Law and the “New Developmentalism”¹

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The field of law and development requires constant realignment. As Trubek and Santos have pointed out, this field exists at the intersection of law, economics, and the practices of states and development agencies. As economic policies, legal theories and institutional practices change, the salient issues in law and development change as well.³ This book explores such changes.

1) Law and Development in Historical Perspective

In some periods, economics, legal theory and development agency practices have come together to form a relatively coherent vision and doctrine that guided the practices of foreign aid agencies and influenced domestic reformers. When law, economics, agency practice and state policy are all aligned, a relatively clear set of policies can be derived and projects planned. This has happened twice in recent memory. The first such moment was the law of the developmental state: in this model law was seen primarily as a tool to render state intervention more effective. The second was the role assigned to law in the neo-liberal market order: neo-liberal law and development saw law basically as a framework for the market and a shield against undesirable state intervention in market activities.

Each of these models was associated with the dominant economic and legal theories of the time. In the 1960s development economists favored a strong role for the state, believed that private enterprise lacked the resources to build key industries and state ownership was essential, and thought that import substitution industrialization and delinking from world markets was the only possible road to development. The first moment of law and development doctrine was based on these theories and pointed to the need to strengthen the state apparatus so it could perform these roles. Law and development took on board the belief in the need for a strong state and drew on prevailing ideas about the power of public law as a transformative agent. But as the limits and distortions flowing from the developmental state model became clearer, economists began to question the prescriptions and counsel a narrowing of the state’s role and an opening to world markets. This move within economics helped generate the second or neo-liberal moment in law and development doctrine. This second moment stressed the role of law in protecting investor expectations, facilitating private transactions, and limited the role of the state. It coincided with developments in legal theory that stressed the importance of markets and the limits of legal intervention.

¹ This is the introduction to Trubek, Alviar, Coutinho and Santos eds., Law, State and Development in Latin America: Case Studies
² All the authors in this volume contributed comments and suggestions for this introduction. I am specially indebted to Alvaro Santos, Shunko Rojas, and Helena Alviar Garcia for their detailed comments.

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Both those moments have passed. While aspects of both models remain in thought and practice, neither mode is hegemonic. Rather, we find ourselves in a period in which there is no prevailing orthodoxy either in development theory or in law and development doctrine. This is a period of contending visions which range from the unreconstructed neo-liberalism of the World Bank’s Doing Business Project to the effort to revive socialism and rebuild a more classical form of the developmental state. The consensus on which the neo-liberal model was built is crumbling and we see new ideas emerging both in development economics and state practice. It is in this climate that ideas about a new developmental state are emerging, and in which some people are starting to work out the implications of these ideas for law. These ideas point to different models of development and different roles for law.

2) The LANDS project and the origins of the book

This book is the result of an effort by a group of experts on law and development in Latin America to understand the changing role of state and law in the region as older economic models are being questioned and new ones explored. We created a project entitled LANDS—Law in the New Developmental State. LANDS sought to explore the new contours of law and development in the 21st Century. Trubek and Santos had predicted the end of neo-liberal dominance in the field but observed that no dominant paradigm had yet emerged to replace it. By 2007 it was clear that a new discourse was emerging in Latin America and there were signs of the emergence of a “new developmentalism”. We thought that if the new developmentalism were to take hold at the policy as well as the discursive level it would lead to another shift in the dominant development paradigm. Such a shift would, of course have great significance for the law—and vice versa.

If the role of the state in the economy and social protection were really changing, it would be logical to see changes in law and legal institutions. Therefore, by studying the relationship between law and the putative “new developmental state” we could both see ways in which new policies were shaping the law, and see in legal developments evidence for policy shifts—or the lack thereof. To make a preliminary cut into this complex set of issues, we conducted case studies of law and policy making in several fields and several countries.

We chose four countries that had accepted neo-liberal prescriptions in the 1990s but had, to one degree or another, moved away from them. On the one hand, we thought we would find continued adherence to neo-liberal models in Colombia and Mexico; a radical rejection of them in Venezuela; and at least

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4 The project, called “Law and the New Developmental State” or LANDS, was sponsored by the University of Wisconsin-Madison and co-sponsored by the Brazilian Center for Analysis and Planning (Cebrap) in São Paulo and the Law School of the Los Andes University in Bogotá. We also received funding from the Ford Foundation. During the course of the project members of the team met several times in Madison and once at Georgetown Law Center. The papers in the volume were presented at a conference held at Cebrap in May 2011.

5 The case study method falls short of a systematic overview of the legal orders of these countries and the changes they are experiencing. Such a study would require massive resources. But by taking a few illustrative cases we hoped to contribute to the development of the intellectual agenda and set the stage for more comprehensive studies. While each of our case studies looks at law and policy in one area and usually in one country, they do allow a glimpse at developments in the larger legal order especially in Brazil and Colombia where we have several cases.
tentative moves toward a new development state in Brazil. These differences, would, in turn, help explain differences in legal institutions and practices. To test these assumptions, studies were conducted of industrial policy and investment strategies in Brazil and Colombia, trade law and policy space for development in Brazil and Mexico, and social policy, poverty alleviation and inequality reduction in Brazil, Colombia and Venezuela. In each we looked at changes in law and policy and the relationship between them. Studies focused on the first decade of the 21st Century.

