INTERNATIONAL TRADE LAW: A Comprehensive E-Textbook

6th Edition, 2025 (Eight Volumes)

VOLUME EIGHT: GROWTH, DEVELOPMENT, AND POVERTY

Raj Bhala

Brenneisen Distinguished Professor
The University of Kansas, School of Law
Lawrence, Kansas, U.S.A.

Member
Council on Foreign Relations (New York)
Royal Society for International Affairs (London)
Indian Society of International Law (Delhi)

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There are seven sins in the world: Wealth without work, Pleasure without conscience, Knowledge without character, Commerce without morality, Science without humanity, Worship without sacrifice, and Politics without principle.

*Mahatma Gandhi (1869-1948)*
Dedication

For Shera and Her Generation,
That They Are Not Scourged by Poverty, Extremism, or a Clash of Civilizations,
But Rather Blessed by Peace through Sustainable Trade and Development.

And for the Glory of God.
About the Author

Born in Toronto, Rakesh (Raj) Kumar Bhala is a dual Canadian-U.S. citizen. He is the inaugural Leo. S. Brenneisen Distinguished Professor (2017-present) at the University of Kansas School of Law (KU Law), before which he was the Rice Distinguished Professor (2003-2017). Both are university-level chairs. He served as KU Law’s Associate Dean for International and Comparative Law (2011-2017). Raj teaches International Trade Law, Advanced International Trade Law, Law and Literature, and Islamic Law. Ingram’s Business Magazine designated him as one of “50 Kansans You Should Know” (https://ingrams.com/article/50-kansas-you-should-know-the-class-of-2020/).

Before joining KU Law, Raj was the Patricia Roberts Harris Research Professor at The George Washington University School of Law (1998-2003). He began his teaching career at William & Mary Marshall-Wythe School of Law (1993-1998), where he was voted tenure and full professorship. At both, he headed the International Law programs.

Raj has been a Visiting Professor at Duke, Michigan, La Trobe University (Melbourne), Tel Aviv University, University of Auckland (where he was the 2017 New Zealand Legal Research Foundation Visitor), Washington University in Saint Louis, and World Trade Institute (Berne). He has guest lectured around the world, including across India, and held fellowships at the Bank of Japan and University of Hong Kong. An International Bar Association (IBA) member since 1995, Raj has served in officer positions on the Academic and Professional Development and Customs and International Trade Law Committees.

Raj practiced at the Federal Reserve Bank of New York (1989-1993), where he twice won the President’s Award for Excellence thanks to his service as a delegate to the United Nations Conference on International Trade Law (UNCITRAL), along with a Letter of Commendation from the U.S. Department of State. He was Senior Advisor to Dentons U.S. LLP (2017-2023), the world’s largest law firm, focusing on International Trade Law. He is a member of the State Department’s Speaker Program.

Raj is a Harvard Law School graduate (1989, Cum Laude), where he wrote his first book – Perspectives on Risk-Based Capital (1989) – as a third-year J.D. student. As a Marshall Scholar (1984-1986), Raj earned two Master’s degrees, from the London School of Economics (LSE, 1985) in Economics, and from Oxford (Trinity College, 1986) in Management (Industrial Relations). His undergraduate degree is from Duke (1980-1984, Summa Cum Laude, Phi Beta Kappa), where he was an Angier B. Duke Scholar and double-majored in Economics and Sociology. At Harvard and Duke, he served as a Research Assistant (RA), respectively, in International Financial Law to Nomura Professor

Raj is author of 100 scholarly articles published in law journals world-wide, including three trilogies: on *stare decisis* in International Trade Law; the failed Doha Round of multilateral trade negotiations; and India’s trade law and policy. He has written 13 books. They include *International Trade Law: A Comprehensive Textbook* (5th edition, 2019, 4 volumes) [www.dropbox.com/s/78sagrm4g30k4g/R%20Bhala%20Book%20Launch.mp4?dl=0](www.dropbox.com/s/78sagrm4g30k4g/R%20Bhala%20Book%20Launch.mp4?dl=0), which is one of the world’s leading references and has been used at over 100 law schools world-wide, plus the first treatise on GATT in nearly 50 years, *Modern GATT Law* (2nd edition, 2013, 2 volumes). His monographs, *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation* (2024), and *TPP Objectively: Legal, Economic, and National Security Dimensions of CPTPP* (2nd edition, 2019), were the first interdisciplinary analyses of their subjects by a legal scholar. *Trade, Development, and Social Justice* (2003) was a rare application of Catholic Social Justice Theory to GATT. Raj is the first non-Muslim American scholar to write a textbook on Islamic Law, *Understanding Islamic Law (Sharī’a)* (3rd edition, 2023). That textbook, too, has been widely used, including for 10 years (2010-2019) in his course for U.S. Special Operations Forces at the Command and General Staff College, Fort Leavenworth, Kansas.

Raj’s current project is a new book, *Principles of Law, Literature, and Rhetoric: A Shakespearean Approach*. Covering legal interpretative methodologies as well as legal themes in classic works, in both a theoretical and practical sense, this work aims to help organize the subject for use in teaching and research.


Raj has served on the Executive Board of Directors of the Carriage Club of Kansas City, including as its Treasurer. He also been on the Alumni Association Board of the University School of Milwaukee (USM), his high school alma mater (Class of 1980). He is grateful to his USM teachers for a liberal arts education that made all good things possible. Raj loves fitness training, has finished 115 marathons, including the “Big Five” of the “World’s Majors” (Boston twice, New York twice, Chicago twice, Berlin, and London). He enjoys studying Shakespeare and (especially since becoming Catholic at Easter Vigil 2001) Theology – and watching baseball.
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Preface

Dating to 1993, this *E-Textbook* is based on 32 years of research and teaching around the world. So, it aims to provide students, scholars, and practitioners around the world with a world-class reference – for free. All eight Volumes of the *E-Textbook* are available Open Access.

These Volumes may be used as a set, in sequence, as I do in my *International Trade Law* and *Advanced International Trade Law* courses, covering Volumes 1-4 and 5-8, respectively. Or, one of them may be assigned as a stand-alone Volume for a specialty course or seminar, such as Volume Four for a class on *Trade and National Security*, Volume Seven for a class on FTAs, or Volume Eight for a class on *Trade and Development*. Or, any one or more of them may be used for research papers, articles, and books on subjects that implicate multiple Volumes. The only constraint on how the *E-Textbook* is read is the imagination of the reader. As trade negotiators sometimes say, the “geometry is variable.”


The prior Editions, whether print or electronic, became ever-more expensive. Since its 1st Edition, and particularly since its 5th Edition, printing costs increased dramatically. Publishers went out of business or were merged into other publishers. (Sadly, many of my editors, who were my friends, lost their jobs.) Contemporaneously, in a world of curt social media communications, patience for thick books decreased. As the endurance of attention spans diminished, bottom-line answers mattered more than cognitive reasoning processes. Authors were pressured to jam more material into less space, and convey all of it faster.

These trends – adversely affecting both the supply and demand curves for lengthy, conventionally published, law school teaching materials – increasingly impeded access to the previous Editions. That was especially true for students of modest means in America and across the world. The cost of those materials became a non-*de minimis* element in calculating student indebtedness to earn a law degree. Some students could not afford to take my *International Trade Law* and *Advanced International Trade Law* courses. Others cobbled together resources, borrowed or shared the book, or made do with old editions. All the while, good teachers, seeking to be good shepherds, cared about serving their students with instructional materials exceed their teachers.

Thanks to the University of Kansas, School of Law, Wheat Law Library, and its Director, Professor Chris Steadham and Team, the problem of rising supply costs is solved. All eight Volumes of this 6th Edition are published by the Library. Thanks also to Marianne Reed, Digital Publishing and Repository Manager, KU Libraries. Because of her, they may be downloaded from KU ScholarWorks quickly and easily at zero cost. No student, teacher, scholar, or practitioner is left behind for want of eight PDF files.
Likewise, all relevant primary and secondary source documents are freely available on the Library’s International Trade Law Research & Study Guide Web page (https://guides.law.ku.edu/intltrade). Not one dollar or dirham, riyal or rupee need be spent on paying for a Documents Supplement.

As for demand, no background in the subject matter is presumed. What is required is intellectual curiosity about the subject, an open-hearted willingness to fall ever-more in love with it – and, yes, patience. Learning the subject pays off handsomely, both in professional and personal returns. What also is needed is an appreciation for the reality that the boundaries of the subject continue to widen, its theory and practice continue to deepen. There is a canon, a common core that is the language for a common dialogue. Yet, this canon evolves.

Accordingly, the 1996 single-volume 1st Edition of this work was 1,450 pages. The work has grown with the 30 years’ worth of developments in the field, avoiding trade-offs that disrespect its controversies and grandeur. The eight Volumes of this 6th Edition span approximately 6,666 pages. The Volumes are organized thematically into 188 Chapters, thus averaging 36 pages per Chapter. A cursory nutshell (summarizing assorted topics), or a slender work on one aspect of the field (e.g., the WTO), have their place. But they can take a reader only so far. This E-Textbook embraces a different challenge: take all readers further.

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1 Volume One (Interdisciplinary Foundations), 753 pages, 25 Chapters; Volume Two (Fundamental Multilateral Obligations), 885 pages, 28 Chapters; Volume Three (Customs Law), 440 pages, 16 Chapters; Volume Four (National Security), 1,089 pages, 25 Chapters; Volume Five (Remedies), 1,085 pages, 33 Chapters; Volume Six (Special Sectors), 628 pages, 16 Chapters; Volume Seven (Free Trade Agreements, Labor, and Environment), 1,196 pages, 30 Chapters; and Volume Eight (Growth, Development, and Poverty), 590 pages, 15 Chapters.

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Acknowledgments

A publication of this breadth and depth results from many skilled minds. I am blessed by such minds around me that not only contribute to a better product than possibly could be achieved alone, but also make the research and writing process every bit as fun as quiet contemplation (an equally indispensable activity).

Each Volume of this E-Textbook is “Made in the Midwest.” That origination is thanks in part to my Research Assistants (RAs). They came from near and far to the University of Kansas School of Law (KU Law) for their Juris Doctor (J.D.) degree, plus earned a Certificate in International Trade in Finance. I asked these talented, cosmopolitan RAs to treat me not as a Professor, but a colleague, and take a “hard look” at the drafts. They worked diligently on hundreds of draft pages. I am grateful for their contributions and personal sacrifices.

Listed alphabetically, my KU Law School RAs on this and previous editions of this work are:

- Jacob C. Barefield, J.D. Class of 2023
- Bridget Beran, J.D. Class of 2023
- Matthew Walter Cooper, J.D. Class of 2015
- Owen Andrew Grieb, J.D. Class of 2007
- Katie Charlotte Hahn, J.D. Class of 2023
- Madeline Renee Heeren, J.D. Class of 2015
- David Roy Jackson, J.D. Class of 2007
- Lauren E. Johannes, J.D. Class of 2019
- Shannon B. Keating, J.D. Class of 2013
- Viet Q. Le, J.D. Class of 2019
- Heidi Minnihan, J.D. Class of 2014, M.B.A. Class of 2014
- Corrine (Cori) Moffett, J.D. Class of 2021
- Quan M. Nguyen, J.D. Class of 2025
- Aqmar Rahman, J.D. Class of 2015
- Michael Robert Rebein, J.D. Class of 2025
- Sarah Schmidt, J.D. Class of 2013, M.A. Economics Class of 2013
- Bruno Germain Simões, J.D. Class of 2013
- Devin S. Sikes, J.D. Class of 2008
- Dan Spencer IV, J.D. Class of 2006
- Brien C. Stonebreaker, J.D., M.P.H. Class of 2024
- Kaitlyn E. Taylor, J.D. Class of 2025
- Chalinee Tinaves, J.D. Class of 2014
- Spencer Toubia, J.D. Class of 2015
- Eric Witmer, J.D. Class of 2016
- Cody N. Wood, J.D. Class of 2017

It is a joy to see each one of them flourish, professionally and personally, in their extraordinary endeavors across the world.
Hearty thanks also go to Professor Chris Steadham, Director, Wheat Law Library, University of Kansas, School of Law. In every respect, at every step, Chris and his Team – which includes W. Blake Wilson, Assistant Director for Instructional and Faculty Services, and Pamela Crawford, Assistant Director for Public & Technical Services (Emerita) – have been efficient, supportive, and responsive. They consistently worked hard to produce, promote, and distribute a product for teaching and research useful around the globe. They are fun professionals with whom to collaborate. Ditto for Marianne Reed, Digital Publishing and Repository Manager, KU Libraries.

This publication is the blessing of a splendid family. The family improves its quality. Actually, it is product of an extended family. There is my immediate family: my smart and lovely wife and best friend, Kara; and our poised daughter, Shera, our little gift who has matured beyond our best dreams into a smiling Dartmouth graduate and Fulbright Scholar with a big heart, world class intellect and très chic sense of fashion. And, there is my Research Assistant family (above). Thank you all.

I also gratefully acknowledge the law firms of Crowell & Moring LLP, Washington, D.C., and Miller & Company, P.C., Kansas City, Missouri. Their monthly client alerts on International Trade Law are superb. In addition to quoting and citing renowned media sources (especially Bloomberg, Financial Times, Nikkei Asia, Reuters, and The New York Times), I have relied on these alerts for valuable explanations and insights on key developments (especially concerning customs classification, AD-CVD, and safeguard cases, and export controls and trade sanctions).


Still more scrutiny was applied to this 6th Edition to ensure all Eight Volumes of the International Trade Law E-Textbook are as universally user-friendly as possible. Toward this goal, I exercised editorial judgment, though in a light-handed manner that in no way impinged on the meaning of any quoted or excerpted materials. Specifically, I: (1) standardized spelling according to American (not British) English; (2) used international dating (day-month-year); (3) occasionally made minor stylistic (but not substantive) changes (e.g., converting bullet points to numbers, adding an Oxford comma, simplifying ellipses, fonts, and indents, and normalizing “emphasis original” and “emphasis added” notations); and (4) providing full citations (thus avoiding the tyranny of the Blue Book).

