



2012

## Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico

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52 Va. J. Int'l. L. 551-632 (2012)

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VIRGINIA JOURNAL  
OF  
INTERNATIONAL LAW

Volume 52 — Number 3 — Page 551



Article

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for Developing Countries in  
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# Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico

ALVARO SANTOS\*

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*Although liberal trade and development scholars disagree about the merits of the World Trade Organization (WTO), they both assume that WTO legal obligations restrict states' regulatory autonomy. This Article argues for relaxing this shared assumption by showing that, despite the restrictions imposed by international economic law obligations, states retain considerable flexibility to carve out policy autonomy. The Article makes three distinct contributions. First, it analyzes how active WTO members can, through litigation and lawyering, influence rule interpretation to advance their interests. Second, the Article redefines the concept of "legal capacity" in the WTO context and introduces the term "developmental legal capacity," which describes how states can use legal tools and institutions not only as a sword to open new markets but also as a shield for heterodox economic policies. Third, the Article offers a comparative analysis of two case studies, Brazil and Mexico, and shows that they have pursued different trade and litigation strategies. While subject to the same WTO obligations, these countries have made different use of their policy*

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*space according to their own economic objectives. The Article concludes that, despite the apparent rigidity of the WTO, countries following a deliberate strategy can expand their regulatory space to advance their own interests.*

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## INTRODUCTION

As countries around the world responded to the 2008 global financial crisis with economic stimulus and rescue packages, a vigorous debate developed in the rich North Atlantic countries about the role of the state in the market. In the United States, the government bailout of several financial institutions, the rescue of the American car manufacturers, and the start of several investment and spending projects seemed to inaugurate a greater role for the state in the economy. For a brief period of time, it seemed as though the strong belief in markets and the aversion to active state participation had crumbled and a paradigm shift in economic thought had taken place. Although this proved to be a temporary illusion and the parameters of the public debate have shifted dramatically since then, the crisis initiated a worldwide debate about the virtues and limits of the market. This debate had been going on for years in the context of developing countries — what was different this time was that a grave economic crisis originated in and affected the rich industrialized countries directly. This time, the debate and the reform policies that followed would have immediate consequences on the economies of the rich countries.

The global financial crisis also threw the World Trade Organization (WTO) into the limelight and reenergized a vigorous debate between two main positions, which I call the “liberal trade” and “development” positions. Liberal trade scholars defend the WTO as an institution that can bring prosperity and increase economic welfare in the world. Development scholars, on the other hand, criticize the WTO for curtailing developing countries’ policy autonomy and hindering their ability to undertake the kind of policies that wealthy countries undertook to become rich. Interestingly, although liberal trade and development scholars disagree about the merits of the WTO, they both share an assumption that the WTO effectively restricts a state’s capacity to regulate in favor of its own domestic economic interests; the difference is that the former group celebrates this condition and the latter bemoans it.

In this Article, I examine and challenge the assumptions of the two main positions in the debate. Development scholars argue that by imposing tight legal restrictions the WTO system hinders poor countries’ prospects for economic growth. As I will show, however, many of the legal restrictions are open-ended and remain in flux through constant interpretation. While there are important limits set by the architecture of the WTO and the asymmetry of power between its members, there is flexibility within the system to expand developing countries’ regulatory autonomy beyond what is currently recognized. By the same token, I challenge the liberal trade scholars’ assumption about the WTO as a rule-based system providing a level playing field and equality of opportunity

between members in the WTO dispute settlement system. I show that there are important structural asymmetries that disfavor developing countries. Thus, while attainable, policy space is expensive and above all, requires a deliberate strategy.

This Article seeks to make three distinct contributions to the literature of trade and development. First, it offers a legal-institutional analysis of the WTO to shed light on the open-endedness of legal obligations and on how active members can influence rule interpretation over time to advance their interests through effective litigation and lawyering. The terms of WTO legal obligations are still contestable; this Article highlights the conditions under which countries can exploit this ambiguity and suggests several avenues by which to do so. While scholars have studied countries' rates of participation and success in WTO litigation, I examine this participation in a dynamic way, looking at the rules in flux and at favorable rule-change over time. I argue that a country's success in WTO litigation should not be measured by the number of cases it has won or lost. Often, a country can lose a case but still obtain a favorable interpretation of a rule so that it can ultimately modify its domestic measures to suit its domestic needs. Thus, what is relevant is how countries — mostly repeat players — manage to change rule interpretations to advance their domestic economic policies within the confines of the WTO legal regime.

Second, this Article seeks to broaden the concept of “legal capacity” in the WTO law literature by analyzing its importance from a new perspective. Scholars use the idea of legal capacity to account for the perceived difficulties that developing countries face in participating in the WTO dispute settlement system to their advantage. Because of the complexity of WTO litigation, developing countries often lack the legal skills and resources to effectively advance their interests within the system. This Article suggests that the current understanding of legal capacity is too limited as it continues to rely on the assumption that its overarching goal is to deepen trade liberalization. In contrast, I introduce the concept of “developmental legal capacity,” which acknowledges that trade law can be both a sword to open markets and a shield for heterodox policies. Countries that actively pursue heterodox development policies are also more likely to invest in their local legal capacity and to rely on it to advance their national policy goals.

Finally, I offer a comparative analysis of two cases studies, Brazil and Mexico, to explore how two developing countries pursue their development objectives within the trade legal regime. These countries have the two largest economies in Latin America, are active participants in the global market, and have the highest participation rates in WTO cases in the region. But, while these countries are similar in many ways, their participation in the WTO shows two divergent trade and development

strategies. Mexico pursues a policy of trade liberalization while Brazil focuses more actively on state promotion of domestic industries and economic actors within the international trade system. These positions are in turn reflected in these countries' participation in the WTO system and the domestic institutions that support it. This comparative analysis shows that active participation in the WTO on its own does not guarantee greater policy autonomy. A country needs to carve out this space deliberately, which requires a great degree of training, coordination, and institutional capability. Ultimately, a country will be able to expand its policy autonomy only if it links its legal capacity to a deliberate domestic development strategy.

Beyond these contributions, this Article seeks to intervene in the literature on the emergence of a New Developmental State, which proposes that the neoliberal economic model is making way for an alternative paradigm.<sup>1</sup> This emergent model presupposes a more active role for the state in the market, but differs significantly from the old Developmental State and the *dirigiste* practices of the past. The characteristics of this emerging model remain unclear and it currently amounts more to a set of policies than to a coherent whole. By analyzing Brazil's experience in the WTO and highlighting the institutions and strategy behind its relative success, I suggest that Brazil may very well be, along with other emerging countries like China and India, the harbinger of a new economic model. By analyzing this case study, I explore what the trade policy of such a New Developmental State might look like.

This Article is divided in four parts. In the first part, I examine the debate over the WTO restrictions on countries' policy autonomy and argue that liberal trade and development scholars alike underestimate the flexibility of the regime. The second part analyzes the legal restrictions introduced by the WTO and the barriers that have arisen when using the exceptions. I argue that while the WTO is more restrictive than the previous General Agreement on Tariffs and Trade (GATT) regime, there is policy space to be gained within the WTO agreements. In the third part, I examine the legal and doctrinal space available to countries in the interpretation of WTO agreements that are open-ended. I show that active participants in the system are influencing rule interpretation and using the system's procedures to their advantage through strategic lawyering and litigation. The experience of rich countries and a few middle-income countries shows that repeat players can expand their policy space to favor their interests. I analyze the type of "developmental legal capacity" and domestic institutional capability that is needed to pursue this strategy.

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1. See, e.g., David M. Trubek, *The Political Economy of the Rule of Law: The Challenge of the New Developmental State*, 1 HAGUE J. ON RULE L. 28, 30 (2009); F. Charles Sherman, *Law and Development Today: The New Developmentalism*, 10 GERMAN L.J. 1257, 1258–59 (2009).

Lastly, in the fourth part I analyze the cases of Mexico and Brazil contrasting their divergent strategies of participation in the WTO. The analysis shows that developing countries can carve out important space for their domestic development objectives.

### I. THE DEBATE ABOUT POLICY AUTONOMY IN THE WTO

The creation of the WTO in 1995 has been hailed as a phenomenal achievement. The organization introduced a new trade regime by expanding the GATT and, in effect, inaugurating a new era of unprecedented global economic integration. The organization stood as the institutional embodiment of an economic model predicated on free markets and free trade being key to social and economic prosperity. In the 1990s, former communist countries and developing countries flocked to the organization with great expectations for economic growth. The WTO has effectively reduced trade restrictions around the world, integrating domestic markets and unleashing production and consumption gains from specialization and trade.

Institutionally, the WTO has become the envy of international organizations for its effectiveness and, above all, for its enforcement capacity. It is no surprise that scholars and policymakers would like to use the WTO as a forum to deal with a variety of challenging global issues, like the environment, labor, immigration, and health.<sup>2</sup> Nor should it be a surprise that many advocates of and players in the WTO resist such expansion because they view it as a threat to its efficacy and legitimacy.<sup>3</sup> Finally, the WTO can boast a slim profile in a world of international organizations that look unnecessarily large, wasteful, and ineffective by comparison.

The WTO regime is often perceived as having moved the trade system from a power-oriented diplomacy toward a rule-oriented diplomacy.<sup>4</sup> Consequently, it is also perceived to be more restrictive than its GATT predecessor. In fact, the motivation behind the WTO was to create an institution that would encourage countries to decrease their trade barriers and that would enforce countries' commitments. In order to achieve these results, it was necessary to curtail domestic government measures that would serve as effective equivalents to tariff barriers and hinder trade liberalization commitments. To ensure this end, the original trade regime has been transformed into a complex legal regime with more effective

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2. See, e.g., Symposium, *The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002).

3. *Id.*

4. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 89 (2006); JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 97 (2d ed. 1997).



institutions (most notably a dispute-settlement body) to enforce existing international obligations.<sup>5</sup> In this Section, I outline the liberal trade and development scholars' debate about the desirability of these restrictions on the policy autonomy of developing countries.

#### *A. Liberal Trade vs. Development Scholars*

Although there is a general consensus that the WTO is more restrictive as compared to GATT, there remains disagreement over whether these new institutional constraints are desirable. Liberal trade scholars argue that the WTO has been a success in terms of increase in global trade and gains to global economic welfare.<sup>6</sup> They note, however, at least two important aspects in which the WTO could be improved. First, liberal trade scholars suggest that developed countries fail to truly embrace the goals of the WTO when they herald trade liberalization by developing countries, yet considerably restrict access to sectors of their own markets, such as the agricultural and textile sectors. Considering that many developing countries have a comparative advantage in these sectors, liberal trade scholars argue that developed countries should reduce their farm subsidies and eliminate other trade restrictions in agricultural and textile goods.<sup>7</sup>

Second, liberal trade scholars advocate providing aid and greater technical assistance to developing countries, so they can fully participate in and take advantage of the existing trade regime.<sup>8</sup> These proposals stem from a conviction that developing countries would benefit from fully participating and complying with the WTO system. Instead of granting developing countries substantive exceptions to the rules the WTO should aid them to become active participants in and take full advantage of the system.<sup>9</sup>

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5. The World Trade Organization (WTO) is a key example of the trend towards courts and judicialization globally. This phenomenon is salient in international law and international organizations, with the proliferation of judicial and quasi-judicial institutions. For a characterization of this practice as part of a broader event in global legal consciousness, legal reasoning and legal institutions, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006) (describing a third globalization of legal thought, originating in the United States, with judges and adjudication as a centerpiece).

6. See, e.g., JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 60–67, 261 (2004); MARTIN WOLF, WHY GLOBALIZATION WORKS 206–12 (2004). It should be noticed that both authors point to limitations of the WTO.

7. See WOLF, *supra* note 6, at 212–16.

8. See, e.g., BHAGWATI, *supra* note 6, at 235–36 (arguing that the World Bank should have a special aid program to compensate developing countries when they bear significant losses in income and market access as a result of unfavorable rulings in the WTO dispute settlement).

9. See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. The declaration, which is the most explicit WTO recognition of developing countries' concerns, emphasizes the importance of technical cooperation and capacity building as "core elements of the development dimension of

In contrast, development scholars argue that the WTO does not serve well the interests of developing countries. They argue that trade liberalization has become the main objective of the WTO at the expense of economic development.<sup>10</sup> The WTO's success, they argue, should not be measured by the increased volume of global trade, but by its effects on member countries' economic development.<sup>11</sup> According to this view, the WTO regime and those who manage it have mistaken the means (trade liberalization) for the goal (development).<sup>12</sup> Thus, development scholars seek to change the WTO's focus from asking what it can do to encourage countries to open their markets to how countries should use the existing trade regime to foster economic growth and improve living standards around the globe.<sup>13</sup> While they criticize developed countries' reluctance to end their subsidies and open their markets in agriculture and textiles, development scholars do not see this liberalization, even if it were to happen, as the key to developing countries' growth.<sup>14</sup>

Developing countries signed up to the WTO chasing its promise of economic growth and better living standards. Development scholars argue, however, that trade liberalization alone has not, and cannot, deliver on this promise.<sup>15</sup> Today's industrialized and rapidly-growing developing countries achieved economic growth by embracing heterodox strategies that combined policies of government support and selective trade liberalization.<sup>16</sup> Development scholars argue that, if the WTO's aim is truly

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the multilateral trading system?" ¶ 38.

10. See DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, AND ECONOMIC GROWTH 213–36 (2008); DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY 76–84 (2011); see also HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 65–83 (2007); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 1–12 (2002); NARCÍS SERRA & JOSEPH E. STIGLITZ, THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (2008); RETHINKING DEVELOPMENT ECONOMICS (Ha-Joon Chang ed., 2003); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK 61–102 (2006); JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2005); Robert Wade, *What Strategies are Viable for Developing Countries Today? The WTO and the Shrinking of Development Space*, 10 REV. INT'L POL. ECON. 621, 621–31 (2003).

11. See, e.g., RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 233–36.

12. See *id.* at 227–28.

13. See *id.* at 233–36.

14. See *id.* at 222–23; Nancy Birdsall et al., *How to Help Poor Countries*, FOREIGN AFF., July/Aug. 2005, at 136.

15. See CHANG, BAD SAMARITANS, *supra* note 10, at 65–83; CHANG, KICKING AWAY THE LADDER, *supra* note 10, at 1–9; RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 216–25; RODRIK, THE GLOBALIZATION PARADOX, *supra* note 10, at 159–83.

16. See CHANG, BAD SAMARITANS, *supra* note 10, at 40–64; CHANG, KICKING AWAY THE LADDER, *supra* note 10, at 1–9; RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 13–55. See generally ALICE AMSDEN, THE RISE OF “THE REST”: CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES (2001); ROBERTO UNGER, FREE TRADE REIMAGINED (2007); ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF

to promote economic development, then the trade regime should give developing countries more policy space to support domestic economic activities and promote industrial policies.<sup>17</sup>

At its most general level, this is a debate about whether the neoliberal development model, with its staunch support for free markets and free trade, even in its more moderate form, holds promise for developing countries. It would be wrong to characterize this debate simply as one between free trade versus protectionism. At the core of this debate there is a disagreement about whether trade liberalization is the main engine for economic growth and whether it should be the main organizing principle of the international trade regime. Consequently, it is also a debate about what institutional form the WTO should take, how much space it should give member countries to promote their own industries and what form this promotion should take.

This Article does not attempt to adjudicate this debate. But, it is important to note that there is a wealth of theoretical and empirical critiques challenging the relationship between free trade and economic growth which was taken for granted when the WTO was created.<sup>18</sup> In addition, many countries that pursued orthodox free trade policy as a development strategy have not fared well whereas countries that followed unorthodox policies have done better.<sup>19</sup> Thus, looking at the current state of the academic and policy debate it is possible to conclude that the relationship is inconclusive at best. These critiques have undermined the confidence in the neoliberal model and triggered attention to other potential determinants of economic growth such as domestic institutions. At the same time, the critiques have ignited a new interest in industrial policy now gradually taken seriously by international development

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GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1992).

17. See RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 122–52; RODRIK, THE GLOBALIZATION PARADOX, *supra* note 10, at 67–88; Dani Rodrik, *How to Save Globalization From Its Cheerleaders*, J. INT'L TRADE & DIPL. 1, 9–11 (2007); see also CHANG, BAD SAMARITANS, *supra* note 10, at 203–22; STIGLITZ, MAKING GLOBALIZATION WORK, *supra* note 10, at 61–102; Wade, *supra* note 10, at 621–23, 636–38.

18. See, e.g., RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 13–55; SERRA & STIGLITZ, *supra* note 10; Francisco Rodríguez & Dani Rodrik, *Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence*, in 15 NBER MACROECONOMICS ANNUAL 2000 (Ben S. Bernanke & Kenneth Rogoff eds., 2001); Francisco Rodríguez, *Openness and Growth: What Have We Learned?* 2 (United Nations Dep't. of Economic & Social Affairs, DESA Working Paper No. 51, 2007); see also Barcelona Development Agenda, City of Barcelona, *available at* <http://tinyurl.com/7n28gdn> (issued by several development scholars after the 2004 Barcelona Forum).

19. See CHANG, BAD SAMARITANS, *supra* note 10, at 67–78; RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 35–44; STIGLITZ, MAKING GLOBALIZATION WORK, *supra* note 10, at 61–102; Birdsall et al., *supra* note 14; Joseph E. Stiglitz, *Is there a Post-Washington Consensus Consensus?*, in THE WASHINGTON CONSENSUS RECONSIDERED, *supra* note 10, at 43–45.

institutions, like the World Bank,<sup>20</sup> and generating discussion in developed countries.<sup>21</sup>

B. *Structural vs. Pragmatic Development Scholars*

While development scholars agree that trade liberalization is not a development strategy on its own and countries should have regulatory space to pursue industrial policies, they disagree as to whether the current WTO framework is an impediment and should be reformed. It is possible to identify a division between two groups of development scholars, which I refer to as “structural development scholars” and “pragmatic development scholars.” On one hand, structural development scholars argue that the WTO and its web of agreements were implemented precisely to prevent countries from undertaking the type of trade and industrial policies carried out successfully by the states in East Asia.<sup>22</sup> In this view, the WTO reflects the economic interests of rich countries and undermines the ability of poor countries to create their own industries, develop technology, and strengthen their domestic markets.<sup>23</sup> The WTO, the argument goes, institutionalizes a systematic double standard, whereby rich countries lock in their competitive advantage, making it practically impossible for poor countries to pursue the kind of strategies they undertook to become rich.<sup>24</sup> Accordingly, the legal regime inaugurated by the WTO has come at the expense of countries’ policy autonomy and their development prospects.<sup>25</sup> Thus, developing countries should coalesce to

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20. The World Bank’s chief economist has recently advocated for the use of industrial policy. See Justin Yifu Lin, *New Structural Economics: A Framework for Rethinking Development* 23 (World Bank Policy Research, Working Paper No. 5197, 2010), available at <http://tinyurl.com/7rg7krk> (recognizing an important role for governments in economic policy, though stating that the government’s role “should be limited to the provision of information about the new industries, the coordination of related investments across different firms in the same industries, the compensation of information externalities for the pioneer firms, and the nurturing of new industries through incubation and encouragement of foreign direct investment,” and the provision of infrastructure).

21. Philippe Aghion et al., *Industrial Policy and Competition 2* (Growth and Sustainability Policies for Eur., Working Paper No. 17, 2011) (“[W]e argue that the debate on industrial policy should no longer be ‘existential’, i.e., about whether sectoral policies should be precluded altogether or not, but rather on how such policies should be designed and governed so as to foster growth and welfare.”). See also the debate organized by *The Economist* titled “Industrial Policy: This house believes industrial policy always fails,” wherein Dani Rodrik debated Josh Lerner against *The Economist*’s position and got seventy-one percent of the public’s vote, at <http://www.economist.com/debate/overview/177>.

22. See, e.g., CHANG, KICKING AWAY THE LADDER, *supra* note 10; Ha-Joon Chang, *The Future for Trade*, CHALLENGE Nov./Dec. 2003, at 6, 11; Wade, *supra* note 10, at 630–31, 638.

23. *Id.*

24. Robert Wade and Ha-Joon Chang have called this “kicking away the ladder,” following German economist Friederich List’s analysis, in the 1840s, about the behavior of nations that had industrialized through trade protection but were preaching free trade. See CHANG, KICKING AWAY THE LADDER, *supra* note 10, at 3–5, 127–28; Wade, *supra* note 10, at 630–32.

25. See CHANG, KICKING AWAY THE LADDER, *supra* note 10; Wade, *supra* note 10. From a different perspective, the WTO has enabled active state policies, but of the kind needed only by

repeat or change the most restrictive rules, such as those prohibiting subsidies, restricting investment conditions or imposing stringent intellectual property protection.<sup>26</sup>

On the other hand, pragmatic development scholars agree the WTO is constraining but, as Alice Amsden has remarked, its “bark is worse than the bite.”<sup>27</sup> These scholars argue that the main obstacle for developing countries is one of political vision, still very much under the influence of liberal trade tenets, not of law.<sup>28</sup> Although the WTO rules may make it harder for developing countries to climb it, the ladder has not been kicked away. Developing countries can still use several policy mechanisms that countries that successfully industrialized under the old GATT regime enjoyed.<sup>29</sup> Pragmatic development scholars point out that many of the mechanisms of protection under GATT can be continued even if under a different legal form. For instance, while voluntary export restraints (VERs) — a popular form of protection under GATT — are no longer allowed, countries could still increase tariffs up to their bound levels to protect their industries.<sup>30</sup> In addition, countries have at their disposal, and are now using, other types of mechanisms to protect their industries, such as non-tariff barriers and anti-dumping measures.<sup>31</sup> Moreover, countries can resort to safeguards in emergency situations to help an industry in distress; they can also use exceptions that allow them to increase tariffs to address balance of payments problems and to support infant industries.<sup>32</sup> Similarly, although there is a new Agreement on Trade-Related Investment Measures, it does not seem to be too stringent in practice, enabling

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industrialized countries. See Linda Weiss, *Global Governance, National Strategies: How Industrialized States Make Room to Move Under the WTO*, 12 REV. INT'L POL. ECON. 723, 729 (2005).

26. See, e.g., CHANG, KICKING AWAY THE LADDER, *supra* note 10, at 144; Birdsall et al., *supra* note 14, at 144 (“[R]ich countries cannot just amend TRIPS [The WTO’s Agreement on Trade-Related Aspects of Intellectual Property Rights]; they must abolish it altogether . . .”); Ha-Joon Chang, *Trade and Industrial Policy Issues*, in RETHINKING DEVELOPMENT ECONOMICS, *supra* note 10, at 257, 269–73; Wade, *supra* note 10, at 624.

27. See Alice H. Amsden & Takashi Hikino, *The Bark Is Worse Than the Bite: New WTO Law and Late Industrialization*, ANNALS AM. ACAD. POL. & SOC. SCI., July 2000, at 104, 110; Alice H. Amsden, *Promoting Industry under WTO Law*, in PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND INTERNATIONAL FINANCIAL INSTITUTIONS (Kevin P. Gallagher ed., 2005); see also Peter Evans, *Neoliberalism as a Political Opportunity: Constraint and Innovation in Contemporary Development Strategy*, in PUTTING DEVELOPMENT FIRST, *supra*.

28. Amsden & Hikino, *supra* note 27, at 105. Rodrik agrees with Amsden on the lack of “vision” but argues that “current WTO regulation do preclude many of the strategies that were usefully employed by the East Asian countries.” RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 226.

29. Amsden & Hikino, *supra* note 27, at 105.

30. *Id.* at 108–09 (stating that many developing countries have legally retained high tariff ceilings, even if their prevailing rates are inferior).

31. *Id.* at 109.

32. *Id.* at 110.

developing countries to maintain their local content requirements in important sectors.<sup>33</sup>

Finally, although export subsidies have been prohibited, and other subsidies are subject to action by affected states upon proof of injury, the WTO originally allowed a number of permissible subsidies related to research and development, regional development, and the environment.<sup>34</sup> Even though these permissible subsidies have officially expired,<sup>35</sup> many countries continue to use them.<sup>36</sup> Additionally, export subsidies remain available for least-developed countries, those countries with per capita income below \$1000.<sup>37</sup> Thus, these scholars conclude that beyond export subsidies, “there is nothing in WTO law that prevents other countries from promoting their nascent industries and subjecting them to performance standards.”<sup>38</sup>

It is important to underscore that these positions I have outlined are ideal-types and are located in a continuum, so that there is certain overlap.<sup>39</sup> There is, for example, wider consensus about the restrictiveness of the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>40</sup> Although development scholars may differ in their perception of

33. *Id.* at 109; Moreover, WTO law has also been quite lax in its enforcement of sprawling free-trade agreements, formally only an exception of multilateral non-discriminatory obligations. Amsden, *supra* note 27, at 219; Amsden & Hikino, *supra* note 27, at 109.

34. Amsden & Hikino, *supra* note 27, at 110.

35. See Agreement on Subsidies and Countervailing Measures, art. 27.2(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1867 U.N.T.S. 3 [hereinafter SCM Agreement]. These non-actionable subsidies were included in Article 8 of the SCM Agreement. According to Article 31, however, these provisions were initially valid for five years after the entry into force of the WTO agreement in 1995 and, although subject to extension, they have not been renewed. An important question is, of course, whether countries would challenge each other on these types of subsidies, even if they were now actionable.

36. Amsden, *supra* note 27, at 221 (arguing that making research and development subsidies illegal “would put the national innovation systems of all developed countries out of business.” Similarly, Europe and the United States use regional development subsidies extensively.)

37. SCM Agreement, *supra* note 35, at art. 27.5.

38. Amsden & Hikino, *supra* note 27, at 108.

39. Initially, Chang seemed to agree with Amsden on the potential flexibilities of the WTO, claiming that the “constraints are not completely overwhelming as many people assume” and that important leeway remains for those who want to use it. Chang, *supra* note 26, at 269. However, in later scholarship, Chang seems firmly placed in the position holding that WTO rules overtly restrict industrial policies:

In the name of ‘leveling the playing field’, the Bad Samaritan rich nations have created a new international trading system that is rigged in their favour. They are preventing the poorer countries from using the tools of trade and industrial policies that they had themselves so effectively used in the past in order to promote their own economic development — not just tariffs and subsidies, but also regulation of foreign investment and ‘violation’ of foreign intellectual property rights.

CHANG, BAD SAMARITANS, *supra* note 10, at 77–78. Moreover, “many of the exceptions to the rules were created in areas where the developed countries needed them.” *Id.* at 76.

40. Chang and Wade are harsh critics of TRIPs. So are many other development economists. See *supra* note 26. Amsden estimates that TRIPs importantly limits the strategies of the “late industrializers,” although it is unclear how it affects poorer “potential industrializers.” Alisa di Caprio & Alice Amsden, *Does the New International Trade Regime Leave Room for Industrialization Policies in the*

how much the WTO restricts developing countries' space to promote selective trade and industrial policies, they share much common ground.

A common trait between the structural and pragmatic development scholars, however, is that both tend to take rules and exceptions at face value as if they imposed clear, fixed and stable limits on states' actions. The problem with this approach is that it underestimates the existence of "gaps, conflicts, and ambiguities" in the legal materials that leave room for legal and institutional change.<sup>41</sup> In this Article, I suggest that an evaluation of WTO constraints needs to be complemented by an analysis of the "rules in flux" and the institutional practices developed in the WTO. Whereas development scholars often take what I would call an *external* look at the WTO regime, this Article does an *internal* legal/institutional analysis. Once this perspective of the WTO is adopted, it becomes clear that there is more room for policy autonomy than is often apparent.

