

Developing Countries and GATT/WTO Rules: Dynamic Transformations in Trade Policy Behavior and Performance

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I. INTRODUCTION: DEVELOPING COUNTRIES IN THE RULES-BASED MULTILATERAL TRADING SYSTEM

What factors explain the shift to policy reforms and liberalization in developing countries¹ after the 1940s “special and differential” approach to GATT rules and disciplines? How did this reform-driven behavior affect the trade performance of developing countries, as well as the agenda and functioning of the WTO? In describing the legal relationship of developing countries to GATT rules and disciplines, Robert Hudec observed that GATT developing country members never agreed to accept the same disciplines as developed members, but

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1. For the purpose of this study and in keeping with the WTO standard, “developing countries” are defined as all countries and separate customs territories minus “developed countries,” which include Australia, Canada, EU27, Iceland, Japan, New Zealand, Norway, Switzerland, and the United States. This standard is in keeping with the fact that developing country status in the WTO is by self-designation and that least-developed countries (LDCs) are recognized as a legal sub-category of developing countries. See WORLD TRADE ORGANIZATION, *Who are the developing countries in the WTO?*, http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Feb. 20, 2011).

sought exceptions from the GATT obligations and code of behavior. The GATT's legal relationship with developing countries consisted primarily of a history of demands for special status, which badly served developing countries and compromised the most-favored-nation (MFN) obligation. This argument correctly characterized the period analyzed by Hudec. While strains of this special and differential approach have persisted, significant changes have occurred. Developing countries trade policy behavior has evolved to demonstrate an offensive reformist behavior, but also defensive postures, averse to rigid constraints on policy flexibility. How did developing countries create their own momentum for liberalization and reform?² Their liberalization impulse is explained by the combination of domestic pressures to respond to crises and national development priorities, compliance with systemic trading rules, adjustments to commitments from successive rounds of trade liberalization, and implementation of domestic reforms pursuant to WTO accession negotiations. The analysis of developing country recently-acceded Members (RAMs) indicates extensive trade reforms and optimization of WTO-rule compliance. This trade policy behavior has resulted in stronger trade performance and resilience, relative to founding Members. In addition, a positive relationship exists between domestic reforms complying with WTO rules and trade performance. Specifically, analysis indicates that the liberalization momentum is driven by complex dynamic interactions between domestic priorities and compliance with systemic trade rules, linked to degrees of flexibility. These relationships are in question in the Doha Round. This article concludes the Doha Round is indispensable for modernizing the rules, sustaining trade reforms, integrating developing countries into the rules-based system, and reinforcing the WTO as a global public good for international cooperation.

A. DEVELOPED AND DEVELOPING COUNTRIES' RELATIONSHIP:
COMPLEX AND EVOLVING

Professor Hudec still challenges our thinking in positive ways. Many of the questions he asked and issues he addressed remain highly pertinent today. His 1987 foresight on the increased importance of developing countries was

2. J. Michael Finger, *Introduction* to ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 19 (Cambridge University Press 2011).

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extraordinarily prescient. Even at the time it was obvious to him that the role of developing countries in the trading system was bound to attract increased attention. The role of developing countries in the trading system and their relationship with GATT rules is still at the heart of the central and unresolved questions in the on-going Doha Round. Despite the evidently changing balance in global trade and economic relations between the traditional post-World War II trading powers and the emerging economies on the other, the Hudec thesis remains relevant to integrating developing countries into the rules-based Multilateral Trading System and managing the complex relationship between developed and developing countries.

GATT/WTO developing Members (countries and separate customs territories) have had a complex and development-mediated relationship with the rules of the trading system over a period of more than sixty years. As correctly described by Hudec, the relationship of developing countries with GATT rules started from essentially a “parity of obligation.”³ This relationship, however, metamorphosed, deviating to an exemption ramp, with requests from developing countries for special and differential treatment coupled with their refusal to accept the same disciplines or undertake the same concessions and commitments as developed members. A range of reasons accounted for this behavior. The preliminary question is, what is the current reality? Has the relationship changed? If so, how should the current relationship of developing countries to the GATT/WTO rules be described? Next, it is necessary to identify the factors that improve understanding of the reformist and trade-liberalizing policy behavior of developing countries from the mid-1980s. What is the effect of this behavior on the actual trade performance of developing countries and on the contemporary agenda and functioning of the WTO? Finally, it is relevant to ask whether there is a “liberalization momentum” amongst developing countries. These legal and policy questions will remain relevant to the relationship between developed and developing WTO Members in the trading system for the foreseeable future.

The relationship of developing countries to GATT/WTO rules remains in complex and dynamic evolution. The nature of this relationship will be affected by the reaction of developed Members. However, although developing countries accept

3. HUDEC, *supra* note 2 at 24.

commitment to the rules-based Multilateral Trading System and are firmly set on domestic reforms and trade liberalization, strains of the exemption orientation remain, in addition to a more nuanced advocacy for differentiated treatment of categories of developing countries at different levels of trade, finance and development. The latter approach advocates a “concept of differentiation and policy flexibility, not to divide countries, but for greater inclusiveness.”⁴ In other words, as advocated, while there is acceptance of the necessity of binding rules and disciplines, different categories within the developing country group seek differentiated treatment, even while reaffirming commitment to the preservation of core systemic trade rules. On one hand there is a commitment to systemic trade rules, domestic reforms, and trade liberalization, and on the other hand, advocacy to rule and policy flexibility for development reasons.

What factors explain the drive for reform and trade liberalization since the mid-1980s, in contrast to the restrictive and protectionist policies in the post-World War II era? In the post-World War II period, most economies, including developing countries had high levels of effective protection. Average tariffs were in the 20–30% bracket. In many developing countries, high tariff levels were combined with quantitative restrictions and exchange controls. These restrictive measures reflected policy objectives that favored infant industry protection, import substitution, and capital controls.⁵ These policies essentially shielded domestic industry from competition. From the mid-1980s, a liberalization impulse was evident in the trade policy behavior of developing countries. A core group of developing countries embarked on significant domestic reforms and trade liberalization. Why was this so? It is argued that this liberalization impulse amongst a core group of developing countries, initiated from the mid-1980s onwards and sustained into the 1990s and 2000s is explained by the combined factors of domestic pressures to respond to crises and national development priorities,

4. Shree Servansing, Coordinator, African, Caribbean and Pacific Group of States (ACP), Remarks at Workshop on Recent Analyses of the Doha Round, Summing Up and Roundtable Discussion: How Can Policy-Makers Use These Analyses And What Other Information Do They Need? (Nov. 2, 2010) (transcript on file with author).

5. Bernard Hoekman, *Changing Developing Country Trade Policies and WTO Engagement* (Ctr. for Econ. Policy Research Discussion Paper No. 8210, 2011).

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compliance with systemic trading rules, adjustments to commitments from successive rounds of trade liberalization, and implementation of domestic reforms pursuant to WTO accession negotiations. The analysis of the trade policy behavior of developing country RAMs is demonstrative. Developing country RAMs have undertaken extensive trade reforms and optimized WTO-rule compliance. This trade policy behavior has resulted in their stronger trade performance and resilience, relative to founding WTO Members. Specifically, analysis indicates that the drive for reform and trade liberalization momentum is driven by complex dynamic interactions between domestic priorities and compliance with systemic trade rules, linked to degrees of flexibility.

It is obvious that a complex range of external and domestic factors interacted to explain the domestic reform and trade-liberalizing behavior of developing countries, from the GATT era (dating from the mid-1980s). This argument differs from the more classical position that, “the GATT played, at best, a marginal role in the trade policy reform process in developing countries” and that, “domestic policy reform is still primarily a function of autonomous decisions by developing country governments.”⁶ While there may be the appearance of autonomy, strategic decision-making is hardly ever autonomous; they tend to be constrained by both external and internal factors. It is argued that decisions for domestic reforms and trade opening in particular have always combined domestic and external factors, and take account of rules of the Multilateral Trading System. Domestic reforms and trade liberalization of developing country RAMs confirm this proposition rather than being an exception to it. Of equal significance is that the external effect of the influence of systemic trading rules has been reinforced by the cumulating jurisprudence of the trading system is strong evidence under the Dispute Settlement Understanding of the WTO.

B. DEVELOPING COUNTRIES AND THE RULES OF THE MULTILATERAL TRADING SYSTEM

Based on a foundation of non-discrimination, GATT rules have continued to evolve, reinforced and qualified by WTO jurisprudence. The GATT established a legal framework for

6. *Id.* at 2.

reciprocal reduction of tariffs. A “code of behavior”⁷ was agreed, which rested on three central principles: i) protection should rest on tariffs and elimination of non-tariff barriers; ii) periodic negotiations aimed at a gradual reduction of existing tariff levels; and iii) MFN treat the trade of all GATT Members equally. Within these rules, developed-country governments achieved a very substantial reduction of trade barriers in the twenty years from 1947. Developing country members of the GATT refused these disciplines. They sought exceptions and although the history of the GATT’s legal relationship with developing countries begins with essentially “parity of obligation,” it ended up primarily with demands for special status. This relationship became a “one-sided welfare relationship” in which developing countries are excused from legal disciplines while developed countries are asked to recognize a series of unilateral obligations, based on economic need, to promote the exports of developing countries.⁸

This relationship, described as “form without substance,” relaxed disciplines, rather than sharply focusing the trade disciplines to constructive and beneficial uses, and has badly served developing countries more than it has assisted them.⁹ For instance, it has been convincingly argued that part of the explanation for asymmetric outcomes in trade negotiations under the GATT resulted from developing countries’ negotiating strategies, such as the insistence on special and differential treatment and refusal to engage in the reciprocal exchange of liberalization commitments.¹⁰

Hudec’s observations about the relationship of developing countries to GATT rules and disciplines described the reality of the period which he studied. Three examples are illustrative. First, in 1965, Part IV of the GATT (Trade and Development Section) was added by the Protocol Amending the General Agreement on Tariffs and Trade. The purpose was to increase trade opportunities for developing country Members by providing them with special and differential treatment. Article XXXVI:8, Part IV, of the GATT 1994 incorporated into WTO law the principle of non-reciprocity in trade negotiations between developed and developing country Members. This

7. HUDEC, *supra* note 2 at 23.

8. *Id.* at 24.

9. *Id.* at 99.

10. Rajesh Chadra et al., *Developing Countries and the Next Round of WTO Negotiations*, 23 WORLD ECON. 431, 433 (2000).

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meant that developed country Members would not seek, nor would developing country Members be required to make, concessions inconsistent with their development, financial, and trade needs; developed country Members were not to expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing country Members. Provisions in Part IV suggested measures by developed Members to promote development.¹¹ There were priority measures identified to eliminate barriers to trade in products of particular export interests to developing country Members¹² and also identified measures to improve conditions of access to world markets of primary products of interest to developing country Members.

Second, in 1979, the GATT contracting parties adopted the Enabling Clause.¹³ The Enabling Clause further elaborated the non-reciprocity principle and special and differential treatment. It provided for preferential market access treatment in merchandise trade to developing countries, including least-developed countries (LDCs), without according such treatment to other Contracting Parties, as an exception to GATT Article 1. In Paragraph 1, the Enabling Clause provided that, "Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."¹⁴ This provision applied to preferential tariff treatment by developed contracting parties to products originating from developed countries within the Generalized System of Preferences framework; differential and more favorable treatment regarding non-tariff measures pursuant to GATT negotiated instruments; regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs; and special treatment for LDCs amongst developing countries in the context of any general specific measures in favor of developing countries. Paragraph 5 provided that developed countries should not expect reciprocity for commitments made by them in trade

11. General Agreement on Tariffs and Trade, Art. XXXVII, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

12. *Id.* para. 1.

13. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, para. 2(c), L/4903 (Dec. 3, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980).

14. *Id.* para. 1.

negotiations to reduce or eliminate tariffs and other barriers in the trade of developing countries.

In 2010, more than thirty years later, in the Doha Round negotiations, a proposal was tabled for a waiver from the obligations under Paragraph 1 of GATS Article II to enable Members to provide preferential treatment to services and LDCs' services suppliers without the same treatment to other Members. The proposed draft waiver was formulated as the services equivalent of the 1979 Enabling Clause. As proposed in the operative section, WTO Members would decide that, "The obligations imposed under Paragraph 1 of Article II of the GATS are hereby waived to the extent necessary to permit Members to provide preferential treatment to the services and services suppliers of least-developed countries without according the same treatment to like services and service suppliers of all other Members provided that any such treatment shall be granted immediately and unconditionally to like services and service suppliers of all least-developed countries."¹⁵

Third, beyond the mid-1980s, in the period from when domestic reforms and trade liberalization were initiated and sustained into the 1990s to the present, strains of special and differential treatment have persisted. In the 2001 Ministerial Declaration launching the Doha Round, the mandate for the launch of the negotiations prescribed conditions for reflecting special and differential treatment for developing and least developed countries in the negotiations for agriculture,¹⁶ non-agricultural market access (NAMA),¹⁷ and to ensure that special and differential treatment was made integral to WTO Agreements¹⁸ and reflected across the entire Doha Round

15. JOB/SERV/18: Preferential Treatment to Services and Services Suppliers of Least-Developed Countries (proposed draft waiver decision submitted by the delegation of Zambia) (on file with author).

16. World Trade Organization, Ministerial Declaration of 14 November 2001, para. 13, WT/MIN(01)/DEC/1; 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

17. *Id.* para. 16.

18. *Id.* para. 44 ("We reaffirm that provisions for special and differential treatment are an integral part of WTO Agreements. . . . We therefore agree that all special and differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, we endorse the work programme on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.").

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negotiations and Doha Work Programme.¹⁹ In the ongoing modalities draft texts for agriculture and NAMA, there are extensive provisions for special and differential treatment.

The current trade policy of special and differential treatment still approximates Hudec's description of these provisions as "form without substance." Special and differential treatment provisions have not advanced beyond so called soft law, good faith, and best endeavor. It is not foreseen that a right or an international law obligation would emerge from special and differential treatment provisions, such as unreciprocated and preferential treatment.

The more recent mutations of the strain of the special and differential treatment approach show critical differences from its more orthodox 1960s strain. In its present form, there is no longer either refusal of or ambivalence toward the core rules and disciplines of the system by developing countries, although there are qualifiers for policy and rule flexibility. The institutional setting of the rules-based Multilateral Trading System and the core rules are accepted. Developing countries accept to be bound by the rules and invoke the Dispute Settlement Understanding (DSU)²⁰ to enforce their rights in the balance of rights and obligations. Furthermore, a critical difference to the 1960s is that developing countries are convinced and committed to domestic reforms and trade liberalizing behavior. Systemic trade rules are used to lock in these reforms and to justify trade-opening behavior. The current approach to special and differential treatment has an underlay of pragmatism and realism which acknowledges the foundation of non-discrimination, and that special and differential treatment will not be upgraded to the status of a right or obligation in international law. Systemic trade rules are used to argue and justify domestic reforms and liberalizing trade policy behavior as necessary means for developing

19. *Id.* para. 50 ("The negotiations and the other aspects of the Work Programme shall take fully into account the principle of special and differential treatment for developing and least-developed countries embodied in: Part IV of the GATT 1994; the Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries; the Uruguay Round Decision on Measures in Favour of Least-Developed Countries; and all other relevant WTO provisions.").

20. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

countries to achieve growth, poverty reduction, development, and multilateral objectives such as the Millennium Development Goals (MDGs). In the post-World War II period, however, developing countries caused self-harm because domestic reform was low on their agenda, domestic industries were largely shielded from foreign competition, and trade policies were protectionist.

A frequent question, now more of historical than contemporary value, is how did the orientation to the 1960s strain of exemption orientation and special and differential treatment emerge? From the establishment of the GATT in October 1947 (as a Protocol of Provisional Application), both developed and developing countries had sought degrees of freedom from the disciplines that the GATT sought to impose. For instance, the Europeans were sympathetic to the infantry industry and reconstruction arguments for protection because of their post-World War II needs for reconstruction and development. The United States had its own exception positions to the disciplines, such as quantitative restrictions on agricultural imports and anti-dumping provisions.²¹ Between developed and developing countries, non-reciprocity flourished primarily because it was an easy route: developing countries could maintain the posture of vigorous representation with their home governments; and, it was the easy way out for developed country governments. For the latter, it was a cost-free answer—a concession that developed countries could make, without having to go through the unpleasant business of asking legislatures for real trade liberalization or real resources.²²

Although the core non-discrimination principle remains the foundation of the rules-based Multilateral Trading System, the rules and core values have been in dynamic adjustment in relation to the 1940s baseline. The baseline legal framework of the GATT was not to discriminate and to engage in reciprocal reduction of tariffs. The code of behavior rested on three central principles: i) MFN—non-discrimination and the commitment to treat the trade of all GATT Members equally; ii) tariff protection and the elimination of non-tariff barriers; and iii) periodic negotiations for the gradual reduction of existing tariff levels.