3) The changing role of the state in Latin America and the “new developmentalism”

To understand the context in which this project developed, it is important to understand the revival of interest in the role of the state. The developmental state is back on the agenda in Latin America. In the middle of the 20th Century, during the era of import-substitution industrialization (ISI), the state played a central role. Elites believed that an open global economy would condemn the region to perpetual economic inferiority, private industry would be too weak to serve as an engine of rapid growth, voluntary savings were too low to finance needed investment, and private markets inefficient. To fill the gaps, the state used taxation and other tools to raise funds for investment, state owned enterprises (SOEs) led the industrialization drive, and state agencies and regulations protected domestic industry against international competition and buffered shocks from the global economy. Technocrats in state agencies developed industrial policies and development plans which charted economic strategies to be carried out through governmental bodies, development banks, and SOEs. For the region as a whole, and especially for some countries like Brazil, these policies paid off at least in terms of relatively high growth rates.

All this began to change in the 1980s. Facing an economic crisis caused by a worsening external environment, a huge overhang of debt, and declining returns from the ISI strategy, most of the region found it necessary to turn to the International Financial Institutions (IFIs) for support. While support was forthcoming, it was conditioned on major policy shifts which significantly affected the role of the state. This conditionality coincided with an intellectual revolution within regional elite circles as free market ideas came to replace the stress on states and planning that dominated developmentalism.

These twin forces led to the emergence of a new development paradigm. The new vision called for a much narrower role of the state. This paradigm, sometimes referred to as the “Washington Consensus” (WC), drew on neoliberal ideas, stressed the importance of markets and open economies for growth and sought a more limited role of the state. The result was a major set of policy shifts including deregulation, privatization, macro-economic stabilization, fiscal discipline, financial liberalization, import liberalization, and encouragement for private foreign investment. Industrial policy, which was a central feature of the ISI era, was largely abandoned (at least at the rhetorical level) and much of the institutional structure of the ISI period was dismantled.

This new discourse became dominant in the 1990s and the WC model influenced policy changes throughout the region. While there was variation in the extent to which these policies were followed and in the sequencing of the several reforms, scholars agree that a major shift in the role of the state occurred throughout Latin America. Commenting on this shift, Stallings and Peres conclude:
“The shift in the 1980s and 1990s from a development strategy based on a strong state and a relatively closed economy to one that is market-oriented and open was among the most profound changes in Latin American economic history.”

Studies of the “neo-liberal”-inspired reforms tend to focus on five core areas: trade liberalization, domestic finance liberalization, capital account opening, privatization and tax reform. To one degree or another, all countries in the region carried out reforms in these areas in the 1990s. The initial results, however, were disappointing. On the one hand, the rapid growth that many expected did not materialize. While average growth rates exceeded 3% from 1950 to 1980, after 1990 they dipped significantly. On the other hand, the reform effort led to substantial social dislocation. Little support was available to offset the impact of these dislocations that led to expressions of dissatisfaction with the new paradigm and protest in many countries. Because the neo-liberal era coincided with democratization in much of the region, this dissatisfaction could not easily be ignored by political elites. As the new millennium dawned, voices within and throughout the region were taking another look at the neo-liberal vision and beginning to question its strictures concerning the state.

Francisco Pannizza divides these voices into three camps: the “post Washington Consensus” or PWC; the “new developmentalism”, and “21st Century Socialism.” The PWC seeks to supplement the WC reforms with more attention to social protection and inequality, recognizes the need for institutional strengthening, and eschews simple “one size fits all” top down approaches in favor of more consensual and bottom up ways of making policy. But the PWC retains the basic WC commitment to market primacy and a limited role for the state. On the other hand, while the new developmentalism assumes that the market is important for development, it posits a more substantial role for the state. 21st Century socialism, however, seems to want to transcend capitalist market relations altogether.

Those who accept the market but promote a more substantial role for the state in growth and social protection use different labels to explain their views. They include neo-structuralism, new state activism, and new developmentalism. These variations on what I will call generically “the new developmentalism” vary in the policies they prescribe. And, while leaders in many countries have challenged neo-liberal orthodoxy and championed more state intervention, and the tide of neo-liberal inspired reforms has clearly turned, there is great variation in the extent to which basic policies have changed and new policies actually implemented.

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8 For a general discussion of this period, see Francisco Panizza, Contemporary Latin America: Development and democracy beyond the Washington consensus, (New York: Zed Books, 2009).
9 Panizza (cites) (You mentioned that I should forget it.
12 Bresser-Pereira, From old to new developmentalism in Latin America.
In an important article, Luiz Carlos Bresser Pereira, a Brazilian economist and former Finance Minister, summarized the “new developmentalism” which, he says, accepts the market as the primary allocator of resources; supports trade liberalization and is export oriented; manages exchange rates to neutralize “dutch disease”; favors industrial policy but makes support for business temporary and conditioned on international competitiveness; favors fiscal equilibrium and opposes inflation. The new developmentalists propose a robust role for the state which should regulate the market, redistribute income, create a national development strategy, supplement private sector investment in areas where capital markets do not function, and facilitate technological progress and innovation.

