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# SOVEREIGNTY, DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: SOME INSIGHTS FROM WTO DISPUTE SETTLEMENT

*Sannoy Das\**

*In this paper, the author examines the relationship between developing nations and the WTO dispute settlement framework, focusing on the interpretative methods of, and epistemic protocols employed by WTO adjudicatory bodies. The imperialist history of international law in general, and of international economic law in particular, has meant that the sovereignty of developing nations has always been a negotiable commodity, subject to the interests of western capital. The author argues that this imperialist strain has cast its long shadow on the prevailing interpretative methods of the WTO dispute settlement bodies. By leaning in favour of a strict textualist approach, while failing to factor 'development' as a teleological aim of the international trade order, the WTO mechanism has prioritised vague notions of certainty over substantive justice in international trade. Aside from the inherent suitability of such a textualist approach to the furtherance of entrenched neo-liberal ideals, the adoption of formalistic reasoning by WTO dispute settlement bodies narrows the ability of States to claim broad regulatory justifications for their policy choices based on their development interests. Thus, despite the rhetoric of 'development' being at the forefront of the political discourse of international trade in the 21st century, 'development' as such is excluded from the process of WTO dispute settlement. In this way, it is argued that the international trade order retains, as any imperialist system of a governance, a sense of liberal politics while acting through deeply conservative law.*

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## I. INTRODUCTION

Compared to the period between 1947 and 1994, when international trade was subject only to the multilateral rules under the General Agreement on Tariffs and Trade (GATT) 1947, the trade regime since the formation of the World Trade Organization (WTO) in 1995, has become more ‘legalised’. This is a transformation that has included the formulation of a greater number of detailed rules, and has been accompanied by a better mechanism for their enforcement.<sup>1</sup> One important feature of this legalised regime is the dispute settlement function of the WTO, which is far busier than any other international tribunal and which, though not free from critique among legal scholars,<sup>2</sup> has largely been judged as an ‘effective’ forum for dispute settlement. The relationship of developing countries to this ‘legalised’ regime, and to the dispute settlement function, is a vexing question. As a general matter, it is possible to argue that structural elements of WTO dispute settlement, including costs of litigation and time-periods involved, are stacked against the poorest member States. This paper however, examines the interpretive methods and epistemic protocols employed by adjudicatory bodies of the WTO (the Panels and the Appellate Body) with a view to exploring the relationship of the WTO dispute settlement process to the question of ‘development,’ and argues that the interpretive methods load the dice against the interest of developing nations.

The relationship between the idea of ‘development’ and international trade is as old as the concept of free trade itself. Ricardo’s theory of comparative advantage, which is at the heart of the liberal international trade order, was premised on the increased income of all nations participating in free trade. But as the years of the long nineteenth and early twentieth centuries have shown, free trade ideology has been intrinsically connected to the colonisation of large parts of the globe and the imperial interests of western capital.<sup>3</sup> The legal architecture supporting this ‘imperialism of free trade’ has been the international law fashioned by the colonial encounter,<sup>4</sup> at the core of which lies the construction of ‘sovereignty’ of western

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1 Joost Pauwelyn, ‘Transformation of World Trade’ (2005) 104 Michigan Law Review 1.

2 See C A Thomas, ‘Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement’ (2011) 14(2) Journal of International Economic Law 295 (dealing with the repeated errors of Panels and the Appellate Body in accepting, and using econometric evidence). There is also the criticism that Panels and the Appellate Body have overreached the political masters of the WTO. For a review of this, see Lorand Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’ (2004) 53(4) International & Comparative Law Quarterly 861 (arguing however, that the fear of judicial activism might be rhetoric); Daniel K Tarullo, ‘The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions’ (2002) 34 Law & Policy of International Business 109.

3 Vladimir Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (Zhizn i Znaniye 1916); John Gallagher and Ronald Robinson, ‘The Imperialism of Free Trade’ (1953) New Series 6(1) The Economic Series Review 1.

4 See generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004); Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40(1) Harvard Law Review 1.

States and of sub-imperial entities. How then, does modern international trade law differ from the colonial period? A ready answer that is often offered is that while colonial international law was in the service of imperialism, modern international trade law is concerned with the development of all people. This paper contends that despite the efforts of developing countries to use 'development' as a tool to undermine the colonial foundations of international economic law, and the apparent centrality of this concept to the WTO, questions of development continue to remain absent as a factor of legal analysis. This legal exclusion is enabled by a 'textualist' interpretive attitude, which bears upon the historical relationship between the legal concept of sovereignty and the competing political goals of imperialism and development. The paper will thus demonstrate a historical continuity of the legal regime with its imperialist past that prevents the decolonisation of international law.

The paper is structured as follows. In Part II, I review the construction of sovereignty in international law, and with the example of international economic law, illustrate the erosion of the sovereign powers of some State actors as a means for securing the interests of exporters of capital at the expense of 'development' interests of peripheral nations. Further along these lines, in Part III, I trace the particular history of international trade law from the years of the GATT, 1947 with a view to examining its treatment of the sovereign State, its role in globalising neoliberal notions of the global economy, and the importance of 'development' as a response articulated by developing nations to this imperialist orientation. With this as the historical context within which questions of development have come to feature in the international trade discourse, in Part IV, I examine the role of the dispute settlement function of the WTO and how this contributes to thwarting claims to development.

## II. SOVEREIGNTY AND INTERNATIONAL ECONOMIC LAW

The working of the WTO dispute settlement mechanism is the product of a curious tension between an international order that is formally based on positivist notions of sovereignty, and a simultaneous erosion of the unrestrained competence associated with its nineteenth century understanding. John Jackson has used the example of international economic law in general, and WTO law in particular, to explain this changing conception of the sovereign. His argument is that at present, a traditional notion of an unrestrained sovereign must be discarded and should instead be replaced with the idea of 'sovereignty-modern', a concept relevant to allocation of powers (horizontally, within the State), and vertically (between international institutions and the nation-State).<sup>5</sup> This changing conception of sovereignty plays an important role in determining the relationship of international law to the development of peripheral economies. In order to appreciate this, some important markers in the history of international law must be revisited.