21. HUDEC, *supra* note 2 at 31–32.

22. *Id.* at 190–91.

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While non-discrimination has remained an infrangible principle and has been strengthened through WTO Article XII accession negotiations, there has been an evolution in the substance and application of the rules over time. This evolution has been development-mediated with adjustments for notions of fairness. Currently, the core values and principles of the trading system revolve around:

- non-discrimination (provided for in MFN and national treatment);
- progressive trade liberalization through successive rounds of trade negotiations;
- predictability of the rules through binding of commitments and transparency of measures;
- fair competition and undistorted trade and the prevention of cheating, through the rules against the use of trade distorting subsidies, dumping, and safeguards;
- development and incentives for promoting domestic economic reform through calibrating the balance between rules and flexibility, targeted technical assistance and capacity building, and Aid for Trade; and
- the DSU that ensures that the rules provided in covered WTO Agreements are enforceable if the benefits of a Member are nullified or impaired through measures or policies by any Member that are inconsistent with the rules.

In contrast to the 1960s, developing countries reaffirm commitment to and invoke the rules and the WTO DSU to seek enforcement of their rights, pursuant to the rules. They are also demonstrating reformist and trade-liberalizing policy behavior. Simultaneously, however, there is strong advocacy for development-friendly trade rules that institutionally differentiates developed from developing countries, with intra-group differentiation of developing countries, in the Multilateral Trading System. This differentiation is proposed in two ways: first, for account to be taken of the different development, financial, and trade needs in the developing countries' group; and, second, for systemic trade rules to provide scope for policy flexibility, such as through waivers, longer transition periods for adjustments, and exemption for LDCs prior to graduation from LDC status. The complexity of the issues involved has been compounded by a moment in

history when emerging economies from the developing country category are growing faster than the traditional trading Members and have become the locomotives for growth and recovery from crisis in the global economy. The issues associated with differentiated treatment of developing countries and the form and substance of the development dimension of trade rules, are under discussion amid intensive negotiations in the Doha Round. The position of the developed WTO Members, such as the United States, is that the proposition that the world's most powerful trading nations could play by a set of rules that gave them "unfettered access to global markets" without appropriate reciprocity lacked realism.²³ Such a system was neither a basis for a sustainable trading system, nor for an outcome in the Doha Round.

C. DEVELOPING COUNTRIES: CHANGING COMPOSITION AND VARIED INTERESTS

The composition and role of developing countries in the Multilateral Trading System is complex and evolving. The group is heterogeneous. It is neither a monolith nor is it unitary. Its interests are mixed, uncertain, and in some cases, divergent. The diverse and variable composition of the developing country group in the trading system explains, in part, why the trade policy behavior of the group as a whole has also been complex and difficult to fully or accurately describe. There were twenty-three Governments at the signing of the GATT Final Act on October 30, 1947. Twelve were developing countries.²⁴ Currently, at the WTO there are 153 Members, of which approximately 120 are developing countries.²⁵ This significantly increased number of developing countries from 1947 is diversely composed. In the developing country category, there are the LDCs, which refer to fifty countries legally defined by the United Nations as LDCs, of which thirty-two are

23. Michael Punke, Deputy United States Trade Representative and Ambassador to the WTO, Statement at the Informal Meeting of the Trade Negotiations Committee Heads of Delegation (Nov. 30, 2010) (transcript available at <http://www.ustr.gov/about-us/press-office/press-releases/statement-ambassador-michael-punke-trade-negotiations-committee>).

24. Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Southern Rhodesia, Syria and South Africa were among the founding members. See Press Brief, WTO, Fiftieth Anniversary of the Multilateral Trading System (Jan. 1, 1998), http://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

25. See *supra* note 1.

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WTO Members and twelve are in the process of WTO accession. The rest fall into the broader category of “developing countries.” As earlier noted, the question of who is a developing country has always been at issue.²⁶

In the Doha Round, various developing country negotiating coalitions have emerged that provide snapshots of the diversity of the trade and economic interests of developing countries in the Doha Round. For instance, in the agriculture negotiations, several groups are operative. These include the Commodities Group; the Cotton-4; the G20 of Members committed to ambitious liberalization in agriculture; the G3-33 with defensive orientations in agriculture; the G-90; the LDCs; the RAMs; small and vulnerable economies (SVEs-Agriculture); and the Tropical and Alternative Products Group. Although the Cairns Group of agricultural exporters includes developed Members such as Australia, Canada, and New Zealand, its other Members are developing countries. For instance, Mauritius, a Member of the African Group is designated a developing country, but participates in the Doha Round Agriculture negotiations with developed Members in the G-10, with high levels of domestic support and low ambition levels in the agriculture negotiations. This is in contrast to South Africa, another developing country member of the African Group, participating with other developing countries in the G-20 group, with low levels of domestic support and high levels of ambition in the agriculture negotiations.

In the Negotiating Group on NAMA, the industrial products group, there is a range of comparable developing country groups. These include the African Caribbean and Pacific (ACP) countries, African Group, Mercosur (Common Market of the Southern Cone), G-90, LDCs, SVEs-NAMA, RAMs, Low-income economies in transition, NAMA-11,²⁷ and “Paragraph 6” countries.²⁸

26. HUDEC, *supra* note 2 at 160.

27. NAMA-11 is a group of developing countries seeking flexibilities to limit market opening in industrial goods trade. *See, e.g.*, Statement, NAMA-11, NAMA-11 Trade Union Statement on the Non-Agricultural Market Access (NAMA) negotiations at the WTO (June 26, 2006), http://www.ituc-csi.org/IMG/pdf/NAMA_tU_statement.pdf.

28. The “Paragraph 6” countries area group of developing countries with less than 35% of non-agricultural products covered by legally bound tariff ceilings. These countries have agreed to substantially increase their binding coverage. However, they want to exempt some products. The reference applies to paragraph 6 of the first version of the NAMA Draft Modalities Text, later paragraph 8. WTO Negotiating Group on Market Access, *Fourth Revision of*

Developing Countries: Trade Performance

Strains of special and differential treatment persist. However, the relationship of developing countries to GATT rules from the mid-1980s is evolving. This changing relationship, manifested in reformist and trade-liberalizing policy behavior and stronger commitment to the rules-based trading system, has been reflected in stronger trade growth and performance trends. With the exception of those developing countries that have been tentative on reform or adversely affected by domestic turmoil, the trend of strong trade growth performance from the mid-1980s has been sustained to the present, taking account of periods of global financial and economic crisis.

In the data reviewed, using 1987 as the base year,²⁹ Figure I and Figure II show the trend of trade growth of developing countries, developed countries, and the world. Figure I shows that, from 1948 to 1987, the trend of trade growth of developing countries was in line with that of developed countries for most of the period. In the early 1980s, there was a jump for developing countries (in 1980 at 32%), although this was not sustained. However, as indicated in Figure II, developing countries started to outperform developed countries from the early nineties (1993). This trend was temporarily arrested during the Asian financial crisis in the late nineties (1999). Developing countries trade declined in 1998 (-8%) and 1999 (-5%), while the developed countries still maintained modest growth (2% in 1998 and 8% in 1999).³⁰ From 2002, however, the trade growth of developing countries continuously outpaced the trade growth of developed countries. Global trade was adversely affected by the 2008–09 global economic and financial crisis. The decline of trade of developing countries was a bit smaller (-22%) than that of developed countries (-24%).

Draft Modalities for Non-Agricultural Market Access, TN/MA/W/103/Rev.3 (Dec. 6, 2008).

29. See *infra* Annex 1 for trade value and growth rate.

30. Year-on-year percentage change.

TRADE PERFORMANCE OF DEVELOPING COUNTRIES

Figure I: Growth of merchandise trade: 1948-1986
(Index, 1987=100)

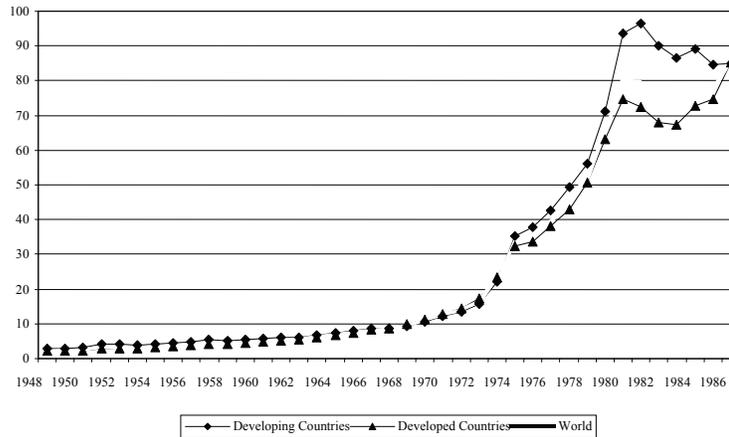
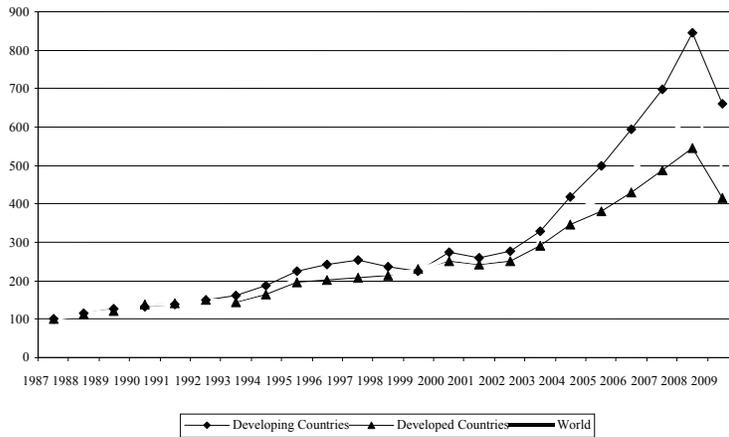


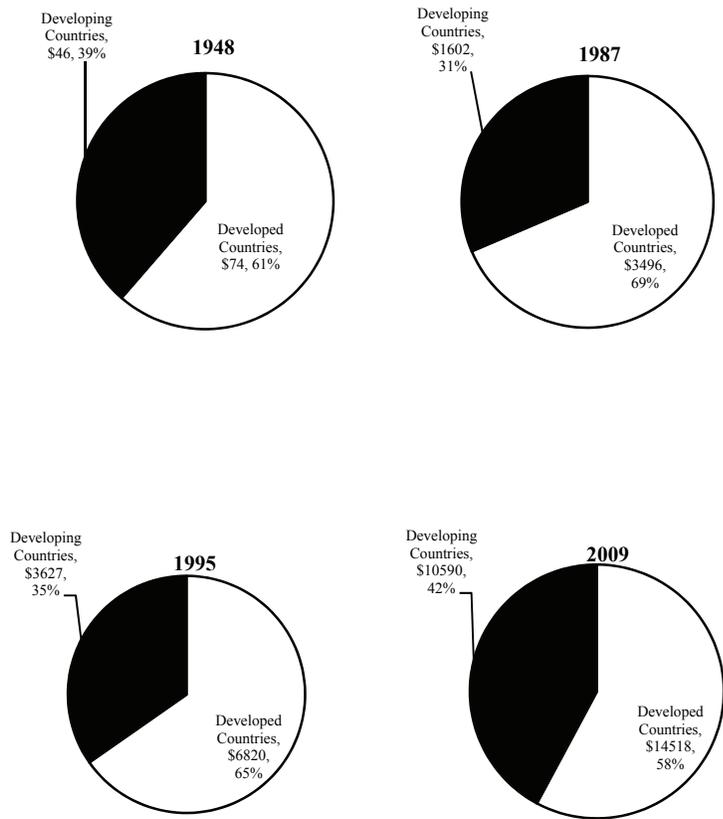
Figure II: Growth of merchandise trade: 1987-2009
(Index, 1987=100)



Charts in Figure III show the growth in merchandise trade share of developing countries from the baseline of 1948. In 1948, developing country merchandise trade share was 39% compared to 61% for developed countries. Developing country merchandise trade share declined to 31% by 1987 compared to the continued increase to 69% in developed country merchandise trade. This period from 1948 to 1987 was the

period of restrictive trade and protectionist policies pursued by developing countries. The mid-1980s marked the period when developing countries embarked on serious and sustained domestic reforms, trade-liberalizing policy behavior, and the Uruguay Round of Multilateral Trade Negotiation that was launched in 1986. In 1995 (the coming into force of the WTO), developing country share of merchandise trade had reversed a negative trend to register at 35% and this further increased to 42% in 2009, compared to developed countries share of merchandise trade at 65% in 1995 and 58% in 2009.

Figure III: Share of merchandise trade; 1949, 1987, 1995 and 2009 (Billion dollars and percentage)



Recent analysis indicates the positive performance of developing countries is set to continue. In the second quarter of 2010, China passed Japan to become the second largest economy in the world after the United States. Current analysis indicates that developing countries' improved growth performance is not simply a reflection of strong performance by China and India.³¹

II. DOMESTIC REFORM PRESSURES

In the 1960s and 1970s, protectionist policies held sway in most developing countries. Trade protection reflected prevailing trade policy for "industrialization" through import substitution and selection of national champions. Trade protection for infantry industry was championed as a viable policy path to industrialization.

In the 1980s, developing countries embarked on massive economic and policy reforms, including of their trade regimes.³² This was the era of the "new liberalizations."³³ The reforms were imperative. They were responses to the crises in the decade of the 1980s.³⁴ Several severe economic shocks played a role in generating these reforms. From 1979 to 1981, the global economy had been subjected to the second oil shock.³⁵ The inability of Mexico to service its debt, signaled the debt shock.³⁶ The United States increased interest rates, as part of monetary policy designed to reduce double-digit inflation.³⁷ This was followed by the global recession, marked by negative growth, high unemployment rates and low consumer confidence. The shocks delivered to the global economy in this period generated

31. Otaviano Canuto, *Recoupling or Switchover? Developing Countries in the Global Economy*, in *THE DAY AFTER TOMORROW: A HANDBOOK ON THE FUTURE OF ECONOMIC POLICY IN THE DEVELOPING WORLD* 33 (Otaviano Canuto & Marcelo Guigale eds., The World Bank 2010).

32. I.M.D. LITTLE ET AL., *BOOM, CRISIS, AND ADJUSTMENT: THE MACROECONOMIC EXPERIENCE OF DEVELOPING COUNTRIES* 271–72 (1993).

33. *Id.*

34. Although most of the 1980s reform had been initiated as a response to the pressures of crises in the period, Colombia was the exception, where reforms were implemented without the pressures of crises. Sarath Rajapatirana et al., *Political Economy of Trade Reforms, 1965–1994: Latin American Style* 20 *WORLD ECON.* 307, 330 (1997).

35. SARATH RAJAPATIRANA, *THE TRADE POLICY OF DEVELOPING COUNTRIES: RECENT REFORMS AND NEW CHALLENGES* 5–6 (2000).

36. *Id.*

37. *Id.*

crises in many developing countries, with the exception of oil exporters.³⁸ These crises, as with several others, combined with and played on domestic weaknesses and vulnerabilities. To counteract the crises arising from these shocks, developing countries in the decade of the 1980s, embarked on economic, including trade policy, reforms and liberalization.³⁹ Surveys and analysis have suggested links between crises and reform.⁴⁰ It has been argued, based on the evidence, that many of the countries that opened up in the 1980s, did so as a reaction to and in the wake of macroeconomic crises.⁴¹ The 1980s crises had been preceded by the consumption splurge and the investment booms of the late 1970s. In combination, the severe economic shocks of the period, the recession and domestic vulnerabilities, generated pressures for reform and re-balancing. The objectives were to improve developing countries' trade and economic performance, increase their access to developed country markets, and restore growth. The reforms that followed were sustained through the 1990s and have continued to the present, with newer versions of reform to respond to current economic challenges.

Several factors were at play in initiating and sustaining the 1980s reforms. Research and analysis laid the foundation and played a central role. There was the initial research preceding these reforms.⁴² Empirical based studies built on this initial research.⁴³ These provided further impetus establishing the necessity for sustaining these reforms and trade

38. *Id.*

39. *Id.* at 5–6, 13.

40. See generally Mariano Tommasi & Andrés Velasco, *Where Are We in the Political Economy of Reform?* 13–18 (Dep't of Econ. Univ. of Cal., L.A., Working Paper No. 733, 1999) (discussing some of the analysis as to whether or not crises actually cause reform).

41. MICHAEL BRUNO, *DEEP CRISES AND REFORM: WHAT HAVE WE LEARNED?* 8 (1996).

42. See, e.g., JAGDISH BHAGWATI, *ANATOMY AND CONSEQUENCES OF EXCHANGE CONTROL REGIMES* (1978); Anne O. KRUEGER, *LIBERALIZATION ATTEMPTS AND CONSEQUENCES* (1978) (discussing economic liberalization policy).

