

(Conference Draft)

“The Future of the World Trade Organization: From Development Perspectives”

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A book on international trade law and development may strike some as brave, or even foolhardy, as there is no consensus on what is ‘development’, how to measure it, what causes it, or what law has to do with it. The forthcoming book, *Law and Development Perspective of International Trade Law* (Cambridge University Press, forthcoming 2011), does not resolve those great questions, but discusses in considerable detail issues that have arisen, and are likely to continue to arise, in the connection between international trade law, especially but not limited to the World Trade Organization (‘WTO’),¹ and development.

Trade is not an end in itself, but a means to improve human welfare (as is development). Since the end of World War II, the global economic system has produced a better than fifty percent improvement in life expectancy in developing countries, a better than ninety percent reduction in maternal and infant mortality, eighty percent of the world’s population now has access to clean drinking water, and billions of people have been lifted out of poverty. The work is far from done – roughly thirty percent of the world’s population is still poor, but for the first time there is at least reason to believe that most of those can reach a better level of welfare than they have now.

The global economic system that provided these benefits is, of course, not a system at all. Governments have a lot to do with managing (and sometimes mismanaging) the process, both through formal international organizations such as the WTO, IMF, World Bank, and regional organizations, but also through fluid informal mechanisms such as G-7/8/20/xx coordination at head of government and ministerial levels. The much-derided United Nations helped prevent the destructive wars that marked the first half of the 20th Century, as did very careful management (to date, at least) of the nuclear standoff between the United States and the Soviet Union/Russia. A united Western Europe provided the longest period of internal peace since at least 843 CE. Governments also learned how to live with the ‘invisible hand’ of literally tens of millions of private enterprises which provided much of the economic growth and welfare improvements. And universities and private non-profit groups provided much of the research and dissemination which made possible the productivity improvements which had taken the world out of the Malthusian trap which had kept almost every person in the world living at bare subsistence levels until the 19th Century (for example, the growth of the world’s food supply since World War II is a complex interaction of increasingly well-educated farmers, university research, and

¹ The attached draft will be included in the forthcoming book, Y.S. Lee et al. (eds.), *Law and Development Perspective of International Trade Law* (Cambridge University Press, forthcoming 2011) as a concluding chapter. The WTO follows and builds on the failed International Trade Organization (‘ITO’) of the post-war arrangements, and the successful-beyond-anyone’s-dreams General Agreement on Tariffs and Trade (‘GATT’). The ITO negotiators had devoted considerable time to development issues. Even the pruned-down GATT, with ‘only’ 23 members (which included leading developing countries such as Brazil and India, as well as a majority of the WTO’s existing 154 members, since it included, whether they wanted it or not, the colonies of the colonial powers such as Britain and France who were original members) had some special provisions for developing countries, and added more within a few years.

international consortia including governments, universities and the Rockefeller and Ford Foundations).

Trade policy, and international trade law rules, played a major role in this achievement.² This book discusses many of those aspects. While clear conclusions are difficult, some of the issues are worth considering:

1. The classical international trade rules -- tariff bindings, unconditional most-favored-nation, and national treatment -- seem to have held up reasonably well for developing countries. South Korea is a good example. South Korea was perhaps one of the poorest countries in the world in 1960. The post-war GATT system provided South Korea two sets of benefits:
 - South Korea, once it joined the GATT, had ‘bound’ access to developed country markets, which South Korean policymakers used as an important part of an export-led development policy.
 - Probably the main benefit of the GATT system for South Korea was the prosperity it helped create among developed countries, which helped create a market for South Korea. Interestingly, South Korea, as a medium-sized developing country, could build an industrial base by gaining relatively small shares of developed country markets (despite much talk about South Korean automobile exports, South Korea’s share of the U.S. automobile market (split among several producers) never reached ten percent, even in the very unusual circumstances of 2009). As many have noted, North Korea eschewed this path – and remains poor.

