

Facilitating Development in the World Trade Organization: A
*Proposal for the Council for Trade and Development and the
Agreement on Development Facilitation (ADF)**

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I. Introduction: Trade and Development

The facilitation of economic development has become an essential issue in the discussion of world trade today.¹ The increased participation of developing countries in the world trading system, comprising currently two-thirds of World Trade Organization (WTO) membership, has brought more attention to the issue of trade and development.² This issue has become an important agenda in the WTO; the WTO Agreement³ sets out the facilitation of development in its objectives,⁴ and the first WTO Ministerial Conference addressed the importance of integrating developing countries in the multilateral trading system by assisting with their economic development.⁵ The current Doha Round also includes a development agenda (Doha Development Agenda: DDA), addressing important issues of trade and development, such as debt and finance; trade and transfer of technology; technical cooperation and capacity building; least-developed countries (LDCs); and special and differential treatment.⁶

¹ The author's forthcoming book, "Reclaiming Development in the World Trading System" (Cambridge University Press, forthcoming 2005) discusses the impact of the current regulatory framework for international trade on economic development.

² The participation of developing countries in the world trading system began in the previous GATT regime. See Robert Hudec, *Developing Countries in the GATT Legal System*, Thames Essays (Trade Policy Research Centre, London, 1987) for a discussion of how the GATT as an institution came to accommodate the increasing involvement of developing countries in the world trading system.

³ The Marrakesh Agreement Establishing the World Trade Organization. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, reprint 2003), at 4-14.

⁴ Its preamble provides in relevant part, "Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." *Id.*, at 4.

⁵ To facilitate this integration, "... the WTO Agreement embodies provisions conferring differential and more favourable treatment for developing countries, including special attention to the particular situation of least-developed countries." WTO, *Singapore Ministerial Declaration*, WTO doc. WT/MIN(96)/DEC (December 18, 1996), para. 13.

⁶ WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (November 20, 2001).

With a majority of the world population, mostly in developing countries, in poverty, the relief of this human tragedy is one of the most pressing issues of our time.⁷ The only long-term solution to this problem is to create economies in these developing countries through economic development that will provide their population with higher standards of living. Trade can play an essential role in the facilitation of economic development.⁸ A group of developing countries in East Asia, namely, the newly industrializing (now industrialized) countries (“NICs”), such as South Korea, Taiwan, Hong Kong, and Singapore, have achieved splendid economic development in a few decades using active export facilitation. The NICs have brought themselves out of poverty by successful economic development.⁹

⁷ In 2000, the United Nations estimated that over half the world's six billion people live under substantial deprivation, surviving on incomes equivalent to \$2 dollars or less per day. To address the question of poverty, the United Nations set the “Millennium Development Goals” (MDG) with several development objectives.

<<http://www.un.org/millenniumgoals>>.

⁸ A large body of literature discusses the contribution of trade on development including: World Trade Organization, “Symposium on Trade and Development”, *Focus*, March 1999, at 6-9; J. Riedel, “Trade as an Engine of Growth in Developing Countries, Revisited”, *Economic Journal*, March 1984, at 56-73; Larry E. Westphal, “Industrial Policy in an Export Propelled Economy: Lessons From South Korea's Experience” (in *Symposia: The State and Economic Development*) (1990) 4(3) *The Journal of Economic Perspectives* 41-59; R. Nurkse, “Patterns of Trade and Development” in R. Nurkse (ed.), *Problems of Capital Formation in Underdeveloped Countries and Patterns of Trade and Development* (Oxford University Press, New York, 1970), at 163-226; K. Krishna, A. Ozylidrim, and N.R. Swanson, “Trade, Investment, and Growth”, *NBER Working Paper No. 6861*, December 1998; J.A. Frankel and D. Romer, “Trade and Growth: An Empirical Investigation”, *NBER Working Paper 5476*, March 1996; D. Salvatore and T. Hatcher, “Inward Oriented and Outward Oriented Trade Strategies”, *Journal of Development Studies*, April 1991, at 7-25.

⁹ These four economies have achieved rapid economic development since the 1960s. Between 1961 and 1996, South Korea's gross domestic product (GDP) increased by an average of 9.80 per cent per annum, Hong Kong by 9.58 per cent, Taiwan by 10.21 per cent and Singapore by 9.95 per cent. The growth of exports from the NICs, fueled by their rapid industrial growth, was phenomenal during their development. For instance, during 1980-1990, exports from South Korea, Taiwan, Hong Kong, and Singapore grew at the average annual rates of 12.0%, 8.9%, 14.4%, and 10.0%, respectively.

Trade promotion, particularly export facilitation, is an important part of development strategy and needs to be supported by the WTO.

The regulatory framework for international trade, currently represented by the WTO, affects the ability of developing countries to adopt trade-related development policies.¹⁰

The author examined whether the current regulatory framework for international trade facilitates the economic development of developing countries,¹¹ and this examination revealed the inadequacy of the current system. The author proposed alternative provisions to better facilitate development and briefly introduced the need for new regulatory treatment of development facilitation, tentatively called the “Agreement on Development Facilitation” (ADF) and for a new body within the WTO to oversee trade and development issues, namely “the Council for Trade and Development.” (the Council)¹² This paper, reiterating the need for the ADF and the Council, takes the next step and provides a more detailed account of the possible elements of the ADF and the role of the proposed Council.

Section II provides a discussion of the current development-assistance provisions in the WTO, as well as the current organizational apparatus with an examination of the effectiveness of the current provisions and organizational structure in facilitating development. Based on this examination, a case for the Council and ADF is made. Then,

¹⁰ For instance, the prohibition of export and import-substitution subsidies under the current subsidy rules deprives developing countries of the ability to adopt these subsidies for the purpose of development. For further discussions, see Y.S. Lee, *supra* note 1, chapter 3.

¹¹ *Supra* note 1. See also Y.S. Lee, “Facilitating Development in the World Trading System: A Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)” (2004) 38 *Journal of World Trade*, 935-954.

¹² Y.S. Lee, *supra* note 1, chapter 2.

Section III discusses the possible elements of the ADF and the role of the Council. Further, this section addresses the need for the Development Policy Review Mechanism (DPRM). Finally, Section IV provides a conclusion.

II. Current Development assistance Provisions and the Organizational Apparatus of the WTO¹³

A. Current Provisions

Major development-assistance provisions include GATT Articles XVIII, XXXVI – XXXVIII, the “enabling clause,” and special and differential provisions (“S&D provisions”) in various WTO Agreements.

a. Article XVIII

Article XVIII of the GATT, entitled “Government Assistance to Economic Development”¹⁴ facilitates the establishment of industries by authorizing relevant trade measures. Paragraph 2 provides,

“The contracting parties recognize further that it may be necessary for those contracting parties (contracting parties the economies of which can only support low standards of living and are in the early stages of development), in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the

¹³ Much of Section II is based on Y.S. Lee, “Reclaiming Development in the World Trading System”, *supra* note 1, chapter 2.

attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry and (b) 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.” (Explanation and emphasis added.)

This Article supports the infant industry promotion policy.¹⁵ This policy uses tariff protections to promote domestic industries in the early stages of development. GATT Article XVIII allows developing countries to establish a particular industry by authorizing them to maintain a flexible tariff structure (e.g., increase tariff rates by modifying the Schedule of Concessions). This flexibility enables developing countries to grant tariff protection for infant industries. Article XVIII also acknowledges the need for trade measures for balance-of-payment (“BOP”) purposes.¹⁶

¹⁴ WTO, *The Legal Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, *supra* note 3, at 447-453.

¹⁵ Friedrich List (1789-1846) is widely known as the father of infant industry promotion, which was proposed in his famous work, *The National System of Political Economy* (1841).

¹⁶ Section B of Article XXVIII authorizes BOP measures for development purposes. Paragraph 8 of the article provides, “The contracting parties recognize that contracting parties coming within the scope of paragraph 4(a) of this article [i.e., developing countries in the early stages of development] tend, when they are in rapid process of development, to experience balance of payment difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.” (Explanation added.) WTO, *The Legal Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 449.

