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REVIEW ESSAY

Sovereignty and Developing Countries: Current Status and Future Prospects at the WTO

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W. Shan, P. Simons, and D. Singh (eds.), *Redefining Sovereignty in International Economic Law*, Oxford and Portland, OR, Hart Publishing, 2008, ISBN 9781841137018, 516 pp., £60.00 (hb).

G. A. Bermann and P. C. Mavroidis (eds.), *WTO Law and Developing Countries*, Cambridge, Cambridge University Press, 2007, ISBN 9780521862769, 380 pp., £45.00 (hb).

1. Introduction

Globalization, as evidenced in increased trade, economic development, and the emergence of new global powers, has meant that the world economy has undergone significant changes over the past two decades. The World Trade Organization (WTO) is more than a potent representation of these developments, it is often seen, along with its predecessor, the General Agreement on Tariffs and Trade (GATT), as having enabled the process of globalization. However, there are profound concerns about what lies ahead in an increasingly complex economic and regulatory setting, in particular for developing countries (DCs).

Specifically, many of these concerns relate to the ostensible North–South divide in international trade. This divide between developed and developing countries is typified by complaints that developed countries are trying to impose their own high standards, be they environmental, human rights-related, or otherwise, on DCs.[1] Should trade measures such as import bans or higher tariffs be used on the basis that another country is harming the environment or perpetrating human rights abuses? How should the relevant definitions and criteria be set? Or should these questions be resolved by the individual countries concerned? These are difficult issues to resolve and they are proving to stand in the way of progress at the current WTO Doha Round of trade negotiations.[2]

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1 R. Senti and H. Mahncke, *A Guide to the World Trade Organization* (2008), 39–43.

2 The Doha Round is the ninth round of GATT and WTO negotiations held since 1947. It commenced in 2001 with the aim of achieving further trade liberalization and an improved regulatory framework, especially with a view to helping developing countries.

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At the heart of these questions lies the issue of sovereignty. There are two conflicting positions which are located at opposite ends of the spectrum. On the one hand there are those who insist that, as sovereign entities, states have the exclusive authority to make their own decisions. In other words, the WTO is akin to a discussion forum and subjection to the disciplines of WTO law is voluntary, renegotiable, and revocable.[3] On the other hand, there are those who suggest that there has been a paradigm shift away from the old Westphalian system of statehood and that the WTO has, in the form of decision-making powers, assumed some of this sovereignty which used to rest with states.[4] Put another way, these opposing views are represented by those who continue to view international trade relations as largely uni- and bilateral engagements and those who take a multilateral perspective.[5] The commonality between these divergent views is that whoever holds sovereignty controls the rule-making discourse, which is why these are important matters to be considered more closely.

Two recent books aspire to bring some clarity to the sovereignty debate in international economic law. The first book, *Redefining Sovereignty in International Law* (hereinafter *Redefining Sovereignty*), is the product of a Society for Legal Studies symposium held in 2006 at Oxford Brookes University. It centres on the notion of state sovereignty, traditionally founded on the Westphalian system of statehood, and ponders whether the emergence of international economic and monetary institutions has altered the traditional view of sovereignty. Have the forces of globalization transformed the established Westphalian model of independent states into a system of interdependence among states? The second book, *WTO Law and Developing Countries* (hereinafter *WTO and DCs*), is more specific in that it looks at the issue of sovereignty from the perspective of DCs. It asks whether the concept of 'special and differential treatment', whereby DCs are given exceptional leverage in terms of their trade commitments and therefore a seemingly higher degree of sovereignty, is a useful mechanism for catalysing development.

Each book tackles its research questions by presenting a collection of essays whose overarching theme is to assess the positioning of sovereignty in a globalizing world of trade. The present study is not meant to be a classic book review but rather an essay which seeks critically to explore the current status of sovereignty in the WTO context by drawing on the various contributions in these two recent publications. The research task of this paper is to trace the location of sovereignty at the WTO, particularly in relation to DCs, on a spectrum ranging from Westphalian independence of states to interdependent internationalism. Have individual WTO members retained sovereignty in economic affairs or has such sovereignty been

3 The WTO itself, on its website, states that 'Above all, [the WTO] is a negotiating forum', www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited 30 September 2008); see also J. A. Marchetti in *WTO and DCs*.

4 See, e.g., J. H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006).

5 Strictly, there are also those who maintain that, as a consequence of globalization, sovereignty over economic matters rests with neither states nor international organizations, but rather with private enterprise. However, a review of such unconventional perspectives would go beyond the scope of the present study, especially as only countries and customs territories are able to join the WTO. See S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (2006).

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transferred to other countries or to the WTO itself? If so, to what extent?[6] The structure of this study is as follows. In the first section, the two books in question are briefly introduced. The next section looks at sovereignty in international trade, as seen from competing viewpoints and as set out in the two books. This forms the basis for the subsequent discussion, which will draw on salient points in attempting to identify common ground and tracing the position of sovereignty within the WTO today. Lastly, a brief summary and an outlook are offered.