Using this approach, this Article's analysis will adopt the strengths and expose the weaknesses of the three positions described above. While the Article retains the liberal trade interest in law as an important mechanism for economic change and for potentially mutually beneficial transactions, it rejects the assumption that given law's formal neutrality all economic outcomes are merely the reflection of each country's economic merit. Similarly, my analysis retains the structural development scholars' interest on the asymmetry of power and resources among different countries, but it rejects the notion that law, and more specifically the WTO regime, is merely epiphenomenal, mechanically or inexorably mimicking the current balance of global power amongst different countries. My analysis attempts at once to recognize more agency and freedom of developing countries' governments, often denied by structural development scholars, while

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*Middle-income Countries?*, (ILO, Working Paper No. 22, 2004), available at <http://tinyurl.com/89yaamm>. Criticism of TRIPS goes beyond development scholars. Liberal trade scholars Bhagwati and Wolf have also criticized the inclusion of TRIPS in the WTO. Bhagwati has stated that "TRIPS should not be in the WTO at all." BHAGWATI, *supra* note 6, at 185. According to Bhagwati, the agreement relies on no serious economic justification and actually harms developing countries. In his view, TRIPS is the result of successful lobbying of software and pharmaceutical companies. These companies have "turned it into a royalty-collection agency simply because the WTO can apply trade sanctions." *Id.* at 182; see also WOLF, *supra* note 6, at 216–17.

41. For a classic analysis of the indeterminacy of law and legal materials, and the law-making work judges do in resolving questions for which there is often no clear or "correct" answer, see DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 28–30 (1997) (examining the ideological character of adjudication and challenging the distinction between legislation and adjudication, which is often a form of denying that the work of judges is ideologically based, particularly when stakes are high). For the purposes of my argument, it suffices to show that the work of law-making continues after the rules in the agreement have been "settled." Both litigating parties (countries) and judges (panelists and Appellate Body members) will be actors in the ensuing change. The direction of the transformation can go in a variety of ways. See JOEL TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 211 (2008) (analyzing international dispute resolution as a hybrid of adjudicative and legislative authority. Trachtman argues that the "indeterminacy, incompleteness, or standard-like nature" of treaty provisions may be regarded as a legislative decision and "a form of implicit delegation to dispute resolution.").

pointing out important asymmetries in the operation of the legal regime that adversely affect those countries with less power and resources, commonly disregarded by liberal trade scholars. Finally, this Article retains the pragmatic development scholars' interest in existing WTO flexibilities available for developing countries, but it eschews a formalist and static understanding of how the WTO legal system operates. My analysis looks more closely at the rules in action and at how strategic actors help to shape and transform these rules over time.

## II. THE WTO LIMITS ON COUNTRIES' POLICY AUTONOMY

In this Part, I examine a number of key differences between the former GATT and the WTO regimes. I analyze both the new restrictions introduced by the WTO on subsidies, intellectual property, and investment as well as the opt-out clauses incorporated from the old GATT system.<sup>42</sup> I conclude that, even though there is an important reduction in juridical space since the creation of the WTO, there is still more room for maneuvering than is currently appreciated.

### A. Restrictions

The creation of the WTO in 1995 introduced new significant restrictions within the international trade regime.<sup>43</sup> First, subsidies are now subjected to greater scrutiny and many forms of government support to domestic industries, such as export subsidies and local content requirements, are prohibited.<sup>44</sup> These restrictions are more onerous than in

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42. See Chantal Thomas & Joel Trachtman, *Editors' Introduction*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 1–20 (Chantal Thomas & Joel Trachtman eds., 2009) (analyzing several areas in which the WTO may constrain regulatory space for development). In addition to the imposition of new substantial obligations, development scholars argue that the variety of exceptions, opt-out mechanisms, and special clauses used by countries under the GATT regime have become harder to use under the WTO. In their view, the WTO has unduly burdened the ability of developing countries to enact policies that proved instrumental in the success of countries like Japan and the Asian Tigers in the twentieth century. See Chang, *The Future for Trade*, *supra* note 22, at 11; Wade, *supra* note 10, at 630.

43. Member countries agreed to use tariffs as the main form of trade barrier, gradually eliminating quotas and other forms of non-tariff barriers. Simultaneously, they agreed to decrease tariff levels. As a result, quantitative protections were largely reduced. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 423 (5th ed. 2008).

44. The new Agreement on Subsidies and Countervailing Measures (SCM Agreement) considerably increased the reach of disciplines for government action. See SCM Agreement, *supra* note 35. The pre-Uruguay Round GATT regime did not have comprehensive subsidies rules and gave countries greater discretion to use them for export promotion and import substitution. U.N. Conference on Trade and Dev. [UNCTAD], *Trade and Development Report, 2006: Global Partnership and National Policies for Development*, at 169–70, UNCTAD Doc. UNCTAD/TDR/2006, U.N. Sales No. E.06.II.D.6 (Aug. 31, 2006) [hereinafter UNCTAD Trade and Development Report, 2006]. The WTO subsidies regime applies to subnational governments, government firms, and private enterprises carrying out government functions. *Id.* at 170. The agreement prohibits export subsidies



the previous GATT regime where countries regularly used export subsidies and local content conditions as part of their industrialization strategy.<sup>45</sup>

Second, the WTO has introduced new regulations on intellectual property under TRIPS. Most notably, countries are now required to grant patent protection to all fields of technology and extend the duration of protection to twenty years.<sup>46</sup> The current TRIPS regime may be contrasted to earlier conditions, under which not only late industrializers but even the United States and the European Union developed.<sup>47</sup> These countries grew while having lax intellectual property laws that enabled domestic producers to appropriate technology and reproduce it.<sup>48</sup> This process of technology transfer helped domestic firms to gradually move up in the value-added chain of production and ultimately created a pool of technologically advanced domestic producers, which generated spill-over effects in the rest of the economy. By establishing more stringent protections on copyright, patents and trademarks, the current WTO regime under TRIPS has in effect made it harder and costlier to appropriate technology.<sup>49</sup>

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(conditioned on export performance) and local content requirements (conditioned on the use of domestically-produced goods). Prohibited subsidies do not even require a demonstration of injury to be challenged. *Id.* The agreement further creates a two-tier classification of subsidies, dividing them into specific subsidies and non-specific ones. *Id.* Specific subsidies are actionable and parties may challenge them through multilateral dispute settlement or countervailing duties. *Id.* The challenging party is required to show injury and causal connection to the measure in question. *Id.* The new classification of subsidies as specific makes it hard for countries to use selective policies to target a firm or industry. *Id.* In contrast, non-specific subsidies are not affected by the agreement. *Id.* These subsidies are general and are deemed not to distort the allocation of domestic resources. *Id.* They typically involve resources for the provision of infrastructure that in principle benefit all enterprises. *Id.*

45. Development scholars have shown how important export subsidies and local content requirements were for countries industrializing in the second half of the twentieth century, “late industrializers” such as Japan, South Korea, Taiwan, and Singapore. These countries used export subsidies to stimulate domestic production and subject national firms to the discipline of international competition. *See, e.g.*, PETER EVANS, *EMBEDDED AUTONOMY: STATES & INDUSTRIAL TRANSFORMATION* (1995). In addition, the implementation of export performance standards was a key mechanism in East Asia’s industrial policy because it limited support to those firms that were able to compete internationally, thereby reducing the risks of abuse and rent-seeking. UNCTAD Trade and Development Report, 2006, *supra* note 44, at 171. At the same time, local content requirements stimulated the creation of domestic firms that could supply inputs for the products of foreign firms. This mechanism established linkages in the domestic market between foreign firms dedicated to export and domestic producers, who acquired new technology needed to supply the foreign and usually more technologically advanced-firms. *See, e.g.*, CHANG, *KICKING AWAY THE LADDER*, *supra* note 10; AMSDEN, *supra* note 16.

46. UNCTAD Trade and Development Report, 2006, *supra* note 44, at 172.

47. *See* B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920*, at 56–57, 260 (“[It is] more than a little ironic that today the United States is at the forefront of efforts to compel developing countries to forego ‘piracy’ and to recognize foreign [patents].”).

48. *See* Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries*, 47 *ECON. & POL. WKLY.* 209, 214 (2003) (analyzing the role of technology imitation in the economic development of Japan and the Asian Tigers).

49. RODRIK, *THE GLOBALIZATION PARADOX*, *supra* note 10, at 199.

Finally, as to restrictions on foreign investment, the Agreement on Trade-Related Investment Measures (TRIMS)<sup>50</sup> limits the use of government measures that are incompatible with the non-discrimination principle of national treatment and prohibits the use of quantitative restrictions.<sup>51</sup> As a result, performance requirements, which were commonly used by the late industrializers to link foreign investors with domestic manufacturers, such as local content regulation, export performance, and foreign exchange balancing rules are now forbidden in the WTO.<sup>52</sup>

### B. *Exceptions*

In addition, there are a number of exceptions and opt-out clauses that have survived from the GATT regime. The WTO trade regime contemplates safeguards, special and differential treatment rules, and balance of payments exceptions that are still in place. However, these exceptions have become harder to use.

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50. Agreement on Trade-Related Investment Measures art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1868 U.N.T.S. 186 [hereinafter TRIMS].

51. The main WTO agreements include two principles of non-discrimination; one is known as “most-favoured-nation” (MFN), and the other is the principle of national treatment. Under MFN, a country is obliged not to discriminate between its various trading partners. Under national treatment, a country is obliged to treat imported products in the same fashion as products produced in its own territory. *See, e.g.*, General Agreement on Tariffs and Trade, art. I (MFN), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; GATT, *supra*, at art. III (national treatment).

52. Development scholars have shown that many successful countries used these regulatory mechanisms to increase domestic value added, generate income, create jobs, and transfer technology. *See, e.g.*, CHANG, KICKING AWAY THE LADDER, *supra* note 10. While the Agreement on Trade-Related Investment Measures (TRIMS) does not clearly define “trade-related investment measures,” it does provide an illustrative list of forbidden regulations in the Annex, including regulations on local content and trade balancing requirements. TRIMS, *supra* note. 50. Already TRIMS commitments have successfully been invoked by developed countries in a number of cases against developing countries, particularly in the automobile industry. All trade-related investment measures have been brought by developed countries against developing countries, with exception of Canada, which has also been sued. *See, e.g.*, Request for the Establishment of a Panel by the United States, *Philippines — Measures Affecting Trade and Investment in the Motor Vehicle Sector*, WT/DS195/3 (Oct. 13, 2000); *India — Measures Affecting the Automotive Sector*, WT/DS146 (Complainant: E.C.) (Oct. 6, 1998), *India — Measures Affecting Trade and Investment in the Motor Vehicle Sector*, WT/DS175 (Complainant: U.S.) (June 1, 1999); *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS 64 (Complainant: Japan) (Nov. 29, 1996), WTO/DS59 (Complainant: U.S.) (Oct. 8, 1996), WTO/DS55 (Complainant: Japan) (Oct. 4, 1996), WTO/DS54 (Complainant: E.C.) (Oct. 3, 1996); *Brazil — Measures Affecting Trade and Investment in the Automotive Sector*, WTO/DS81 (Complainant: E.C.) (May 7, 1997), *Brazil — Certain Measures Affecting Trade and Investment in the Automotive Sector*, WTO/DS65 (Complainant: U.S.) (Jan. 10, 1997), WTO/DS52 (Complainant: U.S.) (Aug. 9, 1996), *Brazil — Certain Automotive Investment Measures*, WTO/DS51 (Complainant: Japan) (July 30, 1996); *Canada — Certain Measures Affecting the Automotive Industry*, WTO/DS142 (Complainant: E.C.) (Aug. 17, 1998), WTO/DS139 (Complainant: Japan) (July 3, 1998). Although the most important investment restrictions stem from bilateral investment treaties (BITs) that many developing countries have entered into, TRIMS seems to have further reduced governments’ scope for policy action. *See generally* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE (2008).

First, consider safeguards. The WTO reformulated the safeguards provision in GATT Article XIX under a new Safeguards Agreement that was designed to eliminate the use of “grey-area measures.”<sup>53</sup> The goal of the Safeguards Agreement is to formalize the requirements for an escape clause — temporarily suspending a GATT obligation — while subjecting safeguards to greater transparency and stricter conditions. This safeguard mechanism, however, has proven to be hard to use. No country invoking a safeguards measure has ever been able to pass muster under the WTO Appellate Body (AB)’s scrutiny.<sup>54</sup> Instead, as a result of this largely inflexible interpretation of WTO safeguards requirements, countries have resorted to other measures, such as anti-dumping and other “unfair trade” laws, that provide similar relief.<sup>55</sup>

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53. Countries used mechanisms like voluntary export restraints (VERs) or marketing agreements to relieve their domestic industries of import pressure. These mechanisms were part of the GATT’s “grey-area measures,” which enjoyed an ambiguous legal status; they contravened the GATT’s legal commitments, but these mechanisms were largely tolerated and remained generally outside the purview of the GATT and its dispute settlement mechanism. JACKSON ET AL., *supra* note 43, at 691. Although developed countries frequently resorted to these mechanisms, they were also used by late industrializers to promote their domestic industry. Amsden & Hikino, *supra* note 27, at 108; For an analysis of the restraints, see Ernst-Ulrich Petersmann, *Grey Area Trade Policy and the Rule of Law*, 2 J. WORLD TRADE L. 22, 22–44 (1988).

54. See Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence 2* (Univ. Chi. Inst. for Law & Econ., Working Paper No. 187, 2003), available at <http://ssrn.com/abstract=415800> (arguing that the Safeguards agreement does not clarify the meaning of the legal prerequisites under GATT Article XIX because it does not offer guidance on concepts such as “increased imports” as a causal variable, on alternative factors simultaneously causing injury — “factors other than imports” — or on the precise contours of the “serious injury” concept itself). For an analysis of the legal constraints and jurisprudence on safeguards, as well as an economic critique, see Alan O. Sykes, *THE AGREEMENT ON SAFEGUARDS: A COMMENTARY* (2006). Despite the interpretive problems of Article XIX, the elimination of gray-area measures has substantially increased members’ use of the Safeguards provision. From 1995 to 2010, 216 safeguards investigations were initiated and reported to the WTO Committee on Safeguards, leading to 101 safeguard measures. *Safeguard Measures*, WORLD TRADE ORG., <http://tinyurl.com/7ysxf54> (last visited Feb. 20, 2012).

55. Anti-dumping duties are high on the list of these measures. Some scholars argue that anti-dumping has become the functional equivalent of the grey-area measures of the pre-WTO era. See, e.g., Chad P. Bown, *Why Are Safeguards in the WTO So Unpopular*, 1 WORLD TRADE REV. 47, 51 (2002). In contrast to the Safeguards agreement, the WTO’s anti-dumping procedure offers a more “managed trade” or negotiated compromise to trade disputes, similar to the more informal, diplomacy-based atmosphere of the old GATT. *Id.* at 53; Patrick A. Messerlin, *Antidumping and Safeguards*, in *THE WTO AFTER SEATTLE* 159, 159–83 (Jeffrey J. Schott ed., 2000) (discussing the impact of antidumping measures on trade law and policy and suggesting reforms in the arena of antidumping measures).

In the context of global economic integration, countries often need to make trade policy adjustments and thus need to resort to escape valves. Safeguards would be a more effective way to deal with these issues because they provide governments with a formal, institutionalized tool by which to address the problems that their domestic constituencies face in an overly competitive market resulting from an influx of foreign imports. Safeguards can be viewed as part and parcel, rather than anomalies of, liberalizing domestic economies. For a proposal to use safeguards to advance explicit development goals, see RODRIK, *ONE ECONOMICS, MANY RECIPES*, *supra* note 10, at 230 (“[C]ountries may legitimately wish to restrict trade or suspend existing WTO obligations . . . for reasons going beyond competitive threats to their industries . . . . Developmental priorities are among such reasons, as are distributional concerns or conflicts with domestic norms or social arrangements in the industrial countries.”). Rodrik has proposed to recast the Safeguards

Second, the WTO has provided for special and differential treatment (SDT) provisions, as encapsulated in the “enabling clause.”<sup>56</sup> The SDT category is a big umbrella, encompassing a variety of provisions in several agreements. These provisions seek to advance developing countries’ interests by providing market access, requiring WTO members to protect the interests of developing countries, granting flexibility in rules and disciplines involving trade measures, allowing longer transitional periods, and providing technical assistance.<sup>57</sup> SDT provisions recognize that developing countries stand on an unequal position *vis-à-vis* developed countries and are aimed at fully incorporating developing countries into the trade regime by providing them with several kinds of formal advantages.

Although the WTO recognizes SDT provisions, they are much more limited in scope than those allowed under the old GATT regime.<sup>58</sup> Under GATT, the two most important principles of SDT rules were preferential treatment and non-reciprocity.<sup>59</sup> Preferential treatment, which is an exception to the non-discrimination principle, allowed members to give special market access to developing countries. Additionally, under the non-reciprocity exception, developing countries were allowed to provide less than full-reciprocity to other GATT member states.<sup>60</sup> These exceptions amounted to legal recognition of the unequal footing of developing countries and gave them some legal space to pursue their national development policies while taking advantage of the trade regime.<sup>61</sup> Under the WTO regime, in contrast, SDT provisions have been designed more narrowly, primarily to increase transition periods and provide technical assistance so that developing countries can implement and comply with the new WTO obligations.<sup>62</sup>

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agreement into an agreement on “Developmental and Social Safeguards.” Such an agreement would expand the scope of the safeguards, recast the current “serious injury” test and even replace it with a requirement that the measure be supported by broad domestic support “among all concerned parties.” *Id.* at 230–31.

56. Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, ¶ 2(a), GATT Doc. L/4093 (Nov. 28, 1979), B.I.S.D. (26th Supp.) 203 (1980).

57. Manickan Supperamian, *Special and Differential Treatment for Developing Countries in the World Trade Organization*, in DEVELOPING COUNTRIES AND THE WTO: POLICY APPROACHES 130 (Gary P. Sampson & W. Bradnee Chambers eds., 2008). Committee on Trade and Development, *Note by the Secretariat: Special and Differential Treatment for Least-Developed Countries*, at 1, WT/COMTD/W/135 (Oct. 5, 2004).

58. See Constantine Michalopoulos, *Special and Differential Treatment: The Need for a Different Approach*, in DEVELOPING COUNTRIES AND THE WTO, *supra* note 57, at 110.

59. See ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 154–83 (2d ed. 2010).

60. This means a country was not under the obligation to provide the same concessions it acquired from another country. GATT, *supra* note 51, at art. XVIII bis.

61. UNCTAD Trade and Development Report, 2006, *supra* note 44, at 167.

62. *Id.*; see also Frank Garcia, *Beyond Special and Differential Treatment*, 27 B.C. INT’L & COMP. L. REV. 291, 291–93 (2004). There are important criticisms to the special and differential treatment (SDT) provisions, both for their limited scope and ineffectiveness. Scholars have pointed out that

Finally, the WTO's approach towards the use of the "balance of payments" exception is significantly more limited as compared to the old GATT regime. During the GATT regime, countries used the balance of payments exception quite often to enact trade restrictions to safeguard their external financial position and prevent a decline in monetary reserves.<sup>63</sup> The WTO regime incorporated a Balance of Payments Understanding<sup>64</sup> that restricted the use of trade measures to deal with balance of payment problems.<sup>65</sup> Furthermore, the Dispute Settlement Body (DSB)<sup>66</sup> has given great deference to the IMF in the interpretation of the meaning of "development policy,"<sup>67</sup> which has resulted in the dismissal of any trade restrictions, enacted in response to balance of payments problems, whenever there are macroeconomic policies that can also address these imbalances. This deference thus effectively constrains the use of trade restrictions as a tool to balance payments, even when a country may prefer it to macroeconomic policies that would have more dire social and economic results.<sup>68</sup>

As highlighted in the preceding discussion, it is possible to observe a reduction in the legal space and domestic policy autonomy that had been available to developing countries under GATT in the form of safeguards, SDT provisions, and balance of payment exceptions. Notwithstanding these new restrictions, however, I argue in the next Part that, developing

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technical assistance funds are insufficient and that the WTO Secretariat lacks the necessary capacity to provide them. In addition, existing transition periods seem arbitrary and unrealistic given the physical and human resources involved in setting up the institutions needed to ensure implementation and compliance. Developing countries also complain about the lack of compliance to the "best endeavors" rules by developed countries. *See, e.g.,* Mari Pangestu, *Special and Differential Treatment in the Millennium: Special for Whom and How Different*, in *THE WORLD ECONOMY: GLOBAL TRADE POLICY 2000*, at 195 (Peter Lloyd & Chris Milner eds., 2000); Donald McRae, *Developing Countries and the Future of the WTO*, 8 J. INT'L ECON. L. 603 (2005); Indeed, in the Doha Declaration, WTO members agreed to review all SDT provisions to clarify them, strengthen them, and increase their effectiveness. Doha Declaration, *supra* note 9, ¶ 44.

63. *See* GATT, *supra* note 51, at arts. XII–XIV.

64. Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 208.

65. Robert Howse, Pursuing Sustainable Development Strategies: The Case of the Balance of Payment Rules in the WTO 16 (2005), available at <http://tinyurl.com/7d96g4r> (last visited on Mar. 18, 2012) (on file with the Virginia Journal of International Law Association).

66. The Dispute Settlement Body (DSB) is established in the Dispute Settlement Understanding in Annex 2 of the Marrakesh Agreement. The DSB is comprised of the WTO General Council sitting under a separate chair, and it governs all disputes arising under the WTO agreement. JACKSON ET AL., *supra* note 43, at 267–68.

67. Howse, *supra* note 65, at 19. *See* Appellate Body Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, ¶ 149 (Aug. 23, 1999) (holding that the Panel had not delegated "its judicial function to make an objective assessment of the matter" despite giving "considerable weight" to the views of the IMF); Panel Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (Apr. 6, 1999).

68. Howse, *supra* note 65, at 19.

countries can exploit existing flexibilities and carve out more space in which they can promote domestic economic policy.

### III. COUNTRIES' ABILITY TO CARVE OUT POLICY AUTONOMY

Considering the restrictions analyzed in the previous Part, it would be tempting to conclude that developing countries would likely benefit from changing the WTO rules to make them more compatible with their development objectives. The Doha Development round, which embodies the most ambitious development agenda in the WTO to date, to some extent follows this route by seeking changes in the WTO rules that would benefit developing countries. Indeed, there has been considerable scholarly attention to negotiations in WTO Ministerial meetings and the emergence of developing country coalitions that could successfully change current WTO rules to improve the lot of the developing world.<sup>69</sup> Given the current political impasse that has arisen as a result of competing interests between developed and developing countries, however, the likelihood of the Round's success and its implications for the WTO are widely debated.<sup>70</sup>

In this Part, I focus instead on the opportunities for expanding policy autonomy<sup>71</sup> that lie in rule change through lawyering and litigation strategies to alter the interpretation of existing rules. Whereas the literature has paid significant attention to the travails of trade negotiations and the opportunities that lie therein,<sup>72</sup> the prospects of gaining terrain in dispute settlement remain underappreciated. Moreover, while progress in political

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69. See, e.g., Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L.J. 483 (2007) (assessing how the WTO institutional structure encourages coalitions of developing countries).

70. See, e.g., HIGH LEVEL TRADE EXPERTS GROUP, *The Doha Round: Setting a Deadline, Defining a Final Deal*: Interim Report — JANUARY 2011 (Jagdish Bhagwati & Peter Sutherland co-chairs, 2011), available at [www.voxeu.org/reports/doha-round.pdf](http://www.voxeu.org/reports/doha-round.pdf); Jagdish Bhagwati, *An Open Letter to President Obama on Doha*, AM. INT. (Sept. 6, 2011), <http://tinyurl.com/7l2ujev>; Dani Rodrik, *Don't Cry for Doha*, PROJECT SYNDICATE (Aug. 4, 2008), <http://www.project-syndicate.org/commentary/rodrik22>; Dani Rodrik, *Let the Doha Round Fail*, PROJECT SYNDICATE (Nov. 21, 2005), <http://www.project-syndicate.org/commentary/rodrik13>.

71. For existing scholarship on policy space within the WTO, see generally Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT'L ECON. L. 405 (2005); MEREDITH KOLSKY LEWIS & SUSY FRANKEL (EDS.), *INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY* (2010); Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT'L ECON. L. 639 (2011). For a different perspective, see ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011) (arguing that the question should not be about whether the WTO can grant more policy autonomy to states — it cannot meaningfully do so — but rather what type of governance and values should prevail in the trade regime, and how those choices should be subject to debate and deliberation).

72. See, e.g., Sonia E. Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT'L ECON. L. 65 (2010).

branch of the WTO has stagnated, activity in the judicial branch has proceeded at a fast pace, making this a crucial area of engagement in the trade regime. Although reforms of WTO agreements by member countries in Ministerial negotiations are undoubtedly important, these efforts need to be complemented by strategic engagement in the WTO litigation sphere.

In the discussion that follows, I first describe the insights that can be gleaned about strategic litigation from legal-sociological literature in the context of the WTO. I analyze how active WTO members influence rule interpretation and use the system's procedures to their advantage. Second, I examine the available legal and doctrinal space under which national regulatory measures could still pass muster, given the gaps, conflicts, and ambiguities in the text of the WTO agreements. Finally, I explore the requisite legal capacity and domestic institutional capability that countries seeking to implement institutional change must develop. Although gaining policy space in this way has generally been the domain of rich countries, a number of developing countries have begun to follow suit.

#### *A. Opportunities Arising From Strategic Lawyering*

##### *1. In Theory*

Dispute settlement is perhaps the most prominent feature of the WTO today and the DSB its most active branch, even when the rate of disputes per year has decreased since the first eight years of the system.<sup>73</sup> While in the initial years rich members, and particularly the United States and the European Union, were by far the most active players, developing nation participation has increased significantly.<sup>74</sup> Scholars have looked at the incidence of participation by developed and developing countries and pondered what accounts for the lower rates of participation by developing countries.<sup>75</sup> In addition, there is a burgeoning scholarship examining the

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73. WORLD TRADE ORG., ANNUAL REPORT 2011, at 88 (2011), available at <http://tinyurl.com/6st32nn> (showing a precipitous drop in claims filed compared to the late 1990s).

74. William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 24 (2005) (noting lower developed-country participation but finding that developing countries' use "increased dramatically" from 2000–2005); Joseph Francois et al., *Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System* (Research Inst. Indus. Econ., Working Paper No. 730, 2008), available at <http://tinyurl.com/84y33jc> (noting increased developing-country participation over the last fifteen years while trying to determine objectively whether they are still "underrepresented").

75. See Marc Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719 (2003); Marc L. Busch et al., *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559, (2009); Andrew Guzman & Beth Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes*, 34 J. LEGAL STUD. 557, 569 (2005); Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 WORLD TRADE REV. 177–98 (2006). See generally Chad Bown,

incidence of wins and losses by developed and developing countries. Scholars looking at WTO dispute outcomes have found that developing countries win or lose just as regularly as do developed countries and have concluded therefore that, once developing countries access the dispute settlement system, there seems to be no bias against them.<sup>76</sup> This conclusion, however, underestimates how the difference in parties' capabilities may determine their ability to advance their interests over time beyond winning or losing in particular instances.

My analysis, in contrast, builds on the American socio-legal tradition, analyzing dispute settlement as a system where participants often have asymmetrical opportunities for gain. A seminal article in this tradition is Marc Galanter's classic "Why the 'Haves' Come Out Ahead,"<sup>77</sup> which provides a socio-legal analysis of dispute-settlement in the U.S. legal system, showing that the formal legal rules and the courts that apply them are only part of the story. It is of great importance to understand who the parties are, and what their different opportunities to gain are given their characteristics.