Reciprocity is required for a modification of the Schedule of Concessions to facilitate an industry; the modifying WTO Member (Member) is required to negotiate with other Members with which the relevant concession was initially negotiated having a substantial interest (paragraph 7(a) of Section A). Therefore, this modification under Article XVIII may require a compensatory measure by the modifying Member to reach agreement with the other Members on the modification. If an agreement is not reached within sixty days after the WTO is notified of the modification, the Member may still modify the concession in question unilaterally, on the condition that the WTO finds that the compensatory adjustment offered by the modifying Member is adequate and that every effort was made to reach an agreement.¹⁷ In addition, the modifying Member must give effect to the compensatory adjustment at the same time as the modification.¹⁸ However, if the WTO finds that the compensatory adjustment offer is not adequate, other Members with a substantial interest are free to adopt retaliatory measures by modifying or withdrawing substantially equivalent concessions against the modifying Member.¹⁹

Article XVIII relaxes the requirement of binding concessions under GATT Article II and authorizes developing country Members to modify its Schedule of Concessions to facilitate an industry. However, the requirement of consultations and negotiations may cause considerable delays in implementing trade measures for development purposes. The requirement of reciprocal concessions (compensation) may also impose a burden on the economy of the modifying developing country. While the effectiveness of infant industry

¹⁷ Art. XVIII, para. 7(b). *Id.*, at 448.

¹⁸ *Id.*

¹⁹ *Id.*

facilitation policies has been questioned in economic circles, the cases of recent development history indicate that the facilitation of industry by government has contributed to successful economic development.²⁰ The case for infant industry promotion is further examined below in the discussion of adjustment to tariff bindings for development purposes.²¹ Thus, the provisions of Article XVIII can play a positive role in assisting economic development. The requirements of negotiations and compensation may diminish the effectiveness of these provisions.

b. GATT Articles XXXVI - XXXVIII

Part IV of the GATT (Articles XXXVI – XXXVIII), entitled “Trade and Development,” provides another set of provisions attempting to assist economic development. The provisions in GATT Articles XXXVI – XXXVIII set out an array of measures, commitments, and collaborations on the part of developed countries, as well as, the WTO in support of economic development.

Article XXXVI²² addresses the vital role of export earnings in economic development; possible authorization of special measures to promote trade and development; the need for more favorable and acceptable conditions of access to world markets for primary products on which many developing countries depend; the need to diversify the economic structure on the part of developing countries and to avoid an excessive dependence on the export of

²⁰ For more discussion on this point, *see* Y.S. Lee, Reclaiming Development in the World Trading System, *supra* note 1, chapter 3.

²¹ Section II.A.c *infra*.

²² WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 468-469.

primary products; and an important relationship between trade and financial assistance to development.²³ The Article also clarifies that there should be no expectation of reciprocity on the part of developed countries for commitments made by them in trade negotiations to reduce or remove tariffs and other trade barriers for developing Members.²⁴

Article XXXVII²⁵ elaborates developed country Members' commitment to assist with economic development of developing countries. Methods 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;²⁶ and according high priority to the reduction and elimination of policies that are applicable specifically to primary products wholly or mainly produced in developing countries and that hamper the growth of consumption of those products.²⁷ Developed country Members are also required to make efforts to maintain trade margins at equitable levels for developing countries where a government directly or indirectly determines the resale price of products wholly or mainly produced in developing country Members.²⁸ They are also obligated to adopt measures providing a greater scope for the development of imports from those developing countries.²⁹ Special regard is to be given to the trade

²³ *Id.*

²⁴ *Id.*, para. 8, at 469.

²⁵ *Id.*, at 469-471.

²⁶ *Id.*, at 469. With respect to this commitment, Paragraph 1 of Article XXXVII provides in relevant part, "*The developed contracting parties shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible – give effect to the following provisions.*" *Id.* This provision allows developed countries to avoid this commitment by, for instance, legislating for import restraints from developing countries.

²⁷ *Id.*, at 469-470.

²⁸ *Id.*

²⁹ *Id.*

interests of developing countries in the application of trade measures against imports. (paragraph 3). Article XXXVIII³⁰ provides for joint action to assist with the development of developing countries. Article XXXVIII calls for an institutional effort by the WTO to provide assistance to development.

It has been criticized that the provisions of Article XXXVI - XXXVIII are rather declaratory than obligatory in the sense that these provisions are not enforced by effective sanctions. Article XXXVII excuses developed country Members from the various commitments set out in the Article by invoking “compelling” reasons, thus further weakening the effectiveness of these provisions.³¹ These compelling reasons may include domestic legal obligations. Developed countries, therefore, may escape from those so-called “commitments” by legislating against them. It is thus doubtful that the commitments under Articles XXXVI – XXXVIII have actually affected the policies of developed countries in any significant way to accord more favorable treatment to developing countries.

c. The Enabling Clause

A set of policy statements made in the GATT Decision on November 28, 1979 in favor of developing country members, referred to as “the enabling clause” also provides developing assistant provisions.³² This enabling clause approves the General System of Preferences

³⁰ *Id.*, at 471-472.

³¹ *Supra* note 26.

³² GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries, GATT B.I.S.D. (26th Supp. 1980), at 203.

(GSP) and the exchange of preferences among developing country members.³³ It also provides for differential and preferential treatment for developing countries with respect to non-tariff measures,³⁴ as well as special treatment for LDCs.³⁵ The enabling clause also states that developed countries should not expect reciprocity for the commitments made by them in trade concessions³⁶ and that developed countries should exercise utmost restraint in seeking concessions from the LDCs.³⁷ As in the case of Articles XXXVI – XXXVIII discussed above, the enabling clause is not mandatory in that there is no effective sanction against a violation of these commitments therein. The enabling clause *enables* developed countries to provide preference for developing countries, but it does not *obligate* them to do so.

d. S&D Provisions

Other provisions in GATT/WTO disciplines, the majority of which are found in the Uruguay Round Agreements, provide special and differential treatment in favor of developing countries.³⁸ These provisions relax current discipline requirements for the benefit of developing countries, require protection of the interests of developing countries, or give more compliance time for developing countries (transitional period). However, this

³³ *Id.*, para. 2a.

³⁴ *Id.*, para. 2d.

³⁵ *Id.*, para. 2b.

³⁶ *Id.*, para. 5.

³⁷ *Id.*, para. 6.

³⁸ One hundred and forty-five such 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 provisions in the WTO, *see* WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Note by Secretariat*, WTO doc. WT/COMTD/W/77 (October 25, 2000).

S&D treatment, as currently provided, is not sufficient to meet the development needs of developing countries on the following grounds.

First, protection is often not sufficient. For instance, Article 9.1 of the Agreement on Safeguards requires the exemption of imports originating in a developing country Member from safeguards where the portion of such imports does not exceed 3 percent, provided that the collective share of imports from all such developing country Members (under 3 percent) accounts for not more than 9 percent.³⁹ Article 9.2 of the Agreement on Safeguards also allows developing country Members to apply safeguards for an additional two years beyond the maximum duration and to re-apply safeguards to the same product after shortened intervals.⁴⁰ It has been criticized that the ceilings (individual 3 percent and collective 9 percent) are too tight, and the small extensions are not very helpful for developing countries.⁴¹ Similarly, these provisions do not relieve developing countries of the requirements of WTO disciplines in any significant way or give substantial protections in the areas where their trade interests are significantly affected, such as tariff bindings, subsidy, and anti-dumping rules.⁴²

The transition period provided as a preference for developing countries is not very helpful, either; the S&D treatment will expire after a stipulated period for transition while the need

³⁹ WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 279-280

⁴⁰ *Id.*

⁴¹ Jai S. Mah, "Injury and Causation in the Agreement on Safeguards" (2001) 4 *Journal of World Intellectual Property* 380-382.

⁴² Thus, the author proposed regulatory reforms in these areas. Y.S. Lee, *Reclaiming Development in the World Trading System*, *supra* note 1.

of development that may justify the S&D treatment may remain. Where permanent exceptions are given, the number of beneficiary developing countries is often too limited: e.g., where exemptions are allowed in subsidy rules to permit export subsidies, only a handful of LDCs benefit from this exemption on a permanent basis.⁴³ In addition, current S&D treatment does not provide differentiated treatment to developing countries of widely different development status, other than LDCs. A recent study pointed out the need for greater differentiation in S&D treatment.⁴⁴

B. Current Organizational Apparatus in the WTO

The major organizational body that concerns trade and development within the WTO is the “Committee on Trade and Development” (CTD). The CTD is established under the General Council with a mandate to handle issues on trade and development and address related issues such as implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased participation of developing countries in the trading system, LDCs, notifications of GSP programs, and preferential trade arrangements among developing countries.