2. *Redefining Sovereignty* and *WTO and DCs*

2.1. *Redefining Sovereignty in International Economic Law*

Redefining Sovereignty consists of 17 essays and is divided into five parts. The first part consists of four essays, including what are probably its most notable contributions – J. H. Jackson's 'Sovereignty: Outdated Concept or New Approaches' and R. Howse's 'Sovereignty, Lost and Found' – which reflect on the notion of sovereignty in international affairs from an abstract, historic, and theoretical perspective. In the other four sections the interaction with state sovereignty of the specific topic areas of trade, investment, banking, and human rights is discussed.

In the first part Jackson and Howse put forward contrasting viewpoints on the theory of sovereignty and these can be neatly juxtaposed. Vaughan Lowe's short contribution skilfully encapsulates some of the salient points underlying the theory of sovereignty. Unfortunately, Petersmann's essay focuses heavily on the human rights angle and does not fit into the discourse of the first section. The next section deals with the specific relevance of the sovereignty debate to the trade law sphere and features four articles. P. M. Nichols, in 'Sovereignty and Reform of the World Trade Organization', provides a clear picture of the discourse between national sovereignty and international trade rules. A. Qureshi, in his 'Sovereignty Issues in the WTO Dispute Settlement – A "Development Sovereignty" Perspective', like most of his peers, contends that sovereignty is a multifaceted term which he tries to dissect in relation to WTO adjudication with DC involvement. The subsequent section deals with the issue of sovereignty as reflected in international investment treaties. It consists of three essays, whereby the first, by Sornarajah, strays seriously off-target, digressing into conspiracy theories about a neo-liberal agenda. In contrast, Karl and Shan (one of the co-editors of the book), offer a scholarly review of the status of sovereignty in investment treaties and investment arbitration. Sovereignty is then explored in respect of financial institutions and governance. The three contributions by Chatterjee and Lefcovitch, Guira, and Singh (another of the co-editors) are technically detailed and impressive accounts of how aspects of the banking system work and of the close correlation between a sturdy banking system and a healthy degree of development. The final section closes the circle by returning to the beginning and, in particular, to Petersmann's contribution on the human rights discourse. The articles by Lang, Simons, and Schneiderman are detailed studies of

6 While the meaning of the term 'sovereignty' is subject to debate, the present study, by asking who determines the terms of trade in the WTO context, will focus on its meaning in a narrow sense, as defined in section 3.

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the relationship between DCs, human rights, and the international trade regime, in particular the educational role of the WTO, the rules for agricultural trade, and the case of South Africa.

It is an inherently difficult task to put together a collection of diverse essays connected by an ambitious theme. This book exemplifes the difficulties, as many of its contributions do not fit the ostensible thrust of the book.

2.2. *WTO Law and Developing Countries*

WTO and DCs picks up on the development theme by examining the status of DCs within the WTO framework in a volume of 12 essays and some related commentary. The two editors, Bermann and Mavroidis, who do not contribute essays of their own, set the bar high, contending in the very first sentence that they have 'put together an internally coherent series of papers' (p. 1). Their task is made easier by the fact that this volume is narrower in scope than *Redefining Sovereignty*. Its emphasis is placed on the term 'special and differential treatment' which encompasses (positive) discrimination in favour of DCs under WTO law.

The first chapter, 'The Legal Status of Special and Differential Treatment Provisions under WTO Agreements', sees E. Kessie providing the necessary background to understanding the WTO and DCs by setting out and explaining the special and differential treatment standard within the framework of WTO law and by looking at cases and interpretations. N. Limao and M. Olarreaga, in 'Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization', then examine the economic case for and against special preferences. Next, F. M. Abbott, in 'China in the WTO 2006: "Law and Limitations" in the Context of TRIPS', discusses the case of China and the alleged failure to implement the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[7] The discussion then moves to the topic of services trade, as regulated in the General Agreement of Trade in Services (GATS).[8] In this area, J. A. Marchetti, in 'Developing Countries in the WTO Services Negotiations: Doing Enough?', finds that DCs have been playing an active role in WTO discussions but not necessarily with the effect of advancing liberalization. M. L. Busch and E. Reinhardt, in 'Developing Countries and GATT/WTO Dispute Settlement', evaluate DCs' participation in dispute settlement and identify problems relating to legal representation. N. Meagher, who has personally represented DCs in legal proceedings at the WTO, in 'Representing Developing Countries in WTO Dispute Settlement Proceedings', sees practical and resources problems beyond the sphere of legal representation as the biggest obstacles to DC participation. M. Diego-Fernandez, in 'Compensation and Retaliation: A Developing Country's Perspective', describes the remedial side of WTO dispute resolution. In an insightful comment J. P. Trachtman argues that the WTO does not normatively demand compliance by all means. Instead, sometimes, a government may choose to bear the costs of remaining in breach if this is to the benefit of its constituents.[9] The

7 GATT Secretariat, *The Results of the Uruguay Round of Trade Negotiations – The Legal Texts* (1994), 321–52.
8 Ibid., at 286–319.
9 Such conduct is termed 'efficient breach'. See A. Hatzis, 'Civil Law and Economic Reasoning: An Unlikely Pair', http://papers.ssrn.com/sol3/papers.cfm?abstract.id=661661 (last visited 31 December 2008).

