

April 2020

Beyond the Doha Round: Towards Development Facilitation in the World Trading System

Yong-Shik Lee

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Yong-Shik Lee, *Beyond the Doha Round: Towards Development Facilitation in the World Trading System*, 40 *Denv. J. Int'l L. & Pol'y* 384 (2011).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

BEYOND THE DOHA ROUND: TOWARDS DEVELOPMENT FACILITATION IN THE WORLD TRADING SYSTEM

YONG-SHIK LEE, PH.D (CANTAB.)*

I. INTRODUCTION

The Doha Round of the World Trade Organization (WTO), which aims to advance the development interests of developing countries in the world trading system,¹ has not been completed for over a decade due to the critical differences among the Member States (Members). While international trade is essentially important for the economic development of developing countries and the rules for international trade have significant impacts on developing countries with respect to their ability to adopt development policies,² the current WTO system does not adequately address the development concerns of developing countries and the rules fail to facilitate economic development. The Doha Round was launched with an objective of meeting the development interests of developing countries, but its progress has been sluggish, reflecting large gaps in positions on development issues between developed and developing countries.³

Even if the current Doha Round is concluded successfully, with its negotiation agendas and objectives⁴ met in the final negotiations, it would not be sufficient to fill the regulatory gap in the current WTO system for development facilitation through international trade, nor does it address the fundamental problem and imbalance in the current

* Prof. Y.S. Lee is Director and Professorial Fellow of the Law and Development Institute and the Editor-in-Chief of the Law and Development Review. Professor Lee is the author of "Reclaiming Development in the World Trading System" (Cambridge University Press, 2006, reprint 2009), "Safeguard Measures in World Trade: The Legal Analysis" (Kluwer Law International, 2003, 2005, 2007), and a co-author and the head editor of "Law and Development Perspective on International Trade Law" (Cambridge University Press, 2011). Correspondences to the author: (e-mail) wtogeneva@hotmail.com.

1. *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Dec. 3 2011). The Doha Round agendas and the main areas of negotiation include agriculture, non-agriculture market access (NAMA), services, intellectual property, trade and development, and trade facilitation.

2. YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 4 (2006).

3. *Id.* at 10.

4. WORLD TRADE ORG., *supra* note 1.

organizational structure of the WTO. The negotiation agendas and mandates of the Doha Round are not sufficient to achieve the reform that would correct the current problem in the regulatory framework and in the institutional apparatus of the WTO. The reform will have to be considered and discussed in a subsequent round.

This paper, based on the author's previous works,⁵ provides a brief account of the "development deficit" in the regulatory framework of the WTO and its organizational apparatus and of the reform proposal to meet the development needs of developing countries, as mandated by the WTO Agreement itself.⁶ The next section discusses the issues with the current regulatory framework with a proposal for a set of development-facilitation provisions, named the Agreement on Development Facilitation (ADF).⁷ Section III provides a discussion of the "development deficit" in the current WTO structure and proposes organizational reform. Section IV draws conclusions.

5. See generally Yong-Shik Lee, *Development and the World Trade Organization: Proposal for the Agreement on Development Facilitation and the Council for Trade and Development in the WTO*, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM 291-319 (Chantal Thomas & Joel P. Trachtman eds., 2009), available at <http://www.law.umn.edu/uploads/nI/ON/nIONhzUtTbUj28QsfHdgbw/wto-Lee.pdf>; YONG-SHIK LEE, ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE 3-32; THE LAW AND DEVELOPMENT INST., LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 105-29 (Yong-Shik Lee et al. eds., 2011); LEE, *supra* note 2; Yong-Shik Lee, *Reclaiming Development in the World Trading System (Revisited): Proposals for reform of WTO Governance*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT 301-27 (Carolyn Deere Birkbeck ed., 2011); Yong-Shik Lee, *Facilitating Development in the World Trade Organization: A Proposal for the Council for Trade and Development and the Agreement on Development Facilitation (ADF)*, 6 ASPER REV. INT'L BUS. AND TRADE L. 177 (2006); Yong-Shik Lee, *Facilitating Development in the World Trading System: A Proposal for Development Facilitation Tariff and Development Facilitating Subsidy*, 38 J. WORLD TRADE 935 (2004), available at <http://www.kluwerlawonline.com/document.php?id=TRAD2004039&type=toc&num=3&>.

6. The Preamble of the Agreement Establishing the World Trade Organization ("WTO Agreement") provides in relevant part, "[r]ecognizing further that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development. . . ." Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. The agenda of the current Doha Round ("Doha Development Agenda" or "DDA") also aims to facilitate economic development of developing countries through international trade. See *supra* note 1.

