundaries of political consensus, for fear of damaging its own legitimacy, when faced with sensitive issues.

These "growth defects" present a problem for the aspirational legitimacy of the WTO in the development context, in that they make the achievement of normative change extremely difficult, tiresome, even impossible. Moreover, for this stage of the argument, suffice it to note that the functional legitimacy of the WTO actually lives quite comfortably with the retarded political rule-making process and the cautious judiciary, in that they allow the automatic mechanics of the rules of trade to follow their course with little disruption or intervention.

III. The Packaging Shift – the Rhetos of Development and the Culture of Expectation

With all the hype surrounding development in the WTO's Doha Round, in governmental, academic, civil society and business circles around the globe, there is one aspect that in my view is not sufficiently acknowledged⁵⁹ or understood. Like the juridification of the WTO as explicated by Weiler, the "Developmentification" of trade is also a package deal. It includes the grafting of a rhetos of development over the rule(s) of trade, a repackaging and repositioning of the GATT/WTO "brand", but it cannot stop (or be stopped) there, at the merely symbolic level. The rhetoric does not simply impact on the public relations of the organization and the processes that it embodies (and hence upon their public acceptance), on the constellation of Member coalitions in negotiations, on the justificatory language and arguments used by negotiators, on the way proposals are drafted and potentially interpreted. The rhetos of development necessarily brings

⁵⁸ See Broude *supra* note 18 at 318.

⁵⁹ But see Simon J. Evenett, *Can the WTO Rise to the Challenge of Economic Development*, AUSSENWIRTSCHAFT (SWISS REV. INT. ECON. REL.) (forthcoming), available at: <http://www.evenett.com/articles/EvenettonWTOandEconomicDevelopment.pdf> (last visited: Nov. 30, 2005): "It is now apparent that few realised the significance of entrenching the goal of promoting economic development into the world trading system in general and the current multilateral trading round in particular"; and Kenneth W. Abbott, *Development Policy in the New Millennium and the Doha Development Round*, Asian Development Bank Paper, May 2003, available at: www.globalpolicy.org/soecon/trade/2003/05abbottdoha.pdf (last visited: Dec. 5, 2005).

with it a rise in the hopes for development *consequences*, a (consumer-like) culture of expectation, even of demand, and as I shall soon suggest – of rightfulness.

There has been a lot of talk about the "promise of Doha".⁶⁰ "Promise" is an interesting, significant word, at least in the English language, not only for jurists.⁶¹ It has no antonym, and (perhaps as a result) absorbs two separate meanings that are almost opposed to each other: "Promise" can be either a plain "Possibility" or a firm, quasi-legal, "Pledge".⁶² Both constructions of the word, the "maybe" and the "must", may raise expectations, but the current rhetoric seems to be interpreted rather more as the latter, at least *ex ante*, at least judging by the ease with which it is converted to the operative, plural and considerably more demanding formulation: the "*promises made* at the Doha Ministerial Conference".⁶³ The expectation that the "promise of Doha" is that kind of promise that is meant to be *kept* is dominant. Significantly, this expectation is truly globalized, as it is held by many in the developed world at least as fervently as in the developing world (perhaps even more so!), and so cannot be cast aside as a purely self-interested negotiation tactic. This expectation is kindled, quite simply, by the rhetos of development.

The problem that lies not far down the road, of course, is that such expectations, especially of the more concrete kind, breed disappointment; and as Hirschman taught us, disappointment should be taken seriously.⁶⁴ The state of disappointment almost always implies that the original expectations were mistaken, mislead, and/or misjudged, and so reflect negatively on the promise, the promisor and the promisee. The dissonance I wish

⁶⁰ See, e.g., Paul Wolfowitz, *Trading for Results: Realizing the Development Promise of the Doha Agenda*, Speech delivered at Keio University, Tokyo, October 12, 2005, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20680534~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (last visited: November 30, 2005).

⁶¹ Contracts are, after all, enforceable promises.

⁶² See ROGET'S NEW MILLENNIUM THESAURUS, 1st edition (v 1.1.1), available at: <http://thesaurus.reference.com/search?q=promise> (last visited: November 30, 2005).

⁶³ See, e.g., Third World Network, *Development Promises of Doha not Fulfilled*, June, 2003, available at: <http://www.twinside.org.sg/title/twe308d.htm> (last visited: November 30, 2005); and Oxfam Press Release, *Oxfam: WTO Agreement a Betrayal of Development Promises*, Dec. 18, 2005, available at: http://www.oxfam.org/en/news/pressreleases/2005/pr051218_wto_betrayal (last visited, Dec. 19, 2005).

⁶⁴ See ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982), at 14 *et seq.*. See also Frank J. Garcia, *Trade, Justice and Security*, in *TRADE AS THE GUARANTOR OF PEACE, SECURITY AND LIBERTY? CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* (edited by Padideh Ala'i, Tomer Broude and Colin B. Picker, 2006) (exploring the impact of the social psychology of justice or injustice on the evaluation of international trade law).

to point out here, between functional and aspirational legitimacies, is in part a result of the WTO's uncoerced and collective move to the use of a rhetos of development, without realizing that it will usher in a culture of expectation that applies significant pressure for change upon the functional, indeed *legal*, foundations of the GATT/WTO. That this rhetorical shift has largely been made in good faith and with good intentions will matter little when the Doha Round's results stand for judgment.

Much of the rhetos of development and its conversion into a culture of expectation is at odds with the rule(s) of trade. Here is a partial inventory.

- Hardly anyone bothers anymore to portray negotiations as talks aimed at trade liberalization for the sake of economic expansion, or at opening markets for the benefit of national export industries. The talks, even developed country positions within them - are ostensibly all about "development" now.
- Increasingly, the headlines on WTO negotiations talk about "rich" and "poor" nations, the word "trade" appearing only as a necessary part of the organization's acronym, for informative rather than operative purposes (as in a typical internet headline: "Poor countries to gain from WTO deal on etc.").⁶⁵ It is as if the WTO is not at all a trade organization designed to promote the reciprocal reduction of trade barriers with the aim of increasing economic efficiency, not a medium for facilitating international exchange, but rather more like the World Bank, G-8, OECD or even UNCTAD, yet another intergovernmental forum in which the "rich" and/or the "poor" – but usually the "rich" - debate (under sometimes watchful, sometimes socially conscientious international public scrutiny) what the former could/should do for the latter.⁶⁶ The untrained eye no longer captures the goals of wealth *creation* advanced through the harnessing of mercantilist self-interest, but rather the more idealized goal of global wealth *distribution*, even of "north-south" wealth *transfer*.

⁶⁵ See, e.g., ABC News, *Rich Nations Wrangle, Poor Complain at Trade Talks*, Dec. 15, 2005, available at: <http://abcnews.go.com/International/wireStory?id=1408235> (last visited: Dec. 30, 2005).