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next chapter, 'A Preference for Development: The Law and Economics of GSP', sees G. M. Grossman and A. O. Sykes revisiting the Generalized System of Preferences (GSP) litigation involving the European Communities (EC) and India. J. Kenners traces the development of the GSP scheme in the EC. In 'The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds', A. Tomazos offers a critique of the Appellate Body's decision in the GSP case, in terms of both its legal merits and its broader implications. In the last section, and in what is effectively a recapitulation of the arguments of this volume, P. Low, in 'Is the WTO Doing Enough for Developing Countries?', asks whether the WTO is doing enough for DCs. In a short but insightful comment W. J. Ethier lauds Low's contribution and highlights the role played by the Uruguay Round, which led to the establishment of the WTO, in catalysing reform in many countries.

The collection of essays in *WTO and DCs* is internally largely coherent, although the authors might have considered repositioning some essays, such as Abbott's contribution, or connecting the special and differential treatment debate with the GSP case, to facilitate a more logical build-up of the narrative.

3. Competing positions on sovereignty

The overarching theme of these two volumes is the position of sovereignty in today's world trade system. Has sovereignty on trade matters been transferred to the international level or does it remain with individual states? As alluded to above, the competing positions in this area are represented by those who espouse the Westphalian model and those who advocate a post-Westphalian order, characterized by rule-making on the multilateral level. In relation to the two books, the two main protagonists in articulating these competing views are Howse and Jackson. In order to trace the current state of sovereignty, the two opposing positions are outlined below.

The term 'sovereignty' precipitates a multitude of interpretations which continue to be a source of vibrant debate in the legal and other scholarly communities.[10] The present study concentrates on the traditional view of state sovereignty under the Westphalian system of statehood[11] as categorized by independence, equality, and immunity (Jackson, *Redefining Sovereignty*). Jackson explains independence as a state's monopoly on maintaining rule-making powers within its borders, state equality is defined by the system of 'one-country-one-vote', and immunity denotes the immunity of state officials (pp. 3–7). It should be noted that, while the system is formally characterized by independence and equality, the consequence of independent rule-making, especially in the world of international trade, is that stronger countries can impose their views on weaker ones. Indeed, it was one of the goals of both the GATT and the WTO to counteract such tendencies, in particular by imposition of the Most

10 H. Steinberger, 'Sovereignty', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 2 (2000), 518; N. Walker, *Sovereignty in Transition* (2003); R. Jackson, *Sovereignty: Evolution of an Idea* (2007).

11 Treaty of Westphalia, 24 October 1648, available at http://fletcher.tufts.edu/multilaterals.html (last visited 31 December 2008).

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Favoured Nation (MFN) non-discrimination rule.[12] Put another way, instead of using the prerogative of a sovereign state to determine the terms of trade autonomously and individually for each and every trading partner, the MFN rule demands that all countries be treated uniformly.

3.1. Post-Westphalian sovereignty

While it is still individual countries, and not the WTO, which set the terms of trade, adoption of the MFN rule in 1947 signified a move away from Westphalian sovereignty in the area of international trade law. Individual countries were no longer entirely autonomous in setting trade policy. Jackson develops this theme by positing that decision-making powers which used to rest with states are now held by other bodies, such as international organizations. He calls this evolving new system 'sovereignty-modern' (p. 7). This system is made up of the constituent parts of a disaggregated understanding of the term 'sovereignty'. While some elements of traditional state sovereignty should be maintained to endow the new system with legitimacy, other decision-making powers should be transferred to international organizations.

Jackson uses the WTO as his main exemplar. He finds that individual states can no longer effectively regulate market forces in a globalizing economy. The WTO, as an organization whose decisions widely affect national sovereignty, is said to be taking up some of the relevant decision-making powers, in particular through its court, the Dispute Settlement Body (DSB). Transfer of sovereignty, defined as rule-making power, to international organizations is deemed to be important for two main reasons. First, international organizations provide so-called 'co-ordination-benefits', which are premised on the assumption that if everyone in international trade acts in their own interests, more harm is done than if such interaction is co-ordinated.[13] Second, the current system implies a 'race to the bottom', whereby regulatory competition between sovereign states leads to a degradation of, among others, social and environmental standards.[14] While he rarely ventures into specifics, the subtext for Jackson's deliberations is that international organizations must be tasked with setting internationally applicable norms and that this is an ongoing process.