43. See, e.g., JEFFREY D. SACHS & ANDREW WARNER, *ECONOMIC REFORM AND THE PROCESS OF GLOBAL INTEGRATION* (1995); David Dollar, *Outward-oriented Developing Economies Really Do Grow More Rapidly: Evidence from 95 LDCs, 1975–1985*, 40 *ECON. DEV. AND CULTURAL CHANGE* 523 (1992); Sebastian Edwards, *Trade Liberalization Reforms and the World Bank*, 87 *AM. ECON. REV.* 43 (1997).

liberalization. Broadly, the starting point of the research results and conclusions was that domestic policy reform and trade liberalization were necessary for growth. The neutral incentives, arising from the macroeconomic fundamentals of fiscal stability, low inflation and competitive, market-oriented exchange rates were necessary, as a basis for managing meaningful trade policy and promoting growth.

Other factors were of equal significance particularly the directions of law and regulation for education, human capital development and infrastructure development.⁴⁴ In the ensuing period, further contributions were made by leading academics and researchers. They emphasized the greater relative importance of selective intervention (and not so much neutral incentives), technology and solid institutional frameworks for the conduct of industrial policy in accounting for growth. Academics in this strain argued that economic growth was not so much attributable to neutral incentives, as to targeted public investments and selective promotion of and intervention in specific sectors.⁴⁵ There were much more than neutral incentives and fundamentals at work.

Although academics accorded varying weights to different factors, more important, in this debate, was the convergence on the necessity for domestic policy reforms, trade policy reforms, and openness. There is a good discussion in the literature of the so called revisionist argument rejecting and/or modifying the theoretical position that trade liberalization, conditioned on neutral incentives fully explain rapid trade (export) growth and high GDP growth rates (such as was the case in East Asia).⁴⁶ What was not questioned, however, was the necessity for domestic and trade policy reforms on the part of developing countries. What remains at issue and with continuing echoes in

44. See, e.g., Chiedu Osakwe, 10th Joseph Mubiru Memorial Lecture, Poverty Reduction and Development: The Contribution of Trade, Macroeconomic and Regulatory Policies (Dec. 14, 2001) (discussing some of these issues in relation to Uganda and concluding that a range of factors are essential to achieve trade growth and development).

45. See, e.g., ALICE H. AMSDEN, *SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989); Dani Rodrik, *The Limits of Trade Policy Reform in Developing Countries*, 6 J. ECON. PERSP. 87 (1992) (discussing some of the limits of trade liberalization policy); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990).

46. See, e.g., Rajapatirana, *supra* note 35, at 6–11.

the WTO today is the correct balance between domestic and trade policy reforms, on the one hand, and sectors for selective intervention and protection. Discussions are on-going regarding the degree of accommodation and balance between trade opening, on the one hand, and domestic regulations, safeguards and protection, on the other.

The momentum for trade liberalization was sustained by the shift to flexible exchange rates in 1984, and its wide acceptance and use by developing countries in the 1990s. Trade liberalization has been associated with the shift from fixed to flexible exchange rates. There was a greater recognition by developing countries that the content of domestic policies created the underlying conditions for economic and financial stability. Domestic policies had a strong relationship and were reflected in exchange rate policies. The recognition and acceptance of the relationship between domestic policies and exchange rate policies allowed developing countries to become more competitive internationally. In this period also, the International Monetary Fund (IMF) and the World Bank enhanced policy support and technical assistance for trade liberalization in developing countries. For instance, trade policy conditions were elements in IMF standby programs.⁴⁷ Although in contrast World Bank support declined, in the 1990s, because of the decline in lending for structural adjustment.

From the late 1990s onward, there was an inchoate and strong dynamic at play, for poverty reduction and development, as an objective of domestic reforms and trade opening in developing countries. The origins of this dynamic were both domestic and externally influenced. From the late 1990s, low-income developing countries were engaged in the process of the Poverty Reduction Strategy Papers (PRSPs), emerging from the World Bank's Comprehensive Development Framework.⁴⁸ This locked low-income countries into an intensive process of domestic coordination to design strategies to reduce poverty and achieve their cardinal development priorities. The first

47. See generally ROBERT SHARER ET AL., TRADE LIBERALIZATION IN IMF-SUPPORTED PROGRAMS (INTERNATIONAL MONETARY FUND, 1998).

48. The Poverty Reduction Strategy Papers describe the macroeconomic, structural, and social policies and programs that a country will pursue over the following years to promote growth and reduce poverty. Int'l Monetary Fund, *Factsheet: Poverty Reduction Strategy Papers*, 1 (Sept. 2010), <http://www.imf.org/external/np/exr/facts/pdf/prsp.pdf>.

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generation of PRSPs encompassed measures and strategies for implementing reforms in the areas of investments, private sector development, agriculture, health, and education. In the subsequent generation of these PRSPs, from 2000 onwards, trade priority areas of action were mainstreamed into several of these PRSPs (or national development plans), using the vehicle of the Integrated Framework (IF) for trade-related technical assistance to LDCs.⁴⁹ The IF process, although external to these low income economies, combined with and strengthened the domestic reform efforts in this developing country group for closer institutional association with the rules-based Multilateral Trading System, and more closely secure them to the ideas of trade liberalization for addressing their development priorities. The IF and its later metamorphosis into the Enhanced Integrated Framework (EIF) provided significant benefits that reinforced the notion of the gains from trade, the benefits of trade openness and the value of trade liberalization. A specific point that was highlighted in the trade mainstreaming exercise was that trade policy was not stand-alone. It requires complementary domestic policies that deliver effective results. These necessary companion policies include infrastructure, education, competition and investment, information technology, intellectual property rights protection, governance and the rule of law, and effective leadership.

In 2000, world leaders agreed to eight MDGs to be achieved by 2015. One of the MDGs is the reduction of poverty by half by 2015.⁵⁰ It is acknowledged that achieving this goal will depend, in part, on the contributions from trade opening and the elimination of trade distortions both in developed country markets, particularly in agriculture, elimination of

49. The IF (now referred to as the Enhanced Integrated Framework) is an inter-agency framework to assist trade development for LDCs, by six agencies namely, the International Trade Centre, UNCTAD, UNDP, World Bank, IMF, and the WTO, with representatives of developed and LDCs. (The author chaired the Inter-Agency Working Group, IAWG, that was formerly used to manage the Integrated Framework from 1999 to 2002). *See generally* Sub-Committee on Least-Developed Countries, *Report on the Seminar by the Integrated Framework Core Agencies*, WT/LDC/SWG/IF/15/Rev.1 (Apr. 17 2001) (detailing the 2001 IF seminar).

50. United Nations Millennium Resolution, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) (describing other goals as well, such as achieving universal primary education and promoting gender equality).

distortions in developing country markets, and improvements in South-South trade.

Academic research reinforced the drive for trade reform and the development dynamic in trade liberalization. This research also exercised a strong influence that systemic trading rules, particularly for the new Doha Round should be fair and that development should be at the core of the Doha Round. The case was made before the launch of the Doha Round that fairness and comprehensiveness should be two governing principles. More specifically, the areas identified for liberalization focus, with potential benefits for developing countries, were agriculture, manufactures, and services (with appropriate regulatory frameworks and funding for small and medium enterprises and under-served groups). Research also focused on trade and liberalization in factors of production (services areas, like labor mobility), non-tariff barriers (anti-dumping and countervailing duties), and promoting effective competition policy and trade facilitation. This research also underlined the necessity for domestic-level policies to accompany trade liberalization at the multilateral level in trade rounds. In summary, research as presented, demonstrated that in rounds of trade liberalization, “[m]ore is at stake than simply the exploitation of the gains from comparative advantages. Trade is vital to the dynamics of successful development.”⁵¹

III. EXTERNAL REFORM PRESSURES—THE CHALLENGE OF EVENTS

Trade policy formulation and behavior have always been subject to the effects of both municipal and external political developments. The 1980s–90s was a period of revolutionary change in the international political economy. Latin America returned to democracy. New leaders emerged, such as President Gaviria in Colombia. The political and economic environment shifted in Brazil, Argentina and Peru. On December 31, 1991, the Soviet Union collapsed; the culmination of a dramatic process that effectively began on January 19, 1990. Market economics took greater hold with the dramatic collapse of the Soviet Socialist experiment with command

51. Joseph Stiglitz, *Two Principles for the Next Round or, How to Bring Developing Countries in from the Cold*, 23 *WORLD ECON.* 437, 452 (2000).

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economies. Lessons were drawn from the collapse of command economies, central of which was that this model of economic governance was unworkable. The inefficiency and failure of state planning were laid bare. There were wholesale conversions to the market economy. The transition from socialism to capitalism at the end of the twentieth century is one of the most significant events in the world economy since industrialization. These changes affected about twenty-five percent of the global population.

The economics of transition from centrally planned economies to the market economy was closely examined because, amongst other reasons, the process was unique. There were a range of important studies on the variability of the individual transition economies and the lessons drawn in the period roughly ranging from 1991 to 2000.⁵² Transition economics emerged as a branch of economics. Important lessons were drawn that related, inter alia, to issues of creating and strengthening institutions, public and private ownership, intellectual property rights, market institutions and the price mechanism, financial reform and capital movements, public finance, competition policy, trade, growth and development, the role of government, and the rule of law and governance. Transition indicators were suggested. Central to these were liberalization (reduction of trade barriers, prices), macroeconomic stabilization (inflation control, fiscal discipline and sustainable balance of payments), institutional reforms, and legal and policy reforms (to secure property rights, privatization, promote competition, the rule of law and transparency in government).

There was appreciation of the enormous difficulties in implementing the transition to the market economy. There were scholarly disagreements over issues of speed and pace with regard to liberalization and macroeconomic stabilization. For instance, there were disagreements on the speed of transfer of assets from the state to the private sector. However, there were self-evident conclusions. The transition from the inefficiencies and gross failures of communism and centrally

52. See, e.g., THE WORLD BANK, *TRANSITION, THE FIRST TEN YEARS: ANALYSIS AND LESSONS FOR EASTERN EUROPE AND THE FORMER SOVIET UNION* (2002); Int'l Monetary Fund, *Transition Economies: An IMF Perspective on Progress and Prospects* (Nov. 3, 2000), <http://www.imf.org/external/np/exr/ib/2000/110300.htm>.

planned economies had achieved notable successes and yielded important lessons for domestic reforms and significant benefits for welfare, growth, and political freedoms. Central planning had failed and the market economy had prevailed. These fundamental lessons exercised decisive effects on the balance of debates in the global political economy. In particular, the lessons from the failure of communism and central planning were particularly salutary on developing countries. The lessons drawn convinced those countries still in doubt about the correctness and the power of the market economy over central planning and protection. The jury had returned a clear verdict. These lessons reinforced the commitment and drive of developing countries to domestic reforms and trade liberalization.

Is the transition complete? Are there lessons still being drawn? At various times, a group of about thirty-four countries have been identified as transition economies.⁵³ Of these, twenty-six embarked on rigorous rules-based market-oriented WTO accession negotiations: sixteen successfully concluded WTO membership negotiations⁵⁴ and ten are still negotiating membership.⁵⁵ Transition economics remain of active interest, and the transition to the market economy for the countries involved is a work in progress. The terms of WTO accession for these countries and the lessons from WTO Article XII negotiations are a key factor driving the liberalization momentum in developing countries.

There has been a succession of financial and economic crisis since the 1930s depression. However, the 2008–09 global financial and economic crisis has been the most severe since the 1930s. This was an event that raised doubts, in some quarters, about market economics and certainly made evident

53. Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Czech Republic, Estonia, Georgia, Hungary, Laos, Latvia, Lithuania, Republic of Kosovo, Kazakhstan, Kyrgyz Republic, Republic of Macedonia, Moldova, Mongolia, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Viet Nam.

54. Albania, Armenia, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Latvia, Lithuania, Kyrgyzstan Republic, Former Yugoslav Republic of Macedonia, Moldova, Mongolia, Ukraine, and Viet Nam.

55. Azerbaijan, Belarus, Bosnia and Herzegovina, Laos Peoples Democratic Republic, Montenegro, Serbia, Kazakhstan, Russian Federation, Tajikistan, and Uzbekistan.

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weaknesses of the market economy, particularly in relation to financial reforms and regulatory issues. For the purpose of this study the key question is, how did the 2008–09 crisis affect the orientation of developing countries to trade liberalization and associated issues in domestic reform? The answers to this question have revolved around which countries that coped better with the crisis, the WTO-consistency of measures taken by individual Members to contain and mitigate the effects of the crisis, and the common position by Members of the value of the WTO, as a multilateral institution, in the midst of the global economic crisis.

The economic performance of developing countries, their reaction, and their role in the aftermath of the 2008 and 2009 global financial and economic crisis is the subject of continuing analysis. The results of analysis, thus far, indicate that developed countries were severely affected by the financial crisis, while developing countries coped better, and are most likely to become the “pulling force” and the “new engine for global growth” with scope to “partially rescue advanced economies.”⁵⁶ It is forecast that the superior performance of developing countries will be sustained, with the projection that, collectively the size of developing countries GDP’s will exceed that of developed countries by 2015.⁵⁷ Some of the factors to which this forecast for enhanced and superior economic performance are attributed include technological convergence, better policies, higher commodity prices, and trade integration.⁵⁸ Details of the analysis indicate that developing countries’ improved growth performance is not simply a bias, reflecting robust performance by China and India. In fact, median growth was substantially higher in developing countries (2.13%) than in advanced economies (-3.72%) in 2009.⁵⁹ Policies in favor of reform and trade liberalization have paid off.

56. Otaviano Canuto, *Toward a Switchover of Locomotives in the Global Economy*, 33 *ECON. PREMISE* 1, 4 (2010), <http://siteresources.worldbank.org/INTPREMNET/Resources/EP33.pdf>.

57. *Id.*

58. See generally Otaviano Canuto & Marcelo Gigugale, *THE DAY AFTER TOMORROW: A HANDBOOK ON THE FUTURE OF ECONOMIC POLICY IN THE DEVELOPING WORLD* 1, 1–27 (Otaviano Canuto & Marcelo Gigugale eds., 2010).

59. Otaviano Canuto, *Recoupling or Switchover? Developing Countries in the Global Economy*, in Canuto & Gigugale, *supra* note 58, at 31, 33–34.

The WTO has not ruled or taken a position on the question of the consistency of trade-related measures by its Members associated with the global economic and financial crisis. And it will not do so because questions about the WTO-consistency or inconsistency of trade measures by its Members are potentially sub judice in an institution with enforceable rules, pursuant to the DSU. However, within the framework of the Trade Policy Review Mechanism (TPRM), in October 2008, WTO Director-General Pascal Lamy initiated Monitoring Reports for WTO Members on the global financial and economic crisis. These reports have focused on trade and trade-related developments associated with the financial and economic crisis.⁶⁰ At the April 2, 2009 Summit in London, G20 leaders requested "Reports on G20 Trade and Investment Measures." Three such reports have been submitted so far to the G20.⁶¹ These reports to the G20 have been jointly prepared by the WTO Director-General, OECD Secretary-General and Secretary-General of UNCTAD. These reports monitor and publicly report on G20 adherence to their undertakings to resist protectionism and promote global trade and investment. The overall purpose of these two classes of reports was to ensure that markets remained open for global recovery. Their central lessons were uniform, of which the fundamental lesson, *inter alia*,⁶² was that, the Multilateral

60. Trade Policy Review Body, *Annual Report by the Director General: Overview of Developments in the International Trading Environment*, WT/TPR/OV/13 (Nov. 24, 2010); Trade Policy Review Body, *Report to the TPRB from the Director-General on Trade-Related Developments*, WT/TPR/OV/W/3 (June 14, 2010); Trade Policy Review Body, *Annual Report by the Director General: Overview of Developments in the International Trading Environment*, WT/TPR/OV/12 (Nov. 18, 2009). Note: The background to these monitoring reports was the work of the internal Secretariat Task Force established by the Director-General in October 2008, to advise him on the trade implications of the financial crisis. Several Members, thereafter, requested that the results of the work of the task force be shared with all Members and that there should be a discussion among Members on the trade impact of the global financial crisis. These reports have since been sustained.

61. Org. for Econ. Cooperation and Dev. [OECD], United Nations Conf. on Trade and Dev. [UNCTAD] & World Trade Org. [WTO], REPORT ON G20 TRADE AND INVESTMENT MEASURES: SEPTEMBER 2009 TO FEBRUARY 2010 (Mar. 8, 2010); OECD, UNCTAD & WTO, REPORT ON G20 TRADE AND INVESTMENT MEASURES: MID-MAY TO MID-OCTOBER 2010 (Nov. 4, 2010); OECD, UNCTAD & WTO, REPORT ON G20 TRADE AND INVESTMENT MEASURES (Sept. 14, 2009).