7. The purpose of this paper is to provide a brief account of the regulatory and organizational gap in the WTO and the points of the proposed reform; thus, those who seek a more extensive discussion should refer to the author's other work, such as RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM, *supra* note 2.

II. REGULATORY REFORM

A. Current Regulatory Imbalance

The current rules of international trade represented by WTO disciplines apply to 195 Members of the WTO, thus constituting the global regulatory regime of international trade.⁸ Various agreements and understandings (WTO agreements) concluded in the Uruguay Round (1986-1994) were added to the rules of the General Agreement on Tariffs and Trade (GATT), which had been implemented since 1947 and still remain as the core principles of the international trade law.⁹ The subsequent WTO agreements reinforce the GATT rules, where applicable, by providing detailed procedures, provisions, and implementation mechanisms.

While most of key GATT provisions have been elaborated by more detailed WTO agreements with implementation mechanisms,¹⁰ none of the GATT's development-facilitation provisions, such as Article XVIII and Part IV provisions (Articles XXXVI ~ XXXVIII), has been reinforced by any WTO agreement. Some of the GATT principles, such as maximum tariff bindings in Article II, restrain the ability of developing countries to adopt trade-related development policies. The development-facilitation provisions in the GATT, such as Article XVIII, address this issue by enabling developing countries to adopt tariff measures beyond their previous commitments under Article II for development purposes.¹¹

8. Marrakesh Agreement, *supra* note 6, art. XIV. Compliance with the WTO legal disciplines is mandatory for all Members: Members are required to bring their own laws and practices in compliance with the rules of WTO legal disciplines.

9. See *WTO Legal Texts*, WORLD TRADE ORG., http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Dec. 29, 2011), for the GATT/WTO rules including Uruguay Round agreements, understandings, and GATT provisions.

10. For instance, GATT Article XIX on Emergency Action on Imports of Particular Products has been developed into the Agreement on Safeguards. General Agreement on Tariffs and Trade art. XIX, Oct. 30, 1947, 61 Stat. A-11, 1867 U.N.T.S. 194 [hereinafter GATT]; Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154. GATT Article VI on Anti-dumping and Countervailing Duties has been developed into two separate Agreements: one on anti-dumping (ADP Agreement) and the other on subsidies and countervailing measures (SCM Agreement). GATT art. VI, Oct. 30, 1947, 61 Stat. A-11, 1867 U.N.T.S. 194; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter ADP Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement]. For the text of the GATT provisions and agreements, see *WTO Legal Texts*, *supra* note 9.

11. GATT, *supra* note 10, art. XVIII, para. 2.

Nonetheless, certain requirements under the GATT's development-facilitation provisions, including those in Article XVIII and Articles XXXVI–XXXVIII,¹² cause difficulties for developing countries to adopt those measures. Article XVIII allows developing countries, whose economies only support low standards of living and are in the early stages of development,¹³ to adopt tariff measures beyond the maximum tariff bindings to which they are committed under Article II in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people.¹⁴ However, developing countries are also required to engage in negotiation with the interested Members and compensation may well be required as a result of any modification.¹⁵ Those negotiations can be lengthy, which may not allow developing countries to adopt the necessary measures in time, or may never be concluded successfully with the interested parties. Developing countries with limited economic resources may not be able to offer compensation required by the other parties. Article XVIII allows developing countries to adopt the measure even if negotiation should not be successful, provided that they offer compensatory measure at the time of applying the measure,¹⁶ but it is subject to retaliatory measures by the other interested Members should the WTO consider the compensation inadequate.¹⁷

Another set of major development-facilitation provisions of the GATT, Articles XXXVI–XXXVIII,¹⁸ lays out an impressive array of preferential treatments in favor of developing countries. Article XXXVI addresses the vital role of export earnings in economic development, the possible authorization of special measures to promote trade and development, and the need for more favorable and acceptable conditions of access to world markets for primary products (on which many developing countries depend).¹⁹ Article XXXVII elaborates the commitment of developed country Members' to assist developing countries with economic development. These commitments include according high priority to the reduction and elimination of import barriers to products of particular export interest to developing Members, refraining from introducing or increasing import barriers to such products, and according high priority to the reduction and elimination of policies specifically applicable to primary products wholly

12. See WORLD TRADE ORG., *supra* note 9, for the text of Article XVIII and Articles XXXVI–XXXVIII.

13. GATT, *supra* note 10, art. XVIII, para. 4(a).

14. *Id.* art. XVIII, para. 7(a).