⁶⁶ Thus, *High Noon in Last-Chance Saloon for Rich and Poor Nations*, the headline of a story in the Guardian about the G-8 Edinburgh summit (Larry Eliot, THE GUARDIAN, June 13, 2005, available at: <http://www.guardian.co.uk/hearfrica05/story/0,15756,1505031,00.html> (last visited: Nov. 30, 2005)) could just as well have referred to the Cancún or Hong Kong WTO Ministerial Conferences.

- In contemporary rhetoric, the conventionally mandated GATT/WTO objective of increasing economic "opportunity" is no longer regarded as either appropriate or sufficient, neither as a policy goal nor as measure for the success of the trade system in general and of trade negotiations in particular:
 - o First, at a fundamental level, the new rhetoric of development suggests that the GATT/WTO's operationalization of "opportunity" through the process-oriented concept of ensuring "competitive conditions" is problematic for development. By semantic (though not economic) definition, "competition" entails winners and losers, and there is a widely held sentiment that conditions of competition as established by successive negotiations, have led developing countries to "lose" so far. The prevailing contemporary rhetoric promises that they must not, will not be allowed to "lose again". The process ideal of "competitive conditions" has in this sense essentially been replaced by the fuzzier concept of "fair and market-oriented" conditions.⁶⁷ Competition can be fair, if it is conducted fairly (remember the "level playing field"?), but it now appears as if the demand for fair economic opportunities is being replaced by a demand for fair economic results. Expectations are being raised that the *outcomes* of the competition will be fair and even, not just the tournament itself. The goal being promised now for developing countries is not the opportunity to compete – to play and to lose - but rather the opportunity to play and to win.
 - o Second, (perhaps as a consequence of the point just raised, but more plausibly for the simple reason that decades of increased "opportunity" have evidently not been enough to pull any parts of Africa, and significant parts of Asia, for example, out of poverty), many of the public attentively observing trade negotiations in the WTO would evidently want to see real, tangible development results that they can understand and evaluate non-intermediately. The accumulation of *official* rhetoric, as well as that of advocacy and research rhetoric, is extremely graphic in this respect. The UN MDGs are the most obvious expression of this concretization of expectations, setting out in precise and purportedly measurable numerical terms which development targets should be met in

⁶⁷ See Para. 13, DDA.

the sub-areas of poverty reduction, eradication of hunger, universal education, gender equality, and so forth.⁶⁸ These goals are of course not tasked to the WTO alone, indeed not even formally incorporated into the WTO DDA, but the national and international actors that will be judged by their success in meeting the MDGs are essentially the same ones that make the DDA tick. It is no longer possible to compartmentalize the technocratic functionality of trade regulation policy and separate it from the socio-economic expectations voiced in "softer", more purely diplomatic fora such as the UN General Assembly or UNCTAD, or in popular public acts like Live-8. The Doha Round itself is continuously subjected to detailed economic analyses attempting to quantify the "Development dividend" to be expected from its successful conclusion.⁶⁹ The ramifications of such solid objectives are very positive for aspirational legitimacy *ex ante*, painting the WTO as a vehicle of global hope, but they do have the concurrent effect of setting benchmarks of success that are not only very high, but also calculable and transparent, so that failure to meet them will be as obvious as it will be damaging for the WTO's legitimacy *ex post*. It may be true that nothing fails like success, but in this case, indeed "failure's no success at all".⁷⁰

- The rhetorical "Developmentification" of the WTO has entailed a shift in the way the discourse of the "Member driven" system relates to individual interests, shaking the "rule of traders" from its roots. Debates about the way trade rules influence poverty – an issue that *can* be defined in purely economic terms⁷¹ - necessarily lead to considerations of the way that trade affects the poor - poor *people*, that is. This may still be a far cry from an empowerment of the underprivileged, but it is a considerable break from the traditional functionality of

⁶⁸ See UN Millennium Goals, *available at*: <http://unstats.un.org/unsd/mi/pdf/mdglist.pdf> (last visited: Dec. 2, 2005).

⁶⁹ See Timothy A. Wise and Kevin P. Gallagher, *The Doha Round's Development Impacts: Shrinking Gains and Real Costs*, Research and Information System for Developing Countries (RIS), Policy Brief No. 19, Nov. 2005, *available at*: <http://ase.tufts.edu/gdae/Pubs/rp/RISPolicyBrief19WiseGallagherNov05.pdf> (last visited: Dec. 30, 2005).

⁷⁰ Bob Dylan, *Love Minus Zero/No Limit*, from the Album *Bringing it All Back Home*, Columbia, 1965; referring to the quotation attributed to economist Kenneth E. Boulding, and virtually reversing it.

⁷¹ See, e.g., L. Alan Winters, *Trade Policies and Poverty Alleviation*, in DEVELOPMENT, TRADE, AND THE WTO (edited by Bernard Hoekman, Aaditya Mattoo and Philip English, 2002) 28.

the GATT/WTO, if only because the poor cannot in earnest be considered as "private economic operators" in the same sense that "traders" are. This may be important in many ways, but I shall mention only a few:

- First, focus on the poor adds a layer of social aspirations to the economic bedrock of the GATT/WTO, which expands its evaluative basis, in much the same way as the new "results-oriented" perspective does;
 - second, it presumes to include the poor as indirect but equal stakeholders in the system, and hence as potential beneficiaries, but no less so, as potentially disappointed hopefuls;
 - third, it challenges the export-driven political economy mechanisms that have made the GATT/WTO a functional success, exerting pressure to change the way the WTO works.
- An intellectual project of integrating the terminology of international social justice into international trade discourse has recently emerged (instead of being raised in opposition to it, as it has been in the past, and still is, in some circles). This aspect of the rhetos of development provides fertile ground for some very thoughtful academic contributions,⁷² as well as for more or less-sophisticated rallying cries from some corners of civil society. In any case, setting aside the question of its economic validity, the ultimate logical extension of this approach seems to be a form of international wealth redistribution, which in turn would require manipulative interventions that stray from both classical economic theory (a "visible hand") and the fundamental mechanics of the GATT/WTO.⁷³
- Reciprocity is also being eroded – and not only in the traditional sense that developing countries are being offered "less-than-full-reciprocity" and other Special and Differential Treatment in various subjects, but rather in a more far-reaching, demanding way. Trade negotiations have always been depicted as international marketplaces where reciprocal concessions are offered and accepted on the basis of seemingly cold and calculated cost-benefit analyses that lead to positive sum results. To be sure, they have never been free of (sometimes) feigned melodrama and (sometimes) real acrimony, but the Doha Round and its

⁷² See Garcia *supra* note 3; and see RAJ BHALA, TRADE, DEVELOPMENT AND SOCIAL JUSTICE (2003).