62. Other key lessons drawn were: i) ensuring continued access and affordability of trade finance to ensure that international trade continued to play its shock-absorbing role; and ii) knowledge of the fact that the global

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Trading System, by keeping markets open during periods of financial and economic crisis, had demonstrated that it provided crisis-affected countries with a chance to recover through trade. Trade restrictions contract the volume of trade and, by consequence, create welfare losses, decelerate growth, and generate pressures for rising unemployment. High levels of unemployment create temptations for protectionism. One of the many lessons from economic history was that protectionist measures have tended to provoke counter measures from trading partners with the risk of tit-for-tat protectionism or beggar-thy-neighbor policies. The 2008–09 crisis had induced the collapse of trade. Global trade volumes fell about 18% in the last two quarters of 2008 and early 2009. Although there was “low intensity” protection, including through measures taken to contain and mitigate the effects of the crisis, fortunately, the huge protectionist backlash that was feared did not materialize. Prevention of full-blown protectionist measures had been kept in check through the monitoring mechanism established by WTO Director-General Pascal Lamy in 2009.⁶³ The rules of the WTO had provided a buffer against protectionist backlash and contributed to recovery and growth by ensuring that markets remained open. There was a clear recognition from the global financial and economic crisis between 2008 and 2009 about the high value of the WTO as a global Public Good and the role it had played in the period of crisis and recession.

IV. MULTILATERAL RULES-BASED REFORM PRESSURES

Always at risk of either inertia, rollback, or protectionist encroachment, the Multilateral Trading System has relied on successive rounds of trade negotiations to initiate new trade liberalization, inject momentum to sustain trade liberalization, and keep protectionism at bay. In making the case for the launch of the Doha Round, the bicycle theory for sustaining trade liberalization and countering protectionism was recalled by Robert Zoellick, the United States Trade Representative:

economy cannot grow above the limits of its real production; growth based on excessive liquidity and debt would eventually create painful corrections.

63. See generally Pascal Lamy, Director-General, World Trade Org., *The Values of the Multilateral Trading System*, Address Before the Lowy Institute (discussing in part the necessity of the WTO's trade policy review mechanism in warding off protectionism).

“[a]fter all, there is a bicycle theory for trade: [i]f the trade liberalization process does not move forward, it will, like a bicycle, be pulled down by the political gravity of special interests.”⁶⁴ Successive trade rounds combined with recourse to the DSU, Trade Policy Reviews, and the regular functioning of the rules-based system, have generated constant multilateral energy for liberalization, in particular in developing countries, and for compliance with extant rules. Trade rounds have reinforced the policy-relevance and the intellectual case for trade liberalization. Developing countries in particular have been heavily influenced by systemic multilateral pressures for reform, which have combined with domestic priorities for reform.

There have been eight rounds of trade negotiations. The Doha Round in progress is the ninth round. The Uruguay Round was launched in 1986. It was an important factor in sustaining the 1980s reform agenda and sustaining the momentum for trade liberalization in the 1990s. The Uruguay Round preparatory work contributed to framing the agenda of trade opening in the 1990s. It was initiated and negotiated, in part, in response to the external shocks, crisis and recession of the 1980s.⁶⁵ The negotiating engagements in the eight-year Uruguay Round assisted developing (and other countries) to respond to the crisis environment of the decade by designing and locking-in domestic reforms, including through commitments for the reduction of barriers to trade. Several of the results of the Uruguay Round, contributed to sustaining the momentum for trade liberalization amongst WTO Members, particularly developing countries. These were:

- the agreement to establish a fair and market-oriented agricultural trading system through a reform process in agriculture, pursuant to the Agreement on

64. Robert B. Zoellick, *Five US Reasons for Liberalizing Trade*, INT'L CHAMBER OF COMMERCE (Nov. 7, 2001), <http://www.iccwbo.org/iccbiie/index.html>. One of the most eloquently argued cases to support the 2001 launch of the Doha Round was by Ambassador Robert Zoellick. Note that Fred Bergsten and Jagdish Bhagwati, two champions of free trade, have been associated with and variously advocated the so called bicycle theory of trade. Sustained liberalization is vital, otherwise the risk of reversals, rollback and protectionist recidivism are ever-present. In trade, the status quo is not a constant. It is always at risk of slippage. The status quo is not a feature of trade policy.

65. See *supra* Part II.

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Agriculture. For the first time, agriculture, a heavily distorted area of international trade, was brought within the framework and disciplines of the rules-based Multilateral Trading System;

- elimination of the Multifiber Agreement;
- the General Agreement on Trade in Services;
- establishment of the Trade Policy Review; and
- an enforceable set of rules in accordance with the DSU.⁶⁶

Empirical data and economic theory show the definite association between freer trade and economic growth. This, however, does not imply causal linkages. There are gains from trade. Countries benefit when they trade in goods and services, produced from their human, industrial, natural, and financial assets, on the basis of their comparative advantage. The free flow of goods and services enhance competition, provide for innovation and open up the inflow of capital, technology and ideas. In static approaches, the effect of trade opening is the increase in real GDP at world prices, through efficiency in resource allocation, specialization, based on comparative advantage, market-based exit and entry of firms and enjoyment of scale economies. There are also dynamic gains.⁶⁷ The evidence indicates that in the first twenty-five years after World War II, world trade grew at an average of 8% faster than world economic growth, averaging about 5%.⁶⁸ The successive cycles of trade negotiations have contributed significantly to global welfare since 1947.

The Doha Round is the ninth round of trade negotiations within the rules-based Multilateral Trading System. It was launched in Qatar in 2001. December 2010 marks the tenth year at which negotiators have been engaged to seek the conclusion of the Doha Round.

66. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

67. WORLD TRADE ORG., *WORLD TRADE REPORT 2008: TRADE IN A GLOBALIZING WORLD*, 27–75 (2008), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report08_e.pdf.

68. World Trade Org., *Understanding the WTO: The Basics, The Case for Open Trade*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm. (last visited Feb. 22, 2011).

PERIOD	ROUNDS	SCOPE/MANDATE	MEMBERS
1947	Geneva	Tariffs	23
1949	Annecey	Tariffs	13
1951	Torquay	Tariffs	38
1956	Geneva	Tariffs	26
1960-1961	Geneva (Dillon Round)	Tariffs	26
1964-1967	Geneva (Kennedy Round)	Tariffs and Anti-Dumping	
1973-1979	Geneva (Tokyo Round)	Tariffs, NTMs, Rules, Services, Intellectual Property	102
1986-1994	Uruguay Round	Tariffs, NTMs, Rules, Services, Intellectual Property, Dispute Settlement, Textiles, Agriculture, WTO establishment	123
2001	Doha Development Agenda	Agriculture, Non-Agricultural Market Access, Services, Trade Facilitation, Trade and Environment, TRIPs, Development, Dispute Settlement	153

There are specific objectives agreed by Members for individual trade rounds. Regardless of the specificity of individual trade rounds, there is a common purpose. The overriding strategic rationale of trade rounds is to provide positive momentum for trade reform and liberalization, contain protectionism and prevent rollback and, at crisis moments, contribute to recovery, with a steady propulsion toward global economic growth. Successive trade rounds have contributed to sustaining the momentum for trade reform amongst WTO Members, including developing country Members. Contracting parties, under the GATT, and Members, under the WTO, have tailored specific arguments to their domestic constituencies prior to the launch and conclusion of trade rounds.

Policy-relevant lessons have been drawn from successive trade rounds for trade liberalization, including from the current

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Doha Round.⁶⁹ Three are relevant for initiating and sustaining the momentum for trade liberalization: establishing an intellectual foundation for reform, demonstrating trade and development linkages, and understanding the lock-step relationship between the pace of domestic reform priorities and multilateral trade opening.⁷⁰

First, there is greater sensitivity to perceived “gains” and “losses.” Trade policy issues integral to trade negotiations are at the center of national policy debates that revolve around globalization and its governance, the benefits of global integration, domestic issues of unemployment, poverty reduction, etc. The intellectual case that was made in the 1980s was key in generating the momentum for trade liberalization in developing countries. Prior to this, the policy option of trade liberalization had been considered overly prescriptive, originating from multilateral institutions advocating the Washington Consensus. The intellectual case that was made contributed to the construction of domestic coalitions for initiating trade and wider domestic reforms.

Second, the first Geneva Trade Round in 1947 focused exclusively on tariffs. Twenty-three countries participated, of which eleven were developing countries. One hundred and twenty-three countries participated in the Uruguay Round (1986–1994). Currently, there are 153 WTO Members, participating in the Doha Round negotiations. A feature of the increase in the membership is characterized by the fact that over one hundred were developing country Members. As a consequence, there has been an increased demand for a development dimension in the rules-based Multilateral Trading System and to more clearly establish the trade and development linkages to ensure that trade serves a development purpose. The development mandate of the WTO was set in the Doha Round; hence the Doha Development Agenda (DDA). An observation from negotiations, past and present, is that rounds tend to reflect the situation in the global economy, because the circumstance of the global economy

69. *Id.*

70. Chiedu, Osakwe, *The Future of the Doha Round after Suspension in Geneva and Deadlock in Potsdam: Is it All in Vain?*, in *AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO* 16, 36 (Harold Hohman ed., 2008).

typically frames the negotiating environment. In the context of the Doha Round negotiations, the pressures remain for the DDA negotiations to be sensitive to developments in the negotiating environment, such as hunger, linked to the 2007–08 food price crises, the poverty reduction and other goals in the MDGs, the 2008–09 global financial and economic crisis, and the constantly recurring use of export restrictions in the agricultural sector (particularly affecting cotton, grains and animal products).

Third, there is a linkage between sustained programs for domestic policy reforms, on the one hand, with multilateral negotiations for trade liberalization, on the other. Furthermore, implementation of the results of multilateral trade negotiations is linked to domestic reforms, buy-in, and ownership. In the ongoing Doha Round, there is keener understanding about the necessary linkages between domestic reform and trade rounds. There is a complex relationship between domestic policy reforms and multilateral trade negotiations (including the implementation of their results). While the pressures of trade negotiations and the consequent multilateral obligations can exercise a positive effect that provide support for countries to lock-in and sustain domestic reforms, the latter can also provide impetus for sustaining multilateral trade liberalization. (The latter applies to both developed and developing country members).⁷¹ This general proposition is as true in trade rounds as they are in accession negotiations for WTO membership.

There was a wave of developing country membership into the Multilateral Trading System, from the mid-1980s to 1995. Between 1986 (launch of the Uruguay Round) and 1995 (the establishment of the WTO), twenty-seven developing countries became Members of the rules-based system.⁷² In addition, eight more developing countries that were GATT signatories during the Uruguay Round became Members of the WTO in 1996.⁷³

71. Three examples would be the United States Trade Promotion Authority and its successive farm bills, the European Union 2009 CAP Reform, and the Sectoral Initiative on Cotton from the four African countries of Benin, Burkina Faso, Chad, and Mali.

72. Bahrain, Bolivia, Botswana, Brunei Darussalam, Costa Rica, Djibouti, Dominica, El Salvador, Guatemala, Guinea, Guinea-Bissau, Honduras, Hong Kong (China), Lesotho, Liechtenstein, Macao (China), Mali, Mexico, Morocco, Mozambique, Namibia, Paraguay, Saint Lucia, Saint Vincent and the Grenadines, Swaziland, Tunisia, and Venezuela.

73. Angola, Fiji, Grenada, Papua New Guinea, Qatar, Saint Kitts and

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The larger proportion of developing country Members gave impetus to the strong advocacy for a development dimension to the rules-based system. This advocacy of a development dimension to the trading system was combined with a new push by developing countries for the liberalization of the most heavily distorted areas of global trade, particularly agriculture. Developing countries also strongly pushed for liberalization of trade policy instruments that had been in restrictive application against their trade and exports. These were primarily tariff peaks and escalation, rules of origin and non-tariff barriers.

The changing trade policy behavior of developing countries towards liberalization was also evident in the dramatic shifts from the Second WTO Ministerial Conference in 1998 in Geneva, to the Third Ministerial Conference in Seattle in 1999, and the Fourth WTO Ministerial Conference in 2001 in Qatar. In the preparatory work and consultations leading up to the Second WTO Ministerial Conference in Geneva, the vast majority of developing countries staunchly opposed the launch of a new trade round. They pushed for the “implementation” of agreed results from the prior trade round. The result from the Geneva Ministerial was the so called “Implementation Outcome.” At the 1998 Second Ministerial Conference, Ministers decided that:

[A] process will be established under the direction of the General Council to ensure full and faithful implementation of existing agreements, and to prepare for the Third Session of the Ministerial Conference. This process shall enable the General Council to submit recommendations regarding the WTO’s work programme, including further liberalization sufficiently broad-based to respond to the range of interests and concerns of all Members, within the WTO framework, that will enable us to take decisions at the Third Session of the Ministerial Conference.⁷⁴

The push to launch a new trade round was deferred to the Third WTO Ministerial Conference, the following year in Seattle, where there was failure again to launch the next trade round, in the face of developing country (largely African) ambivalence and strong opposition. The new round was eventually launched at the Fourth WTO Ministerial Conference

Nevis, Solomon Islands, and the United Arab Emirates.

74. World Trade Organization, Ministerial Declaration of 20 May 1998, para. 9, WT/MIN(98)/DEC/1 (1998).

in 2001 in Doha, Qatar. Decision-making to launch the round had become virtually certain with WTO Members united against the tragic episode of the terror attacks of 9/11 and convinced that the launch of a new trade round would provide greater certainty in the face of global insecurity and calm markets. Therefore, from initial ambivalence and opposition in 1998 and 1999, the vast majority of developing countries reversed their opposition to further liberalization, through trade rounds, and became strong advocates for the launch of the Doha Round. Since the launch of the Doha Round, developing countries are the engines driving efforts to conclude the round. They have also emerged as strong challengers against what they consider as developed country protectionism, through the invocation of the DSU.

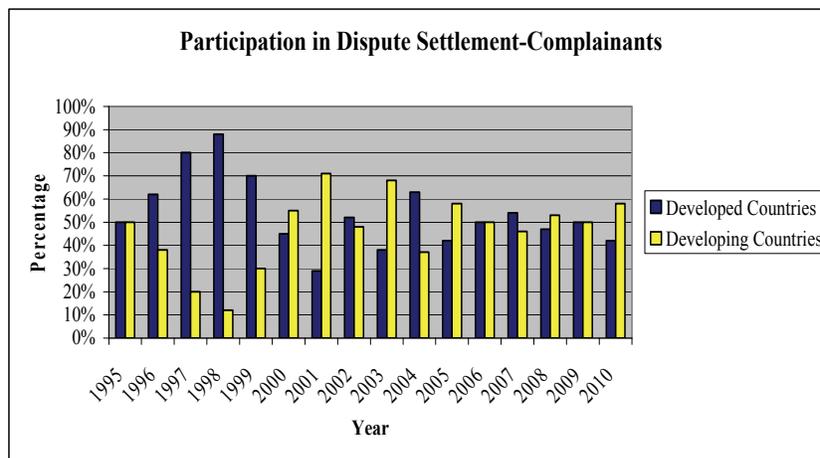
The architecture of the WTO as a multilateral institution has served to secure rule-compliant, trade reformist behavior and systemic pressure to check and counter protectionism. This architecture rests on the pillars of enforceable rules under the DSU, periodic Trade Policy Reports and monitoring reports within the framework of the TPRM, and the accumulating effects of the terms of accession of RAMs, pursuant to GATT Article XII accession negotiations. This architecture, renovated by periodic trade rounds, has acted in combination with domestic growth priorities in developing countries to generate and sustain the momentum for trade liberalization.

The DSU is the foundation of the rules-based Multilateral Trading System. It ensures that trading rules are enforced, that WTO Members operate on the basis of the rule of law and that the trading system is secure and predictable. Recourse to and frequency of invocation of the DSU suggests deeper institutional engagement in the rules-based system. Greater recourse to dispute settlement is associated with trade opening behavior and commitment to domestic reforms. The data suggests that in the fifteen-year period between 1995 and 2010, developing countries, taken together, have increased recourse to dispute settlement as “complainants.” As a group, they are now fairly active users of the system. Increased recourse to dispute settlement would suggest greater sensitivity to the content of trade measures and the effects they carry for consistency or inconsistency with the rules of the trading system.

Figure IV shows that, after 1995 (the year of WTO establishment), developed countries were more likely to invoke dispute settlement as complainants in the following four years. In more recent years, recourse to dispute settlement as complainants, has been more or less comparable between developed and developing countries.

