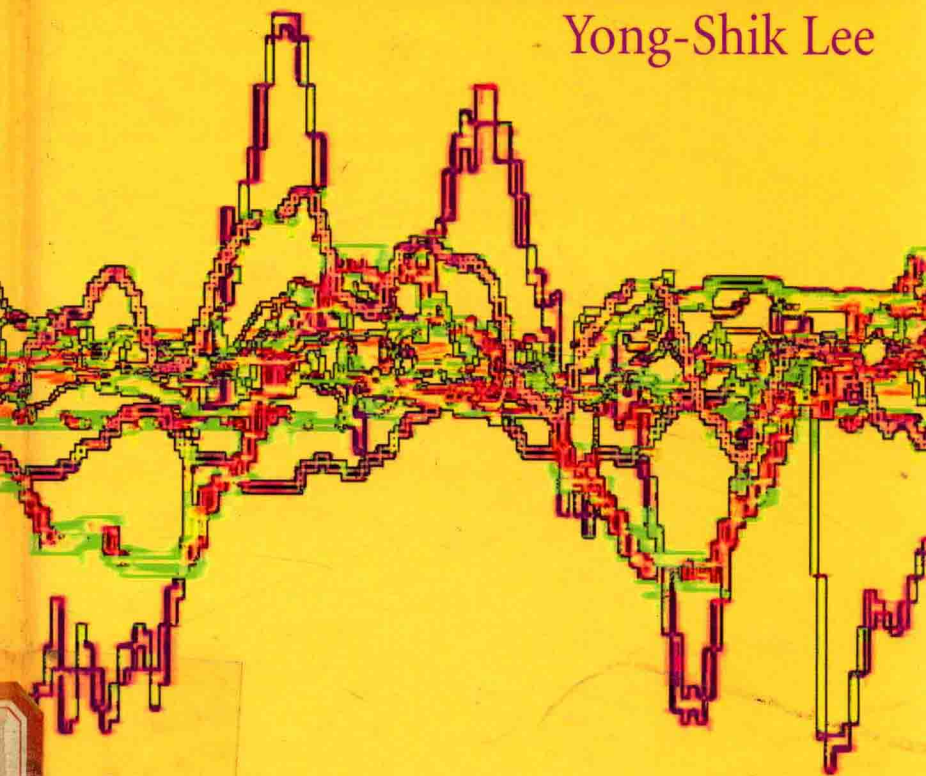


Reclaiming Development in the World Trading System

Yong-Shik Lee



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ADVANCE REVIEWS FOR *RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM*

"Y. S. Lee has written on one of the most intriguing and topical questions facing the current WTO regulatory framework: the adequacy of the existing regime to account for all asymmetries across players. The first part of his book is a diagnosis: the existing regime is ill-equipped to deal with the situation before it. One might of course ask the question, how much can an international regime do to this effect? Development after all, is a wider ballgame, trade liberalization being one of its components (and of varying importance across players). This is where the second part of the book kicks in: when drafting his recipe, the author is well aware that he should be using instruments from the realm of trade policy. He does not prejudge in any way other forms of regulatory intervention. His focus though is trade: his Development-Facilitation Tariff is a tool in this perspective, although the author underscores his awareness that the possibility of abuse should not be underestimated. In the same manner, he goes on to propose a Development-Facilitation Subsidy that would account for the relative poverty of any given country. It is true that economists have often raised a brow when reading the existing WTO Subsidies agreement, and Lee's proposals in this context will find supporters in various corners. Lee explicitly recognizes that the WTO cannot by itself (by virtue of its narrow mandate) address all development policy issues faced by developing countries. His proposals are there to, first, ensure that the current international trade regime be an obstacle to development and, second, provide the necessary flexibility for countries faced with hard choices. His book is a contribution to an ongoing discussion and will provide a welcome addition to the existing literature."

Petros C. Mavroidis

Edwin B. Parker Professor of Law at Columbia Law School, New
York

University of Neuchâtel and CEPR.