Current WTO assistance to developing countries focuses on the capacity-building of developing countries. In this area, the WTO offers assistance through its Training and Technical Cooperation Institute. Assistance includes providing regular training sessions

⁴³ For instance, only LDCs are exempted from the prohibition of export subsidies. *See* Section III.A.d *infra* for a relevant discussion.

⁴⁴ Michael Hart and Bill Dymond, “Special and Differential Treatment and the Doha ‘Development’ Round” (2003) 37 *Journal of World Trade* 409.

about trade policy in Geneva, organizing around 400 technical cooperation activities annually, including seminars and workshops in various countries and courses in Geneva, and offering legal assistance to some developing countries.⁴⁵ These capacity-building activities are undoubtedly helpful to developing countries, but the scope of assistance is rather limited as it focuses on technical capacity-building. The WTO also needs to consider other essential areas concerning trade and development, such as technology transfer, financial mechanism, and debt relief.

The CTD does not have a mandate to address these other essential issues; thus, developing countries have requested discussion of these issues in the WTO. The need for a new round to address a development agenda has been widely resonated. The 2004 Report on the implementation of the U.N. Millennium Declaration emphasized the responsibility of developed countries to meet development goals, stating specifically that developed countries must fulfill their responsibilities “by increasing and improving development-assistance, concluding a new development-oriented trade round, embracing wider and deeper debt relief, and fostering technology transfer.”⁴⁶ In response to this demand, the new round includes a series of development issues in its agenda (DDA). In addition, the DDA established two working groups, “Trade, Debt and Finance” and “Trade and

⁴⁵ For legal assistance, thirty-two WTO governments created an Advisory Centre on WTO Law in 2001. Its members consist of countries contributing funding, and those receiving legal advice. LDCs are automatically eligible for advice, while other developing countries and transition economies have to be fee-paying members. For further information, refer to the WTO website at <www.wto.org>. In addition, The WTO Reference Centre program was also initiated in 1997 with the objective of creating a network of computerized information centers in LDC and developing countries. The International Trade Centre, a joint body with UNCTAD, also helps developing countries to expand export and to improve their import operations.

⁴⁶ U.N. doc. A/59/282 (August 27, 2004), para. 43

Technology Transfer.”⁴⁷ Negotiations on these issues are currently on the way, and the CTD meets in special sessions to handle work under the DDA.

C. Case for the Council for Trade and Development and the Agreement on Development Facilitatio

The current problem with WTO provisions and the organization structure concerning trade and development is that these provisions are not very effective, as discussed above, and that the current organizational apparatus⁴⁸ is rather insufficient to address complex and long-term development issues on trade and development effectively. The mandate of the CTD is limited and the activities of the WTO to assist developing countries also have been rather limited in scope, as discussed above. The problem of ineffectiveness and insufficiency can be answered by elevating the existing Committee to full Council status thus strengthening the organizational apparatus and by establishing a separate agreement on development (ADF).

With respect to the suggested organizational reform, the need for such an elevation can be explained by comparison with the treatment of trade-related aspects of intellectual property rights (TRIPS) promoted by developed countries. While trade and development issues concern the vast majority of WTO members, relatively a limited number of countries promoted intellectual property rights in the Uruguay Round negotiations. Nonetheless, the

⁴⁷ The DDA address the issues of trade, debt and finance; trade and transfer of technology; technical cooperation and capacity building; LDCs; and special and differential treatment. WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (November 20, 2001).

⁴⁸ The current organizational apparatus consists of the CTD and the Subcommittee on LDCs aided by the Training and Technical Cooperation Institute under the WTO Secretariat.

importance of intellectual property rights was emphasized during the negotiations, and the full Council, not a Committee, and a separate Agreement (“the Agreement on Trade-Related Aspects of Intellectual Property Rights” or “TRIPS Agreement”) were established in the WTO to address complex and long-term intellectual property issues.⁴⁹

As mentioned, the issues of trade and development concern a vast number of developing countries, and there is a consensus in the WTO that these issues should be addressed within the WTO. The current DDA reflects this consensus, and the current round is called “the development round”. If these trade and development issues, which concern the majority of WTO membership, are considered as important as TRIPS, which was promoted by a fewer number of developed countries, it is fair and proper that trade and development issues be accorded the same institutional attention and weight by elevating the present Committee to full Council status. This proposed institutional reform would help resolve doubt that trade and development issues have not received due attention and have been set aside.⁵⁰ This elevation will not only make a statement recognizing the essential importance of development issues, but also meet practical needs.

The practical needs include that present working groups would have to be replaced with separate committees. WTO working groups are currently established to address important trade and development issues such as trade, debt and finance, and trade and technology

⁴⁹ The Council for Trade-Related Aspects of Intellectual Property Rights is organized under Article IV of the WTO Agreement. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 5.

⁵⁰ *Per India, WTO, Report of the WTO High-Level Symposium on Trade and Development* (1999), available online at <www.wto.org>.

transfer. These issues are complex and require continued attention within the WTO even after the current round, and separate committees, rather than limited sub-committees, will be necessary to incorporate these important issues as a working agenda in the WTO. To oversee the effective operation of these committees, a separate council would need to be established within the WTO. In addition, as individual developing countries face unique problems with increasing their participation in the WTO and securing full benefits of WTO membership, an additional committee is also necessary to bring adequate institutional attention to these problems and assist with their needs more effectively on an individual country basis. The current Advisory Centre on WTO Law⁵¹ may be expanded and incorporated into this body to render legal advice to developing country Members.

In summary, the lack of due organizational status and the resulting appearance of insufficient institutional attention to development issues have created a widespread perception that the WTO represents the interests of developed countries and multinational corporations rather than those of its majority Members – developing countries. A way to resolve this issue is to elevate the current body in charge of development issues to council level. Instituting a new Council could also serve important functionalities that the current CTD is not mandated to serve. Such functionality could include a better organizational apparatus to deal with specific, but complex and long-term issues of development. A new Council will have a wider mandate concerning trade and development issues to implement necessary measures to promote development, and will bring a capacity to address essential development issues that concern the majority of WTO Members.

⁵¹ *Supra* note 45.

As discussed above, with respect to the current WTO provisions assisting development, the ineffectiveness of these provisions is an issue. For instance, relevant GATT provisions such as Articles XVIII and XXXVI - XXXVIII have become obsolete and ineffective. Yet, unlike other areas, the Uruguay Round did not elaborate on these GATT articles and did not set out more effective and enforceable agreements. Provisions offering S&D treatment are scattered throughout the GATT/WTO disciplines without any coherent regulatory standard, and developed countries have shown reluctance in extending these provisions. Consideration should be given to establishing a coherent set of rules in the form of a separate agreement in the WTO disciplines to address trade and development issues more effectively and consistently.

What regulatory elements should be included in the ADF? The ADF may develop specific legal obligations, as well as monitoring and surveillance of their implementations, to increase the enforceability of developed countries' commitments under Part IV of the GATT, just as other Uruguay Round agreements expand and elaborate the provisions of the GATT, and turn them into more specific, enforceable obligations. The ADF may also provide coherent and differentiated standards to apply S&D treatment to developing country Members. In addition, the author examined the inconsistency of current WTO disciplines in relation to the development interests of developing countries, and proposed reforms of the regulatory disciplines in the areas relevant to development, such as tariff bindings, subsidies, anti-dumping measures, safeguards, agriculture, trade-related

investment measures (TRIMs), TRIPS, and service trade (GATS).⁵² Some of these proposed reforms can also be incorporated in the ADF, as discussed in the following section. However, these elements do not comprise an exhaustive list. The scope and contents of the ADF need to be further discussed, taking into account progress made in the current discussion of the DDA.