The full benefits of international trade rules are only available to WTO Members. Thus, the process of accession to the WTO becomes relevant. As explained in this book by Andrew D. Mitchell and Joanne Wallis through the cases of Tonga, Vanuatu and Samoa, the process of accession to the WTO is lengthy and demanding; and the way the principle of special and differential treatment operates in practice in this context, transforms that

² Trade alone does not lead to development. But trade from early times provided necessities (such as salt), luxuries, (Mediterranean archeological sites include amber from the Baltic), and high tech weapons (such as the obsidian from the upper West of the U.S. found in Mexican sites). Most importantly, for purposes of this book, trade permits specialization of labor. The first ‘trade’ was probably families, or perhaps clans, leaving goods on river banks for another clan or family to trade. If the other party did not reciprocate, the ‘game’ was over. A key point this early is that trade – and indeed all ‘foreign relations’ – was inherently ambiguous: trade provided the necessities/luxuries/weapons/better choice/more wealth than otherwise possible, but any contact with ‘The Other’ was inherently dangerous. Family A could not take its goods across the territory of Family B to trade with Family C without the likelihood of being killed, but Family A could trade with Family B, which could trade with Family C. The Silk Road was a very long version of that transfer, with goods moving further than people, although people were surprisingly safe – sovereigns along the route had worked out that it was more prosperous to allow trade than to simply seize the goods for themselves and kill the traders.

principle into pure rhetoric. As explained by Mitchell and Wallis, the process of accession to the WTO needs to be reformed to better meet the needs of developing countries, and these reforms should be combined by reforms to special and differential treatment. The great for these needs is demonstrated by the unprecedented choice of Tonga and Vanuatu to suspend their WTO accession processes.

2. Special and differential treatment (SD&T) is more ambiguous in its outcomes. Certainly developing countries, (now OECD Members!) such as South Korea, Japan, Mexico, and others were able to use SD&T status to close 'strategic' product markets, for better or worse. But SD&T turned out to be a two-edged sword. Innovative research by Edward Gresser about U.S. tariff policy shows convincingly (at least to me) that SD&T in practice hampered developing country exports to the U.S. The 'headline' from Gresser's research is that Bangladesh pays more tariffs on its exports to the U.S. than does France, even though France exports roughly ten times as much as Bangladesh (and the same is true for many other country pairs). As Gresser points out, the underlying phenomenon is that SD&T meant the developed country negotiators in GATT rounds did not spend much effort negotiating on items of interest to developing countries, because the developed country negotiators knew that they would not achieve reciprocal tariff cuts by the developing countries. So tariff negotiations focused on trade between developed countries, while tariffs on developing country exports remained high. Thus, U.S. tariffs on luxury silk clothing from France range from 0 to low single digits, while tariffs on less expensive cotton clothing from Bangladesh range from 17 to 30 percent. Similarly, U.S. tariffs on stainless steel knives and forks run around 15 percent, while the tariffs on sterling silver knives and forks from developed countries (developed countries are zero or close to it).
3. Tariff Preferences for Developing Countries. The Generalized System of Preferences originated with Raul Prebisch, a brilliant Argentinean who was Secretary-General of UNCTAD in the early 1960s. Prebisch had been one of the original developers of formal import substitution schemes, as a path for developing countries out of monocultural dependence on commodity exports in a period when commodity prices appeared to continually trend downwards, while final consumption products' prices continually rose. By the early 1960s, it was clear to Prebisch that for even medium-size advanced developing countries such as Argentina, the size of the internal market was too small to permit the economies of scale necessary for cost-effective manufacturing. GSP was intended to provide the additional markets so that developing country industries could reach the necessary economies of scale. At that point, a 'virtuous circle' would permit the developing country in question to be 'graduated' from the preferences for that specific product (and eventually from the entire system), thus permitting a different developing country to benefit from the tariff preference for that product.

The data discussed in this book seem to show what has been increasingly argued: that GSP initially helped several industries in several more advanced developing countries, but that the countries most in need of help received the least. This view is elaborated by Caf Dowlah in this book, through an analysis of the US' GSP through the least developing countries' eye, concluding that the scheme is not beneficial to the latter and that therefore some reforms should be made in order to actually address the development needs of those poor countries. GSP was also marred by the (perhaps inevitable) politicization of developed country implementation. Numerous products were excluded, often those most suitable for developing countries (such as apparel). In the U.S., Democrats, led by liberal icon Hubert Humphrey, led the charge to exclude as much as possible, including products (watches!) where the U.S. industry more or less disappeared within ten years.

The U.S. and EU both continually added more and more policy/political conditions (intellectual property rights, expropriation, narcotics controls) with the WTO Appellate Body (in a fit of embarrassing colonialism) providing arguable cover for the proposition that the developed country is the one best suited to determine the development needs of the developing country (perhaps the Appellate Body will find a way to clarify that in some future case). Disputes over product eligibility are often decided following highly political campaigns, where the express needs of developed country multi-nationals are often important – another (if unconsciously) colonial overtone. Even the procedures for renewing preferences (in the U.S., often done retroactively after the tariff preferences have lapsed) prevent reliance on the preferences to build significant manufacturing facilities.