For over three decades, dating to my research and teaching in 1993, this work has been a joyful passion shaping my career, and more importantly, serving readers globally. No further Editions are anticipated. Any significant updates may be offered through a Supplement and/or posted materials, to which the same editorial standards would apply.
## Table of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AANZFTA</td>
<td>ASEAN-Australia-New Zealand Free Trade Agreement</td>
</tr>
<tr>
<td>AB</td>
<td>WTO Appellate Body</td>
</tr>
<tr>
<td>AB InBev</td>
<td>Anheuser-Busch InBev SA/NV</td>
</tr>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
</tr>
<tr>
<td>ABI</td>
<td>Automated Broker Interface</td>
</tr>
<tr>
<td>ACA</td>
<td><em>America Competes Act of 2022,</em> i.e., <em>America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022,</em> sometimes abbreviated as <em>COMPETES Act</em> (House of Representatives bill)</td>
</tr>
<tr>
<td>ACDB</td>
<td>WTO Accession Commitments Data Base</td>
</tr>
<tr>
<td>ACFTA (AfCFTA)</td>
<td><em>African Continental Free Trade Area</em> (entered into force 30 May 2019, operational 7 July 2019, with staged implementation on 1 January 2021 and concluding with full implementation by 2030)</td>
</tr>
<tr>
<td>ACFTU</td>
<td>All China Federation of Trade Unions</td>
</tr>
<tr>
<td>ACI</td>
<td>Anti-Coercion Instrument (EU)</td>
</tr>
<tr>
<td>ACP</td>
<td>African, Caribbean, and Pacific</td>
</tr>
<tr>
<td>ACS</td>
<td>Automated Commercial System</td>
</tr>
<tr>
<td>ACTRAV</td>
<td>Bureau for Workers’ Activities (ILO)</td>
</tr>
<tr>
<td>ACWL</td>
<td>Advisory Center on WTO Law</td>
</tr>
<tr>
<td>AD</td>
<td>Antidumping</td>
</tr>
<tr>
<td>AD Agreement</td>
<td><em>WTO Antidumping Agreement</em> <em>(Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)</em></td>
</tr>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
</tr>
<tr>
<td>Additional Protocol</td>
<td><em>Model Additional Protocol</em> (associated with NPT, CSA)</td>
</tr>
<tr>
<td>ADP</td>
<td>Automatic data processing</td>
</tr>
<tr>
<td>ADR</td>
<td>American Depositary Receipt</td>
</tr>
<tr>
<td>ADVANCE Democracy Act</td>
<td><em>2007 Advance Democratic Values, Address Non-democratic Countries and Enhance Democracy Act</em></td>
</tr>
<tr>
<td>AECA</td>
<td><em>Arms Export Control Act of 1976</em></td>
</tr>
<tr>
<td>AEO</td>
<td>Authorized Economic Operator</td>
</tr>
<tr>
<td>AEOI</td>
<td>Atomic Energy Organization of Iran</td>
</tr>
<tr>
<td>AES</td>
<td>Automated Export System</td>
</tr>
<tr>
<td>AFA</td>
<td>Adverse Facts Available</td>
</tr>
<tr>
<td>AfCFTA</td>
<td><em>African Continental Free Trade Area</em></td>
</tr>
<tr>
<td>(ACFTA)</td>
<td>African Development Bank</td>
</tr>
<tr>
<td>------------------</td>
<td>----------------------------------------------------------------</td>
</tr>
<tr>
<td>AfDB</td>
<td>Administración Federal de Ingresos Públicos</td>
</tr>
<tr>
<td>AFIP</td>
<td>(Argentina, Federal Public Revenue Administration)</td>
</tr>
<tr>
<td>AFL-CIO</td>
<td>American Federation of Labor-Congress of Industrial Organizations</td>
</tr>
<tr>
<td>AFP</td>
<td>Agence France-Presse</td>
</tr>
<tr>
<td>AFR</td>
<td>Application for Further Review</td>
</tr>
<tr>
<td>(U.S. CBP)</td>
<td></td>
</tr>
<tr>
<td>AFTA</td>
<td>ASEAN Free Trade Area</td>
</tr>
<tr>
<td>AG</td>
<td>Aktiengesellschaft</td>
</tr>
<tr>
<td>(1st meaning)</td>
<td>(company incorporated in Austria, Germany, or Switzerland,</td>
</tr>
<tr>
<td></td>
<td>limited by share ownership, the shares of which are tradeable</td>
</tr>
<tr>
<td></td>
<td>on a stock market)</td>
</tr>
<tr>
<td>(2nd meaning)</td>
<td>Agriculture</td>
</tr>
<tr>
<td>AI</td>
<td>Artificial Intelligence</td>
</tr>
<tr>
<td>(1st meaning)</td>
<td></td>
</tr>
<tr>
<td>AI</td>
<td>Avian Influenza</td>
</tr>
<tr>
<td>(2nd meaning)</td>
<td></td>
</tr>
<tr>
<td>AID</td>
<td>U.S. Agency for International Development</td>
</tr>
<tr>
<td>AIG</td>
<td>American Insurance Group</td>
</tr>
<tr>
<td>AIIS</td>
<td>American Institute for International Steel</td>
</tr>
<tr>
<td>AIKSCC</td>
<td>All India Kisan Sangharsh Coordination Committee</td>
</tr>
<tr>
<td>AIM</td>
<td>Aluminum Import Monitoring system</td>
</tr>
<tr>
<td>(U.S. DOC)</td>
<td></td>
</tr>
<tr>
<td>AIO</td>
<td>Aerospace Industries Organization</td>
</tr>
<tr>
<td>(Iran)</td>
<td></td>
</tr>
<tr>
<td>AIOC</td>
<td>Anglo Iranian Oil Company</td>
</tr>
<tr>
<td>AIPAC</td>
<td>American Israel Public Affairs Committee</td>
</tr>
<tr>
<td>AIS</td>
<td>Automatic Identification System</td>
</tr>
<tr>
<td>(ship location transponder)</td>
<td></td>
</tr>
<tr>
<td>AIT</td>
<td>American Institute in Taiwan</td>
</tr>
<tr>
<td>ALADI</td>
<td>Latin American Integration Association</td>
</tr>
<tr>
<td>(Spanish acronym)</td>
<td></td>
</tr>
<tr>
<td>ALBA</td>
<td>Bolivarian Alliance for the Peoples of our America</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Definition</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>ALD</td>
<td>atomic layer deposition (production tools)</td>
</tr>
<tr>
<td>ALJ</td>
<td>Administrative Law Judge</td>
</tr>
<tr>
<td>ALOP</td>
<td>Appropriate Level Of Protection</td>
</tr>
<tr>
<td>ALT</td>
<td>Alternate (alternate proposed text)</td>
</tr>
<tr>
<td>AMA</td>
<td>American Medical Association</td>
</tr>
<tr>
<td>AmCham</td>
<td>American Chamber of Commerce</td>
</tr>
<tr>
<td>AMEC</td>
<td>Advanced Micro-Fabrication Equipment Inc. (China)</td>
</tr>
<tr>
<td>AMI Credit</td>
<td>Advanced Manufacturing Investment Credit (U.S. 2022 CHIPS Act)</td>
</tr>
<tr>
<td>AMIS</td>
<td>Agricultural Market Information System</td>
</tr>
<tr>
<td>AMPS</td>
<td>Acrylamido tertiary butyl sulfonic acid</td>
</tr>
<tr>
<td>AMS (1st meaning)</td>
<td>Aggregate Measure of Support</td>
</tr>
<tr>
<td>AMS (2nd meaning)</td>
<td>Agriculture Marketing Services (USDA)</td>
</tr>
<tr>
<td>ANAD</td>
<td>National Association of Democratic Lawyers (Mexico)</td>
</tr>
<tr>
<td>ANZCERTA</td>
<td>Australia-New Zealand Closer Economic Relations Trade Agreement (CER)</td>
</tr>
<tr>
<td>ANZUS</td>
<td>1951 <em>Australia, New Zealand, United States Security Treaty</em></td>
</tr>
<tr>
<td>ANZUS Treaty</td>
<td><em>ANZUS Treaty</em></td>
</tr>
<tr>
<td>AoA</td>
<td>WTO Agreement on Agriculture</td>
</tr>
<tr>
<td>AOG</td>
<td>All Other Goods</td>
</tr>
<tr>
<td>AOR</td>
<td>All Others Rate</td>
</tr>
<tr>
<td>APA</td>
<td>1946 <em>Administrative Procedure Act</em> (U.S.)</td>
</tr>
<tr>
<td>APEC</td>
<td>Asia Pacific Economic Cooperation (forum)</td>
</tr>
<tr>
<td>APEP</td>
<td>Assistant to the President for Economic Policy (U.S.)</td>
</tr>
<tr>
<td>API</td>
<td>active pharmaceutical ingredient</td>
</tr>
<tr>
<td>APMC</td>
<td>Agricultural Produce Marketing Committee (India)</td>
</tr>
<tr>
<td>APNSA</td>
<td>Assistant to the President for National Security Affairs (U.S.)</td>
</tr>
<tr>
<td>APOC</td>
<td>Anglo Persian Oil Company</td>
</tr>
<tr>
<td>APTA</td>
<td>Asia-Pacific Trade Agreement</td>
</tr>
<tr>
<td>APV</td>
<td>Annual Purchase Value</td>
</tr>
<tr>
<td>AR</td>
<td>Administrative Review</td>
</tr>
<tr>
<td>ARI</td>
<td>Additional (United States) Rules of Interpretation</td>
</tr>
<tr>
<td><strong>ARP Act of 2000</strong></td>
<td><em>2000 Agricultural Risk Protection Act</em></td>
</tr>
<tr>
<td>---------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td><strong>ARRA</strong></td>
<td><em>2009 American Recovery and Reinvestment Act</em></td>
</tr>
<tr>
<td><strong>ARS</strong></td>
<td>Advance Ruling System</td>
</tr>
<tr>
<td><strong>ASA</strong> <em>(1st meaning)</em></td>
<td>American Securities Association</td>
</tr>
<tr>
<td><strong>ASA</strong> <em>(2nd meaning)</em></td>
<td>American Sugar Alliance</td>
</tr>
<tr>
<td><strong>ASCM</strong></td>
<td><em>WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)</em></td>
</tr>
<tr>
<td><strong>ASEAN</strong></td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td><strong>ASL</strong> <em>(AFSL)</em></td>
<td>Anti-Foreign Sanctions Law (June 2021 PRC Law blocking compliance with sanctions against China)</td>
</tr>
<tr>
<td><strong>ASM</strong></td>
<td>artisanal small mine</td>
</tr>
<tr>
<td><strong>ASML</strong> <em>(ASML Holding N.V.)</em></td>
<td>Advanced Semiconductor Materials Lithography (Netherlands)</td>
</tr>
<tr>
<td><strong>ASP</strong></td>
<td>American Selling Price</td>
</tr>
<tr>
<td><strong>ASPI</strong></td>
<td>Australian Strategic Policy Institute</td>
</tr>
<tr>
<td><strong>ATAP</strong></td>
<td>1996 Agreement Concerning Certain Aspects of Trade in Agricultural Products (1985 U.S.-Israel FTA)</td>
</tr>
<tr>
<td><strong>ATC</strong></td>
<td><em>WTO Agreement on Textiles and Clothing</em></td>
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<tr>
<td><strong>ATISA</strong></td>
<td>ASEAN Trade In Services Agreement</td>
</tr>
<tr>
<td><strong>ATPA</strong></td>
<td>1991 Andean Trade Preferences Act</td>
</tr>
<tr>
<td><strong>ATPDEA</strong></td>
<td>2002 Andean Trade Promotion and Drug Eradication Act</td>
</tr>
<tr>
<td><strong>ATT</strong></td>
<td>2014 U.N. Arms Trade Treaty</td>
</tr>
<tr>
<td><strong>AUS$</strong></td>
<td>Australian Dollar</td>
</tr>
<tr>
<td><strong>AUD</strong></td>
<td>Australian Dollar</td>
</tr>
<tr>
<td><strong>AUKUS</strong></td>
<td>September 2021 Australia – United Kingdom – United States Security Partnership (Trilateral Security Agreement concerning nuclear submarines and their deployment in Indo-Pacific region)</td>
</tr>
<tr>
<td><strong>AUMF</strong> <em>(Iraq Resolution)</em></td>
<td>2001 Authorization for Use of Military Force (Iraq Resolution)</td>
</tr>
<tr>
<td><strong>AUMF</strong> <em>(2nd meaning)</em></td>
<td>2002 Authorization for Use of Military Force Against Iraq Resolution</td>
</tr>
<tr>
<td><strong>Automotive Appendix</strong></td>
<td>Appendix, Provisions Related to the Product-Specific Rules of Origin for Automotive Goods, to Annex 4-B of USMCA Chapter 4</td>
</tr>
<tr>
<td><strong>AUV</strong></td>
<td>Average Unit Value</td>
</tr>
<tr>
<td><strong>AV</strong></td>
<td>Audio-Visual</td>
</tr>
<tr>
<td><strong>AVE</strong></td>
<td>Ad Valorem Equivalent</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
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</tr>
<tr>
<td>AVIC</td>
<td>Aviation Industry Corporation of China</td>
</tr>
<tr>
<td>B&amp;H</td>
<td>Brokerage and handling (costs)</td>
</tr>
<tr>
<td>B&amp;O</td>
<td>Washington State Business and Occupation Tax Rate Reduction</td>
</tr>
<tr>
<td>BA</td>
<td>Bankers Acceptance</td>
</tr>
<tr>
<td>BAE</td>
<td>British Aerospace Systems Plc</td>
</tr>
<tr>
<td>BAMS-D</td>
<td>Broad Area Maritime Surveillance-Drone (U.S. Navy)</td>
</tr>
<tr>
<td>BBC</td>
<td>British Broadcasting Corporation</td>
</tr>
<tr>
<td>BBS</td>
<td>Bangladesh Bureau of Statistics</td>
</tr>
<tr>
<td>B.C.</td>
<td>British Columbia</td>
</tr>
<tr>
<td>BCA</td>
<td>Border Carbon Adjustment (Carbon BTA)</td>
</tr>
<tr>
<td>BCI</td>
<td>Business Confidential Information</td>
</tr>
<tr>
<td>bcm</td>
<td>billion cubic meters</td>
</tr>
<tr>
<td>BCR</td>
<td>Blue Corner Rebate (Thailand)</td>
</tr>
<tr>
<td>BDC</td>
<td>Beneficiary Developing Country</td>
</tr>
<tr>
<td>BDS</td>
<td>Boycott, Divestment, and Sanctions</td>
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<tr>
<td>BECA</td>
<td>October 2020 Basic Exchange and Cooperation Agreement (U.S.-India)</td>
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<tr>
<td>beIN</td>
<td>beIN Media Group LLC (Qatar)</td>
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<td>beoutQ</td>
<td>be out Qatar (Saudi Arabia)</td>
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<tr>
<td>BEPS</td>
<td>tax Base Erosion and Profit Sharing</td>
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<tr>
<td>BFA</td>
<td>Banana Framework Agreement</td>
</tr>
<tr>
<td>Bhd (BHD)</td>
<td>Berhad (publicly limited company, Malaysia)</td>
</tr>
<tr>
<td>BIA</td>
<td>Best Information Available (Pre-Uruguay Round U.S. term for Facts Available)</td>
</tr>
<tr>
<td>BILA (ILAB)</td>
<td>Bureau of International Labor Affairs (U.S. DOL OTLA)</td>
</tr>
<tr>
<td>BIMSTEC</td>
<td>Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand (SAARC minus Afghanistan and Pakistan, plus Myanmar (Burma) and Thailand)</td>
</tr>
<tr>
<td>BIS (1st meaning)</td>
<td>Bank for International Settlements</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>BIS (2nd meaning)</td>
<td>Bureau of Industry and Security (U.S. DOC)</td>
</tr>
<tr>
<td>bis (3rd meaning)</td>
<td>second version (of a text), again, repeat</td>
</tr>
<tr>
<td>B.I.S.D.</td>
<td>Basic Instruments and Selected Documents</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>BJP</td>
<td>Bharatiya Janata Party (India)</td>
</tr>
<tr>
<td>bn (bln)</td>
<td>billion</td>
</tr>
<tr>
<td>BNA</td>
<td>Bureau of National Affairs (International Trade Reporter and International Trade Daily)</td>
</tr>
<tr>
<td>BNO</td>
<td>British National (Overseas) passport (Hong Kong)</td>
</tr>
<tr>
<td>BOJ</td>
<td>Bank of Japan</td>
</tr>
<tr>
<td>BOK</td>
<td>Bank of Korea</td>
</tr>
<tr>
<td>Bolero</td>
<td>Bills of Lading for Europe</td>
</tr>
<tr>
<td>BOP</td>
<td>Balance Of Payments</td>
</tr>
<tr>
<td>BOT</td>
<td>Balance Of Trade</td>
</tr>
<tr>
<td>BP</td>
<td>British Petroleum</td>
</tr>
<tr>
<td>bpd (b/d)</td>
<td>barrels per day</td>
</tr>
<tr>
<td>Brexit</td>
<td>British exit, <em>i.e.</em>, withdrawal of the U.K. from EU, effective 31 January 2020, with transition period ended 31 December 2021, following 23 June 2016 U.K.-wide referendum</td>
</tr>
<tr>
<td>BRI</td>
<td>Belt and Road Initiative (China)</td>
</tr>
<tr>
<td>BRICS</td>
<td>Brazil, Russia, India, China, and South Africa</td>
</tr>
<tr>
<td>BSE (1st meaning)</td>
<td>Bombay Stock Exchange</td>
</tr>
<tr>
<td>BSE (2nd meaning)</td>
<td>Bovine Spongiform Encephalopathy (Mad Cow Disease)</td>
</tr>
<tr>
<td>BSSAC</td>
<td>Beneficiary Sub-Saharan African Country</td>
</tr>
<tr>
<td>BSSP</td>
<td>Burmese Socialist Program Party</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>BTA (1st meaning)</td>
<td>Bilateral Trade Agreement</td>