This theoretical approach inverts the traditional analysis, which typically starts at the rules, proceeds to look at how those rules are applied by the respective institutions, and finally looks at their effects on parties. Instead, this approach centers on the parties and their different characteristics, analyzing how these differences affect the way the system works.<sup>78</sup> According to this analysis, there are two ideal types of parties, situated in a continuum: one shotters (OS) who only occasionally resort to court and repeat players (RP) who are frequently engaged in similar disputes over an extended period of time.<sup>79</sup> Whether an actor is a one shotter or a repeat player matters greatly for his incentives and his chances to benefit from the legal system.

RPs have many advantages over OSs based on their greater party capability.<sup>80</sup> This capability is comprised of multiple elements but three

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*Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes*, 27 *WORLD ECON.* 59 (2004); Francois et al., *supra* note 74; Peter Holmes et al., *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* (World Bank Policy Research, Working Paper No. 3133, 2003), available at <http://ssrn.com/abstract=636553>. See text accompanying *infra* notes 187–194.

76. See, e.g., Bernard Hoekman et al., *Winners and Losers in the Panel Stage of the WTO Dispute Settlement System*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM*, *supra* note 42, at 151, 161.

77. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974). For a review of Galanter's analysis twenty-five years later in various legal domains, see Symposium, *Do the "Haves" Still Come Out Ahead?*, 33 *LAW & SOC'Y REV.* (1999). See also *IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?* (Herbert Kritzer & Susan Silbey eds., 2003).

78. Galanter, *supra* note 77, at 97.

79. *Id.*

80. *Id.* at 99–103 (associating party capability with the RP-OS distinction to a greater extent than with wealth and organization); Marc Galanter, *Afterword: Explaining Litigation*, 9 *LAW & SOC'Y REV.*



seem particularly relevant in the WTO context. First, RPs rely on experience, expertise, and economies of scale they have built through previous participation.<sup>81</sup> Second, RPs can play the odds of litigation, seeking to maximize gain over a series of cases, even at the risk of incurring maximum loss in some cases.<sup>82</sup> They play for rules too, strategizing about rule-change over time, even if this means trading-off tangible gain in a particular case. Finally, they are better able to influence the impact of rules that favor them.<sup>83</sup> Thus, although there is overlap with wealth and level or organization, party capability, as honed in by repeat participation, is an independent factor and a crucial one in determining RPs success.<sup>84</sup>

Using this approach, it is possible to examine the parties' different legal capacity, their capacity to bargain given their alternatives, and their knowledge of the judicial apparatus: judges, bailiffs, and the staff that they interact with on a routine basis. Similarly, access to lawyers who know the system well, the "invisible college of international trade lawyers,"<sup>85</sup> matters greatly.<sup>86</sup> What is striking about Galanter's analysis is his demonstration that despite no bias in the rules or obvious favoritism by judges, the institutional practices work to consistently favor the haves over the have-nots.<sup>87</sup>

Galanter's analysis does not have optimistic implications. But his diagnosis can be useful in both understanding the incentives that maintain the status quo, and finding where the opportunities for change may lie. A number of scholars have begun using a sociological approach in the

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347, 360–63 (1975).

81. Galanter, *supra* note 77, at 98–99.

82. *Id.* at 99.

83. *Id.* at 103.

84. Galanter, *supra* note 80, at 363.

85. I borrow this phrase from Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217–26 (1977).

86. Galanter, *supra* note 77, at 114; Galanter, *supra* note 80, at 361–62.

87. Although the traditional discussion of RPs and OSs was not developed in the context of international adjudications, this analysis is nevertheless relevant to understanding the WTO DSB as a system. There are, of course, obvious differences. In the WTO, the parties are states and the domestic processes through which a government decides to pursue litigation is typically more complex than that of a firm. Similarly, state RPs are not actors specialized in a particular business area, but instead deal with a wide range of subject matters. Finally, enforcement in the system is less stringent than in a domestic setting. These differences, however, are not as stark as they may appear. First, governments of RPs calculate the benefits of litigation with the interests of their domestic firms and economic sector in mind and strategize accordingly. The experience and expertise they have gained in past practice remain crucial, as do their ability to reduce costs through economies of scale. Although the range of subject matters in which WTO RPs deal is relatively broad, all of the subjects involve knowledge and expertise in international trade and the WTO Agreements. Lawyers gain expertise in these subspecialties (subsidies, anti-dumping, intellectual property) just as traditional RPs (insurers, banks, manufacturers) do in the different subspecialties of their business practice. Finally, although the WTO's enforcement mechanism is subject to the weaknesses that is characteristic of a supra-national regime, it has been lauded for its effectiveness and its high rates of compliance.

analysis of the international trade regime, which tends to show a disadvantage in litigation for those countries that lack resources and do not have the knowledge and experience to navigate the complex dispute settlement process.<sup>88</sup> The recommendations to target these disadvantages range from building domestic legal capacity, to financial aid and technical assistance, to expanding the WTO legal services department and setting up a small claims court.<sup>89</sup>

Based on this valuable work, the analysis can be extended to account for asymmetries in countries' overall participation in WTO dispute settlement that so far remain unexplored. First, there is RPs ability to influence rule change in the long term.<sup>90</sup> RPs are likely to play for rules in

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88. In order of appearance in the literature, see, for example, Shaffer, *supra* note 75, at 177; Gregory Shaffer, *Three Developing Country Challenges in WTO Dispute Settlement: Some Strategies for Adaptation*, in REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 309 (Dencho Georgiev & Kim Van der Borgh eds., 2006); Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POLITICS 1033–49 (2009); Joseph A. Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 LAW & SOC. INQUIRY 625 (2010); Joseph Conti, *Producing Legitimacy at the World Trade Organization: the Role of Expertise and Legal Capacity*, 8 SOCIOECONOMIC REV. 131 (2010); Sungjoon Cho, *Beyond Rationality: A Sociological Construction of the World Trade Organization*, 52 VA. J. INT'L L. 321 (2012). *But see* Mary Kopczynski, *The Haves Coming Out Behind: Galanter's Theory Tested on the WTO Dispute Settlement System* (2008) (unpublished manuscript, available at [http://works.bepress.com/mary\\_kopczynski/1](http://works.bepress.com/mary_kopczynski/1) (arguing that countries with lower incomes tend to prevail more often). This analysis, however, equates repeat players with wealthy players, which loses key aspects of the RP ideal type. Furthermore, the study counts a loss if the respondent lost only one of multiple claims, regardless of the overall benefit or damage borne by the litigants. Moreover, it is a static analysis, not accounting for the dynamic character of litigation where repeat players may lose in specific instances but win the overall game. Finally, as the author admits, the “underdogs” that come out ahead in the analysis are clearly not made up of poor countries, which are still largely absent in dispute settlement. The most important lesson of the analysis seems to be that complainants win most of the time, regardless of relative wealth.

89. *See, e.g.*, Brian T. Larson, *Meaningful Technical Assistance in the WTO*, 2003 WIS. L. REV. 1163; Gregory Shaffer & Hakan Nordstrom, *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?*, 7 WORLD TRADE REV. 587–640 (2008).

90. Galanter, *supra* note 77, at 103. Conti argues that, in the WTO context, RPs stay on “safe ground” and do not play for rule-change. Conti, *Learning to Dispute*, *supra* note 88, at 656–57. As I hope it will become clear in the following section, the evidence seems to suggest that RPs do strategize about rule development over time. *But see* Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383 (2009) (arguing that rule formation is biased towards liberalization of trade as opposed to repeat players). One potential limitation to the capacity of developing countries to intervene in defining this policy space through litigation may be the WTO panels' exercise of self-restraint. *See, e.g.*, Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT'L ORG. 257 (2010) (concluding that panels were more likely to exercise “judicial economy,” deciding the case on narrow grounds when the United States or the European Union were parties to the dispute). Other scholars are aware of the high stakes of the existing policy space in WTO rule interpretation but are focused on reforms that would actually reduce the involvement of WTO adjudication in deciding such cases. *See, e.g.*, Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT'L & COMP. L.Q. 861 (2004) (arguing that although claims of judicial activism are exaggerated, Panels and AB should avoid making decisions in cases of legal indeterminacy or when the decisions could interfere with the powers of the political organs); Similarly, Krzysztof J. Pelc argues that the

litigation and in political fora, and will spend resources in ensuring that advantageous rules are enforced.<sup>91</sup> RPs are often willing to trade off tangible gain for rule gain. In other words, they would accept to lose a case but win an important rule change that would benefit them in the future. Similarly, a RP might decide to settle a case if it foresees that proceeding with litigation might lead to an unfavorable rule change.<sup>92</sup> Playing the odds of litigation, however, also implies that in some cases a RP might win a case, getting tangible gains in that particular instance, but lose a rule.

Second, the WTO dispute settlement features give rise to another important dynamic that I call “adjusting to the rule.” When a RP’s domestic measure has been found to be in breach of its WTO obligations, it has considerable time and leeway to gradually adjust its measure to the contours of the rule as defined by the WTO AB. In the process of adjusting its measure the losing party may try not to overconform, testing once again the boundaries of the rule. If the winning party is unsatisfied and deems that the measure in question is still in breach, it may request an implementation panel to decide the issue.<sup>93</sup> The implementation panel’s decision may then be appealed. The winning party may subsequently look for compensation and, failing that, request authorization for retaliation in the form of suspension of concessions.<sup>94</sup> If the losing party objects to the level of suspension of concessions, it can bring the matter to arbitration.<sup>95</sup> As it is apparent, the losing party can thus test the boundaries of the rule by slightly modifying its measure and making sure it does not do more than is strictly needed. In addition, this structure also buys the losing party time to deal with its own domestic process.

A third strategic possibility for a losing party is not to bring its measure into compliance. In this case, it will have to compensate the winning party or else accept retaliation. When a losing party deliberately decides to pay for its violation, we are in the presence of efficient breach.<sup>96</sup> In this

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policy space available in the WTO regime might be necessary under some circumstances but as a general matter, it repoliticizes issues that should remain juridified. Krzysztof J. Pelc, *The Cost of Wiggle Room: On the Use of Flexibility in International Trade Agreements* (Aug. 7, 2009) (unpublished Ph.D. dissertation, Georgetown University) (on file with Department of Government, Georgetown University).

91. Galanter, *supra* note 77, at 100.

92. *Id.* at 101.

93. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments — Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

94. *Id.* art. 22.

95. *Id.* art. 22.6.

96. While the text of the DSU unequivocally makes full compliance the preferred mode of reparation over compensation or retaliation (DSU article 22.1), some scholars have argued that incorporating the possibility of efficient breach is a virtue of the WTO system and is one that has given WTO members considerable flexibility. See Judith Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT’L L. 416 (1996). Other scholars argue that describing the

scenario the alternative to compliance is worth more to the losing party than compliance itself. Thus, it decides to pay the costs of non-compliance, which would presumably be outweighed by the benefits it derived from the breach.

In all these instances, RPs can exploit the procedural vulnerabilities of the WTO system to “drag their feet” and gain time without having to pay for it. In addition, the dispute settlement rules only afford prospective relief to the winning party. Thus, compensation is due only from the time of expiry of the reasonable period of time for implementation and not from the time the measure was enacted. Similarly, each party is responsible for its own litigation fees, requiring the losing party to cover only its own costs. These rules create incentives for RPs to resort to litigation and protract it in order to gain time to maintain their domestic measures.

The party behavior I have described in the cases of rule change or adjustment to the rule ought not to be equated with efficient breach. These two options are ways to defend a valuable domestic measure while trying to bring it into compliance with WTO obligations. To be sure, when a respondent values its domestic measure highly it will try to “win” the case before considering paying for non-compliance. But the point is that RPs can “win” in multiple ways beyond obtaining favorable relief in a particular case. They can win by obtaining a rule change even when losing tangible benefits in the case at bar. They can win by “adjusting to the rule” in a gradual manner without conforming. And they can win by exploiting the procedural vulnerabilities of the system, gaining time to phase out the breaching measure while providing a protective cushion to their domestic sectors.

Furthermore, it should be noted that a feature of WTO litigation is that an increasing number of disputes are held between RPs. A number of developing countries have become active participants in the system and they are litigating not only against developed countries, which are RPs, but

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WTO in this way does a disservice to the binding character of international obligations and to the emphasis on restitution (or withdrawal of the violating measure) as the primary means of compliance. See John H. Jackson, *The WTO Dispute Settlement Understanding: Misunderstanding on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997); see also Judith H. Bello, Book Review, 95 AJIL 984 (2001) (reviewing JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO*, and agreeing with Jackson that WTO obligations are legally binding and that a country's choice of efficient breach does not satisfy its legal obligation. However, Bello praises the WTO for “its realistic recognition that it cannot enforce specific compliance” and incorporates second-best mechanisms that can restore the balance of rights and obligations. For a more elaborate analysis on the character of WTO obligations see the following competing positions represented by Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179-204 (2002) and John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT'L L. 109-125 (2004). Irrespective of one's normative position in this debate, it seems to be the case that WTO members resort to this alternative and that the WTO has the institutional and procedural infrastructure to sustain it).

also against other active developing countries. In this scenario of RPs v. RPs, “we might expect that there would be heavy expenditure on rule-development, many appeals, and rapid and elaborate development of the doctrinal law.”<sup>97</sup> These conditions heighten the importance of active participation in dispute settlement and may explain why so many countries are participating as third parties, taking a position on issues that concern them in order to influence rule change.

## 2. *In Practice*

The strategies by RPs designed to advance their interests through rule change or adjustment to the rule are evident in several famous cases. For example, the United States was able to advance domestic environmental policies that at first seemed prohibited by the main GATT obligations and not covered by the exceptions. The United States was successful at expanding the scope of Article XX of GATT<sup>98</sup> so that it could ban the importation of products originating from countries that did not adopt its environmental standards. This is a story of a RP seeking to change a rule through lawyering and litigation while gradually adjusting its measures to fit the new rule interpretation. Although the United States lost every one of its cases, the transformation of the rule, from prohibition to permission, has been quite dramatic and it is ultimately a story of a country’s success in advancing its domestic policies within the WTO framework.

The process of rule change and adjustment to the rule began with the *Tuna-Dolphin* cases. In *Tuna-Dolphin I*,<sup>99</sup> Mexico challenged the United States’s Marine Mammal Protection Act of 1972 (MMPA), which placed an import ban on tuna and tuna products caught using fishing methods that were not comparable to U.S. standards.<sup>100</sup> The panel declared the ban to be in breach of GATT Article XI and to be outside the scope of the exceptions in Article XX, due to its extraterritorial reach. It interpreted

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97. Galanter, *supra* note 77, at 112–13.

98. GATT, *supra* note 51, art. XX. Article XX, which was the central rule at stake in all these cases, consists of a general exception to the non-discrimination principles of the main GATT. Of particular importance in this story were paragraph (g) of Article XX, and the preamble, also known as the chapeau. The Article reads as follows:

Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

*Id.*

99. Panel Report, *United States — Restrictions on Imports of Tuna*, DS21/R (circulated Sept. 3, 1991), 30 I.L.M. 1598 (1991) [hereinafter *Tuna-Dolphin I*].

100. *Id.* ¶¶ 1.1, 2.7.

Article XX(g) as justifying measures that affected only production and consumption in the jurisdiction of the country enacting the measure.<sup>101</sup> It reasoned that a country could not impose import restrictions on a product merely because it originated in a country with different environmental regulations.<sup>102</sup> To accept the extra-territorial interpretation of Article XX proposed by the United States, the Panel declared, would jeopardize the rights of contracting parties under GATT, subjecting those rights to unilateral determination by each country.<sup>103</sup> In addition, as a condition of entry, the measure established a moving target, subjecting exporters to the yearly U.S. incidental dolphin-taking rate, which exporters could not predict. As a result, the Panel established that the measure could not be “primarily aimed at” conservation, and thus it did not “relate to” the conservation of natural resources as required by Article XX(g).<sup>104</sup>

In its conclusion, the Panel noted that if the GATT Contracting Parties wanted to permit this type of trade restrictive measure, “it would be preferable to do so not by interpreting Article XX, but by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder.”<sup>105</sup> This statement illustrates the Panel’s view, and that of many Contracting Parties participating in the case as third parties, that the text of the Agreement as it stood did not allow for this kind of unilateral measures. The Panel thought that they so threatened the rights of parties in the Agreement and the multilateral framework that if the Contracting Parties wanted to allow this type of unilateral measures, it would be best for them to change the rules directly through the “legislative” process. What in fact has happened, however, is exactly the opposite story.

This type of measures became acceptable precisely through rule interpretation by panels and the AB in litigation. The change took place over the course of several cases, in which RPs, primarily the United States, advanced interpretations of GATT Article XX(g) that were favorable to their own domestic policy interests.<sup>106</sup> The trajectory of change has not

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101. *Id.* ¶¶ 5.30–5.34. In addition, the Panel found the U.S. secondary embargo of tuna and tuna products from “intermediary nations” also violated GATT Article XI and was not justifiable under Article XX. *Id.* ¶¶ 5.35–5.37.

102. *Id.* ¶ 6.2.

103. *Id.* ¶ 5.32.

104. *Id.* ¶5.33.

105. *Id.* ¶ 6.3.

106. For example, the United States argued and eventually won acceptance for the extraterritorial application of domestic environmental regulations over bycatch of fishing operations in the global commons. *See id.* ¶ 5.32 (rejecting the extraterritorial application of environmental policies out of hand); Panel Report, *United States — Restrictions on the Import of Tuna*, ¶ 5.24, DS29/R (circulated June 16, 1994), 33 I.L.M. 839 (1994) [hereinafter *Tuna-Dolphin II*] (holding the embargo was not “related to” conservation because it required coercion against other states); Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, 19, WT/DS2/AB/R (Apr. 29, 1996)

been swift nor a perfect linear progression from case to case. It has required the insistent and strategic advancement of favorable doctrinal interpretations and the challenge of unfavorable ones. RP, as the most active players in litigation, have had the greater opportunity to influence rule changes.

In *Tuna-Dolphin II*,<sup>107</sup> a panel analyzed a U.S. primary and intermediary embargo designed to protect dolphins in non-territorial waters that was challenged by the European Economic Community.<sup>108</sup> The Panel once again found the embargo to be in breach of GATT Article III and XI, but, in an important departure from *Tuna-Dolphin I*, it declared that protecting dolphins in non-territorial waters was an acceptable policy encompassed by the Article XX exceptions.<sup>109</sup> The problem in this case, however, was that the means to achieve the policy goals were inappropriate.<sup>110</sup> In interpreting the language of XX(g), the Panel placed particular importance on the words “relating to” and took them to mean “primarily aimed at,” holding that both the *purpose and the effects* of the measure had to be primarily aimed at conservation.<sup>111</sup> The Panel concluded that the U.S. embargoes were in place only to force other nations to comply with U.S. conservation policy.<sup>112</sup> The Panel then reframed the question as to whether measures intended to force other countries to regulate persons in their jurisdiction could relate to preservation. It found that in order to preserve the spirit of the agreement<sup>113</sup> Article XX exceptions should not be interpreted broadly; therefore measures enacted to force other countries to take domestic action do not “relate to” conservation.<sup>114</sup> Although the United States lost again, in this second case the rule became more capacious. After *Tuna-Dolphin II*, in principle, a conservation policy with extra-territorial effects could fall within the scope of the exceptions in Article XX.<sup>115</sup>

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(holding that the “related to” analysis should focus on the purposes of the measure and not the differential treatment between nations); Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 122, WT/DS58/AB/RW (Oct. 22 2001) (holding that unilateral measures penalizing other nations do not violate the chapeau of Article XX if the imposing nation has made a good faith effort to negotiate multilaterally).

107. *Tuna-Dolphin II*, *supra* note 106.

108. *Id.* ¶ 1.1.

109. *Id.* ¶ 5.20.

110. *Id.* ¶ 5.42.

111. *Id.* ¶ 5.22.

112. *Id.* ¶ 5.24.

113. *Id.* ¶ 5.26.

114. *Id.* ¶ 5.27. The Panel concluded that measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed either at the conservation of an exhaustible natural resource, or at rendering effective restrictions on domestic production or consumption, in the meaning of Article XX (g). *Id.*

115. It should be noted that both *Tuna-Dolphin* panel reports were eventually not adopted.

Just days after the WTO was established, another important case arose and the United States continued to push for expansion of the exception under GATT Art. XX(g).<sup>116</sup> The *Reformulated Gasoline*<sup>117</sup> case involved a U.S. measure that required imported gasoline to meet a special statutory baseline (inapplicable to domestic gasoline) with regards to certain chemical characteristics.<sup>118</sup> The Panel declared that the U.S. measure was discriminatory and violated the national treatment rule of Article III:4. Moreover, the measure did not fall within the scope of the exception in Article XX(g). The panel held that the less favorable baseline establishment rules were not “primarily aimed at” the conservation of natural resources.<sup>119</sup>

On appeal, however, the WTO Appellate Body (AB) made an important change to the analysis of Article XX(g) and held that the contested measure did fall within its scope.<sup>120</sup> In an important development, the AB changed the interpretation of the phrase “relating to” in Article XX(g) and separated the analysis of the measure’s purpose from the measure’s effects. It refused to consider the measure’s unfavorable treatment (the effects of the measure) in the analysis of whether the measure “relates to” the conservation of natural resources.<sup>121</sup> The AB considered that discriminatory treatment is already implicit in the invocation of an exception and it should not prejudice whether the measure relates or not to the conservation of natural resources.<sup>122</sup> Instead, the AB examined whether the measure itself was related to the conservation of clean air in the United States and found in the affirmative, stating that it could not be regarded as “merely incidentally or inadvertently” aimed at such conservation goal.<sup>123</sup>

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116. Subject to the new WTO dispute settlement mechanism, this and subsequent disputes would go through a Panel and also through the newly established Appellate Body procedure.

117. Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *AB Reformulated Gasoline*]; Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, (January 29, 1996).

118. *AB Reformulated Gasoline*, *supra* note 117, at 2 (identifying the measure in dispute as the Gasoline Rule, a 1994 regulation that the Environmental Protection Agency enacted pursuant to the Clean Air Act of 1990).

119. *Id.* at 14.

120. *Id.* at 14–19.

121. The Appellate Body declared that one problem with the Panel’s reasoning is that “the Panel asked itself whether the ‘less favorable treatment’ of imported gasoline was ‘primarily aimed at’ the conservation of natural resources, rather than whether the ‘measure’, i.e. the baseline establishment rules, were ‘primarily aimed at’ the conservation of clean air. In our view, the Panel here was in error in referring to its legal conclusion on Article III:4 instead of the measure in issue.” *Id.* at 16.

122. “The result of this analysis is to turn Article XX on its head. Obviously, there had to be a finding that the measure provided ‘less favourable treatment’ under Article III:4 before the Panel examined the ‘General Exceptions’ contained in Article XX. That, however, is a conclusion of law. The Chapeau of Article XX makes it clear that it is the ‘measures’ which are to be examined under Article XX (g), and not the legal finding of ‘less favourable treatment.’” *Id.*

123. *Id.* at 19.



The AB moved the analysis of the measure's effects to the chapeau of Article XX. It set an analytical structure by which first it has to be determined whether the measure fits within one of Article XX exceptions and then whether the *application* of the measure complies with the requirements of the chapeau. The AB concluded, however, that the U.S. measure did not meet the requirements. So, once again, the United States lost the case on appeal but it achieved an important rule change.<sup>124</sup>

In *Shrimp-Turtle I*,<sup>125</sup> at issue was a U.S. statute imposing a ban on the importation of shrimp and certain shrimp products harvested with fishing technology that resulted in the incidental killing of sea turtles and that was not comparable to fishing technology used within the United States.<sup>126</sup> The Panel concluded that the measures violated Article XI and were not covered by Article XX.<sup>127</sup> Reversing the order of analysis set out in *Gasoline*, the Panel considered first whether the measure fell within the scope of Article XX by analyzing whether it satisfied the conditions of the chapeau. The Panel declared that the U.S. measure fell outside the scope of Article XX because it went against the objects and purposes of the WTO.<sup>128</sup> Echoing the reasoning in *Tuna-Dolphin I* and explicitly referring to *Tuna-Dolphin II*, the Panel determined that a country's unilateral measure, conditioning market access upon the adoption of its own domestic standards, would damage the security and predictability of trade

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124. "Although the United States *ultimately lost its appeal*, it expressed great satisfaction with the Appellate Body's analysis of Article XX(g). Past GATT panels had focused, as had the Gasoline panel, on whether the GATT-inconsistent aspect of a measure was 'primarily aimed at' conservation. The AB's decision that it was necessary to look at the broader measure — the baseline establishment rules generally — and examine whether they were aimed at conservation significantly expanded the scope of Article XX(g)." JACKSON ET AL., *supra* note 43, at 611 (emphasis added).

125. The dispute concerning the U.S. measures in *Shrimp-Turtle* would go through all the steps of the WTO dispute settlement system and be litigated several times, first in a Panel, Panel Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *Shrimp-Turtle I*], then in the Appellate Body, Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle II*], and finally in an implementation procedure that included a Panel and AB decisions, Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW (Oct. 22 2001) [hereinafter *Shrimp-Turtle III*]. For purposes of illustrating the changes in rule interpretation and in adjustment to the rule I call these cases *Shrimp-Turtle I*, *II*, and *III* respectively, even though they consist of different phases of the same dispute.

126. The U.S. measure challenged by Malaysia is listed as a supplement to 16 U.S.C.A. § 1537(b) (West 2008) (referred to as § 609). Congress passed the measure in Section 609 of Public Law 101-162, which was a 1989 appropriations bill. Act of Nov. 21, 1989, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (1989). Countries could be exempted from the ban if they certified that 1) there was no risk to sea turtles from the fishing environment in which shrimp was harvested (aqua-farms or "artisanal methods") or 2) the country adopted regulatory measures comparable to the United States. The ban was initially limited geographically to the wider Caribbean/western Atlantic region but was later extended to all countries.

127. *Shrimp-Turtle I*, *supra* note 125, at ¶¶ 7.12, 7.27.

128. *Id.* ¶ 7.49.

relations and threaten the whole multilateral system.<sup>129</sup> The Panel also declared that the U.S. measure was overinclusive, as it did not take into account different local and regional conditions. It concluded that the United States could better achieve its conservation goals through multilateral negotiation of international agreements and not unilateral conditions.<sup>130</sup>

The United States challenged the Panel decision on all fronts and achieved important changes in the interpretation of Article XX in *Shrimp-Turtle II*.<sup>131</sup> Following *Reformulated Gasoline*, the AB reversed again the method of analysis of Article XX and examined first whether the measure fell within one of the enumerated clauses of Article XX and second whether the measure complied with the requirements of the chapeau.<sup>132</sup> The AB decided that the measure “relat[ed] to conservation.”<sup>133</sup> This time, the AB did not use the term “primarily aimed at” and it declared that the measure was proportionate in reach and scope to the goal of conservation of sea turtles: “the means are, in principle, reasonably related to the ends.”<sup>134</sup> Ultimately, the United States lost the case on appeal because it was found to violate the chapeau of Art. XX,<sup>135</sup> but it obtained several important wins concerning the criteria for assessing whether a measure of this kind was permissible.

Following *Shrimp-Turtle II*, the United States revised its measure and adopted the 1999 Guidelines, which modified the conditions under which Section 609 applied.<sup>136</sup> It also made efforts to negotiate a new Agreement

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129. *Id.* ¶¶ 7.46, 7.51.

130. *Id.* ¶ 7.55.

131. *Shrimp-Turtle II*, *supra* note 125.

132. *Id.* ¶ 118. According to the AB, that order had a clear logic and the Panel was wrong to have inverted it. *Id.* ¶ 119.

133. *Id.* ¶ 135-36.

134. *Id.* ¶ 141.

