

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 the 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 Agreement*³ sets out the facilitation of development as its objective,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 Doha Round also includes a development agenda (Doha Development Agenda: DDA)

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¹ See Y.S. Lee, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2006), which 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 E. Hudec, *Developing Countries in the GATT Legal System*, Thames Essays (London: Trade Policy Research Centre, 1987) for a discussion of how 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* (15 April 1994), online: WTO <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> [*WTO Agreement*].

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,” *ibid.* [emphasis in original].

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 (18 December 1996) at para. 13.

that addresses key 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

With the majority of the world population in poverty (mostly in developing countries), relieving this human tragedy is one of the most pressing issues of our time.⁷ The only long-term solution to this problem is the economic development of developing countries; this will create economies capable of providing higher standards of living to these populations. 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, achieved splendid economic development within a few decades, using active export facilitation. The NICs have brought themselves out of poverty through successful economic development.⁹ Export facilitation, being an

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

⁷ In 2000, the United Nations estimated that over half the world’s population (six billion people) live under substantial deprivation, surviving on income equivalent to \$2 or less per day. To address the question of poverty, the United Nations set the “Millennium Development Goals” (MDG) with several development objectives, online: United Nations <<http://www.un.org/millenniumgoals>>.

⁸ A large body of literature discusses the contribution of trade to development including: World Trade Organization, “The High Level Symposium on Trade and Development,” *Focus* (March 1999) at 6-9; J. Riedel, “Trade as the Engine of Growth in Developing Countries, Revisited” (1984) 94:373 *Economic Journal* 56; Larry E. Westphal, “Industrial Policy in an Export-Propelled Economy: Lessons From South Korea’s Experience” (1990) 4:3 *The Journal of Economic Perspectives* 41; R. Nurkse, *Patterns of Trade and Development* (New York: Oxford University Press, 1959); R. Nurkse ed., *Problems of Capital Formation in Underdeveloped Countries* (New York: Oxford University Press, 1967); K. Krishna, A. Ozyildirim & N.R. Swanson, “Trade, Investment, and Growth: Nexus, Analysis, and Prognosis,” *NBER Working Paper No. 6861* (December 1998); J.A. Frankel & D. Romer, “Trade and Growth: An Empirical Investigation,” *NBER Working Paper No. 5476* (March 1996); D. Salvatore & T. Hatcher, “Inward Oriented and Outward Oriented Trade Strategies” (1991) 27:3 *Journal of Development Studies* 7.

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 percent per annum, Hong Kong by 9.58 percent, Taiwan by 10.21 percent, and Singapore by 9.95 percent. 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 percent, 8.9 percent, 14.4 percent, and 10.0 percent respectively.

essential part of the development strategy, 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 in his previous works how the current regulatory framework for international trade facilitates the economic development of developing countries.¹¹ This examination revealed the inadequacy of the current system. The author, therefore, proposed alternative provisions intended to facilitate economic development. He also briefly reasoned the need for a new regulatory treatment of development facilitation, tentatively called the “*Agreement on Development Facilitation*” (*ADF*), as well as the necessity to create 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 Development Council, provides a more detailed account of the possible elements of the *ADF* and the role of the proposed Council.

Section II discusses the current development assistance provisions and organizational apparatus in the WTO, and examines their effectiveness in facilitating development. Based on this examination, a case for the Council and *ADF* is made. Section III explores 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 based on the foregoing discussion.

The Doha Round was suspended in July 2006 for the next several months due to significant dissatisfaction by developing countries about the current and proposed trade concessions, as well as the level of the proposed elimination of agricultural subsidies by major developed countries, including the United States and European Union. Developing countries have felt that the process of the Doha Round did not live up to its promise of the “development round.” The continued impasse of the multilateral trading negotiations will threaten the future of the WTO, and fundamental reform in WTO disciplines in favour of economic development of developing countries is necessary to ensure continued participation of both developing and developed countries in the WTO. The

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 *supra* note 1, c. 3.