“Professor Lee’s well-written, well-researched book raises the challenging question of whether the current WTO rules might retard at least some developing countries’ further economic improvement by ‘kicking away the ladder’ – prohibiting or limiting such tools as infant industry protection, which were used by Western countries during earlier stages of their development (and are still used even without that justification!). He makes innovative recommendations, such as a Development-Facilitation Tariff, but is aware of the possibilities of abuse (for example, he suggests public hearings to ensure more transparency than is typically the case with developed country protectionism). Similarly, his Development-Facilitation Subsidy would be limited by caps based on the relative poverty of the country. Even facially neutral trade defense measures such as anti-dumping and safeguards, which are permitted by the WTO as exceptions to free trade rules, can have perverse developmental effects. Local producers in a large market, such as Europe or the United States, can use these tools to protect a home market large enough to provide a viable production base for world scale production. By contrast, flower producers in Colombia or salmon producers in Chile – both nontraditional exports from countries with a history of monoculture – can lose their key markets (which of necessity are overseas) as a result of those measures. The possibility of reversing those measures prospectively after a three-year WTO litigation process, with no repayment of legally collected duties, is illusory for a industry that would be destroyed in the meantime. Supporters of current rules in the WTO, including proponents of adding Competition Law and Investment, will have to deal with Lee’s arguments. Lee recognizes that trade rules alone are not the source of development. The challenge for developing *and* developed countries is to make sure that trade rules do not get in the way.”

Gary Horlick

Partner, Wilmer Cutler Pickering Hale and Dorr LLP

Former Deputy Secretary of Commerce, Head of U.S. Department
of Commerce Import Administration

RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM

Prevalent poverty in less-developed countries is one of the most pressing issues of our time, and economic development in these countries is necessary to bring them out of poverty. As seen in the successful development cases of East Asian countries, international trade is closely relevant to economic development, and export facilitation and effective industrial policies have been the key to the successful development. Current GATT/WTO provisions facilitating development are insufficient and some of WTO provisions prevent developing countries from adopting effective development policies. This book is the first attempt to propose a comprehensive modification of the current GATT/WTO disciplines to better facilitate development in the trading system. The book also examines the need to elevate the level of regulatory treatment of development issues by the WTO and proposes the Agreement on Development Facilitation and the Council for Trade and Development within the WTO.

Yong-Shik Lee (Y. S. Lee) is an academician, lawyer, and former government counsel. An expert in trade law, Lee has pioneered legal analysis in safeguard measures in world trade, leading to the first comprehensive treatise on this subject, *Safeguard Measure in World Trade: The Legal Analysis* (2nd ed. 2005). Currently an associate editor of the *Journal of World Trade*, he has taught international trade law, public international law, trade and development, business law, and arbitration at law schools and business schools internationally.

To the late Professor Robert Hudec, whose heart went out to the people of developing countries and whose academism sought a way to meet their interest in the international trading system.

To Park Jung Hee, the late president of Korea, revered for his economic achievement and criticized for his authoritarian rule, and to my fellow Koreans whose leadership, determination, and sacrifice saved my mother country from poverty and paved a way to today's prosperity.

Imagine all the people
Living life in peace . . .
No need for greed or hunger

From John Lennon (1940–1980), “**Imagine**”

List of Abbreviations

AD	Anti-dumping
ADF	Agreement on Development Facilitation
ADP Agreement	The Anti-dumping Practices Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)
AFTA	ASEAN (Association of Southeast Asian Nations) Free Trade Area
AMS	Aggregate Measurement of Support (in Agreement on Agriculture)
APEC	Asia-Pacific Economic Cooperation
ATC	Agreement on Textiles and Clothing
B.I.S.D.	Basic Instruments and Selected Documents (published by GATT)
BIT	Bilateral Investment Treaty
BOP	Balance-of-Payment
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CVD	Countervailing Duty
DDA	Doha Development Agenda
DFS	Development-Facilitation Subsidy
DFT	Development-Facilitation Tariff

DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBA Initiative	"Everything But Arms" Initiative (an initiative of the European Union providing preferential treatment to the trade of least-developed countries)
ESG	Emergency Safeguard Measure
EU	European Union
FTA	Free Trade Agreement
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNI	Gross National Income
GNP	Gross National Product
GSP	Generalized System of Preferences
ILO	International Labour Organisation
IMF	International Monetary Fund
IPR	Intellectual Property Right
ITO	International Trade Organization
LDC	Least-Developed Country
MAI	Multilateral Agreement on Investment
MERCOSUR	Mercado Comun der Sur (the Southern Common Market in Latin America)
Member	Member of the World Trade Organization
MFA	The Multifiber Arrangement
MFN Treatment	Most-Favored-Nation Treatment
NAFTA	North America Free Trade Agreement
NICs	Newly Industrializing Countries
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
R&D	Research and Development
RTA	Regional Trade Agreement

SA	Agreement on Safeguards
SCM Agreement	Agreement on Subsidies and Countervailing Measures
S&D Treatment	Special and Differential Treatment
SSG	Special Safeguard (in Agreement on Agriculture)
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UBOP	Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994
U.N.	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNIDO	United Nations Industrial Development Organisation
UR	Uruguay Round
U.S.	United States
USD	U.S. Dollar
WIPO	World Intellectual Property Organization
World Bank	International Bank for Reconstruction and Development
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

Acknowledgments

As I wrote this book, I was inspired by the work of Dr. Ha-Joon Chang, Cambridge economist and author of *Kicking Away the Ladder* (2002). This historical analysis of economic development has convinced me that there are substantial inconsistencies between the provisions of the current regulatory framework for international trade and the development needs of developing countries. This conviction has motivated me to write this book in an effort to identify those inconsistencies and propose alternative provisions that would allow developing countries to adopt effective development policies.

I am indebted to many excellent scholars and professionals for invaluable advice and guidance: Dr. Ha-Joon Chang, assistant director of Development Studies at the University of Cambridge; Don Wallace, professor of law at Georgetown University Law Center and president of the International Law Institute; Gary Horlick, former deputy secretary of commerce; Don Mayer, professor of management at Oakland University School of Business Administration and the editor-in-chief of the *International Business Law Review*; Petros Mavroidis, professor of law at Columbia University and associate editor of the *Journal of World Trade*; Mitsuo Matsushita, professor emeritus of law at the University of Tokyo and former member of the World Trade Organization Appellate Body; Jai S. Mah, professor of economics at Dankook University; and Junji Nakagawa,

professor of international economic law at the University of Tokyo Institute of Social Science and associate editor of the *Journal of World Trade*.

I also thank the late Professor Robert E. Hudec for his insightful work on trade and development that has given immeasurable benefit to so many scholars, including me. Unfortunately, I did not have a chance to meet him. Professor Hudec taught at the University of Minnesota, but when I began to teach at a law school in the Minneapolis/St. Paul area, he had already passed away. Nonetheless, because of his great intellect and generosity toward others, he has become a great example to follow, even after his premature death. This book is in tribute to Professor Hudec.

I express my gratitude to Professor Dani Rodrik of Harvard University for kindly sending me his excellent paper on industrial policy, which is cited extensively in this book. I am also thankful to Cambridge University Press and its staff for their efforts in bringing this book to the light of the day. I would like to thank all other individuals who could not be listed in this limited space but whose kind assistance has been nevertheless essential for completing this book. I remember them in my heart with much gratitude.

Contents

List of Abbreviations page xi

Acknowledgments xv

1 Poverty, Economic Development, and International Trade 1

1.1 The Question of Poverty 1

1.2 International Trade and Development 6

1.3 Kicking Away the Ladder? 9

**2 Current Regulatory Framework for International Trade:
The WTO System 14**

2.1 Introduction 14

2.2 Facilitation of Development in WTO Provisions 25

2.3 Need for Changes 39

3 Reclaiming Development: Tariff Bindings and Subsidies 49

3.1 Two Principal Components of Industrial Promotion
Policies 49

3.2 Tariff Bindings 62

3.3 Subsidies 74

4	Anti-Dumping and Safeguards	82
4.1	Administered Protection	82
4.2	Anti-Dumping	87
4.3	Safeguards	96
5	“Expansion” of Trade Disciplines and Development	107
5.1	Agriculture and Textile	107
5.2	Trade-Related Investment Measures	114
5.3	Trade-Related Aspects of Intellectual Property Rights	123
5.4	Trade in Services	132
6	Foreign Direct Investment and Regional Trade Liberalization	141
6.1	Regionalism in International Trade and Investment	141
6.2	Proliferation of Foreign Direct Investment and Free Trade Areas	145
6.3	Foreign Direct Investment and Free Trade: The Answer for Economic Development?	151
7	Conclusion: Putting Back the Ladder	156
	Epilogue	166
	<i>Bibliography</i>	169
	<i>Index</i>	177