This approach seems to have an elective affinity with what in chapter one of this volume is describes as “the new political economy of development”. This new consensus in development studies stresses the importance of participation in the global economy and posits the need for experimentation and innovation in an increasingly fast moving and integrated world economy. Arguing that neither the state nor the private sector is capable of developing optimal developmental trajectories by themselves, scholars of this persuasion favor partnerships between the state and the private sector and posit an important role for the state in fostering competitiveness and encouraging innovation. The stress on innovation and competitiveness leads to a new kind of industrial policy designed to foster not only public-private partnerships but also joint experimentation. Because the optimal paths for growth in the new global knowledge economy are not known in advance, this will involve experimentation and call for the use of more flexible forms of law.

While there is interest in a more robust role for the state, this does not mean that the “new developmentalists” are calling for a return to the role the state played in the ISI period or that the “new industrial policy” is the same thing that prevailed in the past. Except in Venezuela and the countries that have followed its “21st Century Socialism” approach, no one is calling for renationalization, none are questioning the primacy of the market, and most support foreign investment. Indeed, as Stallings and Peres point out, while the tide of reform has ebbed in the region, in most countries core reforms have been maintained. And even Venezuela, Bolivia, Ecuador, and Argentina, where anti neo-liberalism rhetoric has been strongest, did not make major reversals in most of the core policies at least until recently.

For the new developmentalists the new role of the state and of industrial policy is not to replace the market, but rather to steer private actors in directions that serve the national interest and facilitate their progress while providing social protection to offset dislocations, eliminate poverty, and reduce inequality. There is no interest in disengaging from the world economy; indeed most of the proponents of “new developmentalism” see exports as a major source of growth and thus accept the need to participate in the free trade regime instituted by the Uruguay round and the creation of the WTO. However, they stress the importance of negotiation and reciprocal concessions rather than accepting the trade regime tout court. While some countries like Brazil have revived the idea of industrial policy,

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13 Some are concerned about the impact of hot money but all favor FDI.

14 Stallings and Peres, ‘Is Economic Reform Dead in Latin America?’, Fig. 4.
the goals Brazil has adopted and the means chosen to accomplish them are different than the kinds of plans promulgated in the heyday of ISI when they were designed to reach predetermined goals and govern the action of the SOEs that played a major role in the Brazilian economy at the time. Summarizing developments in Brazil during Lula’s second term, Panizza concludes that the government shifted towards:

“...forms of state intervention in line with neo-developmental thinking. Symbolic of this shift was the change of the framing of the agenda away from the structural reforms characteristic of the WC towards programmes of state intervention in economic and social affairs...The government’s flagship economic programme was the so called Programa de Aceleração do Crescimento (PAC, growth acceleration program) ...of public and private investment in infrastructure...The government also promoted a more proactive industrial policy through subsidized loans and investment by the National Development Bank (BNDES).”

Signaling that the policy was to facilitate not replace the market, and that industrial policy is more of a process than a set of predetermined goals, Brazil created ABDI, the Brazilian Agency for Industrial Development, which brought business, government, and the academy together to coordinate efforts to implement the emerging industrial policy through a joint search for optimal paths. Brazil launched a major redistributive program called Bolsa Familia designed to relieve poverty and help reduce inequality. Similar developments occurred in other countries: Argentina in 2002 recreated the previously dismantled Ministry of Production, relaunched in 2008 as Ministry of Industry. Also, Colombia launched the Programa de Transformacion Productiva in 2008 which resembles Brazil’s ABDI. And both countries developed variations on the CCT program.

If we look at the whole picture, it is fair to say that the role of the state is changing in Latin America. But these changes are not in the same direction: some countries are trying to reinvent the developmental state for a new era; some hold onto neo-liberal commitments while paying more attention to social protection and reduction of inequality.

(4) Findings: Law and the New Developmentalism Today

As the chapters in this book suggest, we were able to find shifts in development policy and identify related legal changes in all four countries. We also found significant difference among the countries in the degree to which they had departed from neo-liberal models and experimented with new forms of state intervention. However, the scene is more complex than is predicted by simple models and we found that things do not always fit predetermined models. The project has provided insights on six important issues:

(a) The relationship between policy change and legal change

In some cases we found a clear relationship between national policy choice and legal developments. Take, for example, the differences between Brazil and Mexico in trade law and policy. At the height of

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15 Panizza, Contemporary Latin America, p. 236-7.
the neo-liberal era, both countries accepted the full strictures imposed by the Washington Consensus and the WTO. But as Brazil increased its interest in forging a national development strategy, reintroduced industrial policy, and sought to strengthen social policy, it began to challenge some of the restrictions on policy space imposed by the trade regime. This led to significant changes in domestic law and government organization and to an aggressive campaign in the WTO and other relevant fora through which Brazil sought to take advantage of flexibilities in the trade regime that would allow the country to maintain heterodox policies. Mexico, on the other hand, accepted a more limited role for the state and has done little to exploit any room for maneuver that may exist within the strictures established by trade law.