¹¹ *Supra* note 1. See also Y.S. Lee, “Facilitating Development in the World Trading System: A Proposal for Development Facilitation Tariff and Development Facilitating Subsidy” (2004) 38:6 J. World Trade 935 [“Facilitating Development”].

¹² *Supra* note 1, c. 2.

proposals in this article have been put forward to aid in this effort.

II. CURRENT DEVELOPMENT ASSISTANCE PROVISIONS AND THE ORGANIZATIONAL APPARATUS OF THE WTO¹³

A. Current Provisions

The major development assistance provisions include *GATT* Articles XVIII, XXXVI - XXXVIII, the “Enabling Clause,” and the special and differential provisions (“S&D provisions”) in various WTO agreements.

a. Article XVIII

Article XVIII of *GATT*, entitled “Governmental 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 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].

¹³ Much of Section II is based on *Reclaiming Development in the World Trading System*, *supra* note 1, c. 2.

¹⁴ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can.T.S. 1947 No. 27 (entered into force 1 January 1948), online: WTO <http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> [GATT].

This Article supports the infant industry promotion policy,¹⁵ which uses tariff protection to promote domestic industries in the early stages of development. 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

Reciprocity is required for a modification of the Schedule of Concessions to facilitate an industry; the modifying WTO 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 other members. If an agreement is not reached within 60 days after the WTO is notified of the modification, the member may still unilaterally modify the concession in question. This can occur only 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 Article II and authorizes developing country members to modify their

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*, trans. by Sampson S. Lloyd, online: Faculty of Social Science, McMaster University <<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/list/national.html>>.

¹⁶ Section B of Article XVIII authorizes balance of payments (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.” *GATT, supra* note 14 [explanation added].

¹⁷ *GATT, ibid.*, art. XVIII at para. 7(b).

¹⁸ *Ibid.*

¹⁹ *Ibid.*

Schedule of Concessions to facilitate an infant 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 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 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, but the requirements of negotiations and compensation may diminish the effectiveness.

b. GATT Articles XXXVI – XXXVIII

Part IV of *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 and 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 favourable and acceptable conditions of access to world markets for primary products (on which many developing countries depend); the need to diversify the economic structure in developing countries and to avoid excessive dependence on the export of primary products; and the important relationship between trade and financial assistance to development.²³ The Article also clarifies that there should be no expectation of reciprocity by 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

²⁰ For more discussion on this point, see *supra* note 1, c. 3.

²¹ Section II.A.c below.

²² *GATT*, *supra* note 14.

²³ *Ibid.*

²⁴ *Ibid.* at para. 8.

²⁵ *GATT*, *supra* note 14. Also with respect to this commitment, para. 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.”

to assist developing countries with economic development. 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 specifically applicable to primary products wholly or mainly produced in developing countries, which hamper the growth of consumption of those products.²⁷

Developed country members are also required to make efforts to maintain trade margins for developing countries at equitable levels when 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 interests of developing countries in the application of trade measures against imports (paragraph 3). Article XXXVIII³⁰ provides for joint action and calls for an institutional effort by the WTO to assist with the development of developing countries.

Critics have argued that the provisions of Article XXXVI - XXXVIII are declaratory rather than obligatory since they are not enforced by effective sanctions. Article XXXVII excuses developed country members from the various commitments set out in the Article for “compelling reasons,” thus further weakening the effectiveness of these provisions.³¹ These compelling reasons may include domestic legal obligations; therefore, developed countries may avoid their “commitments” by legislating against them. Thus, it is doubtful that the commitments under Articles XXXVI - XXXVIII have actually affected the policies of developed countries in any significant way to accord more favourable treatment to developing countries.

This provision allows developed countries to avoid this commitment by, for instance, legislating for import restraints from developing countries.

²⁶ *Ibid.* at para. 1(b).