Figure IV: Participation in Dispute Settlement⁷⁵ as Complainants

1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
50%	62%	80%	88%	70%	45%	29%	52%	38%	63%	42%	50%	54%	47%	50%	42%
50%	38%	20%	12%	30%	55%	71%	48%	68%	37%	58%	50%	46%	53%	50%	58%

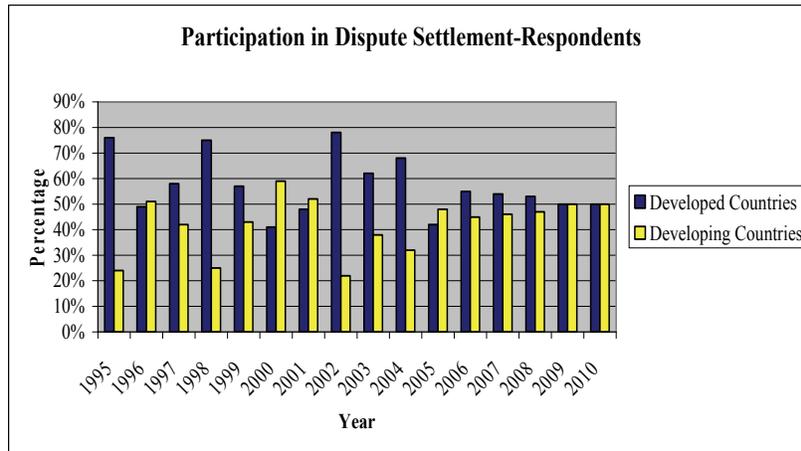


As indicated in Figure V below, as respondents, developing countries have been defendants in about fifty percent less of the cases, compared to developed countries in the fifteen-year period between 1995 and 2010. A range of plausible reasons exist to explain this pattern. Regardless, what is more important is the fact that developing countries have been respondents in cases regarding the WTO-consistency of measures taken. This increases awareness and sharpens sensitivity that trade measures that developing countries take (as with other Members) should aspire to be WTO-consistent.

75. Percentages are based on “requests for consultations.”

Figure V: Participation in Dispute Settlement⁷⁶ as Respondents

1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
76%	49%	58%	75%	57%	41%	48%	78%	62%	68%	42%	55%	54%	53%	50%	50%
24%	51%	42%	25%	43%	59%	52%	22%	38%	32%	48%	45%	46%	47%	50%	50%



The TPRM, although not designed to enforce specific obligations under the covered agreements or to be used in dispute settlement procedures, contributes to improved adherence to the rules and disciplines. The TPRM achieves this objective through greater transparency of the trade policies and practices of Members. Additionally, the TPRM functions to examine the impact of the trade policies and practices of a Member on the Multilateral Trading System. In doing so, account is taken, to the extent relevant, of the wider economic and development needs, policies and objectives and the external environment of the Member under review. In the periodicity of reviews, developed Members are reviewed every two years, developing members every four years and least-developed Members at, more or less, six yearly intervals. There have been 112 Trade Policy Reviews at the WTO since 1995,⁷⁷ of which, 102 for developing countries or separate customs territories had their trade policy reviews, at least once. Amongst the fifteen WTO Members⁷⁸ that have not been

76. Percentages are based on “requests for consultations.”

77. The Trade Policy Reviews of customs territories (SACU, EU and the OECS) are counted as one review each.

78. Cambodia, Cape Verde, Cuba, Democratic Republic of the Congo, Former Yugoslav Republic of Macedonia (FYROM), Guinea Bissau, Kuwait,

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reviewed, fourteen are developing countries,⁷⁹ of which eight are RAMs⁸⁰ (with higher levels of WTO rule compliance in light of their terms of accession). Most Members have been reviewed more than once.⁸¹ The monitoring reports of the crisis effects on the trading system have taken place within the framework of the TPRM.

Three recent examples stand-out of trade liberalization policy behavior by developing countries, engendered by the unique trade liberalizing WTO architecture. These are: i) the Sectoral Initiative on Cotton; ii) the Indian proposal on “Strengthening the WTO;”⁸² and iii) support for the monitoring process initiated by the Director-General, in October 2008, to report on developments associated with the financial and economic crisis and to ensure that such monitoring reports contribute to keeping markets open.

Although trade policy behavior has not always been uniform and consistent, the system, as constructed, has exercised a strong and positively dynamic effect on the trade liberalizing behavior of developing countries as a whole. The rules-based Multilateral Trading System has been a key factor driving the trade liberalization in developing countries. This fact was also highlighted in Hudec’s analysis that developing countries could and should use multilateral trade rules to initiate and lock-in domestic reforms.

V. WTO ARTICLE XII ACCESSION NEGOTIATIONS REFORM PRESSURES

Although there has been a range of critical observations about the WTO accession process and questions on the substance of some of the results produced, the facts show that WTO accessions have contributed in driving the liberalization

Moldova, Myanmar, Nepal, Saudi Arabia, Tonga, Viet Nam, and Zimbabwe

79. FYROM is an EU candidate country.

80. Cambodia, Cape Verde, FYROM, Moldova, Nepal, Saudi Arabia, Tonga, and Viet Nam.

81. For a full and illuminating treatment of the coverage of Trade Policy Reviews and in particular the participation of African countries see, Laker Joan Apecu, *African Participation at the World Trade Organizations—Legal and Institutional Aspects, 1995–2010*, (forthcoming, unpublished PhD Thesis in International Studies—International Law, on file with Graduate Institute of International and Development Studies, Geneva).

82. General Council, *Strengthening the WTO; Communication from India*, WT/GC/W/605 (July 3, 2009).

momentum of a group of recently acceded developing countries. The WTO accession-engendered reforms also explain, in large measure, the positive trade performance of the group of Members referred to as RAMs, of which most are developing Members (countries and separate customs territories). It is also true that the results of WTO accessions have affected the functioning of the WTO. For instance, this is the case with regard to the trade policy behavior of the RAMS in the Doha Round negotiations.

The legal and policy framework for WTO accession negotiations is established in Article XII of the 1995 Marrakesh Agreement.⁸³ Fundamentally, accession is on “terms to be agreed” with Members.⁸⁴ This is open-ended, although in practice these terms have emerged to accord with WTO rules, tighten, update and modernize GATT/WTO rules. In addition, with regard to the LDCs, there is an additional framework for more lenient treatment. In the Doha Declaration, Ministers stated that: “Accession of LDCs remains a priority for the Membership. We agree to work to facilitate and accelerate negotiations with acceding LDCs.”⁸⁵ As follow-up, in December 2002, the WTO General Council adopted the Decision on Accession of Least-Developed Countries (Accession Guidelines).⁸⁶ The Accession Guidelines did not modify the rules for WTO accessions. However, it established a framework for the lenient treatment of LDCs’ accessions on the parameters of reasonableness of request and offer in bilateral market access negotiations, good offices intervention by the Director-General and working party chairpersons to resolve difficulties, the option of choice for LDCs to accept commitments in plurilateral agreements, and enhanced technical assistance for acceding LDCs.⁸⁷

83. Accession under the GATT was pursuant to GATT Article XXVI:5(c), through “sponsorship by Declaration of the responsible Contracting Party,” which largely applied to former colonies. GATT art. XXVI:5(c). Accession was also pursuant to GATT Article XXXIII, comparable to the WTO accession legal framework provided for in Article XII of the 1995 Marrakesh Agreement. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

84. Marrakesh Agreement art. XII.

85. Doha Declaration para. 42.

86. General Council, *Accession of Least-Developed Countries*, WT/L/508 (Dec. 10, 2002).

87. *See id.*

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The accession process has produced concrete and positive results for the WTO and the acceding governments. Membership has expanded. Since the establishment of the WTO in 1995, twenty-five governments⁸⁸ have acceded to the WTO, within the legal and policy framework of Article XII of the Marrakesh Agreement,⁸⁹ and the LDCs' Accession Guidelines. Twenty-one of these governments are developing countries, of which three (Cambodia, Cape Verde⁹⁰ and Nepal) are LDCs. The results of accession negotiations and the consequent terms of entry for the twenty-five RAMs have strengthened systemic rules, reinforced the institution, and provided substantial welfare gains for the RAMs and the global economy through market access enhancement. Using the accession process as an instrument of domestic reform, individual RAMs have accelerated trade growth and advanced their broader domestic modernization agenda. The particular experience of the RAMs has also had its effect on the agenda of the WTO. This is reflected in the trade policy behavior of RAMs in the Doha Round negotiations.

The process per se, pursuant to Article XII of the Marrakesh Agreement, is long, demanding, and complex, in contrast to the accession process under the GATT, pursuant to GATT Articles XXVI:5(c) and XXXIII. Negotiations evolve along two tracks, bilateral and multilateral, reflect long-standing custom, and have varied in length. However, if count is taken from the baseline of the establishment of the working parties, accession negotiations have lasted, on average, eight years and six months. This average time is shorter, if the length of the negotiations is measured from the time when the acceding government submits its Memorandum of the Foreign Trade Regime (MFTR). In this latter category, accession negotiations

88. Bulgaria and Ecuador (1996); Mongolia and Panama (1997); Kyrgyzstan (1998); Estonia and Latvia (1999); Albania, Croatia, Georgia, Jordan and Oman (2000); China, Lithuania and Moldova (2001); Chinese Taipei (2002); Armenia, FYROM (2003); Cambodia and Nepal (2004); Saudi Arabia (2005); Tonga and Viet Nam (2007); and Cape Verde and Ukraine (2008).

89. It is to be noted, however, that in 1996, five countries acceded under a one-off special procedure by the General Council pursuant to Article XII of the Marrakesh Agreement. General Council, *Finalization of Negotiations on Schedules on Goods and Services*, WT/L/30 (Jan. 31, 1995).

90. Cape Verde has graduated from the LDC category and is now classified as a developing country.

have lasted, on average, six years and four months. Questions put to acceding governments are far-reaching, detailed and substantive. This is purposeful. It enables the acceding government to undertake a self-x-ray. Most acceding governments have admitted that the question and answer process, on the multilateral track of the negotiations, enabled them, for the first time, to take stock and re-organize domestic arrangements for the effective coordination and management of economic and trade policy and, the institutions for formulating and decision-making in economic and trade policy. The process of questioning is substantive, iterative and frequentative.

The Article XII accession process is unique in international treaty development. On the basis of the MFTR, submitted by the acceding government, Members initiate a treaty-formulating dialogue with the acceding government. This dialogue is spurred on by a non-stop cycle of questioning that obliges the acceding government to be fully transparent in the disclosure of non-confidential trade details. This dialogue, reflected in periodic updates of the draft working party reports, leads the acceding government to accept commitments to eliminate trade restrictions and secure flexibilities, such as transition periods based on an action plan, to phase-out WTO-inconsistent laws, procedures, and practices. The dialogue leads to the acceptance of negotiated commitment language that forms part of the terms of accession of the acceding government. These are codified in a draft working party report. The dialogue process, driven by the non-stop cycle of the "Q & R" process, reflected in updates of the draft working party report, is unique in international treaty-making. In several areas, these commitments have exceeded those undertaken by the 1995 founding WTO Members. This has had raised questions about the WTO-plus substance of the terms of membership accepted by the RAMs. The substantive terms of membership have entailed far-reaching and sometimes painful domestic reform decisions for acceding governments.

On the bilateral track, individual Members exercise the right of Members to request bilateral market access negotiations with the acceding government. These bilateral negotiations are confidential and evolve on the basis of a request by a Member and an offer by the acceding government. The rationale for confidentiality and the request/offer approach

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is that through negotiating pressure on the one hand, and the carrot of WTO membership, on the other, the acceding government accepts far-reaching tariff concessions and specific commitments in services, which provide win-win welfare gains for the acceding government and the membership. Concluded individual bilateral negotiations are then deposited with the WTO Director-General who consolidates (anonymizes) the results of the individual bilateral negotiations. The results apply on an MFN basis to all WTO Members. The accession protocol, the draft working party report and, the draft consolidated goods and services schedule form part of the final package for the acceding government.

The accession process and the results have been subjected to a range of critical commentary and analysis. The issues are worth reviewing. Some consider that there are tensions in the accession process, arising from the mercantilist heritage of the GATT versus the role of the WTO, as an institutional vessel for a global public good, and that these tensions are evident in the experience of its accession procedures.⁹¹ The purpose of this argument has been to raise issues associated with the cost of accession and that membership is not free.

There have been criticisms of the lack of transparency in the confidential bilateral market access negotiations, which, it is argued, has been a cover for extracting non-trade concessions. In this vein, some have examined the issues by relating what they term as known facts to what they consider to be folklore and perceptions because of confidentiality aspects of the negotiations.

A raft of observations and initial discussions have revolved around increasing costs, protracted duration, negotiating complexity, uncertain and deferred rewards, WTO-plus commitments, developmental impact of accession negotiations, and the risk of a multi-tiered trading system. In some specific observations, for instance, although it is acknowledged that the WTO accession process could play a useful role in the political economy of trade reform, there is systemic concern that the growing price of WTO accession will create a multi-tiered trading system. Concerns are raised that the process is

91. Olivier Cattaneo & Carlos Primo Braga, *Everything You Always Wanted to Know About WTO Accession (But Were Afraid to Ask)*, (World Bank Policy Research Working Paper No. 5116, 2009).

unusually long and complex, with uncertainty of the price of WTO accession. The suggestion is made that developmental needs and sustaining support should drive the design and implementation of the accession process and associated technical assistance.⁹²

Related to the concern about the emergence of a multi-tiered trading system, some have suggested that WTO-plus commitments by RAMs carry a risk for the principle of non-discrimination. The argument is that a two-tier membership (a second class of WTO membership) is emerging because of different terms agreed with RAMs. In this argument, although there are positive effects of WTO-plus obligations, these may carry grave implications for the WTO legal system because, singling out a Member for differential treatment is inconsistent with the fundamental WTO principle of non-discrimination.⁹³

In sum, the basic criticisms have revolved around the issues of mercantilist pressures, complexity, length, transparency, accession benefits, development impact, risks for the principle of non-discrimination arising from WTO-plus (or minus commitments), and risks for the emergence of a multi-tiered trading system. There are degrees of plausibility to several in the arguments.

Traces of mercantilism persist in the Multilateral Trading System. There are no easy or simple ways of eliminating this pernicious practice, except to continue to address it almost educationally through successive rounds of trade negotiations. Trade policy is subject to politics, and mercantilism is one of the several points of intersection of trade policy, economics, and politics. In spite of best efforts to eliminate this practice, traces of mercantilism are likely to permanently linger. However, rather than being the problem, it is argued that the accession process is actually one of the vehicles for addressing the mercantilist problem. The accession process, in a rules-based multilateral trading system, is an instrument for resisting mercantilist pressures.

92. Simon J. Evenett & Carlos A. Primo Braga, *WTO Accession: Moving the Goalposts?*, in *TRADE, DOHA, AND DEVELOPMENT: A WINDOW INTO THE ISSUES* 235–36 (Richard Newfarmer ed., 2006).

93. Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37(3) *J. WORLD TRADE* 483, 512–13 (2003).

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Complexity is in the very nature of the accession process. As WTO rules increase and with interpretation, emerging from jurisprudence pursuant to the DSU, the complexity will be magnified. Complexity is also inherent in a rules-based multilateral system, where the rules are enforceable and require concomitant municipal WTO-consistent legislation. The complexity is deepened because accession commitments are inter-locked with domestic reforms and enactment of legislation. This is in the nature of the WTO, but is a strength, not a weakness.

Transparency questions have revolved around the confidentiality practice in the bilateral market access negotiations compared to the multilateral negotiations which are open to all working party Members. These concerns have been exacerbated in cases where there have been apparent blockages and perceptions of blockage, in instances where other Members have themselves queried requests that are highly questionable in form and substance, and which could only have been made under cover of confidentiality. While there has been some abuse, the background to the practice of confidentiality is useful. It was established as a rational method to assist acceding governments to eliminate harmful and egregious barriers to trade, in bilateral negotiations, without public embarrassing climb-downs for the acceding government. To a large extent, this remains the case. However, questions have arisen in respect of apparent blockages, in a limited number of instances, where confidential negotiations have been used to leverage concessions extraneous to the accession in question. Fortunately, WTO Members (particularly those active in the accession process) are aware of the concerns, and the prevailing perceptions and misperceptions. They have responded to the demands for greater transparency. In some accession processes underway, Members have requested that their questions to an acceding government, stemming from confidentially negotiated bilateral agreements, be circulated to other Members for the process of the multilateral review of consolidated draft schedules.

Other measures have been taken to enhance transparency. The WTO Secretariat is reporting more elaborately and consistently on the state of play in bilateral market access negotiations, although the negotiating core remains

confidential to the parties. In 2009, the Director-General's annual report on accession was introduced. The Informal Group on Accessions, a Members' forum for managing the accession process and the working parties, was expanded to accommodate broader representation and inclusiveness of the Membership spectrum. A Secretariat newsletter service was initiated with acceding governments. This service not only provides relevant information for the acceding government, but also invites them to offer suggestions, such as when they would like to convene their working parties, based on their self-assessment of their state of preparedness, pace of domestic reforms, enactment of legislation and progress in their accessions.

