“The Long and Winding Road – Path Towards Facilitation of Development in the WTO: Reflections on the Doha Round and Beyond”

Yong-Shik Lee, Ph.D (Cantab.)

2016 Law and Development Conference

Buenos Aires, Argentina
October 2016

* Prof. Y.S. Lee is Director of the Law and Development Institute and Visiting Professor for the Master’s in Development Practice Program, Emory University.
The Long and Winding Road – Path Towards Facilitation of Development in the
WTO: Reflections on the Doha Round and Beyond

Yong-Shik Lee, Ph.D (Cantab.)

Summary

The current multilateral trading system under the auspices of the World Trade Organization (WTO) displays a substantial development gap in the regulatory and institutional frameworks. The Doha Round negotiations, which was initiated to promote development interests under the Doha Development Agenda (DDA), have not been concluded for over 14 years, raising doubts about the ability of the WTO system to promote development interests effectively. While the Doha Round sluggishly for a number of years, regional trade agreements, which currently include every WTO Member, have been proliferated, creating significant implications for developing countries. This article examines the development of the Doha Round, analyzes the causes of its impasse, and explores its future prospects. The article also discusses the development gap in the current trading system and advances reform proposals to fill the gap in the system.

Keywords: WTO, international trading system, economic development, the Doha Round, regional trade agreements
I. INTRODUCTION

The facilitation of development has become a key objective for the multilateral trading system under the auspices of the World Trade Organization (WTO), of which three-quarters of the membership is currently comprised of developing countries. Yet, the legal disciplines of the General Agreement on Tariffs and Trade (GATT) and the WTO (“GATT/WTO disciplines”) are marked with a significant development deficit as further discussed in this article. The Doha Round, which was initiated to advance development interests under the Doha Development Agenda (DDA), has not been concluded for over 14 years, failing to deliver on the promises of development. Despite numerical superiority, developing countries have not substantially improved their positions in the world trading system, as demonstrated in the failure to advance their development interests at the Doha Round. This article discusses the difficulties in promoting development interests in the WTO system, identifies the development deficit in the current rules, and presents reform proposals to facilitate development in the WTO system.

The emphasis on development has evolved since the era of the GATT, the predecessor of the WTO. The Preamble of the WTO Agreement provides in relevant part, “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, April 15, 1994, 1867 U.N.T.S. 154 [hereinafter “WTO Agreement”], preamble. See also WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC (Dec. 18, 1996), para. 13.


See also Lee, Reclaiming Development, supra note 1, chapter 1.4.

6 The Doha Round is signified by its development agenda (“DDA”) which aims to advance the interests of developing countries in the current negotiation areas, including agriculture, non-agricultural market access, services, intellectual property, trade and development, trade and environment, trade facilitation, WTO rules, and Dispute Settlement Understanding. WTO, The Doha Round, available online at <http://www.wto.org/english/tratop_e/ddd_e/ddd_e.htm#development>.
WTO. In the early period of the GATT, little progress was made in meeting development objectives, but attention to the importance of development grew over time as the participation of developing countries increased. With the number of developing countries reaching over three-quarters of WTO membership, development has become a key issue in the WTO. The WTO Agreement (i.e., the Marrakesh Agreement Establishing the WTO) includes the facilitation of development among its major objectives. As shown in the preamble to the WTO Agreement, the WTO recognizes the role of international trade in development and the need to ensure that developing countries share in the growth of international trade. The first WTO Ministerial Conference also addressed the importance of integrating developing countries in the multilateral trading system for their economic development, recalling that “the WTO Agreement embodies provisions conferring differential and more favorable treatment for developing countries, including special attention to the particular situation of least-developed countries.”

Despite the emphasis on development, GATT/WTO disciplines display considerable deficiencies in promoting development interests. For instance, a wide range of exceptions exists in the regulations on trade in agriculture, adversely affecting the interests of many developing countries dependent on exports of agricultural products. While market access was demanded of developing countries and trade-related subsidies were banned or made actionable despite their use as an effective tool for economic development, development-facilitation provisions in the

---

7 The late Professor Robert Hudec’s insightful work, Developing Countries in the GATT Legal System, Thames Essays (Trade Policy Research Centre, London, 1987), provides an excellent account of how the GATT as an institution came to accommodate the increasing involvement of developing countries in the world trading system.  
8 A GATT ministerial decision in November 1957 cited “the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries” as a major problem. GATT, Trends in International Trade, 29 November 1957, GATT B.I.S.D (6th Suat), at 18 (1958). This decision led to the publication of the “Haberler Report,” which supported the perception that the export earnings of developing countries were not satisfactory. Gottfried Haberler et al., Contracting Parties to the GATT, Trends in International Trade (1958) cited in Shoenbaum, “The WTO and Developing Countries” (2005) 54 The Journal of Social Science, at 12. 
9 Supra note 2. 
11 The WTO recognizes least-developed countries (LDCs) as designated by the United Nations based on multiple criteria such as a low-income criterion, a human resource weakness criterion, and an economic vulnerability criterion. 48 LDCs are on the U.N. list as of August 2015. For further details of LDCs, see the introduction by U.N.’s Development Policy and Analysis Division, available online at <http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml>. There are currently 48 least-developed countries on the UN list, 34 of which have become WTO members to date. See WTO, Least-developed countries, available online at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>.  
12 See also Lee, Reclaiming Development, supra note 1, chapter 5.1. 
13 Id., chapter 1.4.
GATT, such as Article XVIII, have never been expanded into more enforceable agreements, creating a regulatory imbalance in the system. Trade facilitation is an important part of development strategy and needs to be supported by the WTO. The successful development of East Asian economies—such as those of South Korea, Taiwan, Singapore, Hong Kong, and, more recently, China—was fostered by rapid increases in their exports which, in turn, transformed their industrial structure and enhanced economic growth. A key objective of the Doha Round is to facilitate trade for developing countries, and the next section examines the development of the Doha Round to determine whether this effort has been successful. Section III identifies a regulatory gap and presents reform proposals. Conclusions are offered in Section IV.

