

Development in World Trade law

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Abstract: Trade continues to expand at an unprecedented pace under the WTO regime and is a prime vehicle for development. Yet the gap between rich and poor countries continues to widen. This paper aims to ascertain the true meaning and purpose of development in WTO law. It demonstrates that despite constant mention of ‘development’ in several provisions, there is vagueness or uncertainty in the use, meaning, and purpose of development in WTO law. It argues that this definitional anomaly lends development or the pursuit of development objectives an uneasy alliance with trade discipline, and thereby with its developing trading partners. It recommends an appreciable definition of development from a trade perspective.

I. Introduction

The process to development or its discourse has been likened to an *ideology* that is operationalised (by the World Bank) not according to some clearly discernible unitary model which renders predictable development decisions.¹ Rather, it relies on conflicting contestation of meanings that eventually shape the form of intervention that constrains and transforms development process in a way that makes it easier to apprehend for political mobilization.² The notion of development is not static, having evolved from the ‘grips of colonialism and the liberating movement of the New International Economic Order’.³ It has a fragmented constitutional and normative character and function in international law, owing largely to the differing perspectives on ways to facilitate development.

According to Qureshi and Ziegler, some basic characteristics define the normative framework of development in international law. First, there is ‘traditional model’ of rights and responsibilities of developed and developing members of the international community. Second, there is the ‘facilitative and cooperative framework’ that includes development assistance and preferential treatment in trade. Third is the ‘integrationist framework’, which facilitates the full participation of developing states in the international economy. Then there is ‘externally oriented regulatory framework’, a standards setting structure within the international economy. Finally, there is the ‘communal framework’ ensuring that common resources are shared by all. The normative content of the various spheres may be hard, soft or aspirational.⁴

The history of development found beginnings in individual projects and the concept of the “production function”. Its objectives derived from input-output models and macroeconomic projections.⁵ A reconceptualisation of development began with growing recognition that markets do not create conditions for their own success separate from local context. This reconceptualisation decentres the focus on economic growth to a concept of development broadened by pursuit of human development (of which income is only an aspect) and requires equal consideration to ‘political, social and legal development’.⁶ These multiple aspects of development are compounded in Sen’s concept of ‘development as freedom’, which has a goal to enhance people’s capacities and choices,⁷ and together they reflect in the promotion of a “Comprehensive Development Framework” which incorporates a social agenda in policy recommendations.⁸

In international law, certain fundamental principles relating to development are identifiable. Foremost is the notion of developing countries especially with regards the distribution of rights and duties, differentiation between states according to the level of their development and special needs, and in economic relations, the cost, and

¹ Ngugi J., (2006) p.322

² Ibid

³ Qureshi & Ziegler (2007) p.489

⁴ Ibid pp.489-490

⁵ Picciotto R., (2004) p.355

⁶ Trubek & Santos (2006) p.7

⁷ Sen (2000)

⁸ See Trubek & Santos (2006) p.7; Rittich (2006) p.207

benefits arising from membership of international organisations.⁹ Another principle is the “right to development,” recognised as a process involving the development of economic, social cultural and political aspects of human life.¹⁰ Next is the principle of sustainable development, a norm of customary international law, which aims at reconciling development goals and environmental objectives.¹¹

At the turn of the millennium, globalisation concerns engendered the reconditioning of development objectives as a global agenda, with emphasis on collective responsibility for achieving the millennium development goals (MDGs).¹² The MDGs aim at ending poverty and hunger, universal education; gender equality; improving child and maternal health; combating HIV/Aids and environmental sustainability.

The MDG goals further reiterated the need to develop global partnerships for development particularly in relation to developing further an open trading and financial system that is rule based, predictable and non-discriminatory while addressing the ‘special needs’ of developing countries with targets for development aid, debt relief and enhanced tariff and quota-free market access.¹³ With no multilateral regime which covers the ‘gambit of development issues’; aspects are integrated into international trade and monetary law.¹⁴ However, there are several institutions with mandate to address international development issues.

So far, we see an explicit inclusion of rule-based trading system within the broader framework of development goals. This inclusion could, from a legal perspective pose a conflict between the challenge of discerning the law from the aspirations of nation states, and the principal economic quest to fathom optimum ways of facilitating development.¹⁵ Within the mainstream development community, debates now largely focus upon the way to conceive and merge economic/social agenda, the relationship between the social, and the macroeconomic or financial dimensions of globalisation and the means by which social concerns are to be furthered.¹⁶ At the WTO, even a traditional multilateral trade round was reinvented as a ‘Development agenda’¹⁷. Article 2 of the Doha Ministerial Declaration is explicit on the objective of promoting economic development and alleviation of poverty in poor countries.¹⁸ Development is now at the heart of the WTO agenda, with a special committee for trade and development.

In spite of the centrality of the ‘development principle’ ‘the development dimension has neither been sufficiently articulated, nor coherently structured in the architecture of international trade agreements’.¹⁹ Its meaning remain implicit, uncertain or submerged. This anomaly represents a basis for tensions among the developed and developing members, such as, on questions over whether or not new negotiations should fundamentally alter balances of rights and obligations of the Members in pursuit of development objectives.²⁰ Definitional uncertainty also underscores criticisms of the “trade and” linkages. One such is that trade only recuperates the legitimacy of other regimes for itself,²¹ and allowing for the creation of dissention, disagreement, incoherence and indeterminacy.