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5 John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2009) 57 – 78.

### A. *The Sovereign and its Displacement in International Law: 19<sup>th</sup> and 20<sup>th</sup> Century Developments*

At all relevant points of time since the nineteenth century, international law has treated the question of sovereignty as its central theme. All international legal doctrine is based on the assertion of sovereignty of States on the one hand, and the simultaneous assertion that the competence associated with sovereignty has been ceded, in a binding fashion, to the ‘law’-like character of international law. The tension between these two propositions has seen a shifting balance over time but neither end of the spectrum has been fully determined.<sup>6</sup> The centrality of the ‘sovereign’ to international law was the product of a nineteenth century turn towards legal positivism.<sup>7</sup> Given the critical requirement of an identifiable ‘source’ for any law, as positivist jurisprudence posits, international lawyers in the nineteenth century embraced the sovereign state as the source of international law, to which the state was bound solely by its own consent. While this failed to satisfy ‘hard’ positivists like Austin about the law-like character of international law, positivist international lawyers opined that the critical condition of legal validity had been met. The debate between positivists notwithstanding, international law in the nineteenth century had decisively broken with its ‘naturalist’ past (associated with the writings of Grotius, Pufendorf and Vattel).

The positivist turn in international law has endured through the twentieth century but some crucial shifts must be noted. The rise of ‘international institutions’ in the early part of the twentieth century lent credence to the notion that States were subject more strongly to international law, suggesting a shift in the balance away from the sovereignty pole. Yet, those very institutions reified the sovereign nature of States. That sovereign consent was clearly the basis of the international legal order was asserted by the earliest bodies of international dispute settlement.<sup>8</sup> The second half of the twentieth century shows that despite the development of more international law, the position of the sovereign was not clearly diluted. While the ninth edition of Oppenheim’s treatise (originally written in the heyday of the positivism of the long nineteenth century) asserts that ‘sovereignty’ in international law now only refers to a method of identifying the subject of international law, rather than its competence on the international plane, the most cited developments in the period of the twentieth century belie this position.<sup>9</sup>

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6 For a review of the contests that shape the liberal international order from the standpoint of a ‘realist’, see MS Helal, ‘Am I My Brother’s Keeper? The Reality, Tragedy and Future of Collective Security’ (2015) 6(2) Harvard National Security Journal 383-473.

7 See Henry Wheaton, *Elements of International Law* (Little, Brown & Company 1885) 1-26; For a review, see James Crawford (ed), *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 3-12; Anghie ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (n 4).

8 *The SS Lotus (France v Turkey)* (1927) PCIJ Rep Series A No 10, 18.

9 Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th edn, OUP 2008) 14, 119-126.

The most prominent example that is offered in support of the proposition that sovereign competence has been limited by international law is the development of international human rights law. But in reality, the new rules in this sphere have done little to displace the classical sovereign. The key interpretive principles for much of modern day international law are in fact deferential to sovereignty, such as, the principles of ‘*de minimis* thresholds’ (implying that States must only meet a minimum core of international obligations), ‘due diligence’ (implying that the nature of obligation cast on the State is mostly procedural), and ‘deference to domestic regulation’ (implying that States are entitled to subjectively interpret how international principles are best suited to their domestic contexts).<sup>10</sup>

Instead of describing human rights law as a decisive break on the question of sovereign competence, it is more useful to examine it as a continuity of colonial international law. Human rights law has after all, been the language for universalising a liberal notion of ‘good governance’, which has been rightly criticised by third world scholars as reproducing colonial class hierarchies,<sup>11</sup> quite apart from the fact that its ethnocentric formulations have marginal utility in protecting a diversity of victims.<sup>12</sup> More perniciously, it has been shown that the rhetoric of good governance is primarily linked to restructuring non-Western economies to free trade, and thus, has been in service of the material interests of western capital for access to non-Western markets.<sup>13</sup> However, given that the effect of human rights law and the IMF/World Bank rhetoric of ‘good governance’ on sovereignty is contestable,<sup>14</sup> analysing this any further is of marginal utility to the argument in this paper. It is here then, that we must turn our attention to modern international economic law, its departure from classical and 20<sup>th</sup> century

10 Crawford (n 7) 607-667.

11 Brad Roth, ‘Marxian Insights for the Human Rights Project’ in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 220 – 251.

12 See for example, the formulations of torture in human rights law in Tobias Kelly, *This Side of Silence* (University of Pennsylvania Press 2012).

13 BS Chimni, ‘International Institutions Today: An Imperial Global State in the Making’ (2004) 15(1) *European Journal of International Law* 1-37; Anghie *Imperialism, Sovereignty and the Making of International Law* (n 4) 245-263; William P Alford, ‘Exporting the Pursuit of Happiness’ (2000) 113 *Harvard Law Review* 1677-1715; David P Fidler, ‘A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal, Globalized Civilization’ (2000) 35 *Texas Journal of International Law* 387.

14 The legal peg for good governance, the ‘rule of law’, is incapable of being clearly defined and contests about the ‘rule of law’ have added complexity to institutions like the World Bank. This has rendered the effect of these institutions on the ‘third world’ as resistant to homogenous criticism – see Alvaro Santos, ‘The World Bank’s Use of “Rule of Law” Promise in Economic Development’ in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 253-300. It is also important to note that the nature of the colonial encounter, varying from extractive colonies (like Belgium in Congo) to settler colonies (like Australia, New Zealand), has shaped legal institutions in the colonies differently, which have had lasting impacts in the nature of development of the colonies – see D Acemoglu, S Johnson and J Robinson, ‘The Colonial Origins of Comparative Development: An Empirical Investigation’ (2001) 91(5) *American Economic Review* 1369.

international law, and Jackson's idea of an evolved notion of sovereignty.