If the suggested elements discussed in the following section are to be included in the ADF, the ADF may require separate status within Annex 1 of the WTO Agreement as the provisions of the ADF would affect the TRIPS Agreement, as well as the Multilateral Agreements on Trade in Goods. In addition to the functionalities facilitating development, the ADF, by providing a coherent and permanent regulatory structure on trade development, unlike temporary and limited S&D treatment, would also make a statement that development issues are considered as essential as other issues promoted by developed countries, and thus, development issues are no longer only a subject of elaborate rhetoric.

III. The Elements of the ADF and the Role of the New Council.

A. Possible Elements of the ADF⁵³

a. Setting procedures to monitor and enforce commitments under Part IV of the GATT 1994.

⁵² Y.S. Lee, *Reclaiming Development in the World Trading System*, *supra* note 1. See also Y.S. Lee, "Facilitating Development in World Trading System: Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)", *Journal of World Trade*, Vol. 38, No. 6 (2004), at 935-954.

⁵³ The contents of Section III.A.c~f incorporate regulatory reforms proposed by the author in his forthcoming book, *Reclaiming Development in the World Trading System*, *supra* note 1.

GATT Articles XXXVI–XXXVIII are major GATT provisions that attempt to assist with the economic development of developing countries. However, as discussed earlier, these provisions are largely declaratory and do not create enforceable obligations. The ineffectiveness of these provisions is in part because there is no effective monitoring and enforcement system. Thus, setting procedures to monitor and enforce specific commitments by developed country Members may increase the effectiveness of these provisions. One way is to obligate developed country Members and participating developing country Members to report their specific commitments under these provisions periodically and consult with the WTO on the implementation of these commitments. The Council for Trade and Development, proposed above, can oversee this procedure.

This report, provisionally named “Trade-Related Development Assistance Report” or “TDAR”, may itemize the commitments listed under Article XXXVII⁵⁴ and require every developed country Member to list their specific economic and trade measures that would implement commitments under each item. Developed country Members should also be required to list any laws, practices, and policies that are inconsistent with these commitments and to consult with the Council to resolve the problem. A timetable can be agreed between the developed country Member and the Council setting for their removal or change. The broad exemption that currently excuses developed country Members from commitments under Article XXXVII for any compelling reason, including legal reasons,⁵⁵

⁵⁴ See Section II.A.b *supra* for a discussion of these commitments.

⁵⁵ *Supra* note 26.

should be removed as it allows Members to disregard these commitments simply by legislating against them.

Developed country Members should also be required to report the implementation of relevant measures under the itemized commitments and any undertaking to remove or change inconsistent policies, laws, and practices to the Council on a regular basis. The Council should review these reports, consult with the Members for any violation of their commitments, and adopt measures, if necessary, to ensure their compliance. Any interested Member should be allowed to report a violation of these commitments to the Council. The Council should then examine the incidence and determine whether there has been a violation. If it determines a violation occurred, the Council may also adopt necessary measures to secure compliance, including authorization of trade sanctions. This combination of monitoring, consultation, and enforcement measures, as well as setting their procedures in the ADF should increase the regulatory force of Article XXXVII.

Lastly, the ADF may also establish procedures to set out specific joint actions to be undertaken by the WTO under Article XXXVIII and report implementation of these actions on a regular basis. The Council and other institutions with which the WTO has collaborated under this Article may prepare these reports jointly.

b. S&D provisions

Provisions offering S&D treatment to developing countries are scattered throughout various WTO disciplines without any coherent regulatory standards – i.e., what is the

underlying principle providing S&D treatment and how do we determine developing country Members to benefit from this preferential treatment? Under the current system, the developing country status is self-declaratory, and the absence of definition for developing country Members seems to create regulatory ambiguity. In addition, the current system provides the same level of S&D treatment to developing country Members with widely different levels of development status and economic need for S&D treatment. A recent study emphasizes the need for greater differentiation in S&D treatment.⁵⁶ The ADF should provide a definition for a developing country Member and also differentiate S&D treatment to developing country Members to enhance the clarity and rationality of the system.

What standard can be adopted to determine the developing country status? Individual income level can be considered. The World Bank uses gross national income (GNI) per capita to categorize nations into different income groups.⁵⁷ This economic indicator can be used as a primary determinant for the development status.⁵⁸ Methods for differentiating S&D treatment for different developing country Members should also be sought, and the sub-categorization of the developed country Members such as the one used by the World

⁵⁶ *Supra* note 44.

⁵⁷ As of November 2004, the World Bank made this classification according to its 2003 statistics: low-income group (\$765 or less per capita), lower-middle-income group (between \$766 and \$3,035 per capita), upper-middle-income group (between \$3,036 and \$9,385), and high-income group (\$9,386 or above). Information available online at <www.worldbank.org>.

⁵⁸ The above threshold for the high-income group can be used to create a presumption of the developed country status. If a Member claims the developing country status despite its per capita GNI level above this threshold, due to other factors that indicate a low level of social development or an excessive economic dependency on the production of primary products (e.g., oil), the Member should be allowed to counter the presumption of the developed country status.

Bank can be adopted for such differentiation. For instance, Article 9.2 of the Safeguards Agreement authorizes a longer duration of a safeguard measure to be applied by a developing country Member,⁵⁹ and this additional duration can be differentiated in accordance with the developed status of the particular developing country Member (perhaps extended for poorer developing countries and shortened for richer ones) identified by the sub-categorization discussed earlier.

Achieving regulatory coherency for S&D treatment also requires establishing coherent principles for providing this treatment. It is not clear if such coherent principles exist because provisions offering S&D treatment arose out of political compromises between developed and developing country Members. Developed country Members were rather reluctant to provide extensive S&D treatment while developing country Members insisted on such treatment. Some S&D treatment simply buys developed country Members more time to comply with WTO obligations while others provide permanent preferential treatment.⁶⁰ The tendency trying to limit preferential treatment to developing country Members seem to continue as reflected in a statement made by a prominent speaker in the 1999 WTO High-Level Symposium on Trade and Development that advised developing countries to avoid a push for renewed S&D treatment.⁶¹

The reluctance on the part of developed country Members to provide extensive S&D

⁵⁹ WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 280.

⁶⁰ *Supra* note 38.

⁶¹ C. Fred Bergsten. WTO, *Report of the WTO High-Level Symposium on Trade and Development* (1999), *supra* note 50.

treatment may represent their preference for “one rule for all nations.” In other words, eventually one rule should apply to all trading nations, both developed and developing, and S&D treatment that offers temporary preference should not be extended in time. In addition, S&D treatment that offers a permanent preference to a limited number of developing country Members, such as LDCs, should not be expanded to benefit more developing country Members. It would be necessary to reconsider whether this one-rule policy is justifiable. If the development needs of developing country Members justify preferential treatment in the first place, then this treatment *should not expire* until they attain developed status, and therefore, this one-rule policy is not tenable from the perspective of economic development.⁶² The proposed regulatory reforms suggest that preferential treatment be extended to all developing country Members in many areas of trade, as discussed below.

c. Adjustment to Tariff Bindings⁶³

The GATT/WTO system requires Members to maintain their commitments on import concessions in the form of tariff bindings stipulated in the Schedule of Concessions.⁶⁴

While this principle provides essential stability to the international trading system, the tariff commitments remove the ability of developing countries to use trade protection to facilitate their industries at early stages of development (“infant industries”). There is considerable

⁶² See also Y.S. Lee, Reclaiming Development in the World Trading System, *supra* note 1.

⁶³ The proposal to adjust binding concessions to facilitate development was first made in the author’s previous article, “Facilitating Development in World Trading System: Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)”, *supra* note 52.

⁶⁴ Article I of the GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 425-427.

debate on the validity of infant industry promotion policies. Nonetheless, a recent study recognizes that fundamental economic restructuring seldom takes place in the absence of governmental intervention,⁶⁵ and the case for state supported industrial facilitation has already been made in some literature.⁶⁶ Regardless of the debate, a developing country should be allowed to choose policies that are best suited for their own development, fully considering the ramifications of the proposed tariff increases. If it finally determines that its industrial promotion policy demands tariff increases, its previous import commitments should not tie its hands. The provisions of GATT Article XVIII allow modification of the schedule to aid the facilitation of infant industries, but these provisions require Members to undergo potentially time-consuming and complicated negotiations with other interested Members prior to the application of higher tariffs.