⁹ Qureshi & Ziegler (2007) p.491

¹⁰ See Article 1 and Article 3(3) Declaration on the Right to Development, (adopted by General Assembly resolution 41/128 of 4 December 1986, UN Doc A/41/53 1986; See also Principle 3 Rio Declaration on Environment and Development June 13, 1992, adopted by the UNCED at Rio de Janeiro UN Doc A/CONF.151/26 (Vol.1) (1992) ILM 874 (Rio Declaration)

¹¹ Separate opinion of Judge Weramantry in *Gabcikovo- Nagymaros Project (Hungary/Slovakia)* 1997, ICJ Reports 15 September 1997, GL No. 92 para.140; Rio Declaration Principle 4; Schwartz (2005).

¹² UN Millennium Development Goals (MDGs) available at <http://www.un.org/millenniumgoals/goals.html#>; (accessed 07/08/08); Also Report of the International Conference on Financing for Development, Monterrey Mexico March 18-22 2002 (UN Pub Sales No.E.02.II.A.7) Ch.1 Res 1 annex Johannesburg Declaration and Plan of Implementation UN Doc A/CONF.199/20/Rev.1, Annex at 1–5, and 2, Annex at 7–77, (Johannesburg Principles)

¹³ See also Johannesburg Principles ; For other UN Partners on the MDGS see <http://www.un.org/millenniumgoals/index.shtml> (accessed 08/08/08)

¹⁴ Qureshi & Ziegler (2007) p.488

¹⁵ See generally Qureshi & Ziegler (2007) p.489ff

¹⁶ Rittich (2006) at 207

¹⁷ Sutherland (2005) p.365

¹⁸ Doha Declaration WT/MIN(01)/DEC/1 20 November 2001 available at <http://www.wto.org>

¹⁹ Qureshi (2003) p.2

²⁰ See Joint Communication from the African Group in the WTO, ‘Special and Differential Treatment Provisions’ TN/CTS/W/3/Rev.2 (17 July 2002) at 22.6; see also Chang (2007) pp.553–570

²¹ Lang (2007) P.524; also Beckett J, “Fragmentation, Openness, and Hegemony” Unpublished manuscript, on file with author

To overcome such consequences it is important to ascertain the meaning and scope of development in WTO law. Should we look for its fulfilment from substantive norms, procedural rules, or trade objectives? Should development be determined in terms of trade income, investment capital, individual welfare gains, or distributional issues; or should one construe development from the global economic outcome of trade liberalisation? All these questions call for judgements on the importance of trade to development, the role of trade in the global development agenda and the impact of trade on development. However, this is not the focus of this paper. Nor is the focus to list provisions that tend to favour developing countries or to discuss their fairness or effectiveness.

Rather the paper will analyse the content of relevant WTO rules to ascertain the development dimension of trade terms. It will draw to some extent on the paradigm of development principles in international law discussed above to contrast trade-led development from broader development goals. It will also establish the co-relation between 'developing' status, special treatment, and development 'needs'. In addition, using economic rationality and prevailing theories of law and development, and WTO concept of building trade capacity, the paper will unravel trade and development complexities. The article then recommends an appropriate direction of development in trade terms.

2. Evolving concept of development in world trading system

The notion of development has been a long-standing objective of the GATT/WTO—as demonstrated by the preamble paragraphs to GATT 1994, the WTO Agreement, and the Doha Ministerial Declaration of 2001. Some of the objectives include raising standards of living, ensuring full employment and growing volume of real income, expanded production of effective demand of goods and services trade, and environmentally sustainable development. "Encouraging development and economic reform" is also among the fundamental principles of WTO law. Others include Most-favoured-Nation (MFN), idea of non-discrimination amongst trading partners; National treatment, advocating equal treatment of foreign and domestic products and freer trade through lowering trade barriers; predictability and stability of the system assured through 'binding' commitments, transparency and surveillance of national trade rules and policies.²²

Starting in the 1950s, GATT rules were changed several times to address development concerns. Almost all these amendments conferred on developing countries special and differentiated treatment (SDT), by making exceptions to the basic GATT structure of non-discrimination and reciprocity. SDT was based on the rationale that equal treatment or unequal economies simply perpetuated economic inequality and that only SDT could mitigate the negative effects of economic asymmetries between the developed and developing countries.²³ However, with the Uruguay round, and inception of the 'single package' deal, SDT provisions focused not on problems that poor states face because of economic under development, but on the problems they face as parties to the deal. The new arrangement, according to Dunnoff, moved from "non-reciprocal approach to obligations to a non-reciprocal approach to implementation"²⁴

2.1 'Developing' Status, Differential treatment and Preferences

Developing countries are a highly diverse group often with very different views and concerns, who increasingly look to trade as a vital tool in their development efforts.²⁵ In the WTO the concept of development is linked with status interaction between "developed countries", "developing countries" and "least developed countries" (LDCs). Members announce for themselves whether they are "developed" or "developing" countries and LDCs as those the United Nations recognize as such. The categorization is important in development context for two reasons: entitlement to special treatment and application of concept of "needs".