</tr>
<tr>
<td>BTA (2nd meaning)</td>
<td>2002 Bio-Terrorism Act (Public Health Security and Bioterrorism Preparedness and Response Act of 2000)</td>
</tr>
<tr>
<td>BTA (3rd meaning)</td>
<td>Border Tax Adjustment</td>
</tr>
<tr>
<td>BTD</td>
<td>May 2007 Bipartisan Trade Deal</td>
</tr>
<tr>
<td>C-4</td>
<td>Cotton Four Countries (Benin, Burkina Faso, Mali, and Chad)</td>
</tr>
<tr>
<td>C&amp;F</td>
<td>cost and freight</td>
</tr>
<tr>
<td>CAA</td>
<td>1979 Clean Air Act</td>
</tr>
<tr>
<td>CAS</td>
<td>Canadian Dollar</td>
</tr>
<tr>
<td>CAATSA</td>
<td>2017 Countering America's Adversaries Through Sanctions Act</td>
</tr>
<tr>
<td>CAC</td>
<td>Cyberspace Administration of China</td>
</tr>
<tr>
<td>CAD</td>
<td>Canadian Dollar</td>
</tr>
<tr>
<td>CAFC</td>
<td>United States Court of Appeals for the Federal Circuit</td>
</tr>
<tr>
<td>CAFTA-DR</td>
<td>Central American Free Trade Agreement – Dominican Republic</td>
</tr>
<tr>
<td>CAI</td>
<td>January 2021 EU-China Comprehensive Agreement on Investment</td>
</tr>
<tr>
<td>CAIR</td>
<td>Council on American-Islamic Relations</td>
</tr>
<tr>
<td>CAN</td>
<td>Community of Andean Nations</td>
</tr>
<tr>
<td>CANACAR</td>
<td>Camara Nacional del Autotransporte de Carga</td>
</tr>
<tr>
<td>CAOI</td>
<td>Civil Aviation Organization of Iran</td>
</tr>
<tr>
<td>CAP (1st meaning)</td>
<td>Common Agricultural Policy (EU)</td>
</tr>
<tr>
<td>CAP (2nd meaning)</td>
<td>Carolina Academic Press</td>
</tr>
<tr>
<td>CAPES</td>
<td>Centre d’Analyse des Politiques, Economiques et Sociales (Burkina Faso)</td>
</tr>
<tr>
<td>CASA</td>
<td>Construcciones Aeronauticas SA (Spain)</td>
</tr>
<tr>
<td>CB</td>
<td>citizens band (radio)</td>
</tr>
<tr>
<td>CBA</td>
<td>collective bargaining agreement</td>
</tr>
<tr>
<td>CBAM</td>
<td>Carbon Border Adjustment Mechanism</td>
</tr>
<tr>
<td>CBC</td>
<td>Canadian Broadcasting Corporation</td>
</tr>
<tr>
<td>CBD</td>
<td>U.N. Convention on Biological Diversity</td>
</tr>
<tr>
<td>CBE</td>
<td>Commander of the Most Excellent Order of the British Empire</td>
</tr>
<tr>
<td>CBERA</td>
<td>1983 Caribbean Basin Economic Recovery Act</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>CBI (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Caribbean Basin Initiative</td>
</tr>
<tr>
<td>CBI (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Central Bank of Iran</td>
</tr>
<tr>
<td>CBO</td>
<td>Congressional Budget Office</td>
</tr>
<tr>
<td>CBOT</td>
<td>Chicago Board Of Trade</td>
</tr>
<tr>
<td>CBP</td>
<td>U.S. Customs and Border Protection (&quot;U.S. Customs Service&quot; until 1 March 2003)</td>
</tr>
<tr>
<td>CBSA</td>
<td>Canadian Border Services Agency</td>
</tr>
<tr>
<td>CBTPA</td>
<td>Caribbean Basin Trade Partnership Agreement</td>
</tr>
<tr>
<td>CC</td>
<td>Cooperative Country (Argentina)</td>
</tr>
<tr>
<td>CCB</td>
<td>U.S. Conference of Catholic Bishops</td>
</tr>
<tr>
<td>CCC (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>U.S. Commodity Credit Corporation (USDA)</td>
</tr>
<tr>
<td>CCC (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Customs Cooperation Council (renamed WCO in 1994)</td>
</tr>
<tr>
<td>CCC (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Commerce Country Chart</td>
</tr>
<tr>
<td>CCFRS</td>
<td>Certain cold flat-rolled steel</td>
</tr>
<tr>
<td>CCHT</td>
<td>Center for Countering Human Trafficking (U.S. DHS)</td>
</tr>
<tr>
<td>CCI (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Competition Commission of India</td>
</tr>
<tr>
<td>CCI (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Countervailing Currency Intervention</td>
</tr>
<tr>
<td>CCI (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Commerce Control List</td>
</tr>
<tr>
<td>CCMC</td>
<td>Communist Chinese Military Company</td>
</tr>
<tr>
<td>CCP</td>
<td>Chinese Communist Party (or CPC, Communist Party of China)</td>
</tr>
<tr>
<td>CCPA</td>
<td>U.S. Court of Customs and Patent Appeals (abolished 1982; transfer to Federal Circuit)</td>
</tr>
<tr>
<td>CCS</td>
<td>Carbon Capture and Storage</td>
</tr>
<tr>
<td>CDC (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>U.S. Centers for Disease Control and Prevention</td>
</tr>
<tr>
<td>CDC (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Canadian Dairy Commission</td>
</tr>
<tr>
<td>CDC (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Chilean Distortions Commission</td>
</tr>
<tr>
<td>CDM</td>
<td>Clean Development Mechanism</td>
</tr>
<tr>
<td>CDS</td>
<td>credit default swap</td>
</tr>
<tr>
<td>CDSOA</td>
<td>2000 Continued Dumping and Subsidy Offset Act</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>--------------</td>
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</tr>
<tr>
<td>CE</td>
<td>Conformité Européenne (EU)</td>
</tr>
<tr>
<td>CEA</td>
<td>Council of Economic Advisors (U.S.)</td>
</tr>
<tr>
<td>CEC</td>
<td>Commission for Environmental Cooperation (NAFTA)</td>
</tr>
<tr>
<td>CEMAC</td>
<td>Communauté Économique et Monétaire de l’Afrique Centrale</td>
</tr>
<tr>
<td>CEMS</td>
<td>Continuous Emission Measurement System (EU CBAM)</td>
</tr>
<tr>
<td>CENTCOM</td>
<td>United States Central Command</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>CEP</td>
<td>Constructed Export Price</td>
</tr>
<tr>
<td>CEPA (1st meaning)</td>
<td>India-UAE Comprehensive Economic Partnership Agreement</td>
</tr>
<tr>
<td>CEPA (2nd meaning)</td>
<td>Japan-U.K. Comprehensive Economic Partnership Agreement</td>
</tr>
<tr>
<td>CEPR</td>
<td>Center for Economic and Policy Research</td>
</tr>
<tr>
<td>CER</td>
<td>Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)</td>
</tr>
<tr>
<td>CET</td>
<td>Common External Tariff</td>
</tr>
<tr>
<td>CETA</td>
<td>Comprehensive Economic and Trade Agreement</td>
</tr>
<tr>
<td>CFC</td>
<td>Controlled Foreign Corporation</td>
</tr>
<tr>
<td>CFCRL</td>
<td>Federal Conciliation and Labor Registry Center (Spanish acronym, Mexico)</td>
</tr>
<tr>
<td>CFE</td>
<td>Comisión Federal de Electricidad (Mexico)</td>
</tr>
<tr>
<td>CFIUS</td>
<td>Committee on Foreign Investment in the United States</td>
</tr>
<tr>
<td>CFO</td>
<td>Chief Financial Officer</td>
</tr>
<tr>
<td>C.F.R. (1st meaning)</td>
<td>Code of Federal Regulations</td>
</tr>
<tr>
<td>CFR (2nd meaning)</td>
<td>Council on Foreign Relations</td>
</tr>
<tr>
<td>CGE</td>
<td>Computable General Equilibrium</td>
</tr>
<tr>
<td>CGLO</td>
<td>Central Government Liaison Office (China)</td>
</tr>
<tr>
<td>CGTN</td>
<td>China Global Television Network</td>
</tr>
<tr>
<td>CH</td>
<td>Order of the Companions of Honor</td>
</tr>
<tr>
<td>CHF</td>
<td>Swiss Francs</td>
</tr>
<tr>
<td>CHIP 4 (CHIP 4 Alliance)</td>
<td>U.S., Japan, Korea, and Taiwan (forum concerning semiconductor chips)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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<tr>
<td>CHIPS</td>
<td>Clearing House Interbank Payment System</td>
</tr>
<tr>
<td>CHIPS Act (CHIPS for America Act)</td>
<td>2022 Creating Helpful Incentives to Produce Semiconductors Act</td>
</tr>
<tr>
<td>CIA</td>
<td>U.S. Central Intelligence Agency</td>
</tr>
<tr>
<td>CIC</td>
<td>Citizenship and Immigration Service for Canada</td>
</tr>
<tr>
<td>CIDE</td>
<td>Contribution of Intervention in the Economic Domain (Brazil)</td>
</tr>
<tr>
<td>CIF (c.i.f)</td>
<td>Cost, Insurance, and Freight</td>
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<tr>
<td>CII</td>
<td>Confederation of Indian Industry</td>
</tr>
<tr>
<td>CIP</td>
<td>Chhattisgarh Industrial Program (India)</td>
</tr>
<tr>
<td>CISADA</td>
<td>2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act</td>
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<tr>
<td>CIT</td>
<td>U.S. Court of International Trade (New York, N.Y.)</td>
</tr>
<tr>
<td>CITA</td>
<td>U.S. Committee for Implementation of Textile Agreements</td>
</tr>
<tr>
<td>CITT</td>
<td>Canadian International Trade Tribunal</td>
</tr>
<tr>
<td>CJ</td>
<td>Commodity Jurisdiction</td>
</tr>
<tr>
<td>CKD</td>
<td>Complete knock down</td>
</tr>
<tr>
<td>cm</td>
<td>centimeter</td>
</tr>
<tr>
<td>CMAA</td>
<td>Customs Mutual Assistance Agreement</td>
</tr>
<tr>
<td>CME</td>
<td>Chicago Mercantile Exchange</td>
</tr>
<tr>
<td>CMI</td>
<td>Comité Maritime International (IMO)</td>
</tr>
<tr>
<td>CMIC</td>
<td>Chinese Military Industrial Complex Company</td>
</tr>
<tr>
<td>CMM</td>
<td>Conservation Management Measures</td>
</tr>
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<td>CMO</td>
<td>Common Market Organization (EU)</td>
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<td>CNCE</td>
<td>Commission Nacional de Comercio Exterior (Argentina)</td>
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<td>CNL</td>
<td>Competitive Need Limitation</td>
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<tr>
<td>CNOOC</td>
<td>China National Offshore Oil Corporation</td>
</tr>
<tr>
<td>CNPC</td>
<td>China National Petroleum Corporation</td>
</tr>
<tr>
<td>CNY</td>
<td>Chinese Yuan</td>
</tr>
<tr>
<td>CO₂</td>
<td>Carbon Dioxide</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>CO₂e</td>
<td>Carbon Dioxide equivalent</td>
</tr>
<tr>
<td>CoA</td>
<td>WTO Committee on Agriculture</td>
</tr>
<tr>
<td>CoA-SS</td>
<td>Special Session of WTO Committee on Agriculture</td>
</tr>
<tr>
<td>COBRA</td>
<td><em>Consolidated Omnibus Budget and Reconciliation Act</em> (multiple years)</td>
</tr>
<tr>
<td>COCOM</td>
<td>Coordinating Committee on Multilateral Export Controls</td>
</tr>
<tr>
<td>COFINS</td>
<td>Civil Service Asset Formation Program Contribution (Brazil)</td>
</tr>
<tr>
<td>COFINS-Importation</td>
<td><em>Contribution to Social Security Financing Applicable to Imports of Goods or Services</em> (Brazil)</td>
</tr>
<tr>
<td>COGS</td>
<td>Cost of Goods Sold</td>
</tr>
<tr>
<td>COMAC</td>
<td>Commercial Aircraft Corporation of China Ltd.</td>
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<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<td>CONNUM</td>
<td>Control Number</td>
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<tr>
<td>COO</td>
<td>Certificate of Origin</td>
</tr>
<tr>
<td></td>
<td>(1st meaning)</td>
</tr>
<tr>
<td>COO</td>
<td>Country of Origin</td>
</tr>
<tr>
<td></td>
<td>(2nd meaning)</td>
</tr>
<tr>
<td>COO</td>
<td>Chief Operating Officer</td>
</tr>
<tr>
<td></td>
<td>(3rd meaning)</td>
</tr>
<tr>
<td>COOL</td>
<td>Country of Origin Label</td>
</tr>
<tr>
<td>COP</td>
<td>Conference of the Parties</td>
</tr>
<tr>
<td></td>
<td>(1st meaning)</td>
</tr>
<tr>
<td>COP</td>
<td>Cost of Production</td>
</tr>
<tr>
<td></td>
<td>(2nd meaning)</td>
</tr>
<tr>
<td>CORE</td>
<td>corrosion-resistant steel</td>
</tr>
<tr>
<td>COS</td>
<td>Circumstances of Sale (dumping margin calculation adjustment)</td>
</tr>
<tr>
<td>COSCO</td>
<td>Chinese Ocean Shipping Company</td>
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<td>COVAX</td>
<td>COVID-19 Vaccines Global Access</td>
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<td>COVID-19</td>
<td>Corona Virus Disease (coronavirus)</td>
</tr>
<tr>
<td>CPA</td>
<td>Certified Public Accountant</td>
</tr>
<tr>
<td></td>
<td>(1st meaning)</td>
</tr>
<tr>
<td>CPA</td>
<td>Coalition Provisional Authority (Iraq-U.S.)</td>
</tr>
<tr>
<td></td>
<td>(2nd meaning)</td>
</tr>
<tr>
<td>CPC</td>
<td>Caspian Pipeline Consortium</td>
</tr>
<tr>
<td></td>
<td>(1st meaning)</td>
</tr>
<tr>
<td>CPC</td>
<td>U.N. Central Product Classification list</td>
</tr>
<tr>
<td></td>
<td>(2nd meaning)</td>
</tr>
<tr>
<td>CPC</td>
<td>Communist Party of China</td>
</tr>
<tr>
<td>Acronym</td>
<td>Definition</td>
</tr>
<tr>
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</tr>
<tr>
<td>CPEC</td>
<td>China-Pakistan Economic Corridor</td>
</tr>
<tr>
<td>CPSC</td>
<td>U.S. Consumer Product Safety Commission</td>
</tr>
<tr>
<td>CPTPP</td>
<td><em>Comprehensive and Progressive Agreement for Trans Pacific Partnership</em> (entered into force 30 December 2018, informally called <em>TPP 11</em>)</td>
</tr>
<tr>
<td>CPV</td>
<td>Communist Party of Vietnam (or VCP, Vietnamese Communist Party)</td>
</tr>
<tr>
<td>CQE</td>
<td>Certificate of Quota Eligibility</td>
</tr>
<tr>
<td>CRO</td>
<td>WTO Committee on Rules of Origin</td>
</tr>
<tr>
<td>CROC</td>
<td>Revolutionary Confederation of Laborers and Farmworkers (Mexico, Spanish acronym)</td>
</tr>
<tr>
<td>Crop Year 2001 Act</td>
<td><em>Crop Year 2001 Agricultural Economic Assistance Act</em></td>
</tr>
<tr>
<td>CRPF</td>
<td>Central Reserve Police Force (India)</td>
</tr>
<tr>
<td>CRRC</td>
<td>China Railway Rolling Stock Corporation</td>
</tr>
<tr>
<td>CRS</td>
<td>Congressional Research Service</td>
</tr>
<tr>
<td>CRTC</td>
<td>Canadian Radio-Television and Telecommunications Commission</td>
</tr>
<tr>
<td>CSA</td>
<td><em>Comprehensive Safeguards Agreement</em> (associated with NPT)</td>
</tr>
<tr>
<td>CSCL</td>
<td>China Shipping Container Lines</td>
</tr>
<tr>
<td>CSI</td>
<td>Container Security Initiative</td>
</tr>
<tr>
<td>CSIS</td>
<td>Center for Strategic and International Studies (Washington, D.C.)</td>
</tr>
<tr>
<td>CSMS</td>
<td>Cargo Systems Messaging Service (CBP)</td>
</tr>
<tr>
<td>CSP</td>
<td>Conferences of States Parties (1st meaning)</td>
</tr>
<tr>
<td>CSP</td>
<td>Certificate of Supplementary Protection (CETA) (2nd meaning)</td>
</tr>
<tr>
<td>CSPV</td>
<td>Crystalline Silicon Photovoltaic cells, modules, laminates, and panels (solar panels)</td>
</tr>
<tr>
<td>CSRC</td>
<td>China Securities Regulatory Commission</td>
</tr>
<tr>
<td>CTA</td>
<td>Central Tibetan Administration</td>
</tr>
<tr>
<td>CTC</td>
<td>Change in Tariff Classification</td>
</tr>
<tr>
<td>CTCSC</td>
<td>Customs Tariff Commission of the State Council (China)</td>
</tr>
<tr>
<td>CTD</td>
<td>WTO Committee on Trade and Development</td>
</tr>
<tr>
<td>CTESS</td>
<td>WTO Committee on Trade and Environment in Special</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>CTF</td>
<td>Customs and Trade Facilitation</td>
</tr>
<tr>
<td>CTH</td>
<td>Change in Tariff Heading</td>
</tr>
<tr>
<td>CTHA</td>
<td>WTO <em>Chemical Tariff Harmonization Agreement</em></td>
</tr>
<tr>
<td>CTIL</td>
<td>Center for Trade and Investment Law (India)</td>