⁷³ For proposals along these lines, see Robert Hunter Wade, *What Strategies are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of 'Development Space'*, 10(4) REV. INT. POL. ECON. 621 (2003).

rhetos of development have introduced a more emotional undertone, taking on at times a vocabulary of *sacrifice*. On one hand, developed countries persuade themselves that they are willingly offering to bear real costs in order to correct international economic disparity, or in the pre-Hong Kong words of the EC's Trade Commissioner, "even though it hurts, we'll be fighting for poor nations".⁷⁴ The popularism of this sacrificial sentiment is unmistakable. These lines must surely go down well with affluent members of western societies that are asked to "forego the dessert" in order to help feed the world's hungry.⁷⁵ On the other hand, from their side, developing countries think that it is only rightful that the rich should make real sacrifices for their sake, or at least for the sake of sacrifice, regardless of its effectiveness. From either perspective, there appears to be a demand to see some "bloody noses", to perceive how and where developed countries' economies will be curtailed in order to benefit developing countries, no matter the extent to which the idea that losses to the "North" will *of themselves* bring gains to the "South" may be economic nonsense. This sacrificial mindset has several implications that cannot be comprehensively assessed here, certainly not in the fields of purely economic or ethical analyses that have *a priori* been excluded from the present discussion. Nevertheless, here are the two ramifications that in my view most prominently clash with the sources of the WTO's functional legitimacy:

- First, this expectation of sacrifice, if unrequited (even as it likely should be, if it has no economic value) may simply lead to the disappointment of many, with all the consequential implications for WTO legitimacy.
- Second, in a more systemic sense, the very idea that rich countries – any countries for that matter - might have to alter their GATT/WTO-contractual rights, not only to absorb the opportunity costs imposed upon them by prioritizing development in poorer countries, but to sustain real, material, positive and hence wealth-detracting costs, so as to promote the welfare and wealth of other, less-advantaged societies, cuts

⁷⁴ See Peter Mandelson, *Even Though it Hurts, We'll Be Fighting for Poor Nations*, THE GUARDIAN, Nov. 8, 2005, available at: <http://politics.guardian.co.uk/eu/comment/0,9236,1636771,00.html> (last visited: Dec. 1, 2005).

⁷⁵ In a commercial funded by the UN World Food Program, Africans are seen voicing improbable requests for desserts available at top London restaurant's (e.g., "Pannacotta Please", "Prune and armagnac flan"), in an unlikely attempt to raise funds; the commercial is available at: <http://www.wfp.org/english/?moduleID=1488&key=72> (last visited: Dec. 2, 2005).

against the grain of traditional "reciprocity" in an unprecedented manner. In the past, developed countries may have been asked to permit derogations from reciprocity in ways that benefit them too (if not more); now the rhetoric asks them to forego any benefits, in order to allow developing countries to close gaps.

- Much of the rhetoric of development naturally leads to general calls for a comprehensive overhaul of the multilateral trading system – the definitive, frontal challenge to the "rules of trade". Yet the desire for reform is unlikely to be satisfied without first curing the "growth defects" of the GATT/WTO, without changing the way that the organization's rules regulate change; and at the moment it does not appear that there is much real support in the WTO for such fundamental amendments.

These points, each one taken on its own, but more definitely if seen as elements of a whole, bring to light an emergent, crucial normative effect of the rhetoric of development, one that in my opinion underscores the depth of the gap between functional and aspirational legitimacy in the WTO and its potential (but not inevitable) negative consequences. The "packaging shift" introduced in the WTO does not merely influence, as if in passing, the aspirations associated with the organization and its traditional mandate. It brings with it an enhanced and fundamentally transformative impression that development is in the process of being recognized as a *right* in world economic politics in general and in the WTO in particular, not in the inoperative sense of the frail "inalienable human right" declared upon in the UN,⁷⁶ but as an achievable, tangible right in the WTO system itself, or rather as a *metaright* – the right to benefit from policies that genuinely pursue the objective of making the right to development realizable.⁷⁷ This concept means substantially more than a mere acceptance of the right to development as a "soft" norm of international law that should be taken into account in the WTO as part of its interpretative context, or as an advisory that WTO practice may take into account certain

⁷⁶ See Article 1(1) of the *Declaration on the Right to Development*, G.A. Res. 41/128, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

⁷⁷ See Amartya Sen, *The Right Not to Be Hungry* in *THE RIGHT TO FOOD* (edited by Philip Alston and Katarina Tomaševski, 1984). On the right to development as a "right to a process of development" or "metaright", see UN, ECOSOC, Commission on Human Rights, *Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2001/9*, UN Doc. E/CN.4/2002/WG.18/2 (Dec. 20, 2001), at 7.

human rights aspects of development.⁷⁸ It means, rather, that developing countries, their peoples and their citizens, as well as those of other states, have grounds to demand that the policies agreed upon and implemented in the WTO *all* serve a right to development, understood as an imperative to reduce poverty and enhance human capacities everywhere. Under this reading of the rhetos of development, development becomes the benchmark for the assessment of the multilateral trading rules' success or failure.⁷⁹ It is at this juncture that the "packaging shift" starts to genuinely resemble a paradigm shift, or at least one in the making. Much as this article warns against the growth of a "legitimacy gap" between development aspirations and trade functions in the WTO, it is optimistic in believing that it is in fact only recording a contemporary problem in guidance of the law, and that in the future the asynchronicity and dissonance described here will be a thing of the past.

Moreover, as Sen noted in a not unrelated context, a metaright may, on one hand, remain a mere abstract, background right, or on the other hand, take the form of a concrete, institutional right, using these terms in their Dworkian sense.⁸⁰ The dissonance between the functional legitimacy of the WTO as a trade organization proper, and its aspirational legitimacy as an organization in which the right to development has taken on the guise of a metaright, or at least in which many rules and rule-making dimensions are to be development-guided, is an expression of the tension that arises from "Development"'s practical preservation as an abstract, background right, in the face of the aspirational pressure to concretize and institutionalize it.

⁷⁸ For a study of the potential impact of the UN Declaration on the Right to Development on WTO practice, citing six different possible interpretations of the normative implications of the Declaration, see UN, ECOSOC, *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization* (Study by Prof. Robert L. Howse), UN Doc. E/CN.4/Sub.2/2004/17 (June 9, 2004).

⁷⁹ See *Id.*, at para. 15, suggesting one possible interpretation of the Right to Development as mandating that "the gains from a policy such as trade liberalization are not to be assessed in terms of whether trade is expanded, nor (at least for the most part) by the contribution of trade liberalization to aggregate increases in national wealth or income, but rather by their effects on human opportunities for self-realization".

⁸⁰ See Sen *supra* note 77 at 70-71, referring to RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) at 93.