We also found a relationship between development strategies and social policies. Brazil’s conditional cash transfer policy (Bolsa Familia) has been made part of an integrated program of social and economic development and is governed by a well-structured legal framework that ensures programmatic integrity while Columbia’s CCT which had its origins in a temporary effort to offset social costs of neo-liberal reforms lacks a firm structure and is subject to populist manipulation.

But the relationships are complex; rarely can we point to causalities or a clear set of parallel changes. This is because unlike abstract models which suggest clear delineations, in this current transitional period at least, actual policies are often a mix of the old and the new, layered on top of one another and sometimes contradictory and this complexity and contradiction at the level of policy carries over into the legal domain. For example, in Colombia we find elements of the strictest kind of neo-liberal legal protection for foreign investors co-existing with a flexible regime designed to support “new industrial policy”.

(b) Law in Action

We learned that to understand the relationship between law and development policy today it is necessary to go beyond the study of legal rules and apply a “law in action” approach. This is more fully explained in Alvaro Santos’ chapter on trade law. Addressing the structuralist argument that WTO rules create a straightjacket denying countries the opportunity to pursue effective development strategies, Santos points out that if one looks at what actually happens in disputed cases there is much more flexibility within WTO norms than would appear if one just looked at the texts. It is, he claims, necessary to study the processes by which some countries have created what he calls “development legal capacity”–the ability to mobilize trade law for all national objectives--and deployed it effectively. The law in action approach shows that developing countries can, at a cost, develop potent trade law capacity and use it effectively to preserve some policy space.

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16 Michelle Ratton Sanchez Badin, Developmental responses to the international trade legal game: examples of intellectual property and export credit law reforms in Brazil, this volume.

17 Alvaro Santos, Carving out policy autonomy for developing countries in the WTO, this volume.

18 Compare Helena Alivar Garcia, Social policy and the new development state: the case of Colombia, this volume with Diogo R. Coutinho, Roles of law in development polices: decentralization and coordination in the Bolsa Familia Program, this volume.

19 Shunko Rojas, Law and the new political economy of development in Colombia: changes and continuities in industrial policies, this volume
(c) Flexibility and the New Industrial Policy

The new industrial policy promoted by some new developmentalists is more of a process than a policy. That is, industrial policy is seen as part of a joint public-private discovery process, a collaboration through which the partners experiment with different trajectories seeking optimal paths for company and sectorial growth. We found that states like Brazil and Colombia which are committed to this kind of discovery process have developed flexible legal institutions and tools to structure and manage this kind of collaboration. Thus, in Brazil, the BNDES has launched a new program to foster innovation and has replaced its traditional form of fixed obligation loan agreements with a variety of flexible devices that support collaboration and experimentation. In turn, Colombia has launched the Programa de Transformacion Productiva aimed at building world class sectors and boosting exports through mechanisms of public-private collaboration focused on increasing the sectors’ competitiveness.

(d) Layering and contradictions

While there are several examples of differences between countries, we also found examples of differences and contradictions within a single country. Remember that even if changes are occurring, the period we studied is one of transition. New development strategies and new legal approaches may have been introduced. But often these are layered on top of earlier models which remain in effect, which create possible conflicts or hybrid situations. Thus we find that in Colombia the Constitutional Court has taken an aggressive approach to the enforcement of social and economic rights while neo-liberal executive-centered social policies like Familias in Accion are structured in a strictly discretionary fashion and provide no legal guarantees to recipients.20

Similarly, we can see a kind of layering and hybridization in the legal dimensions of industrial policy in Colombia where one sees a mix of neo-liberal and new developmental approaches sometimes layered on remnants of policies from the ISI era.21 Rojas’ study shows that Colombia has maintained a form of industrial policy and intervenes to promote exports, encourage FDI and increase competitiveness. But it has used different policies and legal tools including a strictly neo-liberal approach to FDI that deploys formalistic legal instruments and a more flexible approach to competitiveness that is accompanied by soft and revisable legal tools.

(e) Gap between discourse and policy

In some cases we note that the discourse of new developmentalism may be employed while neo-liberal polices prevail. This is the case in Colombia as described in Shunko Rojas’ chapter. Noting that Colombia planners have started using the discourse on “new developmentalism” while holding on to much of the neo-liberal regulatory apparatus. When contrasted with actual policies, it is possible to observe that despite possible seeming constraints, the new discourse does not determine outcomes. It is flexible, and

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20 Helena Alivar Garcia, Social policy and the new development state: the case of Colombia, this volume.
21 Shunko Rojas, Law and the new political economy of development in Colombia: changes and continuities in industrial policies, this volume.
perhaps contradictory enough, to allow for the peaceful co-existence of different policies responding to different rationales.

f) Law as help and hindrance

In addition to finding divergence, layering, and contradiction, we have also found that the law can both be a help and a hindrance to policy makers. There is a literature that treats the law in Latin America as a barrier to development and lawyers as hide bound and resistant to change. Yet in several of our cases we see law playing a very positive role. For example, in the case of Bolsa Familia in Brazil, the law has served as the framework for policy innovation. But in others policy makers have seen the law as a barrier. In the area of trade law, we see that law can be both: as Santos points out, the WTO can constrain developing countries but at times it may serve as both a sword and a shield. Finally, while no one would doubt that lawyers sometimes resist change, we have seen situations where creative lawyers developed new legal tools and adopted older ones to facilitate innovative development policies.