It has been argued that the principle of non-discrimination is at risk, with the emergence of a multi-tiered trading system (a second class WTO membership) with WTO-plus commitments. As argued, this risk is increased, in instances, where a Member is singled out in country-specific rule-making for differential treatment inconsistent with the non-discrimination principle.⁹⁴ This argument and its implications need to be carefully considered. At first blush, it is tempting to view this argument as the flip-side of the same coin of Hudec's argument that exemptions from the rules, in the form of the 1940s "special and differential approach" (GATT-minus commitments), compromised the MFN (non-discrimination) principle. In the more recent, almost mirror argument, WTO-plus commitments, in particular those targeted at country-specific rule-making, put at risk the non-discrimination principle.⁹⁵ The question is whether WTO-plus or WTO-minus commitments compromise or put at risk the principle of non-discrimination. The arguments will not be resolved here, but perhaps some points could be identified as to how this question, in particular the WTO-plus commitments, could be examined.

First, WTO-plus (higher level) commitments exercise different effects from WTO-minus (lower level) commitments. The former, on balance, have been decidedly positive to complement, tighten loopholes, and modernize existing GATT rules, in areas that lacked clarity. One of several such areas is that of quantitative restrictions. While there have been dissatisfaction and criticism by some, WTO-plus commitments

94. *See id.*

95. *Id.*

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have strengthened the rules-based system. Exemptions from the rules, at lower levels, are in a different category. Second, the principle of non-discrimination is the foundation of the rules-based Multilateral Trading System. GATT rules, however, provide for departures from non-discrimination, in both the areas of goods and services, but only when Members agree to do so, either with regard to rules that apply to other Members or with regard to the terms of accession of acceding governments. Regarding the rules that apply to Members, the most obvious departures, pursuant to GATT rules are Article I exceptions, the 1979 Enabling Clause, Article III exceptions, Article XIII, Article XIV, the conditional exceptions in Article XX and XXI and Article XXIV. In the GATS, these cover essentially Article II.2 and Article XIV. In addition, the Marrakesh Agreement Article IX:3 provides for waivers. While the risks to and departures from non-discrimination have been ever-constant, the system has been and remains strong enough to fend off these risks. Third, under the DSU, WTO jurisprudence demonstrates that non-discrimination has been consistently upheld with rulings against discrimination.

WTO-plus terms have to be carefully examined to determine their effects on the rules. It does not necessarily follow that WTO-plus will ex ante create different classes of WTO Membership, or compromise the non-discrimination principle, even in instances where the argument is presented, or alleged that such rule(s) have been designed for, or against a Member. Evidence in the system and in the on-going Doha negotiations indicates several instances, where specific rules and draft rules have been designed around a Member. The question would be whether such rules strengthen the system or weaken it. The negotiations amongst Members indicate that the reason for terms or provisions drafted around a Member in multilateral negotiations, or acceding government in accession negotiations, is to take account of realities, circumstances and changing circumstances that are fundamental in trade integration and for ensuring the balance in trade relations amongst members. Systemic rules (“the whole”) have always taken account of the “sum of its parts.” This is not new and has contributed to the stability of the system.

Fourth, the facts clearly indicate that there are variations to the terms of accessions. These variations reflect a range of

factors. They include development status, sensitivity to issues regarding market economy status and related issues in the political economy, and the necessity to tailor accession entry terms on a case-by-case basis. While the non-discrimination principle and provisions are constant, accession terms are case-by-case. These are not contradictory. What matters is that in the final analysis, the dispute settlement system remains the final arbiter with regard to questions about whether the principle of non-discrimination has been violated with specific regard to any measures or policies of a Member that impairs or nullifies the benefits of another Member. Further, WTO rules apply to Members; they do not apply to non-Members. What also matters is that in the first fifteen years of the WTO accession process, the results indicate that the rules have been reinforced, market access has been expanded, and RAMs, individually and collectively, have acknowledged that they used the accession process for their domestic reform and trade opening. Overall, WTO-plus commitments have tended to strengthen the rules and engender trade liberalization and reform.

Taking account of the range of critical commentary, the relevant questions are: i) in what areas and in what ways has the accession process engendered sustained the trade liberalization momentum in developing countries; and ii) what effects did these reforms have had on the trade performance of developing country RAMs? There are several key areas where the commitments accepted by RAMs, including developing RAMs, had a salutary effect in driving their domestic reforms and trade liberalization. Essentially, these areas that drove the reforms and yet provided accommodation for development status needs broadly cover:

- tariff bindings and services commitments;
- trading rights;
- export regulations: application of internal taxes/duties to exports;
- export regulations: application of export restrictions;
- customs valuation;
- state-trading enterprises;
- state ownership and privatization;
- notifications/transparency;

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- dual pricing: non-discrimination, including national treatment;
- transit;
- agricultural policies;
- trade-related intellectual property rights;
- the anti-dumping, countervailing and safeguard regimes (price comparability and market economy status);
- the regimes for standards: Sanitary and Phytosanitary Standards and Technical Barriers to Trade; and
- development status.

Selected areas of commitments on rules by RAMs, particularly developing country RAMs, in accession negotiations, are discussed with illustrations. The sum of the evidence from commitments to the rules plus, engendered domestic reforms and trading opening in these countries and supported a virtuous cycle of sustained reforms with welfare gains.

In consolidated goods schedules of tariff concessions and commitments, RAMs have a 100% binding on tariff lines for both agriculture and NAMA. In services, on the average, RAMs have undertaken specific commitments in more than one hundred services sub-sectors. These are in contrast to the average level of commitments for founding WTO Members, which, in many instances, have been significantly less. The table below is illustrative of the number of services sub-sectors, where ten RAMS have taken commitments in relation to ten original WTO Members with significant interest in services trade (this is not a comparison).

SERVICES: NUMBER OF SPECIFIC COMMITMENTS IN SERVICES SUB-SECTORS			
RAMs	Number of Spec/Commitments	Original Members	Number of Spec/Commitments
China	93	EU	115
Viet Nam	105	US	110
Saudi Arabia	120	Hong Kong, China	68
Oman	98	Singapore	67
Moldova	147	Brazil	43
Kyrgyz	138	Egypt	44
Jordan	110	India	37
Cambodia (LDC)	94	Nigeria	32
Nepal (LDC)	77	South Africa	91
Cape Verde (LDC)	93	Tanzania (LDC)	1

Through the number and quality of their services commitments, RAMs have signaled areas of domestic reforms, existence of prudential regulations, and openness for domestic and foreign investments. Telecommunications and financial services are two good examples.

Trading rights is an area where the non-discrimination principle and its MFN and national treatment rules have been improved and tightened. Trading rights have uniquely emerged from accession negotiations and acquis. Classically, GATT rules were formulated with regard to products and less so to traders (individuals and enterprises). However, governments in regulating trade, adopt regulations and laws, which require traders to register their businesses for importing and exporting. In practice, conditions for business registration for trade in goods, could and do discriminate between goods imported from one country, or countries, or from domestically produced goods. Limitations to trading rights can take a range of forms, such as quantity or price-based limitations, prior approvals (which could be discretionary), and registered scope of business.

The purpose of the trading rights commitment is to ensure that all traders in a country or separate customs territory, including "importers of record,"⁹⁶ have a right to trade in all

96. An "importer of record" is the right of a trader to import goods into a

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goods, and that conditions for the registration of businesses neither discriminate nor modify this right to trade, other than simple and/or automatic registration. In sum, trading rights are the rights of legal and natural persons of any Member, exercised by importers of record, to import goods into the territory of another, as distinguished from the right to sell or distribute, and without this right modified, or subject to nationality or residency limitations, or other conditions or requirements. Trading rights are in accordance with GATT Articles III: 2 and 4, XI.1 and VIII: 1(a). There were no trading rights commitments by RAMs in the first four accession packages.⁹⁷ However, in the subsequent accession packages, twenty-one RAMs accepted commitments on trading rights.⁹⁸ The standard commitment terminology in an accession package is represented by that of Cape Verde as follows:

The representative of Cape Verde confirmed that from the date of accession, Cape Verde would grant any natural or legal person, regardless of physical presence or investment in Cape Verde, the right to be the importer of record of any product allowed to be imported into Cape Verde, at any level of distribution, and that its laws and regulations relating to the right to trade in goods and all fees, charges or taxes levied on such rights would conform fully with its WTO obligations, including Articles VIII:1(a), XI:1, and III:2 and 4 of the GATT 1994, Article III of the General Agreement on Trade in Services, and Article 63 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. He also confirmed that full rights to import and to export would be granted in a non-discriminatory and non-discretionary manner from the date of accession, and any requirements for commercial registration or application for trading rights would be for customs and fiscal purposes only, would not require investment in Cape Verde nor confer the right to distribute there, and would not constitute a barrier to trade. The Working Party took note of these commitments.⁹⁹

Export restrictions, including export duties and taxes, affect trade. There are questions about the clarity and intent of

country or separate customs territory, without this right being modified by nationality or residency, and without the right to sell or distribute goods in a country or separate customs territory.

97. Bulgaria, Ecuador, Mongolia, and Panama.

98. Albania, Armenia, Cambodia, Cape Verde, China, Chinese Taipei, Croatia, Estonia, FYROM, Georgia, Jordan, Latvia, Lithuania, Kyrgyz Republic, Moldova, Nepal, Oman, Saudi Arabia, Tonga, Ukraine, and Viet Nam.

99. Working Party on the Accession of Cape Verde, *Report of the Working Party on the Accession of Cape Verde to the World Trade Organization*, para. 79, WT/ACC/CPV/30 (Dec. 6, 2007).

GATT Article XI, on quantitative restrictions, on the extent of the coverage of export restriction, and why some restrictions were covered and others not. Many observers have also felt that this area of the rules required updating and modernization, adjustment to contemporary realities, and greater clarity. Article XI of GATT 1947 (and 1994) covered and prohibited restrictions on imports and exports made effective through quotas, import or export licenses, with exceptions provided for in sub-paragraphs (a), (b), and (c)(i), (ii) and (iii). Article XI did not cover export duties, taxes or other charges. Article 12 of the 1994 Agreement on Agriculture largely provided for transparency disciplines for measures, pursuant to Article XI.2(a) of GATT 1994 and further limited the application of the provision to only developing countries that are net-food exporters of the specific foodstuff concerned and excluded other developing countries that are not net-food exporters. It is in this context of incomplete coverage, lack of full clarity, and looseness in an area with potentially significant impacts on trade, that tighter disciplines have been developed in accession negotiations.

Commitment language was accepted by six RAMs¹⁰⁰ on export duties, taxes, and charges. The commitment language has ranged from phasing out and elimination of export duties, with exceptions to reduction of export duties, and non-application of any obligatory minimum prices. In the working party reports, the affected RAMs established “tables” where export duties apply and, in cases of reduction, agreed to a schedule for reduction. This area of export duties, taxes, and charges will be one of active legal and policy interest over the course of the on-going thirty accession negotiations.

In the area of export restrictions (export and import licensing) covered by GATT Article XI, eighteen RAMs have accepted commitment language that has tightened adherence to the extant rules and closed loopholes. Although there are variations adapted to the specificities of individual accessions, the standard commitment on export restrictions that has emerged is provided for in the Working Party Report of Oman: “The representative of Oman confirmed that any export control requirements remaining in place on the date of accession would be fully consistent with WTO provisions, including those

100. China, Latvia, Mongolia, Saudi Arabia, Ukraine, and Viet Nam.

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contained in Articles XI, XVII, XX and XXI of the GATT 1994. The Working Party took note of this commitment.”¹⁰¹ The different uses of quantitative restrictions continue to rivet policy and academic focus in trade policy. The degree of interest has been constant from the position expressed by the United States Chief Trade Negotiator in 1949:

Quantitative restrictions present the major issue of commercial policy If uncontrolled, they promise to become universal and permanent. Freedom to employ them is not readily to be surrendered. The proposal that this freedom be limited evoked a debate that went on for many months. The toughest problem in the trade negotiations came to be known by its initials: Q.R. It would not be inaccurate to describe the meetings in London, Geneva, and Havana as the United Nations Conferences on Q.R.¹⁰²

Overall, in this area of export restrictions, export duties, charges, and taxes the consideration has been that accession *acquis* in these areas have strengthened the disciplines and rules. The trade policy community has noted that WTO accessions have created and will continue to create disciplines on export restrictions and export duties that complement the GATT 1994.¹⁰³

Customs valuation is an area strongly associated with trade reform and the benefits of openness to trade. RAMs have accepted commitments to implement GATT Article VII (establishing the transaction value, as the primary basis for the determination of customs value, and eliminating minimum prices, reference prices and fixed valuation methods).¹⁰⁴ Commitments undertaken include implementation of Article VIII.¹⁰⁵ Commitment to the implementation of Article X bound RAMs to the transparency obligation and the establishment of judicial, arbitral, administrative tribunals, or procedures for the purpose, *inter alia*, of the prompt review and correction of

101. Working Party on the Accession of Oman, *Report of the Working Party on the Accession of Oman to the World Trade Organization*, para. 77, WT/ACC/OMN/26 (Sept. 28, 2000).

102. CLAIR WILCOX, *A CHARTER FOR WORLD TRADE*, 82 (1972) *cited in* ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 31 n.29 (2d ed. 2008).

103. Jeonghoi Kim, *Recent Trends in Export Restrictions* (Org. for Econ. Cooperation and Dev., Trade Policy Working Papers, No: 101, 2010).

104. See Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, para. 140, WT/ACC/CHN/49 (Oct. 1, 2001).

105. Specifically, Article VIII requires that fees and charges for exports and important approximate the costs of services rendered. See GATT art. VIII.

administrative action relating to customs matters. Although there have been variations depending on the particular situation of the acceding government, the commitment language accepted by Viet Nam is illustrative:

The representative of Viet Nam confirmed that, from the date of accession, Viet Nam would fully apply the WTO provisions concerning customs valuation, including the Agreement on the Implementation of Article VII of the GATT 1994 and Annex I (Interpretative Notes). Viet Nam would ensure that any customs valuation method to be applied would be in accordance with these WTO rules. In this regard, he confirmed that minimum prices and any system of reference prices or fixed valuation schedule applied to imports in lieu of the transaction value to determine customs valuation had been eliminated and would not be reintroduced and that all methods of valuation used were in strict conformity with those provided for in the WTO Customs Valuation Agreement. . . . The Working Party took note of these commitments.¹⁰⁶

The related areas of state trading entities, state ownership, and privatization have been fundamental to sustainable reform, more so for economies, especially developing economies shifting from command to open markets. Reforms in these areas, pursuant to the WTO accession process have assisted developing countries' momentum toward trade reform and openness. The commitment languages accepted by China and Viet Nam, two developing countries, are illustrative. In the case of China:

The representative of China further confirmed that China would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations, e.g., price, quality, marketability and availability, and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments.¹⁰⁷

106. Working Party on the Accession of Viet Nam, *Report of the Working Party on the Accession of Viet Nam*, para. 238, WT/ACC/VNM/48 (Oct. 27, 2006).

107. Working Party on the Accession of China, *supra* note 104, para. 49.

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And in the case of Viet Nam, similar, if not identical language was accepted.¹⁰⁸

The biggest challenge for accession-induced reforms, entailed the transition from the centrally-planned (including former socialist systems) to market-driven economies, particularly through commitments to comply with GATT Article XVII¹⁰⁹ and transparency commitments on privatization programs. The commitment language by China, as a developing country, with regard to Article XVII provisions on State Trading Enterprises is illustrative.¹¹⁰

Although there are no GATT/WTO rules on privatization, a vicious circle has emerged, induced by accession negotiations specifically in the context of the accession dialogue on state ownership and state trading. Seventeen RAMs¹¹¹ accepted accession terms according to which they agreed to provide periodic reports (essentially notifications) to WTO Members to ensure the transparency of their privatization programs.¹¹² The commitment language by Cambodia, a LDC, is illustrative:

108. Working Party on the Accession of Viet Nam, *supra* note 106, para. 78. The representative of Viet Nam confirmed that Viet Nam would ensure that all enterprises that were State-owned or State-controlled, including equitized enterprises in which the State had control, and enterprises with special or exclusive privileges, would make purchases, not for governmental use, and sales in international trade, based solely on commercial considerations, for example, price, quality, marketability, and availability, and that the enterprises of other WTO Members would have an adequate opportunity in accordance with customary business practice to compete for participation in sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of Viet Nam would not influence, directly or indirectly, commercial decisions on the part of enterprises that are State-owned, State-controlled, or that have special and exclusive privileges, including decisions on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement and the rights accorded to non-governmental enterprise owners or shareholders. The Working Party took note of these commitments.

109. GATT Article XVII, which outlines the rule on State Trading Enterprises (STEs), directs that STEs shall not discriminate for governmental measures affecting imports and exports by private traders and requires STEs to act solely in accordance with commercial considerations. *See* GATT art. XVII.

110. *See supra* text accompanying note 107.

111. Albania, Armenia, Bulgaria, Cambodia, Cape Verde, Chinese Taipei, Croatia, Estonia, FYROM, Georgia, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Saudi Arabia, and Ukraine.

112. *E.g.*, Press Release, World Trade Org., WTO Welcomes Ukraine as a New Member (Feb. 5, 2008) http://www.wto.org/english/news_e/pres08_e/pr511_e.htm.