135. The AB decided that the language of the chapeau in Article XX had to be interpreted in light of the object and purpose of that Article and not of GATT or the WTO Agreement, since the nature of the exception implied the breach of a substantive obligation. The purpose of Article XX was thus to prevent abuse or misuse of the exception and the analysis of the chapeau involved the *application* of the measure, not its design. The AB then proceeded to apply the elements of the chapeau, namely whether there was discrimination and whether such discrimination was arbitrary or unjustifiable “between countries where the same conditions prevail.” The AB found that the U.S. ban was unjustifiable because it required other WTO members to adopt “essentially the same” regulatory standards that existed in the United States to achieve a policy goal, without considering different conditions in other Members’ territories. *Id.* ¶¶ 164–65. The AB also found it to be unjustifiable that the United States had engaged some members but not others in negotiations to conclude international agreements for the protection of sea turtles before imposing its import ban. *Id.* ¶ 166. The AB found that the U.S. measure was also arbitrary, given its rigidity and inflexibility. *Id.* ¶ 177. Moreover, it found that the certification process lacked a review process and that important due process requirements were missing. *Id.* ¶ 180.

136. Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,949 (July 8, 1999). The United States also engaged in negotiations with shrimp producing nations in Southeast

with countries of the Indian Ocean and the Southeast Asia region.<sup>137</sup> In *Shrimp-Turtle III*,<sup>138</sup> Malaysia challenged in a compliance panel these U.S. rule adjustments as an insufficient implementation of the AB *Shrimp-Turtle II* ruling.<sup>139</sup> Malaysia argued that, to avoid arbitrary and unjustifiable discrimination under the chapeau, the United States needed to conclude an international agreement for the protection of sea turtles.<sup>140</sup> The Panel and the AB disagreed and found that serious, good faith efforts to negotiate an international agreement on the part of the United States were sufficient to comply with the chapeau.<sup>141</sup> Malaysia also argued that, even if Section 609 now allowed certification of countries that have “comparable” regulatory programs to the United States and not “essentially the same,” it would still constitute arbitrary and unjustifiable discrimination.<sup>142</sup> The reason, Malaysia argued, was that the measure “conditions access to the United States market on compliance with policies and standards ‘unilaterally’ prescribed by the United States.”<sup>143</sup> The AB disagreed with Malaysia and found that, due to the new flexibilities introduced in Section 609 and the new procedures in the certification process, the measure was now in compliance with the chapeau requirements and therefore valid under XX(g).<sup>144</sup>

It should be noted that, in adjusting its measure to the new rule interpretation in *Shrimp-Turtle II*, the United States carefully tested the boundaries of the rule and managed to obtain a favorable ruling. The United States initiated negotiations, but did not conclude any new multilateral agreement with the winning countries.<sup>145</sup> This ended up being a wise course of action for the United States, since, in *Shrimp-Turtle III*, the AB found that a good-faith effort to negotiate was enough.<sup>146</sup>

In counting the general wins and losses of the United States in these environmental cases the tally is not favorable to the United States, which lost all the cases analyzed above except for the very last one. The United States lost in the sense that the measure in question was found to violate WTO obligations. The United States, however, has been successful in transforming and expanding the scope of Article XX(g), so that it is no

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Asia pursuant to the Appellate Body decision in *Shrimp-Turtle II*. See *Shrimp-Turtle III*, *supra* note 125, at ¶ 131.

137. *Shrimp-Turtle III*, *supra* note 125, at ¶ 115.

138. *Id.*

139. *Id.* ¶ 1.

140. *Id.* ¶ 115.

141. *Id.* ¶ 122.

142. *Id.* ¶ 145.

143. *Id.* ¶ 136.

144. *Id.* ¶¶ 153–54.

145. In fact, the United States negotiated these agreements while the previous measures were still in effect.

146. *Shrimp-Turtle III*, *supra* note 125, at ¶¶ 122–23.

longer interpreted to prohibit conditioning market access to other members upon the adoption of comparable environmental standards of those of the United States. In fact, the rule progressed from outright prohibition of this trade restriction (only fixable through amendment to the Agreement, as the Panel in *Tuna-Dolphin* recommended) to favorable permission. In this way, the United States expanded its policy space through strategic wins in rule interpretation and adjustments to the rule.<sup>147</sup>

As can be seen in these environmental cases<sup>148</sup>, there is a progression by which an RP can achieve an important transformation of a rule or set of rules to accommodate its interests.<sup>149</sup> The emphasis of the analysis here is on the parties and on how they manage to weave their policy interests within the confines of the WTO by expanding the boundaries of the rules. The United States did not get discouraged by what looked like a restriction in the Agreement or by unfavorable interpretations by Panels or the AB. Instead, the United States enacted measures that it deemed important to its domestic objectives and then sought to defend them when challenged. It carefully adjusted its measures to test the limits of new rule interpretations and defended its adjustment whenever it was challenged. Along the way, the United States also took advantage of the procedural vulnerabilities of

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147. This does not mean to suggest that these changes were the sole responsibility of the U.S. government. There was, of course, enormous pressure from U.S. and international environmental groups who advocated for the domestic measure in question. For an analysis of U.S. compliance with the *Shrimp-Turtle* decision, see generally *Renata Benedini, Complying with the WTO Shrimp Turtle Decision*, in *RECONCILING ENVIRONMENT AND TRADE* 419 (Edith Brown Weiss & John H. Jackson eds., 2008).

148. For further analysis of these cases, see Steve Charnovitz, *The WTO's Environmental Progress*, 10 J. INT'L ECON. L. 685 (2007); Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002).

149. In his important article about WTO litigation, Conti asserts that RPs do not strategize to secure rule-changes in ambiguous or untested areas of WTO law. Conti, *Learning to Dispute*, *supra* note 88, at 656. This assertion, however, relies partly on a distinction between clarifying an obligation and creating a new rule that seems hard to sustain. *Id.* When an adjudicator clarifies the meaning of an ambiguous rule, she is, in effect, creating a new rule that chooses a particular interpretation over other competing alternatives. Parties in litigation do not expect adjudicators to create new rules from a clean slate. Rather, they propose interpretations that would give the rule a new meaning, thus creating a new rule to favor their interests. Conti states that “[t]here is little evidence that repeat litigants strategize the development of WTO law over a series of disputes.” *Id.* at 657. Further, he claims that because RPs can anticipate the impact of a potential rule change, they tend to carefully avoid clarification of obligations. He concludes that “this is a reverse playing-for-the-rules strategy based on the avoidance of uncertainty and negative implications of the clarification of obligations.” *Id.* But if RPs are likely to anticipate the impact of a rule, there is no reason they should abstain from strategic litigation if the odds favor them. And it is precisely RPs who are best situated to avoid uncertainty by continuing to push for particular interpretations overtime. Conti recognizes that third parties may join a dispute “for the opportunity to affect the interpretation of an obligation.” *Id.* This behavior, however, may very well be seen as complementary, rather than exceptional, to RPs’ strategy as litigants. Legal analysis of rule development, like the saga of environmental cases analyzed above, shows that RPs invest in rule-change over time through strategic litigation.

the system, by delaying the measure adjustment as much as the procedural mechanism allowed.

Developing countries are learning to use WTO rules and exceptions to their advantage, arguing that their domestic measures fall under accepted justifications, like protecting the environment, health, and public morals. But they are also learning that claiming an exception is not a trump card because there is an elaborate and evolving doctrine, largely influenced by RPs, as to the applicability of each exception. Thus, governments have to learn how to craft their measures in a way that would pass muster under the WTO. For that, they need institutional legal capacity, so they can shape a measure in a manner that would make it WTO-consistent and can defend it through effective lawyering and litigation.<sup>150</sup>

### B. *Rule-Based and Doctrinal Space for Countries' Policy Preferences*

In this Section, I describe areas of policy autonomy that countries have begun to carve out by proposing novel or non-obvious interpretations of the agreements' text in the areas of the environment, labor, and intellectual property.<sup>151</sup>

#### 1. *Environmental Regulations*

As I have shown, the exception in GATT Article XX(g), as now interpreted by the AB, may enable a country to enact unilateral environmental measures with which exporting countries have to comply in order to gain market access, regardless of whether those measures pertain solely to the environment within these exporting countries.<sup>152</sup> Countries have thus gained considerable environmental policy autonomy. As a result, a WTO member can erect trade barriers against exporting countries that do not comply with its environmental regulatory standards.<sup>153</sup>

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150. This might be especially important if DSB itself, according to one argument, has started to develop a bias of interpretation against countries' claims of regulatory autonomy. See Colares, *supra* note 90, at 387–88. For an opposite view, see Michael Ming Du, *supra* note 71.

151. For an excellent analysis of the tension between the values of liberal trade and environmental advocates, see generally Edith B. Weiss & John H. Jackson, *The Framework for The Environment and Trade*, in RECONCILING ENVIRONMENT AND TRADE, *supra* note 147, at, 1; see also Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 1 (Edith Brown Weiss & Harold K. Jacobson eds., 2000) (providing a comprehensive analysis of the main international environmental commitments, the mechanisms to ensure their compliance and the challenges to make them effective).

152. See GARY CLYDE HUFBAUER ET AL., GLOBAL WARMING AND THE WORLD TRADING SYSTEM 51–52 (2009).

153. For a detailed discussion of potential areas of interaction between environmental protection and WTO rules, see Bradly J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 J. INT'L ECON. L. 895 (2009).

Countries could potentially use this expansion of Article XX(g) for the purposes of promoting domestic climate change regulation. Of course, pursuant to the AB's past interpretations, any protective measure still needs to comply with Article XX's chapeau. In fact, the language of the now defunct Boxer Amendment to the Lieberman-Warner Climate Security Act of 2008 in the United States might violate the requirements of the chapeau.<sup>154</sup> Nonetheless, one could imagine climate change legislation that would be more carefully designed to pass muster under WTO by making sure that the provisions of the measure treat similarly situated countries equally.

## 2. *Labor Standards*

Potential space for national policy autonomy also exists in labor standards. For example, a country might be able to enact trade-restrictive measures to ensure compliance with internationally-recognized labor standards.<sup>155</sup> There are plausible interpretations of the non-discrimination principle, found in the most favored nation<sup>156</sup> and national treatment<sup>157</sup> rules, which might justify trade restrictions on goods produced under working conditions that violate fundamental labor rights.

Ultimately, even if the trade measure is considered to be in breach of WTO nondiscriminatory obligations, a state might successfully invoke the public morals exception in GATT Article XX(a) to justify trade sanctions for violations of core labor standards as human rights.<sup>158</sup> The AB first had the occasion to rule on the public morals exception in Article XIV (a) of the General Agreement of Trade in Services (GATS),<sup>159</sup> which has similar text to the public morals exception in GATT. The Panel defined public morals as the "standards of right and wrong conduct maintained by or on

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154. HUFBAUER ET AL., *supra* note 152, at 83–87. The authors conclude that although the Act's "provisions on imports seem to have been written with a roadmap of WTO law in mind . . . there remain GATT violations that would require defense under Article XX, and an adjudication would probably find that the program fails to comply with the chapeau of Article XX. *Id.* at 88.

155. Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 148–49 (1999); See ROBERT HOWSE & MICHAEL TREBILCOCK, *THE REGULATION OF INTERNATIONAL TRADE* 571–74 (2005);

156. See HOWSE & TREBILCOCK, *supra* note 155, at 571 (arguing that under criteria established by the AB in *Canada-Autos* an origin-neutral condition based on compliance with core labor standards in the product's process of production might be consistent with Article I:1 even in regard of like products).

157. *Id.* at 572 (arguing that based on the "consumer tastes and habits" criteria set out by the AB in *Asbestos*, interpreting Article III:4, a state may validly target imported products whose production violates core labor standards for considering them *unlike* similar domestic products whose production complies with such standards).

158. Howse, *supra* note 155, at 142–45; HOWSE & TREBILCOCK, *supra* note 155, at 572–73.

159. Panel Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

behalf of a community or nation.”<sup>160</sup> The AB concurred with the Panel’s decision, thus giving countries considerable latitude to define the scope of its public morals and determine the practices that violate them.<sup>161</sup> More recently, the AB decided its first case on XX(a), confirming this interpretation.<sup>162</sup>

But an exception on public morals is not a blank check.<sup>163</sup> A state enacting such a measure would still need to comply with the requirements of the chapeau in Article XX, as interpreted by the AB in the *Shrimp-Turtle* case. In addition, a WTO member would need to show that a measure is “necessary” for the protection of public morals.<sup>164</sup>

One example of a country’s trade-restrictive measure based on violations of labor standards is the current U.S. ban on all trade with Burma under the 2003 Burmese Freedom and Democracy Act.<sup>165</sup> The Act was issued subsequent to an International Labour Organization (ILO) inquiry into labor rights abuses and an ensuing ILO recommendation to which the Burmese military junta failed to respond. Were the Act to be challenged in the WTO, it could be upheld as an exception because it clearly complies with the requirements under Article XX(a).<sup>166</sup> In this case, there was a definitive multilateral judgment against the violation of labor rights in Burma. Indeed, for the first time, the ILO invoked Article 33 of its Constitution, which allows other ILO members to take measures against a member to secure compliance.<sup>167</sup>

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160. *Id.* ¶¶ 6.4–6.6.

161. *See id.* ¶ 3.5; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, *supra* note 146, at ¶ 296. Robert Howse and Michael Trebilcock argue that “based on the panel’s deferential reasoning as to the content of public morals, there is no reason why [its content] could not extend to beliefs of the importing country concerning the wrongfulness of consuming products produced in a context — either corporate or national — where basic labour rights are not respected.” HOWSE & TREBILCOCK, *supra* note 155, at 572–73.

162. Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

163. *See* Mark Wu, Note, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT’L L. 215 (2008).

164. This would involve an analysis of whether there is any “reasonably available less trade-restrictive alternative” or whether the measure has a “close relationship to the given objective.” HOWSE & TREBILCOCK, *supra* note 155, at 573–74. For the most recent Appellate Body analysis of necessity concerning public morals, see Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, *supra* note 162, at ¶¶ 234–337 (confirming that “at least one of the alternative measures proposed by the United States is an alternative ‘reasonably available’ to China” and declaring that China had “not demonstrated that the relevant provisions are ‘necessary’ to protect public morals”). *Id.* ¶¶ 336–37.

165. Burmese Freedom and Democracy Act, 50 U.S.C.A. §1701 (2003).

166. Howse and Trebilcock note that “a group of WTO scholars from leading U.S. law schools issued a joint statement through the Free Burma Coalition, explaining how, in the case of Burma, sanctions could be defended under Article XX of the GATT, especially given the actions already taken by the ILO [International Labour Organization].” HOWSE & TREBILCOCK, *supra* note 155, at 568.

167. Press Release, Int’l Labour Org., International Labour Conference Adopts Resolution

### 3. *Intellectual Property*

TRIPS is perhaps the WTO agreement that has received the harshest criticism for its stringent standards on patents, trademarks and copyrights. Some development scholars have argued that the TRIPS agreement represents the clearest case of rich states wanting to subject developing countries to their own standards and have called for its repudiation.<sup>168</sup> Criticism of TRIPS has been particularly harsh when it comes to protection of pharmaceutical patents because of the obstacles it imposes on access to medicines in poor countries.<sup>169</sup>

Despite the stringent protections established under TRIPS, legal scholars have pointed out flexibilities in the domestic application of the TRIPS agreement, particularly when it comes to enabling access to medicines to further their health policies.<sup>170</sup> For example, states can mandate compulsory licensing for certain drugs, which effectively supersedes any patent exclusivity in exchange for a royalty.<sup>171</sup> Under TRIPS Article 31, WTO members can grant a compulsory license as long as it is conditioned upon “reasonable compensation to the rights-holder and provided the license applies only to the market of the granting WTO

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Targeting Forced Labour in Myanmar (Burma) (June 14, 2000), available at <http://tinyurl.com/75tsaqj>.

168. See RODRIK, ONE ECONOMICS, MANY RECIPES, *supra* note 10, at 149; Birdsall et al., *supra* note 14, at 144.

169. James Love, *From TRIPs to RIPS: A Better Trade Framework to Support Innovation in Medical Technologies*, Paper for the Workshop on Economic Issues Related to Access to HIV/AIDS Care in Developing Countries, *Agence nationale de recherches sur le sida/Institute d' économie publique (Université de la Méditerranée)*, Marseille, France (May 27, 2003), available at [www.cptech.org/slides/trips2rips.doc](http://www.cptech.org/slides/trips2rips.doc).

170. See, e.g., Bradley Condon & Tapen Sinha, *Global Diseases, Global Patents and Differential Treatment in WTO Law: Criteria for Suspending Patent Obligations in Developing Countries*, 26 NW. J. INT'L L. & BUS. 1 (2005).

171. See Doha Declaration, *supra* note 9, at ¶ 4. The Declaration responded to the perceived danger that the TRIPS agreement would overly restrict countries' ability to deal with public health emergencies. For an early assessment of both the restrictiveness and the flexibility of TRIPS, see Robert Weissman, *A Long, Strange TRIPS: The Pharmaceutical Industry Drive to Harmonize Global Intellectual Property Rules, and the Remaining WTO Legal Alternatives Available to Third World Countries*, 25 U. PA. J. INT'L ECON. L. 1069 (1996). For a thorough account of the interpretive issues that have arisen in the domain of TRIPS flexibilities, see Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 874–86 (2007). In 2009 report to the General Assembly, the UN Special Rapporteur on the right to physical and mental health noted that “pressure from developed countries has played a prominent role in shaping the implementation of TRIPS flexibilities in developing countries and L[east]D[eveloped]C[ountries]”. Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 26, U.N. Doc. A/HRC/11/12 (Mar. 31, 2009) (by Anand Grover). The Special Rapporteur ends the report with a recommendation that “developing countries and LDCs should seek international assistance in building capacity to implement TRIPS flexibilities” and that they should avoid enacting free trade agreements or bilateral trade agreements that include more restrictive provisions (“TRIPS-plus”). *Id.* ¶¶ 106, 108.



member.”<sup>172</sup> But the dominant interpretation of the Article, which has been effectively advanced by the pharmaceutical industry with the support of developed countries’ governments, makes it more difficult for developing countries to use compulsory licensing, even to address a health crisis.<sup>173</sup> Unfortunately, the TRIPs division of the WTO Secretariat seems to have enabled and supported this interpretation by emphasizing the strictness of TRIPs restrictions and “underemphasizing the flexibilities” of the regime.<sup>174</sup>

Furthermore, on the question of whether poor countries without manufacturing capacity could import generic drugs, there is a plausible interpretation that they could do so under Article 30 exception. Although Article 31 limits the granting of such a license to the domestic market of the WTO member in question,

[I]here are good reasons to think that the granting of a compulsory license could be extended to the market in another WTO member country as an Article 30 exception, where that other WTO member indicates that were it to possess its own manufacturing capacity, it would itself have granted such a license for production of generics *domestically*.<sup>175</sup>

This exception is consistent with the normal exploitation of the patent and does not undermine the patent holders’ legitimate interests.<sup>176</sup> The point is that the problem “could be solved within the four corners of TRIPs.”<sup>177</sup> Thus, the key question is not the rigidity of the text but the interpretations promoted by powerful industrial groups and developed countries that promote a closure not warranted by the text of the agreement.<sup>178</sup>

Beyond compulsory licensing, scholars have noted further flexibilities in the implementation of the TRIPs agreement. States can exercise discretion in several areas, such as by limiting the patentable subject matter, setting a high inventive step standard, expanding procedural opportunities to challenge patents before and after they are granted, and imposing

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172. HOWSE & TREBILCOCK, *supra* note 155, at 429.

173. *Id.* Reflecting on the South African controversy, Howse and Trebilcock conclude that “neither the parallel importation foreseen by the South African legislation nor the alternative of compulsory licensing itself is prohibited under TRIPs — the problem was not the Agreement but it being interpreted unreasonably, in a manner that allowed it to be used to bully developing countries with an HIV/AIDS crisis.” *Id.* at 429–30.

174. *Id.* at 429

175. *Id.* at 430.

176. *Id.*

177. *Id.* at 431.

178. Howse and Trebilcock conclude that “it is important that the conduct of the WTO Secretariat in endorsing these kinds of interpretations be carefully reviewed, especially what it tells developing-country governments about the meaning of TRIPs in the context of technical assistance and training programs” *Id.* at 431–32.

limitations on injunctive remedies.<sup>179</sup> While TRIPS contains many bright-line obligations, such as a minimum twenty-year duration requirement for patents, it also includes many vague standards, such as the “requirement to engage in ‘reasonable’ efforts to negotiate with patent holders before overriding a patent”.<sup>180</sup> Developing countries have a real opportunity to interpret these terms in their favor during the implementation and administration of their domestic regulation, in compliance with TRIPS.<sup>181</sup> Some developing countries have already begun to do so.<sup>182</sup> In reaction to this trend and providing further evidence of the existing flexibilities in TRIPS, developed countries such as the United States have tried to negotiate stricter terms in bilateral trade agreements.<sup>183</sup>

As we have seen, even in TRIPS, RPs in the WTO can exploit available legal interpretations to their advantage. One important lesson that emerges from this discussion is that often the biggest impediments to national policy autonomy lie not on the Agreements themselves, but in dominant interpretations of them.<sup>184</sup> RPs are able to promote favorable interpretations in litigation but also through other means. For instance, they can promote advantageous interpretations through technical assistance programs.<sup>185</sup> A key question is thus what the obstacles that developing countries confront in taking advantage of the WTO

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179. Amy Kapczynski, *Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India's Pharmaceutical Sector*, 97 CALIF. L. REV. 1571, 1589 (2009).

180. *Id.* at 1588.

181. *See id.* at 1589 (“In the process of interpreting the TRIPS Agreement, and in part through the intervention of local industry and health advocates, India introduced robust versions of familiar flexibilities such as compulsory licensing, but also introduced some less common and even entirely new flexibilities.”).

182. For an overview of the ways in which developing countries have already tried to take advantage of TRIPS flexibilities, see ELLEN F.M. 'T HOEN, *THE GLOBAL POLITICS OF PHARMACEUTICAL MONOPOLY POWER* 61 (2009).

183. *Id.* at 69–72. For a thorough account of U.S. efforts to conclude bilateral treaties in the area of intellectual property and an analysis of the potentially negative effects on developing countries, see Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, J. WORLD INT'L PROP. 791 (2005). The provisions sought through bilateral treaties are known as ‘TRIPS-plus,’ and they explicitly go beyond what is required by TRIPS. *See* Carlos María Correa, *Implications of Bilateral Free Trade Agreements on Access to Medicines*, 84 BULL. WORLD HEALTH ORG. 399 (2006).

184. This legal-institutional analysis can be taken further to discuss the question of whether the WTO should deal with other pressing global issues, like migration, which are usually thought to lie outside the scope of the Organization. In an illuminating analysis, Joel Trachtman examines the ambivalent relationship between GATS Mode 4, regulating trade in services provided by natural persons from another country, with a host state's immigration law. JOEL TRACHTMAN, *THE INTERNATIONAL LAW OF ECONOMIC MIGRATION: TOWARD THE FOURTH FREEDOM* 241–46 (2009). Trachtman suggests that nothing would bar states from making “cross-concessions” or liberalizations in goods for liberalization in migration. *Id.* at 333.

185. Kapczynski notes that developing countries face important limitations in exploiting these flexibilities, such as lack of resources, a dominant transnational legal culture that fills in the gaps of TRIPS ambiguities with interpretations that favor high-protection jurisdictions, and extra-legal pressure. Kapczynski, *supra* note 179, at 1631.

agreements are and how they may overcome them. This is the question I explore in the next section.

*C. Linking Legal Capacity to a Development Strategy*

Despite the potential flexibilities highlighted in the previous section, structural asymmetries within the WTO make it harder for developing countries to participate successfully in the WTO dispute resolution system. Like any change, the transformation of the international trade regime, from a diplomacy-based to a rule-oriented system, with the creation of the WTO has created new incentives and privileged certain actors over others.<sup>186</sup> Although several scholars have noted the reduced participation of developing countries in the WTO dispute settlement system, as compared to developed countries, the explanations for this phenomenon vary from legal-institutional capacity<sup>187</sup> to trade volume and composition<sup>188</sup>, to economic resources,<sup>189</sup> to power differentials.<sup>190</sup> How to determine with confidence which factor is most relevant is a matter of current debate.<sup>191</sup>

Shaffer, for example, points out that developing countries face several challenges. They lack expertise in WTO law, financial resources to use the system, and they are afraid of pressure or potential reprisals by powerful countries.<sup>192</sup> These are “constraints of legal knowledge, financial endowment, and political power” or “law, money, and politics.”<sup>193</sup>

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186. See, e.g., Shaffer & Nordstrom, *supra* note 89, at 590 (“In sum, where the procedures are the same while stakes differ, the system is not neutral to size. Notionally equal litigation rules provide unequal opportunities for WTO members. Small trading nations are effectively constrained from being able to use the legal system to the full extent, constituting, in practice, a form of in-built discrimination.”).

187. See Busch et al., *supra* note 75, at 576–77 (2009); Conti, *Learning to Dispute*, *supra* note 88, at 625–62; Davis & Bermeo, *supra* note 88; Guzman & Simmons, *supra* note 75, at 569 (finding that legal capacity is a better explanation than power in countries’ constraints to participate in dispute settlement); Shaffer, *supra* note 75, at 197.

188. See Henrik Horn, Petros C. Mavroidis & Håkan Nordström, *Is the Use of the WTO Dispute Settlement System Biased?* (Ctr. for Econ. Policy Research, Discussion Paper No. DP2340, 1999) (published in *THE WTO AND INTERNATIONAL TRADE LAW/DISPUTE SETTLEMENT* (Petros C. Mavroidis & Alan O. Sykes eds., 2005)).

189. See Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L ECON. LAW 861, 865–67 (2005); Shaffer, *supra* note 75, at 197; Shaffer & Nordstrom, *supra* note 89.

190. See Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 WORLD BANK ECON. REV. 387 (2005) (discussing retaliatory and legal capacity); Pilar Zejan & Frank L. Bartels, *Be Nice and Get Your Money — An Empirical Analysis of World Trade Organization Trade Disputes and Aid*, 40 J. WORLD TRADE 1021 (2006).

191. Busch et al., *supra* note 75; Hoekman et al., *supra* note 76 (examining developing country participation in WTO dispute settlement and concluding that once a panel has been formed, there does not seem to be a difference in losses and wins between developing and developed countries).

192. Shaffer, *supra* note 75, at 177.

193. *Id.*

Developing countries face considerable hurdles in accessing the markets of other countries. These trade barriers can be significant for the economies of developing countries.<sup>194</sup> If developing countries could challenge these barriers their economies would benefit. They should be able to do so through the dispute settlement system, the institutional setting provided by the WTO. However, despite the system's recognition of formal equality not all countries can use it effectively.

In Shaffer's work, as in many studies about the WTO dispute settlement system, there is an optimistic note about how once legally-capable countries are able to spot trade barriers, they would be interested in and would stand to gain from tearing them down. In this view, investing in legal capacity allows countries to become "trade-barrier-spotters," finding barriers they could challenge for their benefit. Moreover, because every country has an interest in seeking gains, if everyone has considerable legal capacity and is able to participate in the dispute settlement system, the trade regime would be kept in check by its participants, who would shoot down barriers and prevent other countries from erecting them. This view is consistent with the assumption that trade liberalization is embedded in the WTO regime, which the dispute settlement is supposed to serve.

Taking this view to its logical conclusion, some scholars have suggested having a public prosecutor.<sup>195</sup> Because only a few countries are capable of identifying violations of legal obligations, many go unpunished. If countries are unable to police their own interests, then a public police would keep the regime under closer surveillance. The assumption again is that less trade barriers would be good for everyone, and particularly for developing countries, which currently are less able to challenge them. This understanding of legal capacity takes the assumptions of trade liberalization for granted and seeks to redress the asymmetrical conditions under which different members participate in the system. It recognizes that, despite formal equality, there is real inequality of initial material conditions and that such disparities impact the result. The strategy for developing countries is one of adapting or "catching-up" with developed countries to participate on an equal footing. Here, investing in legal capacity is a key lever in leveling the playing field by helping countries to become RPs.