Jackson criticizes the Westphalian system in the context of international organizations generally and within the WTO sphere specifically. He finds that the old system is prone to misuse in various ways. For instance, the strong predisposition of international institutions to operate on a 'one-country-one-vote' basis distorts the decision-making processes in those bodies. He points out that this system potentially allows 5 per cent of the world's population to command a majority

12 WTO members are obliged to accord all advantages, favours, privileges, and immunities which they accord to any one country, or to a national of another state in relation to trade in goods, services, or as regards intellectual property rights, immediately and unconditionally for like goods, services, and intellectual property rights, to all other WTO members and their nationals. See Senti and Mahncke, *supra* note 1, at 2, 25–9.

13 C. Coglianese, 'Globalization and the Design of International Institutions', in J. S. Nye and J. D. Donahue (eds.), *Governance in a Globalizing World* (2000), 298–300.

14 J. H. Jackson, 'International Economic Law in Times that Are Interesting', (2000) 3 *Journal of International Economic Law* 3.

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within the United Nations. This system also means that the EC has 27 votes at the WTO, while the United States has only one. Jackson further criticizes the consensus based decision-making procedures which seem to be the preferred approach in international organizations and which have their roots in the old GATT system. Specifically, the current system is said to be creating difficulties in reaching agreement in areas such as product safety standards, competition policy, environmental protection, and cultural and heritage preservation.[15] Jackson argues that the old sovereignty system needs to be overhauled to be able to face these modern challenges.

Nichols's view of sovereignty mirrors that of Jackson in that he regards it as a fluid and evolving concept. Although he argues that sovereignty cannot be defined, he holds that whatever sovereignty entails, all countries have some and some countries have more. In the WTO context, countries have come together to cede some of their sovereignty voluntarily. Historically, in early trade agreements this meant that governments surrendered some control over their customs territories, for example, by agreeing on maximum tariff levels. However, Nichols asserts that this definition no longer suffices. Border tariffs are only one, increasingly small, aspect influencing international trade. A new protectionism, embodied in measures such as restrictive government procurement, product and environmental standards, and safety rules, is said to be emerging. Indeed, in many cases, it is no longer the national government that sets the relevant rules but sub-national entities and firms. Thus, given the evolving understanding of sovereignty, in particular in terms of the protagonists, Nichols surmises that the WTO will need to adjust and include other sovereigns.

3.2. Westphalian sovereignty

In contrast, most commentators in these two volumes believe, as a matter of fact but not necessarily as a matter of preference, that Westphalian sovereignty is alive, well, and here to stay.

In *Redefining Sovereignty* Howse, while welcoming the recognition of some normative constraints on national sovereignty, for instance in the area of human rights, feels that it would be impetuous to regard this as the advent of a new era of global constitutionalism. His main hypothesis is that, contrary to common wisdom, sovereignty still rests firmly with nation states. What is more, Howse feels that international organizations have smoothed the way for states to expand and entrench their existing sovereignty, providing several examples to underline this proposition. For instance, the Chinese central government is said to have used its accession to the WTO as a means of seizing back powers from provincial and local governments.[16] In other words, legislation implementing WTO rules is drafted in Beijing and enforceable throughout the country, thereby extending Beijing's reach. Further, in painting WTO entry as an object of national prestige, the Chinese central government

15 Jackson seems to neglect that, although there is a history of consensus decision-making, the WTO Agreements provide for decision-making by majority. See Senti and Mahncke, *supra* note 1, at 17–18.

16 M. Gallagher, 'China's Accession to the WTO: The Legal Perspective', Chinese Law Society Symposium, University of Michigan School of Law, 11 April 2001.

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has forced all sub-national entities to toe the line. The example of Panama is also discussed. Here, Howse stresses that entry into the WTO was guided by a belief on the part of the government that, by subjecting Panama to the rigours of international rules, it could combat vested interests and corruption, thereby strengthening sovereignty.[17] Other examples provided by Howse are those of Brazil and India, which, although they are nascent 'big players' in the world economy, continue to exercise a high degree of control over domestic economic and social policies, as well as outcomes. He cites a 2005 study of the effects of WTO law on political and social outcomes in a number of member countries.[18] The study concludes that, in most cases, national governments and domestic structures are instrumental in determining outcomes. The influence of the WTO and its legal regime was found to be limited. While these examples relate mostly to internal sovereignty, the ramifications can extend beyond the domestic setting. A government which is strong domestically will likely have more to say internationally. This is illustrated by the example of China, specifically the dispute between China and the United States over the value of the Chinese currency, the yuan. Although both the WTO and the International Monetary Fund (IMF) provide rules and instruments to deal with such disputes, the two parties chose to address the issue through bilateral negotiations (pp. 67–9). This suggests that international organizations are bypassed and that relative bargaining power remains a significant factor in the outcome of trade disputes.

Howse concludes that international law in general and the WTO in particular, rather than being an instrument for ceding national sovereignty, are used by many states as a means to project their sovereignty domestically and around the world. Although he would prefer more multilateralism, Howse views the sovereignty debate from a realist's perspective, characterized by the mantra of *qui regit, rex est*.