II. DEVELOPMENT FACILITATION EFFORT IN THE WTO SYSTEM: THE DOHA ROUND

The long delays in the conclusion of the Doha Round—the first round of trade negotiations since the establishment of the WTO to be aimed at advancing development issues—is a testament to the difficulty in promoting development in the WTO regime. The size of the WTO membership and the wide differences among them with respect to trade positions have made it more difficult to reach agreement than in the previous GATT rounds where the number of participants was much smaller. Nevertheless, opportunities to reach agreement and conclude the Round have emerged at times, but such momentum was repeatedly lost over continuing controversies and divisions on some key issues as further discussed below.

A. Necessity for the “Development” Round

Developing countries, feeling under-represented in the WTO, grew markedly discontent in the late 1990s, as shown by the failure of the Seattle Ministerial Conference. Developing countries,
which then comprised the numerical majority in the WTO, formed alliances and demanded changes necessary to “level” the playing field and reduce disadvantages for developing countries by, for example, increasing market access for agricultural products and reducing agricultural subsidies.\(^{20}\) By the end of the 20\(^{th}\) century, it was clear that no progress would be possible in the multilateral trading system unless these development interests were accommodated. Also, the Uruguay Round (UR) came to an end in 1994 with commitments to continue negotiations in three subjects: (i) geographical indications for wines; (ii) agriculture; and (iii) services.\(^{21}\) There was also an interest in resolving issues with the implementation of certain WTO Agreements already in place, all of which necessitated a new round.\(^{22}\)

The Doha Round was the outcome of these events. It was launched in 2001 in Doha, Qatar, at the WTO’s fourth Ministerial Conference.\(^{23}\) Like the previous rounds, the Doha Round also sought to reduce barriers to trade, with a focus on improving the conditions of trade for developing countries.\(^{24}\) The November 2001 Declaration of the Doha Ministerial Conference established a work program on the DDA.\(^{25}\) The DDA, focusing on both trade negotiations and the resolution of issues with the WTO agreements, included 21 subjects initially,\(^{26}\) maintaining the principle of a “single undertaking”; WTO member states (“Members”) were required to accept the entire package and were not permitted to select specific subjects and deny others, which later proved to


\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Supra note 6.

\(^{25}\) Supra note 21.

\(^{26}\) These subjects include: implementation; agriculture; services; market access (non-agriculture); intellectual property; investment; competition; transparency in government procurement; trade facilitation; anti-dumping; subsidies; regional agreements; dispute settlement; environment; e-commerce; small economies; trade, debt and finance; trade and technology transfer; technical cooperation; least-developed countries; and special and differential treatment. WTO, Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 20, 2001). See WTO, Subjects treated under the Doha Development Agenda, text available online at <https://www.wto.org/english/tratop_e/dda_e/dohasubjects_e.htm>. One study examined the negative effect of the Round on state capacity to provide and regulate health services in low-income countries and the impact that effect will have on livelihoods among the poor and their ability to access health services. James Scott and Sophie Harman, “Beyond TRIPS: Why the WTO's Doha Round is unhealthy” (2013) 34:8 Third World Quarterly, at 1361-1376.
be a cause of substantial delays in the conclusion of the Doha Round. The original goal was to conclude all negotiations by January 1, 2005, but as of November 2015 the Round was not concluded, after more than a decade beyond the original deadline.

B. Development of the Doha Round: “The Long and Winding Road”

The progress of the Doha Round was treacherous from the early years of negotiation; in September 2003, the fifth WTO Ministerial Conference, and the first after the launch of the Doha Round, was held in Cancún, Mexico. The main task of the Ministerial Conference was to “take stock of progress in the [Doha Development Agenda] negotiations, provide any necessary political guidance and take decisions as necessary.” However, a great deal of disagreement over agricultural issues and a standstill over a group of issues, collectively referred to as the “Singapore Issues,” led to the failure of the Ministerial. After the Seattle Ministerial, the shift in relative bargaining power among the negotiating participants in favor of the developing countries was also observed in the Cancún Ministerial. Facing considerable difficulties in the Doha Round, Members in increasing numbers turned to the negotiation of regional trade agreements (RTAs) to advance their trade interests.

One year later, the decision adopted by the General Council, known as the July 2004 package, saved the Doha Round from the failure of the Cancún Ministerial and created new momentum to resume the negotiation. The package solidified agreement thus far reached on the negotiation.

---

27 Supra note 21.
28 WTO (2001), Ministerial Declaration, supra note 26, para. 45.
29 Supra note 21.
30 This quote alludes to the title of a famous Beatles song released in 1970.
31 WTO (2001), Ministerial Declaration, supra note 26, para. 45.
32 The Singapore Issues refer to the four subjects, namely trade and investment, competition policy, transparency in government procurement, and trade facilitation, on which Members agreed at the 1996 Singapore Ministerial Conference to set up working parties for further investigation. These four subjects were initially included in the DDA, but for lack of consensus, Members subsequently agreed to proceed on only one subject, trade facilitation. See WTO, Decision of the General Council, WT/L/579 (August 2, 2004).
34 Id. See also supra note 20.
35 Id. See also Lee, Reclaiming Development, supra note 1, chapter 6, for the discussion of the proliferation of RTAs since the establishment of the WTO.
agenda and set up a framework for establishing negotiation modalities in agriculture, thereby paving a way for the 2005 Ministerial Conference to be held in Hong Kong, China, in December 2005. At the 2005 Hong Kong Ministerial Conference, Members agreed on the Ministerial Declaration and adopted a revised negotiation timetable.

