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“Setting International Development Disputes through Conciliation”

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## 1 Introduction

A central 'law and development' perspective on international economic law relates to the effective participation of developing countries in the international economic and legal system – in the World Trade Organization (WTO), regional trade agreements (RTAs), bilateral investment treaties (BITs) and other international economic legal mechanisms. In this field, considerable attention has been given over the last decade or so to two overarching legal issues. Substantively, there is the seemingly intractable difficulty in concretizing and enforcing fluid concepts such as 'development',<sup>1</sup> 'special and differential treatment' (SDT)<sup>2</sup> and 'common but differentiated responsibilities'<sup>3</sup> as firm legal rules and principles. In terms of process and procedure, there is the question of the diminished capacity of developing countries (and associated private economic actors), to use rules-based dispute settlement, such as in the WTO, or under RTAs and BITs, to their advantage.<sup>4</sup>

The present chapter relates to both of these issues, but it is neither about the 'evolving'<sup>5</sup> or 'emerging'<sup>6</sup> – and ever elusive – substance of the international law of development, as such, nor about dispute settlement from the perspective of developing countries.<sup>7</sup> Rather, as its title suggests, it seeks to characterize some international disagreements as disputes that are in themselves "international development disputes", and in this way to provide a new prism for assessing the problem of enhancing the sensitivity of international dispute settlement to development. The chapter will establish that despite the well-acknowledged vagueness of 'development' as an operative legal concept, there exists a set of international legal differences (primarily international economic disputes, but not exclusively so) that should be identified as

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<sup>1</sup> On the position of developing countries in the world trade system, see most comprehensively, Robert E. Hudec, *Developing Countries in the GATT/WTO Legal System* (ed. Joel Trachtman) (2009; 1<sup>st</sup> edition, 1987). On the particular issue of defining 'development', see Tomer Brode, "The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO", 27(4) *Columbia Journal of Transnational Law* (2006) 221, at section IV.2.

<sup>2</sup> See, e.g., Bernard Hoekman, "Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment", 8(2) *Journal of International Economic Law* (2005) 405; and Andrew D. Mitchell and Tania Voon, "Operationalizing Special and Differential Treatment in the WTO: Game Over?", 15 *Global Governance* (2009) 343.

<sup>3</sup> See Duncan French, "Developing States and International Environmental Law: The Importance of Differentiated Responsibilities", 49 *International and Comparative Law Quarterly* (2000) 35.

<sup>4</sup> The literature on this topic is vast. See, e.g., Marc L. Busch and Eric Reinhardt, "Developing Countries and GATT/WTO Dispute Settlement", 37(4) *Journal of World Trade* (2003) 719; and Gregory Shaffer, "Can WTO Technical Assistance and Capacity Building Serve Developing Countries?", 23 *Wisconsin International Law Journal* (2005) 643.

<sup>5</sup> See Oscar Schachter, "The Evolving International Law of Development", 15 *Columbia Journal of Transnational Law* 1 (1976).

<sup>6</sup> See Francisco V. García-Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (1990)

<sup>7</sup> See, e.g., Gary Horlick, "WTO Dispute Settlement from the Perspective of Developing Countries", elsewhere in this volume.

international disputes *about* development. Recognizing them as such has implications for the ways in which such disputes are dealt with. In particular, the effectiveness and legitimacy of using judicial methods to address development disputes should be reconsidered.<sup>8</sup>

Generally defined, international development disputes can be understood as a discrete category of international disputes that in terms of jurisdiction and applicable law, arise under fairly 'hard' rules of international law, such as trade and investment treaties, but in a more practical sense are actually concerned with reviewing the development policies of states, that are regulated on the international level only in very 'soft' terms, if at all.<sup>9</sup> In other words, international development disputes are disputes that involve fundamental disagreements between international actors about "*how to develop?*", even though the law that applies in such disputes is not designed or particularly equipped to cope with this question, many aspects of which are riven with doubt and controversy among economists and policy-analysts.<sup>10</sup>

Seen in this way, international disputes relating to development issues are surprisingly and increasingly common and the avenues of their settlement (or lack thereof) are diverse. Nonetheless, in many cases, judicial and quasi-judicial fora are precluded from considering development needs and concerns as normative factors in their decisions, in any more than the most general of terms (or at least, it would appear that they prefer to refrain from doing so), due to political, legal and structural constraints. Most development-related international dispute settlement avoids frontally engaging with development dilemmas by resorting to legal tools, rules and doctrines that are formally and teleologically exogenous to development.<sup>11</sup> This phenomenon effectively restricts or even neutralizes the legal effect of development law and development considerations rather than enforcing or empowering them. This chapter suggests that it would be conducive to the integration of development into international law, if international development disputes were recognized as a distinct field, that necessitates distinct treatment.

The chapter will be structured as follows. In the next section I will explain in more detail what is meant by "international development disputes", refining and justifying the concept and

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<sup>8</sup> These implications will not be fully developed within the limited scope of this chapter. The idea here is more modestly to explore the viability of "international development disputes" as a definitional concept.

<sup>9</sup> For a recent exposition of hard vs. soft law in international legal systems, and the interaction between them, see Gregory Shaffer and Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance", 94 *Minnesota Law Review*(2010) 706.

<sup>10</sup> See, e.g., Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (2007) for a critique of both orthodox and critical approaches to international development economics.