15. *Id.*

16. *Id.* art. XVIII, para. 7(b).

17. *Id.*

18. WTO *Legal Texts*, *supra* note 9.

19. GATT, *supra* note 10, art. XXXVI, paras. 1–4.

or mainly produced in developing countries, which hamper the growth of consumption of those products.²⁰ Article XXXVIII calls for joint action and institutional effort by the WTO to assist developing countries.²¹ These provisions, however, are declaratory rather than obligatory for absence of sanction in the case of violation of those duties. Article XXXVII also allows developed countries to avoid any of those obligations by legislating against them.²²

Subsequent WTO agreements, while reinforcing other key GATT provisions,²³ do not address the implementation and enforcement problems of the development-facilitation provisions in the GATT, including those of Article XVIII and Articles XXXVI-XXXVIII, leaving regulatory vacuum in this area. The mainstream neo-classical economic stance does not support state-led development policies, such as infant industry promotion policies embodied in Article XVIII,²⁴ but the policy decision has already been made to allow developing countries this option when the Article was adopted by the GATT. Thus it would be only fair and adequate that those development-facilitation provisions are reinforced by subsequent agreements with detailed implementation provisions and enforcement mechanisms. The current WTO rules offer special and differential (S&D) treatment in favor of developing countries.²⁵ However, it is insufficient for the S&D provisions, which are scattered throughout WTO agreements, are either temporary or limited in coverage and extent.²⁶ The remainder of this section makes brief proposals for regulatory revisions to amend this development deficit in WTO legal disciplines.²⁷

B. Reform Proposal

The development deficit in the regulatory system can be cured by elaborating and reinforcing the development-facilitation provisions in the form of a separate WTO agreement, as has been done with other GATT provisions.²⁸ This agreement can be named, "The Agreement on

20. *Id.* art. XXXVII, para. 1.

21. *Id.* art. XXXVIII, para. 2.

22. *Id.* art. XXXVII, para. 1.

23. *See supra* note 10.

24. LEE, *supra* note 2, at 62.

25. 145 S&D provisions are scattered throughout several WTO agreements, understandings, and GATT articles. Twenty-two are applied exclusively to LDCs. For a review of the special and differential treatment (S&D) provisions in the WTO, see Note by Secretariat, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77 (Oct. 25, 2000).

26. *See* LEE, *supra* note 2, at 40-41, for a detailed account of the limits of the S&D provisions.

27. *See id.* ch. 2-6, for more detailed accounts of the proposals.

28. *See supra* note 10.

Development Facilitation (ADF).”²⁹ The Agreement may include rules for new, permanent S&D treatment in the areas that have critical implications for development such as tariff bindings, subsidies, anti-dumping, trade-related intellectual property rights, and trade-related investment measures.³⁰ The ADF can also provide a coherent regulatory standard for determination of developing countries to benefit from regulatory preferences.³¹ A separate agreement will function as exceptional rules to the other WTO agreements and its advantage is to advance development interests without potentially complex revisions to the existing agreements.

The maximum tariff binding under GATT Article II³² has important ramifications for development. Article II prohibits Members from raising tariff rates beyond the maximum bindings that they have agreed in the previous trade round.³³ While the requirement provides essential stability for international trading system, it also restrains the ability of developing countries to adopt tariff measures beyond the maximum bindings to promote domestic industries for development purposes. As mentioned, the GATT has adopted the policy to allow this measure by the provisions of Article XVIII, but the negotiation and compensation requirement causes a considerable difficulty for developing countries.³⁴

Development-Facilitation Tariff (DFT) has been proposed to address this issue.³⁵ The DFT scheme enables developing countries to set the maximum additional tariff rate beyond the tariff binding under Article II.³⁶ It assigns a different maximum DFT rate to an individual developing country on a sliding scale, to be determined in accordance with its level of economic development measured by relevant economic indicators such as per-capita gross national income (GNI) figures.³⁷

29. LEE, *supra* note 2, at 47.

30. *Id.* at 47–48.

31. *Id.* Under the current system, developing country status is self-declaratory and the absence of a definition for developing country Members seems to create regulatory ambiguity. See also Fan Cui, *Who are the Developing Countries in the WTO?*, 1 L. AND DEV. REV. 123 (2008).

32. GATT, *supra* note 10, art. II.

33. *Id.*

34. See discussion *supra* Part II.A.

35. LEE, *supra* note 2, at 66.

36. *Id.* at 68–70.