### *B. International Economic Law and the Erosion of the Sovereignty*

International economic law,<sup>15</sup> which is a body of law including international investment law, the law of the WTO, and regional trade agreements, goes the farthest in bringing certain assumptions about 'sovereignty' into question within international law. Importantly, its incursion into state sovereignty has resulted in disparate effects, replicating the imperialist history of international law.<sup>16</sup> A prominent example in this respect is the body of rules commonly designated as 'international investment law,' which originated within the context of expansion of western capital, and most notably for the protection of early American investments in Latin America.<sup>17</sup> Present day international law, despite the absence of a colonial context, has not undergone a radical transformation, indicating a lasting colonial legacy. In fact, it casts a discernibly neo-imperial gaze on countries importing capital. In the decade from 1990, there was an explosion in the number of bilateral investment treaties signed, and nearly all of them contain an Investor-State arbitration clause of the widest amplitude, designed *solely* to protect the 'investment' made by owners of capital from actions of the sovereign government of the State receiving the investment while creating no international liability for the ill-effects of the investment activity.<sup>18</sup> Under these treaties, in an exceptional break with general international law, individual investors are allowed to sue sovereign States before an international dispute resolution forum. Not surprisingly, several investors from capital exporting countries have used this mechanism to challenge social welfare actions by governments and the *threat* of arbitration has resulted in chilling the ability of States to take appropriate regulatory measures in exercise of their sovereignty.<sup>19</sup> Through a number of disputes commenced against States by investors since 1990, a substantial body of 'investment law' has come into existence which universalises neoliberal positions on treatment of capital and where an alternate explanation

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15 I deliberately exclude from this ambit, the arrangements of the international monetary system. These arrangements have more often been the product of choices made by individual countries, rather than multilateral negotiations and is therefore supported by too thin a legal structure to examine here. For a review of the international monetary system's role in shaping the movement of capital, see Barry Eichengreen, *Globalizing Capital: A History of the International Monetary System* (2nd edn, Princeton University Press 2008).

16 BS Chimni, 'An Outline of a Marxist Course on Public International Law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008). See generally James T Gathii, 'Imperialism, Colonialism and International Law' (2007) 54(4) *Buffalo Law Review* 1013-1066.

17 Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding Capital* (CUP 2013).

18 See generally M Sornarajah, *The International Law on Foreign Investment* (CUP 2010).

19 Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606-628.

of a State's exercise of sovereign power is a non-starter.<sup>20</sup>

International investment law appears particularly stark in reminding how the initial shaping of international law by the colonial encounter casts its long shadow on international law today, in the service of an imperial domination of capital exporting countries, even if such countries may have changed a shade.<sup>21</sup> Does the nexus with imperialism appear as clearly in international trade law, comprising largely of the law of the WTO, as it does with the investment regime? It is submitted that the construction of 'sovereignty' through WTO dispute settlement offers an interesting framework for analysing this question; and in order to explain this construction, this paper will study the methods of interpreting WTO law that are employed by its Dispute Settlement Body. This choice is important because existing literature has addressed how the WTO in general, is a part of an 'unholy trinity' of international institutions, aimed at globalising a neoliberal consensus about the world economy.<sup>22</sup> There is also a considerable body of literature that demonstrates how particular elements of WTO law are aimed at opening up markets of economically backwards nations, and at restructuring their internal legal order to protect the interests of western capital.<sup>23</sup> However, the dispute settlement function of the WTO has escaped such critique; even though it may be applying a body of unfair legal rules, the DSB is lauded as being militant in its neutrality<sup>24</sup> and in fact, an opportunity for developing nations to assert their own interests in the face of an imbalance of world power.<sup>25</sup> More recent work has claimed that within the limits of the WTO system, developing countries can, and have strategically used WTO litigation to nudge the ambiguities in WTO law in favour of their interests.<sup>26</sup> Against this view, this paper will argue that the methods of WTO dispute settlement are structurally biased, and that this bias is linked to the imperialist history of international law. It will in fact, be useful to bear in mind that

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20 M Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness' in Brown and Miles (n 19) 631-657.

21 For example, Ethyl Corporation's commencement of arbitration proceedings against Canada led to Canada's withdrawal of the ban on the gasoline additive, MMT (methylcyclopentadienyl manganese tricarbonyl). See North American Free Trade Agreement (NAFTA) Chapter 11; *Ethyl Corporation v Government of Canada* (1999) 38 ILM 708.

22 Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books 2009).

23 See Arun Ghosh, 'Socialism, Modern Capitalism and Democracy' (1993) 28(14) *Economic & Political Weekly* 551.

24 Some empirical work suggests that there is no 'bias' against developing countries so far as outcomes of WTO Dispute Settlement go. See Don Moon, 'Equality and Inequality in the WTO Dispute Settlement System: Analysis of the GATT/WTO Dispute Data' (2006) 32(3) *International Interactions* 201-208.

25 For a review of the possibilities presented by WTO Dispute Settlement, and the challenges to increased participation by developing countries, see Chad P Bown, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009).

26 Alvaro Santos, 'Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico' (2012) 52(3) *Virginia Journal of International Law* 551-632.

while some developing countries have made copious use of WTO litigation, no African nation has ever commenced a dispute before the WTO.