Thus, more flexible treatment should be available to developing countries with respect to binding concessions authorizing additional tariffs beyond their scheduled commitments to facilitate industries for economic development.⁶⁷ This additional tariff applied for the purpose of infant industry promotion can be called “Development-Facilitation Tariff” or

⁶⁵ Dani Rodrik, *Industrial Policy for the Twenty-First Century* (paper prepared for UNIDO, September 2004), at 15

⁶⁶ Y.S. Lee, “Facilitating Development in World Trading System: Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)”, *supra* note 52, at 938-939.

⁶⁷ Arguably, the need for tariff protection should have been contemplated by developing countries when they agreed to specific tariff bindings in the multilateral trade negotiations. Nonetheless, their economic needs and national goals may have changed following political shifts (e.g., election of a new government, end of a dictatorship, etc), and therefore, development initiatives may begin long after the conclusion of trade negotiations. If so, the developing country should not be prohibited from offering trade protection to its infant industry because of its previous import commitments, and it should be allowed to do so without prolonging negotiations and the burden of compensations or threat of retaliations.

“DFT.”⁶⁸ In brief, the DFT allows a developing country to apply tariff rates above the scheduled commitments unilaterally when the country can demonstrate a development need for such a tariff with a concrete plan for industrial facilitation. The application of a DFT should require procedural safeguards to minimize the possibility of abuse. Safeguards could include a formal investigation and hearing requirement, notices to other interested Members, consultations, and a maximum duration for its application. The maximum applicable rate of the DFT should also be systematically differentiated according to the development stage of a particular developing country, as determined by the level of its per-capita income (i.e., the maximum DFT rate applicable by wealthier developing countries should be lower than that of a less affluent developing country, measured by per-capita income).⁶⁹

Some may argue that the introduction of DFTs in the world trading system will undermine the import concessions made by developing countries and disrupt the balance of concessions achieved through the trade negotiations. While those concessions are important, the need for economic development should be given priority. The impact of DFTs on world trade will be rather limited since over two-thirds of world trade is conducted among developed economies, which would not be subject to DFT applications.⁷⁰

⁶⁸ The author refers the reader to the details of the proposed DFT to the author’s previous article, Y.S. Lee, “Facilitating Development in World Trading System: Proposal for Development Facilitation Tariff (DFT) and Development Facilitation Subsidy (DFS)”, *supra* note 52.

⁶⁹ There will likely be some concern that this liberal treatment may lead to rampant protectionism by developing countries without either a genuine need or a constructive plan for infant industry promotion. The procedural safeguards introduced above counter this possibility of abuse.

⁷⁰ WTO, International Trade Statistics 2004, Table 1.6 Leading exporters and importers in merchandise trade (excluding intra-EU trade), available online at <<http://www.wto.org>>.

In addition, due to demands by developed countries with more powerful economies, developing countries with limited negotiating power are often compelled to make concessions beyond the levels that they are ready to offer.⁷¹ Consequently, where there are clear development plans that demand import protection, it would be fair to allow import restraints to meet development needs.

d. Subsidy Treatment

Another essential element of industrial promotion policies for economic development is a government subsidy. Strategically planned government subsidization has contributed to the successful development of some developing countries, such as South Korea. Under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), export subsidies (subsidies that are provided contingent on export performance) and import-substitution subsidies (subsidies that are contingent on the use of domestic over imported goods) are prohibited as they have adverse effects on international trade.⁷² In addition, a subsidy is “actionable” (i.e., the other country may retaliate against this subsidy with counter measures) when certain conditions are met.⁷³ Countervailing duties (CVDs), which

⁷¹ For developing countries and trade negotiations, see Anne Krueger, “The Developing Countries and the Next Round of Multilateral Trade Negotiations” (1999) 22(9) *World Economy* 909-932.

⁷² *The Results of the Uruguay Round of Multilateral Trade Negotiations*, supra note 3, at 233. Annex I of the SCM Agreement includes the illustrative list of prohibited export subsidies. *Id.*, at 265-267.

⁷³ These conditions are: i) the subsidy is specifically limited to an enterprise or group of enterprises, an industrial sector or group of industries, or a designed geographic region within the jurisdiction of the granting authority (*specificity requirement*) and ii) the subsidy causes adverse effects to the interests of other Members. Adverse effects include a) injury (material injury) to the domestic industry of the importing country, b) nullification or impairment of benefits of bound tariff rates, or c) serious prejudice to the domestic industry. The SCM Agreement, arts 2 and 5. *Id.*, at 232, 235,

are additional tariffs imposed on imports to offset the effect of subsidies,⁷⁴ are also applicable as a remedy where subsidization causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry.⁷⁵

Current WTO subsidy provisions prohibiting export subsidies and import-substitution subsidies, as well as those authorizing countervailing measures against actionable subsidies,⁷⁶ reduce the key ability of developing countries to provide support to promote their industries in the early stages of development.⁷⁷ Infant industries in developing economies often need export markets due to their limited domestic market. Government support is called upon to improve their competitiveness in the foreign market, as well as, in their own. The SCM Agreement recognizes this and affirms, “*subsidies may play an important role in economic development programmes of developing country Members.*”⁷⁸

The SCM Agreement also provides certain special and differential treatment to developing

⁷⁴ Part V of the SCM Agreement (Articles 10-23) provides for substantive and procedural rules for the application of countervailing duties. *Id.*, 243-258. Exporters can also avoid countervailing duties by undertaking to increase their export prices (price undertaking). This price undertaking is voluntary on the part of the exporters, and the importing country may consider the acceptance of the undertaking impractical, for instance, where the number of actual or potential exporters is too great. The SCM Agreement, art. 18. *Id.*, at 253-254.

⁷⁵ GATT art. VI, para. 6. *Id.*, at 431-432.

⁷⁶ *Supra* notes 72, 73.

⁷⁷ It has been observed that the current subsidy rules have made “a significant dent in the abilities of developing countries to employ intelligently-designed industrial policies. Rodrik (2004), *supra* note 65, at 34-35. Note that today’s developed countries provided extensive subsidies during their development stages, which would have been either prohibited or actionable under the SCM. Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, 2002), chapter 2.

⁷⁸ The SCA Agreement, art. 27.1. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 261.

countries: i.e., LDC Members are not prohibited from applying export subsidies,⁷⁹ and other developing countries are permitted to apply export subsidies for a period of eight years from the date of entry into force of the WTO Agreement, which has already expired.⁸⁰ These prohibited or otherwise actionable subsidies should be allowed for developing countries if they demonstrate a need for such subsidies with a concrete development plan. This subsidy that is specially authorized to facilitate development, can be labeled “Development-Facilitation Subsidy” or “DFS.”

As in the case of the DFT, procedural safeguards should be provided to minimize the abuse of DFS applications. The maximum applicable DFS rate should also be differentiated in accordance with the per-capita income level of a particular developing country, as the development need would be greater for poorer developing countries. A question may arise as to whether the availability of a DFS would lead to a subsidy race among developing countries, thus diminishing the effect of the subsidy for the industrial promotion of individual developing countries but causing only a distortion of resources. The answer is that a developing country should be trusted with its own best judgment as to whether subsidization would be necessary. Many economic and political factors would affect a government decision to grant a subsidy, and a prudent government will consider the existence and even the possibility of similar subsidies which may be applied by competing countries in future. A developing country will subsidize export industries it believes have

⁷⁹ The SCA Agreement, art. 27.2(a). *Id.*, at 261. This preference ceases to apply to any of these LDC Members when it reaches USD 1,000 GNP per capita. Annex VII. *Id.*, at 274.

⁸⁰ The SCA Agreement, art. 27.2(a). *Id.*, at 261. The WTO Agreement was entered into force as of 1995.

the best potential of success, and the possibility of these competing subsidies will be part of that equation.

e. The Suspension of Anti-Dumping Measures, TRIMs Agreement and TRIPS Agreement

Elements of the ADF may also include suspension of anti-dumping (AD) measures, the TRIMS Agreement, and the TRIPS Agreement, in favor of developing countries.⁸¹ AD actions⁸² that are applied against “dumped imports” in the form of increased tariffs, are the most frequently applied import measures in the world today. As of June 2003, there were as many as 1,323 AD actions reported to be in force.⁸³ Exports from developing countries have been the primary target of AD actions. Between July 2002 and June 2003, over half of the 238 AD investigations targeted imports from developing countries.⁸⁴ Considering that total exports from developing countries are less than half the exports from developed countries,⁸⁵ a substantially higher rate of exports from developing countries has been targeted for AD actions.