Entitlement to special treatment

First, a members' designation or recognition as either 'developing' or LDC countries entitles them to "special, differential and more favourable treatment" (SDT) which requires developed countries to treat developing countries more favourably than other WTO members. Amongst the favorable treatment provisions are longer time

²² 'Principles of the Trading System' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 07/07/08)

²³ Dunnoff (2003) at.154; Ochieng (2007) at 374 (citing Yani); Garcia (2000)

²⁴ Dunnoff (ibid)

²⁵ See *infra* (note. **Error! Bookmark not defined.**); See generally, Verdiraime (1996) at 164-197

periods for implementing agreements; measures to increase their trading opportunities through greater market access, and support to help build their infrastructure.²⁶

Also developing countries could get 'preferential tariff treatment' under the Generalized System of Preferences (GSP) Schemes,²⁷ 'differential and more favourable treatment' with respect to the provisions of the GATT concerning non-tariff measures, and under GATT Part 4 "Trade and Development", 'non-reciprocity' of commitments in trade negotiations between developed and developing countries.²⁸ There are additional provisions for 'special treatment' of LDCs.²⁹ It must also be mentioned that other members may deny benefit of unilateral preference schemes and can challenge the use of the special differential provisions available to developing countries.

The objective behind the various provisions are mainly to enable developing countries and LDCs respectively to participate better in the multilateral system to facilitate and promote trade, and to have improved market access for their products, and hasten economic development. However, there is the tendency for countries to choose 'developing' status to be able to get benefit of the trade preferential privileges. For instance, an attempt by some countries to create a category that would enjoy similar status to LDCs (e.g. small and vulnerable economies) met resistance by other developing countries that feared that this could lead to further discrimination between developing countries and prejudice their interests.³⁰

Ochieng also suggests that developed and developing countries are still caught up in the dualistic set of logic that resulted from the compromises made on the question of reciprocity and SDT provisions. For developed countries the notion of reciprocity remains that free trade is welfare enhancing for both developed and developing countries; while for developing countries, the economic logic of non-reciprocity is that the trade needs of developing countries are substantially different from those of developed countries, hence the two types of economies should not be subject to the same trade rules.³¹

Application of the concept of 'needs'

Designation of 'developing' status is also important in trade and development context because of its link with the concept of 'needs'. Through out the WTO agreements and instruments, there is consistent recognition that developing countries and LDCs have '*special needs*', '*individual development, financial and trade needs*', '*administrative and institutional capability needs*', '*economic development needs*', and the need to "secure a share in the growth in international trade commensurate with the needs of their economic development".³² According to the WTO Appellate Body in EC Tariff preferences case,³³ the word "commensurate" in this phrase leaves open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. In addition, that 'members' "respective needs and concerns at different levels of economic development" may vary according to the different stages of development of different Members.³⁴

In the immediate context, we observe the content of development in terms of 'proportionality of entitlement' to international trade gains, 'proportionality of trade commitments', and 'entitlement' to trade-focussed development assistance to build trade capacity. In other words, the effect of the respective needs jointly or severally must determine the level of developing countries, contribution, commitment and concessions in trade relations, their qualification for and entitlement to special and differential treatment, preferences and assistance, and the economic and trade capacities or potential. I examine the development content of building trade capacity later in this paper.

²⁶ For a summary of SDT provisions for developing countries and LDCs in other Uruguay round agreements see http://www.wto.org/english/tratop_e/devel_e/anexii_e.doc (accessed 02/06/08); For discourse on the effectiveness of the SDT provisions for development purposes see: Chang (2007) at 553–570; Mitchell, (2006); Lester et al., (2008) at 784; Hudec, (1987)) at 27- 28

²⁷ The Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24)

²⁸ DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES Decision of 28 November 1979 (L/4903) (Enabling Clause)

²⁹ For LDCs' SDT provisions, see WT/COMTD/W/135, 5 October 2004 available at <http://docsonline.wto.org/DDFDocuments/t/WT/COMTD/W135.doc> (accessed 07/07/08)

³⁰ Ismail, (2005) at 398–403

³¹ Ochieng (2007) at 390-391

³² Preamble and Article 11(2) of the WTO Agreement; see also the Enabling Clause (supra n.**Error! Bookmark not defined.**)

³³ Appellate Body Report, European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries, Adopted 20 April 2004, WT/DS246/AB/R

³⁴ Ibid Para 161

However, there remains the problem of assessment of 'needs'. Does this imply '*needs of developing countries*' or '*development needs*'? Is it to represent individualised, 'needs' of developing countries or collective? Who determines whether the particular *need* of the developing country is a trade-led development need; is the determination to be subjective or objective; or is there a general standard on which the determination should base? The closest we can get to these considerations is the EC tariff Preferences case.³⁵