### III. SOVEREIGNTY, DEVELOPMENT AND THE WTO

WTO dispute settlement, as a part of international law, is legitimate because sovereign States have consented to it. The body of WTO law is a highly legalised sphere and is naturally therefore, replete with ambiguity. But unlike general international law, States cannot claim ‘margins of appreciation’ in defining their compliance with ambiguous legal rules. Instead, the mechanism of WTO dispute settlement is largely effective in binding States to particular resolutions of these ambiguities through the process of litigation. At the same time however, the question of sovereignty is not rendered irrelevant; because the source of legitimacy is sovereign consent, States protest any ‘overreach’ on the part of the DSB.<sup>27</sup> This brings to bear a peculiar orientation on the question of sovereignty – every State desires that in a process of dispute settlement, *other* sovereign States are held accountable to the fullest extent of their WTO obligations but *is itself* held to nothing more than what it has consented to.<sup>28</sup> This tension over the question of sovereignty shapes the interpretive attitude of the Dispute Settlement Body – there is a general disavowal of a national deference principle and, more importantly, formalistic arguments, rooted to the ‘text’ of WTO laws,<sup>29</sup> are privileged in contrast with those that rely on teleological claims about the international trade order.<sup>30</sup> As this paper will show, this construction of sovereignty, which is achieved by excluding certain type of claims, has a profound effect on the question of development.

#### A. From GATT 1947 to the WTO: A Changing Concept of Sovereignty

27 See for example, the United States’ blocking of the reappointment of South Korean judge Seung Wha Chang to the Appellate Body – Manfred Elsig, Mark Pollack & Gregory Shaffer, ‘The U.S. is causing a major controversy in the World Trade Organization: Here’s What’s Happening’ *The Washington Post* (Washington DC, 6 June 2016).

28 See Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) LT/UR/A-2/DS/U/1 art 3.2 <[https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm)> accessed 27 November 2016.

29 Sol P Picciotto, ‘The WTO’s Appellate Body: Legal Formalism as Legitimation of Global Governance’ (2005) School of Public Policy Working Paper Series 14 ISSN 1479-9472 <<https://www.ucl.ac.uk/spp/research/publications/downloads/spp-wp-14.pdf>> accessed 10 November 2016; ACM de Mestral, ‘Dispute Settlement Under WTO and RTAs: An Uneasy Relationship’ (2013) 16(4) *Journal of International Economic Law* 777, 810.

30 Certain interpretive tools permit Panels and the Appellate Body to look beyond the absolute confines of the text, for example, principles of “good faith” in treaty interpretation and in the determination of obligations of parties. However, the Appellate Body has been circumspect in allowing expansive use of such tools – see Helge Zeitler, “‘Good Faith’ in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism’ (2005) 8(3) *Journal of International Economic Law* 721.

The contests over the question of sovereignty in international trade law must be traced historically in order to draw some conclusions about the aforesaid orientation of WTO dispute settlement. The negotiations for regulating international trade through a multilateral framework of international law, subject to the administration of an international institution, began in 1945 in the context of an international economic order soon to be shaped by the two Bretton Woods institutions. However, the trade-arm of what may have been a trinity of international institutions was stillborn. The failure of the International Trade Organization, which was to be the institutional framework for the General Agreement on Tariffs and Trade, 1947, is an oft-repeated story - the United States, having driven negotiations so far as the Havana Charter for the ITO, did not ultimately ratify the Charter, given the unwillingness of the Congress to consider ceding ground of US trade policy to an institution that was to be administered through the United Nations.<sup>31</sup> This unwillingness too must be considered in the context of the early years of the post-war world, where the United States while holding all the purse strings, was caught in a sticky negotiation with its allies about the nature of, what Harry Dexter White called, the 'new deal for the new world order.' As the Bretton Woods negotiations show, while crafting an international economic order, there were serious disagreements linked strongly to the nationalistic interests of the United States and Britain.<sup>32</sup> Within this context, a strong multilateral institution for regulating international trade would have been an absurdity.

In the period between 1947 and 1994, international trade was subject to multilateral regulation only through the treaty mechanism of the GATT; and absent a permanent international institution, a rudimentary institutional structure formed around the GATT itself.<sup>33</sup> This was achieved through seven rounds of 'negotiation' by the parties to the GATT, which grew in number from 23 to 128 during this period, with each round leading to progressive lowering of tariffs in the international trade of (mostly industrial) commodities, and with some 'international law' being formed on vexed questions like subsidies, countervailing duties, dumping and the like. Featuring in the context of the GATT years, are two important markers of the second half of the twentieth century - decolonisation and the Cold War. On the one hand, reservations for imperial preferences were written into the text of the GATT,<sup>34</sup> trade concessions were extended to imperial territories and colonies of GATT members acceded to the GATT upon decolonisation. On the other, even while economies of GATT member States were not uniformly liberal and the relationship of the GATT to Cold War era politics

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31 See generally Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* (3rd edn, CUP 2013) 74-81.

32 See Benn Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White and the Making of a New World Order* (Princeton University Press 2013).

33 Bossche (n 31).

34 For a review of the GATT deliberations that secured the imperial preferences exception, see Richard Toye, 'The Attlee Government, the Imperial Preference System and the Creation of the GATT' (2003) 118(478) *The English Historical Review* 912-939; General Agreement on Tariff and Trade (15 April 1994) 33 ILM. 1153 art 1.2 (previously, GATT 1947).

remained fraught, the GATT certainly became a forum for the leading western States to assert the bedrock principle of capitalism - free trade.<sup>35</sup> In this context of international relations, it is possible to explain the GATT years as cautiously building an international legal framework for free trade among old capitalist powers and newly independent nation States, but with weak legal principles, deferential to State sovereignty.<sup>36</sup> The fall of the Berlin Wall in 1989 was after the launch of the final round of GATT negotiations in 1986 at Punta del Este, Uruguay. From 1990 onwards, during the course of the Uruguay Round, proposals were tabled for the formation of a multilateral trade organization. By 1994, the Clinton administration came around to supporting an institution of this nature, and the WTO was born.<sup>37</sup>

With the withering away of the Cold War context, and the triumphalist sentiments of liberalism, concerns for sovereignty naturally receded, and an institution to legalise international trade took shape. But the incursion into sovereignty that WTO law entailed had disparate effects on economies at different stages of development. Neoliberal globalisation cost the developing world in terms of market access, while the promised benefits of free trade remained elusive; this globalisation had its natural discontents.<sup>38</sup> The Seattle ministerial conference in 1999 symbolised the discontentment with the WTO both from the political right and the left<sup>39</sup> amidst growing scepticism among developing nations over the question of whether the international trading system set by the legal architecture of the WTO was geared to meet their needs.<sup>40</sup> In this context, the launch of the Doha Round in 2001 must be seen as an important turning point in the history of international trade law.