However, the progress made was only short-lived; the negotiation modalities were not agreed on by the end of April 2006, missing the deadline that had been set by the Hong Kong Ministerial, and the negotiations were suspended officially in July 2006 due to the impasses created by a number of differences over key issues, mostly related to agriculture. The three areas of the Doha Round—agricultural domestic support, agricultural market access and non-agricultural market access (NAMA), called “the triangle of issues,” were considered key to the successful conclusion of the Round, but Members could not reach agreement on them; according to Pascal Lamy, the then-Director-General of the WTO, “the gap in level of ambition between market access and domestic support remained too wide to bridge. This blockage was such that the discussion did not even move on to the third leg of the triangle — market access in NAMA.”

The negotiations resumed six months after the suspension, but the “July 2008 package,” which was hoped to break the deadlock between proposed negotiation modalities in agriculture and NAMA, was yet again unsuccessful, and the negotiations failed to bridge the gaps on

---

36 WTO, Decision Adopted by the General Council on 1 August 2004, WT/L/579 (Aug. 2, 2004). The “modalities” in agriculture and non-agricultural market access (NAMA) refer to the formulas and other methods used to reduce tariffs and agricultural subsidies. Agreeing on modalities would determine the scale of reductions in tariffs and levels of agricultural subsidies, and as such, agreement has been the main focus of the negotiation.
37 Id., para. 3.
38 WTO, Ministerial Declaration, WT/MIN(05)/DEC (Dec. 22, 2005).
40 Id.
41 Id.
42 Id.
agricultural issues. After the failure of July 2008 negotiations, the gloomy mood of pessimism for the future of the Doha Round and also for that of the WTO as the multilateral trading system prevailed. In the aftermath of the failed negotiations, Pascal Lamy stated, “The round has broken down.” The subsequent worldwide financial crisis diverted attention and energies from the Doha Round, and Members intensified efforts in negotiating and concluding RTAs outside the Doha framework with a smaller number of other countries sharing closer economic and trade interests. Another deadline was set to conclude the Doha Round by the end of 2011, but the attempt to conclude the Round was, again, foiled due to the insurmountable division among Member positions. Reflecting on the state of long delays in the Doha Round, The Economist suggested that focus should be made on manufacturing and services, instead of agriculture, where negotiations were more likely to be successful.

However, the Doha Round was not completely “dead,” and efforts continued in negotiations. As a result, the ninth Ministerial Conference in Bali, Indonesia, in 2013 produced a visible outcome called the “Bali Package,” a series of Ministerial Decisions directed at facilitating trade, facilitating food security in developing countries, and assisting trade in least-developed countries.
As to trade facilitation, the Agreement on Trade Facilitation (ATF) was finalized as a part of the Bali Package. Trade facilitation was included in the Singapore Issues and adopted in the DDA. The ATF, comprised of three Sections, sets out provisions for expediting the movement, release and clearance of goods (including goods in transit), clarifies and improves the relevant articles (V, VIII and X) of GATT, and includes provisions for customs cooperation. The benefits of the Agreement have been highlighted, but the lingering concern is that developing countries could incur a considerable amount of cost in implementing the ATF. The ATF allows developing countries to designate provisions that will be implemented upon acquisition of implementation capacity, but despite this flexibility and some positive economic forecasts, it is not clear whether developing countries stand to gain from this potentially costly regulatory imposition.

In contrast, although a declaration urges developed countries to refrain from using export subsidies, no regulatory commitment has been imposed in the area, an area in which developing countries have a particular interest. As some developing countries complained, there appears to be no adequate balance between the demands on developing countries to make potentially costly commitments in trade facilitation and developed countries’ willingness to make commitments on export subsidies, repeating the pattern of imbalance in the UR that created a development deficit in the system. Similarly, the Ministerial Decision on Preferential Rules of Origin for LDCs does not create binding legal commitments with enforceable numerical stipulations, such as the minimum value addition that would qualify exporting LDC countries for

---

51 Id.
52 WTO, Ministerial Decision of 7 December 2013, WT/MIN(13)/36, WT/L/911 (Dec. 11, 2013). The Agreement was inserted into Annex 1A of the WTO Agreement in November of 2014 under a Protocol of Amendment; when two-thirds of Members have ratified the Agreement, it will enter into force. WTO, Trade Facilitation, text available online at <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm>. As of September of 2015, 17 members had formally accepted the ATF. WTO, Liechtenstein ratifies Trade Facilitation Agreement, 2015 News Items (Sept. 18, 2015), text available online at <https://www.wto.org/english/news_e/news15_e/fac_18sep15_e.htm>.
53 Supra notes 26 and 32.
55 WTO, Agreement on Trade Facilitation, Ministerial Decision of 7 December 2013, WT/MIN(13)/36, WT/L/911 (Dec. 11, 2013), [hereinafter “ATF”], sec. II, art. 2.1.
56 Supra note 54.
58 WTO, Briefing note: Agriculture negotiations — the bid to ‘harvest’ some ‘low hanging fruit’, available online at <https://www.wto.org/english/the WTO_e/minist_e/me9_e/brief_agneg_e.htm#exportsubsidies>.
preferential rules of origin; the Decision merely notes that “LDCs seek consideration of allowing foreign inputs to a maximum of 75% of value in order for a good to qualify for benefits under LDC preferential trade arrangements.” Such a non-enforceable but rather good-faith-obligation approach is also found in other provisions of the Bali package, such as the promotion of duty-free quota-free market access for LDCs.