The representative of Cambodia stated that his Government would ensure the transparency of its ongoing privatization programme and would keep WTO Members informed of progress in the reform of its economic and trade regimes. He stated that his Government would provide periodic reports to WTO Members on developments in its programme of privatization as long as the privatization programme would be in existence, along the lines of that already provided to the Working Party. He also stated that his Government would provide periodic reports on other issues related to its economic reform as relevant to its obligations under the WTO. The Working Party took note of these commitments.¹¹³

In several ongoing accessions affecting formerly centrally planned economies, the privatization trend and disposition to provide information on privatization programs has been maintained. For example, the Serbian delegation informed WTO Members:

The privatization of commercial companies that began in 2001 continues in this year as well. . . . One of the major goals of the Serbian Government is the finishing of the process of privatisation of remaining socially owned enterprises, as well as introducing competition into markets of infrastructure and public utilities. From the beginning of the process of privatization until September 2010, the total number of privatized enterprises amounted to 2414. These efforts go hand in hand with necessary legal reforms aimed, inter alia, at improving the business climate.¹¹⁴

Dual pricing has been one of the sources of distortions in the global economy. Through the terms of accession some of the larger economies with the capacity to affect the global economy have addressed this issue. In the China accession terms:

The representative of China further confirmed that China would provide the same treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China. China would eliminate dual pricing practices as well as differences in treatment accorded to goods produced for sale in China in comparison to those produced for export. The Working Party took note of these commitments.¹¹⁵

Accession negotiations and terms of membership have induced sustained domestic reforms that have set a clear direction towards the market economy. These reforms have

113. Working Party on the Accession of Cambodia, *Report of the Working Party on the Accession of Cambodia*, para. 25, WT/ACC/KHM/21 (Aug. 15, 2003).

114. Vesna Arsic, State Sec'y, Statement at the 9th Meeting of the Working Party on the Accession of the Republic of Serbia to the World Trade Organization 4 (Oct. 20, 2010) (transcript on file with the author).

115. Working Party on the Accession of China, *supra* note 104, para. 18.

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been clearly reflected in accession terms for the determination of price comparability in anti-dumping pursuant to the Agreement on the Implementation of GATT Article VI (the Anti-Dumping Agreement).¹¹⁶ Market economy status has been central in accession terms for addressing subsidies pursuant to the Agreement on Subsidies and Countervailing Measures. Both China and Viet Nam's terms of action committed producers in the acceding governments to show the prevalence of market economy conditions with the additional requirement that those conditions satisfy the importing Member's national law. For instance, with regard to China accession terms, in its Protocol, China undertook the commitment that:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.¹¹⁷

Across the entire area of accession negotiations, acceding governments have accepted commitments, backed up by domestic legislation, confirming acceptance of GATT rules. Additionally they have complemented, reinforced and, in some areas, extended these rules, while regarding the particular circumstance of the acceding government. These commitments have strengthened the MFN principle, the transparency rule, and set a clear direction for sustained market reforms and trade opening.

A horizontal issue emphasized by other commentators is that accession terms have not taken account of development

116. *See id.* para. 178.

117. *Id.* at 73.

needs and circumstance. The facts indicate that although accession terms have neither explicitly ascribed development status, with the exception of LDCs, nor allowed ex ante deviations from the rules on account of development status, accession negotiations have taken account of development needs in specific ways. This is reflected by the LDCs' Accession Guidelines,¹¹⁸ action plan-based transitional time frames for acceding governments to implement their commitments, and the set de minimis levels for Aggregate Measurement of Support (AMS) directing developing country domestic support for agriculture.¹¹⁹ In the case of Jordan, WTO Members in the Working Party took particular account of the development circumstance of Jordan for purposes of Article 6.4 in the Agreement on Agriculture. In setting the AMS reduction commitment for Jordan over a seven-year period, Members, "also considered that for the purposes of Article 6.4 of the WTO Agriculture Agreement, Jordan was a developing country."¹²⁰

In the course of accession negotiations, Members have ensured that acceding governments accept commitments to the existing rules. These commitments require acceptance of the rules-plus (in several instances) and enactment of domestic legislation that provides statutory backing for these commitments. Part of the accession package is a Legislative Action Plan. Trade-relevant legislation is deposited with the WTO Secretariat for review by Members. This strong legislative foundation was largely absent for the different specific areas of WTO rules for many founding WTO Members, including developing countries. Transparency and greater openness in trade have been associated with faster growth.

In reviewing the impact of their WTO accession, RAMs have repeatedly stressed its positive effects on the rule of law, domestic coordination for trade policymaking (frequently absent or minimal prior to the accession process), trade-

118. See General Council, *Accession of Least-Developed Countries*, WT/L/508 (Jan. 20, 2003).

119. In accordance with the rules in the Agreement on Agriculture, the *de minimis* levels are 5% for developed countries and 10% for developing countries, with LDCs not subject to reduction commitments in domestic support. See Marrakesh Agreement Annex 1A.

120. Working Party on the Accession of Jordan, *Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan to the World Trade Organization*, para. 189, WT/ACC/JOR/33 (Dec. 3, 1999).

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opening, and the predictability of trade and investment. In spite of the complexities and rigors of the WTO accession process, representatives of RAMs have acknowledged the high value of the accession process, as a necessary instrument for their domestic policy reform, specifically for economy-boosting trade liberalization.¹²¹ In a recent statement, the RAMs, as a group, stated:

[A]s Members of the RAMs group we have always strongly advocated that the accession of new Members to the WTO, including developing countries and in particular LDCs, continues to broaden the scope of trade covered under WTO disciplines. Universal membership in the WTO is a critical factor in the establishment of a strong rules-based trading system. We therefore call for the expeditious accession process for developing countries and in particular LDCs. . . .¹²²

Individual RAMs have also evaluated the impact of their WTO accession on their trade performance and welfare. Saudi Arabia recently stated:

What we have seen as the consequence of Saudi Arabia's accession to the World Trade Organization at the end of 2005 is . . . the acceleration of growth rates—almost a doubling of the rate of growth. With it has come an in foreign investment in Saudi Arabia. . . . The investments that are taking place in the Kingdom of Saudi Arabia will generate jobs and they are generating jobs.¹²³

Taking account of periods of global financial and economic crises, recession and domestic turmoil within countries, trade data (provided below) suggest that RAMs achieved significant gains in trade performance with more stable performance, following their accession-related domestic reforms and trade liberalization, compared to the pre-accession reform period.

The trade data indicate that the international trade of all RAMs increased significantly as they started to implement their accession-related reforms, some of these pre-accession, others upon accession, and some through agreed phased

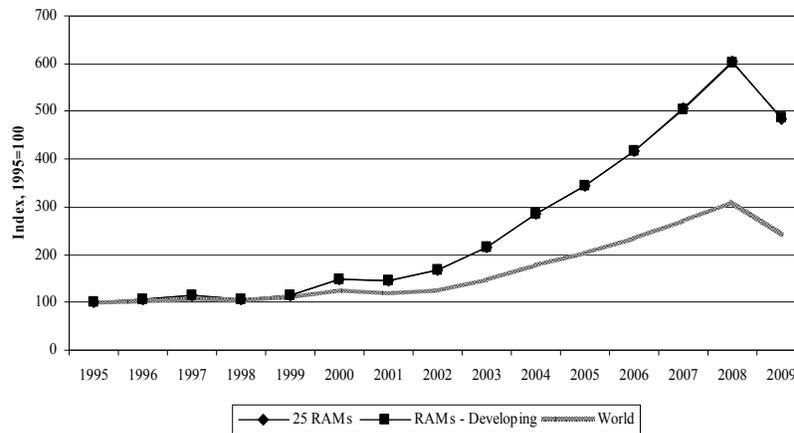
121. Confirmed by numerous conversations with representatives of RAMs from Cambodia, China, Viet Nam, Cape Verde. *See also* World Trade Organization, Ministerial Conference 7th Session, Round Table Statement on the Least-Developed Countries' Accessions, WT/MIN(09)/1 (Oct. 5, 2009).

122. WTO General Council, 21 October 2010. Remarks by the Representatives of Chinese Taipei, on behalf of the Group of Recently Acceded Members (RAMs).

123. Ambassador Adel Al-Jubeir, Ambassador of Saudi Arabia to the United States, Remarks at the NCUSAR Annual Conference (Oct. 21, 2010), <http://www.saudiembassy.net/announcement/announcement10221001.aspx>.

transition. Figure VI and Annex 2 show that from 1995¹²⁴ to 2009, the value of merchandise trade grew at average annual rates of 13%, while Figure VII and Annex 3 show that trade in commercial services grew by 11%. These average annual growth rates were much faster in comparison to the growth of world merchandise trade at 7% and services at 8%. Between 1995 and 2008¹²⁵ the value of merchandise trade of all RAMs rose by approximately 500% in contrast to world trade that increased by about 200%.

Figure VI: Value of merchandise trade of all RAMs and developing country or territory RAMs: 1995-2009¹²⁶

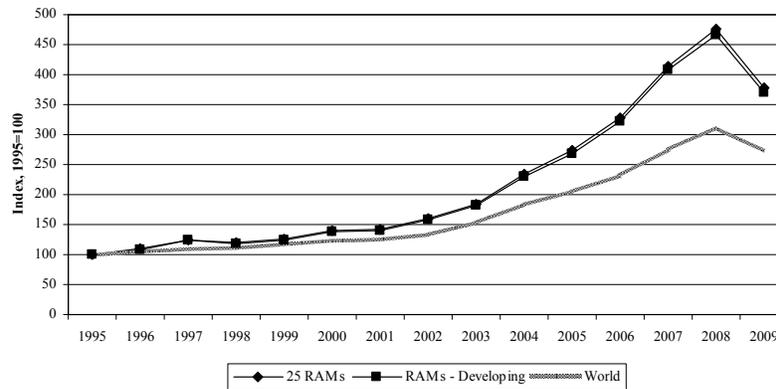


124. The establishment of the World Trade Organization was in 1995.

125. This period saw growth prior to the effects of the global economic and financial crisis of 2008–09.

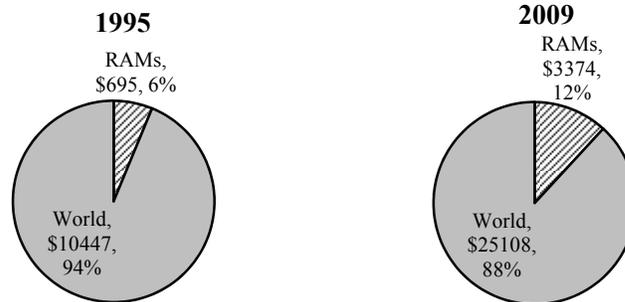
126. Twenty-five RAMs minus Bulgaria, Estonia, Latvia, and Lithuania.

Figure VII: Value of trade in services of all RAMs and developing country or territory RAMs: 1995-2009



This positive trade performance was also reflected in the share of world merchandise trade of RAMs, which significantly increased from 6 to 12% during 1995–2009 as seen in Figure VIII.

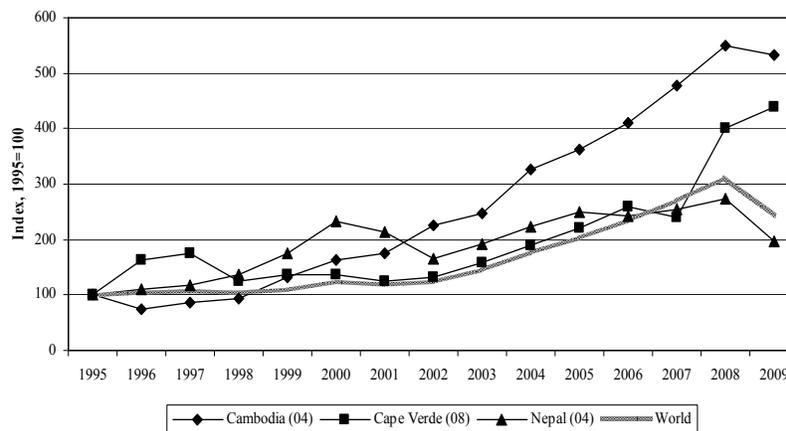
Figure VIII: RAMs’ share of world merchandise trade: 1995-2009¹²⁷(Billion dollars and percentage)



127. Figures incorporating 2009 data reflect the trade collapse experienced as a result of the 2008–2009 global financial and economic crisis, making RAMs’ growth all the more significant.

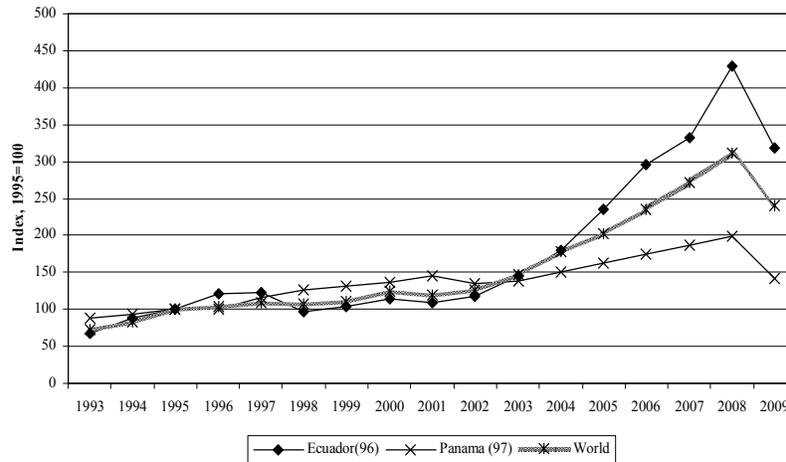
For the merchandise exports of the LDCs recently acceded Members, between the year of their individual accessions and the most recent figures available (2009), there is a varied picture as seen in Figure IX(A). A significant percentage change was registered for Cambodia at 63%, which acceded in 2004, with a modest positive change for Cape Verde at 10%, which acceded in 2008, the year the global economic crisis began, and a negative merchandise export for Nepal at -12%, which acceded in 2004.

Figure IX (A): Value of merchandise exports of RAMs that acceded as LDCs: 1995-2009



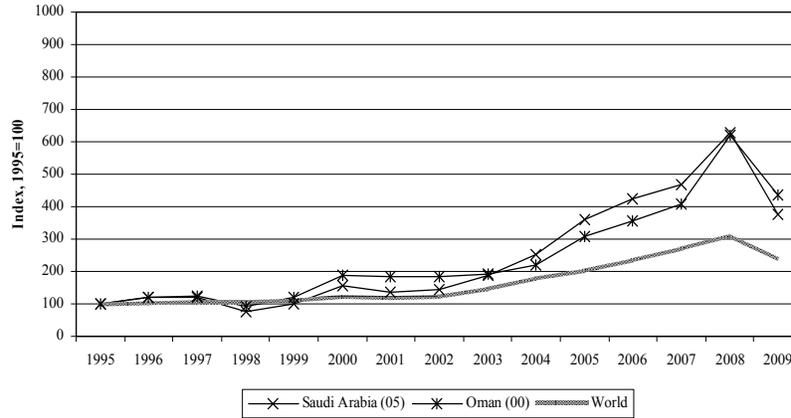
For the non-LDCs recently acceded developing Members, between the year of their individual accessions and the most recent figures available (2009), significant percentage changes were registered. Ecuador, which acceded in 1996, experienced a 164% change and Panama, which acceded in 1997, experienced a 22% change, as seen in Figure IX (B).

Figure IX (B): Value of merchandise exports of Ecuador and Panama: 1995-2009



Between the year of its accession (2005) and 2008, the percentage change for the merchandise export of Saudi Arabia was 73%, a growth differential that was cut to 4% when analyzed from the year of accession to 2009 at the height of the economic crisis. Oman, which acceded in 2000, registered a percentage change in merchandise exports of 134% between its accession year and 2009 as seen in Figure IX (C).

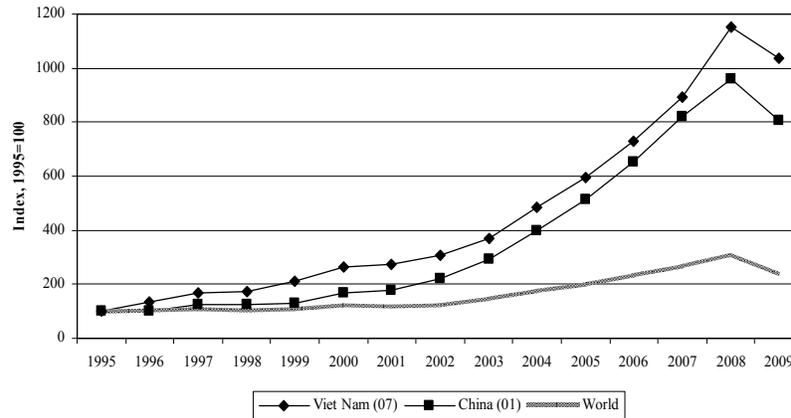
Figure IX (C): Value of merchandise exports of Saudi Arabia and Oman: 1995-2009



Viet Nam registered a percentage change of 29% in merchandise export between its year of accession in 2007 and 2008, a differential that was cut to 16% when analyzed from the accession year to 2009. China, which acceded in 2001, registered a percentage change in merchandise exports of 437% between its accession year and 2008, but experienced a decrease in its growth rate down to 352% in 2009 compared to the year of its accession as seen in Figure IX (D).