</tr>
<tr>
<td>CTPA</td>
<td>United States – Colombia Trade Promotion Agreement</td>
</tr>
<tr>
<td>C-TPAT (CTPAT)</td>
<td>Customs – Trade Partnership Against Terrorism</td>
</tr>
<tr>
<td>CTSH</td>
<td>Change in Tariff Sub-Heading</td>
</tr>
<tr>
<td>CU</td>
<td>Customs Union</td>
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<tr>
<td>Customs Valuation Agreement</td>
<td>WTO Agreement on Customs Valuation (Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994)</td>
</tr>
<tr>
<td>CUFTA (CUSFTA)</td>
<td>Canada – United States FTA</td>
</tr>
<tr>
<td>CUSMA</td>
<td>Canada – United States – Mexico Agreement (revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)</td>
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<tr>
<td>CV</td>
<td>Constructed Value</td>
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<td>CVA</td>
<td>Canadian Value Added</td>
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<td>CVD (1st meaning)</td>
<td>Countervailing Duty</td>
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<td>CVD (2nd meaning)</td>
<td>Chronic Venous Disorder</td>
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<td>CVI</td>
<td>Chronic Venous Insufficiency</td>
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<tr>
<td>CVID</td>
<td>Complete, Verifiable, Irreversible Disarmament</td>
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<td>CWP (1st meaning)</td>
<td>Circular Welded carbon quality steel Pipe</td>
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<td>CWP (2nd meaning)</td>
<td>Cooperative Work Program (IPEF)</td>
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<td>DAHD</td>
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<td>DARPA</td>
<td>U.S. Defense Advanced Research Projects Agency</td>
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<td>DBT</td>
<td>U.K. Department for Business and Trade (established February 2023 via merger of DIT with certain other government functions)</td>
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<td>Full Form</td>
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<td>DCIV</td>
<td>Double Cab In Van</td>
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<td>DCR</td>
<td>Domestic Content Requirement</td>
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<td>DCS</td>
<td>Destination Control Statement</td>
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<td>DDA</td>
<td>Doha Development Agenda</td>
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<td>DDTC</td>
<td>U.S. Directorate of Defense Trade Controls (Department of State)</td>
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<td>Digital Economy Agreement</td>
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<td>DeitY</td>
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<td>DEPA</td>
<td>Digital Economic Partnership Agreement (generally)</td>
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<td>June 2020 Digital Economic Partnership Agreement (Chile, New Zealand, Singapore)</td>
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<td>DFFT</td>
<td>Data Free Flow with Trust</td>
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<td>DFQF</td>
<td>Duty Free, Quota Free</td>
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<tr>
<td>DG</td>
<td>Director General (Director-General)</td>
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<td>DGCFMC</td>
<td>WTO Director General’s Consultative Framework Mechanism on the development aspects of Cotton</td>
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<td>DGFT</td>
<td>Director General of Foreign Trade (part of Ministry of Commerce, India)</td>
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<td>Department of Investment and Public Asset Management (India)</td>
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<td>DJAI</td>
<td>Declaración Jurada Anticipada de Importación (Argentina, Advance Sworn Import Declaration)</td>
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<td>DIEM</td>
<td>Derechos de Importación Específicos Mínimos (Argentina, Minimum Specific Import Duties)</td>
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<td>DIFMER</td>
<td>Difference in Merchandise (dumping margin calculation adjustment)</td>
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<td>DIT</td>
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<td>DIY</td>
<td>Do It Yourself</td>
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<td>DM</td>
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<td>Deutsche Marks</td>
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<td>2022 EU Digital Markets Act</td>
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<td>De-Militarized Zone</td>
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<tr>
<td>DNA</td>
<td>deoxyribonucleic acid</td>
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<td>DNI</td>
<td>Director of National Intelligence (U.S.)</td>
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<td>DNR</td>
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<td>DOC</td>
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<td>DP</td>
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<td>DPW</td>
<td>Dubai Ports World</td>
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<td>DPA</td>
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<td>DPA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Deferred Prosecution Agreement</td>
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<td>DPA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Data Protection Authority (India)</td>
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<td>DPA (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Dolphin Protection Consumer Information Act</td>
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<td>Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade (WTO)</td>
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<td>Democratic People’s Republic of Korea (North Korea)</td>
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<td>Dynamic Random-Access Memory</td>
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<td>Dispute Resolution Mechanism (JCPOA)</td>
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<td>Dynamic Random-Access Memory Semiconductor</td>
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<td>DST</td>
<td>Digital Sales Tax, Digital Services Tax</td>
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<td>WTO Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes)</td>
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<td>Description</td>
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<td>DUV</td>
<td>deep ultraviolet lithography (systems)</td>
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<td>Digital Video Recording</td>
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<td>Britain, France, and Germany</td>
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<td>Environmental Assessment</td>
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<td>1979 Export Administration Act</td>
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<td>EAC (1st meaning)</td>
<td>East African Community</td>
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<td>East Asian Community</td>
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<td>EAC (3rd meaning)</td>
<td>Environmental Affairs Council (CAFTA-DR, KORUS)</td>
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<td>EADS</td>
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<td>Eurasian Economic Union</td>
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<td>Electric Arc Furnace</td>
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<td>EAGLE Act</td>
<td>2021 Ensuring American Global Leadership and Engagement Act</td>
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<td>EPA</td>
<td>2015 Enforce and Protect Act (U.S.)</td>
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<td>Export Administration Regulations</td>
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<td>EBA</td>
<td>Everything But Arms</td>
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<td>EBOR</td>
<td>Electronic On Board Recorder</td>
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<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
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<td>EC (1st meaning)</td>
<td>European Commission</td>
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<td>EC (2nd meaning)</td>
<td>European Communities</td>
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<td>ECA (1st meaning)</td>
<td>Economic Cooperation Agreement</td>
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<td>Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation (KORUS)</td>
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<td>Export Controls Act of 2018 (part of 2018 NDAA)</td>
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<td>ECC (1st meaning)</td>
<td>Environmental Cooperation Commission (CAFTA-DR)</td>
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<td>ECC (2nd meaning)</td>
<td>Extraordinary Challenge Committee (NAFTA)</td>
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<td>ECCAS</td>
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<td>ECCN</td>
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<td>ECE</td>
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<td>ECFA</td>
<td>Economic Cooperation Framework Agreement</td>
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<td>ECG</td>
<td>electrocardiogram</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECLAC</td>
<td>Economic Commission for Latin America and the Caribbean</td>
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<td>E-Commerce</td>
<td>Electronic Commerce</td>
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<td>ECOSOC</td>
<td>U.N. Economic and Social Council</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>ECU</td>
<td>European Currency Unit</td>
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<td>ED</td>
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<td>EDBI</td>
<td>Export Development Bank of Iran</td>
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<td>EDC</td>
<td>Export Development Corporation (Canada)</td>
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<td>EDI</td>
<td>Electronic Data Interchange</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EEU</td>
<td>Eurasian Economic Union</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EFSA</td>
<td>European Food Safety Authority</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>EGA</td>
<td>WTO Environmental Goods Agreement</td>
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<td>EHC</td>
<td>export health certificate (U.K.)</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EIF</td>
<td>Enhanced Integrated Framework (formerly “IF,” or “Integrated Framework”)</td>
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<td>EIG</td>
<td>équipement d’intérêt général (France)</td>
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<td>ELLIE</td>
<td>Electronic Licensing Entry System</td>
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<td>ELS</td>
<td>Extra Long Staple (cotton)</td>
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<td>Explanatory Note</td>
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<td>ENAM</td>
<td>Electronic National Agricultural Market system (India)</td>
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<td>ENFORCE Act</td>
<td>2015 Trade Facilitation and Trade Enforcement Act</td>
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<td>Definition</td>
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<tr>
<td>(TFTEA, TEA)</td>
<td>Executive Order (U.S.)</td>
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<td>EO (E.O.)</td>
<td>Electronic On Board Recorder</td>
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<td>EOBR</td>
<td>Export Price</td>
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<td>EP</td>
<td>Economic Partnership Agreement</td>
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<td>EPA (1st meaning)</td>
<td>U.S. Environmental Protection Agency</td>
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<td>Economic Policy Institute</td>
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<td>EPI</td>
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<td>End-Use Review Committee (U.S. DOC BIS, set forth under EAR)</td>
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<td>ERC</td>
<td>Effective Rate of Protection</td>
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<td>ERP</td>
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<td>E-SIGN Act</td>
<td>2000 Electronic Signatures in Global and National Commerce Act</td>
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<td>ESCS</td>
<td>European Steel and Coal Community</td>
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<td>ESG</td>
<td>Environmental, Social, and Governance</td>
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<td>ESL</td>
<td>English as a Second Language</td>
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<td>ESP</td>
<td>Exporter’s Sales Price (Pre-Uruguay Round U.S. term for Constructed Export Price)</td>
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<td>ESPO</td>
<td>Eastern Siberia Pacific Ocean</td>
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<td>ET (EST)</td>
<td>Eastern Time (Eastern Standard Time)</td>
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<td>ETA</td>
<td>Employment and Training Administration (DOL)</td>
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<td>ETF</td>
<td>Exchange traded fund</td>
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<td>ETI Act</td>
<td>2000 Extraterritorial Income Exclusion Act</td>
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<td>ETIM</td>
<td>East Turkistan Islamic Movement</td>
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<td>ETP</td>
<td>Eastern Tropical Pacific (Ocean)</td>
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<td>ETS</td>
<td>Emission(s) Trading Scheme (System)</td>
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<td>European Union</td>