37. *Id.* at 68–69. For instance, suppose that the maximum DFT rate is set at 100 percent over the tariff binding and the economic threshold for an eligible developing country to benefit from a DFT is 15,000 USD per capita GNI. Then any country that has a higher per-capita income than 15,000 USD will not be eligible for a DFT. Country A with the per capita GNI of 3,000 USD, which is 20 percent of the threshold income, will be allowed to apply a DFT of 80 percent ($100\% \times (100\% - 20\%) = 80\%$). Country B with the

While negotiation and compensation requirements are not imposed on developing countries,³⁸ a series of procedural requirements, such as a report setting forth rationale for the proposed increase in tariffs, public hearing, notice, and gradual liberalization and elimination of the DFT after a set period of time, should reduce the possibility of an abuse.³⁹

A similar treatment can be considered for subsidies. Government subsidies are important development tools for developing countries,⁴⁰ and the WTO recognizes their importance for economic development.⁴¹ Yet, some of the key trade-related subsidies, such as export subsidies and import-substitution subsidies, are prohibited by the current WTO rules.⁴² The other kinds of subsidies that affect the trade of other Members adversely are also "actionable": i.e. subject to trade sanctions including countervailing measures.⁴³ As Dani Rodrik has aptly described, the current trade rules have made "a significant dent in the ability of developing countries to employ intelligently-designed industrial policies."⁴⁴

Historically, subsidies have played an important role in the economic development of today's developed countries,⁴⁵ and developing countries should be able to adopt trade-related subsidies without the fear of retaliatory measures from developed countries.⁴⁶ The concept of the sliding scale, which is used for the DFT, can be applied to subsidies otherwise prohibited or actionable under the current WTO rule.⁴⁷

per capita GNI of 12,000 USD, which is 80 percent of the threshold income, will be allowed to apply a DFT of 20 percent ($100\% \times (100\% - 80\%) = 20\%$). *Id.* at 69.

38. See discussion *supra* Part II.A. Those requirements are present for the application of Article XVIII measures.

39. LEE, *supra* note 2, at 66-67. The Agreement on Safeguards also includes those procedural requirements. See Agreement on Safeguards *supra* note 10, arts. 3, 7, 12.

40. LEE, *supra* note 2, at 52-54.

41. SCM Agreement, *supra* note 10, art. 27, para. 1.

42. *Id.* art. 3.

43. *Id.* arts. 5-7.

44. Dani Rodrik, Industrial Policy for the Twenty-First Century 34-35 (Sept. 2004) (unpublished paper prepared for the United Nations Industrial Development Organization) (on file with Harvard University), available at <http://www.hks.harvard.edu/fs/drodrik/Research%20papers/UNIDOSep.pdf>.

45. See HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 19-51 (2002). For instance, the United Kingdom provided extensive export subsidies to textile products in the eighteenth century, *id.* at 21-22, the United States offered subsidies to railway companies in the nineteenth century and invested heavily in research and development of new technologies, *id.* at 30-31, and Germany also subsidized a number of industries, including textiles and metals, *id.* at 33-34. Other developed countries today, including France, the Netherlands, Sweden, Japan, and the East Asian countries (NICs) all provided subsidies to promote their industries, *id.* at 35-51.

46. LEE, *supra* note 2, at 79.

47. See *supra* notes 42-43.

“Development-facilitation subsidy” or “DFS” can be considered in favor of developing countries under certain income thresholds. Under this scheme, developing countries are allowed to adopt otherwise prohibited or actionable subsidies in accordance with their per-capita income status.⁴⁸ The procedural requirements, comparable to those for the DFT, would also be important for the DFS scheme to prevent abuse.

Anti-dumping (AD) is another area in which substantial trade interests of developing countries are adversely affected. WTO rules allow Members to adopt AD measures in the form of added tariffs where they determine that imports are “dumped,” i.e. sold at prices below normal value.⁴⁹ The “normal value” is determined by comparison to the home price or to an export price in a third country where a proper comparison cannot be made for the market situation or a low sales volume in the domestic market.⁵⁰ The normal value can also be “constructed” based on costs and reasonable profits.⁵¹ This regulatory flexibility allows national authorities much latitude with anti-dumping investigations, making AD measures the most prevalently adopted trade measures of all.⁵² There is little economic rationale for imposing anti-dumping measures,⁵³ and particularly cheaper imports from developing countries have been a major target for AD measures, undermining the trade and development interests of developing countries.⁵⁴

The determination of “normal value” is inherently arbitrary and imprecise. For example, there may not be a single home market to compare, and the complex adjusted average may have to be calculated to come up with a reference home price.⁵⁵ Where a comparison should be made to an export price in a third country, there may not be a single export price but potentially many substantially different prices. Where a normal value needs to be constructed, the result can be vastly different, depending on a specific methodology adopted to calculate

48. LEE, *supra* note 2, at 79. Since the objective of the DFS is to promote economic development through export facilitation, it may not be used to support exports from developing countries whose share in the export market is above certain thresholds and that are already competitive.