### *B. Challenges from Below: Entrenching Development and the Doha Round*

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35 Francine McKenzie, 'GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947-1959' (2008) 10(3) *Journal of Cold War Studies* 78-109.

36 For a review of the importance of the GATT in shaping the post-war international trade order, its achievements and shortcomings, see Douglas A Irwin, 'The GATT in Historical Perspective' (1995) 85(2) *American Economic Review* 323.

37 See Bossche (n 31).

38 For a more detailed discussion on the disenchantment with institutions regulating the world economy, particularly, the IMF and the World Bank, see Joseph Stiglitz, *Globalization and its Discontents* (WW Norton 2002).

39 See Noah Smith, 'The Dark Side of Globalization: Why Seattle's 1999 Protesters were Right', *The Atlantic* (Washington D.C., 6 January 2014) <<http://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/>> accessed 10 November 2016.

40 '[...] In response I can only say that if the WTO Agreements do not contribute to the development of the less fortunate Members, these Agreements are irrelevant for them. We find that there are subtle attempts to link implementation to issues like policy environment, good governance etc. However, these attempts cannot succeed in masking the real issues.' Preparations for the 1999 Ministerial Conference: Communication from India to the General Council Special Session (25 February 1999) WT/GC/W/150.

At the close of the Seattle ministerial conference, it had become fairly clear that the developing world would find a rules-based international system of trade legitimate depending on the ability of these rules to “focus on all round development capable of eradicating poverty”.<sup>41</sup> The launch of a new ‘round’ of negotiations at Doha was by no means without controversy. Following the debacle at Seattle, the WTO was in need of finding relevance. At the behest of its most powerful, developed members, it ushered a new, comprehensive round of trade negotiations, with its work program taking up issues of trade and environment, labour, competition, investment and a search for more rules on issues of intellectual property. The schism between this agenda and the wishes of the developing and least developed members could not have been more prominent. Despite the express opposition of several third world actors,<sup>42</sup> the draft Ministerial declaration prepared for adoption at Doha suggested that the round be dedicated for negotiations on all those issues, whose relevance to the developing world was either marginal or whose effect on the development of the poorer nations would have been adverse.<sup>43</sup> India, for example, noted that the draft declaration was ‘neither fair nor just’.<sup>44</sup> This draft declaration was nonetheless adopted and its legacy is interesting – the draft declaration, despite its substantive provisions, made frequent references to the question of development, suggesting, almost ironically, that the WTO was to place the ‘needs and interests [of developing countries] at the heart of the...Declaration’.<sup>45</sup>

The Doha Declaration has come to be known as the Doha Development Agenda but as the circumstances of its adoption show, it hardly signified a break with the long history of international trade law and its particularly fraught relationship with the question of development. This continuity notwithstanding, the rhetoric of development has become the most significant marker of international trade discourse in the twenty first century. In the years following the adoption at Doha, frequent assertions have been made over the commitment of the WTO to the question of development. A former Director General of the WTO asserted that ‘development is the *raison d’être* of the Doha Round.’<sup>46</sup> In light of such statements, a pertinent question that arises for an institution supporting a multilateral *legal* framework for international trade, is how the idea of ‘development’ is embedded in WTO law?

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41 Statement by Mr. Murasoli Maran, Minister of Commerce and Industry, India, Ministerial Conference Seattle (30 November 1999) WT/MIN(99)/ST/16.

42 For a review, see ‘NGOs Condemn Manipulation of Draft Doha Declaration’ (*Third World Network*, 3 November 2001) <<http://www.twm.my/title/twr133h.htm>> accessed 10 November 2016.

43 See Draft Ministerial Declaration, Ministerial Conference Fourth Session, Doha (9-14 November 2001) WT/MIN (01)/DEC/W/1.

44 Statement by Mr. Murasoli Maran, Minister of Commerce and Industry, India, Ministerial Conference Doha (9-14 November 2001) WT/MIN(01)/ST/10.

45 See Ministerial Declaration, Ministerial Conference, Fourth Session (14 November 2001) WT/MIN(01)/DEC/1.

46 WTO Committee on Trade and Development, ‘Lamy Says the Round’s Development Potential must be Preserved’ (*World Trade Organization*, 28 November 2005) <[https://www.wto.org/english/news\\_e/news05\\_e/stat\\_lamy\\_28nov05e.htm](https://www.wto.org/english/news_e/news05_e/stat_lamy_28nov05e.htm)> accessed 10 November 2016.

A set of formal and largely procedural provisions is strewn across WTO law according to 'special and differential treatment' to developing and least developed countries. Plenty of literature on these provisions demonstrates that the value of these provisions, as 'law', particularly in the context of WTO disputes, is marginal; their effectiveness in ushering in transformative change in the development of the poorer nations is greatly in doubt.<sup>47</sup> In such circumstances, we must turn our attention to the methods of WTO dispute settlement in order to further examine the relationship of development to WTO law. In doing so, it is equally important to note that the political function of the WTO, which is to create more trade law, has become largely dormant over the last few years. A recent neo-conservative turn in world politics is likely to perpetuate this stalemate. In such a context, the role of the dispute settlement function of the WTO assumes even further significance if we are to examine whether and how the half-promises of Doha can be answered.