In *WTO and DCs* Marchetti makes a very similar argument in the narrower context of services trade, the second main pillar of the WTO. He views the WTO as a debating club, which, although it has some benefits, should be seen as tangential to measures taken domestically. While services are undoubtedly one of the most important aspects of economic development, there are some inherent limitations, which do not apply to goods. One of the biggest stumbling blocks in relation to services is that they often require the presence of natural persons in foreign countries. In this respect trade and immigration laws intersect. Marchetti holds that little has been achieved so far at the WTO in respect of the temporary movement of persons, especially those from DCs. He further postulates that services liberalization is desirable even if it is carried out unilaterally, and that it must include domestic regulatory reform. The author acknowledges the WTO's 'scapegoat role' in this process, whereby painful measures are made palatable and credible in the eyes of domestic constituents by 'blaming' WTO commitments. The real action, however, is said to take place in

17 A. Ferrer, *Accession of Panama to the WTO: Implications for Developing Countries Joining the World Trade System* (2001), 182–5.

18 M. Gallagher, P. Low, and A. L. Stoler, *Managing the Challenges of WTO Participation: 45 Case Studies* (2006), 21–2.

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the domestic setting, suggesting that sovereignty in services trade rests firmly with national governments.[19]

In the area of intellectual property, the last of the three main pillars of the WTO, Abbott argues that there is a distinct divide between those countries who benefit from enforcement and those who do not. China, a country which is not yet generating substantial amounts of intellectual property, is said to be currently better off not enforcing intellectual property rights. At some point this balance may tip. Abbott describes how the WTO, through TRIPS,[20] has created artificial incentives for the enforcement of intellectual property rights, for instance by imposing penalties in cases of non-compliance. Such penalties can include WTO extraneous sanctions, such as sanctioning breaches of intellectual property rights held by firms and individuals of the offending country. However, while Chinese-owned intellectual property rights are in short supply, there are few incentives on the Chinese side to comply with the relevant rules. Abbott suggests striking a balance between what is achievable and what is desirable. The implication is that sovereignty in the area of intellectual property rights enforcement is still largely a matter for national policy- and decision-making, as well as bilateral negotiations.

With regard to DCs, Low, by arguing that DCs must take responsibility for their own outcomes, seems to side with Howse and Marchetti by regarding the traditional system of sovereignty as prevalent. While Low does not endorse the redeeming features of traditional notions of sovereignty in the way that Howse does, he does acknowledge that countries are responsible for their own plight, at least in part. In particular, he points out that DCs have banded together to block liberalization progress at the WTO. In turn, exercise of their sovereignty in this manner is setting them back economically. Similarly, he identifies a problem whereby it is often the DCs themselves that stifle progress in other DCs by employing their sovereignty to impose protectionist trade measures. In other words, even DCs, especially when they act together, have retained sufficient amounts of traditional sovereignty to influence outcomes.

4. The present status of sovereignty at the WTO

Westphalian and post-Westphalian sovereignty represent the two ends of the sovereignty spectrum and one might therefore assume that the present status of sovereignty at the WTO is located at an intermediary point along it. Yet this does not seem to be the case. It is noticeable that a majority of authors describe the status quo as a manifestation of the Westphalian system, even if this view conflicts with their personal preferences. Indeed, almost all authors aspire to a post-Westphalian order in international trade. The difference between the various positions seems to be that while some authors envision the international trade discourse as heading in the desired direction, most are resigned to a reality where relations between

19 This conclusion is supported by the voluntary nature of the MFN and National Treatment commitments under GATS. See Senti and Mahncke, *supra* note 1, at 73–5.

20 Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 7, at 321–53.

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WTO members are becoming more Westphalian, not less. It is noteworthy that, aside from a few contributions such as Nichols's, neither book focuses on the capacity of private entities to seize sovereign powers. The common view seems to be that while private companies and bodies, such as standard setting agencies, have gained influence over regulatory and policy decisions, they have done so by petitioning their national governments, and thus that is where the power remains vested.

In the light of the undeniable and increasing economic interdependence between countries, as evidenced for instance in energy and commodity dependence, such an assessment of the status quo and of future prospects seems somewhat counterintuitive. However, the evidence that sovereignty continues to rest with individual countries is compelling. Indeed, as Howse in particular has shown, some countries have not only retained sovereignty but have used the WTO to expand it for their own benefit.[21] This is a perspective originally articulated by Jennings, who put forward the proposition that some states, by joining international organizations, 'acquire new and different, and international powers'.[22] In the WTO context, such expansion involves both internal and external sovereignty, the latter of which is usually obtained at the expense of smaller and developing countries (see, e.g., Howse in *Redefining Sovereignty*, and Limao and Olarreaga and Diego-Fernandez in *WTO and DCs*). This view falls within the school of thought previously developed by de Vos, who has advanced the theory that special and differential treatment regimes have undermined DC sovereignty by forcing them to accept trade terms laid down by economically stronger countries.[23] A similar view has recently been expressed by Harpaz, who contends that the contingent nature of trade preferences has detrimental effects for DCs.[24] If sovereignty has indeed been recaptured, retained, and enlarged by individual countries, what is the role of the WTO, how will DCs fare, and what does the future hold?