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<td>Euro</td>
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<td>EUSFTA</td>
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<td>End-User Review Committee (U.S.)</td>
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<td>Extreme ultraviolet lithography</td>
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<td>Eurojust</td>
<td>EU agency for judicial cooperation in criminal matters</td>
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<td>Europol</td>
<td>European Union Agency for Law Enforcement Cooperation</td>
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<td>EV</td>
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<td>U.S. Export-Import Bank</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>FACT Act of 1990</td>
<td>1990 <em>Food, Agriculture, Conservation and Trade Act</em></td>
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<td>(1990 Farm Bill)</td>
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<td>FAIR Act of 1996</td>
<td>1996 <em>Federal Agricultural Improvement and Reform Act</em></td>
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<td>(1996 Farm Bill)</td>
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<td>FAIR Transition and</td>
<td>2021 <em>Fair, Affordable, Innovative, and Resilient Transition and Competition Act</em> (proposed BCA legislation)</td>
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<td>Food and Agricultural Organization</td>
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<td>Federal Acquisition Regulation (U.S.)</td>
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<td>Federally Administered Tribal Areas (Pakistan)</td>
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<td>FBI</td>
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<td>Fong Chun Formosa Fishery (Taiwan)</td>
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<td>U.S. Federal Crop Insurance Corporation (USDA)</td>
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<td>Food and Drug Administration (U.S.)</td>
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<td>FDI</td>
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<td>FDP Rule</td>
<td>Foreign Direct Product Rule (U.S.)</td>
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<td>U.S. Court of Appeals for the Federal Circuit (Washington, D.C.)</td>
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<td>FEMA</td>
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<td>FEP</td>
<td>Fuel Enrichment Plant (e.g., for UF₆ at Natanz, Iran)</td>
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<td>U.S. Federal Energy Regulatory Commission</td>
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<td>FF</td>
<td><em>French Francs</em></td>
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*FACT Act of 1990* (1990 Farm Bill) and *FAIR Act of 1996* (1996 Farm Bill) refer to significant agricultural policies in the United States. The *FAIR Transition and Competition Act* is a proposed bill that aims to address trade and competition issues. *FAQ* stands for Frequently Asked Question, *FAR* for Federal Acquisition Regulation, *FAS* for Foreign Agricultural Service, and *FAST* for Free And Secure Trade.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>FFI</td>
<td>foreign financial institution</td>
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<tr>
<td>FFPO</td>
<td>Fines, Penalties and Forfeitures Office (U.S. Ports of Entry)</td>
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<td>FFTJ</td>
<td>Fittings, flanges, and tool joints</td>
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<td>FGUP</td>
<td>State Research Center of the Russian Federation</td>
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<td>FICCI</td>
<td>Federation of Indian Chambers of Commerce and Industry</td>
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<td>FIFA</td>
<td><em>Fédération Internationale de Football Association</em></td>
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<td>Fimea</td>
<td>Finnish Medicines Agency</td>
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<td>FinCEN</td>
<td>U.S. Financial Crimes Enforcement Network (Department of the Treasury)</td>
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<td>financial technology</td>
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<td><em>Foreign Investment Risk Review Modernization Act of 2018</em> (part of 2018 NDAA)</td>
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<td>Feed-in tariff</td>
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<td>Forced Labor Enforcement Task Force (DHS)</td>
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<td>Federal Motor Carrier Safety Administration</td>
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<td>2011 <em>Food Safety Modernization Act</em></td>
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<td>FMV (1st meaning)</td>
<td>Foreign Market Value (Pre-Uruguay Round U.S. term for Normal Value)</td>
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<td>FMV (2nd meaning)</td>
<td>Fair Market Value</td>
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<td>Federal Motor Vehicle Safety Standards</td>
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<td>Footnote 4 Entity (entity to which Footnote 4 is added to its entry on Entity List)</td>
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<td>Facts Otherwise Available</td>
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<td>Free On Board</td>
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<td>Factors of Production</td>
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<td>FPC</td>
<td>U.S. Federal Power Commission (predecessor of DOE)</td>
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<td>FPGA</td>
<td>field programmable gate array integrated circuit</td>
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<td>FRAND</td>
<td>Fair, Reasonable, and Non-Discriminatory (terms)</td>
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<td>FRCP</td>
<td>U.S. <em>Federal Rules of Civil Procedure</em></td>
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<td>FRS</td>
<td>Fellowship of the Royal Society</td>
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<td>FRSA</td>
<td>Fellowship of the Royal Society for the Encouragement of Arts, Manufactures, and Commerce</td>
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<td>FSA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
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<td>FSA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Food Safety Agency (EU)</td>
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<td>Free Trade Agreement of the Asia Pacific Region</td>
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<td>Federal Trade Commission (U.S.)</td>
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<td>FTZ (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Free Trade Zone</td>
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<td>GAAP</td>
<td>Generally Accepted Accounting Principles</td>
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<td>GAFA</td>
<td>Google, Apple, Facebook, and Amazon</td>
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<td>GAIN</td>
<td>USDA FAS Global Agricultural Information Network</td>
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<td>General Agreement on Tariffs and Trade 1947 and all pertinent legal instruments (Protocols, Certifications,</td>
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<td>Global Intangible Low-Taxed Income</td>
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<td>Global Initiative on Sharing Avian Influenza Data</td>
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<td>high-assay, low-enriched Uranium</td>
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<td>HDPE</td>
<td>high-density polyethylene</td>
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<td>HIPC</td>
<td>Highly Indebted Poor Country</td>
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<td>HKS</td>
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<td>Hong Kong Monetary Authority</td>
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<td>HKSAR</td>
<td>Hong Kong Special Administrative Region</td>
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<td>HKSE</td>
<td>Hong Kong Stock Exchange</td>
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<td>HKU</td>
<td>Hong Kong University (University of Hong Kong)</td>
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<td>HLED</td>
<td>High Level Economic Dialogue <em>(e.g., U.S.-Mexico)</em></td>
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<td>HM</td>
<td>Her (His) Majesty</td>
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<td>High Net Worth</td>
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<td>HOEP</td>
<td>Hourly Ontario Energy Price</td>
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<td>High Pathogenic Avian Influenza</td>
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<td>HPNAI</td>
<td>High Pathogenic Notifiable Avian Influenza</td>
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<td>Headquarters</td>
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<td>Headquarters Ruling Letter (U.S. Customs Service, CBP)</td>
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<td>HS</td>
<td>Harmonized System</td>
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<td>HSBC</td>
<td>Hong Kong Shanghai Banking Corporation</td>
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<td>HSBI</td>
<td>Highly Sensitive Business Information</td>
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<td>Harmonized System Committee (WCO)</td>
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<td>HTS</td>
<td>Harmonized Tariff Schedule</td>
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<td>Harmonized Tariff Schedule of the U.S.</td>
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<td>HVAC</td>
<td>Heating, Ventilation, and Air Conditioning</td>
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<td>IA (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Import Administration (U.S. DOC)</td>
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<td>IA (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Information Available</td>
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<td>IA (3&lt;sup&gt;rd&lt;/sup&gt; meaning)</td>
<td>Internal Advice</td>
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<td>IAC</td>
<td>Iran Alumina Company (IMIDRO subsidiary)</td>
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<td>IADB</td>
<td>Inter-American Development Bank</td>
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<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<td>IAR</td>
<td>Internal Advice Response (CBP)</td>
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<td>International Bank for Reconstruction and Development (The World Bank)</td>
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<td>IBT (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>International Brotherhood of Teamsters</td>
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<td>IBT (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>International Business Transactions</td>
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<td>IC (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Indifference Curve</td>
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<td>IC (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>integrated circuit</td>
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<td>Indigenous Communities</td>
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<td>Description</td>
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<td>ICAC</td>
<td>International Cotton Advisory Committee</td>
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<td>ICAO</td>
<td>International Civil Aviation Organization (U.N.)</td>
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<td>ICBM</td>
<td>Intercontinental Ballistic Missile</td>
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<td>ICC (1st meaning)</td>
<td>International Chamber of Commerce</td>
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<td>ICC (2nd meaning)</td>
<td>International Criminal Court</td>
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<td>ICE</td>
<td>U.S. Immigration and Customs Enforcement</td>
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<td>ICFTU</td>
<td>International Confederation of Free Trade Unions</td>
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<td>ICIT</td>
<td>Intergovernmental Commission on International Trade (Ukraine)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICOR</td>
<td>Incremental Capital Output Ratio</td>
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<td>Investment Court System</td>
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<td>International Center for the Settlement of Investment Disputes</td>
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<td>ICT</td>
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<td>International Center for Trade and Sustainable Development</td>
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<td>IDB</td>
<td>Integrated Database</td>
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<td>Israeli Defense Forces</td>
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<td>WTO Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade</td>
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<td>International Electrotechnical Commission</td>
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<td>Importer-Exporter Code (India)</td>
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<td>2006 Iran Freedom Support Act</td>
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<td>1985 United States-Israel Free Trade Implementation Act</td>
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<td>1970 Illegal Gambling Business Act</td>
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<td>itinéraire à grand gabarit (France)</td>
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(Inuit and other indigenous communities)