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Figure IX (D): Value of merchandise exports of China and Viet Nam: 1995-2009



Overall, the results and momentum generated from accession-driven domestic reforms and liberalization have been clearly reflected in the better than average trade performance of RAMs compared with founding WTO Members. Only RAMs that have experienced domestic political difficulties have seen the nullification of the effects of domestic economic reforms for trade opening. WTO accession process and corresponding commitments to GATT/WTO rules have provided a strong impetus for developing countries to create their own reform momentum, improve their trade growth performance, and provide institutional reinforcement for the WTO in market access and rule terms.

Furthermore, the behavior of RAMs has influenced the agenda and contemporary functioning of the WTO in two ways. First, RAMs have explicitly accepted the standard rules and the “rules plus” in their terms of accession. Second, although RAMs have held a defensive line in the Doha Round negotiations, beyond what they judge as their already substantial tariff concessions and specific commitments in their bilateral market accession negotiations, most RAMs have been proactive in pushing current acceding governments to lower levels of protection. RAMs have also maintained the line that the Doha Round should build on the foundation and the results

of accession negotiations, pursuant to Article XII of the Marrakesh Agreement.

One of the original insights by Hudec was that governments, under liberal trade policy regimes, need the same sort of powers to resist protectionist demands as those advocated by infant industry proponents for government intervention to improve on imperfect market outcomes.¹²⁸ Consequently, Hudec argued that by using constraining procedures established by multilateral rules, governments could acquire greater control over policy and substantially increase welfare gains.¹²⁹ “Far from diminishing sovereignty, such legal restraints would increase it.”¹³⁰ This lucid and logical argument is now frequently used to show that the constraints in multilateral rules and disciplines assist in locking-in welfare-increasing domestic reforms. Because trade policymaking is subject to the political economy, interventionist policies are almost impossible to control. A question to which Hudec drew attention was the necessity of ensuring that prudent and correct judgments are made about where and when to intervene.¹³¹ The accession process and results not only provide support for this argument, namely that multilateral rules help governments lock-in domestic reforms, but also demonstrate that the process and results were critical in generating momentum for trade liberalization in developing RAMs and economies in transition.

VI. CONCLUSION

From the mid-1980s there was a change in the trade policy behavior of developing countries. They embarked on far-reaching domestic policy reforms and trade liberalization. This behavior was neither collective, nor organized group behavior. There were differences in timing, pace, depth, and focus in these reforms. Collectively observed, the trade policy behavior of developing countries has reflected both fast-clipped, offensive trade liberalizing behavior and, at the same time, defensive

128. Professor Hudec's argument was in relation to GATT Article XVIII and he was always clear that governments must always refuse to undertake wasteful investments. *See* HUDEC, *supra* note 2.

129. *See id.* at 175

130. *Id.*

131. *See id.* at 144–51.

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postures that border on protection. Uniform characterization has been limited by the heterogeneity of the group. Nonetheless, the facts demonstrate that in contrast to the trade policy behavior in the 1960s GATT era reflecting protectionism, industrial policy behavior, exemption orientations from systemic trading rules and non-market systems, developing countries that committed to domestic reforms and trade liberalization have had significant economic payoffs. They have grown faster than the traditional trading nations. They have recovered quicker from crisis. They are now considered by development economists as the “global growth locomotives.”¹³² They have demonstrated greater ambition in the long-standing and most distorted areas of negotiations in the Doha Round, although they seek flexibilities in other areas and reflect caution in such areas as financial services liberalization. What factors explain the domestic reforms and the shift to trade liberalizing behavior in those developing countries that embarked on these reforms? What have been the implications of this trade liberalizing behavior and its significant positive economic pay-offs for developing countries in their relationship with developed country counterparts?

A combination of domestic and external factors, including the role of personalities who managed these reforms, explains the drive to reform and trade liberalization in developing countries. In the 1980s, developing countries reversed 1960s and 1970s protectionist policies and an exemption orientation from GATT rules and shifted to an ambitious reformist agenda. This imperative reform agenda was implemented in response to the 1980s growth shock crises¹³³ and recession, domestic development priorities, and multilateral reform pressures from the 1986 launch of the Uruguay Round. This liberalization momentum was sustained by the changing global political economy highlighted by the emergence of democracy in Latin America, the collapse of the socialist experiment of command economies and the consequent transition to market economies.

Current analysis has accorded insufficient weight to the effect of the multilateral rules and institutions in modifying the

132. See Canuto, *supra* note 56, at 1, 4.

133. These crises included the second oil shock (1979–81), the inability of Mexico to service its debt, increased interest rates in the United States meant to reduce double-digit inflation, and the ensuing global recession.

domestic behavior of leaders. The effect of the rules-based Multilateral Trading System in particular has been underestimated. The architecture of the WTO has operated to secure rule-compliant, trade-reformist behavior and exercised systemic constraints on individual Members to check and counter protectionism. This architecture rests on the pillars of enforceable rules, under the DSU, periodic Trade Policy Reports and monitoring reports, within the framework of the TPRM, and the accumulating effects of the terms of accession of RAMs, pursuant to Article XII accession negotiations. This architecture, renovated by periodic trade rounds, has acted in combination with domestic growth priorities, in developing countries, to generate and sustain the momentum for trade liberalization.

Always at risk of inertia, rollback, or protectionist encroachment, the Multilateral Trading System has relied on successive rounds of trade negotiations to inject momentum, sustain further trade liberalization, or keep protectionism at bay. Trade rounds combined with recourse to the DSU, Trade Policy Reviews, terms of accession, and the regular functioning of the rules-based system, have generated constant multilateral energy for reform, liberalization, and compliance with extant rules, particularly in developing countries.

There are three recent examples of trade reform policy behavior by developing countries, inspired by the unique trade liberalizing and anti-protectionist WTO architecture. These are i) the Indian proposal on Strengthening the WTO; ii) virtually unanimous developing country support for the monitoring process initiated by the WTO Director-General in 2008, reporting on developments associated with the financial and economic crisis, to ensure that markets remain open for global recovery; and iii) the African Sectoral Initiative on Cotton, which invokes trade rules to challenge United States domestic support in the cotton sector. Yet, trade opening behavior has not been uniform and consistent. There is also the learned behavior of developing countries, illustrated in the numerical increase in the use of trade defense mechanisms with protectionist effects. For instance, between 1995 and 2009, developing countries reported 1,604 anti-dumping measures in comparison to 770 such measures by developed countries.

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The WTO accession process is one of the most powerful explanations for domestic reforms and trade liberalization in developing countries. The results of these accessions provide critical insight into reforms in about twenty-five WTO RAMs. Unfortunately, general analysis of the results of these accessions has narrowly and exclusively focused on the issue of costs divorced from the broader immediate and longer-term effects for trade performance and growth. Across specific areas of coverage of Article XII accession negotiations,¹³⁴ acceding governments have accepted commitments, backed-up by domestic legislation that have confirmed acceptance of extant GATT rules, and gone further to complement, reinforce and, in some areas, extend these rules adapted to the particular circumstance of the acceding government. These commitments have strengthened the MFN principle, concretely improved trade openness and transparency, set a clear direction for sustained market reforms and trade opening and, have not undermined the non-discrimination principle. The results and momentum generated from WTO accession-driven domestic reforms and liberalization have been clearly reflected in the better than average trade performance of RAMs in contrast to founding WTO Members, with the exception of those instances where domestic political difficulties have nullified the effect of reform and trade opening. Controlling for periods of financial and economic crises, recession, and domestic turmoil, trade data indicate that RAMs achieved significant gains in trade performance with more stable performance following their accession-related domestic reforms and trade liberalization, compared to the pre-accession reform period.¹³⁵ The analyzed trade data indicate that the international trade of all RAMs increased significantly as they started to implement their accession-related reforms, some of these pre-accession, others upon accession, and some through agreed phased transition. From 1995 to 2009, their value of merchandise trade grew at average annual rates of 13%, while trade in commercial services grew by 11%. These average annual growth rates were much faster in comparison to the growth of world merchandise trade at 7% and services at 8% in the same period. In the period between 1995 and 2008, the value of merchandise trade

134. *See supra* p. 404.

135. *See supra* pp. 417–24.

of all RAMs rose by approximately 500%, in contrast to world trade that increased by approximately 200%.

As trade liberalization and domestic reforms have proceeded apace in developing countries, some of these countries, within a diverse group, insist on differentiated treatment. There have been suggestions that special and differential treatment has undermined the principle of non-discrimination. Non-discrimination is positively associated with openness and competition and also explains, in part, the liberalizing behavior of developing countries. Policy-wise there are serious misgivings about the accumulating effects of differentiated treatment in a system of legally enforceable rules and disciplines. Systemic vigilance and monitoring is required to ensure that the value of predictable rules and disciplines are not eroded. However, legally, WTO jurisprudence demonstrates that special and differential treatment has not undermined the foundation principle of non-discrimination. The trade policy behavior of Members, including developing Members, has been significantly influenced by WTO DSU jurisprudence and systemic rules. The jurisprudence and the rules have consistently upheld the non-discrimination principle. Both the jurisprudence, on questions addressed, and Members' rules recognize that differentiation in treatment may be applied, as exceptions and without such differentiation undermining the foundation non-discrimination principle. For instance, in *European Communities—Conditions for the Granting of Preferences to Developing Countries* (EC—Tariff Preferences), the Appellate Body (AB) upheld the Panel's finding that the 1979 Enabling Clause is an exception to GATT Article I.1.¹³⁶ However, the AB also concluded that in granting differential tariff treatment, in accordance with non-discrimination, preference-granting countries are "required . . . to ensure that identical treatment is available to all similarly-situated GSP beneficiaries . . . that have the 'development, financial and trade needs' to which the treatment in question is intended to

136. Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004).

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respond.”¹³⁷ Differential treatment has also been addressed through Article IX waivers.¹³⁸

Notwithstanding the trade reform agenda of developing countries, LDCs in particular, within the developing country group, maintain demands for specific rule exemptions. Different categories of non-LDC low income countries seek differentiated rule and market access treatment and developing countries in general seek policy space and rule flexibility.

On the foundation of far-reaching reforms and strong economic performance, a group of emerging economies led by Brazil, China, and India have become locomotives for recovery and growth in the global economy. Their role is critical in coordinated efforts with the post-World War II traditional economies of the United States, the EU27, and Japan in addressing global macroeconomic balances. The cooperative negotiating engagement of these two groups of countries is indispensable in resolving the disagreements and sorting out the trading rules under the Doha Round to govern trade relations in the twenty-first century. The absence of agreement is reflected in the progress and reversals in the Doha Round over the past ten years, with effective deadlock since July 2008.¹³⁹ The relationship between developed and developing countries is captured by the situation in the Doha Round. It is a complex relationship, explained by historic shifts in the global balance of trade and economic power. Tensions, disagreements and conflicts are being played out in the Doha Round. The emerging economies are calling for a greater stake in the rules-

137. *Id.* para. 173.

138. Three examples are helpful. First, the Doha Decision on waiver for EC-ACP partnership agreement waiving EC obligation under GATT Article 1.1, with respect to the granting of preferential treatment for products originating from ACP States (waiver was until December 31, 2007). See World Trade Organization, *European Communities—the ACP-EC Partnership Agreement*, WT/MIN(01)/15 (Nov. 14, 2001). Second, the 2001 Decision on Transitional Regime for Banana imports, based on the European Communities' waiver request from its obligations under GATT Article XIII paragraphs 1 and 2. See World Trade Organization, *European Communities—Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16 (Nov. 14, 2001). Third, the Waiver for the United States African Growth and Opportunity Act which was granted on May 27, 2009 and is in effect until September 30, 2015. See *United State—African Growth and Opportunity Act*, WT/L/754 (May 29, 2009).

139. *E.g.*, Giles, Beattie & Oliver, *Leaders Warn on Doha Deadlock*, FINANCIAL TIMES, Nov. 11, 2010, <http://www.ft.com/cms/s/0/dde10ee6-edb3-11df-9612-00144feab49a.html#axzz1EnnmUBqB>.

based system, commensurate with their enhanced trade and economic standings on the foundation of ambitious reforms. The response of the developed Members is that a higher stake in an adjusted rules-based Multilateral Trading System, that provides greater accommodation to the emergent economies, entails acceptance of increased responsibility and greater leadership to support the system. For instance, the United States in responding to allegations of unrealistic Doha Round proposals countered: "What is not realistic is the notion that a few of the world's most powerful trading nations can play by a set of rules that gives them largely unfettered access to global markets—without giving appropriate reciprocity in return."¹⁴⁰ In its view, this was neither a basis for a sustainable trading system nor an appropriate outcome for the Doha Round.¹⁴¹

There is an urgency to Doha Round completion to, inter alia, address the complex and evolving relationship between the developed and developing countries. The high income emerging economies are integrated into the global economy, ascendant and growing faster than the traditional economic powers. The low and middle-income developing countries require assistance for their continued integration into the rules-based Multilateral Trading System. The value of the Doha Round has been typically assessed in terms of the value of what is on the table, with welfare estimates of between US\$43 billion and US\$300 billion.¹⁴² However, the value of the Doha Round is much more than the welfare calculations.¹⁴³ Not only are their considerable welfare gains, there are also systemic benefits. Even more, this paper has argued that there are yet more enduring gains embedded in the long-term

140. Ambassador Michael Punke, U.S. Permanent Rep. to the World Trade Org., Statement to the Trade Negotiations Committee (Nov. 30, 2010) <http://geneva.usmission.gov/2010/11/30/statement-by-ambassador-punke-to-the-trade-negotiations-committee/>.

141. *See id.*

142. *See* Gary Clyde Hufbauer, Address at the Workshop on Recent Analyses of the Doha Round (Nov. 2, 2010). *See also* Hoekman, Martin & Mattoo, *Conclude Doha: It Matters!*, 9 WORLD TRADE REVIEW 505–30 (2010).

143. *See generally* Hoekman, Martin & Mattoo, *supra* note 142, at 514 (The Doha Round offers "market access" trade facilitation and "the aid for trade initiative."); Pascal Lamy, Director-General, World Trade Org., Speech at the 10th Anniversary of the World Trade Institute: The Changing Patterns of World Trade (Oct. 1, 2010) ("What is at stake is more than the economic benefits that would flow from a successful Doha deal. The real issue is the relevance of the multilateral trading system itself.").

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management of the relationship between the traditional trading powers and the emergent economies of China, Brazil, India, and others. This relationship requires periodic adjustments through successive rounds of trade negotiations. As painful as they may be, there is a permanent rationale to trade rounds. Trade Rounds not only address specific trade and economic difficulties, but also provide a forum for necessary periodic adjustments in the ever-changing global balance in trade and economic power.

All Members and negotiating coalitions have a role to play in trade rounds. But, every negotiation requires critical, driving leadership by a core group of Members. The leadership reflects a combination of major-trader status, emergent powers, and an institutional understanding of the vital importance of multilateral institutions to manage changes in global order. In the immediate post-World War II era, this role was played by the United States. Canada, the EU, and Japan were to join in the famous, productive and successful QUAD leadership of the Multilateral Trading System in the GATT, up until just before the launch of the Uruguay Round in 1986. This world has dramatically changed. While the role of the traditional traders in the QUAD remain vital new, powerful, and ascendant economies have emerged. Brazil, China and India are pre-eminent. In August 2010, China became the second largest economy in the world,¹⁴⁴ and as of 2009 India is the fifth largest and Brazil the tenth largest. These robust and dynamic, developing economies and the traditional economies will need to work more effectively, imaginatively and cooperatively on the Doha Round.

The WTO is a permanent negotiating forum, where Members agree to the rules that regulate global trade. Its rules are enforceable. It operates a dispute settlement system that adjudicates trade differences that arise between Members. It is a global public good, providing benefits that cannot be supplied by other institutions. If this system of rules did not exist, it would have to be created. The global public advantage of the WTO was evident during the 2008–2009 global economic and financial crisis. It was widely acknowledged that protectionism

144. See David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 15, 2010, <http://www.nytimes.com/2010/08/16/business/global/16yuan.html>.

did not break out, despite the recession and high levels of unemployment, because of the restraining effect of the rules of the WTO and its monitoring oversight. Both the WTO, as an international organization, and the Doha Round, as a negotiating engagement, are vital in managing the enduring questions surrounding the relationship between traditional and emergent trading powers, a question put on the agenda in Bob Hudec's classic.