In that case, India challenged the conditions of tariff preferences accorded by the EC under the EU's 'special' GSP drug arrangement scheme for combating drug production and trafficking. In analysing provisions of the Enabling Clause, the Appellate Body made some clear statements as to what considerations could be relevant in the determination of 'needs' for purposes of application of the GSP scheme. The Appellate Body found that the qualification of the GSP as "generalized, non-reciprocal and non discriminatory" imposes obligations on preference-granting countries to make available identical tariff preferences to all "*similarly situated*" beneficiaries. They also held that the preferential treatment under a GSP scheme should "*respond positively*" to the "development, financial and trade needs of developing countries".³⁶ On the question of whether the itemised needs covers the "needs" of developing countries collectively, the Appellate Body finds that there is no explicit requirement and obligation under paragraph 3(C) of the Enabling Clause to respond to needs of 'all' or 'each and every' developing countries.

Yet, who determines what particular 'needs' must be responded to positively by developed countries, and how should the response be channelled in trade terms? On this point, the Appellate Body observes that the types of needs to which a response is envisaged are limited to "development, financial and trade needs" and not to "any kind of response to any claimed need of developing countries".³⁷ In their view, a "need" cannot be characterized as one of the specified "needs of developing countries" in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim is made, the existence of a "development, financial [or] trade need" must be assessed according to an objective standard and 'broad-based recognition' of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.³⁸

Further, the Appellate Body considered that in the context of a GSP scheme, the particular need at issue must be such that it can be effectively addressed through tariff preferences. Accordingly, the expectation that developed countries will "respond positively" to the "needs of developing countries" suggests that a sufficient nexus should exist between, respective preferential treatment measure and, the likelihood of alleviating the relevant "development, financial [or] trade need".³⁹ But in this case The Appellate body found that if the EU regulation had a 'prerequisite' or 'objective criteria' of including or removing beneficiaries from the arrangements on the basis that they are no longer 'similarly situated' or "similarly affected by the drug problem", this would have fulfilled the 'need'. However, the Appellate Body did 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".⁴⁰

What the Appellate body is suggesting is that developing countries needs are wide and varied, but must be limited to 'development, financial and trade needs'. The source of claim to such needs should be drawn from broadly recognised needs, not only in WTO agreements, but also from multilateral instruments of international organisations and must be assessed from an 'objective standard', rather than on developing countries or preference granting states' assertions. Several problems emerge from the Appellate Body's elaboration on the concept of needs.

Firstly, in its findings on who may assert claims to development needs, the Appellate Body creates an uncertainty over ownership of development 'needs' and priorities, and further compounds this in suggesting that these can be sourced outside the WTO agreements. Also, 'broadly recognised needs' does not translate to particular 'development, financial and trade needs' that a developing country member may have.

Moreover, even if these 'broadly recognised needs' are assumed under the broader development goals, the practice is for developing countries to have ownership of national development strategies. Even the Integrated framework, which supports LDC governments in trade capacity building, follows this practice by providing assistance to "*capacity building needs*" identified by each of the LDC governments and other national stakeholders.⁴¹ There is also concern that to include other areas of international policy in the WTO is in effect a

³⁵ EC Tariff Preferences, (supra n.**Error! Bookmark not defined.**)

³⁶ Ibid Para 148-158 (emphasis added)

³⁷ Appellate Body Report (supra n.**Error! Bookmark not defined.**) Para 163

³⁸ Ibid

³⁹ Ibid, Para 163-164

⁴⁰ Ochieng (2007) at 363-395; Lester et.al (2008)

⁴¹The Integrated Framework for Least Developed Countries

http://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm (Integrated Framework)

call for a different policy from that mandated by respective international organisations.⁴² It might therefore be useful to consider Hoekmann's recommendation for the adoption of a 'new development framework' in the WTO, which determines the reach of disciplines.⁴³

Second, the Appellate Body's ruling leaves no correlation between positive response to development need and positive outcome of the response. Issues of uncertainty of the life span of preferences, eroding preferential margins, and the inability for some developing producers to respond adequately to preferences may leave beneficiary members with no significant impact on trade.⁴⁴ Also, 'positive or adequate response' of specific preference granting programme may not necessarily enhance developing countries development potential or directly affect their development condition but will instead aim to address priorities and values of the preference granting country as leverage in international relations.

An example is the concern of African Trade Ministers, that partnership under African Growth and Opportunity Act (AGOA) will lure African governments to give in on the new issues that the US want to introduce into the WTO and which, they opposed.⁴⁵

I submit that the assessment of development needs in trade terms must encompass issues that reflect "development, financial and trade needs of developing countries" in the conjunctive and not, as separate and distinct analysis of these objectives as alternatives. Adoption of the conjunctive meaning would limit interpretation of development to where these have trade financial and development implications, as opposed to the broad development framework. This concept of trade-led development — the rationale of addressing conjunctive development, finance and trade needs for development— also evinces in the GATT /WTO infant industry and balance of payment exceptions examined.

2.2 Economic rationality, trade law and development

The notion of development in world trade law also represents an objective to promote economic development, raise general standards of living and employment. Here some basic economic rationality underpins trade law, which is the vehicle for promoting trade-led development in developing countries.