All of these problems have surfaced in greater or lesser form in other preference schemes such as the EU's EBA and EPA programs, U.S. CBI, ATPDEA, and AGOA, and similar programs. The programs remain very important commercially for some industries and for the countries where those industries are located, but overall they have hardly delivered their initial promise (if ever that was possible – by the early 1970's, Prebisch was sufficiently disillusioned with GSP to suggest that the only salvation for Latin America was to negotiate the elimination of new military purchases, at a time when many of the regimes in power were military).

One positive result of the preference systems has been to provide an area where the interests of multi-national corporations and developing countries align closely.

One legal aspect of interest is the role of the Enabling Clause as a tool for development. As explained by Won-Mog Choi in this book, the Enabling Clause was signed in 1979 and further adopted by WTO Members in 1995 without any modification that would reflect the principles of the new trade era. The result is certain inconsistencies between

the text of the Enabling Clause and the development principles embraced by the WTO. Perhaps the text of the Enabling Clause should be amended so as to reflect these principles and therefore allow developed countries to also use the Enabling Clause for negotiating tariff reduction or elimination with developing and least developed countries, in the context of RTAs. As of today, this opportunity is only given to developing and least developed countries among each other.

4. Regional Trade Agreements ('RTA') have had similarly mixed results for developing countries. On their face, many, if not most, of the North-South RTA negotiations are embarrassingly one-sided, with high-tariff, developing countries eliminating tariffs, while low-tariff developed countries keep their panoply of non-tariff barriers, particularly in the trade remedy field. (And the negotiating tactics famously may be even more high-handed than the results). And as developed countries enter into more and more North-South RTAs, the benefits for any one developing country are inevitably diluted. Yong-Shik Lee elaborates on this issue in this book, through an analysis of the economic and geopolitical impact of the US-Korea FTA –in case of approval by the US Congress. Moshe Hirsch also analyzes the flaws on current North-South RTAs and proposed some legal mechanisms to enhance the benefits accruing to developing countries under these RTAs. South-South RTAs have less history. The most important one to date, Mercosur, has managed to hold together despite many challenges, and indeed offers the occasional lesson to the WTO (*i.e.*, dispute settlement proceedings are limited to three months from the date of the establishment of the panel). The real question is the one originally posed by Prebisch – does a South-South arrangement such as Mercosur spur development more than any North-South arrangement would have?

Regionalism and multilateralism both seek trade liberalization, although using different methodologies. As discussed by Mitsuo Matsushita and Yong-Shik Lee in this book, the former option has become a significant alternative to the latter due to a stalled multilateral system. But the proliferation of RTAs also poses a challenge to the multilateral system as RTAs do not generally adopt some important multilateral protections provided under the WTO, such as special and differential treatment. However, as Matsushita and Lee propose, regional rules could be coordinated through, for example, the WTO Trade Policy Review Body, in order to not only seek convergence and harmonization of trade rules, but to also promote the interest of developing countries.

5. The WTO, in short, looks better and better for developing countries. In addition to formal equality, the rules themselves give quite a lot of 'policy space' for developing countries (though at the cost of nearly as much space for developed countries – in the context where the largest markets often set the rules, although it should be recalled that the third largest market, China, is a developing country, with other developing countries also growing in size). Large developing countries visibly throw their weight around just as

much as large developed countries – and [small] medium-size developing countries such as South Africa, South Korea, Chile, Malaysia, New Zealand, and others probably have an impact in the WTO (often by sending skilled officials to Geneva) disproportionately greater than their population would suggest. As the book points out, many of these developing countries played leading roles in the GATT as well. As Faizel Ismail explains in this book, developing countries have been active in the GATT era, as well as in the Uruguay and the Doha Rounds. According to Ismail, the role of developing countries has significantly increased along the road, up to the point at which, in the current Doha Round, these countries are shaping not only the content and the outcome of the negotiations, but also the architecture and trajectory of the multilateral trading system.

6. A much-debated topic is the role of developing countries in the WTO dispute settlement system. Developing countries have had a strong representation on the Appellate Body over the years, and since the EU and U.S. insist in being parties in almost every case, developing countries provide a frequent majority of panel members. Developing country students are strongly represented in ‘feeder programs’ which lead to employment within the WTO system, such as the University of Bern’s World Trade Institute and law school programs such as Georgetown, Columbia and Cambridge.