4) Outline of the volume and summary of the chapters

The volume includes nine chapters. The first is a general essay on political economy and law that traces the rise of a new political economy of development and its relevance to law. Following this there are three major sections which include the case studies LANDS conducted. These deal with investment and industrial policy in Brazil and Colombia; trade law and development policy space in Brazil and Mexico; and social policy and equality in Brazil, Colombia, and Venezuela.

a) Political Economy of Development and the Law

In Developmental States and the Legal Order: Towards a New Political Economy of Development and Law, David M. Trubek looks at recent theoretical work on the political economy of development, showing that these new developments require a rethinking of the role of law in development; outlines some of the new legal and governance processes and practices that are emerging, and discusses what would be needed construct a robust theory of the role of law in a new developmental state. The chapter stresses the importance of public private coordination, experimentation, and mutual learning in the global knowledge economy and suggests that appropriate legal institutions will be needed to carry out the new political economy of development. The legal institutions for the “new industrial policy” will, Trubek argues, need to be flexible and revisable.

b) New Industrial Policies, Investment, and Flexible Law

In this section, we look at cases from Brazil and Colombia. Both countries have adopted some version of the “new industrial policy” and found that this policy requires close public-private cooperation and

22 Diogo R. Coutinho, Roles of law in development polices: decentralization and coordination in the Bolsa Familia Program, this volume.
23 Manuel A. Gómez, Law, governance and social policies in Venezuela: the case of two Bolivarian misiones, this volume.
24 Mario G. Shapiro, Rediscovering the developmental path? Development bank, law, and innovation financing in the Brazilian Economy, this volume. Also see, Rojas, Law and the new political economy, this volume.
flexible legal tools. In Colombia, at least, this “new developmental” approach exists alongside older models from both the classic developmental state and WC eras.

In *Rediscovering the Developmental Path: Development Bank, Law and Innovation Finance in the Brazilian Economy*, Mario Schapiro examines the financing of innovation by BNDES (the Brazilian National Development Bank) showing how this new dimension of the Bank’s operations illustrates key features of the new developmentalism. BNDES was set up in the 1950s as an arm of the classic developmental state during the ISI era. It supported Brazil’s industrialization drive, initially funding major SOE’s as well as some private entities. Later, it facilitated privatization. Today it is one of the largest development banks in the world, having dispersed over $60 billion in 2010.

In recent years BNDES’ activities have been geared towards support of Brazil’s new industrial policy. This policy, set out first in 2004 and expanded in 2008 in the PDP (Productive Development Policy) assumes that to prosper in conditions of global competition Brazil needs state action to promote innovation and maintain competitiveness. BNDES’ innovation financing program is designed to support these new industrial policies.

Schapiro notes that the program fits the new developmentalism paradigm: it brings the state into a new area of activism, uses new modalities, and employs new legal tools. The idea of state promotion of innovation is new, as is the understanding that this must be done in a full-scale partnership with the private sector. Instead of the top-down and pre-defined financial operations, designed to meet economic planning requirements, the financing of innovation is based on alliances and public-private partnerships between the private companies and the public Bank. This occurs in Bank investments in individual companies as well as in joint operations between BNDES and capital market investment groups that have formed private venture capital funds with BNDES financial support.

Finally, the tools developed for this new mission represent a break in the Bank’s legal paradigm which heretofore highlighted fixed obligations: in this area the Bank relies on flexible legal structures that, formally or informally, support a financial relationship between Bank and the recipients of its support that permits changes of trajectory and adaptation of plans. Among the legal tools employed in this area are: (i) partnerships with technological institutes and grants to promote the development of new products; (ii) relational loan contracts that include non-binding performance criteria, staged disbursements, and constant Bank monitoring through shared governance mechanisms; (iii) equity investments coupled with shared governance established through Shareholder Agreements that give the Bank a seat on the Board and subject certain corporate decisions to Bank approval; and (iv) arrangements by which the Bank participates on the investment committee of Venture Capital Funds that it assists. While the Bank’s innovation funding clearly represents a new form of state activism and new approaches to law, Schapiro notes that the program represents a tiny portion of the Bank’s total portfolio and it is unclear whether this segment of the program will expand in the future.