C. Concluding the Doha Round

At the writing of this article, the WTO’s tenth Ministerial Conference has been scheduled to take place in Nairobi, Kenya, December 15–18, 2015. However, it appears unlikely that the international community will see the resolution of the key issues of the Doha Round, the so-called triangle of issues (agricultural market access, domestic subsidy, and NAMA), in the near future; instead, focus will be placed on the other issues with less disagreement, such as LDC issues. Considering the passage of time and the seemingly irreconcilable differences among Members on the key issues, one possible option would be to adjust the goals of the Doha Round to a realistically achievable level and conclude the Round. However, in such a case the WTO may face a considerable loss of credibility for failing to reach agreement on the key issues after having spent so many years negotiating them. Because little has been achieved to promote the interests of developing countries, if the Doha Round is concluded without agreement on the key issues, the hopes to realize a more balanced trading system in the WTO might also diminish.

59 The Decision states in relevant part, “In the case of rules based on the ad valorem percentage criterion…it is desirable to keep the level of value addition threshold as low as possible and that the methods for the calculation of value should be as simple as possible.” (emphasis added) WTO, Ministerial Decision of 7 December 2013, WT/MIN(13)/42, WT/L/917 (Dec. 11, 2013), paras. 1.3 and 1.4.
60 Id., para. 1.3.
61 WTO, Ministerial Declaration of 7 December 2013, WT/MIN(13)/44, WT/L/919 (Dec. 11, 2013). As a part of the Bali package, agreement was also reached to refrain temporarily from raising a legal complaint against stockholding of food by governments of developing countries at supported prices for food security, even if it results in exceeding the limits set by the Agreement on Agriculture. WTO, Ministerial Declaration of 7 December 2013, WT/MIN(13)/38, WT/L/913 (Dec. 11, 2013).
63 Supra note 39.
64 Alternatively, another drive could be made to reach agreement on the key issues, built upon the revised draft modalities, but this will require strong political support on the part of all major Members. As negotiations for RTAs outside the Doha Round are intensifying among them, as shown in the recent conclusion of the Trans Pacific Partnership (TPP) Agreement, it is not at all clear whether the WTO will be able to attain such strong political support from Members to reach agreement on the key issues.
65 This outcome would be against the aspirations of the Round as stated in the Doha Declaration,
This is the dilemma that the WTO faces, an important reason that it could not announce the conclusion of the Round with the more modest achievements for the past 14 years.

III. DEVELOPMENT “DEFICIT” IN THE CURRENT RULES AND REFORM PROPOSAL

Regardless of the current development of the Doha Round and its future prospects, there is a fundamental need for reforming current GATT/WTO disciplines to rectify their significant development deficits, issues beyond the scope of reform attempted by the Doha Round. Some GATT/WTO provisions attempt to support the interests of developing countries, as discussed below, by granting special and differential treatment (“S&D treatment”). S&D provisions aim to increase the trade opportunities of developing countries, require Members to safeguard the interests of developing countries, allow some flexibility to developing countries with respect to commitments and use of policy instruments, provide additional transitional time-periods to implement commitments, and offer technical assistance. According to a WTO report, 138 S&D provisions are scattered throughout the GATT, WTO agreements, and understandings, 14 of which are applied exclusively to LDCs. As discussed below, these S&D provisions are insufficient to support development interests, and more extensive regulatory reform is required in the following areas.

A. Tariff Bindings

GATT Article II requires WTO member states (“Members”) to “bind” maximum tariff rates through their Schedule of Concessions. Paragraph I of Article II provides:

(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to

“The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration . . . . [W]e shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development.” WTO (2001), Ministerial Declaration, supra note 26, para. 2.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.\(^{67}\)

While this requirement of maximum tariff binding provides essential stability for the international trading system, it also restrains the ability of developing countries to adopt tariff measures above the maximum bindings to promote domestic industries for development purposes.\(^{68}\)

GATT Article XVIII, entitled “Government Assistance to Economic Development,”\(^{69}\) offers S&D treatment to developing country Members with respect to the tariff binding. Specifically, Article XVIII enables developing country Members, whose economy can only support low standards of living and are in the early stages of development,\(^{70}\) “to maintain flexibility in their tariff structure to be able to grant the tariff protection \textit{required for the establishment of a particular industry} and to apply quantitative restrictions for balance of payment purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.” (emphasis added)\(^{71}\) The purpose of Article XVIII is to assist developing country Members in implementing programs and policies of economic development designed to raise the general standard of living of their people, doing so by authorizing those Members to take protective or promotional measures affecting imports (e.g. raising tariffs beyond their bound concessions).\(^{72}\)

\(^{67}\) GATT, art. II, para. 1(a) and 1(b).

\(^{68}\) While there has been controversy as to the effectiveness of the tariff protection as means of facilitating domestic industries and fostering economic development, the GATT approves measures for this purpose, as in GATT Article XVIII.

\(^{69}\) GATT, art. XVIII.

\(^{70}\) Id., para. 4(a).

\(^{71}\) Id., para. 2.