As more and more countries become involved in dispute settlement, the process becomes more routine, but also poses real challenges internally. The decisions in the cases brought against China on auto parts, intellectual property rights, and trading rights all pose interesting problems internally for the Chinese trade regime, while the decision of the Appellate Body in the U.S. – Softwood Lumber CVD case on ‘specificity’ significantly narrows the policy space for governments seeking to use the system as a development instrument. Large countries, such as the U.S. and the EU, have a structural advantage in WTO dispute resolution by being able to keep a large number of specialized litigators on staff (thus, turning the marginal cost of hiring counsel into a fixed cost). But Brazil has one of the very best track records in WTO dispute resolution, and a very strong institutional structure combining a medium-sized, highly skilled internal staff with outside counsel retained as necessary and typically paid for by the affected Brazilian industry. Some of the decisions coming out of the dispute settlement system are strikingly neo-colonial programs (such as the EU-GSP case mentioned above, or the U.S. *Shrimp-Turtle* case). The *Shrimp/Turtle* decision may reflect a weighting of environmental concerns large enough to permit unilateral action by a developed country against developing countries, but it may also reflect an under-weighting of human rights concerns. (Should the Appellate Body have balanced the environmental concerns of a developed country’s citizens with the human rights of the impoverished fishers in the developing country parties?).

As described by Katherine Fennell and me in this book, there is an imbalance in the access to the WTO dispute settlement system that should be addressed in order to increase the possibility of developing countries pursue development under the existing multilateral trade scheme. As explained by Tomer Broude in his chapter, the international community could also start conceiving certain international economic disputes that involve the interpretation and application of development issues, as part of a new group of disputes –international development disputes- in order to reflect the idea that every dispute settlement mechanism in the international economic law arena, should bear the responsibility of pursuing the development of developing and least developed countries.

Once access is obtained to the WTO dispute settlement system, developing countries could lose cases in the WTO forum, but, as suggested by Taj Bhala and Won-Mog Choi through their analysis of China's first loss in *China – Auto Parts* in this book, those losses are also lessons for the future.

7. The role of human rights and human rights agreements has been broached within the international trading system. Much of the impetus has come from attempts by developed countries to impose developed country labor standards on competitive industries in developing countries (even where the developed countries in question do not formally accept those standards as binding). This issue has been explored by Anthony E. Cassimatis in this book.
8. Perhaps it is inevitable that the GATT, and the WTO, as agreements between sovereign entities, do not really get at the heart of economic development in developing countries (and even some areas and sectors of developed countries). Greater difficulties are often encountered in those countries and sectors, especially by workers in small businesses, than would be the case for big enterprises in developed countries. The term in Brazil is 'cousto Brasileiro' and there have even been attempts to measure it. International trade rules generally do not reflect an understanding of how difficult it is, and how many challenges have to be overcome. Just as the 'microfinance' movement has attempted to deal with this issue in the credit area, perhaps international trade rules need a 'microtrade' framework reflecting the size of the obstacles posed by paperwork, border security measures, the documentation needed to qualify for preferences for developing countries where documentation is difficult; even the concept of access to an international dispute resolution system could be rethought. Indeed, as discussed by Yong-Shik Lee in this book, the 'microtrade' option constitutes a potential mean to reduce or eliminate poverty in LDCs, if implemented correctly.
9. Intellectual property is another area of trade that could be used for pursuing the development of the developing world. One way of doing it, as discussed by Bryan Mercurio in his chapter, is by developing countries maximizing the flexibilities found in

the TRIPs Agreement. This could attract scrutiny from interested actors but, according to Mercurio, it is the only option for countries seeking to prevent the protection of IPRs from becoming a completely one-sided proposition which benefits developed countries at great cost to the developing world.

Finally, the purpose of this book has been to explore some of the existing imbalances between developed and developing countries in the international trade arena, not with the purpose of undermining international trade as such, but to improve it as a tool for development. As explained by Y.S. Lee, Young-Ok Kim and Hye Seong Mun in this book, international trade is a key element for materializing development in developing countries such as North Korea. Colin. B. Picker calls in his chapter for taking into account the special development needs of ‘economic heterogeneous states’ in the international trade arena, so that development is obtained at every state level as opposed to only some of them. Furthermore, through the application of the specificity test to China’s foreign investment policies, Xiaojie Lu considers in this book that the use of international trade law rules should also reflect an acceptable balance between legitimate development objectives adopted domestically and the possible trade distorting effects at the international level of specific governmental measures.