49. ADP Agreement, *supra* note 10, art. 1.

50. *Id.* arts. 1-2.

51. *Id.* art. 2.

52. At the end of June, there were as many as 1,379 AD measures in force. WTO Secretariat, *Annual Report 2011*, 40 (2011), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf.

53. LEE, *supra* note 2, at 94.

54. Between July 1, 2009 and June 30, 2010, over three-quarters of the 181 new AD investigations were targeted to products from developing countries. WTO Committee on Anti-Dumping Practices, REPORT (2010) OF THE COMMITTEE ON ANTI-DUMPING PRACTICES, Annex C, G/L/935 (Oct. 28, 2010).

55. LEE, *supra* note 2, at 92.

costs and average prices, not to mention that the measure of "reasonable profit" can also vary.⁵⁶ The national authorities have almost free hands to determine the existence of dumping and the dumping margin. Limited reform of the AD Agreement has been proposed,⁵⁷ but it is unlikely to remove the inherent arbitrariness from the AD regime. As Yale economist T. N. Srinivasan has characterized, AD is indeed the equivalent of "nuclear weapon in the armoury of trade policy,"⁵⁸ and the ADF should prohibit AD measures against imports from developing countries altogether.

Certain trade-related government measures on investment (TRIMs) are also regulated by WTO rules. TRIMs are important government development policy tools, thus the rules regulating TRIMs need to be examined. Provisions of the WTO Agreement on Trade-Related Investment Measures⁵⁹ (TRIMs Agreement) prohibit a range of investment measures that affect international trade.⁶⁰ Those prohibited TRIMs include local content requirements (imposing the use of a certain amount of local inputs in production); import controls (requiring imports used in local production to be equivalent to a certain proportion of exports); foreign exchange balancing requirements (requiring the foreign exchange made available for imports to be a certain proportion of the value of foreign exchange brought in by the foreign investment from exports and other sources); and export controls (obligating exports to be equivalent to a certain proportion of local production).⁶¹

Investment can contribute to economic development significantly by bringing needed capital, technology, and management expertise to the host nation, and some of the TRIMs are designed to maximize investment's contribution to their development agenda.⁶² While the economic utility of TRIMs has been debated and the distorting trade effect of TRIMs has been underscored,⁶³ the decision to adopt TRIMs needs to be vested with developing countries. According to a recent study, all of today's developed countries also adopted investment

56. *Id.* at 93.

57. See WORLD TRADE ORG., *supra* note 1.

58. Int'l Institute for Sustainable Development, *Report on the WTO's High-Level Symposium on Trade and Development* (Mar. 17-18, 1999), available at http://www.wto.org/english/tratop_e/devel_e/sumhhl_e.pdf.

59. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 168 [hereinafter TRIMs Agreement].

60. The TRIMs Agreement prohibits investment measures that are inconsistent with Articles III and XI of the GATT, which requires national treatment and the general elimination of quantitative restrictions, respectively. *Id.* art. 2; GATT, *supra* note 10, arts. III, XI.

61. TRIMs Agreement, *supra* note 59, annex, ¶¶ 1(a)-2(c).

62. LEE, *supra* note 2, at 114, 117.

63. *Id.* at 118.

measures to meet their development objectives during their own development.⁶⁴ Reflecting this concern, twelve developing countries proposed to change the text of the TRIMs Agreement to make commitments under the agreement optional and not mandatory.⁶⁵ It would be indeed fair that today's developing countries should be accorded the same opportunity to use TRIMs to promote economic development. The ADF may include provisions to lift the application of the TRIMs Agreement in favor of developing countries.