ONE

Poverty, Economic Development, and International Trade

1.1 The Question of Poverty¹

In today's world of unprecedented technological and economic advances, the majority of the world population has not been able to share in this prosperity.² Persistent poverty still remains in many parts of the world, and this human tragedy is one of the most pressing problems in our

¹ Most of us understand what poverty means and no elaborate definition would seem necessary. The World Bank describes the nature of poverty as the following: "Poverty is hunger. Poverty is lack of shelter. Poverty is being sick and not being able to see a doctor. Poverty is not being able to go to school and not knowing how to read. Poverty is not having a job, is fear for the future, living one day at a time. Poverty is losing a child to illness brought about by unclean water. Poverty is powerlessness, lack of representation and freedom." <http://www.worldbank.org//poverty>. The World Bank also uses the reference lines set at one dollar and two dollars per day in 1993 Purchasing Power Parity (PPP) terms as "poverty lines." *Id.*

Although poverty does exist among the population of developed countries, this book focuses on the need to improve the general economic conditions of developing countries where a larger portion of population suffers from poverty.

² In 2000, the United Nations estimated that more than half the world's 6 billion people live under substantial deprivation, surviving on incomes equivalent to two dollars or less per day. Only 20 percent of the world population living in the highest-income countries accounts for 86 percent of the world's GDP. <http://www.un.org/events/poverty2000/backpp.htm>.

time. Nevertheless, despite some efforts by international organizations,³ poverty does not seem to receive priority consideration from leading nations that could provide key political and economic support toward resolving this problem.⁴ Consider this issue from another perspective: not only is the relief of persistent poverty our moral obligation⁵ but it is also consistent with our long-term security interest because societies with adequate economic resources are less likely to foster violence and terrorism that has torn our world apart throughout history.⁶

How can this problem of poverty be resolved? Poor countries cannot indefinitely depend on donations from outside, even if such donations

³ In 2000, the United Nations set the Millennium Development Goals with several development objectives. <<http://www.un.org/millenniumgoals>>. The 2004 report on the implementation of the U.N. Millennium Declaration emphasized the responsibility of developed countries, as well as that of developing countries, to meet the development goals, stating that developed countries must fulfill their responsibilities "by increasing and improving development assistance, concluding a new development-oriented trade round, embracing wider and deeper debt relief and fostering technology transfer." U.N. doc. A/59/282 (Aug. 27, 2004), para. 43.

⁴ Although the assistance of developed countries alone may never resolve poverty issues in developing countries without developing countries' significant effort to achieve economic development themselves, developed countries can nevertheless provide essential support by, among other things, helping to create a development-friendly international environment, such as a trading system that facilitates the economic development of developing countries.

⁵ For a discussion of the moral grounds to help the poor, see Peter Singer, "Famine, Affluence, and Morality," (1972) 1 *Philosophy & Public Affairs* 229–243.

⁶ Although considerable resources have been put forth to "fight" terrorism, relatively little effort and attention has been given to addressing its economic and social causes. Some may argue that the primary causes of worldwide terrorism are religious conflicts and political struggles, rather than economic problems. Nonetheless, economic difficulties and instabilities remain an important cause of this problem: poverty is commonplace in countries viewed as bases for terrorist activities. For instance, Afghanistan, which was accused of providing home for Al Qaeda, and Palestine, which has been the base for terrorist attacks against Israelis, are also characterized by poverty. History has shown that economic problems often lead to violence and war. In the 1930s, serious economic problems in Germany were a primary cause of the fall of the democratic regime and the subsequent rise of Adolf Hitler's Nazi party and the beginning of the Second World War. For the economic causes of the Second World War, see Andrew J. Crozier, *The Causes of the Second World War* (Blackwell Publishers, Oxford, 1997).