IV. Trade and Development: The Dissonance and its Implications

On this background, for presentational and narrative purposes, it is once again instructive to turn to Weiler's analysis of the disharmony between judicial and diplomatic dimensions of the WTO, as an analogical starting point for the final stage of this exploration of the incongruity between trade rules and development rhetoric in the WTO. Here I wish to mention some – though not all⁸¹ – of the aspects of the current conduct of the WTO and the Doha Round negotiations in which the dissonance is particularly salient. These are examples of questions and issues in which the new and increasing discursive focus on development encounters difficulties with pre-existing structures of trade law and practice (and vice versa), with ramifications that suggest that legal and institutional reform is necessary. Like Weiler's perspective, the one I offer is essentially "not judgmental but organic";⁸² and with respect to the dissonance presently discussed I would also venture that it is "almost inevitable and its correction, where such correction is needed, will not be painless or without cost especially as there is, in my view, in some cases a certain zero-sum game"⁸³ – here, not between the internal and external legitimacies related to the WTO dispute settlement system, but between the functional and aspirational legitimacies related to the evolving relationship between trade and development in the substantive law and governance of the WTO.

⁸¹ There are others worthy of discussion, most notably the consensus-based decision-making and 'single-undertaking' rule-making process, which make progress of the kind advocated in the rhetos of development unachievable without the consent of all Members in a web of cross-linkaged issue areas. Thus, the organization cannot change, without first amending the way it changes. Faithful to the functional legitimacy considerations of the organization, and fearful perhaps of institutional collapse, many developing countries strongly support existing decision-making practice, even though its procedures fail to translate their growing number and weight into development clout. This is a staid position, but as such it is well-grounded in GATT/WTO functional traditions, best captured in this statement by the Sixth Ministerial Conference Chairman, Sec. John Tsang of Hong Kong: "We want to have, indeed, we need to have, an open, transparent and inclusive process, with nothing new or novel, nothing untried, nothing untested or nothing unfamiliar" (December 2, 2005, online: http://www.wto.org/English/news_e/news05_e/stat_tsang_dec05_e.htm (last visited: Mar. 12, 2006)). This phenomenon, derived from the WTO's political 'growth defects' would not be so problematic for the WTO's aspirational legitimacy, if it were somehow balanced or provoked by judicial findings of the dispute settlement system. Development, however, seems to be a field in which the AB is especially abhorrent of pulling the chestnuts out of the fire for the Membership. Indeed, it is in this areas that the thesis of this article is in close affinity to Weiler's original article on internal and external legitimacy, beyond analogy. Moreover, in this section I am more interested in substance than in process, and will not dwell upon this controversial area of WTO law and practice.

⁸² See Weiler *supra* note 20.

⁸³ *Id.*

1. Purpose: Telos and Nomenclature

"Imagine not being able to distinguish the real cause from that without which the cause would not be able to act as a cause. It is what the majority appear to do, like people groping in the dark; they call it a cause, thus giving it a name that does not belong to it".⁸⁴ By thus referring to Plato's fourth dialogue, and his arguments on the relationship between function, telos (purpose, or end), and the words people use to describe both, I do not presume to enter this pivotal and enduring philosophical (and at times theological)⁸⁵ debate. I only wish to illuminate the scope of the problem of incoherent teleology in today's WTO, and its reflection on the organization's overall legitimacy.

International organizations can be understood as essentially teleological creatures. They are "subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals".⁸⁶ A clear definition of telos, these "common goals", is crucial for any organization because its reasons for existence inform the manner in which it exists, the ways in which it functions. In a cooperative, "Member driven" organization like the WTO, telos is doubly important because it provides a collective guiding beacon for the actions of disparate institutions and a diversely composed membership, a general principle (if not a constitution) against which all positions, measures and decisions must be evaluated and justified. No less importantly, under international law that applies to the WTO (and of which WTO law is a part of), telos translates into the "object and purpose" of a treaty in the light of which it is to be interpreted.⁸⁷

⁸⁴ See PLATO, PHAEDO, 99bc.

⁸⁵ Although controversy over the WTO is sometimes so high as to cause some to perceive the WTO as representing a "religion"; see Justina Legoe, *No WTO Protest Roundup*, REPORTAGE, Magazine of the UTS and the Australian Centre for Independent Journalism, Nov. 2002, available at: <http://www.reportage.uts.edu.au/stories/2002/political/nowto2.html> (last visited: Dec. 11, 2005)(quoting an anti-WTO protester as saying that "The religion of the WTO is neo-liberalism and their Jesus is Adam Smith"; the sadly informed speaker seems oblivious to the theoretical and practical gaps between the WTO, neo-liberalism and Adam Smith).

⁸⁶ See International Court of Justice, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of July 8, 1996 (Preliminary Objections), request by the World Health Organization, at para. 19.

⁸⁷ See Article 31(1) of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 Jan 1980, 1155 UNTS. 331; and Article 3.2 DSU.

The telos of the GATT/WTO has traditionally been quite clear – the goal of trade liberalization.⁸⁸ Even when confronted with growing tensions with other legitimate policy goals, the centrality of this historical telos has never been questioned in earnest⁸⁹ – indeed, the distinctiveness of the telos of trade in the GATT/WTO is the lightning rod that attracts much of the popular criticism raised against it by proponents of non-trade interests. The trade liberalization telos has so far also proven resilient in the face of claims that development and trade expansion are decidedly *not* one and the same. The insertion of a preambular recital relating to developing countries in the 1994 WTO Agreement did not alter the traditional telos – rather, it reinforced it: the relevant paragraph provides that in the WTO, efforts shall be designed to ensure that developing countries "secure a share in the growth of international trade commensurate with the needs of their economic development".⁹⁰ The central goal thus remains the expansion of trade, and only a secondary effort should be made to spread its benefits; the traditional telos is trade, not development as such.

Nevertheless, the rhetos of development that now pervades the trade discourse, inevitably leads to uncertainty and ambiguity in the definition and perception of the WTO's telos, breaking with the simpler purposefulness of the past. Nothing symbolizes this aspect of the current dissonance in the WTO more straightforwardly than the most obvious contemporary gap in nomenclature: we are, after all, in the midst of negotiations in the World Trade Organization, that have been labeled a *Development* Round. Is the telos

⁸⁸ See section II *supra*. Of course, the telos need not be phrased identically to convey the same essence of purpose, e.g. "The Telos of the WTO is to combat official restrictions on trade" (see Steve Charnovitz, *The World Trading Organization and Law Enforcement*, Council on Foreign Relations, 6 March, 2003, available at <http://www.cfr.org/publication.html?id=5860> (last visited: Dec. 7, 2005)).

⁸⁹ Nonetheless, the WTO Appellate Body has demonstrated significant willingness to incorporate non-trade considerations, such as environmental protection, into its decisions, as in *Shrimp-Turtle*, *supra* note 45 at para. 153: "this language [of the first preambular paragraph of the WTO Agreement] demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development" (at para. 153). Environmentalists may see this as an acceptance of sustainable development as an overriding concern in the WTO (see, e.g., UNCTAD-ICTSD, *RESOURCE BOOK ON TRIPS AND DEVELOPMENT* (2005)), but even here, the pure telos remains economic expansion, with sustainable development regarded as an additional consideration to be integrated with it, if not an impediment to its achievement. That this judicial statement was not intended to rewrite the telos of the GATT/WTO is made clear in the subsequent sentence in the same paragraph of the *Shrimp-Turtle* Report, in which it is clarified that the goal of sustainable development (in this case relating specifically to environmental rather than developmental concerns) must add only interpretative "colour, texture and shading", not substance.