Using an alternative approach, I suggest that we invert the starting question. Instead of asking "why aren't developing countries using the system in greater numbers?" or "what stops them from participating in it?", we should ask: Why *are* developing countries using the system? And what are they using it *for*? Surely one could argue that it is because

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194. *Id.*

195. See Bernard Hoekman, *Strengthening the Global Trade Architecture for Development: The Post Doha Agenda*, 1 WORLD TRADE REV. 23, 36 (2002).

developing countries have enough legal capacity to know their legal opportunities, financial resources to embark on litigation, and market power to withstand the process. But this just tells us that these countries have the means to use the system. In other words, they are using the system because they can. In contrast, to go deeper into the reasons developing countries have to use the system is to inquire into their governments' economic policy and the domestic interests that stand to gain.

If we pursue this line of inquiry, an alternative picture emerges. A few prominent developing countries are using the dispute settlement system to defend their economic policies against challenges from other countries. They are also increasingly emboldened to challenge measures of rich countries that affect the economic interests of their domestic industries. They have to pick their fights and strategize, choosing which domestic regulation to defend and which domestic sectors to stand by. And they are doing this while learning that the rules of the international trade regime are open-textured and they can push them to accommodate their interests. Thus, adopting a viewpoint that analyzes why developing countries are interested in participating in WTO dispute resolution (rather than why they cannot participate), the concept of legal capacity not only explains how developing countries can participate more often, but it also reveals how countries can increase their policy space to achieve a specific economic objective.

I examine legal capacity not as a question of increasing a country's repertoire of legal expertise. To be sure, a proficient knowledge of WTO law and its operation would be necessary. But I am interested in legal capacity as a tool that can show the contested nature of legal expertise as well. One that recognizes that legal expertise is not an objective or neutral good, but rather a mode of using knowledge in the pursuit of certain policy goals.<sup>196</sup> Viewed in this way, legal capacity can help developing countries to understand the policy choices behind different interpretations of WTO rules. It could help them develop their own interpretations that, while consistent with WTO Agreements, take their interests to heart. From this perspective, increasing legal capacity is not merely a strategy of catching up to developed countries through training and technical assistance.<sup>197</sup> Rather, it must be a program that educates a country's public

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196. See, e.g., David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY. L. REV. 5, 19 (2005); see also Andrew T.F. Lang, *Legal Regimes and Regimes of Knowledge: Governing Global Services Trade* 38 (LSE Legal Studies, Working Paper No. 15/2009, July 2009), available at <http://ssrn.com/abstract=1423538> (noting that legal experts are empowered by "the significant role in the interpretation of international legal norms").

197. Indeed, technical assistance might stand in the way of increasing developmental legal capacity to the extent that technical training promotes the idea that there is a fixed meaning to WTO restrictions or advances particular interpretations of rules as necessary.

officials in identifying the normative and policy choices contained in the WTO rules and the various legal strategies available to them.

To refine this different perspective on legal capacity, I propose a distinction between “free-trade legal capacity” and “developmental legal capacity.” Free-trade legal capacity refers to a process of equipping countries with the appropriate international trade expertise, and litigation skills to ensure successful participation in the WTO dispute settlement system. The goal of free-trade legal capacity is to enable developing countries to gain access to other markets by spotting other countries’ trade barriers and benefit from further liberalization. The assumption is that if countries manage to effectively enforce their rights in the WTO, their economies will stand to gain. In contrast, developmental legal capacity refers to a process of building lawyering and litigation skills that countries can use to increase their policy space, which in turn allows them to not only gain market access, but also to promote and sustain their domestic industrial policies. The goal of developmental legal capacity is to promote a country’s development goals within the framework of WTO Agreements. The assumption is that the WTO Agreements are a compromise, which countries continue to influence to advance their interests. These two types of legal capacities originate from divergent development strategies, which place different value on the objectives of development of local lawyering skills and strategic, long-term rule-change.

This Part has analyzed how RPs enjoy a privileged position from which to influence the system in their favor. They use strategic lawyering and litigation to pursue their policy objectives by changing rule interpretation over time and by adjusting to the rule in the most favorable way possible. This Part has explored several domains in which countries can make use of rule-based and doctrinal flexibilities to pursue their policy objectives. Finally, this Part examined the relative importance of legal capacity in enabling a country to pursue its policy goals and argued that the shape of a country’s legal capacity may be determined, to an important extent, by its domestic economic development strategy. We are now in a position to see how these elements combine to delineate a country’s policy autonomy.

It is possible to conceptualize policy autonomy as the available regulatory space that results from the combination of three factors: rule and doctrinal flexibility, legal capacity and development strategy.<sup>198</sup> Figure

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198. The analysis of policy flexibility in the interpretation of international agreements has a domestic correlative, too. John Jackson has noted how a country’s domestic legal infrastructure can have serious implications for its policy flexibility. Specifically, whether a country makes treaties directly applicable in its domestic legal order, and what hierarchy it gives them in relation to federal laws and the constitution, may matter greatly for that country’s ability to interpret, modify, and implement its obligations. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310 (1992).

A country whose treaties are directly applicable as domestic law would have no opportunity to

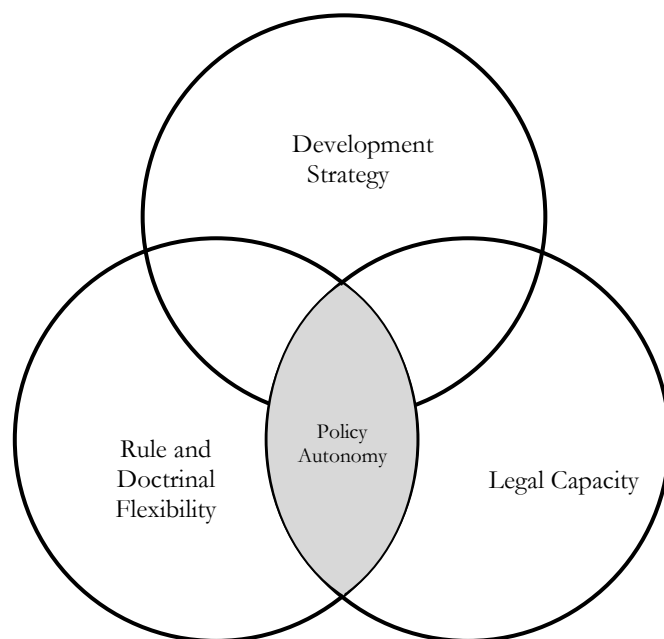
1, below, illustrates this interaction. Prompted by its own domestic development goals, a country may mobilize its legal capacity to mine the rule-based and doctrinal space available in its international obligations. The domestic development goals refer here to a country's domestic policy objective (economic, social, environmental, etc.), which motivates a country to seek the necessary space to achieve it within its web of international legal obligations. A country would develop its legal capacity to be able to pursue its policy goals. This legal capacity would then be informed by and attuned to the domestic policy goals. Consequently, a country would deploy its legal capacity to exploit the rule and doctrinal flexibility available in the legal agreements to assert and expand the policy autonomy needed to achieve its domestic goals. Conversely, a country with legal capacity but no domestic development strategy would end up with less policy autonomy, despite potential rule-based and doctrinal flexibility and regardless of where it stands on law, money, and power.

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interpret the treaty obligations favorably through a statute and would be subject to individuals' private right of action before domestic courts. In contrast, when treaties are not self-executing, countries retain more control over the interpretation of the treaty for domestic purposes. This option prioritizes the domestic democratic process and recognizes that, if the country departs from its international obligation in implementation, it could be held liable and may have to compensate the other parties. The attraction of this choice, however, is that the country keeps the option of flexibility in interpretation and implementation. *Id.* at 321–30. When, in addition, a direct applicability country gives treaties higher authority than federal laws, the problem of rigidity is compounded. In that case, a country has effectively locked in a particular international obligation, and it may not be able to change it by enacting a subsequent federal law that alters the obligation. In contrast, when the status of the treaty is lower or equal to federal laws, the country preserves greater policy flexibility on the domestic impact of the treaty. *Id.* at 330–34.

As can be gleaned from this analysis, the choices of direct applicability and status of international treaties can have important consequences for a country's policy autonomy. Nothing demands that a country may seek to preserve policy autonomy in all areas. According to Jackson, a country may want to lock in particular international obligations, like human rights treaties or market-oriented commitments. This would depend on how much trust there is in the domestic institutions and the national political process. *Id.* at 334–37. But these are important choices, and countries with functional democratic processes may want to preserve control over the particular domestic compromises they have struck between "economic efficiency and legitimate social goals." *Id.* at 338. Thus, prudent government officials may not want to give away that flexibility. *Id.* at 340.

FIGURE 1: POLICY AUTONOMY



#### IV. THE CASES OF BRAZIL AND MEXICO

This Part turns to the experiences of Brazil and Mexico to explore how they have used their legal capacity in the pursuit of policy space and development strategy in the WTO. These two relatively similarly situated countries have the two biggest economies in Latin America and both are firmly inserted into the global economy.<sup>199</sup> Brazil and Mexico also share important parallels in their recent economic history. They adopted similar economic development models after World War II, embracing policies of import-substitution industrialization up until the eighties.<sup>200</sup> Subsequently, they both initiated structural liberalization reforms, opening up their economies to international markets, privatizing state-owned enterprises, and deregulating the domestic market.<sup>201</sup>

199. Brazil's Gross Domestic Product (GDP) for 2011 was estimated at approximately \$2.28 trillion, while Mexico's was approximately \$1.66 trillion. Brazil ranked eighth in the global economy and Mexico twelfth. *Country Comparison: GDP (Purchasing Power Parity)*, CIA WORLD FACTBOOK, <http://tinyurl.com/83euool> (last visited Mar. 18, 2012).

200. Diana Alarcon & Terry McKinley, *Beyond Import Substitution: The Restructuring Projects of Brazil and Mexico*, 17 *LATIN AM. PERSP.* 72, 76–77 (1992); see also Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 *LATIN AM. RES. REV.* 95 (1972).

201. For a detailed account of how Mexico became an “early liberalizer” in Latin America, see generally Patrick Cronin, *Explaining Free Trade: Mexico, 1985–1988*, 45 *LATIN AM. POL. & SOC'Y* 63 (2003).



An important difference between these countries is that trade represents a greater percentage of Mexico's gross domestic product (GDP) than that of Brazil's.<sup>202</sup> This seems to suggest that Mexico has relied much more on international trade, rather than on its own domestic market, as an engine for growth.<sup>203</sup> In fact, Mexico is the paradigmatic case of a country that made trade liberalization its most important economic development strategy. This liberalization strategy dates back to Mexico's entry into GATT in 1986, and was consolidated and expanded by the North American Free Trade Agreement (NAFTA) in 1994. Since then successive governments have further pursued free-trade agreements. Today, in addition to its NAFTA and WTO obligations, Mexico has entered into multiple trade agreements with Europe, Japan, and other countries from all over the world.<sup>204</sup> Brazil, on the other hand, was a founding member of GATT, the WTO, and *Mercado Común del Sur* (Common Southern Market or MERCOSUR) and a member of other trade agreements. However, in what appears to be a strong contrast to Mexico, Brazil resisted efforts to create a NAFTA-type regime through the Free Trade Agreement of the Americas, arguably because it was not convinced that it was favorable to its economic interests.<sup>205</sup>

In social policy, both countries have made comprehensive efforts to reduce poverty through targeted, conditional cash and transfer programs. In fact, Brazil's *Bolsa de Família* program, seems to have followed on the steps of Mexico's *Oportunidades* program.<sup>206</sup> In the last decade, both countries have reduced their poverty levels, although at a different rate.<sup>207</sup>

202. In 2009, exports composed twenty-eight percent of Mexico's GDP and only eleven percent of Brazil's GDP. See *World Development Indicators: Exports of Goods and Services*, WORLD BANK, <http://tinyurl.com/7zn3rpk> (last visited Mar. 18, 2012).

203. The growth results in the last decade (2001–2009) also differ. While Brazil has grown at an average rate of 3.18%, Mexico's growth rate has been 1.37%. See *World Development Indicators: GDP Growth*, WORLD BANK, <http://tinyurl.com/78jyvqw> (last visited Mar. 18, 2012).

204. See generally Antonio Ortiz Mena L.N., *Mexico*, in 3 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 215–47 (2005); Antonio Ortiz Mena L.N., *Mexico's Trade Policy: Improvisation and Vision*, in THE STRATEGIC DYNAMICS OF LATIN AMERICAN TRADE, 213–31 (Vinod Aggarwal, Ralph H. Espach & Joseph S. Tulchin eds., 2004). For a brief overview of Mexico's trade policy, including its participation in NAFTA and a list of regional trade agreements, see generally M. ANGELES VILLARREAL, CONG. RESEARCH SERV., R40784, MEXICO'S FREE TRADE AGREEMENTS (2010).

205. See Ricardo A. Markwald, *The Political Economy of Foreign Trade: The Brazilian Case*, in DOMESTIC DETERMINANTS OF NATIONAL TRADE STRATEGIES 107–10 (Roberto Bouzas ed., 2006); SHAFER J.F. HORNBECK, CONG. RESEARCH SERV., RL33258, BRAZILIAN TRADE POLICY AND THE UNITED STATES 5–6 (2006);

206. For a comparative appraisal of the two programs, see generally Fábio Veras Soares et al., *Evaluating the Impact of Brazil's Bolsa Família: Cash Transfer Programs in Comparative Perspective*, 45 LATIN AM. RES. REV. 173 (2010). See also Sergei Soares, *Conditional Cash Transfer Programs in Brazil, Chile, and Mexico: Impacts upon Inequality*, International Poverty Centre United Nations Development Programme Working Paper 35 (April 2007), available at <http://www.ipc-undp.org/pub/IPCWorkingPaper35.pdf> (last visited Mar. 18, 2012).

207. In 2001, 35.2% of Brazil's population lived below the poverty line. By 2010, this number

Furthermore, average income has increased in both countries.<sup>208</sup> As a result, scholars and policy analysts are increasingly talking about an important expansion of the middle-class in both countries.<sup>209</sup>

This Part uses these two countries to explore what seem to be two divergent trajectories by identifying the different industrial policies and trade finance mechanisms employed by each country. Despite the aforementioned differences, Brazil and Mexico are both bound by the same WTO obligations and are thus arguably equally restricted in their domestic regulatory space. Moreover, as middle-income countries, they both rely on considerable economic and human resources that enable them to actively engage in their respective trade regimes. The analysis shows, however, that these countries have had different experiences, suggesting that the existence of regulatory flexibility, or lack thereof, probably has more to do with a country's own economic strategy and how it manages its international agreements to reflect that strategy than is currently recognized.

#### A. *Differences in Trade Promotion and Industrial Policy*

Both Brazil and Mexico are countries that followed policies of import substitution industrialization (ISI), starting as early as in the 1930s, reaped the benefits of the model during the period from the 1950s to 1970s and faced tremendous difficulties in the 1980s.<sup>210</sup> During the debt crisis in the 1980s, however, there was an increasing sense that the ISI model had been exhausted. Advocates of free trade and economic liberalization advanced a powerful critique of ISI as the source of the economic crisis and offered a program of market reform that seemed a compelling, simple solution. This program included trade liberalization, market deregulation, and privatization of state owned enterprises.<sup>211</sup>

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decreased to 21.4%. By comparison, 53.6% of Mexico's population lived below the poverty line in 2000, compared to 47.8% in 2008. *Id.*

208. In Brazil, gross national income (GNI) per capita over purchasing power parity (PPP) has grown from \$8,960 in 2000 to \$14,020 in 2009. Mexico's has grown from \$6,830 in 2000 to \$10,160 in 2009. See *World Development Indicators: GNI Per Capita, PPP (Current International \$)*, World Bank, <http://tinyurl.com/82te9ge> (last visited Mar. 18, 2012).

209. See, e.g., JORGE G. CASTAÑEDA, *MAÑANA FOREVER?: MEXICO AND THE MEXICANS* 34–67 (2011); Homi Kharas, *The Emerging Middle Class in Developing Countries* 31 (OECD Dev. Ctr., Working Paper No. 285, 2010), available at <http://tinyurl.com/3b6wvbp>.

210. For an overview of the period of import substitution policies in each of these countries see Antonio Ortiz Mena L.N. & Ricardo Sennes, *Brazil y México en la Economía Política Internacional*, in *BRASIL Y MÉXICO: ENCUNTROS Y DESENCUNTROS* 204–16 (Antonio Ortiz Mena L.N. et al. eds., 2005).

211. For some of the most powerful critiques of ISI, see generally BÉLA BALASSA, *THE NEWLY INDUSTRIALIZING COUNTRIES IN THE WORLD ECONOMY* (1981), ANNE O. KRUEGER, *POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* (1993), and DEEPAK LAL, *THE POVERTY OF 'DEVELOPMENT ECONOMICS'* (1983). For an analysis of the market-oriented reforms in Mexico, see JUAN CARLOS MORENO-BRID & JAIME ROS, *DEVELOPMENT AND GROWTH IN THE*

Although both Brazil and Mexico embraced this program enthusiastically, they proceeded at different speeds and in somewhat different directions.<sup>212</sup> Brazil preserved and revamped a number of development institutions. Moreover, it has reintroduced several industrial policies and seems to be reengaging more actively in economic planning. Mexico, on the other hand, was quicker in weakening or dismantling its development institutions and industrial policies.

### 1. *Brazil*

During the last decade, Brazil has explicitly embraced industrial policy as a strategy to promote development.<sup>213</sup> Arbix and Martin identify four main components of the emerging development model in Brazil: trade promotion, industrial policy and science, technology and innovation policy, finance, and social policy.<sup>214</sup> This “Inclusionary State Activism without Statism”<sup>215</sup> model is neither a return to the old developmental state nor a simple progression from market fundamentalism. Instead, it reflects an active State that operates under a macroeconomic institutional framework introduced by the neoliberal economic model but goes beyond it, imprinting a new direction.<sup>216</sup>

Brazil’s strategy actively seeks new or deeper markets abroad,<sup>217</sup> particularly for its own goods and investment capital.<sup>218</sup> This strategy has brought a welcome diversification in trading partners and goods. Brazil is moving away from dependence on Organisation for Economic Co-operation and Development (OECD) countries, as its trade with China and the global south increases. Its exports are also more diverse, encompassing more sectors and degrees of value added. The commodities

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MEXICAN ECONOMY, A HISTORICAL PERSPECTIVE 165 (2009) and ENRIQUE DUSSEL PETERS, POLARIZING MEXICO: THE IMPACT OF LIBERALIZATION STRATEGY (2000).

212. See Ortiz Mena & Sennes, *supra* note 210, at 216.

213. This is remarkable given that the term industrial policy was considered a dirty word in Brazil — as in much of Latin America — ever since the introduction of liberalizing reforms and the dismantling of the developmental state by the administration of Collor de Mello in 1989. As a once acting Minister of Finance in Brazil put it: “The best industrial policy is no industrial policy.” Glauco Arbix & Scott B. Martin, *Beyond Developmentalism and Market Fundamentalism in Brazil: Inclusionary State Activism without Statism* 11 (Mar. 12–13, 2010) (unpublished manuscript), available at [http://www.law.wisc.edu/gls/documents/paper\\_arbix.pdf](http://www.law.wisc.edu/gls/documents/paper_arbix.pdf) (on file with the Virginia Journal of International Law Association); see also FRANCISCO PANIZZA, CONTEMPORARY LATIN AMERICA: DEVELOPMENT AND DEMOCRACY BEYOND THE WASHINGTON CONSENSUS (2009); Luiz Carlos Bresser-Pereira, Structuralist Macroeconomics and the New Developmentalism 2 (Oct. 19, 2011) (unpublished manuscript) (on file with the Virginia Journal of International Law Association).

214. Arbix & Martin, *supra* note 213, at 15.

215. *Id.* at 7.

216. *Id.* at 7.

217. *Id.* at 15; see also Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil’s Success*, 41 CORNELL INT’L L.J. 383 (2008).

218. Arbix & Martin, *supra* note 213, at 17.

sector, for instance, includes now not only simple commodities but also value-added commodities such as ethanol.<sup>219</sup>

But Brazil's strategy has also entailed the aggressive defense of domestic measures of selective protection used to promote its domestic firms.<sup>220</sup> Starting with the government of Cardoso and strengthened by the Lula administration, Brazil has created a host of new institutions and programs to advance a national industrial policy.<sup>221</sup> In addition, existing institutions have been reinforced.<sup>222</sup> Finally, a key focus of Brazil's industrial policy in this new era is on innovation and technological development.<sup>223</sup> Between

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219. *Id.* at 15–16 (“[E]ven within a context of openness that policy elites across the last two presidencies have not just accepted but actively embraced — in a historic shift for Brazil — the state has not taken that simple cue to retreat into a passive ‘laissez faire’ position of accepting Brazil’s inherited comparative advantage of current structure of imports and exports and trading partners.”). *Id.* at 16.

220. “[W]hile the country has perhaps not been as aggressive as some East Asian countries [in using selective protection tools] Brasília has not shied away from a sometimes aggressive defense of measures such as the automotive regime of the mid to late 1990s (forcing multinationals to invest directly in the country if they wished to receive lower tariffs on imports).” *Id.* at 16.

221. These institutions include the Ministry of Development, Industry, and Commerce in 1999, the National Agency for Industrial Development (*Agencia Brasileira de Desenvolvimento Industrial* — ABDI) and the Council for Industrial Development (*Conselho de Desenvolvimento Industrial* — CNDI) in 2004. The Lula administration issued two main sets of industrial policies in 2004 and 2008. The first one focused on innovation and is managed by ABDI. The second one, called Policy for Productive Development (PDP) was developed by the President’s Chief of Staff and emphasized investment for capacity-building in several areas. Arbix & Martin, *supra* note 213, at 17.

222. Arbix and Martin particularly note the *Financiadora de Estudos e Projetos* (Financing Agency for Studies and Projects — FINEP) under the Ministry of Science and Technology, which funds basic and applied research for public and private projects. *Id.* at 18. They also point to institutions that play a similar role at the state level. *Id.*

223. *Id.* at 18 (“The goal of industrial policy under Lula has been to redefine the policy’s scope and tools, to drive the country into knowledge-intensive sectors, seen as the only way to sustain long-term growth. In sum, industrial policies of the present are essentially different than past experiences, and are innovation-oriented. As there is not too much room left for protectionism, not for any autarkic development, state interventions must be very different from what they were during the heyday of the developmental state.”). For a critical perspective on Brazil’s industrial policy, see generally Mansueto de Almeida, *Desafios de Real Política Industrial Brasileira Do Seculo XXI* (IPEA, Working Paper 1452, 2009). De Almeida argues that Brazil’s industrial policy still focused too much on sectors where Brazil already was competitive (low-medium tech) and where the promotion of innovation did not contribute to export growth. Brazil’s most competitive industries in 2008 were exactly the same as those in 1996, despite the government’s efforts to promote technology-intensive sectors. In addition, De Almeida faults BNDES’s policy of encouraging internationalization and mergers and acquisitions as not really compatible with industrial policy, and causing an appreciation of the Real, which in turn reinforced the existing structure in Brazil (i.e., benefiting sectors with high margins and strong competitiveness, and hindering the emergence of new sectors). He is also critical of BNDES’s strategy of aiming to consolidate the leadership position of certain Brazilian companies in the global value chain because it does not factor in the necessity that these companies should gradually move up within the production chain, to get more value-added, and because such concentration makes it harder for small enterprises lower in the production chain to flourish (since they essentially face an oligopsony. Mansueto De Almeida, *The New Old Industrial Policy*, VALOR ECONÔMICO, Jul. 17, 2009; available at <http://tinyurl.com/6oqxkks> (“But the current industrial policy in Brazil does not correspond to that written on the official documents, does not impose performance requirements on private firms and, in many cases, the policies adopted are against the

2000 and 2008, government spending in science, technology and innovation increased from \$14.3 billion to \$43.4 billion. Investment in research and development went up from 0.97 % of GDP in 2005 to 1.13% of GDP in 2008.<sup>224</sup>

## 2. Mexico

Industrial policy shifted from occupying a central role in the state's economic policies to a minimal, almost unnoticeable position.<sup>225</sup> Since the economic liberalization reforms of the 1980s, the Mexican government has dismantled most of its former industrial policies, which had been supported by subsidies, trade protection, tax incentives, and performance requirements.<sup>226</sup> A few government programs, however, devised to help small- and medium-sized enterprises, as well as credit and capacity-building assistance for exporting firms remained. The primary government program for the promotion of industry is a tax-free regime for the temporary importation of inputs used in export goods.<sup>227</sup>

Mexico's position regarding industrial policies since the liberalization reforms can be summed up in three phases.<sup>228</sup> In the first phase, from the mid-eighties to 1994, the government dismantled most of its existing industrial policies.<sup>229</sup> Government support shifted from sector-specific programs to general programs available to anyone. In the second phase, from 1994 to 2000, the government sought to address the increasing

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actual definition of what we understand by 'industrial policy.'" (last visited Mar. 18, 2012). Another assessment of the overall efficacy of the industrial policy shows that no major shift in production sectors has occurred, but that industrial performance and exports overall have increased considerably. Claudio Robert Amtrano, *O modelo de crescimento da economia brasileira no período recente: condicionantes, características e limites*, 7 POLITICA ECONOMICA EM FOCO 206, 215 (2005/2006). The strongest growth within industry came from extractive industries, capital goods productions, and durable consumer goods. *Id.* at 220. High-tech, despite its fast growth, only made up 9% of the economy and does not figure highly in exports either. *Id.* at 225. This view attributes industrial performance mostly to a strong growth of the global economy — resulting in increased exports — and, to a lesser degree, to state interventions, including increased available of credit, export promotion, and the incentives that form part of the industrial policy. *Id.* at 224–25.

224. Arbix & Martin, *supra* note 213, at 20. Arbix and Martin highlight the National Plan for Science, Technology and Innovations Systems, which prioritized funding of innovation in firms. The government uses tax incentives and subsidies to support the creation and diffusion of technology in established and start-up companies.

225. Enrique Dussel Peters, *Industrial Policy, Regional Trends, and Structural Change in Mexico's Manufacturing Sector*, in CONFRONTING DEVELOPMENT: ASSESSING MEXICO'S ECONOMIC AND SOCIAL POLICY CHALLENGES 241, 245–49 (Kevin J. Middlebrook & Eduardo Zepeda eds., 2003).

226. MORENO-BRID & ROS, *supra* note 211, at 165. (stating that a number of industries, such as the automotive, textile, electronics, footwear, appliances, steel, petrochemical, and canned foodstuff industries, initially retained their protections, but they were ultimately phased out); *see also* Kendra Sawyer Leith, Challenges for Implementing Industrial Policy in Mexico 47 (June 2009) (M.C.P. thesis, Mass. Inst. Tech.), available at <http://dspace.mit.edu/handle/1721.1/50111>.

227. MORENO-BRID & ROS, *supra* note 211, at 167.

228. *See id.* at 165–67.