In *Law and the New Political Economy of Development in Colombia: Changes and Continuities in Industrial Policies*, Shunko Rojas notes industrial policies are coming back in Latin America. He argues that these policies do not constitute a coherent set derived from clear recommendations enshrined in
an economic model. In a study of industrial policy in Colombia, Rojas shows that while Colombia has been influenced to a degree by the new developmentalism, the policies chosen respond only partially to these ideas. He shows that the particular content and shape of these policies, their meaning and distributive effects, are deeply influenced by the political economy underlying them, the institutional and legal scaffolding in which they are inserted, and the particular legal instruments chosen to implement them.

Focusing on the configuration of industrial policies in Colombia under the Uribe administration (2002-2010), Rojas addresses export promotion, foreign direct investment and competitiveness policies. The analysis tracks the historical evolution of these policies from their origins under the Import-Substitution Industrialization model in the 1960s, through their transformations under the Washington Consensus in the 1990s, to the present. The research finds that industrial policies in Colombia during the 2000s were largely justified by appealing to some core ideas and arguments of the new developmentalism, albeit retaining at the same time some of the key concepts of the Washington Consensus discourse. He finds that hybrid forms of law as new approaches are layered over older structures so that the regulatory scene includes areas like FDI protection in which a highly formalistic view of law that stresses the role of law as a constraint to state action as well as areas like competitiveness promotion where law is more informal and flexible and serves as a mechanism to coordinate and facilitate communication between the state and the private sector.25

Rojas points to some of the key implications deriving from his findings. First, regardless of the political sign or ideological orientation of the government, the new development discourse in Colombia, especially as enshrined in its 2006-2010 Development National Plan, was partly built on typical structures and argumentative bites of the new developmentalism as in other left-of-center governments in the region. Second, when contrasted with actual policies, it is possible to observe that despite possible seeming constraints, the new discourse does not determine outcomes. It is flexible, and perhaps contradictory enough, to allow for the peaceful co-existence of different policies responding to different rationales. Third, behind the discursive indeterminacy, however, it is still possible to identify certain types of rules and legal approaches that prevail as well as systematic effects in their application. In the Colombian case, behind the merge of the public and the private and the search for experimentation, in the first decade of the 21st Century there seems to have been more continuity than change, both in rules and in outcomes.

c) Trade Law: Carving out Development Policy Space within the WTO Regime

In this section we look at how two countries have dealt with possible restrictions to their development policies that might be imposed by WTO law. We see that Brazil has managed to find ways to preserve some degree of space for “new developmental” strategies despite potential clashes with WTO norms.
while it seems that Mexico has stuck with WC orthodoxy and has not taken advantage of possible flexibilities in the regime.

In *Carving out Policy Autonomy for Developing Countries in the WTO*, Alvaro Santos notes that one feature of the “new developmentalism” is the attention given to the relationship between international trade and growth creation for poor countries. Confidence in free trade and the continued furthering of trade liberalization as an indisputable strategy for development has faltered in the face of disappointing growth results and scholarly critique. As the most important international trade regime, the WTO has figured prominently in this debate. As the impact of the WTO on domestic policy has expanded, scholars have emphasized the importance of allowing greater policy autonomy in the international trade regime even if it is at odds with further trade liberalization.

Some development scholars criticize the WTO for curtailing developing countries’ policy autonomy and thus hindering their ability to undertake the kind of policies that wealthy countries undertook to become rich. They argue that WTO legal obligations are burdensome shackles that prevent developing countries from unleashing their development potential. They see the limits as unfair restrictions and as confirmation that the multilateral trade regime favors the interests of the advanced economies.

Santos challenges these scholars’ narratives as well as the contrasting “liberal” view that the WTO offers a level playing field. Santos recognizes that the WTO has introduced important limits on states’ regulatory autonomy. And he agrees with the critics that, due to asymmetries of power and resources, the system imposes a burden on developing countries who seek to escape some if its’ strictures. But he does not see these obstacles as insurmountable: the chapter identifies mechanisms through which states can carve out space to pursue development policies as long as they engage the WTO system actively and strategically. Deploying a “law in action” analysis, he looks closely at how litigation in the WTO actually operates. Highlighting the open-ended and contestable nature of legal obligations and the ability of “repeat players” to shape norms, he shows how active members can, through litigation and lawyering, influence rule interpretation over time to advance their interests.

The chapter highlights and redefines the concept of “legal capacity” in WTO law. This is a concept that has developed to deal with the perceived difficulties developing countries have using the WTO system to their advantage. Because of the complexity of WTO litigation, developing countries often lack the legal capacity effectively to advance their interests within the system. Santos agrees with this analysis but feels it is too limited. Where most scholars have defined trade law capacity only as the ability to use the system to overcome barriers to a developing countries’ exports, he argues for a broader concept which he calls “developmental legal capacity” defined as the creation of the capacity to mobilize trade law tools to promote all of a nation’s developmental policies. That includes using trade law as a shield for heterodox policies as well as a sword to open markets.

The paper examines the trajectories of Brazil and Mexico in the WTO and explores how these two active developing countries pursue their development objectives. These countries have the two biggest economies in Latin America, are full participants in the global market and have the highest participation
rate of WTO cases in the region. While these countries are similar in many ways, their participation in the WTO reflects two divergent development strategies.