⁸¹ An argument may be made that these elements can be included in the corresponding agreements and not in the ADF. Their regulatory placement requires further discussion. In this paper, these elements are introduced to discuss their substantive merits.

⁸² The WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-dumping Practices Agreement” or “ADP Agreement”) For the specific determination of dumping margins and the imposition and collection of anti-dumping duties, see The ADP Agreement, arts 6.10 and art. 9. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, supra note 3, at 157-158, 160-162. Price undertakings are also allowed as in the application of CVD actions. *Supra* note 74. The ADP Agreement, art. 8. *Id.*, at 159-160. For the origin of anti-dumping measures, see Congressional Budget Office, *How the GATT Affects Antidumping and Countervailing-duty Policy* (1994) at 18. Anti-dumping actions include both anti-dumping duties and price undertakings.

⁸³ WTO, *Annual Report* (WTO: Geneva, 2004), at 46.

⁸⁴ *Id.*

⁸⁵ WTO, *International Trade Statistics 2004*, available on line at <www.wto.org>.

Most economists doubt that solid economic justifications exist for anti-dumping measures. Also, inherent complexity and arbitrariness in the determination of dumping⁸⁶ have been a breeding ground for abuse of AD actions.⁸⁷ National authorities can adopt a methodology that will yield the least desirable result for exporters⁸⁸ and then come up with a finding of dumping.⁸⁹ Depending upon their choice of methodology and calculation, the authorities will also be able to find different dumping margins.⁹⁰ This arbitrariness in the current AD rules and its significant adverse effect on trade have led to the inclusion of AD rules in the

⁸⁶ A dumping is defined as the sale at a price under “normal value” that needs to be first determined. The ADP Agreement, art 2.1. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 147. The complexity and arbitrariness in the determination of normal value are easily seen: e.g., there may not be a single home market price to compare, and the complex adjusted average may have to be calculated to come up with a reference home price; the home country may not completely be a market economy (e.g., “transitional economy”), and therefore, the home price may not represent the true market price; or the product in question may not even be sold in the home market or too few of it is sold to be the basis of a valid home price. In all these cases, the price needs to be “constructed” by an evaluation of cost (constructed cost) plus reasonable profit. Finding the “export price” that is necessary to determine the existence of dumping by comparison with the home price can be equally complex since a number of adjustments to the transaction price may be necessary to keep the comparison with the home price fair. These adjustments may include complex calculations involving numerous items such as warranty services, advertising costs, etc. *Y.S. Lee, Reclaiming Development in the World Trading System*, *supra* note 1, chapter 4.

⁸⁷ Depending upon 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. A recent study has revealed that in the case of the United States, the vast majority of national AD practices do not even actually identify either price discrimination or sales below cost. Brink Lindsey, “The U.S. Antidumping Law: Rhetoric versus Reality,” Cato Institute Trade Policy Analysis No. 7 (August 16, 1999).

⁸⁸ Article 2 of the ADP Agreement authorizes such leeway in the determination of dumping. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiation*, *supra* note 3, at 147-150.

⁸⁹ Although the provisions of the ADP Agreement attempt to provide disciplines on AD actions, “in common parlance, it is usual to designate all low-cost imports as dumped imports.” International Trade Centre UNCTAD/WTO and Commonwealth Secretariat, *Business Guide to the Uruguay Round* (ITC/CS: Geneva, 1995), at 181.

⁹⁰ *Supra* note 88.

new Doha Round agenda, with a possibility of rule modifications.⁹¹ Nonetheless, it is unlikely that the inherent arbitrariness in determining dumping could be reduced to a satisfactory level.⁹²

AD measures cause a critical problem to the trade of developing countries. The competitiveness of their product is normally based on low prices, reflecting lower labor costs. Developing countries should be allowed to exploit this advantage to achieve economic development through international trade. AD measures that are targeting inexpensive products have been major impediments to the exports of developing countries.⁹³ Although a lower price alone is not a sufficient ground for the application of AD measures,⁹⁴ the current provisions permitting the “construction” of costs and reference prices make it relatively easy for the national authorities to find dumping and apply AD measures against exports from developing countries. Yale economist T. N. Srinivasan has characterized anti-dumping as the equivalent of a “nuclear weapon in the armory of trade

⁹¹ WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (November 20, 2001), para. 28. Reform proposals have been made to reduce the abuse and arbitrariness in the application of AD measures. See Brink Lindsey and Dan Ikenson, “Reforming the Antidumping Agreement: A Road Map for WTO Negotiations”, Cato Institute Trade Policy Analysis No. 21 (December 11, 2002).

⁹² It is because the very attempt to determine the “normalcy” of a price in a market economy in which prices are determined by market forces and not by any normative rules, is inherently arbitrary no matter what standard is applied. It was pointed out that “[t]he primary justification for the antidumping law is really more political than economic. The guiding precept is *legitimacy* rather than *efficiency*.” Brink Lindsey, “The U.S. Antidumping Law: Rhetoric versus Reality,” *supra* note 87, at 3.

⁹³ *Supra* note 89.

⁹⁴ Dumping should also *cause* or *threaten* material injury to the domestic industry for the application of an AD measure. GATT Article VI, para. 6, WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 431-432. Unlike the serious injury standard required for the application of a safeguard measure (Agreement on Safeguards, art. 2. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 276-277), the threshold for material injury is not considered high.

policy” and suggested removing it in the 1999 WTO High-Level Symposium on Trade and Development.⁹⁵ Indeed, considering the economic needs of developing countries, AD measures should not be applicable to their trade. Safeguard measures, emergency trade restriction measures applicable to increases in imports that cause or threaten to cause serious injury to a domestic industry,⁹⁶ can respond to the predatory dumping that results in the displacement of domestic products, which may be the only justification for anti-dumping rules, despite its limited likelihood of success.⁹⁷

Another area that has significant relevance to the economic development and trade of developing countries is foreign investment. Foreign direct investment (FDI) may provide developing countries with resources necessary for the development that these countries typically lack, including financial capital, technological resources, production facilities, and managerial expertise. FDI also offers employment opportunities for local populations. In accepting FDI, the host developing countries may be inclined to set a series of conditions to steer FDI to maximize its contribution to their development objectives. For example, in order to facilitate export industries, these governments may adopt *investment measures* that require foreign investors to export a certain portion of products that are produced in the host country.

⁹⁵ World Trade Organization, *Report on the WTO High-Level Symposium on Trade and Development* (1999), *supra* note 95.

⁹⁶ Article 2.1 of the Agreement on Safeguards sets out the general requirement for the application of a safeguard measure. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 275.

⁹⁷ For more discussion, see Y.S. Lee, *Safeguard Measures in World Trade: The Legal Analysis* (Kluwer Law International, 2nd ed. 2005), chapter 14.2.

Investment measures may have significant implications on trade. For instance, if the host country adopts investment measures requiring foreign investment to export a certain portion of their products in an attempt to promote exports and reduce competition with other domestic producers, this foreign company may be compelled to export more than it would otherwise have. Similarly, if investment measures that require foreign investments to purchase domestic products may reduce the importation of these products from other countries that it may have in the absence of such measures. The WTO Agreement on Trade-Related Investment Measures⁹⁸ attempts to regulate certain investment measures that affect trade, namely, those that are inconsistent with Articles III and XI of the GATT.⁹⁹

As mentioned, trade-related investment measures (TRIMs) are often adopted in pursuing development objectives. Although there was some doubt as to the industrial promotion effects of TRIMs,¹⁰⁰ TRIMs may nevertheless play an important role in industrial promotion since they can help facilitate infant domestic industries by promoting exports and encouraging the use of domestic products. Note that all of today's developed countries also adopted investment measures to meet their development objectives during their own

⁹⁸ WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 143-146.