Article 18 of the GATT was included in 1954-55, as a development based exception for developing countries particularly 'economies of which can only support low standards of living' and are in the early stages of development.' The provision allows for establishment and protection of infant industry and government assistance to promote particular industry with a view to raising the general standard of living of its people. Developing countries could also impose quotas in order to secure balance of payment, and to ensure a level of reserves adequate for the implementation of economic development programmes.⁴⁶ Further Developing countries could use GATT Article 12 (balance of payment exception to GATT article 11, which is the normal rules for other members) in aid of "domestic policies directed towards full and productive employment or towards development of economic resources".

The procedures and caveats to application of these provisions have warranted criticisms to the effect that they do not necessarily help achieve growth and development and are inadequate vehicle for lifting poor countries out of poverty.⁴⁷ It is nonetheless, important to explore trade-led development context in economic rationality and theory of law and development.

Comparative advantage, liberalisation and development

The economic rationality underlying the GATT article 18 provisions is that economic development is a pursuit of public function or state intervention in establishment and protection of manufacturing industries (Import substitution) based on the principles of comparative advantage and trade liberalisation. The rationale is that the process of economic development entails creation of new industries and that temporary support from government could promote long-term development. According to Stiglitz and Charlton, the industry argument justifies temporary government intervention to redress market failures and pioneering firms may bring benefit to the

⁴² Dunnoff (2003) at.155

⁴³ Hoekman (2005) 405–424 at .407

⁴⁴ Mueller, (2008)

⁴⁵ Chakravarthi R., "Africa: NGOs start campaign against US AGOA" available at <http://www.twinside.org.sg/title/agoa.htm> (accessed 10/08/08)

⁴⁶ See GATT Articles 18(2)(a)&(b) 18(9) (10); 18(13); See also Panel Report, India— Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Adopted 20 August 1999, WT/DS90/R

⁴⁷ Matsushita et al; (2006); Hoekman(2005) at.405-424; See also Article 27(1) of the Agreement on Subsidies and Countervailing Measures

economy, when they invest in providing workers with new knowledge, technology transfer, or skills which become a 'public good' that will become available to all firms.⁴⁸

This rationality is in line with the classical law and development thinking of the 1950s-1960s wherein law was primarily a tool that the "developmental state" could use for economic management, to remove traditional barriers and to create formal structures for macro economic control and to change economic behaviour.⁴⁹ Trade law in this context should be an instrument of effective state intervention in the economy to regulate public sector corporations, manage complex exchange controls and import regulations to attain trade led economic development through industrialisation.

How does this industry protection and government assistance argument synchronise with the liberalisation economic rationale for development? The 1980s developmental thinking became concerned with the role of Markets (as opposed to State) in economic development. Development policy mechanism in this era was to transform command economies to market systems and integrating developing countries into the world economy.⁵⁰

This "neoliberal market" development policy advocates forging economic growth through capital markets, fiscal discipline, promoting free trade, encouraging foreign investment, serving larger markets, lowering cost of production, and improving efficiency of local production through competition from foreign firms. The judiciary (or dispute settlement mechanisms) has a role to restrain state and facilitate markets, but also to provide fidelity and predictability to the law.⁵¹ These are all trade-led development parameters of the WTO principles of comparative advantage and liberalisation. Implementation of these objectives occur through a trend of forcing the 'narrow 'straitjacket of policy harmonisation' of trade and industry on developing countries as a vehicle for attaining economic growth.⁵²

However Stiglitz and Charlton, argue that it is inappropriate for the world trading system to be implementing rules which circumscribe the ability of the developing countries to use both trade and industry policies to promote industrialisation and economic development through liberalisation.⁵³ Trade liberalisation is supposed to deliver gains as resources are transferred from protected sectors, in which a country does not have comparative advantage, to those sectors where it is more efficient and where it can export more successfully. However, in developing countries the constraint to growth of new export sectors is not the lack of resources including labour, since these are available in vast reserves and usually unemployed. So trade liberalisation is not required to free-up these resources for use in new industries.⁵⁴

They further suggest that there is still a lot that economist do not know about the process of development and therefore, in areas of trade and industry, developing countries should be given freedom to develop their own policy strategies tailored to their own 'idiosyncratic circumstances'. Thus, complimentary policies should be used to ease the other constraints⁵⁵ to developing successful export industries rather than imposing liberalisation by removing protection given to domestic industries.⁵⁶

2.3 Trade capacity and Development

According to the WTO, building trade capacity will enable developing countries to participate more fully in global trading, trade more effectively and in consequence to enable them alleviate poverty and raise living standards.⁵⁷ Development via trade capacity has several dimensions in the WTO regime.