Mexico’s development strategy is predicated in the virtues of trade liberalization. The country is a member of the WTO and NAFTA and has gone on a spree signing bilateral trade agreements with a multitude of countries. The assumption is that free trade, as enshrined in the legal regime set up by these international agreements, will be the engine for economic growth and unleash the country’s development potential. Brazil, on the other hand, seems to have embraced a more skeptical position towards free trade as a development strategy on its own. This stance recognizes an important role for the state in actively promoting its industries and economic actors by making use of the international trade regime. It is by no means a renunciation on economic openness, but it represents a more pragmatic and less orthodox position on the role of the state in promoting a domestic development agenda.

These positions are in turn reflected in the countries’ participation in the WTO system and the domestic institutions that support it. Brazil has created an effective cadre of international trade lawyers that know the system well and provide institutional continuity. It has also promoted intra-government coordination among several of its ministries concerning trade issues. Moreover, there is an effective coordination between the government and the private sector, which consult on potential cases and on strategy. There is also intense participation of the country’s civil society through NGOs and other organizations on trade-related issues.

Using the case of WTO litigation over aircraft financing subsidies, Santos shows how a WTO challenge to Brazil’s development policy led it to create the kind of network of lawyers, policy makers and representatives of civil society that constitute “developmental legal capacity” and protect key aspects of its export policy. Although Brazil was forced to modify its subsidies program, through a long and drawn out litigation it managed to protect elements of the policy.

The story of Brazil contrasts with that of Mexico. Although the latter has formed successful international trade lawyers, it has not managed to provide institutional continuity in the government. Moreover, there is practically no coordination between government ministries on questions of trade and often not even between different departments in the Ministry of the Economy. The links between the government and the private sector are weak at best and the involvement of civil society on trade-related matters is scant.

In a parallel paper on Developmental Responses to the International Trade Legal Regime: Examples of intellectual property and export credit law reforms in Brazil, Michelle Ratton Sanchez analyzes the inter-connection of WTO rules and domestic regulation in Brazil in light of changes in Brazil’s development strategy over the last fifteen years. The chapter focuses on two cases of potential conflict between WTO rules and Brazil’s domestic policy and law: intellectual property regulation and export finance. These cases show how a new developmental discourse emerged in Brazil which helped it successfully resist challenges including allegations of WTO violations that threatened to limit the state’s ability to promote economic and social goals.
When it initially joined the WTO, Brazil accepted the whole package of WTO agreements and did not adjust its domestic institutions to ensure that it could protect key policies. But as neo-liberal enthusiasm waned, successive administrations have protected domestic policy space by challenging restrictive interpretations of global trade rules. This growing willingness to challenge WTO-based restrictions is a result of changes in development policy and in the way trade policy is formulated in Brazil. As the state began to play a more robust role in the promotion of economic growth and social protection, trade policy-making has become more closely integrated with overall development policy and Brazil has invested in the legal and related skills needed for success in trade disputes. At the same time the arena for discussion of trade policy has been expanded as more government agencies began to participate and the private sector and a flourishing civil society movement entered the debate. The result has been that in the cases studied and other instances Brazil has been able to use trade law as a shield for policy innovation.

In the case of intellectual property, Brazil was able to carve out space within the TRIPS regime that allowed it to negotiate better prices for anti-viral drugs. Although initially it looked like TRIPs would preclude this kind of action, a number of changes in law, politics and government organization at the domestic level as well as action in the international arena helped strengthen the government’s capacity to shape domestic health policy in the face of international constraints. The judiciary entered the arena to enforce a constitutional right to health, administrative changes were made that opened trade policy discussions to a wider range of interests, and the legislature was mobilized. Specific legal changes at the domestic level included: (i) reforms of the legal system in order to eliminate TRIPS-plus provisions; (ii) authorization for use of such flexibilities as compulsory licenses; (iii) the approval of new mechanisms implicitly authorized by the international system that favor access to technology (such as the Bolar exception); and (iv) the creation of new government institutions that could serve as countervailing powers to industry interests in the patent approval process. At the same time, Brazil and other developing countries carried on a campaign at the international level that led WTO and WIPO to take a more supportive stance towards the use of policy space in this field.

The trade finance case also shows how Brazil has been able to protect domestic policy space from restrictions from the WTO. As part of its new industrial policy, Brazil sought to build Embraer into a national champion and facilitate its efforts to develop market share in the global regional jet market. One thing it did was provide subsidized government financing for sales of Embraer planes. Such financing is an essential part of the deal for all aircraft manufacturers and Embraer was hampered by the high cost of finance available to Brazilian companies. To deal with this, the government provided a subsidy to the institutions that provided finance for Embraer sales. This practice was challenged by Canada’s Bombardier as a violation of the WTO subsidies code. After a long and drawn out litigation, Brazil was been forced to make changes in its subsidies.26 But through a partially successful campaign that drew on the growing capacity of government and industry working together in the trade law field, Brazil was able to preserve part of the subsidy program and shift the whole issue of aircraft financing terms into the OECD where it felt it had a better chance of achieving its goals. By moving the issue to the OECD, Brazil got a voice in the main forum affecting global rules for aircraft finance. This meant it has a