²⁷ *Ibid.* at para. 1(c).

²⁸ *Ibid.* at para. 3(a).

²⁹ *Ibid.* at para. 3(b).

³⁰ *Ibid.*

³¹ *Ibid.*, art. XXXVII at para. 1.

c. The Enabling Clause

A set of policy statements made in the GATT Decision on 28 November 1979, in favour of developing country members referred to as the “Enabling Clause,” also provides developing assistance provisions.³² This Enabling Clause approves the General System of Preferences (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 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. 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

There are other provisions in the GATT/WTO disciplines, the majority of which are found in the Uruguay Round Agreements, which provide special and differential treatment in favour 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). Currently, however, this S&D treatment is not sufficient to meet the development needs of developing countries for several reasons.

First, protection is often not sufficient. For instance, Article 9.1 of the *Agreement on Safeguards* requires the exemption of imports originating

³² *Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries*, GATT C.P. Nov. L/4903, 26th Supp. B.I.S.D. (1980) 203.

³³ *Ibid.* at para. 2(a).

³⁴ *Ibid.* at para. 2(b).

³⁵ *Ibid.* at para. 2(d).

³⁶ *Ibid.* at para. 5.

³⁷ *Ibid.* at 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 (25 October 2000).

in a developing country from safeguards where the portion of such imports does not exceed three percent, provided that the collective share of imports from all such developing country members (under three percent) accounts for not more than nine percent.³⁹ Article 9.2 of the *Agreement* 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 Critics have argued that the ceilings (the individual three percent and collective nine 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 protection in the areas where their trade interests are significantly affected, such as tariff bindings, subsidies, 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 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 has pointed out the need for greater differentiation in S&D treatment.⁴⁴

B. The 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. Its mandate is also to address related issues such as the implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased

³⁹ WTO, *Agreement on Safeguards*, online: WTO <http://www.wto.org/english/docs_e/legal_e/25-safeg.pdf>.

⁴⁰ *Ibid.*

⁴¹ Jai S. Mah, “Injury and Causation in the WTO Agreement on Safeguards” (2001) 4:3 *Journal of World Intellectual Property* 373 at 380-82.

⁴² Thus, the author proposed regulatory reforms in these areas. *Supra* note 1.

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

⁴⁴ Michael Hart & Bill Dymond, “Special and Differential Treatment and the Doha ‘Development’ Round” (2003) 37:2 *J. World Trade* 395 at 409.

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 capacity-building. In this area, the WTO offers assistance through its Training and Technical Cooperation Institute. Assistance includes providing regular training sessions on trade policy in Geneva, organizing approximately 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 the focus is on technical capacity-building. The WTO needs to consider other essential areas concerning trade and development, such as technology transfer, financial mechanism, and debt relief.

The CTD does not have the mandate to address these other essential issues and thus, developing countries have requested the WTO discuss these issues. The need for a new round to address a development agenda has resonated widely. The 2004 Report on the implementation of the United Nation 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 Transfer of Technology.”⁴⁷ The CTD met in special sessions to handle work under the DDA.

⁴⁵ For legal assistance, 32 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, see online: WTO <<http://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 *Implementation of the United Nations Millennium Declaration*, UN 59th Sess., UN Doc. A/59/282 (2004) at para. 43.

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 (20 November 2001).

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

The current problem with WTO provisions and the organizational structure concerning trade and development is that these provisions are not very effective, as discussed above, and that the current organizational apparatus is rather insufficient to address complex and long-term development issues on trade and development.⁴⁸ The mandate of the CTD is limited and the WTO's activities to assist developing countries also have been rather limited in scope. 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 facilitation (*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 promoted by developed countries. While trade and development issues concern the vast majority of WTO members, a relatively limited number of countries promoted intellectual property rights in the Uruguay Round negotiations. Nonetheless, the 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 to address complex and long-term intellectual property issues in the WTO.⁴⁹

As mentioned, trade and development issues concern a vast number of developing countries, and there is 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 smaller 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 the doubt that trade and development issues have not received due

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.