<sup>11</sup> To be sure, international trade law – that area of law most closely related to economic development - has, as its ideal goal, "raising standards of living", "sustainable development", and "the needs of [developing countries] economic development" (see Preamble, Marrakesh Agreement Establishing the WTO), but the world trading order is hardly designed as a fully liberalized system, or with the advancement of developing countries firmly in mind; for a comprehensive critique, see Joseph E. Stiglitz, *Making Globalization Work* (2006).

distinguishing it from 'development law' and 'developing countries' as related terms. In the subsequent section, I will provide a general typology of disputes that should be considered "international development disputes", in that they relate to development in three interrelated yet distinct senses: economic development, rights-based development and sustainable development. In the fourth section, in keeping with the present volume's focus on international trade, I will discuss central examples of international development disputes in the WTO. On this basis, in the fifth and final section I will briefly evaluate the overall impact of development disputes, actual and potential, on the evolution of international development law, and ways in which the concept of "international development disputes" might be leveraged from a law and development perspective.

## **II. What are International Development Disputes?**

The term "international development disputes" as referred to in this chapter requires some clarification and elaboration. After all, it is certainly not a term in common usage.<sup>12</sup> Rather than providing a rigid definition, let us consider some of the relevant alternative dimensions:

### **A. Development disputes transcend international development law**

First, we might pursue a restrictive *ratione materiae* approach, linking disputes to the substantive law they address. Development disputes would then include those international disputes involving differences over the interpretation and application of a predetermined area of "international development law", just as international trade disputes relate to international trade law, or international maritime disputes relate to international maritime law. This would then depend on the substantive scope of international development law, and would assume that such an area of law, composed of international development rights and obligations, is clearly identifiable. However, international development law thus construed has always been difficult to delimit in juridically meaningful terms, despite lawmaking and academic efforts to do so.<sup>13</sup>

International development law has, for example, been defined as an "emerging" international legal order based on two principal substantive elements, the "right to development", and the

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<sup>12</sup> A standard Google.com (May 1, 2010) search for the term "international development disputes" yielded only 11 'hits', mostly irrelevant, in contrast to the term "international investment disputes" that yielded 889,000 hits, the term "international trade disputes" that yielded 609,000 hits, and the term "international environmental disputes" that yielded 192,000 hits.

<sup>13</sup> Oscar Schachter's seminal essay on the topic begins with the words "[To] talk about an evolving international law of development requires us to identify that law. This compels us to think about fundamentals, an activity not always congenial to practical lawyers who have difficulty enough with the uncertainties of international law and its elusive sources." (Schachter *supra* note 5 at 1); while the international law that relates to development has no doubt become more robust since these lines were written 35 years ago, they ring just as true today.

"duty to cooperate for development".<sup>14</sup> To these we must add the evolving international norms of sustainable development.<sup>15</sup> This approach would therefore regard these international legal principles as the applicable law of international development, from which a slew of particular legal claims could be derived, directly informing the international regulation (and litigation) of aid, trade, investment, economic and social rights as well as environmental and natural resource issues. This approach would be analytically neat and doctrinally attractive. International development disputes would be deemed as all disputes which involve legal applications and interpretations of the right to development, the duty to cooperate for development, principles of sustainable development arise and other applicable norms of international development law.

However, such an approach would be quite narrow and not very instructive. These principles are sparsely cited before international tribunals, even more rarely applied by them, and a basic (and related) criticism that can be leveled against them reflects upon their juridical disutility and normative fuzziness. Following this approach would then either leave us with very little to study, oblivious to the broader effects that disputes in other areas of international law have on development; or would require us, in a rather contrived fashion, to read the substantive normative principles of international development law into specific judicial cases despite their explicit absence or very minor role in practice. Quite simply, international development disputes arise under a broader range of norms than the (unclearly) applicable law of development, *de lege lata*.

## **B. Development disputes transcend developing/developed country disputes over differential treatment**

Another possible alternative approach (strongly related to the first), would be to adopt a definition of international development law as based on the "duality of norms" that derives from "the emergence of a special type of subjects in international law – the category of developing countries",<sup>16</sup> an approach that would be familiar to many proponents from earlier times. Georges Abi-Saab has described this approach very concisely as one that

"postulates as its basis the common interest of all states in the development of the weakest and most vulnerable, which justifies according them preferential treatment in the form of special protection or targeted aid. From this derives the principle of the duality of norms as the principal axis and common denominator of legal regulation, which is formulated differently according to the different

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<sup>14</sup> See García-Amador, *supra* note 6 at 31 *et seq.*

<sup>15</sup> For a state-of-the-art collection of essays on the international law of sustainable development, see *International Law and Sustainable Development: Principles and Practice* (Nico Schrijver and Friedl Weiss, eds.)(2004).

<sup>16</sup> See Maria Magdalena Kenig-Witkowska, "Development Ideology in International Law", in *The Right to Development in International Law*, Subrata Roy Chowdhury, Erik M.G. Denters and Paul J.I.M. de Waart, eds. (1992), 35 at 39.

sectors of North-South economic relations: commodities, manufactured goods, technology transfers, financial flows, etc.”<sup>17</sup>

With respect to international development disputes, this approach would include all disputes relating to international rules that establish legally differential relations between developed and developing countries, such as SDT in the WTO, or CDR under international environmental law, or commitments towards 'North-South' technology transfer, e.g., in Part XIV of the United Nations Convention on the Law of the Sea (UNCLOS). Development disputes would then primarily be disputes over the extent of this duality, the scope of this differential treatment. Indeed, we might even simply consider "development disputes" *ratione personae*, as all disputes that arise between developing countries and developed countries. Both of these directions – the narrow and the broad - might be based on the common perception of international development law as "the law regulating the relations among sovereign but economically unequal states".<sup>18</sup> In the context of international disputes, this approach would also relate well to the logic of the important contemporary debate over the relative capacity of developing countries to participate in international dispute settlement and strategies for its enhancement, as already mentioned.<sup>19</sup>