Human, institutional and infrastructure capacity

Development translates into enhancing human, institutional and infrastructure capacity. Human capacity enhances through "technical assistance" for training trade professionals, towards helping officials better understand complex WTO rules and disciplines so that they can implement WTO agreements, and negotiate effectively.⁵⁸ "Institutional

⁴⁸ Stiglitz & Charlton (2006) 20-21

⁴⁹ Trubek and Santos (2006)

⁵⁰ Ibid at.2

⁵¹ Trubek and Santos (2006) at.2; Stiglitz and Charlton (2006) at 13-17

⁵² Stiglitz and Charlton, Ibid

⁵³ Ibid at 17

⁵⁴ Ibid at 6

⁵⁵ Such constraints include: as technology backwardness, high trade and transport costs, skilled labour, lack of social safety nets, insurances, credit availability weak government institutions

⁵⁶ Stiglitz & Charlton (2006) at 28

⁵⁷ DECISION ON MEASURES IN FAVOUR OF LEAST-DEVELOPED COUNTRIES Clause 1; also http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm

⁵⁸ See also Agreement On Technical Barriers To Trade (Art 11(2) (4) And (5);

capacity” is enhancing of institutions and businesses that governments rely upon for trade such as customs and national standardisation authorities. “Infrastructure capacity” is the physical setup required for trade to happen, - roads, ports, and telecommunications- but this is largely the responsibility of other international organizations.⁵⁹

The essence of technical cooperation and assistance also ensures that other international institutions, national development agencies, and donor support could provide assistance in building trade capacity. For instance, the Integrated Framework (IF) (a joint technical assistance programme) aims to support LDC governments in trade capacity building and integrating trade issues into overall national development strategies.⁶⁰ Generally, the IF involves a four-part process. First is on awareness- building on the importance of trade for development. Next is Diagnostic for a Trade Integration Strategy (DTIS), a study to identify constraints to traders, sectors of greatest export potential, and a plan of action for integrating into the global trading system. Then there is the process of integrating the plan of action into the national development plan, such as the Poverty Reduction Strategy Process (PRSP). The final stage involves the implementation of a plan of action in partnership with the development cooperation community.

Trade financing for development

In the wake of the Asian financial crisis, WTO members became interested in the issue of how trade-related measures can contribute to find a durable solution to problems of debt and financial instability and crises in developing countries.⁶¹ Trade finance issues for development include, coherence in global financial policy, improving flows of trade-financing (for example letters of credit and other documentary credit) in particular by encouraging regional development institutions to expand WTO-compatible and innovative ways of finance. Trade finance facilitation programs such as guarantees covering the payment risk of an import/export between two countries are important consideration in facilitating trade led development.⁶²

But here again developing countries and their developed counterparts have different views on the trade financing development agenda. The EU and the US welcome the mandate on coherence in global financial policy but with focus on addressing “concrete topics” on trade and finance. They prefer a modus where work of other institutions would ideally be better integrated and coordinated with that of the WTO, keeping in mind respective competencies.⁶³ The developing countries on the other hand want more focus on individual constraints giving that their “development, financial and trade needs” are wide and varied. They therefore seek to have permanent body to continue trade and finance deliberations.⁶⁴

Development through “Aid for trade”

Aid for Trade (AfT) is a global initiative — launched at the WTO's 2005 Hong Kong Ministerial Conference — to scale up international financial assistance for trade capacity building in developing countries.⁶⁵ AfT comprises aid that finances trade-related technical assistance, trade-related infrastructure and aid to develop productive capacity.⁶⁶ An “all encompassing definition (in terms of objectives), would cover for example, trade and regulations; trade development activities; support to address supply-side constraints (infrastructure); support for micro-economic adjustment (worker training, social safety nets, targeted subsidies); support for a macroeconomic adjustment (preference erosion, fiscal revenue losses, impact of changes in the prices); [and]commodity price stabilisation.”⁶⁷

Aid flows may affect trade flows, either because of the general economic effects they induce in the recipient country, or because aid is directly tied to trade (when they reflect conditionality or additional dimensions), or because it reinforces bilateral economic and political links or a combination of all three.⁶⁸ According to Pascal Lamy, “More Aid for Trade” is not about rebalancing WTO rules in a more development-

⁵⁹ See generally, http://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm

⁶⁰ Integrated Framework (supra n.**Error! Bookmark not defined.**)

⁶¹ Paragraph 36 Doha Declaration

⁶² Working Group on Trade, Debt and Finance - Expert Group Meeting on Trade Finance - 25 April 2008 - WT/WGTDF/W/38 July 2008; and Report of the Meeting of 14 September 2007 WT/WGTDF/M/15 27 September 2007;

⁶³ Ibid

⁶⁴ Ibid; see generally also “Working Group on Trade, Debt and Finance”

http://www.wto.org/english/tratop_e/devel_e/dev_wkgp_trade_debt_finance_e.htm

⁶⁵ See Paragraph 57 of the Hong Kong Ministerial Declaration

⁶⁶ Aid for Trade at http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm

⁶⁷ Laird (2007)

⁶⁸ Eisenmann and Verdier (2007) at 481-507.

friendly way, nor is it a substitute for better trade rules. It is an important complement to a fairer trading system".⁶⁹ The steps towards mobilizing AfT include the making of trade capacity and infrastructure a national priority over and above 'building more roads and bridges' by 'focusing on the profound global economic changes', and finding new ways to finance and implement projects regionally, more efficiently and effectively. Focus on the private sector, especially on the incentives that are required to leverage private resources is also vital.⁷⁰