⁴⁹ The Council for Trade-Related Aspects of Intellectual Property Rights is organized under Article IV of the *WTO Agreement*, *supra* note 3.

attention and have been set aside.⁵⁰

The suggested elevation will not only make a statement recognizing the essential importance of development issues, but also meet practical needs. The practical needs include the replacement of present working groups with separate committees. Currently, WTO working groups are established to address important trade and development issues such as trade, debt and finance, and trade and technology transfer. These issues are complex and require continued attention within the WTO. 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, individual developing countries face unique problems resulting from increased participation in the WTO and securing full benefits of WTO membership. Therefore, an additional committee is necessary to bring adequate institutional attention to these problems and assist with the needs of developing countries 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. One 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 functions that the current CTD is not mandated to serve. Such functions could include a better organizational apparatus to deal with specific complex and long-term issues of development. Such new Council will have a wider mandate to implement all necessary measures to promote trade and development and a capacity to address essential development issues that concern the majority of WTO members.

As discussed above, the ineffectiveness of the current WTO provisions assisting development is an issue. For instance, relevant *GATT* provisions such as Articles XVIII and XXXVI - XXXVIII have become ineffective and obsolete. 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,

⁵⁰ WTO, International Institute for Sustainable Development, *Report of the WTO's High-Level Symposium on Trade and Development on 17-18 March 1999*, online: WTO <http://www.wto.org/english/tratop_e/devel_e/summhl_e.htm>.

⁵¹ *Supra* note 45.

and developed countries have shown reluctance in extending these provisions. To address trade and development issues more effectively and consistently, consideration should be given to the establishment of a coherent set of rules in the form of a separate agreement within the WTO disciplines.

What regulatory elements should be included in the *ADF*? The *ADF* may develop specific legal obligations, as well as monitor its implementation to increase the enforceability of developed countries' commitments under Part IV of *GATT*. This is not unlike other Uruguay Round agreements that expand and elaborate on *GATT* provisions, turning 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. It was proposed that reforms of the regulatory disciplines were necessary in areas relevant to development, such as tariff bindings, subsidies, anti-dumping measures, safeguards, agriculture, *Trade-Related Investment Measures (TRIMs)*, *TRIPS*, and service trade (*General Agreement on Trade in Services (GATS)*).⁵² Some of these proposed reforms can also be incorporated in the *ADF*, as will be 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 analyzed and discussed, taking into account the progress made in the current discussion of the DDA.

If the suggested elements 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* and the Multilateral Agreements on Trade in Goods. In addition to facilitating development, the *ADF*, by providing a coherent and permanent regulatory structure on trade development (unlike temporary and limited S&D treatment), would make a statement that development issues are considered as essential as other issues promoted by developed countries, thereby demonstrating that development issues are no longer only a subject of elaborate rhetoric.

⁵² *Supra* note 1. See also Facilitating Development, *supra* note 11.

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 GATT 1994.

GATT Articles XXXVI-XXXVIII are the major provisions that attempt to assist the economic development of developing countries; however, as previously discussed, these provisions are largely declaratory and do not create enforceable obligations. The ineffectiveness of these provisions is, in part, the result of an ineffective monitoring and enforcement system. Thus, setting procedures to monitor and enforce specific commitments by developed country members may increase their effectiveness. One way to do this is to obligate developed country members and participating developing country members to report periodically their specific commitments under these provisions 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 its 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 consult with the Council to resolve the problem. A timetable can be agreed upon between the developed country member and the Council, setting out for the removal or change of any offending practices. The broad exemption that currently excuses developed country members from commitments under Article XXXVII for any compelling reason, including legal reasons, should be removed as it allows members to disregard these commitments simply by legislating against them.⁵⁵

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

⁵⁴ For the discussion of these commitments, see Section II.A.b. above.