4.1. Free trade areas

The most significant argument against the existence of a post-Westphalian order is that no regulatory powers have actually been conferred on the WTO and countries are bound only by the rules to which they agreed, such as the MFN discipline. In other words, the WTO is not entitled to make rules and all that member states have agreed is to constrain their own rule-making in certain ways. Moreover, even the MFN principle, perhaps the WTO's most prominent restraint on state sovereignty, is increasingly being subverted.

21 See section 3.2. above.

22 R. Jennings, 'Sovereignty and International Law', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002), 35–8.

23 E. de Vos, 'The Cotonou Agreement: A Case of Forced Regional Integration?' in Kreijen, *supra* note 22, at 507–12.

24 G. Harpaz, 'Regionalism, Economic Interdependence, Approximation of Laws and their Impact on Sovereignty, National Identity, and Legitimacy: The Euro-Med Case', in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (2008), 315–18.

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Specifically, according to Limao and Olarreaga, free trade areas (FTAs)[25] are progressively undermining the efficacy of MFN status. Countries that form an FTA are not obliged to extend the benefits of such agreements to other WTO members. In recent years, FTAs have spawned to an extent where they are suffocating multilateral trade liberalization. Trade benefits are not extended to all WTO members, but only to FTA participants. Further, FTAs, in terms of both their formation and their operation, lend themselves to the old order, to power-based rule-making. Economically powerful FTA partners set the agenda and the rules.[26] This is particularly relevant in the area of bilateral FTAs.[27] Aside from unequal bargaining power, Ethier suggests that FTAs can also have a detrimental effect on DCs, as trade is diverted from them to FTA members.

Given the ongoing inability to progress the Doha Round negotiations and the bleak economic outlook, it is expected that dominant trading countries will continue to forge new trade routes by using the FTA path, thereby enhancing their own sovereignty and further diminishing MFN and multilateralism.

4.2. The Generalized System of Preferences

Aside from FTAs, the Generalized System of Preferences (GSP) also undermines the MFN principle. Specifically, with the introduction of the GSP and the 'Enabling Clause' in the 1970s, it became allowable for GATT parties to grant special and differential treatment to DCs without having to offer such treatment to other countries.[28] Although this scheme was aimed at helping DCs in their development efforts by granting them superior terms of trade, it can be argued that the effect has been the reverse, in terms of both development and the surrender of sovereignty.

For instance, says Kenners, the GSP scheme in the EC has transformed itself from having mainly economic aspirations in the early years to its current format, which incorporates a comprehensive policy regime designed to promote human rights, democracy, and other standards. In other words, preferential trade conditions are subject to human rights stipulations or other caveats. While this may be desirable from a normative perspective, the consequences on the WTO side are that the principle of unconditionality which is embedded in the MFN principle has been relinquished, along with the MFN principle itself. In turn, this means that countries that are able to offer special and differential treatment are in a position to dictate the terms of trade.

Limao and Olarreaga point out also that there is empirical evidence to suggest that the stagnation of multilateral liberalization through the Doha Round is having

25 The conclusion of free trade agreements is authorized by Article XXIV of the GATT and Article V of the GATS, *supra* note 7.

26 Senti and Mahncke, *supra* note 1, at 27–9.

27 There are numerous examples of unequal bargaining power in bilateral FTA negotiations. For instance, during the US–Singapore free trade negotiations, the United States insisted on imposing an obligation on Singapore to introduce a generic competition law into its national legislation. See ch. 12, 2003 US–Singapore Free Trade Agreement, signed 6 May 2003, entered into force 1 January 2004, available at www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html (last visited 31 December 2008).

28 Senti and Mahncke, *supra* note 1, at 27–9.

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a negative effect on the quantity and quality of unilateral preferences granted to DCs via the GSP scheme. To compound the problem, they suggest that DCs are stifling advancement of WTO negotiations in order to protect their own GSP benefits, which they feel might be watered down if there was more multilateral liberalization. One particular area with potentially huge liberalization benefits is government procurement, but, Low states, DCs have, by flexing their collective muscles, prevented negotiations on this issue. Effectively, special and differential treatment is subverting liberalization as there are incentives for both developed countries and DCs to undermine multilateralism. While Limao and Olarreaga suggest replacing special and differential treatment with alternatives such as an import subsidy regime, such a scheme, even if it could be devised, is unlikely to see the light of day as the current system of special and differential treatment has become an entrenched part of many country's trade policies.