However, there are concerns over the license to donors to converge or maintain interaction between respective policies and instruments of trade, Aid and development. The "welfare worsening" effects of such interaction has been well documented, such as where value of exports (of tied aid) from donor country can exceed value of aid; or tendency to use AfT as duplicitous bargaining for market access.⁷¹

Transfer of technology and development

The role of technology in development is undisputed as both a critical determinant and an outcome of rising incomes and also, as critical driver of economic progress.⁷² In consideration of the 'special development, financial and trade needs' of developing countries, a number of provisions in the WTO agreements recognise their weak technological base and the need for a transfer of technology to take place between developed and developing countries.⁷³ The WTO Working Group on Trade and Transfer of Technology is considering ways in which technology can be transferred to developing countries to enhance development within the trade framework.⁷⁴

Some of the indicators for trade led technology transfer for development identified by a World Bank and UNCTAD respective studies include the following:-basic infrastructure; macro economic stability; trade in capital goods, in business and professional services (migration); FDI flows and expenditure of transnational corporations in research and development; payment of royalties and licensing fees by the users to technology providers; education for creating absorptive capacity and growth of industrial alliances. These are drivers of technology diffusion, technological performance and productivity increases in the global market place.⁷⁵

From these indicators we could observe that technology transfer for development in trade framework encompasses trade in goods, services and intellectual property and FDI regimes, and on the extent to which companies engage in research and development. Developing countries could exploit the linkage between technology transfer and Article 1(2) (b) & (C) of the GATS regime of 'commercial presence' of companies under Modes 3, and the temporary movement of natural persons under Mode 4. However, on the more general transfers (under GATS Article IV (1) (a)), that should strengthen their domestic services capacity, efficiency and competitiveness, developing countries access should be on 'commercial basis.'

In addition, in context of trips, Article 7 (also 66) developing countries will benefit from technological innovation, transfer and dissemination of technology because of protecting and enforcing intellectual property rights of developed countries companies. Finally, there is the linkage of foreign investment with domestic enterprises and the interface between technology and human resources as these acquire and apply skills with technology diffusion.

The development dimension of trade and technology transfer here is attunes with liberalization, trade facilitation, trade capacity, efficiency and competitiveness, investment promotion and enterprise development in developing countries. It does not address broader development goals such as poverty alleviation, though it may influence these indirectly by outcome of rising incomes, and welfare enhancement as trade opens up, firms increase productive capacity and trade more across borders. It still does not address issues of technology life cycles, technology dumping by developed countries, trade and inequality, bargaining power in global production chains and the distribution of gains from trade, the effects of terms of trade on poverty, the effects of primary commodity dependence, and the relationship between export and import instability and vulnerability.⁷⁶

⁶⁹ Lamy "Aid-for-Trade initiative "critical" for Latin America and the Caribbean" available at http://www.wto.org/english/news_e/sppl_e/sppl68_e.htm#quote

⁷⁰ Ibid

⁷¹ Eisenmann and Verdier (2007)at 487-490

⁷² World Bank, (2008)

⁷³ See generally, Agreement on Technical Barriers to trade Article 11(2), (4) and (5); Article 12:2; TRIPS Agreement Articles 7; 8, 65, 66 and 67; Agreement on Sanitary and Phytosanitary Measures Article 9

⁷⁴ Working Group (2008) on Trade and Transfer of Technology - Twenty-Third Session - Note on the Meeting of 10 March 2008 WT/WGTTT/M/23 15 May 2008

⁷⁵ World Bank Study (2008); UNCTAD World Investment Report (2000): at pp 172-174 ;also Working Group (ibid) WT/WGTTT/M/23 15 May 2008

⁷⁶ See generally, Freres and Mold, (2004); Working Group (2008)(supra n.**Error! Bookmark not defined.**);UNCTAD, LDCs Report (2004); Ochieng (2007)

3. Conclusion

This paper has explored various context of use and application of the concept of 'development' in WTO regime. It reveals that trade and development complexity is rooted in the differing perspectives on how to discern and distinguish the conjunctive 'development, financial and trade needs of developing countries' within WTO law from the aspirations or more general development needs of developing nation's states.

From a trade perspective, an appreciable definition of development is 'trade-led development for trade gains'. This definition focuses on everything that can enable developing countries to 'trade and deal' in the local and global market forum - from liberalization, to trade facilitation, production and service efficiency and competitiveness, investment promotion and enterprise development in developing countries; and building trade capacity for these through human institutional and infrastructure capacity, trade financing, aid for trade, and technology transfer. Any development objective outside these should not be a trade imperative but a consideration that must not prejudice developing countries. To maintain this definition is to assure the sovereignty of nations, enhance the integrity of the trading system, ensure that development resources of other institutions and their mandates are not duplicated and creates a viable environment in which developing countries can pursue 'trade-led development for trade gains'.