\(^{72}\) See also Lee, \textit{Reclaiming Development}, supra note 1, chapter 3.1.2.
Article XVIII addresses the need of developing countries to establish and promote industries for the purpose of economic development by authorizing import restrictions. However, the provisions of this Article also require developing countries to conduct negotiations with other interested Members and to offer reciprocal concessions.\(^\text{73}\) This requirement of consultations and negotiations may cause considerable delays in implementing necessary trade measures for development purposes, and the reciprocal concessions may also burden their economies and prove counter-effective to their development interests. Although it is desirable to allow developing countries additional facilities to have a more flexible tariff structure, as Article XVIII attempts to do, this type of multilateral scrutiny diminishes their effectiveness in assisting with development.\(^\text{74}\) As a result, this Article has never been invoked, except to address balance of payment issues, since the beginning of the WTO regime in 1995, demonstrating its ineffectiveness.\(^\text{75}\)

The “Development-Facilitation Tariff” or “DFT” has been proposed to address this issue.\(^\text{76}\) The DFT scheme enables developing countries to set the maximum additional tariff rate above the tariff binding under Article II to assist the development of their infant industries.\(^\text{77}\) 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.\(^\text{78}\) For instance, suppose that the maximum DFT rate is set at 100% over the tariff binding and the economic threshold for an eligible developing country to benefit from a DFT is 12,000 USD per capita GNI. Then any country that has a higher per-capita income than 12,000 USD will not be eligible

---

\(^\text{73}\) GATT, art. XVIII, para. 7.
\(^\text{74}\) This may explain the relatively few numbers of Article XVIII measures. From 1947 to 1994, Section A of Article XVIII were invoked only nine times (by Benelux on behalf of Suriname (1958), Greece (1956, 1965), Indonesia (1983), Korea (1958), and Sri Lanka, twice in 1955 and once each in 1956 and 1957), and has not been invoked since the establishment of the WTO. WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by the Secretariat*, WT/COMTD/W/196 (June 14, 2013). BOP measures had been invoked more often, over 20 times before the WTO Agreement entered into force. *Id.* Since the establishment of the WTO, 14 developing countries had used BOP measures by 2012.
\(^\text{75}\) *Id.*
\(^\text{77}\) *Id.*
\(^\text{78}\) *Id.*
for a DFT. Country A with the per capita GNI of 3,000 USD, which is 25% of the threshold income, will be allowed to apply a DFT of 75% (100% x (100% - 25%) = 75%). County B with the per capita GNI of 9,000 USD, which is 75% of the threshold income, will be allowed to apply a DFT of 25% (100% x (100% - 75%) = 25%). While the imposition of negotiation and compensation requirements on developing countries is not proposed in the DFT, a series of procedural requirements—such as a report setting forth rationales for the proposed increase in tariffs, a public hearing, notice, and gradual liberalization and elimination of the DFT after a set period of time—should reduce the possibility of abuse.\(^79\)

B. Subsidies

A similar type of reform needs to be considered for subsidies.\(^80\) Government subsidies are an important development tool for developing countries, as recognized by the WTO.\(^81\) Yet, some of the key trade-related subsidies, such as export subsidies and import-substitution subsidies, are prohibited by the current WTO rules.\(^82\) Other kinds of subsidies that affect the trade of other Members adversely are also “actionable”: i.e., subject to trade sanctions including countervailing measures.\(^83\) As Dani Rodrik aptly described, the current trade rules have made “a significant dent in the ability of developing countries to employ intelligently-designed industrial policies.”\(^84\)

Historically, subsidies have played an important role in the economic development of developed countries today,\(^85\) so developing countries should be able to adopt trade-related subsidies without

\(^79\) The Agreement on Safeguards also includes those procedural requirements. Agreement on Safeguards, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter “SA”], arts. 3, 7, and 12.


\(^82\) Id. art. 3.

\(^83\) Id. arts. 5-7.


\(^85\) See Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (London: Anthem Press, 2002), at 19-21. 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
fear of retaliatory measures by developed countries or prohibition by the WTO.\textsuperscript{86} The concept of the sliding income scale, proposed in the DFT, can be applied to subsidies otherwise prohibited or actionable under the current WTO rule.\textsuperscript{87} The “Development-Facilitation Subsidy” or “DFS” can be considered in favor of developing countries under certain per-capita income thresholds. Under this scheme, developing countries are allowed to adopt otherwise prohibited or actionable subsidies in accordance with their per-capita income status.\textsuperscript{88} Since the objective of the DFS is to promote economic development through export facilitation, it cannot be used to support exports from developing countries whose share in the export market is above certain thresholds, making them already competitive. The procedural requirements, comparable to those for the DFT, would also be important for the DFS scheme to prevent abuse.

C. AD measures

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.\textsuperscript{89} The “normal value” is determined by comparison to the home price or, where a proper comparison cannot be made due to the market situation or a low sales volume in the domestic market, to an export price in a third country.\textsuperscript{90} The normal value can also be “constructed” based on costs and reasonable profits.\textsuperscript{91} This regulatory flexibility allows national authorities a degree of latitude in anti-dumping investigations, making AD measures the most prevalently adopted trade measures of all.\textsuperscript{92} There is little economic rationale for imposing anti-dumping measures:

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{90} Id. arts. 1-2.
\textsuperscript{91} Id. art. 2.
\textsuperscript{92} At the end of June, 2014, there were as many as 1,449 AD measures in force. WTO, \textit{Annual Report 2015} (WTO, Geneva, 2015), at 60.
for example, “predatory dumping”—a practice whereby a producer sells below cost to drive competitors out of the market and then raises prices to cover the interim loss—is unlikely to succeed in today’s global market where a number of producers may enter into market at any time. Further, other kinds of dumping, such as one to get rid of temporary surplus products, are considered by most economists to be beneficial, rather than harmful, to consumers. Particularly, cheaper imports from developing countries have been a major target for AD measures, undermining the trade and development interests of developing countries.