⁵⁵ A question was raised as to how this proposal may be consistent with the current DSU (the Understanding on Rules and Procedures Governing the Settlement of Disputes). Article 1.2 of the DSU provides, "The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered

Developed country members should also be required to report to the Council on a regular basis on the implementation of relevant measures under the itemized commitments, as well as on any undertaking to remove or change inconsistent policies, laws, and practices. 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 incident 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 the authorization of trade sanctions. This combination of monitoring, consultation, and enforcement measures, as well as the ability to set the 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.*, standards that regulate the underlying principle providing S&D treatment and determine which developing country members 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 for developing

agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail . . . ” The procedural aspect of this recommendation is specified in the *ADF* and can be identified in Appendix 2, and those rules identified in Appendix 2 will prevail if there is any conflict.

⁵⁶ *Supra* note 44.

country members to enhance the clarity and rationality of the system.

What standard can be adopted to determine developing country status? Individual income levels 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 Bank, can be adopted for such differentiation. For instance, Article 9.2 of the *Agreement on Safeguards* authorizes a longer duration of a safeguard measure to be applied by a developing country member.⁵⁹ 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 reasoned 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 among 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 types of S&D treatment simply buy developed country members more time to comply with WTO obligations, while others provide permanent preferential treatment.⁶⁰ The tendency of trying to limit preferential treatment to developing country members seems to continue, as reflected in a statement made by a prominent speaker at the 1999 WTO High-Level Symposium on Trade and Development advising developing countries to avoid a push for renewed S&D treatment.⁶¹

The reluctance on the part of developed country members to provide

⁵⁷ As of May 2007, the World Bank made this classification according to its 2005 statistics: low-income group (\$875 or less per capita), lower-middle-income group (between \$875 and \$3,465 per capita), upper-middle-income group (between \$3,466 and \$10,725), and high-income group (\$10,726 or above), online: World Bank <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.

⁵⁹ *Agreement on Safeguards*, *supra* note 39.

⁶⁰ *Supra* note 38.

⁶¹ C. Fred Bergsten (main speaker), *Report 1999*, *supra* note 50.

extensive S&D 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 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 its 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,

⁶² See also *supra* note 1.

⁶³ The proposal to adjust binding concessions to facilitate development was first made in Facilitating Development, *supra* note 11.

⁶⁴ GATT, *supra* note 14, art. II.

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

⁶⁶ Facilitating Development, *supra* note 11 at 938-39.

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 “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. For example, 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 trade negotiations. While these 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 and not subject to DFT applications.⁷⁰ In addition, due to demands by developed countries with

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.

⁶⁸ See Facilitating Development, *supra* note 11, for the details of the proposed DFT.

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 Developing countries' share of world merchandise exports was 36% in 2006. World Trade Organization, Press Release /472, “World Trade 2006, Prospects For

more powerful economies, developing countries with limited negotiating power are often compelled to make concessions beyond the levels that they are prepared to offer/accept.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 *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 the subsidy with countermeasures) when certain conditions are met.⁷³ Countervailing duties (CVDs), which are additional tariffs imposed on imports to offset the effect of subsidies,⁷⁴ are also an applicable remedy where

2007: Risks lie ahead following stronger trade in 2006, WTO reports,” online: WTO <http://www.wto.org/english/news_e/pres07_e/pr472_e.htm>.

⁷¹ For developing countries and trade negotiations see Anne Krueger, “The Developing Countries and the Next Round of Multilateral Trade Negotiations” (1999) 22:7 *The World Economy* 909.

⁷² *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, LT/UR/A-1A/9, online: WTO <http://www.wto.org/english/docs_e/legal_e/24-scm.pdf> [*SCM Agreement*]. Annex I of the *SCM Agreement* includes the illustrative list of prohibited export subsidies.