Indeed, Tomazos points out, the WTO's Appellate Body, by ruling that it may sometimes be allowable to discriminate among DCs within the GSP framework, has created further incentives for countries to maintain special and differential treatment regimes. Also, by permitting discrimination in some circumstances, J. L. Dunoff, in *WTO and DCs*, states that the Appellate Body has assigned itself the role of deciding which preferences are desirable and which ones are not, thereby effectively adjudicating on policy matters rather than on law. Similar problems have also arisen in relation to the GATT Article XX exceptions where the courts have opined on the relative desirability of various policy choices.[29]

Generally, any instance of discrimination invites calls for more discrimination, which is why less discrimination is preferable. Grossman and Sykes make the point that where one country extends preferences on the basis of environmental stipulations, another might wish to do so on the basis of drugs enforcement or any number of other areas. In the context of sovereignty, any scheme which is not based on MFN treatment would tend to have the effect of reviving the old system of determining terms of trade on a basis of who holds the most leverage. This situation is not unlike the Westphalian model. Put bluntly, if a country wants the benefit it needs to do what the stronger country demands. While, in the case of GSP, the bargaining power is ostensibly used to achieve virtuous ends, the questions raised are whether trade policy should be used to achieve non-trade-related ends and who determines the virtuousness of any given policy. Ironically, for all their good intentions, both special and differential treatment regimes and FTAs have led to a dilution of MFN status, which, in turn, has diminished DC sovereignty and thwarted DCs in their quest to achieve equal footing in international trade.

4.3. Dispute settlement

As the Appellate Body's deliberations in the GSP case demonstrate, the WTO courts have assumed powers which seem to go beyond judging whether measures are lawful and reach into the realm of whether or not they are desirable. The difference may be

29 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Report, adopted 6 November 1998, AB-1998–4, WT/DS58/AB/R, paras. 153–155.

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nuanced, but if and when the courts take on oversight over policy preferences, the loss of state sovereignty may extend beyond mere adherence to trade rules.[30] Thus, having seen how sovereignty has been recaptured by individual countries as a result of the demise of the MFN discipline, the dispute settlement system may stand as perhaps the only area of governance within the WTO where sovereignty has been effectively transferred to the international level.

While it is true that the courts have asserted themselves on numerous occasions, sometimes perhaps going beyond their remit,[31] and while, unlike in the previous GATT regime, WTO dispute settlement is binding on the parties to a case,[32] in reality the effect of ceding sovereignty to the WTO's Dispute Settlement Body is limited. Trachtman suggests that, since the WTO courts have no bailiff, their powers are limited to the extent that countries can choose to ignore judgments, remain in breach, and simply put up with possible sanctions. Additionally, as the *EC – Bananas* cases have shown, a lengthy process must be borne out before arriving at the remedial stage.[33] Even where a country has gone through this lengthy process, the remedy may be unsatisfactory. A good case in point is the 2005 *US – Gambling* litigation, in which Antigua and Barbuda successfully challenged a US ban on offering gambling services over the Internet.[34] Given the unequal bargaining power of the two parties involved, the Antiguan court victory could be regarded as a manifestation of a post-Westphalian order. However, by 2007, the United States had failed to comply with the Appellate Body's decision and a WTO arbitration panel found that Antigua was entitled to retaliate by suspending concessions.[35] The value of concessions to be suspended totalled a mere US$21 million and thus the United States could easily afford to remain in breach. While the operation of the dispute settlement system has meant a reduction of sovereign power for individual member states, in

30 Another development which suggests that the courts have seized a measure of legislative authority is the fact that, at the Appellate Body level, previous decisions tend to be treated as binding on future courts. See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Appellate Report, adopted 20 May 2008, AB-2008–1, WT/DS344/AB/R, para. 160: '[A]bsent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.'

31 For instance, by allowing discrimination among GSP beneficiary countries; see *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Appellate Report, adopted 7 April 2004, AB-2004–1, WT/DS246/AB/R. Or by reviewing anti-dumping measures in a manner which may contravene Article 17(6)(ii) of the Anti-dumping Agreement; see *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing')*, Appellate Report, 18 April 2006, AB-2006–2, WT/DS294/AB/R. Or by interpreting the GATT Article XX exceptions broadly, *supra* note 29.

32 Senti and Mahncke, *supra* note 1, at 18–21.

33 This case commenced in early 1996 and remains unresolved. See *EC – Regime for the Importation, Sale and Distribution of Bananas*, Panel Report, adopted 25 May 1997, WT/DS27/R; Appellate Report, adopted 9 September 1997, WT/DS27/AB/R; *Arbitration under Article 21.3.c*, Decision by the Arbitrator, WT/DS27/15, 7 January 1998; *Recourse to Arbitration by the EC under Article 22.6*, Decision by the Arbitrators, WT/DS27/ARB, 9 April 1999; *Recourse to Article 21.5 by Ecuador*, Panel Report, WT/27/RW/ECU, 12 April 1999; *Recourse to Article 21.5 by the EC*, Panel Report, WT/27/RW/EEC, 12 April 1999; *Second Recourse to Article 21.5 by Ecuador*, Panel Report, WT/DS/RW2/ECU, 7 April 2008; *Recourse to Article 21.5 of the DSU by the United States*, Panel Report, WT/DS27/RW/USA, 19 May 2008 (note: an appeal was filed on 28 August 2008); see also J. H. Jackson and P. Grane, 'The Saga Continues: An Update on the Banana Dispute and Its Procedural Offspring', (2001) 4 *Journal of International Economic Law* 581.