The determination of “normal value” is inherently arbitrary and imprecise. For example, there may not be a single home market price to compare, in which case the complex adjusted average may have to be calculated to come up with a reference home price. 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, depending on a specific methodology adopted to calculate costs and average prices, the result can be vastly different, not to mention that the measure of “reasonable profit” can also vary. National authorities virtually have a free hand to determine the existence of dumping and the dumping margin. Limited reform of the ADP Agreement has been proposed, but it is unlikely to remove the inherent arbitrariness from the AD regime. As Yale economist T N Srinivasan characterized, AD is indeed “the equivalent of nuclear weapon in the armoury of trade policy,” and regulatory reform is called on to restrain AD measures against imports from developing countries altogether.

D. TRIMs

Certain trade-related investment measures (“TRIMs”) are also regulated by WTO rules. TRIMs are important government development policy tools, so the rules regulating TRIMs need to be

---

95 Lee (2009), *supra* note Error! Bookmark not defined., at 92.
96 Id. at 93.
examined. Provisions of the WTO Agreement on Trade-Related Investment Measures\textsuperscript{99} ("TRIMs Agreement") prohibit a range of investment measures that affect international trade.\textsuperscript{100} 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).\textsuperscript{101}

Investment can contribute significantly to economic development 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 the host country’s development agenda.\textsuperscript{102} While the economic utility of TRIMs has been debated and the distorting trade effect of TRIMs has been underscored,\textsuperscript{103} the decision to adopt TRIMs must rest with developing countries. According to a study, all of today’s developed countries have, in the course of their own development, adopted investment measures to meet their development objectives.\textsuperscript{104} Reflecting this concern, twelve developing countries proposed a change to the text of the TRIMs Agreement to make commitments under the agreement optional rather than mandatory.\textsuperscript{105} It would be indeed fair for today’s developing countries to be accorded the same opportunity to use TRIMs to promote economic development, and in this spirit, several African countries have already legislated for the adoption of certain TRIMs, such as local content requirements prohibited under the TRIMs Agreement.\textsuperscript{106}

\textsuperscript{99} Agreement on Trade-Related Investment Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 168 [hereinafter “TRIMs Agreement”].
\textsuperscript{100} 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. \textit{Id.} art. 2; GATT, arts. III, XI.
\textsuperscript{101} TRIMs Agreement, annex, paras. 1(a)-2(c).
\textsuperscript{102} Lee (2009), \textit{supra} note Error! Bookmark not defined., at 114, 117.
\textsuperscript{103} \textit{Id.} at 118.
\textsuperscript{104} Ha-Joon Chang & Duncan Green, \textit{The Northern WTO Agenda on Investment: Do as we Say, Not as we Did} (South Centre, June 2003), at 33.
\textsuperscript{106} Chilenye Nwapi, “Defining the ‘Local’ in Local Content Requirements in the Oil and Gas and Mining Sectors in Developing Countries” (2015) 8:1 \textit{Law and Development Review} 187-216.
such a resolution, the regulatory reform could lift the application of the TRIMs Agreement in favor of developing countries.

E. TRIPS

The current WTO rules on intellectual property rights (“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. However, this importance tends to create tension between developing countries, whose priority is to acquire advanced technology and knowledge, and developed countries, whose interest is to control access to their intellectual property. Assigning proprietary rights to technology and knowledge domestically through local law and internationally through international convention is an effort to protect intellectual property. The TRIPS Agreement—the most extensive provisions in WTO legal disciplines—sets out mandatory standards for the protection of several intellectual property rights (IPRs), including patents, trademarks, copyrights, designs, and geographical indications. It also requires the protection of foreign IPR holders by incorporating other major IPR conventions and provides for enforcement against IPR violations.

While IPR protection is a legitimate interest, those extensive requirements are counterproductive to the development effort of developing countries whose legal and financial recourses may not be sufficient for extensive IPR protection. Regulatory reform should exempt developing countries from the application of the provisions in the TRIPS Agreement which impose legislative

---


Lee (2009), supra note Error! Bookmark not defined., at 123.


110 TRIPS Agreement is composed of 73 Articles in seven parts. See TRIPS Agreement, supra note 107.

111 Id. arts. 9-12.

112 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” (2000) 19:3 Cato Journal, at 435.
requirements on them. A better alternative is to develop a new set of rules to elaborate on the relevant provision of GATT Article XX, which allows Members to take measures to protect their IPR interests.\textsuperscript{113} Such a set of rules would specify applicable measures together with the procedural and substantive requirements for the application of the measures, as does the WTO Agreement on Safeguards which, in turn, was developed based on GATT Article XIX.\textsuperscript{114}

F. Preference for LDCs

The Agreement on Development Facilitation (ADF) may also require duty-free, quota-free (DFQF) treatment for imports from LDCs. Some developed countries have offered preferential treatment to LDCs. For instance, the European Union provides the “Everything But Arms” (EBA) initiative, offering DFQF treatment to products currently exported by LDCs.\textsuperscript{115} 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.\textsuperscript{116} Considering the dire economic need of LDCs, an EBA-type of DFQF 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.\textsuperscript{117}

\textsuperscript{113} GATT Article XX provides in relevant part:

\begin{quote}
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 . . . .
\end{quote}

GATT, art. XX.

\textsuperscript{114} 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, \textit{Safeguard Measures in World Trade: The Legal Analysis} (3\textsuperscript{rd} ed., Cheltenham: Edward Elgar Publishing, 2014), for a detailed study of safeguard measures.