⁹⁹ GATT arts III and XI. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 427-249, 437, respectively.

¹⁰⁰ The criticism includes: TRIMs are economically inefficient since investment terms are controlled by investment measures rather than by market forces; the governments of the hosting countries may abuse TRIMs politically, for instance, to serve the interests of select producers that are not necessarily relevant to the needs for development; and the restrictive terms of TRIMs may also discourage investors from making investments in developing countries adopting these measures and thereby deprive the host developing countries of the opportunities to benefit from the investment that can provide necessary resources for their development. This criticism about TRIMs is in line with the objections to state industrial promotion discussed earlier. *See also* Y.S. Lee, *Reclaiming Development in the World Trading System*, *supra* note 1, chapter 3.1.

development.¹⁰¹ The TRIMs Agreement seems to target mostly the investment regulations of developing countries. There seems no clear need for such multilateral control on investment. For instance, major investors are often in a position to negotiate with the host developing country about the terms of their investment. In addition, over 1,100 bilateral investment treaties (BITs) around the world¹ already require national treatment in favor of foreign investors and prohibit a wider range of TRIMs than those restrained by the TRIMs Agreement. If a developing country is ready to give up certain TRIMs, it will do so bilaterally or unilaterally, even without any treaty obligations. However, if a developing country considers the adoption of TRIMs as necessary to meet their development objectives, then mandatory trade rules should not prohibit their adoptions. Therefore, the multilateral control on TRIMs needs to be lifted in favor of developing countries.¹⁰²

Lastly, the application of the TRIPS Agreement to developing countries should be reconsidered. Advanced knowledge, such as new technology and production techniques, is essential to facilitating industries. Historically, the ability to copy technologies developed in advanced countries has been one of the most essential elements in determining the

¹⁰¹ Ha-Joon Chang and Duncan Green, *The Northern WTO Agenda on Investment: Do As We Say, Not As We Did*, South Centre/CAFOD, June 2003, at 33. TRIMs can be either effective or counter-effective to the development interest of a particular developing country depending upon the economic conditions and the development stage which the individual developing country is in. For instance, an imposition of a local content requirement may be unnecessary and economically inefficient at a time when the domestic industry can compete with imports. On the other hand, this particular investment measure may be useful and facilitate domestic infant industries in the initial stages of development where domestic industries require some protection. This suggests that TRIMs can be a means to facilitate development.

¹⁰² Reflecting this concern, twelve countries proposed to change the text of the TRIMs Agreement to make commitments under the Agreement optional and not mandatory. WTO doc. WT/GC/W/354 (dated October 11, 1999).

ability of developing countries to catch up.¹⁰³ Developed countries today attempt to prevent unauthorized use of advanced technology by assigning a propriety right called intellectual property right (IPR). Thus, the enforcement of IPRs affects the ability of developing countries to acquire advanced technology for the purpose of development. The introduction of the TRIPS Agreement in trade disciplines is one of the important attempts to enforce IPRs around the world.

The introduction of the TRIPS Agreement was an ambitious undertaking in the Uruguay Round.¹⁰⁴ This Agreement, comprised of seventy-three Articles in seven Parts, is one of the most extensive provisions in the WTO Agreement. It establishes mandatory standards for the protection of various IPRs, including copyrights, trademarks, geographical indications, industrial designs, patents, and layout designs of integrated circuits, providing substantial minimum terms of their protection (e.g., 50 years for copyright, 20 years for patent and indefinite renewal of trademark with the minimum of 7 years for each registration).¹⁰⁵ In addition to providing effective enforcement procedures under their own laws,¹⁰⁶ the TRIPS Agreement also requires Members to apply national treatment and MFN treatment for the protection of foreign IPRs.¹⁰⁷ Rules of other major IPR conventions are also incorporated by reference in the relevant provisions of the TRIPS

¹⁰³ Richard R. Nelson, "The Changing Institutional Requirements for Technological and Economic Catch Up," Columbia University, June 2004 *cited in* Rodrik (2004), *supra* note 65, at 35.

¹⁰⁴ Annex 1C of the WTO Agreement. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 320-353.

¹⁰⁵ WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, *supra* note 3, at 325-339.

¹⁰⁶ *Id.*, at 339-343.

¹⁰⁷ TRIPS Agreement, arts 3 and 4. *Id.*, at 323-324.

Agreement.¹⁰⁸

The adoption of the TRIPS Agreement as part of trade disciplines raises important concerns. First, the TRIPS Agreement attempts to establish a regulatory regime to protect IPRs within all WTO Members, including those whose economic and social developments do not yet embrace the concept of IPRs and whose judicial systems have not yet developed enough to recognize and enforce IPRs.¹⁰⁹ It is doubtful that the imposition of an economic and legal system such as an IPR regime should be the role of trade disciplines. Their role should be limited to remedying trade injury resulting from IPR violations where such injury has been demonstrated. The adoption of the TRIPS Agreement in the WTO, primarily for the effectiveness of enforcement, is not a desirable precedent.

The imposition of an IPR regime may prematurely set economic and legal barriers to acquiring advanced technology for their development.¹¹⁰ This concern is amplified because the current TRIPS provisions require long durations of IPR protections.¹¹¹ One may argue that the protection of IPRs provides an incentive for creations and innovations

¹⁰⁸ The Paris Convention (1967), the Berne Convention (1971), the Rome Convention (1961) and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989) are incorporated by reference. *Id.*, at 322-339.

¹⁰⁹ A historical study shows that IPRs began to be recognized and protected when considerable economic and social developments had taken place. Chang, *supra* note 77, at 83-85.

¹¹⁰ In addition, concern was raised that the compliance requirement of the TRIPS Agreement will impose a considerable financial burden on developing countries, particularly LDCs. 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* 435.

¹¹¹ *Supra* note 105.

which may contribute to economic development, but in today's world where technological gaps between developed and developing countries are wider than ever, developing countries can close this gap by relying on their own "creativity" alone,¹¹² and they need access to advance knowledge and technology. In this respect, developing countries today are at a considerably larger disadvantage than those in the past when there was no international IPR regime imposed on them, certainly not to the extent imposed by the TRIPS Agreement today.

While the trade effect of IPR violations may need to be addressed, the imposition of an IPR regime clearly and unnecessarily impedes the development interest of developing countries. On the other hand, the need to acquire advance knowledge and technology on the part of developing countries does not mean that developed countries have to give up their IPR interests entirely. Alternative provisions that enable developed countries to apply trade sanctions where they demonstrate that a violation of their IPR has led to significant injury to their trade but not those that attempt to establish an IPR regime throughout the world can be considered.¹¹³ In the meantime, the provisions of the TRIPS Agreement

¹¹² On the other hand, if a developing country considers that the extensive protection of IPRs is in their own interest, this country, rather than the WTO, should be trusted to set its own standards for the protection under their own laws and regulations. Y.S. Lee, *Reclaiming Development in the World Trading System*, *supra* note 1, chapter 5.

¹¹³ The general exceptions of Article XX already allow trade sanctions to protect IPRs. What seems necessary is to set detailed rules for the substantive and procedural requirements for the application of a trade measure to remedy injury caused by an IPR violation. A Member should be authorized to apply trade measures only where a violation of its IPRs *causes injury* to its domestic industry through trade. An injury test, such as the one found in Article 4.2(a) of the Safeguards Agreement, should be required to ensure that the measure is applied based on a reasonable assessment of injury caused by IPR violations and not on an arbitrary determination by national authorities. This way, developed countries will be able to protect their own IPR interests by applying their own laws as well as the rules of relevant international IPR conventions, without imposing regulatory burden

should be suspended in favor of developing countries to the extent that it imposes on these countries the establishment of an IPR regime.

f. Extension of Special Treatment for LDCs

Some developed countries have offered preferential treatment to LDCs greater than that provided under the existing Generalized System of Preference (preferential tariff rates in favor of qualifying developing countries: GSP) scheme. For instance, the European Union has recently introduced the “Everything But Arms” (EBA) initiative, offering duty-free and quota-free treatment to products currently exported by LDCs.¹¹⁴ 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.¹¹⁵ Considering the dire economic need of LDCs, an EBA type of duty-free and quota-free treatment to the trade of LDCs needs to be implemented into the WTO by developed countries and participating developing countries. In implementing this initiative in favor of LDCs, a transitional period can be set for the complete removal of trade barriers to sensitive products.¹¹⁶ Members

on developing countries such as the one currently imposed by the TRIPS Agreement. Y.S. Lee, *Reclaiming Development in the World Trading System*, *supra* note 1, chapter 5.