34 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Appellate Report, adopted 7 April 2005, AB-2005–1, WT/DS285/AB/R.

35 *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Decision by the Arbitrator, adopted 21 December 2007, WT/DS285/ARB.

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particular as regards certain aspects of available policy options, the consequences of this sovereignty loss still very much depend on the parties involved. When the opposing party lacks economic clout, the effect is negligible. Only when the parties to a dispute are on a more equal footing can the repercussions of non-compliance be meaningful.[36] Thus the verdict on the role of the WTO dispute settlement system in capturing sovereignty from nation states is equivocal.

Given that the court-prescribed response to dealing with breaches is retaliation, Diego-Fernandez suggests that the underlying problem seems to be the nature of the available remedies. Lacking traditional enforcement mechanisms, one of the possible solutions might be to outsource retaliation to countries with more clout. In other words, a country which has won the right to retaliate could sell that right to a third country. Indeed, Diego-Fernandez reports, Mexico has proposed to amend existing rules to allow for such 'tradable retaliation'. However, this proposal is fraught with difficulties, not least because of the *res judicata* doctrine,[37] the diplomatic sensitivities this would raise, and the effect retaliation would have on the retaliating country. How would the retaliating country be selected and why should ordinary citizens in the retaliating country bear the cost? Even if these obstacles could be overcome, it is unlikely that countries that benefit from the current arrangements would agree on any changes.

While the WTO dispute settlement system was regarded as effective in its early years, there are now suggestions that with increased non-compliance, perhaps as a result of policy-oriented decision-making by the Dispute Settlement Body, and a wider range of countries participating in the system, it is losing its potency.[38] Overall, in respect of the dispute settlement system, the evidence seems to show that the old, power-based mechanisms are in good health.

5. Conclusion

In an age of globalized markets, the absence of globalized sovereignty is conspicuous. While most countries are keen to trade with others, they are equally keen to maintain the power to determine the terms of such trade. Effectively, this means that those who have traditionally held this power, namely rich states, have a tendency to try and maintain or even expand their influence. But this tendency does not only hold true for rich states. Poorer states, too, want to maintain whatever powers they have to affect the terms of trade. Unfortunately, in their case, they usually only hold leverage over fellow DCs, which is why so much of today's protectionism plays out between DCs. The only emerging players able to enter the arena with the old guard are those who have economic and military clout, such as Brazil, China, and India.

36 D. Palmer, 'EU Gambling Firms See WTO Case Coming against US', Reuters, 18 September 2008, http://us.mobile.reuters.com/mobile/m/FullArticle/p.rdt/CCOMPR/ncompanyNewsAndPR_uUSN17261309200809 18.

37 The decision in a case is binding on the parties to the case.

38 K. Iida, 'Is WTO Dispute Settlement Effective?', (2004) 10 *Global Governance* 207; G. Sacerdoti, 'The Dispute Settlement System of the WTO: Structure and Function in the Perspective of the First 10 Years', Bocconi Legal Studies Research Paper No. 07–03, March 2007, Social Science Research Network, http://ssrn.com/abstract=981029 (last visited 31 December 2008).

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The result seems to be that we are going to see a continuation of the Westphalian tradition of national sovereignty with a few extra players staking their claims. For now, the WTO's dispute resolution mechanism and multilateral trade negotiations will continue to be important fora of engagement. However, as is already becoming evident, the repercussions of the resurgence of traditional sovereignty are that these systems will become less effective and that, given the contemporaneous proliferation of FTAs, the failure of special and differential treatment schemes, the dilution of the MFN standard, the deficiencies of available remedies, and the trend of the courts to adjudicate on policy matters, the WTO may find itself in a long-term decline. In its place, terms of trade will increasingly be determined in regional trade fora where the big players will dominate. Instead of a post-Westphalian, multilateral system of trade regulation – something which had been envisaged by the designers of both the GATT and the WTO – recent indications suggest that the world trade order is moving in the opposite direction. However, this does not mean that all countries, in particular smaller and developing countries, will regain their sovereignty in trade matters. On the contrary, instead of being sheltered by the WTO's MFN protections, they will face increased pressure to accept terms dictated by more powerful trading partners. This is a shame, as the WTO held considerable promise for DCs to participate in the world trading system on an equal footing. Instead, determinations on terms of trade will increasingly be made on the basis of power-orientated negotiations featuring participants with unequal bargaining strength.

These conclusions form both a synthesis of and deductions from the different views expressed in the two volumes reviewed in this article. The current status of the WTO regime is unfavourable to multilateralists, as well as to smaller and developing countries, and there is not much on the horizon to suggest that the situation will improve. *Redefining Sovereignty* and *WTO and DCs* represent important contributions on the path to understanding what lies ahead.

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