229. *Id.* at 165–66.

erosion of linkages in domestic production chains and limited value-added in exports, which resulted from its trade liberalization policies. It recognized the need for selective support to help some sectors become more competitive in the exports market.<sup>230</sup> Although the government started a variety of programs, the key policy measure consisted of tax exemptions on temporary imports used for export products.<sup>231</sup> Seeking to increase the competitiveness of domestic firms, other programs focused on administrative simplification of government support and on support for firms' marketing strategies. In the third phase, from 2000 to date, the government has, if more in rhetoric than in practice, explicitly recognized the role of the state in the promotion of economic growth.<sup>232</sup> It has identified priority industries and offers preferential financial support.<sup>233</sup> Despite this gradual change of position, however, government support remains limited and its effects have not been significant.<sup>234</sup>

### B. *Differences in Development Banks and Export Finance*

In both countries, development banks have recently served a crucial role as buffers from the full impact of the 2008 financial crisis by injecting

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230. *Id.* at 166.

231. After the economic crisis of 1994–1995, the Zedillo administration launched the Program for Industrial Policy and Foreign Trade (PROPICE). It is worth noting that “[the program] explicitly excluded the notion of going back to trade protectionism or granting financial or tax subsidies to promote exports or investment.” *Id.* at 166. In practice, the program granted tax rebates and accelerated the elimination of tariffs for certain imported inputs. *Id.* Additional programs included the Program for Temporary Importation to Produce Export Goods (PITEX) and Highly Exporting Firms (ALTEX), which offered exporters a tax-free regime for the temporary importation of inputs. Another program, the Mexican System of External Promotion (SIMPEX) sought to advertise investment opportunities in Mexico and to help domestic companies market their products for export. *Id.* at 166–67.

232. In 2000, however, the name of the ministry traditionally in charge of economic promotion changed from Secretariat of Commerce and Industrial Promotion (SECOFI) to simply Secretariat of Economy. The name change probably acknowledges that the function of industrial promotion, which used to be at the core of this ministry, is now peripheral.

233. The Fox administration (2000–2006), explicitly recognized the role of the state in promoting international competitiveness and stated the need for sector-specific programs as a development strategy. In a departure from previous practice, the government offered financial support in preferential conditions to these industries. But the strategy turned out to be much less comprehensive than announced. Moreover, due to the programs' limited funds and delay in their implementation, analysts doubt they had any significant impact. MORENO-BRID & ROS, *supra* note 211, at 167. The Calderon administration (2006–2012) has made the improvement of the country's competitiveness the cornerstone of its economic policy. See Eje 2, *Economía competitiva y generadora de empleos*, Plan Nacional de Desarrollo [The National Development Plan], <http://pnd.calderon.presidencia.gob.mx/economia-competitiva-y-generadora-de-empleos.html> (last visited Mar. 18, 2012). However, there seems to be no coherent plan except for tariff reductions. The country's industrial policy is in a chaotic situation exactly when the manufacturing sector is in one of its worst crises in decades. Enrique Dussel Peters, *La manufactura Mexicana, ¿Opciones de Recuperación?*, ECONOMÍA INFORMA (2009), available at <http://dusselpeters.com/40.pdf> (on file with the Virginia Journal of International Law Association).

234. MORENO-BRID & ROS, *supra* note 211, at 167.

credit to the economy. Thus, banks in both countries have seen their budgets grow, as they are used in a counter-cyclical fashion to minimize the effects of the crisis. But beyond this shared objective, the functioning of the development banks in both countries shows two different visions of how to use public finance to support domestic industries and promote exports.

First, the Brazilian Development Bank (BNDES)<sup>235</sup> has a much larger budget than Nafinsa and Bancomext (the two main Mexican development banks) combined.<sup>236</sup> In 2010, BNDES made three times the aggregate disbursements that all the Mexican development banks made. In fact, by 2009, BNDES was one of the largest development banks in the world, with \$222 billion in assets,<sup>237</sup> lending more funds annually than the World Bank.<sup>238</sup> BNDES's lending during the recent economic crisis alone accounted for 37% of capital provided in the Brazilian economy and its role has become increasingly important.<sup>239</sup> BNDES is the primary source of credit in the Brazilian economy and operates partly through "second-tier" banks, creating a partnership with the financial sector that helps increase the coverage of BNDES.<sup>240</sup> By contrast, as a result of the liberalization reforms introduced in the 1980s and 1990s in Mexico, development banks were downsized and their purpose transformed.<sup>241</sup> The

235. BNDES: BRAZILIAN DEVELOPMENT BANK, <http://tinyurl.com/3tn86vz> (last visited Mar. 18, 2012).

236. Nafinsa was created in 1933 as the country's first development bank in charge of financing long-term industrial development. See MORENO-BRID & ROS, *supra* note 211, at 86. NAFIN has been touted as one of the most successful development banks. See, e.g., JAMES M. CYPHER & JAMES L. DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* 286 (3d ed. 2009). Bancomext was created in 1937 for the promotion of exports. Scholars credit these development banks, and especially Nafinsa, for having played a crucial role in enabling Mexico's industrialization during the period of "stabilizing development" in 1940–1970. See MORENO-BRID & ROS, *supra* note 211, at 86–88.

Nafinsa established in 1941 a department of promotion and began to make systematic studies of industrial development projects. With a predilection for manufacturing, it promoted enterprises in practically every sector of the Mexican economy over the course of the next several years. The roster of firms aided by loan, guarantee, or purchase of stocks and bonds reads like a 'who's who' of Mexican business.

Calvin Blair, *Nacional Financiera*, in *PUBLIC POLICY AND PRIVATE ENTERPRISE IN MEXICO* 193, 213 (Raymond Vernon ed., 1964).

237. Luciano Coutinho, *The Role of Development Banks for Growth in Emerging Economies*, in *RENCONTRES ÉCONOMIQUES D'AIX-EN-PROVENCE: À LA RECHERCHE DE LA NOUVELLE CROISSANCE* 263, 264 (Le Cercle des economists ed., 2010).

238. David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* 25 (U. Wis. Law Sch. Legal Stud. Res. Paper Series, Paper No. 1075, 2008), available at <http://ssrn.com/abstract=1349163>.

239. Coutinho, *supra* note 237, at 266.

240. *Id.* at 265.

241. While before the liberalization period Nafinsa lent directly to firms, after the 1990s reforms it became a second-tier bank giving out loans through private intermediaries. BARBARA STALLINGS & ROGERIO STUDART, *FINANCE FOR DEVELOPMENT: LATIN AMERICA IN COMPARATIVE PERSPECTIVE* 219 (2006). The results of privatization and liberalization reforms have not improved the availability of credit in the economy and thus finance continues to be a key obstacle for growth.

privatization of state-owned firms, many of which were financed by Nafinsa, and the dismantling of industrial policy ultimately reduced the scope of these banks' activities.

Second, BNDES has a much wider range of business objectives, ranging from venture capital to microfinance. BNDES is set up to make credit available on a "horizontal basis,"<sup>242</sup> meaning that firms in almost any sector can access funding. However, the government in its Production Development Policy (*Política de Desenvolvimento Produtivo*) has also identified "priority areas" that receive more and better access to funding.<sup>243</sup> BNDES has thus facilitated growth in Brazil by expanding productivity,<sup>244</sup> fostering job creation,<sup>245</sup> and facilitating the growth of many industries, such as the successful Brazilian air-manufacturing industry.<sup>246</sup>

By contrast, although Mexico's Nafinsa has a variety of objectives, it has devoted most of its resources to facilitating credit for small and medium enterprises (SMEs). But even in this area, its financing is clearly insufficient and not supplemented by robust private bank lending to SMEs.<sup>247</sup> Mexico's domestic financing to firms represents 28% of its GDP, which pales in comparison to Brazil's 82%.<sup>248</sup> Moreover, this scarce pool of capital is only available to a small number of very large, elite firms, which are often able to find other financing sources themselves in the

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MORENO-BRID & ROS, *supra* note 211, at 248. Moreover, the "downsizing and weakening of development banks (NAFINSA and BANCOMEXT) brought about by the reform process made bank lending to firms more scarce." *Id.* Stallings and Studart note that "[u]ntil Mexico has a deeper domestic financial system and provides broader access, long-term growth that encompasses the domestic economy as well as exports will be hard to generate." STALLINGS & STUDART, *supra*, at 185.

242. Coutinho, *supra* note 237.

243. The priority areas include "investments to expand capacity, enhance productivity in strategic sectors, promote exports and increase the value added in the manufacturing sector." *Id.* In 2010, BNDES disbursed \$96.3 billion, of which \$45.2 billion (47%) went to industry, \$29.8 billion (31%) to infrastructure, \$15.4 billion (16%) to trade and services, and \$5.7 billion (6 %) to farming. *Performance Report*, BNDES, (Dec. 11, 2011), <http://tinyurl.com/6nrknaf> (last visited Mar. 18, 2012); see also *Performance: The Evolution of the BNDES' Disbursements*, BNDES, <http://tinyurl.com/823s9cu> (last visited Mar. 18, 2012).

244. See Luiz A. Esteves et al., *BNDES, Technological Innovation and Performance of Brazilian Industrial Enterprises*, in PROCEEDINGS OF THE THIRD CONFERENCE ON MICRO EVIDENCE OF INNOVATION IN DEVELOPING ECONOMIES (2009), available at <http://tinyurl.com/7dnwwgy> (last visited Mar. 18, 2012).

245. See Ernani Teixeira Torres Filho & Fernando Pimentel Puga, *Empresas Apoiadas Pelo BNDES Geram Mais Emprego e Pagam Mais* [Firms Supported by BNDES Create More Jobs and Pay More], 17 BNDES VISÃO DE DESENVOLVIMENTO [Vision of Development] (2006).

246. See Regis Bonelli & Armando Castelar Pinheiro, *New Export Activities in Brazil: Comparative Advantage, Policy or Self-Discovery?* (Inter-Am. Dev. Bank, Working Paper No. R-551, 2008), available at <http://tinyurl.com/6ntl8t8> (last visited Mar. 18, 2012).

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248. *Id.*



international markets anyway. The majority of domestic firms, therefore, have to rely on retained earnings and other sources of funding.<sup>249</sup>

Third, BNDES aims to facilitate long-term investment in productive activities. According to the government “Growth Acceleration Program,” BNDES is expected to play an active role in the expansion of Brazil’s infrastructure, focusing on providing loans to the following sectors: energy transmission and distribution, gas, and oil production and distribution, railways, ports, airports, roadways, water and sanitation, and urban transportation.<sup>250</sup> By contrast, Mexico’s Nafinsa has increasingly focused on short-term lending to finance working capital and address immediate liquidity problems.<sup>251</sup> It has been relegated to second-tier banking and limited to support private banking.<sup>252</sup>

Fourth, BNDES is aggressively promoting Brazil’s exports and supporting Brazilian companies abroad. BNDES lends to companies primarily focused on capital goods, engineering/construction services and software.<sup>253</sup> In addition, BNDES supports Brazil’s social agenda by

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249. *Id.* Scholars identify several problems in the finance sector, such as “the high segmentation and shallowness of the banking system, the lack of capital markets, and the scarcity of long-term finance, particularly for start-up innovative firms.” MORENO-BRID & ROS, *supra* note 211, at 248. Moreover, the “downsizing and weakening of development banks (NAFINSA and BANCOMEXT) brought about by the reform process made bank lending to firms more scarce.” *Id.*

250. *BNDES — Fifty Years of Development*, BNDES (Sept. 2002), <http://tinyurl.com/83ugtmg> (last visited Mar. 18, 2012). BNDES has established guidelines for Micro, Small, and Medium-sized Enterprises (MSME), which focus on providing loans to allow scaling and implementation of innovative products and processes. *BNDES Annual Report 2008*, BNDES 70–71 (2008), <http://tinyurl.com/7p3mw3x> (last visited Mar. 18, 2012). In 2010, BNDES expected to distribute \$1.4 billion for innovation for MSMEs alone, and spent \$18 billion supporting small and medium sized firms during the twelve months ending in April of 2010. *Id.* Despite the fact that small and medium-sized enterprises are a priority area, they account for a quarter of total loans. *Management Report-BNDES Group*, BNDES (June 30, 2009) <http://tinyurl.com/7jztcng> (last visited Mar. 18, 2012). While the number of operations for MSMEs accounted for 93% of all operations, funding only accounted for 27% of disbursements. *Performance Report*, *supra* note 243.

251. Nafinsa has been lauded as a successful example of a developing country using solutions such as “reverse factoring” to enable the short-term financing of SMEs. For a largely positive account of Nafinsa’s program and how it works, see Leora Klapper, *The Role of Factoring for Financing Small and Medium Enterprises*, 30 J. BANKING & FIN. 3111, 3124–29 (2006). For a critical assessment of this retreat from clear development goals to short-term financing, see Alejandra Salas-Porras, *Basis of Support and Opposition for the Return of a Developmental State in Mexico*, PONTO DE VISTA, Aug. 2009, at 20. For another very critical assessment by former federal legislator Suárez Dávila, see Roberto González Amador, *Censura Suárez Dávila que se Desmantele la Banca de Desarrollo* [Suárez Dávila Censors the Dismantling of Development Banking], LA JORNADA (Jan. 19, 2008), <http://tinyurl.com/6vg9r7s> (last visited Mar. 18, 2012).

252. “Nafin has been transformed into a second-tier bank, with special responsibility for SMEs. Five other development banks carried out more specific mandates: Bancomext (foreign trade, especially export finance), Banobras (infrastructure), Banrural (agriculture), Fina (sugar) and Banejercito (banking services for military personnel).” STALLINGS & STUDART, *supra* note 247, at 197; *see also id.* at 219.

253. This lending accounted for seventy-two percent of total disbursements. *BNDES Annual Report 2008*, *supra* note 250, at 124.

assessing projects based on their environmental impact on the country and serving as a microfinance bank to provide credit to poor Brazilians.<sup>254</sup>

In contrast, Bancomext's budget has been reduced and the government has informally merged Nafinsa and Bancomext.<sup>255</sup> Mexico has also gradually been dismantling Bancomext, reassigning functions of the latter to a trust for foreign investment called Pro-México.<sup>256</sup> In addition, it has given the Ministry of the Economy, through the program Pymes, a quasi-banking role with no clear targets or oversight.<sup>257</sup>

At the core, there seems to be a different vision about the role the government should play in the economy and how it can create the policy tools to advance its agenda through development banking. While banks in both countries underwent important transformations after the liberalization reforms, BNDES has been given an explicit mission of promoting and financing industrial policy in strategic sectors. In contrast, Nafinsa and Bancomext have been retooled as supplements of the private sector, helping some firms to be able to eventually access private capital.<sup>258</sup>

### C. *Legal Capacity in the Service of Policy Autonomy*

Having analyzed the differences in the two countries' development strategies, this Section describes how these differences are reflected in Brazil's and Mexico's litigation patterns and dispute settlement experiences. Specifically, I examine how the experience of each country is underpinned by a different mode of legal capacity. This Article has previously argued that policy autonomy is the space that a country can create by mobilizing its legal capacity to use the rule and doctrinal flexibility of the WTO in the service of a development strategy.<sup>259</sup> In the

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254. BNDES — *Fifty Years of Development*, *supra* note 250.

255. Amador, *supra* note 251. Some analysts perceive the new objectives of the development banks to be too narrow and too reliant on a failing market. They advocate a more robust role for development banking, focused not on liquidity and working capital but on long-term productive investment, prioritizing small and medium enterprises. In addition, they consider that development banks should be able to work as direct lenders and obtain funding through issuing bonds. *Mexico Frente a la Crisis: Hacia un Nuevo Curso de Desarrollo* 23–24 (Sept. 2009), available at [http://www.nuevocursodedesarrollo.unam.mx/docs/Mexico\\_frente\\_a\\_la\\_Crisis.pdf](http://www.nuevocursodedesarrollo.unam.mx/docs/Mexico_frente_a_la_Crisis.pdf) (last visited Mar. 18, 2012).

256. Amador, *supra* note 251.

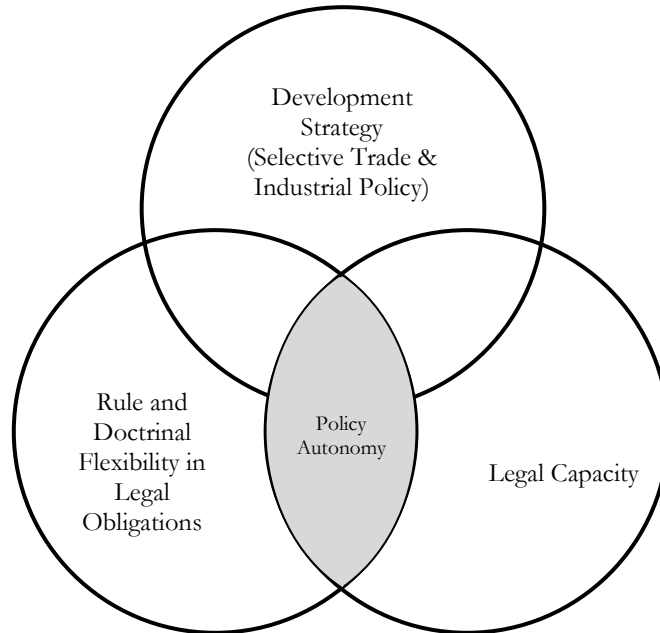
257. *Id.*

258. Critics of BNDES argue that it is expanding too aggressively, crowding out private banking in the financial sector. See *Brazil's development bank: Central planning*, *ECONOMIST*, Apr. 4, 2009, available at <http://www.economist.com/node/13496820> (last visited Mar. 18, 2012). On the other hand, critics of Nafinsa and Bancomext argue that the development banks are ineffective because they fail to realize their potential ability to expand and reinvigorate the banking and financial system in the country. The latter critics see the limited role of development banking as a reason for the lack of sustained economic growth in Mexico. MORENO BRID & ROS, *supra* note 211, at 248 *Mexico Frente a la Crisis: Hacia un Nuevo Curso de Desarrollo*, *supra* note 255, at 7, 23–24.

259. See *supra* Figure 1.

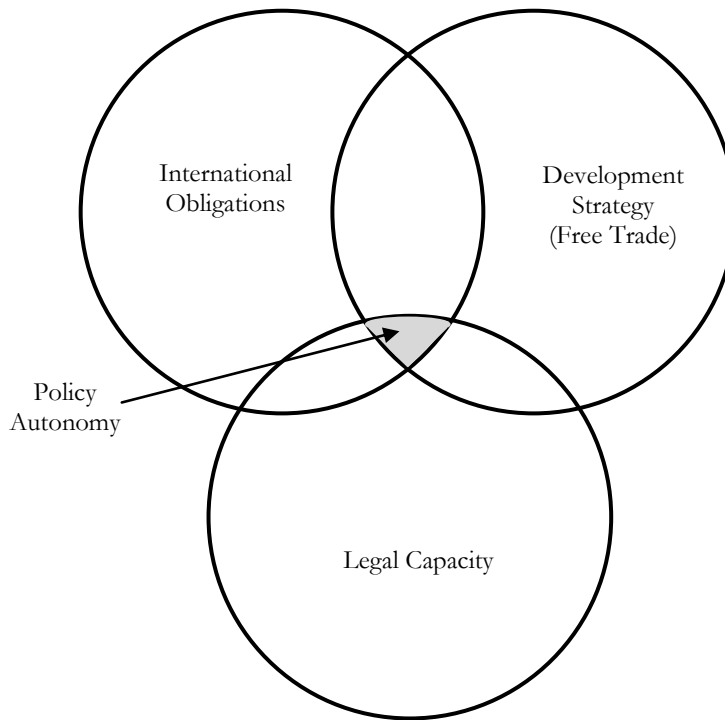
case of Brazil, the development strategy that animates the country's legal capacity is industrial policy. The following table illustrates the relationship between these factors.

FIGURE 2: BRAZIL'S POLICY AUTONOMY



In the case of Mexico, the development strategy is one of free trade liberalization. Under this paradigm, since WTO obligations already encapsulate the development strategy, these elements appear side by side in the diagram below. The scope of what the government can or cannot do is considered as already delineated by its WTO commitments and thus there is no need to look for more space through rule or doctrinal flexibilities. The country uses its legal capacity primarily to enforce its obligations in the system.

FIGURE 3: MEXICO'S POLICY AUTONOMY



The dispute-settlement experiences of Brazil and Mexico exhibit a pattern that seems consistent with this distinction. While Mexico's development policy has remained largely lodged within the Washington Consensus paradigm, Brazil has put in place a growth strategy program based on deliberate industrial policies to promote specific economic sectors. Each country's development strategy is reflected in the challenges that these two countries have chosen to initiate as complainants and those that they have had to defend as respondents. Brazil, on the one hand, has forcefully promoted its exports abroad by challenging a variety of trade barriers, but it has also used the dispute settlement to defend several of its industrial programs that seem to contravene the WTO. Mexico, on the other hand, is largely concerned about ensuring market access for its exports in other countries and about fending off unfair competition caused by foreign imports at home.

1. *Differences in Legal Capacity*

Perhaps due to their different development strategies and priorities, these countries exhibit different types of legal capacities. Both countries

have competent lawyers who are experts in international trade law. But there are also important institutional and strategic differences that reflect divergent policies about how to create, foster, and deploy legal capacity.

a. Brazil

Brazil has built an institutional legal infrastructure that includes a trade team in the Foreign Affairs Ministry, a variety of intra-ministerial trade groups, and established coordination mechanisms between the government and the private sector and civil society. The Foreign Ministry lawyers have been sent for training to Brazil's permanent mission in the WTO and to trade litigation firms in Washington, D.C. and elsewhere. As a result, Brazil has created a cadre of lawyers who are able to represent the government in the WTO dispute settlement system.<sup>260</sup>

Brazil exhibits what can be described as developmental legal capacity, geared to advance the country's industrial policy agenda through the government's promotion of select, targeted sectors. An important aspect of Brazil's legal capacity is making sure that the country's legal strategies accord with the government's interests, not only for a given case but also systemically for the future. So far, Brazil has been able to defend several of its industrial policies in the WTO against challenges from countries that claimed they were violations of its WTO obligations.<sup>261</sup>

b. Mexico

The experience of Mexico presents a different picture.<sup>262</sup> There is a unit in charge of international trade in the Ministry of the Economy, which was first created to provide legal advice for and participated in the NAFTA negotiations. This office is now in charge of international trade negotiations and dispute resolution.<sup>263</sup> Although several very competent lawyers have worked and developed their careers in that office, there is a different institutional approach than that of Brazil's. Over the years, there

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260. Michelle Rattón Sanchez Badin, *Developmental Responses to the International Trade Game: Examples of Intellectual Property and Export Credit Law Reforms in Brazil* 14–15 (2011) (on file with the Virginia Journal of International Law Association); Shaffer et al., *The Trials of Winning*, *supra* note 217, at 424, 428–29. It should be noted that the government of Brazil has frequently resorted to hiring outside counsel, particularly from the United States, even though it has a trained domestic team of lawyers working for the government.

261. *See* Shaffer et al., *The Trials of Winning*, *supra* note 217, at 413–22.

262. Research for this section was based on semi-structured interviews with current and former Mexican government officials.

263. This unit is called the Office of Legal Counsel for Trade Negotiations. It provides legal advice to the Ministry of the Economy in trade and investment negotiations, free trade and investment promotion, implementation of existing agreements, and dispute settlement proceeding. For an organizational chart of the Ministry of the Economy, see Secretaría de Economía, *available at* <http://www.economia.gob.mx/images/ConoceSE/organigramafinal.png> (last visited Mar. 18, 2012).

has been considerable turnover and limited institutional continuity to take advantage of accumulated knowledge and experience.<sup>264</sup> There are few incentives for people to stay and ascend the career ladder, eventually pushing them out and losing valuable human capital. This may reflect a problem of design in the civil service career structure.<sup>265</sup>

In addition, the Ministry of the Economy has largely relied on outside legal counsel—primarily from the United States and Canada—for preparation of its cases and for lawyering strategies.<sup>266</sup> There seems to be no movement towards investing in and training a cadre of Mexican lawyers that can do the bulk of the lawyering and litigation.<sup>267</sup> Of course, there is nothing wrong in working with outside foreign counsel; given the highly technical aspects of WTO litigation, it may well be essential, particularly at the beginning of a country's participation in the WTO legal system. But developing one's own legal capacity and moving toward greater autonomy might yield considerable advantages, including saving the government important resources.<sup>268</sup> In addition, it may generate legal capacity spillovers

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264. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author); Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (on file with author). Phone Interview with official #3 at the Ministry of the Economy [name withheld], in Washington, D.C. (Jan. 31, 2011) (on file with author) (stating that while many of the lawyers who negotiated NAFTA remain in office in the United States and Canada, "everybody is gone in Mexico"). This is particularly worrisome in light of scholars' account of important accumulated experience is and how legal capacity and expertise accrue primarily to individuals. See Conti, *Learning to Dispute*, *supra* note 88, at 625.

265. Phone Interview with official #3 at the Ministry of the Economy [name withheld], in Washington, D.C. (Jan 31, 2011) (stating that even though a civil service career statute exists it is badly designed. While the statute establishes conditions of entry, it does not really establish the conditions to create a public service career).

266. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author). Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (on file with author) (stating that recently, the Office of Legal Counsel has begun to write its briefs in some cases, depending on the dispute. Stating also that Mexico had a rule whereby only Mexican lawyers would represent Mexico in oral arguments before international panels). Indeed, a small number of lawyers from the United States and Canada providing outside legal counsel to the Secretariat since NAFTA seems to be the main point of continuity. This small number of foreign legal advisors remained the same until the current administration began to expand the pool. Phone Interview with official #3 at the Ministry of the Economy [name withheld], in Washington, D.C. (Jan 31, 2011).

267. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author). Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (on file with author).

268. Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (on file with author) (stating that relying to such an extent on outside counsel is not only costly, it also may hamper the development of local capacities that could complement or eventually substitute outside advice, at least at the strategic level of litigation). "The government spends too much money in outside counsel. It would be better to spend that money to gradually create a group of first-rate in house lawyers within the government. The result would be a strong group of well-paid in-house lawyers." This would save money, but most importantly, it would build capacity in the government. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author) (stating that it would be hard to

to the private sector, where private law firms and companies would benefit from the services of competent domestic lawyers.<sup>269</sup>

Moreover, there is a noticeable lack of coordination between the trade unit in the Ministry of the Economy and other government Ministries and agencies as well as within the Ministry of the Economy itself.<sup>270</sup> For instance, there is scant coordination between the Ministry of the Economy offices in charge of trade promotion and the Ministry of the Economy offices responsible for industry promotion.<sup>271</sup> There are institutional channels for coordination between the Ministry of the Economy and the private sector, but this interaction largely depends on the initiative of representatives of economic sectors to approach the government. This institutional setup generally favors large firms and established industrial interests at the expense of medium and small enterprises.<sup>272</sup> In addition, there is practically no outreach to civil society groups.<sup>273</sup>

The apparent lack of coordination suggests that there are no overarching, explicit economic policies that the Mexican government is interested in advancing. Instead, Mexico adheres to the agendas that are assumed to be embedded within its international trade agreements. The Office of the Legal Counsel takes the cases as they come; each case is a separate problem with no relation between each other or to a deliberate agenda.<sup>274</sup> Thus, the cases undertaken by Mexico are not systemic, in the sense that they are not designed to change the rules of the game or to

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entirely do without outside counsel but that the government could use it for a second opinion, without heavily relying on them and at a considerably lower cost).

269. Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (stating that there is a dearth of lawyers trained in international trade law in the country and there are no Mexican law firms specialized in WTO or NAFTA. This capacity-building could have spill-over effects as some lawyers would eventually enter the private sector. This in-house team would be a seeder for international trade lawyers in the country); Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author).

270. Antonio Ortiz Mena, *The Domestic Determinants of Mexico's Trade Strategy*, in *THE DOMESTIC DETERMINANTS OF NATIONAL TRADE STRATEGIES: A COMPARATIVE ANALYSIS OF MERCOSUR COUNTRIES, MEXICO, AND CHILE* 230–32 (Roberto Bouzas ed., 2006).