¹¹⁴ For an initial evaluation of the EBA initiative, *see* Paul Brenton, “Integrating the Least Developed Countries into the World Trading System: The Current Impact of European Union Preferences Under ‘Everything But Arms’” (2003) 37 *Journal of World Trade* 623-646.

¹¹⁵ For instance, the United States has recently implemented the Africa Growth and Opportunity Act which offers improved access to certain African, but not Asian, LDCs. *Id.*, at 644-645.

¹¹⁶ In the EBA initiative, trade liberalization is complete except for three products, fresh bananas, rice, and sugar where tariffs will be gradually reduced to zero (in 2006 for bananas and 2009 for rice and sugar). Duty-free tariff quotas for rice and sugar will be increased annually. *Id.*, at 625.

should also ensure that non-tariff measures do not undermine the trade benefit of these preferences for LDCs.¹¹⁷

B. The Role of the Council for Trade and Development

The remainder of this section considers the role of the Council for Trade and Development proposed earlier. The primary objective of the new Council is to set a development agenda and promote development interests in the trading system. Its role can include i) the promotion of a development agenda and the implementation of trade-related development-assistance policies ii) regulatory monitoring concerning development, and iii) instituting and supervising development-assistance activities, including those of sub-committees.

a. Development Assistance Policy Implementation

The Council should create a regulatory environment in the trading system that allows and facilitates the implementation of effective development policies by developing country Members. In doing so, the Council should identify problems and gaps in the current trading system in facilitating development and accordingly set a trade and development agenda on a regular basis. This agenda may be discussed in the Ministerial Conferences and trade rounds to improve a more development-supportive regulatory system and modify relevant rules, if necessary. In promoting a trade and development agenda, the Council should cooperate with relevant international bodies such as the United Nations Committee

¹¹⁷ It has been observed that non-tariff measures, as well as stringent rules of origin, continues to limit exports from LDCs significantly. Inama (2002), “Market Access for LDCs: Issues to Be Addressed” (2002) 36 *Journal of World Trade* 115. Applications of administered protection, such as anti-dumping measures, countervailing duties and safeguards, can also diminish the beneficial effect of preference for LDCs.

on Trade and Development (UNCTAD) and the United Nations Industrial Development Organisation (UNIDO). Through such cooperation, the trade and development agenda set by the WTO would be promoted throughout the world more effectively and consistently.

In addition, a mechanism should be devised for developed country Members and participating developing country Members to file a mandatory Trade-Related Development Assistance Report (“TDAR”) on a regular basis, which reports the activities of Members in compliance with the trade and development agenda set by the Council. The Council should receive and examine TDARs on a regular basis and be in consultation with relevant Members to discuss their development-assistance activities. The Council and developed country Members may agree on specific commitments to be fulfilled by the developed country Members to promote the trade and development agenda and the Council may further examine, within a certain time period, whether these commitments are met.

The point of this proposal is to have a independent Council to set a relevant trade and development agenda on a regular basis and through the reporting mechanism, impose specific commitments on each developed and participating developing country Members to assist with development. The enforceability of these commitments may be questioned, as the WTO may not always be able to apply effective sanctions against the violating Members. The authorization of retaliatory measures may not be an effective sanction if these developing countries do not have leverage against the violating developed country Members. Nonetheless, Council activities to identify the relevant trade and development agenda and the reporting mechanism in the trading system to identify and monitor

Members' specific obligations in the trading system will still promote development interests. Since the implementation of the WTO, Members have largely complied with the specific obligations imposed by the WTO even without the threat of sanctions.

b. Regulatory Monitoring

The Council should also monitor compliance of development-assistance WTO provisions, including the existing S&D provisions, GATT Articles XXXVI ~ XXXVIII, and the provisions of the suggested ADF. Part of these monitoring elements can be incorporated in the aforementioned TDAR. Violations of these provisions should be reported to the Council if the violation is detrimental to the trade interest of a developing country Member. Then the Council should be subsequently in consultation with the violating Member to seek a resolution. The commitments on the part of developed country Members in GATT Articles XXXII can be monitored by the TDAR. Compliance with these commitments may require a more broad policy adjustment by the developed country Member, which may necessitate the monitoring by the Council. The Council should publish an annual report on the compliance status of these development-assistance provisions and provide a check against any systematic compliance problem. The Council should include such a problem in the trade and development agenda for possible rule modification.

c. Instituting and Supervising Sub-Committees

The Council should institute either standing or ad-hoc sub-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

sub-committee specifically devoted to the problems of LDCs and another assisting with building capacities of developing countries to participate fully in the trading system and realize the benefit. Assistance should be provided to developing country Members involved in costly and time-consuming trade disputes, and the current WTO Advisory Centre¹¹⁸ should be expanded to offer assistance to every developing country Member in need of assistance with respect to the panel or Appellate Body proceedings. Consideration should be given as to whether it would serve the need of developing country Members to assign the function of the existing WTO Advisory Centre to a sub-committee under the Council for Trade and Development.

IV. Conclusion – Development Assistance: From Rhetoric to Action

To facilitate development effectively in trade disciplines, it is important to examine the current institutional apparatus and regulatory structure of development-assistance provisions in the WTO. The current Committee on Trade and Development and the development assistance provisions scattered throughout the GATT/WTO disciplines are not sufficient to meet this objective. Regulatory and organizational reforms are thus necessary to effectively meet the development agenda and implement development-assistance policies. This reform should include the elevation of the CTD to the new Council on Trade and Development and the establishment of a coherent body of rules that facilitate development (ADF).

¹¹⁸ *Supra* note 45.

The proposed expansion of the current organizational apparatus means an expansion of staff and an increase in resources available to assist with developing countries. As of 2004, the current WTO budget of 1.36 million Swiss (roughly USD 1.18 million) francs for technical cooperation and of 4.29 million Swiss francs (USD 3.72 million) for training would be inadequately low to meet this proposal. Financial assistance from some Members has allowed trade ministers and representatives from developing countries to participate in WTO meetings and negotiations. Financial assistance necessary to enable participation of developing countries should not be left to the generosity of individual Members, but should be provided systematically by the WTO. The WTO Advisory Centre on WTO Law should also be supported by the WTO budget. The WTO budget allocation to the activities and functions of trade and development should be significantly increased to meet these needs.

Logistics need to be improved to address the needs arising from the limited financial and human resources of developing countries. The scarcity of these resources often prevents developing countries from participating in the trade organization fully; so, WTO meetings and negotiations schedules should also be set to allow the maximum participation of developing countries.¹¹⁹ The use of modern technology, such as web-technology, should be adopted to increase participation of developing countries which cannot afford to station experts in Geneva to participate in these meetings, without having to travel to Geneva from

¹¹⁹ Renato Ruggiero, the former General-Director of the WTO, acknowledged that some developing and least-developed countries had difficulty in participating fully in the organization, mainly due to too many meetings. He believed that it is an objective problem, but not the result of a deliberate policy of exclusion. WTO, *Report of the WTO High-Level Symposium on Trade and Development* (1999), *supra* note 50.

their home countries. The lack of participation by developing countries in WTO processes has been often pointed out as a reason for the poor representation of the interests of developing countries, thus ways to relieve these difficulties, such as the proposals made above, should be sought.

The monitoring and enforcement mechanism of the development-assistance provisions and policies should also be devised. The requirement of a Trade-Related Development Assistance Report can be considered. Developed country Members should be required to make this Report on a regular basis, subject to the review of the Council for Trade and Development. Willing developing country Members may also participate in this reporting process on a voluntary basis. This Report requirement will be consistent with the objectives of development facilitation manifested in the Part IV of the GATT. The proposed organizational and regulatory reform, as well as this suggested improvement of practical logistics, would help to turn what many have doubted as merely “rhetoric for development-assistance” into real and effective actions to assist developing countries.