The current WTO rules on intellectual property rights (Agreement on Trade-Related Property Rights⁶⁶ or TRIPS Agreement) should also be reconsidered in the context of development. Acquiring advanced technology and knowledge is important for developing countries to improve their industries and promote economic development,⁶⁷ and this tends to create tension between developing countries whose priority is to acquire advanced technology and knowledge and developed countries with an interest to protect them. Assigning proprietary rights to technology and knowledge domestically through local IPR law and internationally through conventions⁶⁸ is an effort to protect them. The TRIMS Agreement, the most extensive provisions in WTO legal disciplines,⁶⁹ sets out mandatory standards for the protection of several intellectual property rights (IPRs), including patents, trademarks, copyrights, designs, and geographical indications, mandates protection of foreign IPR holders by incorporating other major IPR conventions, and requires enforcement against IPR violations.⁷⁰

While protection of IPRs is a legitimate interest, those extensive requirements are counterproductive to the development effort of developing countries whose legal and financial recourses may not be

64. Ha-Joon Chang & Duncan Green, *The Northern WTO Agenda on Investment: Do as we Say, Not as we Did*, SOUTH CENTRE, 33 (June 2003), http://www.southcentre.org/index.php?option=com_content&task=view&id=380&Itemid=67 (follow "click here to download" hyperlink).

65. World Trade Organization, Preparations for the 1999 Ministerial Conference, ¶¶ 20-21, WT/GC/W/354 (Oct. 11, 1999).

66. Agreement on Trade-Related Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

67. LEE, *supra* note 2, at 123.

68. For instance, the Paris Convention for the Protection of Industrial Property art. 2, ¶ 1, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 11851, offers protection for foreign patent holders and the Berne Convention for the Protection of Literary and Artistic Works, arts. 1-2, ¶ 1, Sept. 9, 1886, 1161 U.N.T.S. 30, does so for foreign copyright holders.

69. TRIPS Agreement is composed of 73 Articles in seven parts. See TRIPS Agreement, *supra* note 66.

70. *Id.* arts. 9-12.

sufficient for the extensive IPR protection.⁷¹ The ADF should exempt developing countries from the application of the TRIPS Agreement to the extent that it imposes legislative requirements on them. This does not mean that developed countries should give up their IPR interests in the context of international trade. A better alternative is to develop another set of rules and elaborate on the relevant provision of GATT Article XX which allows Members to take measures to protect their IPR interests,⁷² so as to specify applicable measures as well as the procedural and substantive requirements for the application of the measures as has been the case with the adoption of the WTO Agreement on Safeguards which was developed based on GATT Article XIX.⁷³

Finally, the ADF may also require quota-free, tariff-free treatment for imports from least-developed countries (LDCs). Some developed countries have offered preferential treatment to LDCs. For instance, the European Union has introduced the "Everything But Arms" (EBA) initiative, offering duty-free and quota-free treatment to products currently exported by LDCs.⁷⁴ Other countries, such as the United States and Canada, offer similar preferential treatment to LDCs, although less comprehensive and more limited in scope than the EBA initiative.⁷⁵ Considering the dire economic need of LDCs, an EBA-type

71. According to a study, implementing the TRIPS obligations "would require the least developed countries to invest in buildings, equipment, training, and so forth that would cost each of them \$150 million — for many of the least developed countries this represents a full year's development budget." J. Michael Finger, *The WTO's Special Burden on Less Developed Countries*, 19 CATO J. 425, 435 (2000).

72. GATT Article XX provides in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trade marks and copyrights, and the prevention of deceptive practices

GATT, *supra* note 10, art. XX.

73. The Agreement on Safeguards elaborate on GATT Article XIX and provides a detailed set of substantive and procedural requirements for the application of a safeguard measure. See YONG-SHIK LEE, *SAFEGUARD MEASURES IN WORLD TRADE: THE LEGAL ANALYSIS* (2d ed. 2007), for a detailed study of safeguard measures.

74. See Paul Brenton, *Integrating the Least Developed Countries into the World Trading System: The Current Impact of European Union Preferences Under "Everything But Arms,"* 37 J. WORLD TRADE 623, 623-26 (2003), for an initial evaluation of the EBA initiative.

75. For instance, the United States has implemented the *Africa Growth and Opportunity Act*, which offers improved access to certain African, but not Asian, LDCs. *Id.* at 644-45.

of duty-free and quota-free treatment needs to be implemented by developed countries and participating developing countries in the WTO. A transitional period can be established for the complete removal of trade barriers to sensitive products.⁷⁶ Members would also have to ensure that non-tariff measures do not undermine the trade benefit of these preferences for LDCs.⁷⁷

III. WTO GOVERNANCE

A. Case for WTO Council for Trade and Development⁷⁸

The present organizational structure of the WTO is not adequate to address the development interests of developing countries at the highest level. The main body in the WTO which deals with trade and development issue is the Committee on Trade and Development (CTD). The CTD reports to the General Council and has a mandate to address certain trade and development issues such as implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased participation of developing countries in the trading system, and LDCs issues. The WTO provides assistance to developing countries which focuses on capacity-building.⁷⁹