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<td>Institute of International Finance</td>
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<td>IIPA</td>
<td>International Intellectual Property Alliance</td>
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<td>IIT</td>
<td>Indian Institute of Technology</td>
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<td>ILAB</td>
<td>Bureau of International Labor Affairs (U.S. DOL OTLA)</td>
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<td>International Law Commission</td>
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<td>International Labor Organization</td>
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<td>International Labor Rights Forum</td>
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<td>ILSA</td>
<td>1996 <em>Iran and Libya Sanctions Act</em> (called <em>ISA</em> after <em>IFSA</em>)</td>
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<td>Industrial Metal and Commodities</td>
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<td>International Monetary Fund</td>
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<td><em>Articles of Agreement of the International Monetary Fund</em></td>
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<td>Iranian Mines and Mining Industries Development and Renovation Organization</td>
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<td>iron mechanical transfer drive component</td>
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<td>Inc. Inc.</td>
<td>incorporated (U.S.)</td>
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<td>Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (Brazil)</td>
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<td>Indian Rupee (2nd meaning)</td>
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<td>IPBES</td>
<td>Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Studies</td>
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<td>IPCC</td>
<td>U.N. Intergovernmental Panel on Climate Change</td>
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<td>IPEF</td>
<td>Indo-Pacific Economic Framework</td>
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<td>International Plan Of Action</td>
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<td>Irish Republican Army (Provisional Irish Republican Army)</td>
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<td>Iranian Revolutionary Guard Corps (Islamic Revolutionary Guard Corps)</td>
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<td>Islamic Revolutionary Guards Corps Navy (Iran)</td>
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<td>Islamic Republic News Agency (Iran)</td>
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<td>IRQ</td>
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<td>Investor-State Dispute Settlement</td>
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<tr>
<td>ISI</td>
<td>Inter-Services Intelligence (Pakistan)</td>
</tr>
<tr>
<td>ISIL</td>
<td>Islamic State in the Levant (ISIS)</td>
</tr>
<tr>
<td>ISIS</td>
<td>Islamic State in Shams (ISIL)</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
</tr>
<tr>
<td>ISTC</td>
<td>International Sugar Trade Coalition</td>
</tr>
<tr>
<td>IT</td>
<td>Information Technology</td>
</tr>
<tr>
<td>ITA</td>
<td>1996 WTO Information Technology Agreement (1st meaning)</td>
</tr>
<tr>
<td>ITA</td>
<td>U.S. International Trade Administration (DOC) (2nd meaning)</td>
</tr>
<tr>
<td>ITA II</td>
<td>2015 Information Technology Agreement (Expansion of the Information Technology Agreement)</td>
</tr>
<tr>
<td>ITAR</td>
<td>International Traffic in Arms Regulations</td>
</tr>
<tr>
<td>ITC</td>
<td>International Trade Center (joint WTO-U.N. agency) (1st meaning)</td>
</tr>
<tr>
<td>ITC (U.S.ITC)</td>
<td>U.S. International Trade Commission (2nd meaning)</td>
</tr>
<tr>
<td>ITDS</td>
<td>International Trade Data System (electronic single window for import-export data)</td>
</tr>
<tr>
<td>ITO</td>
<td>International Trade Organization</td>
</tr>
<tr>
<td>ITO Charter (Havana Charter)</td>
<td>Charter for an International Trade Organization</td>
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<td>ITRD</td>
<td>International Trade Reporter Decisions</td>
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<td>ITSR</td>
<td>Iranian Transactions and Sanctions Regulations (31 C.F.R. Part 560)</td>
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<tr>
<td>ITT</td>
<td>ITT Corporation</td>
</tr>
<tr>
<td>ITT NV</td>
<td>ITT Night Vision</td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunications Union</td>
</tr>
<tr>
<td>IUD</td>
<td>intra-uterine device</td>
</tr>
<tr>
<td>IUSCT</td>
<td>Iran – U.S. Claims Tribunal</td>
</tr>
<tr>
<td>IUU</td>
<td>illegal, unreported, and unregulated</td>
</tr>
<tr>
<td>IWC</td>
<td>International Whaling Commission</td>
</tr>
<tr>
<td>JADE Act</td>
<td>2008 Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act</td>
</tr>
<tr>
<td>J&amp;K</td>
<td>Jammu and Kashmir (Indian-Administered Kashmir)</td>
</tr>
<tr>
<td>JCPOA</td>
<td>July 2015 Joint Comprehensive Plan of Action</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
<td>-------------</td>
</tr>
</tbody>
</table>
| JeM     | Jaish-e-Mohammed  
       (<span style="font-style:italic">“The Army of Muhammad,”</span>  
       Pakistan-based terrorist organization) |
| JFTC    | Japan Fair Trade Commission |
| JIA     | Japanese Investigative Authority |
| JNPT    | Jawaharlal Nehru Port Terminals  
       (Mumbai, India) |
| JPC     | Joint Planning Committee  
       (India) |
| JSC     | Joint Stock Company  
       (Russia) |
| JSI     | Joint Statement Initiative |
| JV      | Joint Venture |
| KAF     | Khalid Al Falih  
       (former Saudi Minister of Oil) |
| KCBT    | Kansas City Board of Trade |
| KDB     | Korea Development Bank |
| KEXIM   | Export-Import Bank of Korea |
| KFC     | Kentucky Fried Chicken |
| KfW     | Kreditanstalt für Wiederaufbau  
       (Germany, Credit Agency for Reconstruction) |
| kg      | kilogram |
| KGB     | Komitet Gosudarstvennoy Bezopasnosti  
       (“Committee for State Security,”  
       Soviet Union) |
| KH      | Kata’ib Hezbollah  
       (<span style="font-style:italic">Hezbollah</span> Brigades, Iraq) |
| km      | kilometer |
| KMA     | Kubota Manufacturing of America |
| KMT     | Kuomintang |
| KORUS   | Korea – United States Free Trade Agreement |
| KPPI    | Komite Pengamanan Perdagangan Indonesia  
       (competent international trade authority) |
| KSA     | Kingdom of Saudi Arabia |
| KU      | University of Kansas |
| kW      | kilowatt |
| kWh     | kilowatt hour |
| L/C     | Letter of Credit |
| LAC     | Line of Actual Control  
       (Ladakh-Aksai Chin) |
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>LAN</td>
<td>Local Area Network</td>
</tr>
<tr>
<td>LAP</td>
<td>Labor Action Plan (Colombia TPA)</td>
</tr>
<tr>
<td>LCA</td>
<td>Large Civil Aircraft</td>
</tr>
<tr>
<td>LCD</td>
<td>Liquid Crystal Display</td>
</tr>
<tr>
<td>LDBDSC</td>
<td>Least Developed Beneficiary Developing Country</td>
</tr>
<tr>
<td>LDC</td>
<td>Least Developed Country</td>
</tr>
<tr>
<td>LDC (1st meaning)</td>
<td>Least Developed Country</td>
</tr>
<tr>
<td>LDC (2nd meaning)</td>
<td>Less Developed Country (includes developing and least developed countries)</td>
</tr>
<tr>
<td>LDC (3rd meaning)</td>
<td>Local distribution company</td>
</tr>
<tr>
<td>LED</td>
<td>light-emitting diode</td>
</tr>
<tr>
<td>LEEM</td>
<td>Licensing and Enforcement Experts Meeting (MTCR)</td>
</tr>
<tr>
<td>LegCo</td>
<td>Legislative Council of the Hong Kong Special Administrative Region</td>
</tr>
<tr>
<td>LGBTQ+</td>
<td>Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and others</td>
</tr>
<tr>
<td>LLDC</td>
<td>Landlocked Developing Country</td>
</tr>
<tr>
<td>LNG</td>
<td>Liquefied Natural Gas</td>
</tr>
<tr>
<td>LNPP</td>
<td>Large Newspaper Printing Press</td>
</tr>
<tr>
<td>LNR</td>
<td>Luhansk People’s Republic</td>
</tr>
<tr>
<td>LOC</td>
<td>Line of Control (Kashmir)</td>
</tr>
<tr>
<td>LOT</td>
<td>Level of Trade (dumping margin calculation adjustment)</td>
</tr>
<tr>
<td>LPAI</td>
<td>Low Pathogenic Avian Influenza</td>
</tr>
<tr>
<td>LPF</td>
<td>level playing field</td>
</tr>
<tr>
<td>LPG</td>
<td>Liquefied Petroleum Gas</td>
</tr>
<tr>
<td>LPMO</td>
<td>Livestock Products Marketing Organization (Korea)</td>
</tr>
<tr>
<td>LPNAI</td>
<td>Low Pathogenic Notifiable Avian Influenza</td>
</tr>
<tr>
<td>LPR (1st meaning)</td>
<td>Labor Force Participation Rate</td>
</tr>
<tr>
<td>LPR (2nd meaning)</td>
<td>Loan Prime Rate (PBOC)</td>
</tr>
<tr>
<td>LRW</td>
<td>Large Residential Washer</td>
</tr>
<tr>
<td>LTFV</td>
<td>Less Than Fair Value</td>
</tr>
<tr>
<td>LVC</td>
<td>Labor Value Content</td>
</tr>
<tr>
<td>LVMH</td>
<td>Louis Vuitton Moët Hennessey</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
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</tr>
<tr>
<td>LWR</td>
<td>Light-Walled Rectangular pipe and tube</td>
</tr>
<tr>
<td>LWS</td>
<td>Laminated Woven Sacks</td>
</tr>
<tr>
<td>M&amp;A</td>
<td>mergers and acquisitions</td>
</tr>
<tr>
<td>MAD</td>
<td>Mutually Assured Destruction</td>
</tr>
<tr>
<td>MAFF</td>
<td>Ministry of Agriculture, Forestry, and Fisheries (Korea)</td>
</tr>
<tr>
<td>MAI</td>
<td>Multilateral Agreement on Investment</td>
</tr>
<tr>
<td>MAP</td>
<td>Monitoring and Action Plan</td>
</tr>
<tr>
<td>Marrakesh Protocol</td>
<td>Marrakesh Protocol to GATT 1994</td>
</tr>
<tr>
<td>Maastricht Treaty</td>
<td>1992 Treaty on European Union</td>
</tr>
<tr>
<td>MAS</td>
<td>Monetary Authority of Singapore</td>
</tr>
<tr>
<td>MBB</td>
<td>Messerschmitt-Bölkow-Blohm GmbH (Germany)</td>
</tr>
<tr>
<td>MBS</td>
<td>Mohammed Bin Salman (Crown Prince, Saudi Arabia)</td>
</tr>
<tr>
<td>MCF</td>
<td>military-civil fusion (doctrine) (China)</td>
</tr>
<tr>
<td>MCIT</td>
<td>Ministry of Communications and Information Technology (India)</td>
</tr>
<tr>
<td>MCL</td>
<td>Munitions Control List</td>
</tr>
<tr>
<td>MCTL</td>
<td>Military Critical Technologies List</td>
</tr>
<tr>
<td>MDG</td>
<td>Millennium Development Goal</td>
</tr>
<tr>
<td>MDL</td>
<td>Military Demarcation Line (DMZ)</td>
</tr>
<tr>
<td>MEA</td>
<td>Multilateral Environmental Agreement</td>
</tr>
<tr>
<td>MEC</td>
<td>Myanmar Economic Corporation</td>
</tr>
<tr>
<td>MEDT</td>
<td>Ministry of Economic Development and Trade (Ukraine)</td>
</tr>
<tr>
<td>MEFTA</td>
<td>Middle East Free Trade Agreement</td>
</tr>
<tr>
<td>MEHL</td>
<td>Myanmar Economic Holdings Limited</td>
</tr>
<tr>
<td>MEK (PMOI)</td>
<td>Mojahedin-e Khalq (People’s Mojahedin Organization of Iran, PMOI, exiled Iranian opposition group)</td>
</tr>
<tr>
<td>MENA</td>
<td>Middle East North Africa</td>
</tr>
<tr>
<td>MEP</td>
<td>Member of the European Parliament</td>
</tr>
<tr>
<td>METI</td>
<td>Ministry of Economy, Trade, and Industry (Japan, formerly MITI)</td>
</tr>
<tr>
<td>MEU</td>
<td>military end user</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>MFA</td>
<td>Multi-Fiber Arrangement (1974-2004)</td>
</tr>
<tr>
<td>MFN</td>
<td>Most Favored Nation</td>
</tr>
<tr>
<td>MGE</td>
<td>Myanmar Gems Enterprise</td>
</tr>
<tr>
<td>MHI</td>
<td>Mitsubishi Heavy Industries, Ltd.</td>
</tr>
<tr>
<td>MHT</td>
<td>Matra Hautes Technologies  (France)</td>
</tr>
<tr>
<td>MI5</td>
<td>Military Intelligence, Section 5  (U.K. domestic counter-intelligence and security agency)</td>
</tr>
<tr>
<td>MI6</td>
<td>Military Intelligence, Section 6  (U.K. foreign intelligence service)</td>
</tr>
<tr>
<td>MIIT</td>
<td>Ministry of Industry and Information Technology (China)</td>
</tr>
<tr>
<td>MITI</td>
<td>Ministry of International Trade and Industry (Japan)</td>
</tr>
<tr>
<td>MLA</td>
<td>Member of the Legislative Assembly  (Stormont, Northern Ireland)</td>
</tr>
<tr>
<td>mm</td>
<td>millimeter</td>
</tr>
<tr>
<td>MMA</td>
<td>Minimum Market Access (quota)</td>
</tr>
<tr>
<td>MMBtu</td>
<td>Million British Thermal Unit</td>
</tr>
<tr>
<td>MMPA</td>
<td>1972 Marine Mammal Protection Act</td>
</tr>
<tr>
<td>MMT</td>
<td>million metric tons</td>
</tr>
<tr>
<td>mn</td>
<td>million</td>
</tr>
<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
</tr>
<tr>
<td>MNE</td>
<td>Multinational Enterprise</td>
</tr>
<tr>
<td>MOCI</td>
<td>Ministry of Commerce and Industry (India, Saudi Arabia)</td>
</tr>
<tr>
<td>MOCIE</td>
<td>Ministry of Commerce, Industry, and Energy (Korea)</td>
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<tr>
<td>MOFAT</td>
<td>Ministry of Foreign Affairs and Trade (Korea)</td>
</tr>
<tr>
<td>MOFCOM</td>
<td>Ministry of Commerce (China)</td>
</tr>
<tr>
<td>MOGE</td>
<td>Myanma Oil and Gas Enterprise (sometimes referred to as Myanmar Oil and Gas Enterprise)</td>
</tr>
<tr>
<td>MOI (MOI Test)</td>
<td>Market Oriented Industry</td>
</tr>
<tr>
<td>MOTIE</td>
<td>Ministry of Trade, Industry, and Energy (Korea)</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>MP</td>
<td>Member of Parliament</td>
</tr>
<tr>
<td>MPC</td>
<td>Marginal Propensity to Consume</td>
</tr>
<tr>
<td>MPF</td>
<td>Merchandise Processing Fee</td>
</tr>
<tr>
<td>Acronym</td>
<td>Definition</td>
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<tr>
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<tr>
<td>MPIA</td>
<td>WTO Multi-Party Interim Appeal Arbitration Arrangement</td>
</tr>
<tr>
<td>MPS</td>
<td>Marginal Propensity to Save</td>
</tr>
<tr>
<td>MRA</td>
<td>Mutual Recognition Agreement</td>
</tr>
<tr>
<td>MRE</td>
<td>Meals Ready to Eat</td>
</tr>
<tr>
<td>MRI</td>
<td>magnetic resonance imaging</td>
</tr>
<tr>
<td>MRL</td>
<td>Maximum Residue Level</td>
</tr>
<tr>
<td>MRM</td>
<td>Marine Resource Management</td>
</tr>
<tr>
<td>mRNA</td>
<td>messenger ribonucleic acid</td>
</tr>
<tr>
<td>MRS</td>
<td>Marginal Rate of Substitution</td>
</tr>
<tr>
<td>MRT</td>
<td>Marginal Rate of Transformation</td>
</tr>
<tr>
<td>MSCI</td>
<td>Morgan Stanley Capital International</td>
</tr>
<tr>
<td>MSF</td>
<td>Médecins Sans Frontières</td>
</tr>
<tr>
<td>MSME</td>
<td>Micro, Small, and Medium Sized Enterprise</td>
</tr>
<tr>
<td>MSP</td>
<td>Minimum Support Price (1st meaning)</td>
</tr>
<tr>
<td>MSP</td>
<td>Ministry of Social Protection (2nd meaning) (Colombia)</td>
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<tr>
<td>MSS</td>