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26 This details of the litigation are described in Santos, Carving out policy autonomy, this volume.
say in the terms affecting its competitors and thus more bargaining leverage in the continuing dispute with Bombadier.

d) Social Policy and Equity: three approaches to the relationship between social policy and development strategy

In this section we look at social policy in three countries and explore the relationship between social policy, development strategy and legal tools and institutions. While both Brazil and Colombia have developed conditional cash transfer programs (CCTs), their articulation with development policy has differed. Brazil’s *Bolsa Familia* is a well run program that is an integral part of new developmentalism or “new state activism” which has led to a significant reduction of poverty and inequality while in Colombia *Familias in Accion* still bears the marks of its origins as a short term stop-gap to offset dislocations caused by neo-liberal policies and the distortions of populism. In Venezuela, social policy is being used to get around the legal order and is tied to a constitutional revolution that is designed to create a new type of state altogether.

In *Roles of Law in Development Policies: Decentralization and Coordination in the Bolsa Familia Program*, Diogo R. Coutinho identifies an elective affinity between the Bolsa Familia Program (BFP) and the new developmentalism. He argues that BFP can be considered a policy initiative that, in the broad context of a new legal and institutional transformation, has introduced innovations in the Brazilian social policy and asks “what legal instruments are being used in BFP?” and “to what extent do these instruments represent a change in the roles of law in Brazilian social policies?” To answer them, he presents an analytical approach adopted to discuss the relationships between law and development and recapitulate the main characteristics of the Brazilian social policies between 1930 and 1988. The post-1988 period is then presented as the outset of a process through which rights, institutions and policies expanded and a new concept of social assistance is adopted. Some of BFP’s most important tools - a registry for all social programs (Cadastro Único), a decentralized management index (IGD), its integrating and coordinating roles as well as its potential to work as laboratory for policy innovations – are then referred to with the aim of shedding light on constitutive, instrumental, institutional and participatory roles played by the law. Since BFP faces dilemmas and trade-offs, some of its challenges and perspectives are discussed. He concludes that while BFP has been playing a key role when it comes to fighting poverty and inequality it should not be considered a development panacea and that the equity gains that Brazil has achieved recently can be better described as the result of a broader picture in which while universal programs remain central, “targeting within universalism” can foster development outcomes.

In *Social Policy and the New Developmental State: The Case of Colombia*, Helena Alviar Garcia notes that since the 1990s, the design and provision of social policies in Colombia has undergone substantial transformation. In general, these transformations seem to reflect a regional trend to combine a selective enforcement of constitutionally protected economic, social and cultural rights, with a reliance on conditional cash transfers as the most effective way for the state to channel social services to segments of society who were excluded before. At the same time, scholars and policy makers in the development field have identified these transformations in the design and provision of social policies in
Latin America as part of a series of institutional changes pointing towards the emergence and consolidation of a new conception of the role of the state in the development process. A cursory comparison of the outcomes of conditional cash transfers as implemented in different countries in Latin America reveals a wide margin of variation. In the particular case of Colombia, social policies structured to combine conditional cash transfers and constitutional adjudication seem to have had a marginal effect on improving the conditions of its beneficiaries or the structural characteristics of the economy, as measured by rates of inequality, unemployment and informality.

She argues that the adoption of new social policies does not necessarily co-relate with positive developmental outcomes. More specifically, she contends that the success of new social policies is not only path dependent but also seems to be determined by two additional, interrelated factors. On the one hand, on the specific political choices and economic development models that made the adoption of these policies possible. On the other hand, the legal tools and modes of legal reasoning will also determine the transformative impulse and redistributive capacity of social policies in general, and conditional cash transfers in particular. Because Familias in Accion still bears the earmarks of a temporary stop-gap program; has not been aligned with a multi-pronged developmental strategy the way BTF was in Brazil; and has been administered in a populist fashion; its impact on poverty alleviation has been limited.

Finally, in Law, governance and social policies in Venezuela: The case of two Bolivarian Misiones, Manuel A. Gómez reports on a study of two social protection programs in Venezuela (Bolivarian Misiones). He examines the Venezuelan government’s utilization of certain legal tools, namely the enactment of special legislation and the transformation of legal institutions, to assist in the implementation of social policies. His goal is to explore whether the law works as a mechanism to regulate and institutionalize government action, thus enhancing accountability and transparency and setting clear boundaries to what the executive and other actors can or cannot do with respect to social policies; or if, to the contrary, law is simply employed as an instrument that facilitates government action by removing those obstacles, institutional or otherwise, that slow down the implementation of the social and the political agenda. He argues that, in the case of the Misiones, legal tools have been manipulated to shield the government from any external oversight and accountability, thus rendering the Misiones vulnerable to political manipulation and be used instead as vote purchasing strategies. As a result, the Misiones have had little or no effect on the successful eradication of poverty and the further attainment of the country’s stated developmental goals.