⁹⁰ See *supra* note 1, second preambular recital.

then trade, or is it development? To say that the telos is some combination of both trade *and* development merely begs the question, for we must then either assume that trade liberalization *is* development, ignoring all claims to the contrary;⁹¹ or, if this assumption is rejected, then we must set out to identify the intrinsic finality of the WTO's telos – trade *or* development. Importantly, it is not necessary to choose between these challenging options nor to engage in a substantive discussion of economic policy to acknowledge the problem I am noting here.

This incoherence of purpose may be awkward enough, but it becomes even more problematic when one concedes that in current rhetoric, the telos of development seems to be gaining importance over trade. Consider this statement by WTO Director-General Pascal Lamy, on the eve of the December 2005 Hong Kong Ministerial Conference: "Le développement c'est la *raison d'être* du Cycle de Doha".⁹² Or the even more visionary, nigh-Senian post-Hong Kong statement by the same speaker: "we need to remember that *trade is only a tool to elevate the human condition*; the ultimate impact of our rules on human beings should always be at the centre of our consideration".⁹³ These statements are not unique, of course, nor is Lamy alone in voicing their sentiment; but if proclamations such as these are not to be discarded as merely empty rhetoric, their interpretation implies, first, a recognition that development as a goal is qualitatively and appreciably different from mere trade expansion, if only because trade liberalization in itself could not justify (or even permit) either the launch of the current round of talks, or its ultimate conclusion in the future. Second, they signal that in the Development Round the telos of the WTO is being transformed, at least in the eyes of some, into a telos of development, that may not supplant or displace the telos of trade entirely, but is superior to it – that development *is the* intrinsic finality, a metaright or meta-telos to be served by all other purposes of the WTO.

⁹¹ Indeed, for many traditionalists, the enhanced development goal of the WTO only means that the original objective of trade liberalization should be pursued still further in the current round, for the classical welfare-enhancing reasons, which to them are synonymic with development; *see e.g.*, William R. Cline, *Doha and Development*, 87(4) FOREIGN AFFAIRS (2005).

⁹² Pascal Lamy, Statement to the WTO Committee on Trade and Development, Nov. 28, 2005 (original emphasis), *available at*: http://www.wto.org/english/news_e/news05_e/stat_lamy_28nov05_e.htm (last visited: Nov. 30, 2005)(emphasis added).

⁹³ Pascal Lamy, Speech entitled "Humanising Globalization", Santiago de Chile, Chile, Jan. 30, 2006, *available at*: http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm (last visited: Jan. 31, 2006)(emphasis added).

And yet it may be the case that as far as such teleological aspirations of "developmentification" are concerned, the WTO and its Members in such statements are "groping in the dark", simply giving the WTO a "name that does not belong to it", guilty of Plato's charge.⁹⁴ Form follows function, and function follows purpose, but in the WTO the ostensible shift in telos from trade to development is incomplete and risks superficiality, is not supported by a corresponding change in its actual workings. Not even the most naïve of national delegates to the WTO's 2005 Sixth Ministerial Conference in Hong Kong, if asked, would claim that "we have created a development organization". Indeed, we are continuously reminded by WTO insiders and observers that the WTO "is *not* a development organization".⁹⁵

They are right. Were the WTO to disappear from the face of the earth tomorrow, as its fiercest opponents might daydream, and in the consequent institutional and normative void an international conference of plenipotentiaries were to be called to design and establish an effective *development* organization that would regulate international trade, writ large, for this purpose, there is little reason to believe that the resultant organization would resemble today's WTO. But, most of the time, it serves the aspirational legitimacy of the WTO to pretend otherwise. And so, the "development"

⁹⁴ Some see this situation in the starkest of terms: See Joseph Stiglitz, *The Development Round that Wasn't*, Project Syndicate, 2005, available at: <http://www.project-syndicate.org/commentary/stiglitz65> (last visited: Dec. 31, 2005): "Both as it was conceived, and even more as it has evolved, today's Development Round does not deserve its name. Many of the issues that it has addressed should never have been on the agenda of a genuine development round, and many issues that should have been on the agenda have not been".

⁹⁵ Emphasis added. See, e.g., Michael Moore (former WTO Director-General), *Trade, Poverty and the Human Face of Globalization*, Speech delivered at the London School of Economics, June 16, 2000, available at: http://www.wto.org/english/news_e/spmm_e/spmm32_e.htm (last visited, Nov. 11, 2005); Bernard Hoekman (Senior Advisor in the World Bank's Development Research Group), *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8(2) (2005) J. INT. ECON. L. 405; Harald Kreid (Austrian representative to the Geneva UN Organizations), *Some Issues Involved in WTO Accession*, in UNCTAD, UNCTAD/DITC/TNCD/1, WTO ACCESSIONS AND DEVELOPMENT POLICIES, 2001, available at: http://www.unctad.org/en/docs/ditctncd11_en.pdf (last visited: Dec. 11, 2005); intervention by Hoe Lim (WTO representative), UN Press Release, *Committee on Economic, Social and Cultural Rights Concludes Discussion on Cooperation with International Organizations*, CESR, 25th Session, May 7, 2001, available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/378F2362FA1F09A7C1256A4600273CE8?op=opendocument> (last visited: Dec. 12, 2005); and Kim Hyung-Chong (Minister for Trade, Republic of Korea), *Regionalism, Development and Political Direction: Major Challenges for the WTO in the 21st Century*, remarks at WTO public symposium, April 20, 2005, available at: http://www.wto.org/english/news_e/events_e/symp05_e/kim_e.doc (last visited: Dec. 11, 2005).

nomenclature is convenient.⁹⁶ It is problematic, however, in that it encourages demands for real, substantive, functional change that the WTO and its Members have so far been unwilling to make. Imagine a footwear producer marketing "hiking boots" as "track shoes" to the barefoot without making any palpable functional changes in the item's design.⁹⁷ This is what the language of the "development" round is to the WTO, without any hint of fundamental reform – a change in labeling and packaging, little more.

In practical terms, setting nomenclature aside, the conversion of the trade rules and mechanisms of the WTO to a development-prioritized telos may be likened to the challenge of the large-scale conversion of military industries to dynamic civilian markets.⁹⁸ But in facing this test, the WTO runs up against its deeply seated stakes in its functional legitimacy, that relies on its proven effectiveness as a trade liberalizing mechanism. It also encounters a difficulty, more human in nature, in that the majority of WTO practitioners, in law, economics and policy, are indoctrinated with the rule(s) of trade, and it is no simple task to redirect these cohorts to a fundamental development perspective. Nevertheless, such a redirection may be underway. The legitimacy gap between function and aspiration will exert a pressure for change that will be impossible to withstand if the WTO is to persist. As far as nomenclature is concerned, my preference would have been for a development-focused project in the clothing of a trade organization (a "World Trade" organization intent on development and poverty alleviation), rather than the reverse, a "Development Round" that is more-of-the-same trade liberalization bargaining with little or no true emphasis on development.