<td>Ministry of State Security (China)</td>
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<tr>
<td>MST</td>
<td>Minimum Standard of Treatment</td>
</tr>
<tr>
<td>MSY</td>
<td>maximum sustainable yield</td>
</tr>
<tr>
<td>mt</td>
<td>metric ton</td>
</tr>
<tr>
<td>MTA</td>
<td>Managed Trade Agreement (1st meaning)</td>
</tr>
<tr>
<td>MTA</td>
<td>Metropolitan Transit Authority (2nd meaning) (New York City)</td>
</tr>
<tr>
<td>MTA</td>
<td>Multilateral Trade Agreement (3rd meaning)</td>
</tr>
<tr>
<td>MTB</td>
<td>Miscellaneous Trade Bill (multiple years)</td>
</tr>
<tr>
<td>MTCR</td>
<td>Missile Technology Control Regime</td>
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<tr>
<td>MTN</td>
<td>Multilateral Trade Negotiation</td>
</tr>
<tr>
<td>MTO</td>
<td>Multilateral Trade Organization</td>
</tr>
<tr>
<td>MTOP</td>
<td>Millions of Theoretical Operations per Second</td>
</tr>
<tr>
<td>MUFG</td>
<td>Mitsubishi UFJ Financial Group Bank, Ltd. (Japan)</td>
</tr>
<tr>
<td>MVTO</td>
<td>Motor Vehicles Tariff Order (Canada)</td>
</tr>
<tr>
<td>MWh</td>
<td>Mega Watt hour</td>
</tr>
<tr>
<td>MY</td>
<td>Marketing Year</td>
</tr>
<tr>
<td>NAD Bank</td>
<td>North American Development Bank</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>NAAEC</td>
<td>North American Agreement on Environmental Cooperation (NAFTA Environmental Side Agreement)</td>
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<tr>
<td>NAALC</td>
<td>North American Agreement on Labor Cooperation (NAFTA Labor Side Agreement)</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement (NAFTA 1.0 and/or NAFTA 2.0)</td>
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<tr>
<td>NAFTA 1.0</td>
<td>North American Free Trade Agreement (original FTA that entered into force 1 January 1994)</td>
</tr>
<tr>
<td>NAFTA 2.0</td>
<td>North American Free Trade Agreement (revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)</td>
</tr>
<tr>
<td>NAI</td>
<td>Notifiable Avian Influenza</td>
</tr>
<tr>
<td>NAM (1st meaning)</td>
<td>U.S. National Association of Manufacturers</td>
</tr>
<tr>
<td>NAM (2nd meaning)</td>
<td>Non-Aligned Movement</td>
</tr>
<tr>
<td>NAMA</td>
<td>Non-Agricultural Market Access</td>
</tr>
<tr>
<td>NAND</td>
<td>Not AND flash memory chip technology</td>
</tr>
<tr>
<td>NAO</td>
<td>National Administrative Office (NAFTA)</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>NASA</td>
<td>U.S. National Aeronautics and Space Administration</td>
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<tr>
<td>NASDAQ</td>
<td>National Association of Securities Dealers Automated Quotations exchange (U.S.)</td>
</tr>
<tr>
<td>NBA</td>
<td>National Basketball Association</td>
</tr>
<tr>
<td>NBP</td>
<td>National Bank of Pakistan</td>
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<tr>
<td>NC</td>
<td>Net Cost</td>
</tr>
<tr>
<td>NCC (1st meaning)</td>
<td>National Chicken Council</td>
</tr>
<tr>
<td>NCC (2nd meaning)</td>
<td>Non-Cooperative Country (Argentina)</td>
</tr>
<tr>
<td>NCCDA</td>
<td>National Critical Capabilities Defense Act (part of ACA)</td>
</tr>
<tr>
<td>NCM</td>
<td>Non-Conforming Measure</td>
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<tr>
<td>N.C.M.</td>
<td>Nomenclatura Común MERCOSUR (MERCOSUR Common Nomenclature)</td>
</tr>
<tr>
<td>NCSC</td>
<td>National Counterintelligence and Security Center</td>
</tr>
<tr>
<td>Acronym</td>
<td>Meaning</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>NCSC</td>
<td>National Cyber Security Center (U.K.)</td>
</tr>
<tr>
<td>NCTO</td>
<td>National Council of Textile Organizations</td>
</tr>
<tr>
<td>NDA</td>
<td>National Democratic Alliance (India)</td>
</tr>
<tr>
<td>NDC</td>
<td>North Drilling Company (Iran)</td>
</tr>
<tr>
<td>NdFeB</td>
<td>neodymium-iron-boron permanent magnets (also called neodymium magnets, neo magnets, or rare earth magnets)</td>
</tr>
<tr>
<td>NDRC</td>
<td>National Development and Reform Commission (China)</td>
</tr>
<tr>
<td>NEA</td>
<td>1976 <em>National Emergencies Act</em></td>
</tr>
<tr>
<td>NEI</td>
<td>National Export Initiative</td>
</tr>
<tr>
<td>NEP</td>
<td>New Economic Policy (Malaysia)</td>
</tr>
<tr>
<td>nes</td>
<td>not elsewhere specified</td>
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<tr>
<td>NFIDC</td>
<td>Net Food Importing Developing Country</td>
</tr>
<tr>
<td>NFTC</td>
<td>National Foreign Trade Council</td>
</tr>
<tr>
<td>NG</td>
<td>Natural Gas</td>
</tr>
<tr>
<td>NGR</td>
<td>Negotiating Group on Rules (WTO Doha Round)</td>
</tr>
<tr>
<td>NHI</td>
<td>National Health Insurance (Korea)</td>
</tr>
<tr>
<td>NHS</td>
<td>National Health Service (U.K.)</td>
</tr>
<tr>
<td>NHT</td>
<td>National Hand Tools Corporation</td>
</tr>
<tr>
<td>NI</td>
<td>Northern Ireland</td>
</tr>
<tr>
<td>NIC</td>
<td>Newly Industrialized Country</td>
</tr>
<tr>
<td>NICO</td>
<td>Naftiran Intertrade Company</td>
</tr>
<tr>
<td>NIDC</td>
<td>National Iranian Drilling Company (NIOC subsidiary)</td>
</tr>
<tr>
<td>NIEO</td>
<td>New International Economic Order</td>
</tr>
<tr>
<td>NIOC</td>
<td>National Iranian Oil Company</td>
</tr>
<tr>
<td>NIST</td>
<td>U.S. National Institute of Standards and Technology</td>
</tr>
<tr>
<td>NITC</td>
<td>National Iranian Tanker Company</td>
</tr>
<tr>
<td>NJPA</td>
<td>National Juice Products Association</td>
</tr>
<tr>
<td>NLC</td>
<td>National Labor Committee (U.S.)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>NLCF</td>
<td>National Livestock Cooperatives Federation</td>
</tr>
<tr>
<td>NLD</td>
<td>National League for Democracy (Burma)</td>
</tr>
<tr>
<td>NLR</td>
<td>No Licence Required (U.S. DOC BIS)</td>
</tr>
<tr>
<td>NLRB</td>
<td>National Labor Relations Board (U.S.)</td>
</tr>
<tr>
<td>nm</td>
<td>nanometer</td>
</tr>
<tr>
<td>NMDC</td>
<td>National Minerals Development Corporation (India)</td>
</tr>
<tr>
<td>NME</td>
<td>Non-Market Economy</td>
</tr>
<tr>
<td>NMFS</td>
<td>U.S. National Marine Fisheries Service (DOC)</td>
</tr>
<tr>
<td>NNSA</td>
<td>U.S. National Nuclear Security Administration (DOE)</td>
</tr>
<tr>
<td>NOAA</td>
<td>U.S. National Oceanic and Atmospheric Administration (DOC)</td>
</tr>
<tr>
<td>NOx</td>
<td>Nitrogen oxides</td>
</tr>
<tr>
<td>NPA</td>
<td>Non-Prosecution Agreement</td>
</tr>
<tr>
<td>NPC (1st meaning)</td>
<td>National People’s Congress (China’s legislature)</td>
</tr>
<tr>
<td>NPC (2nd meaning)</td>
<td>National Petrochemical Company (Iran)</td>
</tr>
<tr>
<td>NPCSC</td>
<td>National People’s Congress Standing Committee (NPC’s top-decision making body)</td>
</tr>
<tr>
<td>NPF</td>
<td>Non-Privileged Foreign status</td>
</tr>
<tr>
<td>NPL</td>
<td>Non-Performing Loan</td>
</tr>
<tr>
<td>NPT</td>
<td>1968 Nuclear Non-Proliferation Treaty</td>
</tr>
<tr>
<td>NRA</td>
<td>National Rifle Association</td>
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<tr>
<td>NRC</td>
<td>U.S. Nuclear Regulatory Commission</td>
</tr>
<tr>
<td>NRI</td>
<td>Non-Resident Indian</td>
</tr>
<tr>
<td>NRL</td>
<td>Nuclear Referral List</td>
</tr>
<tr>
<td>NSA</td>
<td>U.S. National Security Agency</td>
</tr>
<tr>
<td>NSC</td>
<td>National Securities Commission (Argentina)</td>
</tr>
<tr>
<td>NS-CMIC List</td>
<td>Non-SDN Chinese Military Industrial Complex Companies List</td>
</tr>
<tr>
<td>NSF</td>
<td>U.S. National Science Foundation</td>
</tr>
<tr>
<td>NSG</td>
<td>Nuclear Suppliers Group</td>
</tr>
<tr>
<td>NSIBR</td>
<td>National Security Industrial Base Regulations</td>
</tr>
<tr>
<td>NSL</td>
<td>National Security Law (2020 Law of the PRC on Safeguarding National Security in...</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
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<tr>
<td>NSM</td>
<td>Jawaharlal Nehru National Solar Mission (India)</td>
</tr>
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<td>NSPK</td>
<td>National Payment Card System Joint Stock Company (Russia)</td>
</tr>
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<td>NSPD</td>
<td>National Security Presidential Directive</td>
</tr>
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<td>NSS</td>
<td>WTO SPS National Notification System</td>
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<tr>
<td>NTA</td>
<td>National Textile Association (U.S.)</td>
</tr>
<tr>
<td>NTB</td>
<td>Non-Tariff Barrier</td>
</tr>
<tr>
<td>NTC</td>
<td>National Trade Council (United States)</td>
</tr>
<tr>
<td>NTE (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>National Trade Estimate Report on Foreign Trade Barriers (USTR)</td>
</tr>
<tr>
<td>NTE (NTE sector) (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Non-Traditional Export (sector)</td>
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<tr>
<td>NTM</td>
<td>Non-Tariff Measure</td>
</tr>
<tr>
<td>NTR</td>
<td>Normal Trade Relations</td>
</tr>
<tr>
<td>NTSB</td>
<td>National Transportation Safety Board (U.S.)</td>
</tr>
<tr>
<td>NV (N.V.) (1&lt;sup&gt;st&lt;/sup&gt; meaning)</td>
<td>Naamloze Vennootschap (Dutch), a publicly limited liability company, with legal personality, which sells capital that is divided into shares to the public to obtain income.</td>
</tr>
<tr>
<td>NV (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>Normal Value</td>
</tr>
<tr>
<td>NVOCC</td>
<td>Non-Vessel Operating Common Carrier</td>
</tr>
<tr>
<td>NWFP</td>
<td>North West Frontier Province (Pakistan) (Khyber Pakhtunkhwa)</td>
</tr>
<tr>
<td>N.Y. Fed (FRBNY)</td>
<td>Federal Reserve Bank of New York</td>
</tr>
<tr>
<td>NYSE</td>
<td>New York Stock Exchange</td>
</tr>
<tr>
<td>NYU</td>
<td>New York University</td>
</tr>
<tr>
<td>NZ$</td>
<td>New Zealand Dollar</td>
</tr>
<tr>
<td>NZD</td>
<td>New Zealand Dollar</td>
</tr>
<tr>
<td>OAS</td>
<td>Organization of American States</td>
</tr>
<tr>
<td>OBE</td>
<td>Officer of the Most Excellent Order of the British Empire</td>
</tr>
<tr>
<td>OBRA</td>
<td>Omnibus Budget and Reconciliation Act (multiple years)</td>
</tr>
<tr>
<td>OCD</td>
<td>Ordinary Customs Duties</td>
</tr>
<tr>
<td>OCR</td>
<td>Out of Cycle Review</td>
</tr>
<tr>
<td>OCTG</td>
<td>Oil Country Tubular Goods</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>ODC</td>
<td>Other Duties and Charges</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OED</td>
<td><em>Oxford English Dictionary</em></td>
</tr>
<tr>
<td>OEE</td>
<td>U.S. Office of Export Enforcement (BIS)</td>
</tr>
<tr>
<td>OEM</td>
<td>Original Equipment Manufacturer</td>
</tr>
<tr>
<td>OFA</td>
<td>Other Forms of Assistance</td>
</tr>
<tr>
<td>OFAC</td>
<td>U.S. Office of Foreign Assets Control (Department of the Treasury)</td>
</tr>
<tr>
<td>OIC</td>
<td>Organization of Islamic Conference</td>
</tr>
<tr>
<td>OIE</td>
<td>World Organization for Animal Health (<em>Office International des Epizooties</em>)</td>
</tr>
<tr>
<td>OLI</td>
<td>Ownership, Location, and Internalization (Theory)</td>
</tr>
<tr>
<td>OMA</td>
<td>Orderly Marketing Arrangement</td>
</tr>
<tr>
<td>OMB</td>
<td>Office of Management and Budget (U.S.)</td>
</tr>
<tr>
<td>OMO</td>
<td>Open Market Operation</td>
</tr>
<tr>
<td>OOIDA</td>
<td>Owner-Operator Independent Drivers Association</td>
</tr>
<tr>
<td>OPA</td>
<td>Ontario Power Authority (Canada)</td>
</tr>
<tr>
<td>OPEC</td>
<td>Organization of Petroleum Exporting Countries</td>
</tr>
<tr>
<td>OPZ</td>
<td>Outward Processing Zone (KORUS)</td>
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<tr>
<td>OSINFOR</td>
<td><em>Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre</em> (Forestry regulator, Peru)</td>
</tr>
<tr>
<td>OTCA</td>
<td><em>Omnibus Trade and Competitiveness Act of 1988</em></td>
</tr>
<tr>
<td>OTCG</td>
<td>Oil Country Tubular Good</td>
</tr>
<tr>
<td>OTDS</td>
<td>Overall Trade distorting Domestic Support</td>
</tr>
<tr>
<td>OTEXA</td>
<td>Office of Textiles and Apparel (U.S. DOC)</td>
</tr>
<tr>
<td>OTLA</td>
<td>Office of Trade and Labor Affairs (in DOL)</td>
</tr>
<tr>
<td>OTR</td>
<td>Off-The-Road</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>P5+1</td>
<td>China, France, Russia, U.K., and U.S. (five permanent U.N. Security Council members), plus Germany</td>
</tr>
<tr>
<td>P&amp;I</td>
<td>protection and indemnity (maritime insurance)</td>
</tr>
<tr>
<td>PACOM (USINDOPACOM)</td>
<td>United States Indo-Pacific Command</td>
</tr>
<tr>
<td>PADIS</td>
<td>Program of Incentives for the Semiconductors Sector (Brazil)</td>
</tr>
<tr>
<td>PAP</td>
<td>People’s Action Party (Singapore)</td>
</tr>
<tr>
<td>PAPS</td>
<td>Pre-Arrival Processing System</td>
</tr>
<tr>
<td>Paris Agreement</td>
<td>December 2015 Paris Climate Accord, or Paris Climate Agreement, under UNFCCC</td>
</tr>
<tr>
<td>Paris Convention</td>
<td>1883 Paris Convention for the Protection of Industrial Property</td>
</tr>
<tr>
<td>PASA</td>
<td>Pre-Authorization Safety Audit</td>
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<tr>
<td>PATVD</td>
<td>Program of Support for the Technological Development of the Industry of Digital TV Equipment (Brazil)</td>
</tr>
<tr>
<td>PBC (PBOC)</td>
<td>People’s Bank of China</td>
</tr>
<tr>
<td>PBS</td>
<td>Price Band System</td>
</tr>
<tr>
<td>PBUH</td>
<td>Peace Be Upon Him</td>
</tr>
<tr>
<td>Pub. L. No.</td>
<td>Public Law Number (United States)</td>
</tr>
<tr>
<td>PC</td>
<td>Personal Computer</td>
</tr>
<tr>
<td>PCA (1st meaning)</td>
<td>Post-Clearance Audit</td>
</tr>
<tr>
<td>PCA (2nd meaning)</td>
<td>Permanent Court of Arbitration (The Hague)</td>
</tr>
<tr>
<td>PCAOB</td>
<td>Public Company Accounting Oversight Board (United States)</td>
</tr>
<tr>
<td>PCAST</td>
<td>President’s Council of Advisors on Science and Technology (United States)</td>
</tr>
<tr>
<td>PCB</td>
<td>printed circuit board</td>
</tr>
<tr>
<td>PCBA</td>
<td>printed circuit board assembly</td>
</tr>
<tr>
<td>PCG (PCG fibers)</td>
<td>polyvinyl alcohol (PVA), cellulose, and glass fibers</td>
</tr>
<tr>
<td>PDB</td>
<td>President’s Daily Brief</td>
</tr>
<tr>
<td>PDR</td>
<td>People’s Democratic Republic (Lao PDR)</td>
</tr>
<tr>
<td>PDV</td>
<td>Present Discounted Value</td>
</tr>
<tr>
<td>PDVSA</td>
<td>Petróleos de Venezuela, S.A.</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
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</tr>
<tr>
<td>PEESA</td>
<td>Protecting Europe’s Energy Security Act of 2019, as amended</td>
</tr>
<tr>
<td>Pemex</td>
<td>Petróleos Mexicanos (Mexico)</td>
</tr>
<tr>
<td>PEO</td>
<td>Permanent Exclusion Order</td>