271. Interview with official #4 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 15, 2010) (on file with author).

272. Mena, *supra* note 270, at 239–41. Interview with official #4 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 15, 2010) (on file with author) (stating that strong industries whose interests the government has agreed to represent have worked in tandem with the government during litigation).

273. Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011). *See also* Mena, *supra* note 270, at 229–41.

274. Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (stating that lawyers are a tool but like the external counsel, they do not make policy. This is something that has to be set by the deputy minister). “We were never influenced by policy decisions. We undertook the disputes as they came.” *Id.*

make the rules more favorable to its interests. Rather, they seek primarily to provide immediate relief.<sup>275</sup>

## 2. *Differences in Policy Objectives*

The differences in the approaches to legal capacity by Brazil and Mexico can be explained in terms of policy, even if an implicit one, rather than at the level of State competence or individual expertise or professionalism. Each approach seems to track individual positions regarding free trade and industrial policy, particularly as to the role of the state in supporting domestic infant industries, only this time in legal services. Brazil, on the one hand, seems interested in creating its own domestic “industry” in international trade law legal services by investing heavily in the training of government in-house lawyers. It has also stimulated “technology” or expertise transfer (in the form of legal knowledge) from outside foreign counsel to Brazilian government lawyers and to the private sector. By hiring legal services from Brazilian law firms, it is cultivating a domestic market, albeit still small, in the field. And it is deliberately generating linkages between government lawyers and other government ministries, as well as with the private sector and civil society.

Mexico’s approach to creating legal capacity, on the other hand, is more consistent with its free-trade orientation. It has in place a competent team of lawyers who can perform the basic governmental function of legal representation and participation in the WTO system. It has additionally “imported” legal services, buying those services it considers optimal from the international market. Mexico thus seems to have put fewer resources into building its own in-house or domestic legal capacity. As a result, the state plays no role in generating legal capacity in the domestic private sector through the promotion of technology transfers or domestic government procurement. Nor does the Mexican government seek to establish deliberate linkages with the private sector or civil society.

In Brazil the prominence of international trade policy has risen and is undoubtedly at the forefront of the country’s international and domestic agenda. There is considerable discussion about the role of Brazil in the WTO and about how it may advance its interests using the system.<sup>276</sup> In

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275. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author) (stating that the cases that Mexico undertakes are not systemic and that Mexico’s interpretation of its trade Agreements is rather conservative, staying within the limits of what has been tried out). “Mexico is the champion of compliance. Mexico is more papist than the Pope.” *Id.* Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (stating that Mexico does not have a case like Brazil-Cotton). “Trade lawyering and litigation has never been conceived as a tool for trade policy.” *Id.*

276. See, for example, Brazil’s effort to include currency manipulation measures under the WTO. Jonathan Wheatley & Joe Leahy, *Trade War Looming, Warns Brazil*, FIN. TIMES, Jan. 10, 2011, <http://tinyurl.com/7seafqe> (last visited Mar. 18, 2012). Interview with former official #2 at the



contrast, in Mexico, trade policy seems to be on the wane. By and large, the development discussion in Mexico is about second-generation domestic reforms. The international trade obligations are for the most part taken for granted and the focus is on what other structural reforms are pending. Those reflecting on the experience of the Mexican legal team that negotiated NAFTA and was to take charge of international trade in the Ministry of the Economy speak of trade as a part of a state policy and vision for the country that no longer exists.<sup>277</sup>

### 3. *Differences in Litigation Experience*

This Section selects some of the most important cases that Brazil and Mexico have participated in, either as a complainant or a respondent.<sup>278</sup> These cases illustrate how different development strategies translate into different lawyering objectives. Brazil uses its legal capacity to expand its policy space and promote its industrial policies. Mexico uses its legal capacity to enforce what it assumes to be its existing international trade obligations and defend itself against unfair trade practices.

As should be clear by the end of this analysis, the litigation experience of Brazil and Mexico shows that, when a country has a clear development goal and has built the legal capacity to pursue it, a country can create policy space and exploit the latent flexibilities in the WTO regime. This flexibility for policy autonomy is often invisible and cannot be taken for granted. Rather, it results from a country's deliberate strategy to pursue a development goal within the WTO framework, testing its limits, and seeking to obtain the most advantage of it.

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Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 15, 2010) (on file with author). (stating that Brazil is an example of a country that stands for itself. The cases of aircraft and intellectual property show how Brazil uses the DSB to achieve certain ends, both geopolitical and domestic).

277. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author). Phone interview with former official #6 at the Ministry of the Economy [name withheld] (Oct. 6, 2011) (stating that the centrality of international trade in the country's economic and political agenda has declined and with it, so is the power and influence that the Trade Division and the Ministry of the Economy exercises within the government). Phone Interview with official #3 at the Ministry of the Economy [name withheld], in Washington, D.C. (Jan 31, 2011) (stating that "trade policy has stopped being a priority for Mexico").

278. Brazil has been involved in twenty-five cases as complainant and fourteen as respondent. Mexico has been involved in twenty-one cases as complainant and fourteen as respondent. WORLD TRADE ORG., 2011 ANNUAL REPORT 88 (2011), available at <http://tinyurl.com/6st32nn> (last visited Mar. 18, 2012).

a. As Complainants

i. Brazil

Brazil has actively promoted its exports in other countries, ensuring market access and equal treatment. On this score, Brazil has been fairly successful as a complainant. Indeed, Brazil's record as a complainant, particularly against the United States and Europe, has been more effective than Mexico's.<sup>279</sup>

One example is the dispute between Brazil and the United States concerning cotton. Brazil argued that the U.S. cotton subsidies<sup>280</sup> violated several WTO agreements, including the Subsidies Agreement, the Agricultural Agreement, and GATT.<sup>281</sup> The dispute resulted in five different opinions from Panels and the Appellate Body and will be undoubtedly influential in future cases concerning agriculture, subsidies, and countervailing measures. Both the Panel and AB found that several U.S. programs were inconsistent with the WTO Agreements, either as prohibited subsidies or as actionable subsidies that caused serious prejudice to Brazil.<sup>282</sup> Furthermore, Brazil obtained permission to cross-retaliate by suspending concessions not only in goods, but also in services and TRIPs. Although the arbitrator accepted neither the total amount of damages claimed by Brazil nor the amount of concessions Brazil claimed it was entitled to cross-retaliate, the decision represented an important victory for Brazil.<sup>283</sup> After Brazil received permission to enact

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279. Cf. JORGE A. HUERTA-GOLDMAN, MEXICO IN THE WTO AND NAFTA, LITIGATING INTERNATIONAL TRADE DISPUTES 122 (2010); Shaffer et al., *supra* note 217, at 413 (presenting Brazil as "the most successful developing-country user of the WTO dispute settlement system" in terms of the number of cases and their systemic implications).

280. The United States started the subsidy program in 1933 with the Agricultural Adjustment Act. This act aimed to stabilize the prices for cotton producers through various forms of subsidies and government purchases. Despite its modest beginnings in a single act, by the time Brazil challenged the use of agricultural subsidies, the U.S. program involved a complex web of regulations. See William Gillon, *The Panel Report in the U.S.—Brazil Cotton Dispute: WTO Subsidy Rules Confront U.S. Agriculture*, 10 DRAKE J. AGRIC. L. 7, 9, 23–28 (2005). Between 1999–2002, the years right before Brazil's complaint, U.S. support for cotton producers in the United States peaked as world prices for cotton fell to their lowest level in over a decade. Karen Halverson Cross, *International Decisions: United States — Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil: WTO Appellate Body — Compliance with Recommendations and Rulings in U.S. — Upland Cotton — Pending Arbitration Over Countermeasures by Brazil—Scope of Compliance Proceedings*, 103 AM. J. INT'L L. 110, 111 (2009).

281. Request for Consultations by Brazil, *United States — Subsidies on Upland Cotton*, WT/DS267/1 (Oct. 3, 2002).

282. Appellate Body Report, *United States — Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005); Panel Report, *United States — Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

283. Cross, *supra* note 280, at 113. Brazil had asked for suspension of concessions equal to \$4 billion annually. The arbitrator found that Brazil was entitled to countermeasures totaling \$147.6 million for fiscal year 2006 for prohibited subsidies, and an amount based on the calculations going into that number for future years. The arbitrator also found that Brazil was entitled to \$147.3 million annual for actionable subsidies. *Id.*

countermeasures in goods and announced its intention to retaliate in services and TRIPs, both parties reached a mutually agreeable solution.<sup>284</sup>

The dispute was significant for the WTO system because it was the first successful challenge “to highly trade-distorting, actionable, and prohibited agricultural subsidies under the WTO.”<sup>285</sup> Because such agricultural subsidies are a large part of the domestic program of the United States and the EU, the dispute can have widespread ramifications. Moreover, this case shows that Brazil was willing to use this retaliatory entitlement in order to pressure the United States to remove its subsidies and comply with its WTO obligations, as well as to use this entitlement in sectors other than goods where it could gain additional advantage, such as intellectual property protection. Thus Brazil, drew from its experience as a RP and its domestic development strategy to create policy space in the domain of retaliatory measures.

## ii. Mexico

Mexico’s primary focus in litigating WTO cases has been to ensure market access and equal treatment of its exports in the importing country and to fight what it perceives as unfair trade measures by its competitors in its home market. As a complainant,<sup>286</sup> Mexico has challenged other

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284. Press Release, Office U.S. Trade Representative, U.S., *Brazil Agree on Framework Regarding WTO Cotton Dispute* (June 2010), <http://tinyurl.com/7skqhwq> (last visited Mar. 18, 2012); *Framework for a Mutually Agreed Solution to the Cotton Dispute in the World Trade Organization (WT/DS267)*, BRAZIL-U.S. BUS. COUNCIL., <http://tinyurl.com/89va2t3> (last visited Mar. 18, 2012). See also Dispute Settlement: Dispute DS267, *United States — Subsidies on Upland Cotton*, WORLD TRADE ORG., available at <http://tinyurl.com/gufm7qz> (last visited Mar. 18, 2012) (describing the settlement between the United States and Brazil).

285. Scott Andersen & Meredith A. Taylor, *Brazil’s WTO Challenge to U.S. Cotton Subsidies: The Road to Effective Disciplines of Agricultural Subsidies*, BUS. L. BRIEF 2, 2 (Fall 2009).

286. As a complainant in the WTO, Mexico has only been successful in winning in litigation against United States or European Community (EC) measures when it was a co-complainant of either the United States or the EC against the other. In *EC-Bananas*, for example, Mexico joined the United States in a successful challenge against the EC. In *U.S.-Offset Act*, it joined the EC and other WTO members against the United States. Mexico was not able to win on its own against the United States before the AB (U.S.-OCTG). HUERTA-GOLDMAN, *supra* note 279, at 172–73. In fact, Mexico has lost the only two cases it has litigated as a sole complainant before the AB, one against the United States and the other against Guatemala (*Guatemala-Cement I*). *Id.* at 174. Furthermore, until 2010, out of sixteen cases in which Mexico had been a complainant, only six had been implemented. Only two of seven cases against the United States have been implemented. See Request for Consultations by Mexico, *United States — Anti-Dumping Measures on Cement from Mexico*, WT/DS281 (Jan. 31, 2003); Request for Consultations by Mexico, *United States — Anti-Dumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico*, WT/DS49 (July 1, 1996). Both of these cases related to anti-dumping and were not litigated but rather reached a settlement through negotiation. HUERTA-GOLDMAN, *supra* note 279, at 175. One of the most important cases for Mexico against the United States was the case concerning sugar. This dispute was initiated by Mexico under NAFTA, and it spilled over to the WTO. The case started out by Mexico claiming that the United States was violating its NAFTA commitments of market access to Mexican sugar, and it has turned into one of the worst headaches for the country. The protracted litigation in the WTO and the Antidumping and

countries' trade measures when they undermine Mexican exports. For example, it launched a complaint against the E.C.'s banana import scheme, which gave several forms of preference to exporters from African, Caribbean and Pacific countries over Mexican exporters, among others.<sup>287</sup> Similarly, it complained of U.S. labeling requirements that negatively impacted Mexican tuna imports.<sup>288</sup> Some of the most prominent disputes initiated by Mexico are challenges to anti-dumping duties (AD)<sup>289</sup> imposed by other countries on Mexican products, such as cement<sup>290</sup> and steel.<sup>291</sup> In fact, in five out of the six cases initiated by Mexico that reached implementation, Mexico invoked a violation of the Anti-Dumping Agreement.<sup>292</sup> In these cases, Mexico challenged the sufficiency of evidence presented in the investigation or the methodology applied in determining dumping margins. Mexico has also challenged countervailing duties, tariffs and other countries' measures affecting its exports. In recent years, Mexico filed a few complaints that address another country's internal subsidy mechanisms, especially where that country might be a competitor in the export market.<sup>293</sup>

Mexico's focus merely on maintaining the current free trade regime is clear. Take for example Mexico's position in the *NAFTA Trucking* case, where Mexico as an RP had an opportunity to expand its policy space, had

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Investment chapters of NAFTA all resulted in adverse rulings and hefty compensation claims against Mexico. For an overview of the complex sugar dispute, see GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 310–27 (2005); see also Sergio Puig de la Parra, *The Political-Economy and the Causes of Compliance of Trade and Investment Agreements: NAFTA and the Sweeteners Sector* (May 2009) (unpublished J.S.D. thesis, Stanford Law School) (on file with Robert Crown Law Library, Stanford Law School), available at <http://tinyurl.com/7qqtxlf> (last visited Mar. 18, 2012).

287. Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/1 (Feb. 12, 1996).

288. Request for Consultations by Mexico, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/1 (Oct. 28, 2008). See Request for Consultations by Mexico, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2001).

289. Among OECD countries, excepting the United States and the EC, Mexico is the most frequent user of ADA as complainant (eleven times) and as a respondent (six). HUERTA-GOLDMAN, *supra* note 279, at 170–71.

290. See Request for Consultations by Mexico, *United States — Anti-Dumping Measures on Cement from Mexico*, WT/DS281/1 (Feb. 11, 2003); Request for Consultations by Mexico, *Ecuador — Definitive Anti-Dumping Measure on Cement from Mexico*, WT/DS191/1 (Mar. 17, 2000); Request for Consultations by Mexico, *Guatemala — Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/1 (Jan. 8, 1999).

291. See Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008).

292. See HUERTA-GOLDMAN, *supra* note 279, at 104.

293. See Request for Consultations by Mexico, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS398/1 (Aug. 26, 2009); Request for Consultations by Mexico, *China — Grants, Loans and Other Incentives*, WT/DS388/1 (Jan. 8, 2009).

its development strategy demanded it.<sup>294</sup> The Mexican government won a case against a U.S. regulation prohibiting Mexican trucks from entering U.S. territory, in violation of NAFTA. But Mexico took years to start retaliatory measures in the face of United States non-compliance. Moreover, in its retaliation measures, the government selected a mix of goods by a process that was merely designed to hurt and put pressure on the United States to revoke its prohibition; it paid no attention to how it could use countermeasures to support specific domestic industries. Indeed, Mexican officials forcefully rejected deliberately using these reprisals as a way to provide a temporary boost to domestic sectors. In their view, that would be an unjustifiable way to “pick winners” and would open the floodgates, with every industry demanding that their sector be included in the retaliation list.<sup>295</sup>

The experiences of Brazil and Mexico illustrate two different attitudes towards the use of retaliation. Optimally, the use of a reprisal involves attacking the breaching country’s products whose exclusion would ratchet up pressure on that country to remove its trade barriers. On its face, the availability of a reprisal, which is a legally recognized privilege accorded to the winning party to harm the breaching country as a way to compensate for the original injury, can help a domestic industry because its foreign competitor has been hit with higher tariffs. Although Brazil seems to use this retaliation privilege effectively by deliberately targeting the domestic industries it can temporarily promote, Mexico seems reluctant to further any economic strategy other than hurting the losing country.<sup>296</sup> It refuses to take advantage of this privilege for fear that such protection may engender rent seeking, even though such a tactic might not be deemed illegal.

b. As Respondents

Perhaps the starkest contrast in the trade policy of Mexico and Brazil is visible in the cases they have to deal with as respondents. Brazil has been challenged over a wide array of domestic measures designed to implement

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294. Final Report, *In the Matter of Cross-Border Trucking Services*, No. U.S.-Mex-98-2008-01 (Feb. 6, 2001), available at <http://www.worldtradelaw.net/nafta20/truckingservices.pdf>.

295. Interview with official at the Ministry of the Economy #4 [name withheld], in Mexico City, Mex. (Dec. 15, 2010) (on file with author).

296. One exception to this position was Mexico’s use of retaliatory tariffs on the case U.S. Safeguard Action Taken on Corn Brooms. After winning the case, Mexico used its entitlement to retaliate by increasing tariffs on U.S. HFCS (high fructose corn syrup) and thus reduce its competitive pressure on the domestic sugar industry. The government decided to “use the bargaining chip obtained in the broom case to increase tariffs on fructose.” Puig de la Parra, *supra* note 286, at 132 (internal quotes and footnotes omitted). This action shows that this policy space is there and can be used at will. In the sugar case, however, this temporary relief was not tied to an overarching strategy or industrial policy to make the sector economically viable in the long term.

the government's industrial policies, while Mexico has been targeted mostly for its anti-dumping measures. This pattern is consistent with the different trade policies in each country. Brazil has not only enacted anti-dumping measures, but also implemented a series of industrial policies that seek to promote its domestic firms at home and abroad. Mexico, on the other hand, focuses on using anti-dumping measures or other countervailing duties to offset what it perceives as unfair trade measures by trade partners. It protects its domestic industries only when it deems that they are being harmed unfairly.

i. Brazil

Brazil's trade policy goes beyond seeking market access and protecting its domestic industry against unfair competition. Out of fourteen cases as a respondent, Brazil has faced a couple of challenges to its anti-dumping measures and one to countervailing duties.

The most prevalent cases challenge Brazil's measures to support its industrial policies. These measures include local content requirements, import restrictions schemes, and export promotion programs concerning areas such as investment, intellectual property and subsidies.

Consider first local content requirements, which Brazil has used to promote domestic manufacturing by conditioning the extension of certain benefits to a foreign exporter who can meet local production or content standards.<sup>297</sup> The most prominent local requirements case involved the U.S. challenge of Brazil's Industrial Property Law, which established a "local working" requirement to grant exclusive patent rights and to effectively forced compulsory licensing if the patent was not worked in Brazil.<sup>298</sup> The United States deemed this requirement to be inconsistent with Brazil's obligations under Articles 27 and 28 of the TRIPS Agreement, and Article III of GATT 1994.<sup>299</sup> In response, Brazil mounted

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297. Brazil implemented such a program in the automotive sector, which Japan, the United States, and the EU challenged in separate cases, citing several nondiscrimination articles, including Articles I:1 and III:4 of the GATT 1994, Article 2 of the TRIMs Agreement, and Articles 3 and 27.4 of the Subsidies Agreement. See Request for Consultations by the European Communities, *Brazil—Measures Affecting Trade and Investment in the Automotive Sector*, *supra* note 52 (where the complainant was the European Communities); Request for Consultations by the United States, Dispute Settlement: DS65, *Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, *supra* note 52 (where the complainant was the United States); Request for Consultations by the United States, *Brazil—Certain Measures Affecting Trade and Investment in the Automotive Sector*, WT/DS52/1 (Aug. 9, 1996) (where the United States was the complainant); Request for Consultations by Japan, *Brazil—Certain Automotive Investment Measures*, *supra* note 52 (where Japan was the complainant). Eventually, Brazil reached an agreeable solution with all complainants and they dropped their cases. For an analysis of Brazil's promotion policies in the auto industry see Mahrukh Doctor, *Boosting Investment and Growth: The Role of Social Pacts in the Brazilian Automotive Industry*, OXFORD DEV. STUD. 105 (2007).

298. Request for Consultations by the United States, *Brazil—Measures Affecting Patent Protection*, WT/DS199/1 (June 8, 2000).

299. Article 27 explicitly prohibits discrimination based on place of invention or production.

a successful lawyering campaign during the Doha development round, which made public health an international priority and made clear that the TRIPS agreement had to be interpreted in light of public health concerns. Furthermore, Brazil filed a complaint against the United States, alleging that the U.S. Patent Code's local working requirements in Chapter 18 — "Patent Rights in Inventions Made with Federal Assistance" — violated Articles 27 and 28 of the TRIPS Agreement and Articles III and XI of GATT 1994.<sup>300</sup> Brazil also argued violation of Article 2 of the TRIMS Agreement, which contains a national treatment requirement.<sup>301</sup> Through the health campaign, and the case against the United States, Brazil was able to frame the dispute in its favor and withstand tremendous pressure from the U.S. government and the pharmaceutical industry to change its law. Eventually, both countries reached an agreement and withdrew their respective complaints.

Consider now import restrictions. Brazil imposed import prohibitions on "virtually all used consumer goods, including motor vehicles."<sup>302</sup> The most notable type of import restriction was its 2005 ban on retreaded and used tires. The EU challenged the ban, which exempted MERCOSUR countries, as discriminatory.<sup>303</sup> Brazil justified the ban as necessary to protect human, animal, and plant life from dangerous tire waste, which increased the risk of disease transmission and toxic emissions from tire fires.<sup>304</sup> Although the Panel agreed with Brazil's Article XX(b) argument, it rejected the import ban on retreaded tires as applied because it was unjustifiably discriminatory and thus in breach of Article XX's chapeau provision.<sup>305</sup>

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Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994). Article 28 requires WTO members to protect patent holders against third party use without their consent. It prevents "third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product." *Id.* art. 28(1)(a). Article III (4) of GATT requires countries to give imported products national treatment, which the local working requirement violates. GATT, *supra* note 51, art. III (4).

300. Request for Consultations by Brazil, *United States — US Patents Code*, WT/DS224/1 (Feb. 7, 2001).

301. *Id.*

302. WTO Secretariat, *Trade Policy Review Brazil: Report by the Secretariat*, ¶ 14, WT/TPR/S/212 (Feb. 2, 2009).

303. Request for Consultations by the European Communities, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/1 (Jun. 23, 2005).

304. Shaffer et al., *supra* note 217, at 466. This justification purported to be aligned with GATT Article XX(b).

305. Despite its import ban, Brazil permitted imports of used tires in significant amounts under court injunctions blocking the application of the law and also granted an exemption to MERCOSUR countries. *Id.* at 468 n. 350 (citing Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 258(b), WT/DS332/AB/R (Dec. 3, 2007)). These exemptions undercut Brazil's stated environmental and health objectives.

Despite losing this case, Brazil obtained two important findings. First, the AB declared that Brazil's ban on tires was an appropriate measure and would have been upheld if it was applied on a non-discriminatory basis. It rejected the EC's objection that there were other less trade-restrictive measures available to achieve Brazil's objectives. Second, the AB held that panels must consider a country's regulatory capacity when assessing whether there are reasonably available alternatives to the measure in question.<sup>306</sup> This means that a developing country's cost and technology constraints must be taken into account.

Thus, despite losing this particular dispute, Brazil obtained a valuable rule change for future cases. To bring the measure into compliance with the AB ruling, Brazil halted the allowance of importation of used tires by court injunctions and passed legislation to make the import ban effective on "all reusable, recyclable and recycled solid waste that poses a public health or environmental risk."<sup>307</sup> As a result, the protection against imported retreaded or used tires, which effectively supports the Brazilian domestic tire industry, is still in force.

Brazil has also adopted programs that have been challenged because they support certain new industries by incentivizing them to export. The most prominent example is PROEX<sup>308</sup>, whereby Brazil provided export financing assistance at significantly reduced interest rates to its airplane manufacturer, Embraer. Brazil defended the measure using a variety of rather creative arguments and resisted implementing the DSB's adverse finding, instead making minor modifications and repeating previously rejected arguments.<sup>309</sup> The WTO eventually approved Brazil's PROEX scheme after the interest rate was adjusted to a level permitted under the OECD convention, although it was higher than Brazil's previously suggested rates.

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306. Shaffer et al., *supra* note 217, at 467–68.

307. Michael Kepp, *Brazil's Chief Justice Overturns Lower Court, Citing Health Risks from Imported Used Tires*, 24 INT'L TRADE REP. (BNA) 1554, 1554 (2007).

308. In Portuguese: *Programa de Financiamento às Exportações*.

309. For a complete list of the cases resolving the dispute, see Panel Report, *Brazil — Export Financing Programme for Aircraft*, WT/DS46/R (Apr. 14, 1999); Appellate Body Report, *Brazil — Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999); Panel Report, *Brazil — Export Financing Programme for Aircraft — Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW (May 9, 2000); Appellate Body Report, *Brazil — Export Financing Programme for Aircraft — Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW (Jul. 21, 2000); Arbitration Decision, *Brazil — Export Financing Programme for Aircraft — Recourse to Arbitration by Brazil Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB (Aug. 28, 2000); Panel Report, *Brazil — Export Financing Programme for Aircraft — Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW2 (Jul. 26, 2001).



## ii. Mexico

The cases in which Mexico acted as a respondent offer a picture of its domestic economic policies. Frequently, Mexico responded to perceived unfair trade measures by imposing countervailing duties or anti-dumping measures that were subsequently challenged by the target country.<sup>310</sup> Out of fourteen cases in which Mexico has had to defend trade-related measures against other WTO members, eight have been anti-dumping measures and countervailing duties. In addition, Mexico has been sued for other measures it has taken, including customs valuations, import restrictions related to technical barriers to trade and sanitary and phytosanitary measures, domestic taxes, and restrictions on access to telecommunications services.<sup>311</sup>

Among Mexico's challenged domestic measures, two stand out as unusual because they protected the domestic industry for reasons other than for unfair trade practices and the disputes were actually litigated: 1) a tax on soft-drinks that used sweeteners other than cane sugar,<sup>312</sup> and 2) an anticompetitive regulation placed on its telecommunications sector.<sup>313</sup> Although these cases might look like exceptions, they in fact confirm the country's free trade policy described above: neither of these measures were implemented to further any industrial policy.

Take for example the soft drinks tax dispute. The tax regulations at stake arose as response to what the Mexican government considered to be an unfair U.S. trade practice under NAFTA.<sup>314</sup> Unable to pursue its case under NAFTA due to the United States's unwillingness to form a panel, the Mexican government passed a series of taxes and bookkeeping requirements affecting beverages containing sweeteners other than cane sugar, which the United States then proceeded to challenge in the WTO. Before the Panel, Mexico conceded that its measures were aimed at protecting the sale of domestic cane sugar, which was being displaced by imported high fructose corn syrup, but argued that the dispute was part of a larger disagreement over bilateral trade in sweeteners under NAFTA.<sup>315</sup>

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310. For example, Mexico imposed anti-dumping measures on high fructose corn syrup imports from the United States that were subsequently challenged by the United States. Panel Report, *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, ¶ 1.2, WT/DS132/R (Jan. 28, 2000).

311. See *Disputes by country/territory*, WORLD TRADE ORG., available at <http://tinyurl.com/eadxf> (last visited Mar. 18, 2012) (providing a link to the dispute summary of all fourteen cases where Mexico has been a respondent). See also HUERTA-GOLDMAN, *supra* note 279, at 112–14.

312. See Appellate Body Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (March 6, 2006); Panel Report, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, ¶ 4.72, WT/DS308/R (Oct. 7, 2005).

313. See Panel Report, *Mexico — Measures Affecting Telecommunications Services*, WT/DS204/R (April 2, 2004).

314. Panel Report, *supra* note 312, at ¶ 4.72.

315. Appellate Body Report, *supra* note 312, at ¶ 2; Panel Report, *supra* note 312, ¶¶ 4.96, 4.115;

Further, Mexico asserted a GATT Article XX(d) defense, justifying the taxes as necessary to secure U.S. compliance United States with its domestic regulation, of which NAFTA formed part.<sup>316</sup> Both the Panel and AB rejected these claims and Mexico subsequently repealed the tax.