While clearly international development law is inseparable from international economic disparity, between the so-called North and South, these approaches, too, would seem to be problematic and unenlightening when applied to the area of international disputes. Technically, they would assume that a satisfactory definition of "developing countries" exists, when in fact this is a continuing problem in development law.<sup>20</sup> These definitions would also exclude all "South-South" disputes that may be highly relevant to development,<sup>21</sup> as well as "North-North" disputes that may not involve economic inequality or legal differentiation, but apply universally applicable legal rules and interpretations that are pertinent to development and North-South situations as well.<sup>22</sup> Such definitions would also exclude disputes involving non-state parties, such as international organizations, especially International Financial Institutions (IFIs), whose

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<sup>17</sup> See Georges Abi-Saab, "Wither the International Community?", 9 *European Journal of International Law* (1998), 248 at 263.

<sup>18</sup> See Milan Bulajić, *Principles of International Development Law* (Dordrecht: Martinus Nijhoff, 1993, 2<sup>nd</sup> rev. ed.) 43; and Edward Kwakwa, "Emerging International Development Law and Traditional International Law: Congruence or Cleavage?" 17 (1987) *Georgia Journal of International and Comparative Law* 431, 432.

<sup>19</sup> See *supra* note 4.

<sup>20</sup> See Guglielmo Verdirame, "Definition of Developing Countries under the GATT and other International Law", 39 *German Yearbook of International Law* (1996) 164; and Broude *supra* note 1.

<sup>21</sup> For example, the Brazil-Uruguay dispute in MERCOSUR on import prohibitions of retreaded tyres (MERCOSUR, Tribunal Permanente de Revision, Laudo No. 1/2005, *Prohibicion de Importacion de Neumaticos Remoldeados Procedentes del Uruguay*; or the Argentina-Uruguay Pulp Mills dispute; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April, 2010.

<sup>22</sup> For example, ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September, 1997; and PCA, *Belgium/Netherlands (Iron Rhine Arbitration)*, Award of September 20, 2005.

important roles and responsibilities in international development are indisputable;<sup>23</sup> corporations, in the case of investment disputes, or cases involving accountability for violations of components of the right to development; and indeed individuals, wherever they possess standing or their rights are directly affected. On the other hand, definitions that focus on the differential status or legal treatment of states might include disputes that do not at all involve development issues. Arguably, not all economic disputes between developing and developed countries, not even all trade disputes that peripherally revert to SDT, involve questions of international development;<sup>24</sup> and clearly, many North-South *non*-economic disputes do not relate to development.<sup>25</sup>

In sum, international development disputes do not necessarily relate to the application of differential treatment, nor should the concept be defined as disputes between developed and developing countries.

### **C. Development disputes are disputes that affect development policy**

These formal definitions (that focus on international development law, or on developing countries) are therefore inadequate for an inquiry into international development disputes. Indeed, they appear to suffer from the general failings of international development law, as a field. A more object-oriented, integrated and functional definition could be proposed, whereby "international development disputes" are broadly understood as disagreements between international actors (including both states and non-state actors), *requiring determinations under international law that have significant ramifications for the design and implementation of development policy at the national or international level*, whether involving international development law or developing countries (however defined) or not. So described, international development disputes are in essence legal disagreements on issues that have repercussions for the overarching policy question of *how to develop*, and its more specific derivatives.

Thus, an investor-state arbitration under a BIT between a corporation from developed country A and the government of developing country B over an infrastructure contract might in certain circumstances be considered a development dispute, if the contested nationalization were related to A's development policy.<sup>26</sup> A World Bank Inspection Panel review relating to the effects of a Bank-financed project on the land rights of indigenous peoples would likely be a development

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<sup>23</sup> Of particular relevance are IFI accountability mechanisms, such as the World Bank Inspection Panel, that reviews adverse developmental and human rights effects of Bank-financed projects; see World Bank, *Accountability at the Bank: The Inspection Panel at 15 Years* (2009).

<sup>24</sup> This point is elaborated upon in section 3(i) below.

<sup>25</sup> For example, although a dispute between Mexico and the US over the treatment of Mexican nationals in the US upon arrest as suspected criminals (ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March, 2004) has distinct political North-South dimensions, it cannot seriously be considered as a development dispute, in the absence of ramifications for development policy.

<sup>26</sup> One might consider a dispute such as ICSID, *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania*, ICSID Case ARB /05/22, Award of July 24, 2008, to be such a case.

dispute.<sup>27</sup> And a trade dispute at the WTO over national import restrictions imposed for the sake of environmental sustainability, even if no SDT provisions were involved, would also be considered as an "international development dispute", to the extent that it could affect development policy by providing legal imperatives or constraints. These might all be development disputes, although they might have been excluded by the previously discussed definitions, either because they did not strictly involve "development law" (but rather, investment protection law, World Bank operational policies or procedures, and the general law of the multilateral trading system, respectively), and/or because they were not disputes between developing and developed countries, as the case may be.

