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Review of The Development of World Trade Organization Law

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Book Review of Gregory Messenger, *The Development of World Trade Organization Law* (Oxford 2016)

Gregory Messenger has written an interesting new book, *The Development of World Trade Organization Law*. The choice of title might appear to imply a focus on development – as in *economic* development – a subject close to the WTO's core mandate, but Messenger has decided instead to analyze the process of *legal* development in the organization.

Implicit in Messenger's choice is a dissatisfaction with conventional accounts of the law's evolution. These stress the law's change from static moment to static moment rather than interactively and incrementally. As Messenger sees it, what is needed is an emphasis on law as process. It is an attractive idea, one made more attractive by the fact that we live "in a time of intense global interactions" giving rise to "a complex legal framework of competing and interacting jurisdictional influences" that often seem to find their fulcrum in WTO law. WTO law is a dense site of legal activity. It is a "laboratory" within which his thesis can be tested.

As Messenger describes it, the process of legal development is reflexive rather than direct. Actors are simultaneously constrained and enabled by a legal system. In WTO law there are many such actors, states being only the most visible. There are organs within the organization like panels and the Appellate Body, other international organizations like the Codex Alimentarius, and interest groups like OXFAM or the World Wildlife Fund. All of them interact together to develop the unique institutional identity of the organization and of each other. Such an approach offers a richness that many conventional accounts lack. It is part of the book's kaleidoscope.

In three finely crafted chapters devoted to rules on safeguards, sanitary and phytosanitary (SPS) disciplines, and subsidies, Messenger details how WTO law is a 'multi-causal' construct that frequently generates unexpected outcomes. In the case of safeguards, for instance, the preambular language of "unforeseen developments" in GATT Art. XIX has been given new life. In the case of SPS measures, the Appellate Body has struck a deft balance between consumer concern and appropriate attention to the scientific bases of national SPS measures. And in the case of subsidies, the development of WTO law has contributed to the refinement of legal standards while being influenced by natural constraints on WTO dispute settlement.

At the same time, the author is candid in admitting that the book's account offers an "incomplete analytical approach". His narrative is primarily descriptive, not predictive. For that reason, it has limits. The limits are severalfold.

One stems from the examples chosen. Much of the book is devoted to illustrations culled from U.S. and EU experience in the organization, something which gives the book a decidedly North Atlantic orientation. It is hard to consider the development of international standards concerning safeguards, SPS or subsidization without also considering the particular legal culture they arise from. One also wonders what other major actors in the organization – Brazil, Russia, India and China for instance – have contributed in terms of the law's development. Perhaps it is too soon to tell. Still, more focus in that regard would have been warranted.

Another limit is inherent in the multi-causal approach as applied. Messenger is clear that "[t]he international legal system is both complicated and complex" and that "examining the development of international law presents a considerable challenge", yet it is not evident that the challenge is completely overcome by replacing one trinity of analytical approaches (i.e. functionalist, formalist and idealist explanations of law) with another (i.e. systematic, instrumental and constitutive ones of causation). To do so convincingly, a detailed account of how systematic, instrumental and constitutive approaches contribute to the law's development would have been warranted, but that is indistinct here. Instead, the analysis remains largely expressive. Conclusions are thin. The reader is left with the impression of an array of actors who act in operative fashion at different "sites" to influence the law they wish to see. Not surprisingly, they do not always get the legal developments they want. Then again, perhaps that isn't so problematic. The law does not comport with the subjective expectations of any one member so much as with the objective expectation of legality among the membership generally.

Possibly the chief limitation of a book like this is the difficulty of identifying commonalities within the idea of a system. A system is a set of relationships, yet the book's close attention to individual actors and their identities make those relationships hard to discern.

There are hints of them here, of course. The author rightly observes, for instance, that actors are constrained and enabled by the WTO system, although he does not do so by necessarily tracing these insights to obligations (i.e. constraint) and rights (i.e. freedom). He is on solid ground when he notes that “[w]ithout an effective edifice on which to rest, the law cannot be used instrumentally and has a weak influence on actors. Equally, without the will to use the law instrumentally ... there is no realization of the law's potential as an empowerer or stimulator of change.” Nevertheless, more could have been done to trace the underlying threads that together make up the fabric of the law. Once again, it is possible to be awed by the spectacle of actors, identifies and sites at play in WTO law, but unless a clear idea is given of what the recurrent jural elements in action are – for instance, the way that obligations are interpreted as plenary and rights restrictively – it is difficult to say exactly what the idea of legal development in WTO law means.

To be sure, Messenger shows admirable awareness in his recognition of these deficiencies. His comprehensive method is driven by awareness that “decisions of judicial bodies and treaty change are no longer adequate to furnish complete explanations for how international law develops”. That is undoubtedly true. There is now an intertwining of treaty and non-treaty sources, state and non-state subjects. But it is also true that a multi-causal approach is self-admittedly incomplete, and when considered carefully, it is not clear how ‘more is more’, that is, how more information leads necessarily to more insight. Without the ability to distill what is put forward into a system of ideas, a theory, there is surprisingly little that such a kaleidoscopic approach can offer.

This shortcoming becomes apparent in the concluding chapter, a scant 5 pages, where Messenger ends with “an agnostic stance in relation to how we think the law should play out in a given instance.” Agnostic? Really? Perhaps more attention could have been given to the strength of systemic influences and why system is important at all. Is it because the WTO Agreement aims to develop “an integrated, more viable and durable multilateral trading *system*” in which rights are necessarily subordinate to obligations? Is it because safeguards, SPS measures and subsidization are all manifestations of a state's residual power to exercise its sovereignty – in other words, its rights - and that that power must be circumscribed and exercised in accordance with a country's WTO commitments in mind?

None of these questions is answered. Instead, we are left with the spectre of disappointed expectations. Again and again, Messenger notes, WTO legal “outcomes have confounded those who were central to their creation.” Such disappointment reflects the fact “that the expectation of the party in question is the fruit of having prioritized certain ways of thinking about the law.” But that disappointment is to overlook the idea of system, a community. Living communally, individual actors must efface some of their expectations. The “collective turn” in thinking is vitally important since it explains the origins of the ability to consider and judge matters *objectively*, the very crux of a true legal system and the immediate origin of disappointed expectations. Out of that disappointment, new legalized expectations are created.

In sum then, Messenger has done a masterful job of dissecting the law, of identifying its players, and of detailing their interactions. It is hard work, skillfully done. What is to be gleaned from such an analysis is more difficult to determine.