\textsuperscript{116} For instance, the United States has implemented the \textit{Africa Growth and Opportunity Act}, which offers improved access to certain African, but not Asian, LDCs. \textit{Id.} at 644-45.

\textsuperscript{117} 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. \textit{Id.} at 625.
has issued a Ministerial Decision on DFQF Market Access for Least-Developed Countries, but it does not create a legally binding obligation.\textsuperscript{118}

Members would also have to ensure that non-tariff measures do not undermine the trade benefit of these preferences for LDCs. These non-tariff measures include rules of origin, which determine the country origin of a product and, transitively, the applicability of trade preference to it. Each WTO Member has separate rules of origin, and these rules have not yet been harmonized.\textsuperscript{119} It has been observed that stringent rules of origin limit exports from LDCs significantly.\textsuperscript{120} The recent Bali Decision, which attempts to relax rules of origin for the benefit of LDCs, offers recommended guidelines, rather than enforceable obligations on Members.\textsuperscript{121} Applications of administered protection, such as AD measures, countervailing duties, and safeguards, can also diminish the beneficial effect of preference for LDCs. Divergent rules of origin and rampant applications of trade remedy measures substantially interfere with exports from developing countries, including LDCs, against their development interests. Thus if the rules cannot be harmonized in the near future,\textsuperscript{122} the WTO could alternatively develop guidelines for the application of rules of origin for exports from developing countries to minimize negative impacts on their trade.

G. DSU

Finally, consideration should also be given to the operation of the dispute settlement mechanism in the WTO and how it may facilitate development. WTO disciplines prohibit the adoption of a unilateral trade sanction and require that a trade dispute is adjudicated multilaterally by the

\textsuperscript{118} The Decision states “Developed-country Members that do not yet provide duty-free and quota-free market access for at least 97% of products originating from LDCs, defined at the tariff line level, shall seek to improve their existing duty-free and quota-free coverage for such products, so as to provide increasingly greater market access to LDCs....” (emphasis added) WTO, Duty-Free and Quota Free (DFQF) Market Access for Least-Developed Countries, Ministerial Decision of 7 December 2013, WT/MIN(13)/44, WT/L/919 (Dec. 11, 2013).

\textsuperscript{119} The WTO Agreement on Rules of Origin aims to harmonize rules of origin, but there is disagreement as to whether the harmonization is necessary. WTO, “Members divided on way forward for rules of origin” (Sept. 26, 2013), available online at \textless http://www.wto.org/english/news_e/news13_e/roi_26sep13_e.htm\textgreater .


\textsuperscript{121} WTO, Preferential Rules of Origin for Least-Developed Countries, Ministerial Decision of 7 December 2013, WT/MIN(13)/42, WT/L/917 (December 11, 2013), available online at \textless http://www.wto.org/english/tratop_e/memb_e/mc9_e/desci42_e.htm\textgreater .

\textsuperscript{122} See \textit{supra} note 119.
Dispute Settlement Body (DSB) comprised of WTO membership. The Dispute Settlement Understanding (DSU) provides for procedures to deal with a trade dispute.\(^{123}\) A Member may refer a trade dispute arising from a violation of WTO disciplines to the DSB, which may lead to the establishment of a dispute settlement panel.\(^{124}\) Decisions by a panel may be appealed to the standing Appellate Body which renders final decisions.\(^{125}\) The Appellate Body decisions are adopted by the DSB, and failure to comply with the decision may lead to the authorization of a retaliatory measure against the non-complying party.\(^{126}\)

Developing countries may breach WTO disciplines where it is inevitable to meet their key development interest. An example would be a use of trade-related government subsidies for development purposes, as discussed earlier, which may be either prohibited or actionable under the current WTO disciplines. Another example would be the widespread adoption of local content requirements prohibited under the TRIMs Agreement.\(^{127}\) Regulatory reforms are proposed throughout this paper, but a broad “development exemption” has also been suggested with the application of the DSU.\(^{128}\) The proposal is to allow those measures deemed necessary for development purposes that may otherwise be in breach of WTO disciplines, even if they were referred to the DSB for adjudication, and not to require their withdrawal or authorize any sanction. This is indeed a broad exemption, and a question may be raised as to whether this type of broad exemption would dismantle WTO disciplines all together. Adjustment to the DSU, which would allow the WTO DSB to consider development interests, particularly in the consultation process,\(^{129}\) would be necessary to resolve this issue.

\(^{124}\) DSU, art. 6.
\(^{125}\) Id., art. 17.
\(^{126}\) Id., art. 22.
\(^{127}\) Supra note 106.
\(^{128}\) The proposers include Professor Mitsuo Matsushita, senior academic and former Appellate Body member. This proposal has merit particularly when considering the potential difficulty associated with the proposed changes in substantive WTO disciplines.
\(^{129}\) DSU, art. 4, para. 1
H. Agreement on Development Facilitation

The feasibility and desirability of a separate set of rules facilitating development also needs to be considered. As discussed earlier, GATT/WTO provisions offering S&D treatment to developing countries, although insufficient, are scattered throughout various provisions of WTO disciplines without any coherent regulatory structure. Many of them are temporary, expiring after a certain period of time. Some of this temporary S&D treatment, such as the subsidy rules for developing countries, needs to be converted into permanent rules as part of a new agreement. The inclusion of these scattered provisions in a separate and enforceable agreement may also provide a coherent and permanent regulatory structure to S&D treatment that is currently lacking. For instance, such an inclusion could provide clear and objective standards for determining developing country status; 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.