This definition of international disputes can be criticized because it appears to be dependent on a clearly defined and widely accepted definition of the term "development", just as the ones discarded above were reliant on delimitations of "development law" or the identification of "developing countries". This might have been the case, had it required a legal delimitation of development, say, for the purpose of establishing jurisdiction, or to determine the applicable law. This definition, however, depends on no such term. It refers to the potential *effects* of a dispute, not to the law that regulates it, nor to the "North/South" identity of its parties. And it refers to development *policy*, which can be defined more loosely than development law. Development policy is taken here to include the courses of action pursued by governments and international organizations to promote development in a broad sense, namely, a combination of economic growth and poverty alleviation, furtherance of collective and individual social rights and environmental sustainability. International development disputes are thus not related to a single, particular area of substantive law, but to the behavior of international actors aimed at development, so defined.

This functional, integrated approach to development is not without legal basis, if one considers the language of the Declaration in the Right to Development,<sup>28</sup> the Rio Declaration,<sup>29</sup> the Doha Declaration<sup>30</sup> and other sources, but for present purposes it does not need it. To be sure, "development law" might itself be defined as all international law that significantly influences

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<sup>27</sup> For example, World Bank Inspection Panel, IPN Request RQ97/1, *Brazil: Itaparica Resettlement and Irrigation Project* (1997).

<sup>28</sup> The Declaration views development as a process; therefore development policy is policy aimed at contributing to this process: "[D]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom"; see UNGA Doc. A/RES/41/128, 4 December, 1996, *Declaration on the Right to Development*, Annex, second preambular paragraph.

<sup>29</sup> The Rio Declaration also views sustainable development as a process, aimed not only at economic development but also environmental concerns. See, e.g., Principles 4 (referring to the "development process"); see UNGA Doc. A/CONF.151/26 (Vol. I), *Report of the United Nations Conference on Environment and Development*, Annex I, *Rio Declaration on Environment and Development*, 12 August, 1992.

<sup>30</sup> See Paras. 2 and 6, WTO Doc. WT/MIN(01)/DEC/1, *Ministerial Declaration*, 20 November, 2001.

development policy - a possibility certainly worth entertaining, but this would be more far reaching than is necessary here. International development disputes are disputes that have repercussions for development policy, regardless of how we define development *law*. In the next section, this approach will be refined, examining particular ways in which disputes may impact upon development policy.

### **III. Types of International Development Disputes**

The integrated definition of international development disputes is useful, because it allows us to look at disagreements over development “through the cases”, rather than through the narrower lens of law as it is prescribed. In this respect, and in order to prevent the definition from overreaching itself, it is useful to disaggregate the concept into a few categories. At least three such categories of international development disputes may be identified. These should not be confused with areas of substantive law, or with the jurisdictions of particular fora, as none of them is exclusively associated with any; neither are these categories mutually exclusive, since a given development dispute may fall into more than one category. These categories are: (i) disputes relating to economic development policy; (ii) disputes relating to rights-based development policy; and (iii) disputes relating to sustainable development policy.

#### **A. Disputes relating to economic development policy**

Economic development disputes are disputes over international rights and obligations that guide or constrain domestic or international policies aimed at promoting development as measured by economic indicators (e.g., Gross Domestic Product (GDP) per capita, or economic measures of poverty). Disputes of this type arise mainly under international economic law, such as trade and investment law, and are often found in the respective fora, e.g., the dispute settlement systems of the WTO and regional trade agreements (RTAs), or in the International Center for the Settlement of Investment Disputes (ICSID). These are sets of international rules and institutions that clearly may affect national and international economic development policy. Thus, if a state objects to another state’s use of subsidies, on the basis of international trade law, because of their negative effect on its economic development,<sup>31</sup> or considers that for developmental reasons it should be eligible for trade preferences granted by another state,<sup>32</sup> these cases can be understood as economic development disputes. Investment disputes that arise out of changes in economic policy, and differences over the terms under which international development aid and finance are provided are also, at root, disputes relating to economic development policy. Economic development disputes may also involve other dimensions of development policy, such as social

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<sup>31</sup> See, e.g., WTO, WT/DS267/AB/R, *US – Subsidies on Upland Cotton*, Appellate Body Report, 3 March, 2005.

<sup>32</sup> See, e.g., WTO, WT/DS246/AB/R, *EC - Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report, 7 April, 2004.

rights or environmental issues, e.g., disputes over the use of child-labor in industry or adherence to environmental standards,<sup>33</sup> but at their core they are economic.

However, should this description appear too expansive, it is crucial to understand that not all international trade disputes, let alone all economic disputes, should be considered international development disputes.

First, many economic disputes arise for reasons that are not related to development, and address measures that are not part of development policy. Most trade disputes relate to disagreements over international competitive conditions, and are driven by competition between private economic actors over access to markets. When a government decides to shield a domestic industry from foreign competition, or to support its production and export capacity, a dispute over compliance with trade disciplines may arise. Targeted protection of certain industries may be a component of deliberate development policy, especially if it is embedded in a broader economic and social policy context, even though such policies may, nonetheless, be controversial in economic and political terms. These controversies, and the effects of development policy on competition, may give rise to disagreements on 'how to develop' – the very domain of international development disputes, as understood here. However, in many – perhaps even most – cases, such protection or support is not the outcome of informed development policy, but rather the result of protectionist pressures by private economic actors concerned with their own stakes in international trade. These cases should not be considered international development disputes, but rather classical trade disputes.

To be sure, the line between protectionism driven by domestic interest-group lobbying, on one hand, and economic measures that are part of development policy, on the other hand, can be a difficult one to draw. This is but a reflection of the lack of consensus on legitimate development policy, which is itself a necessary reason for examining development disputes. Notably, existing international trade and investment law does not include a 'general exception' for development policy, that would permit divergence from trade liberalization and investment protection disciplines where it is necessary for development.<sup>34</sup> This should not in itself present an obstacle to the conceptual distinction between disputes that are development-related, and those that are not, that is not a distinction based on applicable law, as explained above.