⁹⁶ Again, Weiler's words, written with respect to WTO dispute settlement terminology, are at least as potent with respect to the nomenclature of WTO substance.

⁹⁷ The footwear analogy builds on a previous one made in Sutherland Report *supra* note 35 at 11: "Open trade is also condemned as a prescription that ignores the maxim that 'one [shoe] size fits all' [...] Yet there is a fundamental decision to be made by governments on whether they to go barefoot or wear shoes at all" (emphasis omitted).

⁹⁸ On the problems associated with this conversion, see UNDESA/UNDP, *Restructuring and Reform Business Development Opportunities in Military Industry Conversion to Civilian Markets*, ST/TCD/SER.E./63, 1998, available at: <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN000468.pdf> (last visited: Dec. 12. 2005).

2. Defining Development: Policies, Needs and Interests

The abstract confusion relating to the grand question of WTO telos translates into genuine perplexity when the language of the WTO agreements already explicitly requires that due regard be given to "development" as a legal term. For just like a *Matryoshka* nesting doll, within the question of the overall role of development in the WTO, lies the question that may be troubling the reader since this article's first page, "what *is* development?", and within that lies, in turn, the question "what are development "needs" or "policies" or "interests?", as the textual case may be? And what is the substantive relationship between these terms? For, rhetoric aside, if development is not yet a meta-right in the WTO, it is nevertheless an (undefined) operative term in some of its legal texts, such as the Special and Differential Treatment provisions of Article XII:3(d) GATT, Article XVIII GATT, Article 21.2 DSU, Article 3(c), 5 and 6 of the Enabling Clause, and Article 27.4 of the Agreement on Subsidies and Countervailing Measures (SCM).⁹⁹ And despite the rhetos of development, there is no consensus, or lesser degree of accord, on the substantive content of these terms.

Beyond the stagnation in negotiations on Special and Differential Treatment,¹⁰⁰ this definitional problem is reflected in the inability or unwillingness of the dispute settlement system to make any meaningful pronouncements on the legal implications of "development" in the WTO, even when the term is written into the agreements. Seven years ago, the WTO Appellate Body was confident enough to make a singular sweeping positive legal proclamation on the ins-and-outs of development, even when transcending the bounds directly related to trade.¹⁰¹ Moreover, in most cases, certainly more recent

⁹⁹ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 231 (1999).

¹⁰⁰ Despite the multitude of specific issues to be tackled in negotiations on Special and Differential Treatment, talks in the Doha Round have spent themselves on discussing whether these topics should be discussed as cross-cutting issues or rather, each in its own legal sector. For the state of play at the time of writing, see *CTD-SS Continues Examining S&D Proposals*, 10(8) BRIDGES WEEKLY TRADE NEWS, Mar. 8, 2006, available at <http://www.ictsd.org/weekly/06-03-08/story3.htm> (last visited: Mar. 11, 2006).

¹⁰¹ See *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (1999), WTO Doc. WT/DS90/ABR (Appellate Body Report), para. 126-128: "[W]e are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue [...] If India were asked to implement agricultural reform or to scale back reservations on certain products for small-scale units as indispensable policy changes in order to

cases, the Appellate Body has avoided making decisions that purport to say anything as charged about "development", let alone its legal consequences. In one report, a Panel followed the path of deference, going so far as to state that "it is the developing country Member itself which is best positioned to identify its development needs";¹⁰² but in effect, and on appeal, the same issue was determined on a procedural, burden of proof issue.¹⁰³ In the *GSP* case,¹⁰⁴ the Appellate Body recognized the possibility that different developing countries may have different "development needs", that might justify different treatment by developed countries under certain conditions,¹⁰⁵ but in analyzing the EC's conditional "drug arrangements", refrained from addressing the fundamental question of the extent to which these arrangements could in fact be seen as responsive to developing countries' needs at all,¹⁰⁶ rather than to the EC's own social problems – even though it appears to have been aware of both the general definitional problem,¹⁰⁷ and the more specific one relating to the appropriateness of the EC's arrangements in an international development context.¹⁰⁸ Article 21.3(c) DSU arbitrators have been similarly bewildered when tasked with considering precisely how "interests of developing country Members" should affect their determinations of the reasonable period of time allowed for implementation of adopted WTO reports,¹⁰⁹ usually simply bypassing the core issue involved on bases akin to judicial economy.¹¹⁰

overcome its balance-of-payments difficulties, such a requirement would probably have involved a change in India's development policy".

¹⁰² See *Brazil – Export Financing Programme for Aircraft* (1999), WTO Doc. WT/DS46/R (Panel Report) at para. 7.89.

¹⁰³ See *Brazil – Export Financing Programme for Aircraft* (2000), WTO Doc. WT/DS46/AB/R (Appellate Body Report) at paras. 134-141.

¹⁰⁴ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), WTO Doc. WT/DS246/AB/R (Appellate Body Report) (the "*GSP* case").

¹⁰⁵ See *Ibid.* at paras. 157-174.

¹⁰⁶ See *Ibid.* at para. 179: "we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to "respond positively to the development, financial and trade needs of developing countries".

¹⁰⁷ See *Ibid.* at para. 63 (stating that the existence of a development need must be assessed "according to an *objective* standard" (original emphasis)).

¹⁰⁸ See *Ibid.* at fn. 335 (referring to the European Communities' argument that drug production entails "particular problems for developing countries", without passing judgment on the argument). For detailed discussion, see Gregory Shaffer and Yvonne A. Mensah, *Institutional Choice in the General System of Preferences Case: Who Decides the Conditions for Trade Preferences? The Law and Politics of Rights* 39(5) J. WORLD T. (2005) 977.

¹⁰⁹ See *Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) DSU* (2000), WTO Doc. WT/DS110/14, at para. 45: "although cast in quite general terms, because Article 21.2 is in the DSU, it is not simply to be disregarded".

¹¹⁰ See *European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) DSU* (2006), WTO Doc. WT/DS269/13, at para. 82: "Having

This twilight zone of WTO jurisprudence is symptomatic of the uncertain legal effects of the trade-development dissonance in the context of legitimacy. On the one hand, judicial resistance to a robust injection of development concerns into the jurisprudence is functionally comforting in that it does not disrupt the heritage of trade-based rules. It is not unjustified, given the insufficient resolution and definition of rules relating to development policies, interests and needs in the legal texts themselves. But to the extent that these rules ultimately have little real impact on problems of poverty and development in developing countries, they end up belonging to the rhetoric of development, not its practice, promoting unwarranted aspirations with the disappointment that may follow them. This does not bode well for the implementation of post-Doha Special and Differential Treatment rules that refer to development, unless they offer the definition - specification and concretization – that the dispute settlement system would need in order to turn them into living letters with significant development effects.