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. *SCM Agreement, ibid.*, arts. 2 & 5.

⁷⁴ Part V of the *SCM Agreement* (arts.10-23) provides for substantive and procedural rules for the application of countervailing duties. According to art.18, 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. (*SCM Agreement, ibid.*).

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 a 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 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* in 1995, 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 and causing only

⁷⁵ *GATT*, *supra* note 14, art. VI at para. 6.

⁷⁶ *Supra* notes 72 & 73.

⁷⁷ It has been observed that the current subsidy rules have made “a significant dent in the ability 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* (London: Anthem Press, 2002) c. 2.

⁷⁸ *SCA Agreement*, *supra* note 72, art. 27.1 [emphasis added].

⁷⁹ *SCA Agreement*, *ibid.*, art. 27.2(a). This preference ceases to apply to any of these LDC Members when it reaches US\$1,000 GNP per capita. *SCA Agreement*, *ibid.*, Annex VII.

⁸⁰ *SCA Agreement*, *ibid.*, art. 27.2(b).

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 that may be applied by competing countries in the future. A developing country will subsidize those export industries that it believes have 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 and the *TRIMs* and *TRIPS Agreements* in favour 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 2005, there were as many as 1,291 AD actions reported to be in force.⁸³ Exports from developing countries have been the primary target of AD actions. Between July 2004 and June 2005, over half of the 209 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.

Most economists doubt that solid economic justifications exist for anti-dumping measures. Also, inherent complexity and arbitrariness in

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 For the specific determination of dumping margins and the imposition and collection of anti-dumping duties, see WTO, *The WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, arts. 6.10 & 9, online: WTO <http://www.wto.org/english/docs_e/legal_e/19-adp.pdf> [“*Anti-dumping Practices Agreement*” or “*ADP Agreement*”]. Price undertakings are also allowed as in the application of CVD actions. *Supra* note 74; *ADP Agreement*, art. 8. 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 2006* at 31, online: WTO <http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep06_e.pdf>.

⁸⁴ *Ibid.*

⁸⁵ WTO, “World Trade 2006, Prospects for 2007”, *supra* note 70.

the determination of dumping⁸⁶ have created 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 new Doha Round agenda, with a possibility for rule modifications.⁹¹ Nonetheless, it is unlikely that the inherent

⁸⁶ A dumping is defined as the sale at a price under “normal value” that needs to be first determined. *ADP Agreement*, *supra* note 82, art. 2.1. 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.* *Supra* note 1, c. 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 (16 August 1999), online: Cato Institute <http://www.cato.org/pub_display.php?pub_id=3650>.

⁸⁸ Article 2 of the *ADP Agreement* authorizes such leeway in the determination of dumping. *ADP Agreement*, *supra* note 82.

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 & Commonwealth Secretariat, *Business Guide to the Uruguay Round* (Geneva: ITC/CS: 1995) at 181.

⁹⁰ *ADP Agreement*, *supra* note 82.

⁹¹ WTO, *Ministerial Declaration*, WT/MIN(01)/DEC/1 (20 November 2001) at para. 28. Reform proposals have been made to reduce the abuse and arbitrariness in the application of AD measures. See Brink Lindsey & Dan Ikenson, “Reforming the Antidumping Agreement: A Road Map for WTO Negotiations,” Cato Institute Trade Policy Analysis No. 21 (11 December 2002), online: Cato Institute <http://www.cato.org/pub_display.php?pub_id=3636>.

arbitrariness in determining dumping could be reduced to a satisfactory level.⁹²

AD measures cause a critical problem to trade of developing countries. The competitiveness of their product is normally based on low prices, reflecting lower labour costs. Developing countries should be allowed to exploit this advantage to achieve economic development through international trade. AD measures 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 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 policy,” and suggested removing it at 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 measures⁹⁶ can respond to the predatory dumping that results in the displacement of domestic products, which may be the only justification for anti-dumping rules.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

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*.”[emphasis in original]. 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*, *supra* note 14, art. VI at para. 6. Unlike the serious injury standard required for the application of a safeguard measure (*Agreement on Safeguards*, *supra* note 39, art. 4), the threshold for material injury is not considered high.