This case was only one part of a complex and broader dispute about market access for Mexican sugar in the U.S. market and later U.S. fructose in the Mexican market.<sup>317</sup> The dispute initially included antidumping measures by Mexico, which the United States challenged successfully before WTO and NAFTA panels.<sup>318</sup> As a result of the taxes, three U.S. companies sued Mexico for undermining their investment interests under NAFTA Chapter 11 and won.<sup>319</sup> The saga of this conflict makes clear that the sugar industries in both countries are highly protected and that both governments have a strong interest in supporting them.<sup>320</sup> It also makes clear, in the case of Mexico, that it did not have a good legal strategy on how to challenge the U.S.'s refusal to adjudicate their disagreement about the terms of the U.S.'s market-access commitments for sugar under NAFTA. Whilst Mexico started out as the aggrieved party in the conflict, complaining that the United States had defected on its promise and was refusing to even adjudicate the disagreement according to NAFTA proceedings, it ended up as the villain of the story, enacting measures that made it vulnerable to challenges in the WTO and made it liable to pay \$110.8 million in compensation for NAFTA investment panel decisions against it.<sup>321</sup> None of these measures by Mexico seemed to have been

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Puig de la Parra, *supra* note 286, at 163.

316. Appellate Body Report, *supra* note 315, ¶ 13.

317. For an overview of the sugar conflict, see GARY C. HUFBAUER & JEFFREY J. SCHOTT, *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 310–27 (2005). *See also* Puig de la Parra, *supra* note 286, at 163.

318. Panel Report, *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, ¶ 8.2, WT/DS132/R (Jan. 28, 2000); Article 21.5 Appellate Body Report, *Mexico — Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, ¶¶ 135(b)–(c), WT/DS132/AB/RW (Oct. 22, 2001).

319. *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA) (Sept. 18, 2009); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Nov. 21, 2007); *Corn Products International Inc. v. Mexican States*, ICSID Case No. ARB(AF)/04/1 (May 20, 2005), 21 ICSID REV. 364 (2006); *see also* Alice Vacek-Aranda, *Sugar Wars: Dispute Settlement Under NAFTA and the WTO as Seen Through the Lens of the HFCS Case and Its Effects on U.S.–Mexican Relations*, 12 TEX. HISP. J.L. & POL'Y 121, 156 (2006).

320. *See* HUFBAUER & SCHOTT, *supra* note 317, at 310–27. *See also* Puig de la Parra, *supra* note 286, at 163.

321. *See, e.g.*, *Cargill Inc.*, *supra* note 319, ¶ 559; *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc.*, *supra* note 319, ¶ 304; *Corn Products International Inc.*, *supra* note 319, ¶ 193 (establishing liability only; damage calculation pending or settled separately). The internal tensions between different branches of the Mexican government were at full sight concerning the tax measure. While Congress passed the tax, the President invoked special powers to suspend it and the Supreme Court finally upheld it. Similarly, a sugar mill challenged the constitutionality of a President's expropriation decree, which the Supreme Court declared unconstitutional on due process grounds. These tensions also revealed that there was not a clear, overarching strategy by the

enacted as a component of a coherent, long-term industrial policy but rather as immediate palliatives to the economic struggles and the political pressures of the sugar industry in the country.

In the *Mexico – Telecommunications* case, the United States challenged Mexico's regulations as anti-competitive and discriminatory and charged Mexico with tolerating privately-established market-access barriers and failing to take regulatory action.<sup>322</sup> Mexico defended its regulatory measures, but it did not appeal the Panel's unfavorable decision.<sup>323</sup> In doing so, the Mexican government used this U.S. challenge as an opportunity to economically liberalize one of its own sectors, which had been dominated by Telmex, a powerful private monopoly, by inviting international competition. This was a decision in the direction of liberalization, and in this case, it was very likely desirable. What underlies the decision, however, is not the stricture of the international agreement, whose interpretation Mexico did not even appeal, but the economic policy of the country. Again, this case illustrates the trade policy strategy of Mexico. In both cases, however, none of the measures in question seemed to be part of a coherent, well thought out industrial policy aimed at promoting economic development.

One potential objection to the analysis of Mexico's experience in the WTO is that this forum is marginal for this country. After all, the main trade forum for Mexico is NAFTA, and trade with the United States represents 80% of its overall trade.<sup>324</sup> While it is true that NAFTA is Mexico's principal trade regime, the features of the country's legal capacity and of trade strategy are practically the same in both fora. There is plenty to learn from Mexico's experience in the world's prime multilateral trade regime. Moreover, the WTO has turned out to be relevant in cases involving disputes between NAFTA members. Mexico has litigated disputes in the WTO, as complainant and defendant, against the United States in disputes that overlap with NAFTA. Thus, even for disputes concerning its NAFTA partners, Mexico needs to be able to use effectively the WTO.

A second potential objection would be that Mexico's policy autonomy is reduced by NAFTA's more stringent legal obligations, particularly its

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President and the Ministry of the Economy about how to deal with the problems of the domestic sugar industry in the face of U.S. refusal to grant greater market access and competition of U.S. fructose in the Mexican market. Puig de la Parra, *supra* note 286, at 157–65.

322. See generally Panel Report, *Mexico — Measures Affecting Telecommunications Services*, ¶ 3.1, WT/DS204/R (Apr. 2, 2004).

323. See Dispute Settlement: Dispute DS204, *Mexico — Measures Affecting Telecommunications Services*, WORLD TRADE ORG., available at <http://tinyurl.com/778wlwh> (last visited Mar. 18, 2012) (showing no Appellate Body ruling).

324. Christopher E. Wilson, *Working Together: Economic Ties Between the United States and Mexico*, MEXICO INST., WOODROW WILSON INT'L. CTR. FOR SCHOLARS (Nov. 2011), <http://tinyurl.com/76h5276> (last visited Mar. 18, 2012).

investment agreement in Chapter 11. In contrast to the WTO, which gives legal standing to States only, NAFTA gives private parties a right of action against member States. In addition, while WTO remedies are prospective and damages are computed only from the time of final judgment, NAFTA remedies are retrospective and require the losing State to compensate from the date that the measure was enacted. Under NAFTA, a trade measure might have investment ramifications and thus have a chilling effect on the potential action of the State to begin with. In this view, what explains the difference between Mexico and Brazil is simply that Mexico has more stringent international obligations, due to NAFTA, and is thus unable to pursue more heterodox economic policies.

It is possible to speculate that the Mexican government feels less able to act because of the potential investment claims against it under NAFTA.<sup>325</sup> But the record shows that when the government has an interest in defending a particular industry, even in the most indefensible ways, it does so without regard to the potential investment claims. Even if Mexico had indeed less room for maneuver, there will be important terrain to be gained by using the available space. The main point is that what lies behind the government's underuse of its policy autonomy is not its international obligations, even if NAFTA further reduces its space, but its own domestic development strategy.

#### 4. *The Brazil Aircraft Case and the Export Subsidies Prohibition*

As can be seen from the preceding discussion, Brazil and Mexico pursue considerably different trade policies, development strategies, and legal responses in their interactions with other WTO members. For developing countries that are interested in achieving greater policy autonomy, it demonstrates that building legal capacity to become a RP, like Brazil and Mexico, is not on its own enough to take advantage of the WTO system. Legal capacity must be accompanied by a development goal that could make the RP push for favorable rules. This final Section uses a specific case to highlight how Brazil deploys a legal strategy to defend its program and the lessons that this type of lawyering can offer to developing countries.<sup>326</sup>

One of Brazil's most prominent industrial policy programs involved its support to the aircraft manufacturer firm Embraer. Under Brazil's export financing program (PROEX), the government provided interest rate

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325. Interview with former official #1 at the Ministry of the Economy [name withheld], in Mexico City, Mex. (Dec. 13, 2010) (on file with author).

326. For an analysis of Brazil's strategy in subsidies and intellectual property, see Michelle Ratton Sanchez Badin, Developmental Responses to the International Trade Legal Game: Example of Intellectual Property and Export Credit Law Reforms in Brazil 49 (2011) (on file with the Virginia Journal of International Law Association).

equalization subsidies for Embraer's sales at the amount of 3.8 percentage points of the actual interest rate on any transaction.<sup>327</sup> Brazil's government justified this subsidy by arguing that Embraer was at a competitive disadvantage in the world's credit market due to the country's sovereign risk.<sup>328</sup>

Canada challenged Brazil's PROEX program before the WTO, alleging that it was an export subsidy and thus violated the Agreement on Subsidies and Countervailing Measures (SCM).<sup>329</sup> At issue was the interpretation of two important rules. The first was SCM Agreement Article 27.4, which accords special and differential treatment to developing countries by allowing them to continue prohibited export subsidies for eight years after the Agreement entered into force, as long as the subsidies were gradually phased out during this period.<sup>330</sup> The second rule of concern was item (k) on the illustrative list of prohibited subsidies in SCM Agreement Annex I. The interpretation of this second rule hinged upon whether the subsidy was used to secure a "material advantage" for the subsidy beneficiary or not.<sup>331</sup>

The Panel agreed with Canada that Brazil had not met the requirements of Article 27.4 and therefore could not avail itself of the exception available for developing countries.<sup>332</sup> In analyzing the text of item (k), the

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327. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 4, WT/DS46/AB/R (Aug. 2, 1999).

328. *See id.* at ¶ 15 (referring to Brazil's justification of the subsidy program: "PROEX subsidies simply compensate for higher interest rates incurred on transactions involving Embraer that result from what it terms 'Brazil risk'. 'Brazil risk' occurs because a Brazilian commercial entity cannot avoid bearing the additional cost of Brazil sovereign risk when it raises capital or finances a purchase or a sale. Brazil sovereign risk results from the perception in the market for debt securities as to the likelihood of repayment on schedule." (citing Panel Report, *Brazil—Export Financing Programme for Aircraft*, ¶¶ 4.94–4.96, WT/DS46/R (Apr. 14, 1999)).

329. What ensued was a prolonged and highly acrimonious dispute; the dispute was up for decision six times. It started with the Panel report and the Appellate Body decision, both of which found Brazil's measure to be in violation of the SCM Agreement. Canada then brought the dispute to an Article 21.5 implementation panel, which Brazil appealed and lost. Then, the dispute went to an Article 22.6 arbitration in charge of deciding whether the suspension of concessions proposed by Canada, as retaliation, was equivalent to the damage it had suffered. Finally, Brazil brought a second recourse to an Article 21.5 panel, which decided that Brazil's modified measure was in compliance. From the moment that Canada requested formal consultations to the final report, the dispute took five years spanning from June 1996 to July 2001. Request for Consultations by Canada, *Brazil—Export Financing Programme for Aircraft*, WT/DS46/1 (June 21, 1996).

330. SCM Agreement, *supra* note 35, art. 27.4. Appellate Body Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 126(c), WT/DS46/AB/R (Aug. 2, 1999).

331. Appellate Body Report, *Brazil—Aircraft*, *supra* note 327, ¶¶ 166–77.

332. To reach this conclusion, it determined that (1) subsidies consisted of actual expenditures and not of budgeted amounts, ¶ 7.74 (2) subsidies were granted when the NTN-1 bonds were issued and not when the letter of commitment was issued, ¶ 7.71 and (3) constant and not nominal dollars should be used for the calculation. ¶ 7.73 In the panel's assessment, Brazil had indeed increased the level of its subsidies. Thus, it could not enjoy beneficial treatment under Article 27 of SCM Agreement, and PROEX was held to be a prohibited form of subsidy under Article 3.1(a). Panel Report, *Brazil—Export Financing Programme for Aircraft*, ¶¶ 8.1–8.2, WT/DS46/R (Apr. 14, 1999).

Panel concluded that, even if PROEX was a permitted government payment, it was still used in a way that secured a material advantage. Finding that the PROEX rate was indeed lower than the market rate, the panel determined that there was a material advantage. On appeal, although Brazil still lost the case, the AB modified the Panel's interpretation of "material advantage."<sup>333</sup> Instead of looking at market rate, the AB used as a benchmark the OECD Arrangement, included in Annex 1 of the SCM Agreement, although it noted that this was not the only benchmark possible.<sup>334</sup>

Brazil subsequently adjusted its program, which became PROEX II, in order to implement the ruling. PROEX II included as a new benchmark, the U.S. Treasury bond interest rate, plus a 0.2% spread.<sup>335</sup> Canada challenged PROEX II before an Article 21.5 implementation panel, arguing that Brazil had not withdrawn its subsidies and that PROEX II was still not in compliance with the Subsidies Agreement.<sup>336</sup> The Panel and, after Brazil's appeal, the AB agreed on both counts, requiring Brazil to withdraw the ongoing subsidies granted under PROEX I and to bring PROEX II under compliance.<sup>337</sup>

Canada subsequently requested authorization under Article 22 to retaliate. Brazil objected to the level of suspensions and referred the matter to an Article 22.6 arbitration. The Arbitrator authorized counter measures in the amount of 344.2 million Canadian dollars per year.<sup>338</sup> Brazil adjusted its program one more time but Canada still considered this a continued violation of Brazil's SCM obligations. Thus, Canada requested a second Article 21.5 implementation panel, which analyzed whether Brazil's PROEX III program was in compliance. This time, the benchmark Brazil used was the OECD Arrangement. The Panel declared that it could no longer find Brazil's PROEX program to be a prohibited subsidy.<sup>339</sup> Canada decided not to appeal the ruling.<sup>340</sup>

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333. Appellate Body Report, *Brazil—Aircraft*, *supra* note 327, ¶¶ 176–77; see Panel Report, *Brazil—Export Financing Programme for Aircraft*, ¶¶ 7.23, 7.33, 7.37, WT/DS46/R (Apr. 14, 1999).

334. Appellate Body Report, *Brazil—Aircraft*, *supra* note 327, ¶ 181.

335. Panel Report, *Brazil—Aircraft—Recourse by Canada to Article 21.5 of the DSU*, ¶ 2.3, WT/DS46/RW (May 9, 2000).

336. *Id.* ¶ 3.1.

337. *Id.* ¶ 7.1; Appellate Body Report, *Brazil—Export Financing Programme for Aircraft—Recourse by Canada to Article 21.5 of the DSU*, ¶ 82, WT/DS46/AB/RW (Jul. 21, 2000).

338. Decision by the Arbitrators, *Brazil—Export Financing Programme for Aircraft*, ¶ 4.1, WT/DS46/ARB (Aug. 28, 2000).

339. The Panel found that PROEX III allowed Brazil sufficient discretion to discontinue subsidies when they conferred an advantage to regional aircraft. Panel Report, *Brazil—Export Financing Programme for Aircraft—Second Recourse by Canada to Article 21.5 of the DSU*, ¶ 5.55, WT/DS46/RW2 (July 26, 2001).

340. See Dispute Settlement: Dispute DS46, *Brazil—Export Financing Programme for Aircraft*, WORLD TRADE ORG., available at <http://tinyurl.com/7xhso6a> (last visited Mar. 18, 2012) (showing no further appeals).

What *Brazil Aircraft* made clear is that what initially looks like an outright prohibition, such as a measure that provides exports subsidies, can be interpreted or adjusted to become less restrictive than as first appears. Brazil managed to turn what initially looked like a very explicit and somehow inflexible prohibition in the SCM into a more permissive rule.<sup>341</sup> Brazil, a founding member of the WTO, not only did not gradually reduce its subsidies program to take advantage of the Article 27.5 exception for developing countries in the SCM Agreement, but actually doubled it. When Canada challenged the program, it took another five years before adjusting its subsidies to a level that was palatable to a WTO implementation panel.

Furthermore, an important part of this story is that soon after Canada had challenged Brazil's PROEX program, Brazil sued Canada in the WTO for a variety of measures that Brazil considered export subsidies in favor of Bombardier, Canada's aircraft manufacturer. The panel and AB found that some of Canada's measures were inconsistent with the SCM Agreement.<sup>342</sup> Brazil sued Canada a second time, challenging a variety of Canada's export credits and loan guarantees.<sup>343</sup> While most of the challenges were not successful, the panel decided that a Canadian program under the Export Development Corporation (ECD), was an export subsidy prohibited under the SCM Agreement. This dispute went to an Article 22.6 arbitration that granted Brazil the right to retaliate in the amount of \$247 million.<sup>344</sup>

Thus, this story shows that, through strategic litigation and lawyering, a state can assert and use its policy space to advance domestic agendas that it considers crucial to its economy.<sup>345</sup> Brazil experienced tremendous pressure throughout the dispute and was required to change its PROEX program, but it did so gradually, carefully testing the limits of the restriction and moving its measure to a threshold point where it could be considered permissible. Of course, this does not mean that WTO subsidy

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341. Cf. Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. INT'L ECON. L. 153 (2009) (arguing that the Brazil Tyre case similarly opens up policy space for developing countries).

342. See Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (Apr. 14, 1999); Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999).

343. Panel Report, *Canada — Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/AB/R (Jan. 28, 2002).

344. Recourse to Article 22.6 Arbitration Report, *Canada — Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 4.1, WT/DS222/ABR (Feb. 17, 2003).

345. This case, which started only one year after the WTO was created, mobilized the government of Brazil and made clear the need to be prepared to litigate and defend its interests in the dispute settlement system. It was a "wake-up call" for the government, but also to the private sector and civil society groups. Shaffer et al., *supra* note 217. The case became a matter of Brazilian foreign policy and national pride, which propelled trade relations to the center of the political scene in the country.

rules are free of constraints. After all, Brazil had to change its program and had to spend considerable resources in litigating disputes. However, at the very least, this case does show that an RP can succeed in defending a program it deems important for its domestic economic development and in ensuring that it does not overconform to the apparent restriction.<sup>346</sup>

Brazil's lawyering strategy achieved important benefits for its policy of supporting Embraer. First, it managed to keep the subsidies for aircraft purchase financing, even if at lower levels. Second, it managed to reduce the levels of subsidies that Canada accorded to Bombardier, its main competitor in the regional jets market, by getting the Panel and AB to declare that Canada was itself in breach of the Subsidies Agreement.<sup>347</sup> In addition, Brazil got permission to retaliate against Canada because it failed to bring its subsidies into compliance. The case that Brazil brought against Canada demonstrated that export subsidies are important for developed countries as well as for developing countries. Finally, Brazil's lawyering strategy got Brazil a ticket into OECD forum that sets the benchmarks for export subsidies that are excluded from the SCM Agreement prohibitions.<sup>348</sup> As a result, Brazil is now an active participant in setting up the standards for aircraft finance and can more closely advance its interests there.

#### D. *The Limits of Strategic Litigation*

It should be noted that pursuing a strategy of litigation as means for legal, but also social or economic change, carries the risk of legitimating the system by achieving gains that are more symbolic than material.<sup>349</sup>

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346. This is not to say that Brazil got all it wanted. The panel and AB could have accepted Brazil's argument that its program did not offer a "material advantage" and could not be considered a subsidy. There was also no basis to make the OECD benchmark, which is a "safe haven" for OECD countries export subsidies, the baseline for calculating "material advantage." As Robert Howse notes, this case necessarily rejected Brazil's position that the "marketplace" baseline in paragraph (k) "be adjusted to the needs and circumstances of developing countries" because it was not a special and differential treatment provision. This decision is particularly troublesome in view of the SCM's Art. 27.2 recognition that "subsidies may play an important role in economic development programmes of developing country Members." Howse, *supra* note 65, at 21–22. Howse notes that, as a result of this case developing countries have put this issue in the Doha Round negotiations. *Id.* at 22.

347. See Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R (Apr. 14, 1999); Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999); Panel Report, *Canada — Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 8.3, WT/DS222/R (Jan. 28, 2002).

348. Rattón Sanchez Badin, *supra* note 326, at 49. *But see* Howse, *supra* note 346, at 21–22 (arguing that baseline subsidies set by the OECD are insufficient to balance the difficulty of finding competitive access to capital in developing countries).

349. "Rule-change may make use of the courts more attractive to 'have-nots'. Apart from increasing the possibility of favorable outcomes, it may stimulate organization, rally and encourage litigants. It may directly redistribute symbolic rewards to 'have-nots' (or their champions). But tangible rewards do not always follow symbolic ones. Indeed, provision of symbolic rewards to 'have-nots' (or crucial groups of their supporters) may decrease capacity and drive to secure



This may create the impression that the transformation has been significant and that no further changes are required in the WTO system. The argument of the paper, however, is that a lawyering and litigation strategy should be viewed as complementary to diplomatic strategies with potential “legislative” and institutional changes in the context of Ministerial rounds, as well as with work in the various WTO technical committees,<sup>350</sup> public campaigns, and whatever other mechanisms developing countries can find to advance their interests. The project of becoming a RP and increasing legal capacity holds promise only if it is inspired by a development strategy. It is the furthering of that strategy that can work against conformism with illusory changes.

A potential objection to the project of carving out policy autonomy through litigation is that this is an agenda that only middle-income countries can undertake. According to this view, only relatively wealthy developing countries, such as Brazil and Mexico, have the economic and human resources to devise a strategy like the one I have described. Poorer countries have other priorities and do not have the resources or cannot invest them in such a gradual reform.

It might be right that this is a project that only middle-income countries, with a sizable economy and significant trade volume, would be interested or even capable of taking on. The list of current repeat players in the WTO suggests that currently it is primarily these countries that are involved in active litigation. Of course, this might change if litigation continues to be the main avenue for reform and poor countries enter the fold. However, even if this was a strategy out of reach for poor countries, there are two important points to consider. First, the asymmetries between poor and middle-income countries are also present in the negotiating rounds that seek legislative reforms. On this front, it is also middle-income countries that generally take the lead, have the resources, and are better situated to promote their interests. This raises a serious concern about representation of poor countries’ interests in the WTO regime but it is not a problem exclusive to the litigation strategy. The question is whether strategic lawyering and litigation might ultimately have something to contribute to the benefit of poor countries. Second, the changes in rule interpretation that middle-income countries obtain through litigation would be available and potentially beneficial for poor countries too.

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redistribution of tangible benefits.” Galanter, *supra* note 77, at 137.

350. See, e.g., Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT’L L. 575 (2009) (arguing that although most academic attention on the WTO focuses on the dispute settlement mechanism, there are important technical committees that disseminate information, facilitate technical assistance, and are influential in creating dominant interpretation of open-ended rules). For a qualification of this argument, bringing to the fore the centrality of states in WTO committees, see Richard H. Steinberg, *The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott*, 20 EUR. J. INT’L L. 1063 (2009).

Moreover, even if legislative reform were the preferable tack, the terms of the new agreements would still need to be interpreted and, again, those countries with better institutional capacity to be repeat players and to actively pursue their domestic economic interests would benefit the most. So, to the extent that their priorities allow, poor countries would do well to invest in developmental legal capacity.

It is important to mention the work of the WTO Advisory Center, which provides legal advice and legal counsel to developing countries at below market fees. The center has been praised for its professionalism and for facilitating access by developing countries to the WTO dispute settlement system. The center is a phenomenal resource for poor countries. It could be used as a way to jump-start and develop a country's institutional capability. But the center will focus on the specific case at hand and it seems unlikely that it will have the long-term interests of the country in mind. As useful as it can be, the center cannot be a substitute for having a development strategy. A country may use the center as part of its strategy but it cannot rely on the center to develop one.

This Article has adopted a state-centric analysis, looking at how countries may use lawyering and litigation strategies in pursuance of policy space. The assumption is that policy autonomy can be put in the service of a development strategy and that, indeed, the strategy is often the motivation to look for space in the first place. Furthermore, it is assumed that the international position of the state represents its national interest. This assumption is subject to limits and future research could complement this analysis with an account of how the state articulates its trade policy domestically: which sectors, interests, or groups, are benefiting from the state's strategy and based on what justifications? In other words, who wins when the state wins?

Even if one assumes that policy space is desirable, it is not clear that it should only be the task of developing countries or that they are always the best situated actors to expand the flexibilities in the WTO. As it has been noted in the Article, developed countries are already doing this to accommodate their interests and the question is how developing countries may fend for themselves. However, there is no reason to limit the analysis to states. Future research can expand on how other stakeholders of the international trade regime, such as NGOs may advance expansion of policy space either by acting domestically or by further opening the WTO to their participation.

#### CONCLUSION

This Article has argued against the commonly held assumption that WTO legal obligations overly restrict countries' regulatory autonomy.

Despite the presence of restrictions, there is still flexibility in the system for countries to carve out regulatory space for themselves. That countries can expand their policy autonomy shows that governments of developing countries have more agency and responsibility than development scholars typically admit. At the same time, however, the asymmetry of power and resources between countries does affect their experience in the system and thus influences the outcomes to a greater extent than liberal trade scholars usually acknowledge.

This Article provided an account of how countries are creating policy space in a way that is currently underappreciated in existing academic literature. This space relies on the ability of countries, as RPs, to make use of textual open-endedness in legal obligations, to seek out favorable rule interpretation, and to actively participate in the WTO system through strategic lawyering and litigation. To pursue this strategy, countries invest in “developmental legal capacity,” through which governments recognize the need to make gains in policy autonomy in order to pursue economic policy goals that may be in tension with the WTO’s free trade objectives.

This Article drew on two case studies to examine the availability of policy space within WTO obligations and the role of developmental legal capacity. It analyzed the trajectories of Brazil and Mexico in the WTO to show two different experiences of RPs. The divergent lawyering and litigation experiences of Brazil and Mexico reflect different attitudes towards the free trade regime inaugurated by the WTO. Mexico seems to have considered WTO membership — part of its trade liberalization policy — as a strategy for economic growth in itself. Its participation in the regime has been mostly to ensure market access for its domestic producers abroad and to defend its own market from what it considers unfair competition. It has largely abandoned its powers to selectively promote specific sectors in which it may create comparative advantages with greater growth potential. In contrast, Brazil seems to have combined a strategy to promote market access for its exports with domestic measures to promote economic sectors it considers valuable. When other countries in the WTO have challenged those measures, Brazil has defended them by seeking to expand its policy space within the system. In this way, the experience of Brazil seems to show that, claims to the contrary notwithstanding, states can take an active role in the promotion of their domestic industries and their economic future, even under WTO constraints.

The lesson to draw from the experience of Brazil and Mexico is not that one trajectory is better than the other. Rather, the lesson is that the economic trajectory depends, not only on the international trade regime, but also on the domestic economic strategy of each country. Therefore, the responsibility of the virtues and vices that one may associate with each

of these divergent strategies must be placed largely on the domestic government and the economic policies it has decided to follow.

To say that we should turn our attention to the domestic economic policies is not to say, however, that the international legal framework is unimportant. Rather, it is to say that despite the international constraints, countries can expand their policy space — if they deem it desirable — and find room for policies they want to advance. The Article recognizes that there are limits to what countries can do. Not all rules are ambiguous and subject to favorable interpretation. Not all strategic lawyering will turn to an advantage either. Moreover, carving out policy space requires significant resources — material, human, political — that not all countries may easily muster in order to become RPs. Poorer countries may therefore experience greater limits — real or apparent — imposed by the international trade regime. However, to show that countries subjected to similar international obligations can pursue divergent trade and development policies is to make clear that there is policy space and that this space can be put to different uses with divergent outcomes.

This Article has sought to challenge the argument, commonly made by developing countries' governing elites, to wit that their country's legal obligations "tie their hands" and command them to act in a specific way. Instead, the Article calls attention to the agency of developing countries' governments. While recognizing that there are important limits set by the architecture of the WTO and the asymmetry of power between its members, the Article argued that there is flexibility within the system to expand developing countries' regulatory autonomy beyond what is currently recognized. Developing countries' governments should bear responsibility — and their citizens should hold them accountable — for the kind of developing strategy they pursue, or refrain from pursuing, within the international trade regime.