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<sup>33</sup> The initial complaint in the *EC – GSP* dispute (*ibid.*), included reference to labor rights, but this aspect of the complaint was later abandoned by India, the complainant.

<sup>34</sup> This option is rarely floated (but see, e.g., in the investment context, UNCTAD Doc., UNCTAD/ITE/IIT/18, *International Investment Agreements: Flexibilities for Development* (2000), at 96 (proposing a general exception for development in investment protection agreements). Indeed, conservative economists would consider such an exception to be an internal contradiction in any trade liberalization scheme, with the understanding that all trade liberalization promotes economic development.

Second, many economic disputes emerge as a result of barriers to trade and investment that are not necessarily motivated by protectionism, but relate to public policy considerations that lie outside the sphere of development policy, such as public morals. Such disputes should also not be considered development disputes, unless they simultaneously relate to development.

## **B. Disputes relating to rights-based development policy**

Beyond (and in parallel to) economic variables, development is recognized as a concept that aims to promote the 'human condition', to be equated with and derived from human freedom.<sup>35</sup> This has fed into the idea of rights-based development,<sup>36</sup> which is strongly associated with social justice as well as particular social and economic rights, such as the right to food, the right to health, the right to work, the right to water, and the right to education, in addition to the right to development itself.<sup>37</sup> Many, if not all, international disputes that affect the scope of these rights are hence international development disputes. These might include not only relevant decisions by regional human rights tribunals and reports by international human rights bodies but also investment disputes relating to social rights (e.g., the privatization or nationalization of an essential facility such as water works or sewerage), IFI accountability procedures that examine human rights effects of development projects, or trade disputes affecting access to medicines for epidemic diseases.<sup>38</sup>

However, just as not all economic disputes are development disputes, not all disputes over social rights infringements relate to development, but only those that are derived from, or may influence development policy. For example, disputes over the scope of the right to education may arise because of racial discrimination, in ways that cannot be the result of informed development policy.<sup>39</sup>

## **C. Disputes relating to sustainable development policy**

A crucial element of development policy is its environmental sustainability, the principles of which are perhaps most concisely enumerated by the Rio Declaration.<sup>40</sup> Most international

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<sup>35</sup> See Amartya Sen, *Development as Freedom* (2001)

<sup>36</sup> See, e.g., Stephen P. Marks, "The Human Rights Framework for Development: Seven Approaches", in *Reflections on the Right to Development* (Arjun Sengupta, Archana Negi and Moushumi Basu, eds.)(2005) at 23.

<sup>37</sup> See U.N. ECOSOC, "Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization", U.N. Doc. E/CN.4/Sub.2/2004/17 (June 9, 2004) (Study by Prof. Robert L. Howse)

<sup>38</sup> Such as the dispute over the seizure in the EU of generic pharmaceuticals manufactured in India for use in Brazil; see International Center for Trade and Sustainable Development, "Brazil Slams EU for Seizure of Generic Drugs", February 4, 2009, available at <http://ictsd.org/i/news/bridgesweekly/39772/>.

<sup>39</sup> See European Court of Human Rights, Grand Chamber, *Case of Oršuš and Others v. Croatia*, Application No. 15766/03, Judgment of 16 March, 2010.

<sup>40</sup> See UNGA, A/Conf.151/26 (Vol. I), Report of the UN Conference on Environment and Development, Annex I, Rio Declaration on Environment and Development, 12 August, 1992.

disputes over sustainable development policy involving environmental and/or national or international resource management should be viewed as international development disputes. In this category, a dispute based on international trade law and the international law of the sea with respect to the regulation of fishing<sup>41</sup> may be regarded, for example, at least in part, as a development dispute. An investment dispute that relates to environmental policy<sup>42</sup> may also be deemed a development dispute. This is the case even if the disputes in question are concurrently economic development disputes, or otherwise relate to social rights. Some environmental or resource allocation disputes should not, however, be considered development disputes, if they have no implications for development policy, but it is difficult to envision transnational environmental disputes that do not have developmental implications.<sup>43</sup>

To be sure, there are many overlaps between these categories of development disputes, and the definitional lines are not bright ones, reflecting the functional and integrative nature of development. The typology's main purpose is to illustrate the scope of international development disputes, not as defined in relation to the substantive law that may govern them, but in relation to development policy.

#### **IV. International Development Disputes in the WTO**

As we have already seen, international development disputes can arise in many different fora – from the WTO to human rights tribunals - and may be governed by many branches of international law. Given this volume's focus on international trade law, it makes sense to elaborate some more on the development disputes that make their way to the WTO.

Due to its comprehensive, indeed almost universal membership,<sup>44</sup> highly active and binding dispute settlement system, and above all, its focus on international trade regulation, many significant international development disputes have reached the WTO. WTO law includes rules

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<sup>41</sup> Such as the Chile-EU Swordfish dispute, that set off proceedings both at the WTO and at the International Tribunal for the Law of the Sea, but has been suspended through settlement; see Marcos Orellana, "The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and ITLOS", *ASIL Insights*, February 2001, Available at <http://www.asil.org/insigh60.cfm>.

<sup>42</sup> See, e.g., the NAFTA Chapter 11 investment arbitration in *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August, 2005, available at <http://www.state.gov/documents/organization/51052.pdf>.