⁹⁵ *Report 1999*, *supra* note 50.

⁹⁶ Article 2.1 of the *Agreement on Safeguards* sets out the general requirement for the application of a safeguard measure. See *supra* note 39.

⁹⁷ For more discussion, see Yong-Shik Lee, *Safeguard Measures in World Trade: The Legal Analysis*, 2d ed. (The Hague: Kluwer Law International, 2005) c. 14.2.

countries may be inclined to set a series of conditions to steer FDI to maximize its contribution to their development objectives. For example, to facilitate export industries, these governments may adopt investment measures requiring foreign investors to export a certain portion of products produced in the host country. 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 require foreign investments to purchase domestic products, this may reduce the importation of these products from other countries that it may have imported from in the absence of such measures. The *WTO Agreement on Trade-Related Investment Measures (TRIMs)*⁹⁸ attempts to regulate certain investment measures that affect trade, namely, those that are inconsistent with Articles III and XI of *GATT*.⁹⁹

As mentioned, *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 development.¹⁰¹ The *TRIMs Agreement* seems to mainly target the

⁹⁸ WTO, *Agreement on Trade-Related Investment Measures*, online: WTO <http://www.wto.org/English/docs_e/legal_e/18-trims.pdf> [*TRIMs*].

⁹⁹ *GATT*, *supra* note 14, arts. III and XI.

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 *supra* note 1, c. 3.1.

¹⁰¹ Ha-Joon Chang & 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

investment regulations of developing countries, but there seems to be no clear need for such multilateral control on investment. For instance, major investors are often in a position to negotiate the terms of their investment with the host developing country. In addition, over 1,100 bilateral investment treaties (BITs) around the world already require national treatment in favour 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 its development objectives, then mandatory trade rules should not prohibit their adoption. Therefore, the multilateral control on *TRIMs* needs to be lifted in favour 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 ability of developing countries to catch up.¹⁰³ Today, developed countries attempt to prevent unauthorized use of advanced technology by assigning a propriety right called an 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 73 Articles in 7 Parts, is one of the most extensive provisions in the *WTO Agreement*. It establishes mandatory standards for the protection of

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, *Preparations for the 1999 Ministerial Conference*, WTO Doc. WT/GC/W/354 (1999).

¹⁰³ Richard R. Nelson, "The Changing Institutional Requirements for Technological and Economic Catch Up" (Paper presented at the DRUID Summer Conference 2004 to Industrial Dynamics, Innovation and Development), online: Danish Research Unit for Industrial Dynamics <<http://www.druid.dk/conferences/summer2004/papers/ds2004-280.pdf>>.

¹⁰⁴ WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, online: WTO <http://www.wto.org/English/docs_e/legal_e/27-trips.pdf> [*TRIPS*].

various IPRs, including copyrights, trademarks, geographical indications, industrial designs, patents, and layout-designs of integrated circuits, providing substantial minimum terms of protection (*e.g.*, 50 years for copyright, 20 years for patent, and indefinite renewal of trademark with a 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 Most-Favoured-Nation (MFN) treatment to protect foreign IPRs.¹⁰⁷ Rules of other major IPR conventions are also incorporated by reference in the relevant provisions of the *TRIPS 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 member States. This includes those member States whose economic and social developments do not yet embrace the concept of IPRs and whose judicial systems have not yet developed sufficiently 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 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 that may

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, art. 41.

¹⁰⁷ *Ibid.*, arts. 3 - 4.

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. *TRIPS*, *ibid.*, art. 1.

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* 425.