3. Classification and Discrimination: Developing Country Status, Differentiation and Graduation

This is perhaps the most intricately tangled set of legal and systemic dilemmas relating to the position of "development" in the multilateral trading system. Which Members are eligible for differential treatment, and when? Should they be distinguished one from the other, so as to receive different rights and forms of economic treatment, and if so, on the basis of which criteria? And indeed, when does a Member cease to be a "developing" country? In legal terms, these questions threaten the functional neatness of the credo of MFN and the dynamic of multilateralism. Politically, they involve multi-

arrived at the shortest period of time possible, I consider that the reasonable period of time for implementation is not additionally affected by the fact that Brazil, as a complaining Member in this dispute, is a developing country"; similarly, *see* US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) (2005), WTO Doc. WT/DS285/13, at para. 62-63; and EC – Conditions for the Granting of Tariff Preferences to developing Countries – Arbitration under Article 21.3(c) (2004), WTO Doc. WT/DS246/14 at para. 59. In EC – Export Subsidies on Sugar – Arbitration under Article 21.3(c) DSU (2005), WTO Doc. WT/DS265/33, WT/DS266/33, WT/DS283/14, at paras. 100-101, Arbitrator A.V. Ganesan considered certain evidence relating to the sugar industry as demonstrating the interests of Brazil and India as developing countries to be relevant to the determination of a reasonable period of time, i.e., Article 21.3(c) was construed *verbatim* as referring to the *interests of* developing countries, as the arbitrator may deem relevant, not necessarily to their *development interests*.

dimensional and subtle conflicts, not only between developed and developing countries, but between and among groups of developing countries themselves. For these reasons they are unpopular questions in the "development community". Yet they cannot be evaded indefinitely, for there solution will be necessary for the organization's aspirational legitimacy.

It is one of the oddities of the WTO's legal system that it does not define which Members should be treated as "developing countries" under differential rules, nor does it set out procedures for such definition. Art. XVIII GATT provides the closest to a definition of developing countries,¹¹¹ but its language is vague, archaic and uncertain in its applicability. Developing country status is ultimately a voluntary, self-elected matter. The judicial system has not, to date, demonstrated a capacity to cope with the question of developing country classification. Case in point is China's claim before a Panel and subsequently, before the Appellate Body, that Article 9.1 of the Agreement on Safeguards¹¹² should apply to it as a developing country, in its first complaint in the WTO.¹¹³ With little to no positive legal basis to cling to, the debate between China and the US deteriorated to an almost childish "yes I am", "no you're not" kind of argumentation.¹¹⁴ Not surprisingly, both the Panel and the Appellate Body avoided ruling on China's status, on the basis of judicial economy.¹¹⁵ In contrast, Least Developed Countries ("LDCs") are a category of Members recognized as such in accordance with empirical criteria set by the United Nations.¹¹⁶ In the WTO these apply to only 32

¹¹¹ Art. XXVIII GATT applies to "contracting parties the economies of which can only support low standards of living and are in the early stages of development".

¹¹² Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999).

¹¹³ United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WTO Doc. WT/DS248/R (2003)(Panel Report); and United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WTO Doc. WT/DS248/AB/R (2003)(Appellate Body) ("US – Safeguards").

¹¹⁴ Anecdotally, witnesses to the oral arguments before the Appellate Body confirm this observation, which is evident from the written submissions. *See* US – Safeguards (Panel Report), para. 7.1882: "The United States submits that China's sole argument in support of its claim to be a developing country Member is the assertion that it is, and has always claimed to be, a developing country Member, especially when it acceded to the WTO". And compare paras. 234-2345 and 260 of the US – Safeguards Appellate Body Report.

¹¹⁵ *See* US – Safeguards (Panel Report), para. 10.714. and US – Safeguards (Appellate Body Report), para. 508.

¹¹⁶ *See* Office of the High Representative for the Least-Developed Countries, Landlocked Developing Countries and Small Island Developing States, online: <http://www.un.org/special-rep/ohrrls/lcd/lcd%20criteria.htm> (Last Visited: March 12, 2006).

Members; by definition, large economies such as India and Brazil cannot qualify as LDCs.

Self-election of developing country status is a misnomer, however, because it is subject to a broad range of political and economic pressures from developed states.¹¹⁷ This ultimately results in a patchwork of differential application of derogations, with many Members invoking (or being allowed to invoke) developing country status in some areas, but not in others.¹¹⁸ Indeed, a state may be recognized as "developing" by one Member for a given purpose, but not by another. China has even (unsuccessfully) argued against the legality of this situation.¹¹⁹

The threshold question of developing country identification loses some of its significance when one realizes, even only on the basis just described, that in practice there is no single legal circumstance of "developing country status", in the multilateral system proper, even without considering the "spaghetti bowl" of regional trade agreements, with their widely disparate provisions. Indeed, the need – and power – to differentiate between developing countries, within the GSP, has been acknowledged and legally sanctioned by the WTO Appellate Body.¹²⁰ The legitimate basis for such distinction is the developing country's development needs – but as discussed above this remains an empty vessel. Nevertheless, the general principle that the system should allow differentiation between developing countries on the basis of their differing development needs is sensible and highly relevant to the potential satisfaction of development expectations. Policy choices of international social redistribution and economic intervention, can rest only with difficulty on a legal mechanism of formal non-

¹¹⁷ Thus, in some cases eligibility for Special and Differential Treatment is in fact determined according to developed country interests, not development needs, much like the way preferences under the GSP are determined by the preference granting Member. On the latter, *see* Shaffer and Mensah *supra* note 108.

¹¹⁸ E.g., the varying commitments made by China upon its accession, some reflecting development country status, others not (*see* Protocol on the Accession of the Accession of the People's Republic of China, WTO Doc. WT/L/432 (2001)). Even advanced states like Israel or South Korea still invoke developing country provisions in various circumstances.

¹¹⁹ *See* US – Safeguards (Panel Report) *supra* note 113, para. 7.1863: "Further in China's view, it is not possible that a single Member be considered a developing country by, say, the United States and not the European Communities and others in respect of the same dispute or the same provision. To proceed otherwise would deprive WTO developing country Members from all legal certainty as far as their rights and obligations under WTO Agreements are concerned. To proceed otherwise would also be in contradiction with the need for a multilateral approach of the "special and differential treatment" provisions within the WTO".

¹²⁰ In the *GSP* case, *supra* note 104.

discrimination; quite the contrary, they necessitate degrees of "positive discrimination" or "affirmative action", not only between the rich and the poor, the developed and the developing, but between different sorts and categories of developing economies.