#### IV. LEGALISED DEVELOPMENT AND THE WTO DISPUTE SETTLEMENT BODY

As shown above, the contests over development and sovereignty have been central to the evolution of WTO law, and the continuing relevance of the WTO after the launch of the Doha Round. The construction of 'sovereignty' in WTO disputes is therefore critical to assessing the role of the Dispute Settlement Body in either aiding or impeding the 'development' of less developed economies. The key question that falls for consideration is whether the interpretive methods adopted in WTO Dispute Settlement have the effect of constraining the policy-choices that a sovereign State, particularly a developing country can make? It is important to note that scholars of the critical legal studies tradition have asserted that 'formalism', or the method of interpretation that stresses on fidelity to the written words of a legal text, is particularly suited to the politics of neo-liberalism, when the text itself is the product of neoliberal thought.<sup>48</sup> But that alone does not address the question of whether this process is particularly ill-suited to meet the aspirations of its less developed participants.

##### *A. Treatment of 'sovereignty' against 'development' in WTO Dispute Settlement: Two Criticisms*

The erosion of the sovereign competence of States in taking regulatory decisions affecting international trade owing to the rules of WTO law has the effect of reducing policy space for economic development.<sup>49</sup> The adoption of formalistic reasoning by WTO dispute settlement

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47 Amin Alavi, *Legalization of Development in the WTO: Between Law and Politics* (Wolters Kluwer 2009) 153-184.

48 See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 63-73.

49 However, for an early defence that the Appellate Body is meaningfully deferential to legitimate

panels (and the Appellate Body) narrows the ability of States to claim broad regulatory justifications for their policy choices based on their development interests. The concern with respect to the question of development is not simply whether this constraint is in itself problematic, but whether the application of formalistic standards is even-handed.<sup>50</sup> Do the constraints imposed by formalistic reasoning affect developing countries disparately? B S Chimni, for instance, has suggested that this has indeed been the experience of developing countries with WTO dispute settlement.<sup>51</sup> As a remedial measure, he suggests that developing countries must negotiate for the adoption of new principles for the resolution of WTO disputes, one of which would be to oblige dispute settlement panels to defer to sovereign choices, unless such policy choices are egregious violations of the WTO legal principles. In other words, on ambiguous propositions of law, dispute settlement panels must grant a margin of appreciation to the regulatory powers of a State.<sup>52</sup> Chimni, it appears, is suggesting that in order to ensure 'development', the competence of the 'sovereign' must be restored in WTO law. However, more interestingly, he does not wish for this principle of 'deference' to be incorporated universally, as a part of WTO law, but merely as one operating in favour of developing nations. To the extent that international economic law is based on, and has reproduced, a colonial hierarchy between exporters and importers of capital (and capital intensive industrial commodities), Chimni wishes to recover a more powerful sovereign position for the third world nation-States. The suggestion strikes at the heart of the imperialist history of international economic law, and is for that very reason, rendered politically infeasible. Also, the question that remains begging is, why haven't large developing countries like India, which is an active participant in WTO negotiations, taken up this plank? There may be two possible explanations – *first*, that developing countries in general perceive that this is an unrealistic negotiating position; and more sceptically, *second*, that large developing countries are not aligned towards an explicit 'third-world' strategy, which might run counter to their interest vis-à-vis further peripheral members.

Diametrically opposed to Chimni's argument is the claim that the development of all people through liberalised international trade is thwarted by the very assertion of State

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national regulatory interests, see William J Davey, 'Has the WTO Dispute Settlement Exceeded Its Authority?' (2001) 4(1) *Journal of International Economic Law* 79. For a critique of this deference, as with the Appellate Body in *US-Shrimp* allowing an expansion of the term 'natural resources,' see BS Chimni, 'China, India and the WTO Dispute Settlement System: Towards an Interpretive Strategy' in M Sornarajah and J Wang (eds), *China, India and the International Economic Order* (CUP 2010) 217-226.

50 See Julia Ya Qin, 'Pushing the Limits of Global Governance: A Commentary on the China-Publications Case' (2011) 10 *Chinese Journal of International Law* 292; Paolo D Farah and Elena Cima, 'Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel' (2013) 16(3) *Journal of International Economic Law* 707, 728.

51 Chimni (n 49) 226-27.

52 Chimni (n 49) 242.

sovereignty in WTO law. This liberal internationalist view argues that if international trade law is to contribute to development as promised, its effect must be deeper, and that States ought not to be able to resist its application based on claims of sovereignty. To this end, it has been suggested that international trade law must act as a vehicle for enforcing ‘human rights’ obligations, including a ‘human right’ to development, against poverty, upon sovereign States. In this sense, international trade law would be a part of a global constitutional government.<sup>53</sup> But this ‘constitutional governance’ framework ought to hold little appeal for post-colonial States. It appears to reproduce the visibly colonial rhetoric of ‘good governance’ imposed externally, and is philosophically grounded in a Eurocentric liberalism.<sup>54</sup>

### *B. Formalist Interpretation Techniques and the Exclusion of ‘Development’*

The two criticisms described above can be united and met by positing that the legitimacy of WTO decision-making should depend on whether a decision appropriately balances trade interests with development interests. Balancing and proportionality tests are abundant in WTO jurisprudence, but Panels and the Appellate Body have eschewed ‘development’ as a factor in any of its legal formulations. There is a clear reason for this – outside limited ‘special and differential treatment’ provisions (many of which are limited by hortatory language), the texts of covered WTO agreements do not refer to development as a factor in the analysis of disputes. To explicitly factor development concerns would be ‘moving beyond’ the texts of WTO agreements, to teleological considerations about the relevance of development as an ‘object’ of the WTO legal system. Were dispute settlement bodies to move in this direction, WTO decision-making would gain legitimacy among both, developing States, and civil society participants whose interests may not fuse with those of the State. Most significantly, this would signal an epistemic rupture with the colonial history of international law in general, and the visibly imperialist strain in international economic law in particular.