<sup>43</sup> This is true with respect to cases that involve 'North-North' engagement, such as the classical *Trail Smelter Case* between the US and Canada (*Trail Smelter Arbitration (United States v. Canada)*, 3 R. Int'l Arb. Awards 1911 (1938), reprinted in 33 A.J.I.L. 182 (1939), 3 R. Int'l Arb. Awards 1938 (1941), reprinted in 35 A.J.I.L. 684 (1941)) and the recently concluded *MOX Plant Case* between Ireland and the United Kingdom (see Nikolaos Lavranos, "The Epilogue in the MOX Plant Dispute: An End Without Findings", *European Energy and Environmental Law Review*, June 2009).

<sup>44</sup> As of this writing (May, 2010), the membership of the WTO includes 153 States and Separate Customs Territories.

that impact not only on border measures such as industrial and agricultural tariffs, but also on "behind the border" measures that are especially pertinent to sophisticated national development policy, such as domestic regulation, taxation, subsidies and environmental protection. As already mentioned, the WTO also incorporates many rules reflective of international development policy, such as SDT provisions and the Generalized System of Preferences (GSP). All of these factors contribute to the WTO's considerable experience with international development disputes, many of which involve developing countries as parties, and address high-profile development issues.

However, WTO jurisprudence only partially reflects the potential coverage of development disputes in the WTO. Many developing countries have proven dispute-averse, and in fact Least Developed Countries have yet to take part in a WTO dispute. This clearly constrains the impact of WTO dispute settlement on international development policy, and might be a form of "adverse selection" as far as it relates to the states whose development is most problematic. Furthermore, disputes relating to rights-based development have not as of this writing been settled in the WTO, although it is likely that such disputes may occur in the future;<sup>45</sup> disputes that involve sustainable development have arisen,<sup>46</sup> and will probably increase in the future.

Consequently, the contribution of the WTO to the field of international development disputes, however important, has so far been mainly restricted to economic development disputes relating to the industrial development policies of economically significant developing countries such as Korea, Brazil, India and China, and to the developmentally sensitive areas of textiles and agriculture, with a handful of sustainable development disputes as well. To be sure, as explained in the previous section, in areas of economic development it is difficult – though necessary - to make a clear distinction between trade disputes that stem from Members' domestic sectoral political economy preferences and disputes that directly relate to national economic development policy. For example, anti-dumping duties are usually related to the protectionist needs of domestic industries, but in principal may also be part of national import-substitution development strategies, although this might be an abuse of anti-dumping disciplines. A subsidy may in some cases be granted to preserve the position of an industry in the domestic economy in the face of external competition, but in other cases it may be part of an export-based economic development policy. All anti-dumping, subsidies and countervailing measure disputes jurisprudence may therefore be indirectly relevant to development policy, but a dispute should be considered to be a development dispute only if it requires determinations that can be shown to be related to national or international development policy.

Thus construed, development disputes settled in the WTO generally fall into the following groups. First, there are disputes in which a WTO Member challenges an element of another Member's economic development policy on the basis of WTO rules; these may be called

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<sup>45</sup> See *supra* notes 33 and 38 for examples.

<sup>46</sup> See section 4.(iv) *infra*.

'constraining development disputes', because they may have the effect of constraining a state's development policy. Second, there are cases in which a WTO Member complains against a measure of another WTO Member because it constrains its own development policy. These may be called 'enabling development disputes', because they may have the effect of increasing the effectiveness of development policy. Third, there are disputes in which a complaint is lodged against a WTO Member's measure that is harmful to the economic development of the complaining party. These may be described as 'defensive development disputes'; they are distinct from 'enabling development disputes' because they do not relate to the development policy of complaining party, but rather to the externalities imposed by one Member on the development of another Member. Fourth, there are disputes that are concerned with the sustainable environmental policies of members; these will be referred to as 'sustainable development disputes'. A fifth, rights-based type of development dispute may arise in the future, but as mentioned above, such disputes have not yet been properly adjudicated in the WTO.

#### **A. Constraining Development Disputes: Challenges to Members' economic development policy as WTO-inconsistent**

These are cases in which an element of a WTO Member's economic development policy has been challenged by another Member as incompatible with WTO obligations. Many of these disputes relate to what is generally referred to as 'industrial policy', including the subsidization of infant industries, the protection of domestic industry as part of import-substitution policies, tax manipulation, local content requirements and weak intellectual property protection. A survey of WTO disputes that reached the full panel adjudication process in the first decade of the WTO's existence has shown that a very high proportion of WTO disputes – approximately 25% - have dealt with such developmental policies, as enacted by both developing countries and developed countries.<sup>47</sup> An indicative list of such constraining development disputes in the WTO would include the following:

- WT/DS46 *Brazil – Export Financing Programme for Aircraft*.
- WT/DS54, 55, 59, 64 *Indonesia – Certain Measures Affecting the Automotive Industry*.
- WT/DS96 *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial products*.
- WT/DS146 *India – Measures Affecting the Automotive Sector*.
- WT/DS273 *Korea – Measures Affecting Trade in Commercial Vessels*.
- WT/DS339, 340, 342 *China – Measures Affecting Imports of Automobile Parts*.