Moreover, any formalization of differentiation smacks of discrimination that might unsettle MFN as a fundamental principle of the WTO's trade functionality, regardless of its pervasive erosion through regionalization. The system therefore prefers an informal and inevitably non-transparent system of differentiation. The dynamic range of this kind of *de facto* differentiation is restricted from the outset to the array of preferences established by developed countries and the vague provisions of Special and Differential Treatment in the WTO Agreements. It can offer little more in terms of benefits or re-alignment between developing and developed countries. It is thus firmly nested and bounded by the heritage and ethos of the rules of trade, and hence its development effect is limited. Furthermore, any proposal to formalize differentiation beyond the developing country/LDC divide¹²¹ is treated with suspicion by developing countries, who fear that anything untried, untested and unfamiliar¹²² might establish a manipulative, "divide and rule" system of *de jure* differentiation. If such proposals are not augmented by clear development policy justifications, these suspicions may not be without merit. But as a result, developed countries may be less willing to grant concessions to developing countries because they cannot discriminate against those of them who might already pose economic competition.

The clash here between function and aspiration is subtle yet critical. The multilateral trade regime is built on the foundational myth of MFN, an indivisible normative absolute. Development, however, may require degrees of relativity and divisibility. The tarnished, functional myth may have to step aside in favor of new expectations and aspirations.

¹²¹ See EC Proposal, *Making Hong Kong a Success: Europe's Contribution*, Brussels, 28 October 2005, online: <http://www.delphi.cec.eu.int/docs/EU%20offer%2028%20Oct%202005.pdf> (last visited: March 12, 2006); and *EU's Price for Farm Tariff Cuts Too Steep, Say Developing Countries*, 9(37) BRIDGES WEEKLY TRADE NEWS Nov. 2, 2005, available at <http://www.ictsd.org/weekly/05-11-02/story2.htm> (last visited: Mar. 12, 2006) (describing an EC proposal to differentiate between four categories of non-LDC countries – "advanced developing countries", "developing countries", "poorer developing countries" and "small and vulnerable economies"). It is safe to say that this proposal was never seriously considered.

¹²² To paraphrase the speaker in fn. 81 *supra*.

4. (Im)balance: The Role of Reciprocity and Special and Differential Treatment

The expectations of development should provoke serious and systematic reconsiderations of the centrality of reciprocity as an organizing principle in the WTO. This is a fundamentally important issue that exemplifies the interplay between functional and aspirational legitimacy in the WTO. Reciprocity was tremendously important to the functional success of the GATT/WTO system as trade-liberalizer during the decades in which tariff-reduction was its main task. Technically, it remains a convenient organizing principle for both negotiations and enforcement. There is, however, something mechanistic and insensitive about the reflex of reciprocity that makes it unsuitable for a legal and institutional system that aspires (even partially) to promote development in poorer countries rather than simply reduce barriers to trade. This is particularly true in an international economic regulatory environment that is far more complex than a tariff-based one. For what does reciprocity actually *mean* when the question at hand relates to the indeterminate economic and developmental implications of the proposed extension of "additional protection" under Article 23 TRIPS to geographical indications for products "other than wines and spirits"?¹²³ Or, more broadly, in trade in services, where the potential distributional effects span sectors with such varied development dimensions such as blue-chip lawyers and blue-collar construction workers, yet all are regulated by the same instrument, the GATS? And, for that matter, what does "Special and Differential Treatment" mean, in practice and potentially, in these and other contexts?

I would not purport to seriously deal with any of these issues and many others like them in this short article. Rather, I wish to point out some of the 'cross-cutting', fundamental problems with the principle of reciprocity itself in the development context, beyond its ultimate incommensurability and immeasurability in many branches of modern international economic law. Reciprocity is unsatisfying as a legal principle of trade regulation aimed at development if only because its focus "is not on the welfare or growth prospects of members, or on the identification of "good" policy, but on ways that national policies impose costs on other countries".¹²⁴ Reciprocity gauges concessions –

¹²³ On the complexity of this issue, see Tomer Broude, *Culture, Trade and Additional Protection for Geographical Indications*, 9(9) BRIDGES MONTHLY, Sept.-Oct., 2005, available at <http://www.iprsonline.org/ictsd/docs/BridgesMonthly9-9GIs.pdf> (last visited: Mar. 11, 2006).

¹²⁴ See Hoekman *supra* note 35 at 15.

top-down, reductions of negative externalities – not positive relative contributions to welfare, or improvements in comparison with the starting conditions of the negotiating Members. In addition, other problems make it difficult to reconcile reciprocity – a principle intended to *maintain* balance, an instrument of *status quo* – with development aspirations that aim to *alter* and *reduce* imbalance, to produce change. Indeed, unlike the mathematical meaning of the term,¹²⁵ "reciprocity" in the GATT/WTO is almost synonymous with the more geometrical meaning of "symmetry". Each Member is expected to quantitatively mirror the concessions granted and costs borne by other Members. Beyond whatever concrete problems the requirement may raise for developing countries, this is conceptually at odds with the emerging contemporary formulation of the problem of international development, which focuses rather on *asymmetry*.¹²⁶

The mercantilist logic of reciprocity also means that the developed country "concessions" most needed and sought after by developing countries are the ones that are the costliest or most difficult for them to procure – not necessarily because they impose the greatest costs on developed countries, but because the specific demand for them is highest. One need only think of the difficulties encountered by African countries seeking solutions to the problems of access to HIV/AIDS medicine, or the abolition of developed country subsidies on cotton, to see that these were/are not necessarily the most sensitive cases from the developed country perspective, but only that the developing countries had little to offer in terms of reciprocal "concessions".

In a different vein, the reciprocity mindset traps developing countries into considering every step towards market liberalization as a costly concession, to be made only when reciprocal concessions are tendered by developed countries. Thus, although freer trade should in theory be developmentally beneficial without reciprocity, developing countries may be conditioned to take prudent economic decisions only grudgingly, at least for negotiation purposes. Matters are made worse when developed *demandeurs* (somewhat disingenuously) overstate the claim that their own demands are not entirely self-serving but mainly pro-development measures, and that developing countries should be fulfilling them of their own will. The negative effect of the reciprocity game is compounded still further when developing countries are faced with claims that unilateral

¹²⁵ In mathematics, "reciprocals" are the "multiplicative inverse" of each other, numbers whose multiplication with each other gives the product of 1, e.g., 5 and 1/5, or 3/4 and 4/3.

¹²⁶ See *supra* text accompanying fn. 3-4.

liberalization steps previously taken – such as reductions of applied tariffs beyond the GATT-bound rate – should not be counted to their credit in future tariff cuts, a claim that was raised in the initial stages of DDA discussions on tariff reductions in non-agricultural market access.

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The gap between the rule(s) of trade and the rhetos of development, between function and aspiration, is not insurmountable. Indeed, while this article has depicted it as a potential source of disappointment, discontent and disquiet, there is a sub-text, suggesting a more optimistic scenario. With all its legal and institutional gravity, for better and for worse, the WTO is the international forum with the best potential for addressing the trade needs of developing countries. The foundations of its functional legitimacy can and should become a leverage point for development and the fulfillment of the conditions of its aspirational legitimacy, not an obstacle.