A separate agreement, which may be entitled, “the Agreement on Trade Facilitation” or “the ADF,” will function as exceptional rules to the other WTO agreements, the advantage of a separate agreement being the advancement of development interests without potentially complex revisions to the existing agreements. The ADF might require a special status in the WTO Agreement as it would affect the operation of the GATS and the TRIPS Agreement, as well as the Uruguay Round agreements on Trade in Goods. The establishment of the ADF would also make a historic statement that development issues are elevated to the status of focal regulatory importance. Where TRIPS, which have been promoted primarily by the fewer developed countries, have been granted separate regulatory treatment, the same treatment for development issues, which concern the majority of WTO membership, would be all the more justifiable and appropriate.

130 Supra note 66.
131 See also Lee, Reclaiming Development, supra note 1, chapter 3.
132 See also Fan Cui, “Who are the Developing Countries in the WTO?” (2008) 1:1 Law and Development Review, at 123.
I. Institutional Reform: Proposal for the WTO Council on Trade and Development

There is a question as to the sufficiency of the current organizational apparatus—which consists of the Committee on Trade and Development and the Sub-Committee on LDCs, aided by the Institute for Training and Technical Cooperation under the WTO Secretariat—to address complex and long-term development issues. First, this question can be addressed by way of comparison with the treatment of TRIPS; a full council, not a committee, is organized to cover complex and long-term TRIPS issues.\(^{133}\) As discussed in the context of the ADF, if the magnitude of development issues should be considered to be no less important than that of developed country issues such as TRIPS, consideration should also be given to elevating the level of the institutional body on trade and development to the full council level. This elevation will not only make a symbolic statement recognizing the essential importance of development issues but also will meet practical needs as follows.

Some of the development issues addressed in WTO working groups, such as trade, debt, finance, and technology transfer, have fundamental implications for development. Should these issues become a permanent agenda to be covered by the WTO, to be monitored and addressed on a permanent basis, then the importance of these issues will require the establishment of separate committees replacing the working groups. A separate Council for Trade and Development can oversee the operations of these committees. There should be at least one full committee specifically devoted to the problems of LDCs and another separate committee to assist with building the capacity of developing countries to participate fully in the trading system and realize its benefits.\(^{134}\)

Greater assistance should also be provided to developing country Members involved in costly and time-consuming trade disputes. Consideration should be given to assigning the function of the existing the Advisory Centre on WTO Law (ACWL),\(^ {135}\) which provides support to

\[^{133}\] The Council for Trade-Related Aspects of Intellectual Property Rights is organized under Article IV of the WTO Agreement. See also Lee, \textit{Reclaiming Development, supra} note 1, chapter 1.3.

\[^{134}\] The Aid for Trade done by the WTO has been helpful for developing countries in this regard. See Aid for Trade, World Trade Organization, \(<\text{http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm}>)\.

\[^{135}\] For legal assistance, thirty-two WTO governments set up “the Advisory Centre on WTO Law (ACWL)” in 2001. Its members consist of countries contributing to the funding and those receiving legal advice. LDCs are
developing countries with respect to panel or Appellate Body proceedings, to a committee under the proposed Council for Trade and Development to better serve the needs of developing country Members. The current ACWL, if it is to be preserved, needs to be expanded so that it can offer assistance to every developing country Member in need of support, not only LDCs.

In addition, the reform may include a mandatory reporting requirement for all developed country Members and participating developing country Members, requiring participants to file a “Trade-Related Development Assistance Report,” or “TDAR,” periodically. This report would identify and examine trade practices and activities of each Member that are in compliance with the trade and development agenda set by the Council, as well as those that are inconsistent with it. 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.

IV. CONCLUSIONS

The inability of Members to conclude the Doha Round for the past 14 years is a testament to the degree of difficulty in facilitating development in the WTO system. For the last 14 years, the Doha Round negotiations have bogged down, at times marginalized by major trading nations to promote the other interests such as RTAs. RTAs have been proliferated since the establishment of the WTO, encroaching on the MFN principle of the multilateral trading system and creating trade disciplines parallel to those of the multilateral trading system. This encroachment further compromises the position of developing countries and development interests where RTAs are promoted by developed countries with substantial market leverage vis-à-vis developing countries.

automatically eligible for advice, and other developing countries and transition economies have to be fee-paying members to receive advice. For further information, refer to the WTO Web site at <www.wto.org>.
Where three-quarters of WTO membership is comprised of developing countries, the multilateral trading system will not be sustainable unless the promises of development facilitation, as reflected in the DDA, are delivered. The WTO may not be a development institute *per se*, but given the key impact that international trade has on economic development, it will be essentially important for GATT/WTO disciplines to be facilitating development through trade, rather than inhibiting it. As discussed, deeper regulatory and institutional reform, deeper than that promoted by the DDA, needs to be considered and promoted to fill the development gap in the WTO system and restore the balance of trade interests between developed and developing countries, as proposed in this article.

At the end of the day, the successful development of developing countries would serve the interest of all countries, not just developing countries. In this relatively open trading system, successful economic development would create affluent consumer markets for today’s developed countries, as proven by the development cases of East Asian economies. The current regulatory and institutional apparatus of the WTO places considerable limitations on the policy space that is required for the adoption of effective development policies for developing countries. It is not clear whether the limited regulatory reform undertaken during the Doha Round, such as GPA amendment and the ATF, promotes the development interests of developing countries effectively, while imposing considerable regulatory burden on developing countries. The more effective and desirable ways to fill the development gap would be to redress the current imbalance by extensive regulatory reform and not to require developing countries to offer reciprocal concessions for the reforms necessary to fill this gap.