The organizational status and mandate of the CTD is insufficient to address fundamental trade and development issues such as finance and debt relief in the context of trade, technological transfer which is key to resolve capacity-building issues, and extensive regulatory reform to fill the development deficit in the present regulatory framework. Those core issues with ramifications that affect the WTO as a whole must be addressed at the Council level, which is the highest decision making body in the WTO organization. The trade and development issues cited above require long-term attention and intense negotiation efforts at the highest organizational level. LDC issues, which are now being

76. At the adoption of the EBA initiative, trade liberalization was complete except for three products: fresh bananas, rice, and sugar, where tariffs were to be gradually reduced to zero (in 2006 for bananas and 2009 for rice and sugar). Duty-free tariff quotas for rice and sugar were to be increased annually. *Id.* at 625.

77. It has been observed that non-tariff measures, as well as stringent rules of origin, continue to limit exports from LDCs significantly. Stefano Inama, *Market Access for LDCs: Issues to Be Addressed*, 36 *J. WORLD TRADE* 85, 115 (2002). Applications of administered protection, such as anti-dumping measures, countervailing duties, and safeguards, can also diminish the beneficial effect of preference for LDCs.

78. LEE, *supra* note 2, ch. 2.3.2.

79. At present WTO assistance to developing countries focuses on capacity-building. In this area, the WTO Secretariat primarily offers assistance through its Institute for Training and Technical Cooperation. Assistance includes legal advice to some developing countries, regular training sessions on trade policy in Geneva, and the organization of approximately 400 technical cooperation activities annually, comprising both seminars and workshops in developing countries and courses in Geneva.

discussed at a subcommittee under the CTD, require attention and work at a full committee level given the complexity and urgency of the dire economic conditions of the LDC. This committee on LDCs can be constituted under the proposed Council for Trade and Development.

The proposed organizational elevation of the CTD to a full Council is well justified by comparison to the treatment of intellectual property right issues in the WTO. IPRs have been promoted by a relatively small number of developed Members within the WTO, but their importance has been emphasized and recognized by instituting a separate Council for Trade-Related Intellectual Property Rights.⁸⁰ Trade and development issues are considered essentially important by the majority of WTO membership, which is comprised of developing countries. This majority interest should receive the comparable attention and recognition by the WTO. Setting up a separate Council for Trade and Development will be an affirmation of such recognition and will allow trade and development issues to be addressed at the highest institutional level.

B. Proposed Role of the Council for Trade and Development⁸¹

The role of the proposed Council should be set out to meet its objective to advance the trade and development agenda in the WTO. Thus the role of the new Council may include promotion of development agendas and implementation of trade-related development assistance policies, monitoring development and implementation of trade-related rules and policies relevant to development interests of developing countries, and establishment and supervision of subcommittees to address specific development issues.

As to the implementation of trade-related development assistance policies, the Council may on a regular basis identify problems and gaps in the current trading system and practices in facilitating development and set a trade and development agenda accordingly. This agenda may be discussed at the Ministerial Conferences and in subsequent trade negotiations to develop a more development-supportive regulatory system and trade practices. This would include modifying relevant rules where necessary. In promoting a trade and development agenda, the Council may also cooperate with relevant international bodies such as the United Nations Committee on Trade and Development (UNCTAD) and the United Nations Industrial Development Organisation (UNIDO). Through such cooperation, the trade and development

80. Marrakesh Agreement, *supra* note 6, art. IV.

81. See LEE, *supra* note 2, ch. 2.3.2; Yong-Shik Lee, *World Trade Organization and Developing Countries*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 109, 109-11 (Yong-Shik Lee et al. eds., 2011).

agenda set by the WTO would be promoted and coordinated more effectively and consistently.

In addition, the reform may include a mandatory reporting requirement for all developed country Members and participating developing country Members to file a "Trade-Related Development Assistance Report" (TDAR) on a regular basis. This report would identify and examine trade practices and activities of an individual Member that are in compliance with the trade and development agenda set by the Council, as well as those that are inconsistent with them. The Council should examine TDARs on a regular basis and consult with relevant Members to discuss their development assistance activities. The Council could agree on specific commitments to be fulfilled by the developed country Members and participating developing country Members to promote the trade and development agenda, and the Council may further examine, within a certain time period, whether these commitments are being met.