Reference

- 1) Chang, S.,(2007) "WTO For Trade And development Post-Doha" *JIEL*10(3), 553–570;
- 2) Dunnoff, J., "Is International Trade regime fair to Developing States?" 97 *ASILP* 154 2003
- 3) Eisenmann A.S and Verdier T., "Aid and Trade" in *Oxford review of Economic policy*, Vol.23, No.3, 2007 pp481-507.
- 4) Freres and Mold, (2004) 'European Union Trade Policy and the Poor: Towards Improving the Poverty Impact of the GSP in Latin America', Working Paper, 02/04, EC-PREP (2004);
- 5) Garcia, F. (2000) "Trade Inequality and Justice in the Developing World" 21 *Mich. J. Int'l L.* 975 1999-2000
- 6) Hoekman, B.,(2005) "Operationalizing The Concept Of Policy Space In The WTO: Beyond Special And Differential Treatment" *JIEL* (2005) Vol.8(2), 405–424
- 7) Hudec, R., (1987) "Developing Countries in the GATT Legal System" (London: Trade Policy Research Centre, 1987
- 8) Ismail, F, (2005) 'A Development Perspective on the WTO July 2004 General Council Decision,' 8 *JIEL* (2005)
- 9) Laird, S., *Aid for Trade: Cool Aid or Kool-Aid? ,G-24 Discussion Paper No. 48 November 2007 UNITED NATIONS PUBLICATION UNCTAD/GDS/MDPB/G24/2007/6 available at http://www.unctad.org/en/docs/gdsmdpbg2420076_en.pdf*
- 10) Lindroos, A., and Mehling M. (2005) "Dispelling the Chimera of "self-contained Regimes" International Law and the WTO 16 *EJIL* (2005) 857
- 11) Matjaz N., (2006) "International Institutions, International Legal Norms and the Millennium Development goals" Law and Development: problems, Perspectives and Prospects 100 *Am. Soc'y Int' L Proc.* 425 2006
- 12) Matsushita et al *The World Trade Organisation, (2nd Edition)* OUP 2006
- 13) Mueller, T, (2008) "The Effect Of The African Growth And Opportunity Act (AGOA) On African Exports To The U.S." Paper Presented At The Annual Meeting Of The ISA's 49th Annual Convention, Bridging Multiple Divides, Hilton San Francisco, CA, USA, Mar 26, 2008 http://www.allacademic.com/meta/p250877_index.html (accessed 17/08/08)
- 14) Ngugi, J(2006) "The World Bank and the Ideology of Reform and Envelopment in International Economic Discourse" 14 *Cadozo J.Int'l & comp. L.* 313, 2006
- 15) Ochieng, C., (2007) "The Eu–Acp Economic Partnership Agreements And the 'Development Question': Constraints And Opportunities Posed by Article xxiv and Special And differential treatment Provisions Of The WTO *JIEL*10(2), 363–395
- 16) Mitchell, M.(2006), 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 *World Trade Review* 445 (2006).;
- 17) Lester *et.al World trade Law* Hart Publishing Oxford and Portland Oregon 2008
- 18) Lang, A.T.F" (2007) "Reflecting on "linkage": Cognitive and institutional change in International trading System" 70 *MLR* (2007)
- 19) Picciotto, R., (2004) "Scaling Up: A Development Strategy For the new Millennium in *Economic Integration and Social Responsibility*, Bourguignon F. et al (eds) World bank Washington Developing Countries. 2004
- 20) Qureshi, A.,(2003) 'Interpreting WTO Agreements for the Development Objective', Paper Presented at the ICTSD Conference, Making the WTO Dispute Settlement System Work for Developing and Least Developed Countries, Switzerland, Geneva, 7th February 2003

- 21) Qureshi & Ziegler.,(2006) *International Economic Law*, Sweet and Maxwell, London 2007 p.489
- 22) Rittich, K.(2006) The Future of law and Development: Second Generation Reforms And the Incorporation of the Social” *The New Law and Economic Development* CUP
- 23) Rittich, K., 2006, “The state of Law and Development : challenges after the Second Generation Reforms” in *100 Am. Soc’y Int’ L Proc.* 425 2006,
- 24) Schwartz, P.,(2005) “Sustainable Development In International Law” *Journal of Non-State Actors and International Law*, Martinus Nijhoff publishers Vol.5, No.2
- 25) Sutherland P., (2005) “The Doha Development Agenda: Political Challenges To The World Trading System – A Cosmopolitan Perspective” *JIEL*8(2), 363–375
- 26) Trubek & Santos (2006) “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in *The New Law and Economic Development* CUP 2006
- 27) UNCTAD, LDCs Report, (2004) UNCTAD, Geneva (2004)
- 28) UNECA, ‘Africa Economic Report’, UNECA, New York (2004).
- 29) UNCTAD World Investment Report 2000:” pp 172-174 available at http://www.unctad.org/en/docs/wir2000_en.pdf;
- 30) World Bank, 2008 "Global Economic Prospects: Technology Diffusion in the Developing World" Washington DC 20433 available at <http://go.worldbank.org/8MWWU5RAS0>;
- 31) World Bank, Study (2008) "Global Economic Prospects: Technology Diffusion in the Developing World" Washington DC 20433 available at <http://go.worldbank.org/8MWWU5RAS0>.