The *Indonesia-Autos* example demonstrates the character of development disputes as disputes over 'how to develop'. In the mid-1990s, Indonesia pursued a 'National Car Program' that included local content incentives applicable to imported automobiles. The policy was similar to

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<sup>47</sup> See Alisa DiCaprio and Kevin P. Gallagher, "The WTO and the Shrinking of Development Space: How Big is the Bite?", 7(5) *Journal of World Investment and Trade* (2006) 781 at 795.

pre-WTO policies successfully followed by Brazil in the establishment of its local automobile industry. The *Indonesia-Autos* panel found that Indonesia's policies were in violation of particular provisions of GATT Article I (Most-favoured Nation treatment) and Article III (National Treatment), the TRIMS, and the WTO Agreement on Subsidies and Countervailing Measures.<sup>48</sup> Indonesia therefore had to amend its automobile policy to bring it into conformity with WTO disciplines. Indeed, as with any such industrial policy, the pre-dispute policy was prone to criticism as an inefficient development policy.<sup>49</sup> The role of government intervention in development presents a legitimate controversy in development economics. What is important to note, for present purposes, is that in the WTO such 'constraining development disputes' are adjudicated strictly under international trade disciplines, without addressing the core question of the development effect of the measure and policy under review.<sup>50</sup>

### **B Enabling Development Disputes: Challenges to Members' measures constraining the economic development policy of other Members**

These are cases in which a WTO Member (typically a developed country) has taken unilateral action targeting an element of another WTO Member's economic development policy (typically that of a developing country), and the latter tries to push back through WTO dispute settlement. If the complaint is successful, the removal of the measure therefore enables the development policy of the complaining Member.

Disputes in this category are relatively rare for two reasons. First, they are *a priori* limited to cases in which a WTO Member may take unilateral action under WTO rules (in goods, these are primarily countervailing duties, or in some cases, safeguard measures or anti-dumping duties); second, they will often require initiation of the complaint by a developing country, whose legal capacity might be insufficient.

An example of an enabling development dispute is South Korea's struggle against countervailing measures on Dynamic Random Access Memory Semiconductors (DRAMs) imposed by both the US and the EU. Korea's support for its DRAMS industry has been a strategic element of its post-industrial technological policy for the last two decades.<sup>51</sup> Korea's policy has met with resistance

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<sup>48</sup> See WTO, WT/DS54, 55, 59, 64 *Indonesia – Certain Measures Affecting the Automotive Industry* (Panel Report), 2 July, 1998.

<sup>49</sup> See Haryo Aswicahyono, "How Not to Industrialize? Indonesia's Automotive Industry", 36(1) *Bulletin of Indonesian Economic Studies* (2000) 209.

<sup>50</sup> Indeed, in *Indonesia- Autos*, Indonesia invoked some SDT provisions, but these arguments were rejected by the panel. In any case, the panel did not conduct (and to be sure, would not conduct, under prevalent readings of WTO jurisdictional rules and practice) any analysis of the development impact of Indonesia's policy.

<sup>51</sup> See Cheng-Fen Chen and Graham Sewell, "Strategies for Technological Development in South Korea and Taiwan: The Case of Semiconductors", 25(5) *Research Policy* (1996) 759. For an economic justification of this extended 'learning period', see Staffan Jacobsson, "The Length of the Infant Industry Period: Evidence from the Engineering Industry in South Korea", 21(3) *World Development* (1993) 407.

in the form of anti-dumping measures and countervailing duties in the US and the EU, both of which have given rise to WTO disputes.<sup>52</sup> By finding that some EU and US measures were WTO-inconsistent, the WTO dispute settlement system largely enabled the continuation of Korea's relevant economic development policy. However, it is noteworthy that the fundamental questions of permissible economic development were not at issue in these cases, but rather, at least primarily, the arcane technicalities of countervailing duty procedures and their imposition.<sup>53</sup>

Another example, in trade in services, can be found in the *US-Gambling* dispute.<sup>54</sup> Like other Caribbean states, Antigua and Barbuda's encouraged liberalization of internet gaming based in its territory with the goal of economic development and diversification.<sup>55</sup> The enforcement by the US (and some of its constituent states) of restrictive gaming laws threatened to disrupt this developmental impact. Antigua's complaint, often seen through the technical prism of services classification and substantive rules<sup>56</sup> or the important question of public morals exceptions to trade liberalization,<sup>57</sup> may therefore also be seen as a development dispute.

### **C Defensive Development Disputes: Challenges to Members' measures harmful to the economic development of other Members, in particular developing countries**

In defensive development disputes, measures taken by one WTO Member produce externalities that harm or impede another WTO Member's economic development. The developmental focus here is not the policy of the complainant, but the effects – or externalities - of the respondent's policy on the economic development (and alleviation of poverty, as the case may be) of the complainant. Characteristic cases deal with import restrictions imposed by developed countries that deny market access to goods from developing countries in sectors that are crucial to the economic well-being of the latter; subsidies granted to producers in developed countries that suppress world prices and compete unfairly with products from developing countries; and preferences granted by developed countries that discriminate between different developing countries. The following are examples of such defensive development disputes:

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<sup>52</sup> WT/DS99 United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea; WT/DS296 United States – Countervailing Duty Investigation on DRAMS from Korea; WT/DS299 European Communities – Countervailing Duties Measures on DRAM Chips from Korea; WT/DS336 United States – Countervailing Duties on DRAMs from Korea.

<sup>53</sup> See also Dukgeun Ahn, "Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development", 6(3) *Journal of International Economic Law* (2003) 597.

<sup>54</sup> See WT/DS285/AB/R, US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Appellate Body Report), 7 April, 2005.

<sup>55</sup> See Mark Wilson, "Chips, Bits and the Law: An Economic Geography of Internet Gambling", 35(7) *Environment and Planning* (2003) 1245.