The Trade and Development Council could also monitor compliance with WTO provisions on development assistance, including the existing S&D provisions,⁸² GATT Articles XXXVI XXXVIII, as well as the pro-development provisions proposed in the preceding section of this chapter.⁸³ A portion of this monitoring could be incorporated in the TDAR. A violation of those provisions should be reported to the Council if it is detrimental to the trade interests of developing country Members. The Council may subsequently consult with the violating Member to seek a resolution.

The TDAR could also monitor the commitments of developed country Members to developing countries under GATT Article XXXVII.⁸⁴ Compliance with these commitments may require a broader policy adjustment by the developed country Member, which may necessitate monitoring by the Council. The Council should publish an annual report on compliance with the development assistance provisions and provide monitoring of any systematic compliance failure. The Council may also include issues of compliance failure in the trade and development agenda with a prospect of rule modification where necessary.

Finally, the Council may also establish standing or ad-hoc committees to address specific issues of trade and development that require long-term attention, such as technological transfer between developed and developing country Members. There should be at least one committee specifically devoted to the problems of LDCs and another

82. See *supra* note 25.

83. See discussion *supra* Part II.B.

84. See discussion *supra* Part II.A.

to assist with capacity building of developing countries to participate fully in the trading system and realize its benefits.⁸⁵ Greater assistance should also be provided to developing country Members involved in costly and time-consuming trade disputes. Consideration should also be given to whether it would better serve the needs of developing country Members to assign the function of the existing WTO Advisory Centre to a committee under the proposed Council for Trade and Development. In either case, the current WTO Advisory Centre needs to be expanded so that it can offer assistance to every developing country Member in need of support with respect to the panel or Appellate Body proceedings.

IV. CONCLUSION

The current regulatory framework for international trade under the WTO is marked by "development deficit." The Uruguay Round failed to elaborate and develop any of the development-facilitation provisions in the GATT, such as Article XVIII and Articles XXXVI XXXVIII, into a more detailed, enforceable set of rules in WTO agreements, while it has done so in the other areas.⁸⁶ S&D provisions in the WTO agreements are either temporary or insufficient to meet the development interests of most developing countries.⁸⁷ While market access and freer trade is emphasized across the board, exceptions have been legislated in the areas it does not serve the interests of many developed countries, such as agriculture. The outcome is the clearly imbalanced rules in the WTO system, which promotes the trade interests of developed countries disproportionately, and undermines the development interests of developing countries.

Also, the organizational structure of the WTO does not adequately reflect on the interests of developing countries. While the trade interests of developed countries, such as trade in services and trade-related intellectual property rights, are regularly addressed at the highest institutional level, in the Council for Trade in Services and the Council for Trade-Related Intellectual Property Rights, the comparable institutional weight has not been accorded to the development interests of developing countries. There is no Council devoted to the trade and development issues, only a Committee (CTD) under the General Council, with an insufficient mandate to address fundamental trade and development issues, which would require negotiations and decisions at the highest level. Considering that over three-quarters of

85. The Aid for Trade done by the WTO has been helpful for developing countries in this regard. See Aid for Trade, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (last visited Nov. 22, 2011).

86. See discussion *supra* Part II.A.

87. *Id.*

the entire WTO membership is developing countries, whose primary membership interest is economic development through international trade, the present organizational status of the CTD is not inappropriate and should be elevated to the full Council level.

Since the inception of the WTO, world trade as a whole has increased rapidly benefitting developed countries and some select developing ones.⁸⁸ However, many developing countries, particularly least-developed countries, have not taken a fair share of economic growth through trade.⁸⁹ The forecited regulatory imbalance and the inadequate institutional coverage of trade and development issues at the WTO have contributed to this problem. The Doha Round was launched to address the development deficit in the system, but its successful conclusion is not in clear sight. Even if the present Round is concluded, the development deficit in the WTO regulatory disciplines and trade practices will not be cured. This chapter has proposed regulatory and organizational reform to address this issue. It is hoped that developed countries will join to support the necessary reform with understanding that the successful development of developing countries will provide markets for their own exports in future, as some of the former developing countries, such as South Korea, Taiwan, Singapore, Hong Kong, and more recently, China, have shown.⁹⁰ After all, the proposed regulatory and institutional facilitation of development would prove to be in the interest of all.

88. For instance, China has substantially increased its trade, particularly after joining the WTO in 2001.

89. The LDC's share of world trade has declined by more than 40 percent since 1980 to a mere 0.4 percent. United Nations Conference on Trade and Development, *The Least Developed Countries 1999 Report*, at 106, U.N. Doc. UNCTAD/LCD/1999 (Jan. 12, 1999).

90. LEE, *supra* note 2, at 6-9.