Undoubtedly, with an expanded discretion to consider development interests, not of States alone, but of populations within them, WTO decision making would become unpredictable, or to some extent, unstable. But importantly, this would disrupt the carefully constructed balance over the question of sovereignty and sovereign competence, which has been central to the imperialist history of international trade law. There may be concern that when adjudicatory bodies exercise greater discretion, rather than maintaining fidelity to rules, it gives rise to

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53 See Ernst-Ulrich Petersmann, *International Economic Law in the 21<sup>st</sup> Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012) 7.

54 See for example, Ernst-Ulrich Petersmann, ‘Multilevel Governance Problems of the World Trading System beyond the WTO Conference at Bali, 2013’ (2014) 17(2) *Journal of International Economic Law* 233-270 (containing blithe assertions that postcolonial stress on socialism has contributed to poverty in countries like India, and suggesting that the future of the international trade order must draw on Kantian and Rawlsian principles).

'judicial law-making/ activism' and negates more 'democratic' political processes.<sup>55</sup> However, it must be noted that the preference for a political process, and the demand that judicial bodies respect textually defined political outcomes is neither universal nor free from critique. Whether political processes are better indicators of democratic will is questionable. Textualist interpretation calls for deductive methods of reasoning, which are themselves susceptible to abuse.<sup>56</sup> At any rate, basic insights from critical theory make it clear that no objective 'will' can be discerned from written texts – the acts of translation involved in writing legal texts, and their 'textualist' interpretation, cannot transliterate the democratic will. In other words, it is difficult to say that the 'agreement' arrived at in a political process can easily be discerned through textualist interpretation.

The preference for an adjudicatory process that pegs decision-making to the text of covered agreements is therefore, a preference for predictability over substantive development interests. This choice should be subject to political contestation because it marks a continuity with an imperialist past. While it is true that factoring teleological arguments in contentious cases imposes a cost in the form of some loss of predictability in decision-making, there is nothing to suggest that this cost, in the WTO context, will be inherently disproportionate, or objectively greater than development gains. Yet, the realisation of this method of interpretation as a means of decolonising international law is replete with difficulty, contributed in no small measure by the failures of large developing countries, such as India, to address the question of interpretation in WTO Dispute Settlement. India has been a party to nineteen WTO disputes and has participated in several others as a 'third party' to the litigation. However, in its approach to WTO dispute settlement, there has been no discernible attempt to seek a revision of the textualist method of interpretation. The fact that India has emerged 'successful' in respect of several of its claims in the course of these disputes has only further forced the question of interpretative methods to the background.<sup>57</sup> It is worth noting here that the resistance to an expanded role of the Dispute Settlement Body is significant. The DSU requires that the dispute settlement function will not add to or modify the disciplines imposed by the Agreements. This is the peg on which most criticism of the 'activism' of the Appellate Body rests. Indeed, it has been suggested that a stress on teleological considerations would

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55 See WTO, Negotiations on Improvement and Clarifications of Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement: Communication from the United States (October 2005) TN/DS/W/82; WTO Dispute Settlement Body, Minutes of Meeting (22 July 2003) WT/DSB/M/150.

56 Francois Geny, 'The Negative Critique of the Traditional Method' in *Méthodé d'interprétation et sources en droit privé positif* (Duncan Kennedy and Amanda Knudsen (trs), 2nd edn, LGDJ 1919) [translation is on file with the author].

57 For discontentment with India's strategy at the WTO in the early years of the institution, and its fate in WTO disputes, see Sumitra Chishti, 'India and the WTO' (2001) 36(14/15) *Economic & Political Weekly* 1246.

destroy the faith of members in the dispute settlement system.<sup>58</sup> Understood in the context of the WTO, where the dispute settlement function is the only active function left, this sounds ominous. And yet on the other hand, the more conservative the dispute settlement function becomes, the promise of development is eroded that much further.

If a State party to a WTO dispute were to argue that a trade measure is justified in the interest of its development, the argument would be deemed nonsensical. It is a non-starter because there exists no balancing doctrine in international trade law that permits consideration of ‘development’ as a factor. How can this situation be viewed theoretically? A popular insight from social epistemology that is useful here, is Foucault’s concept of an *episteme* – roughly, the structure that unites all discursive practices at a time in a manner that makes formalised systems of knowledge possible (or to put it simply, accord ‘sense’ to statements).<sup>59</sup> Viewed along these lines, there exists an international trade law *episteme* constructed by the discursive practices of the community of WTO Member States that renders it impossible to argue against the grain of textualist interpretive technique. What permits the construction of this *episteme* is the absence of alternative discursive practices, or that an alternative discursive practice is made invisible by the structures of power. The historical trajectory of international law in general, and of international economic law and international trade law in particular as sketched earlier in this paper, may suitably explain this absence.

### C. The Discursive Frame of WTO Dispute Settlement

The absence of an alternative discourse about how the WTO dispute settlement body ought to interpret WTO law, and how this may be linked to the question of development, is often examined by reference to the decision in US-Shrimp. For the purpose of this article, I propose however to examine the case titled *India-Solar Cells*<sup>60</sup> which was decided by the Appellate Body in September 2016. Of interest here though, are the original proceedings, which illuminate some of the questions that this paper has sought to tackle. In the course of this dispute, the adjudicating panel was faced with the task of interpreting the meaning of Article XX(j) of the GATT for the first time. The United States had initiated proceedings against India on the basis that ‘domestic content’ requirements that were imposed on solar power developers selling electricity to the Government of India violated WTO law. The

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58 See for example, Michel Cartland and others, ‘Is Something Wrong with WTO Dispute Settlement’ (2012) 46 *Journal of World Trade* 979.