<sup>56</sup> See Joost Pauwelyn, "*Rien ne Va Plus?* Distinguishing Domestic Regulation from Market Access in GATT and GATS", 4 *World Trade Review* (2005) 131.

<sup>57</sup> See, e.g., Jeremy C. Marwell, "Trade and Morality: The WTO Public Morals Exception after Gambling", 81 *New York University Law Review* (2006) 802.

- WT/DS27EC – *Regime for the Importation, Sale and Distribution of Bananas* (and related disputes).
- WT/DS33 US – *Measures Affecting Imports of Woven Wool Shirts and Blouses from India*.
- WT/DS231 EC – *Trade Description of Sardines*.
- WT/DS246 EC – *Conditions for the Granting of Tariff Preferences to Developing Countries*.
- WT/DS263,266, 283 EC – *Export Subsidies on Sugar*.
- WT/DS267 US – *Subsidies on Upland Cotton*.

The 'poster child' of this category of disputes is, without a doubt, the *US – Cotton* dispute, in which Brazil challenged US subsidies for cotton producers, with the effect of depressing world prices and denying competitive advantages from Brazil and other developing cotton producers. Notably, the legal focus in cases of this type is not on the respondent's compliance with trade rules. The effects of its policies on the economic development of the respondent are considered only insofar as they constitute an element of the violation, e.g., the question of 'serious prejudice' in subsidies cases.<sup>58</sup>

#### **D. Sustainable development Disputes: Challenges to sustainable development policies of Members as WTO-inconsistent**

This special category of development disputes shows most clearly that disputes over development are not the exclusive domain of developing countries. At times, the environmental policy of a developed country comes into conflict with the economic development needs of a developing country; at other times it is the sustainable development policy of a developing country that is under scrutiny. Examples of sustainable development disputes in the WTO include:

- WT/DS332 *Brazil – Measures Affecting Imports of Retreaded Tyres*
- WT/DS58 US – *Import Prohibition of Certain Shrimp and Shrimp Products*.
- WT/DS2 US – *Standards for Reformulated and Conventional Gasoline*

Importantly, in some of these disputes WTO adjudicators have taken into account sustainable development considerations.<sup>59</sup> This may be attributed to the specific toeholds relating to sustainable development in the WTO agreements themselves (such as in the Preamble to the Agreement establishing the WTO, and Article XX(g) GATT), and to the existence of 'hard', non-

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<sup>58</sup> See *US – Cotton*, *supra* note 31 at 146 *et seq.*

<sup>59</sup> Particularly in WT/DS58/AB/R *US – Import Prohibition of Certain Shrimp and Shrimp Products*, at para. 129 *et seq.*

WTO sources of sustainable development law, such as the Convention on International Trade in Endangered Species (CITES).<sup>60</sup>

## V. Assessing the Impact of Development Disputes in the WTO

In trade circles, one often hears the truism that "the WTO is not a development organization".<sup>61</sup> The stagnant so-called 'Doha Development Round' makes this abundantly clear; the WTO is not providing an effective negotiating environment conducive to development concerns. Nevertheless, the WTO and its members cannot avoid the inconvenient truth: much of what it actually does in the trade arena, relates very strongly to development. Focusing on the concept of development disputes elaborated on in this article suggests that a large proportion of WTO disputes that are ostensibly about the enforcement of trade rules, are actually 'about' development, and the perennial question, '*how to develop?*'.

And yet, despite the subdued prominence of development issues in WTO disputes, the WTO dispute settlement system regularly treats development disputes of all kinds as if they were simply run-of-the-mill trade disputes driven by regular political economy factors relating to international competitiveness. Thus, issues that should properly be classified as fundamental differences over development policy are dealt with through technical rules of international trade, that pay only lip service to development concerns. At best, development is promoted indirectly, when trade disciplines coincide with a development cause, as in the *US - Cotton* case. At worst, this dissonance may result in severe restrictions of development policy space that is necessary at the national level, as in some of the 'constraining development disputes' discussed above.

The standard responses to this state of affairs have, so far, been calls to make WTO dispute settlement friendlier to developing countries; or to revise substantive WTO law to make it more amenable to development concerns. Neither of these approaches, however well-motivated, has so far amounted to a lot, and so development disputes continue to be adjudicated by the WTO dispute settlement system (and in other tribunals or institutional systems) despite its insensitivity to their development aspect, in a way that is ultimately detrimental to the legitimacy of the WTO; and the contribution of the resultant jurisprudence to the evolution of international development law is scattered and easily distinguished, almost *ad nullum*.

In these circumstances, it seems appropriate to ask, whether development disputes should not be treated differently. States have agreed to trade disciplines, but there is little agreement on fundamental principles of development policy. Perhaps it would be better for development, developing countries, and the WTO itself, if 'development disputes' as discussed here were

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<sup>60</sup> See *Ibid.*.

<sup>61</sup> See, e.g., "Trade, Poverty and the Human Face of Globalization", Speech by WTO Director-General Mike Moore, June 16, 2000, available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm32\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm32_e.htm).

recognized as disputes that can also be settled by softer means, such as good offices, mediation or conciliation, and not through rules-based adjudication, whose rules do not address the developmental heart of the disputes. The potential advantages of such recourse to alternative dispute resolution, as well as the methods to be pursued, need to be carefully considered, and will be left for another article. Moreover, it would perhaps be through such a process, and the practices that it would spawn, that development law – a genuine law of development, not simply trade-related development law, or investment-related development law, would truly emerge.

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