¹¹¹ *TRIPS*, *supra* note 104.

contribute to economic development, but in today's world where technological gaps between developed and developing countries are wider than ever, developing countries cannot close this gap by relying on their own "creativity" alone.¹¹² They need access to advance knowledge and technology. In this respect, developing countries today are at a considerably larger disadvantage than those of the past, as no international IPR regime was imposed on them, or 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 provisions that attempt to simply establish a uniform IPR regime throughout the world is one consideration.¹¹³ In the meantime, the provisions of the *TRIPS Agreement* should be suspended in favour of developing countries to the extent that it imposes on these countries the establishment of an IPR regime that they are not even ready for.

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 favour of qualifying developing countries, "GSP") scheme. For instance, the European Union has recently

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 protection under their own laws and regulations. *Supra* note 1, c. 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 *Agreement on Safeguards*, 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 on developing countries such as the one currently imposed by the *TRIPS Agreement*. *Supra* note 1, c. 5.

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 by developed countries and participating developing countries in the WTO. While implementing this initiative in favour of LDCs, a transitional period can be established for the complete removal of trade barriers to sensitive products.¹¹⁶ Members would also have to 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.

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) 37:3 J. World Trade 623.

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. *Ibid.* at 644-45.

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. *Ibid.* at 625.

¹¹⁷ It has been observed that non-tariff measures, as well as stringent rules of origin, continue to limit exports from LDCs significantly. Stefano Inama, “Market Access for LDCs: Issues to Be Addressed” (2002) 36:1 J. World Trade 85 at 115. Applications of administered protection, such as anti-dumping measures, countervailing duties and safeguards, can also diminish the beneficial effect of preference for LDCs.

i. 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 at the Ministerial Conferences and trade rounds to develop a more development-supportive regulatory system and modify relevant rules when necessary. In promoting a trade and development agenda, the Council should cooperate with relevant international bodies such as the United Nations Committee on Trade and Development (UNCTAD) and the United Nations Industrial Development Organisation (UNIDO). Through such cooperation, the trade and development agenda set by the WTO would be promoted more effectively and consistently throughout the world.

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. It would report those members' activities that are in compliance with the trade and development agenda set by the Council. The Council should receive and examine TDARs on a regular basis and consult 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 being met.

The point of this proposal is to have an 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 member 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 violating members. The authorization of retaliatory measures may not be an effective sanction if developing countries do not have leverage against the violating developed country member. Nonetheless, Council's activities to identify the relevant trade and development agenda and 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.

ii. 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 violations are detrimental to the trade interests of developing country members. The Council should subsequently consult with the violating member to seek a resolution. The commitments of developed country members in *GATT* Articles XXXII can be monitored by the TDAR. Compliance with these commitments may require a broader 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 monitoring of any systematic compliance failure. The Council should include such a problem in the trade and development agenda for possible rule modification.

iii. Instituting and Supervising Committees

The Council should institute standing or ad-hoc committees to address specific issues of trade and development that require long-term attention, such as technological transfer among developed and developing country members. There should be at least one committee specifically devoted to the problems of LDCs, and another to assist with building capacities of developing countries to participate fully in the trading system and realize the benefits. 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 committee under the Council for Trade and Development.

¹¹⁸ *Supra* note 45.

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*).

The proposed expansion of the current organizational apparatus means an expansion of staff and an increase in resources available to assist developing countries. As of 2007, the current WTO budget of 7 million Swiss francs (roughly US\$5.8 million) for technical cooperation and training would be inadequate 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. The financial assistance necessary to enable the 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 negotiation schedules should also be set to allow 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 their home countries. The lack of participation by developing countries in WTO

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 was an objective problem, but not the result of a deliberate policy of exclusion. *Report 1999, supra* note 50.

processes has often been 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 regularly, subject to review by the Council for Trade and Development. Willing developing country members may also participate in the reporting process on a voluntary basis. This Report requirement will be consistent with the objectives of development facilitation manifested in Part IV of *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.