59 See Michel Foucault, *Order of Things* (Alan Sheridan tr, Routledge 1989); the term ‘episteme’ in later works gives way to ‘apparatuses’ and ‘disciplines’, concepts that clarify the role of ‘power’ in shaping discursive formations – See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (Colin Gordon ed, Pantheon Books 1980) 196-97.

60 Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules* (24 February 2016) WT/DS456/R [88]-[98].

Indian regulations that were subject to challenge required that solar power developers in India use domestically manufactured solar modules (to different extents) in their power projects. Given that this measure has the effect of limiting the access of importers of solar modules to the Indian market, thus treating them unlike domestic manufacturers, it entailed a violation of WTO law. However, India argued that the measure was necessary to boost the domestic industry in respect of a product that was in local short supply, i.e. solar modules, and for such reason, the measure fell within the ambit of the exception contained in Article XX(j) of the GATT allowing the adoption of measures essential to the acquisition or distribution of products in short supply.

In dealing with this defence, the important question that the Panel sought to determine was the import of the term ‘general or local short supply’ and the circumstances under which a product would be found to be in such ‘short supply’. Given its textualist orientation, the Panel determined with a great deal of verbosity that ‘short supply’ referred to a situation when the supply was unable to meet a local demand. On the question of whether solar cells and modules were indeed in short supply, India argued that the condition must be deemed as met when domestic manufacturing capacity could not ensure local supply. Reading the provision as a whole, India argued that the term ‘supply’ ought not to be judged based on available imports but on domestic production only. It further argued that in a globalised world, the provision would have little meaning if imports were to be considered as a factor of ‘domestic supply’. In this sense, India requested the Panel to interpret the provision in an ‘evolutionary manner’ in light of present circumstances rather than with an eye to the conditions prevalent at the time when the GATT was drafted.<sup>61</sup> Consistent with the earlier practice of adjudicatory bodies, India’s argument was based on interpreting the ‘language’ of the provision; the key assertion being that the term ‘domestic supply’ was linguistically equivalent, or ought to be treated as equivalent, to ‘domestic production’. But taken to its logical end, India’s argument would also mean that Art XX(j) can be invoked to protect almost any policy of import substitution industrialisation. Undoubtedly, this would be found to be incompatible with the *telos* of a liberal world trade order. Curiously, this incompatibility was not noted by the Panel – instead, it ruled on the basis of semantic difference between ‘supply’ and ‘production’. The fallout of this is that imports must be factored when determining the ‘short supply’ calculus. Structurally, this calculus is biased against developing countries.

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61 ‘Evolutionary Interpretation’ refers to a method of interpreting language of treaty provisions based on the changes in context between the time of writing of a treaty provision, and the date when the interpretation is called for. The applicable law for interpreting treaties is contained in Article 31 of the Vienna Convention on the Law of Treaties, which requires that the meaning of a provision be determined with reference to ‘the ordinary meaning... given to the terms of the treaty in their context and in light of its object and purpose (emphasis supplied). This provision is applicable to interpreting WTO treaties. Article 31 of the Vienna Convention clearly permits both textualist and teleological modes of interpretation. In *Namibia Advisory Opinion* [1970] ICJ Rep 1971 16, the International Court of Justice ruled that it also permitted the interpretation of treaties in an ‘evolutionary manner.’

The Panel's ruling on Art XX(j) would serve to sustain a trade regime where the poorest members continue to remain importers of capital and/or capital-intensive goods, reifying the world system's division between the core and the periphery. Would this then be consistent with the political rhetoric about the trade order? It is submitted that the better approach would have been for the Panel to have examined if India's defence under Art. XX(j) struck a suitable balance between the competing goals of 'development' and 'liberalised trade'. The outcome of this balance would necessarily differ based on the country invoking the defence. Indeed, it is not the suggestion here that India ought to have succeeded in this argument, but that the method of deciding the issue ought to have been different. However, neither the contestant nor the Panel found it fit to address the underlying question of the balance between trade-liberalisation and development. In this way, an opportunity to bring the question of development to the forefront of WTO dispute settlement was lost. As described above, contests between the questions of development and liberalised trade are the bases for the continued legitimacy of WTO law in the 21<sup>st</sup> century. But if this contest recedes to the background in the dispute settlement function, then attempts to re-characterise the normative foundations of international economic law (away from that of economic imperialism) will be foiled.

## V. CONCLUSION

The discursive framework within which WTO dispute settlement operates is such that the obvious political questions that are central to decision-making are masked in a series of textualist interpretive manoeuvres. Epistemic protocols employed by adjudicating bodies in the WTO render a frank contest on the question of development difficult, if not impossible. This paper has attempted to demonstrate that this particular orientation of dispute settlement, which excludes the question of 'development' of the less developed economies, is linked to the imperialist history of international law. This exclusion is made possible by maintaining a particular balance on the relationship of sovereignty of States to WTO law. The dispute settlement function ensures that sovereign consent remains central to international trade law, while reducing sovereign competence in a way that developing countries cannot freely chart their course to development. International law in general, and international economic law in particular, has been constructed by, and in service of the colonial encounter and its doctrine has been particularly useful in protecting the interests of capital, capital exporting countries, and commodities manufactured in capital-rich economies. The legal architecture of the international economy has been crucial to sustaining a neoliberal globalisation. Recognizing this, third world actors have sought to contest the foundations of international economic law, and undermine its imperial character by asserting that international economic law must be reshaped to factor concerns about development. However, in tune with its imperialist history, the doctrinal formulation of sovereignty in international trade law has maintained a disjunction between conservative law and progressive politics. Thus, while the

World Trade Organization has, since the turn of the century asserted in political rhetoric that the central focus of international trade law is to ensure the development of all people, its dispute settlement function has retained a conservative flavour. Thus, despite the question of development having become central to the politics of international trade, international trade *law* has been able to relegate it to the background.