</tr>
<tr>
<td>PETA</td>
<td>People for the Ethical Treatment of Animals</td>
</tr>
<tr>
<td>PF</td>
<td>Privileged Foreign status</td>
</tr>
<tr>
<td>PFC</td>
<td>Priority Foreign Country</td>
</tr>
<tr>
<td>Pharma Agreement</td>
<td>WTO Agreement on Pharmaceutical Products (Uruguay Round plurilateral sectoral agreement)</td>
</tr>
<tr>
<td>PhRMA</td>
<td>Pharmaceutical Manufacturers of America</td>
</tr>
<tr>
<td>PI</td>
<td>preliminary injunction</td>
</tr>
<tr>
<td>PIS/PASEP</td>
<td>Social Integration Program/Civil Service Asset Formation Program Contribution (Brazil)</td>
</tr>
<tr>
<td>PIS/PASEP-Importation</td>
<td>Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services (Brazil)</td>
</tr>
<tr>
<td>PJSC</td>
<td>Public Joint Stock Company (Russia)</td>
</tr>
<tr>
<td>PLA</td>
<td>People’s Liberation Army (China)</td>
</tr>
<tr>
<td>Plc</td>
<td>public limited company (U.K.)</td>
</tr>
<tr>
<td>PLI</td>
<td>Production-Linked Incentive</td>
</tr>
<tr>
<td>PLO</td>
<td>Palestine Liberation Organization</td>
</tr>
<tr>
<td>PM</td>
<td>Prime Minister</td>
</tr>
<tr>
<td>PMC</td>
<td>Popular Mobilization Committee (Iraq)</td>
</tr>
<tr>
<td>PME</td>
<td>Pingtan Marine Enterprise (China)</td>
</tr>
<tr>
<td>PNTR</td>
<td>Permanent Normal Trade Relations</td>
</tr>
<tr>
<td>PNW</td>
<td>Pine wood nematode</td>
</tr>
<tr>
<td>POA</td>
<td>Power of Attorney</td>
</tr>
<tr>
<td>POC</td>
<td>Point of Contact (MTCR)</td>
</tr>
<tr>
<td>POI</td>
<td>Period of Investigation</td>
</tr>
<tr>
<td>POR</td>
<td>Period of Review</td>
</tr>
<tr>
<td>POW-MIA</td>
<td>Prisoner of War – Missing in Action</td>
</tr>
<tr>
<td>PP</td>
<td>Purchase Price (Pre-Uruguay Round U.S. term for Export Price)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
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</tr>
<tr>
<td>PPA</td>
<td>Power Purchase Agreement</td>
</tr>
<tr>
<td>PPB</td>
<td>Basic Productive Process (Brazil)</td>
</tr>
<tr>
<td>PPE</td>
<td>personal protective equipment</td>
</tr>
<tr>
<td>PPF</td>
<td>Production Possibilities Frontier</td>
</tr>
<tr>
<td>PPM (1st meaning)</td>
<td>parts per million</td>
</tr>
<tr>
<td>PPM (2nd meaning)</td>
<td>process and production method</td>
</tr>
<tr>
<td>PPP</td>
<td>Purchasing Power Parity</td>
</tr>
<tr>
<td>PPS</td>
<td>Probability-Proportional to Size</td>
</tr>
<tr>
<td>PR</td>
<td>public relations</td>
</tr>
<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
</tr>
<tr>
<td>PROEX</td>
<td>Programa de Financiamento às Exportações (Brazil)</td>
</tr>
<tr>
<td>PRO-IP Act</td>
<td>2008 Prioritizing Resources and Organization for Intellectual Property Act</td>
</tr>
<tr>
<td>PRS</td>
<td>Price Range System</td>
</tr>
<tr>
<td>PSA (1st meaning)</td>
<td>Port of Singapore Authority</td>
</tr>
<tr>
<td>PSA (2nd meaning)</td>
<td>production sharing agreement</td>
</tr>
<tr>
<td>PSC</td>
<td>Post-Summary Correction (U.S. CBP)</td>
</tr>
<tr>
<td>PSH</td>
<td>Public Stock Holding</td>
</tr>
<tr>
<td>PSI</td>
<td>Pre-Shipment Inspection</td>
</tr>
<tr>
<td>PSI Agreement</td>
<td>WTO Agreement on Pre-Shipment Inspection</td>
</tr>
<tr>
<td>PSRO</td>
<td>Product Specific Rule of Origin</td>
</tr>
<tr>
<td>PSU</td>
<td>Public Sector Unit (India)</td>
</tr>
<tr>
<td>PTA (1st meaning)</td>
<td>Preferential Trade Agreement, or Preferential Trading Arrangement</td>
</tr>
<tr>
<td>PTA (2nd meaning)</td>
<td>Payable through account</td>
</tr>
<tr>
<td>PTO</td>
<td>U.S. Patent and Trademark Office</td>
</tr>
<tr>
<td>PUBG</td>
<td>PlayerUnknown’s Battlegrounds (Chinese app)</td>
</tr>
<tr>
<td>PV</td>
<td>Photovoltaic</td>
</tr>
<tr>
<td>PVA (PVA fibers)</td>
<td>Polyvinyl alcohol fibers</td>
</tr>
<tr>
<td>PVC</td>
<td>Polyvinyl chloride</td>
</tr>
<tr>
<td>PVLT</td>
<td>passenger vehicle and light truck</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>PwC</td>
<td>PricewaterhouseCoopers</td>
</tr>
<tr>
<td>QAI</td>
<td>Quds Aviation Industries (Iran)</td>
</tr>
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<td>QC</td>
<td>Queen’s Counsel</td>
</tr>
<tr>
<td>QE</td>
<td>Quantitative Easing</td>
</tr>
<tr>
<td>QIZ</td>
<td>Qualified Industrial Zone</td>
</tr>
<tr>
<td>QR</td>
<td>Quantitative Restriction</td>
</tr>
<tr>
<td>Quad</td>
<td>Quadrilateral Security Dialogue (Australia, India, Japan, and U.S.)</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and Development</td>
</tr>
<tr>
<td>R&amp;TD</td>
<td>Research and Technological Development measures</td>
</tr>
<tr>
<td>RAM</td>
<td>Recently Acceded Member (of WTO)</td>
</tr>
<tr>
<td>RAN</td>
<td>Radio Access Network</td>
</tr>
<tr>
<td>RBI</td>
<td>Reserve Bank of India</td>
</tr>
<tr>
<td>RCC</td>
<td>United States – Canada Regulatory Cooperation Council</td>
</tr>
<tr>
<td>RCEP</td>
<td>Regional Comprehensive Economic Partnership</td>
</tr>
<tr>
<td>RCMC</td>
<td>Registration-cum-Membership Certificate (India)</td>
</tr>
<tr>
<td>RDIF</td>
<td>Russian Direct Investment Fund</td>
</tr>
<tr>
<td>rDNA</td>
<td>recombinant deoxyribonucleic acid</td>
</tr>
<tr>
<td>REACH</td>
<td>Registration, Evaluation, and Authorization of Chemicals (EU)</td>
</tr>
<tr>
<td>REC</td>
<td>Regional Economic Community</td>
</tr>
<tr>
<td>REER</td>
<td>Real Effective Exchange Rate</td>
</tr>
<tr>
<td>Rep.</td>
<td>Representative</td>
</tr>
<tr>
<td>RESTRICT Act</td>
<td>U.S. Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act</td>
</tr>
<tr>
<td>RFMO</td>
<td>Regional Fisheries Management Organization</td>
</tr>
<tr>
<td>RFMO/A</td>
<td>Regional Fisheries Management Organization or Arrangement</td>
</tr>
<tr>
<td>RMA (1st meaning)</td>
<td>Risk Management Association (U.S.)</td>
</tr>
<tr>
<td>RMA (2nd meaning)</td>
<td>Risk Management Authorization</td>
</tr>
<tr>
<td>RMB</td>
<td>Ren min bi (“people’s money,” the Chinese currency)</td>
</tr>
<tr>
<td>RMG</td>
<td>Ready Made Garment</td>
</tr>
<tr>
<td>RMI (DRM)</td>
<td>Rights Management Information (Digital Rights Management)</td>
</tr>
<tr>
<td>RNG</td>
<td>WTO Negotiating Group on Rules</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>RNRC</td>
<td>Russian National Reinsurance Company</td>
</tr>
<tr>
<td>ROA</td>
<td>Return on Assets</td>
</tr>
<tr>
<td>ROC (R.O.C.)</td>
<td>Republic of China (Taiwan)</td>
</tr>
<tr>
<td>Rome Convention</td>
<td>1964 Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organizations</td>
</tr>
<tr>
<td>ROO</td>
<td>Rule Of Origin</td>
</tr>
<tr>
<td>ROW</td>
<td>Rest Of World</td>
</tr>
<tr>
<td>ROZ</td>
<td>Reconstruction Opportunity Zone</td>
</tr>
<tr>
<td>RPC</td>
<td>RCEP Participating Country</td>
</tr>
<tr>
<td>RPG</td>
<td>Rocket-propelled grenade</td>
</tr>
<tr>
<td>RPL</td>
<td>Relative Price Line</td>
</tr>
<tr>
<td>RPOC</td>
<td>Reinforced Point Of Contact (MTCR)</td>
</tr>
<tr>
<td>RPT</td>
<td>Reasonable Period of Time</td>
</tr>
<tr>
<td>RRM</td>
<td>USMCA Rapid Response Mechanism</td>
</tr>
<tr>
<td>Rs.</td>
<td>Rupee</td>
</tr>
<tr>
<td>RSS</td>
<td>Rashtriya Swayamsevak Sangh (India)</td>
</tr>
<tr>
<td>RTA</td>
<td>Regional Trade Agreement</td>
</tr>
<tr>
<td>RTAA</td>
<td>Re-employment Trade Adjustment Assistance</td>
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<tr>
<td>Rusi</td>
<td>Royal United Services Institute (U.K.)</td>
</tr>
<tr>
<td>RV</td>
<td>Recreational Vehicle</td>
</tr>
<tr>
<td>RVC</td>
<td>Regional Value Content</td>
</tr>
<tr>
<td>S&amp;D</td>
<td>Special and Differential</td>
</tr>
<tr>
<td>S&amp;ED</td>
<td>Strategic and Economic Dialogue (U.S.-China)</td>
</tr>
<tr>
<td>S.A.</td>
<td>Société Anonyme (French company designation), Sociedad Anónima (Spanish company designation), Sociedade Anônima (Portuguese company designation)</td>
</tr>
<tr>
<td>S.A. de C.V.</td>
<td>Sociedad Anónima de Capital Variable (Mexican company designation)</td>
</tr>
<tr>
<td>SAA</td>
<td>Statement of Administrative Action</td>
</tr>
<tr>
<td>SAARC</td>
<td>South Asia Association for Regional Cooperation</td>
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<tr>
<td>SABIC</td>
<td>Saudi Arabian Basic Industry Corporation (Saudi Arabian Basic Industries Corporation)</td>
</tr>
<tr>
<td>SAC</td>
<td>State Administration Council (Burma)</td>
</tr>
<tr>
<td>SACU</td>
<td>Southern African Customs Union</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SAF</td>
<td>sustainable aviation fuel (IPEF)</td>
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<tr>
<td>SAFE</td>
<td>State Administration of Foreign Exchange (China)</td>
</tr>
<tr>
<td>SAFE Port Act</td>
<td>2006 Security and Accountability for Every Port Act</td>
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<tr>
<td>SAFTA</td>
<td>South Asia Free Trade Agreement</td>
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<td>SAGIA</td>
<td>Saudi Arabian General Investment Authority</td>
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<td>SAIC</td>
<td>Shanghai Automotive Industry Corporation Motor Corporation Limited (China)</td>
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<td>SAM</td>
<td>surface-to-air (missile)</td>
</tr>
<tr>
<td>SAMA</td>
<td>Saudi Arabian Monetary Authority</td>
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<td>SAP</td>
<td>Structural Adjustment Program</td>
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<td>SAPTA</td>
<td>South Asia Preferential Trading Arrangement</td>
</tr>
<tr>
<td>SAR (1st meaning)</td>
<td>Suspicious Activity Report (FinCEN)</td>
</tr>
<tr>
<td>SAR (2nd meaning)</td>
<td>Special Administrative Region (China)</td>
</tr>
<tr>
<td>SAR (3rd meaning)</td>
<td>Saudi Arabian Riyal</td>
</tr>
<tr>
<td>SARS</td>
<td>Sudden Acute Respiratory Syndrome</td>
</tr>
<tr>
<td>SASAC</td>
<td>State-owned Assets Supervision and Administration Commission of the State Council (China)</td>
</tr>
<tr>
<td>SBV</td>
<td>State Bank of Vietnam</td>
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<tr>
<td>SCC</td>
<td>standard contractual clause</td>
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<tr>
<td>Scexit</td>
<td>Exit of Scotland from the U.K.</td>
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<tr>
<td>SCGP</td>
<td>Supplier Credit Guarantee Program</td>
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<td>SCI</td>
<td>Secretaría de Comercio Interior (Argentina, Secretary of Domestic Trade)</td>
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<tr>
<td>SCM</td>
<td>Subsidies and Countervailing Measures</td>
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<tr>
<td>SCM Agreement</td>
<td>WTO Agreement on Subsidies and Countervailing Measures (ASCM)</td>
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<td>SCP</td>
<td>Sugar Containing Product</td>
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<td>SDF</td>
<td>Steel Development Fund (India)</td>
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<td>SDG</td>
<td>United Nations Sustainable Development Goal</td>
</tr>
<tr>
<td>SDIC</td>
<td>State Development &amp; Investment Corp. (China)</td>
</tr>
<tr>
<td>SDLP</td>
<td>Social Democratic and Labor Party (Northern Ireland)</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>SDN (SDN List)</td>
<td>Specially Designated Nationals and Blocked Persons (List)</td>
</tr>
<tr>
<td>Sdn Bhd (SDN BHD)</td>
<td>Sendirian Berhad (privately limited company, Malaysia)</td>
</tr>
<tr>
<td>SDR (1st meaning)</td>
<td>services domestic regulation</td>
</tr>
<tr>
<td>SDR (2nd meaning)</td>
<td>IMF Special Drawing Right</td>
</tr>
<tr>
<td>SE</td>
<td>Secretaría de Economía (Secretariat of Economy, Mexico, formerly SECOFI)</td>
</tr>
<tr>
<td>SEBI</td>
<td>Securities and Exchange Bureau of India</td>
</tr>
<tr>
<td>SEC</td>
<td>U.S. Securities and Exchange Commission</td>
</tr>
<tr>
<td>SECOFI</td>
<td>Secretary of Commerce and Industrial Development (Secretario de Comercio y Fomento Industrial), i.e., Ministry of Commerce and Industrial Development (Mexico, renamed SE in December 2000)</td>
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<tr>
<td>SED</td>
<td>Strategic Economic Dialogue (U.S.-China)</td>
</tr>
<tr>
<td>SEI</td>
<td>Strategic Emerging Industry (SEI Catalogue – China)</td>
</tr>
<tr>
<td>SEIU</td>
<td>Service Employees International Union</td>
</tr>
<tr>
<td>Sen.</td>
<td>Senator</td>
</tr>
<tr>
<td>SENTRI</td>
<td>Secure Electronic Network for Travelers Rapid Inspection</td>
</tr>
<tr>
<td>SEP</td>
<td>Standard Essential Patent</td>
</tr>
<tr>
<td>SEZ</td>
<td>Special Economic Zone</td>
</tr>
<tr>
<td>SFA</td>
<td>Singapore Food Agency</td>
</tr>
<tr>
<td>SFO</td>
<td>Serious Fraud Office</td>
</tr>
<tr>
<td>SG&amp;A</td>
<td>Selling, General, and Administrative expenses</td>
</tr>
<tr>
<td>SG$</td>
<td>Singapore Dollar</td>
</tr>
<tr>
<td>SGD</td>
<td>Singapore Dollar</td>
</tr>
<tr>
<td>SHIG</td>
<td>Shahid Hemmat Industries Group (Iran)</td>
</tr>
<tr>
<td>SIDS</td>
<td>Small Island Developing States</td>
</tr>
<tr>
<td>SJM</td>
<td>Swadeshi Jagaran Manch (India)</td>
</tr>
<tr>
<td>SIE</td>
<td>State Invested Enterprise</td>
</tr>
<tr>
<td>SIFI</td>
<td>Systemically Important Financial Institution</td>
</tr>
<tr>
<td>SIFMA</td>
<td>Securities Industry and Financial Markets Association</td>
</tr>
<tr>
<td>SII</td>
<td>Serum Institute of India</td>
</tr>
<tr>
<td>SIL</td>
<td>Special Import License (India)</td>
</tr>
<tr>
<td>SIM</td>
<td>Sistema Informático MARIA</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>SIMA</td>
<td>Special Import Measures Act (Canada)</td>
</tr>
<tr>
<td>SKD</td>
<td>Semi-knock down</td>
</tr>
<tr>
<td>SKM</td>
<td>Samyukta Kisan Morcha (India, umbrella group of approximately 40 farmers unions)</td>
</tr>
<tr>
<td>SMART</td>
<td>Secondary Materials and Recycled Textiles Association</td>
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<tr>
<td>SMBC</td>
<td>Sumitomo Mitsui Banking Corporation (Japan)</td>
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<tr>
<td>SME</td>
<td>Small and Medium Sized Enterprise (1st meaning)</td>
</tr>
<tr>
<td>SME</td>
<td>Square Meter Equivalent (2nd meaning)</td>
</tr>
<tr>
<td>SMIC</td>
<td>Semiconductor Manufacturing International Corp. (China)</td>
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<td>SMS</td>
<td>Supply Management System (Canada)</td>
</tr>
<tr>
<td>SNAP</td>
<td>Supplemental Nutritional Assistance Program</td>
</tr>
<tr>
<td>SNAP-R</td>
<td>Simplified Network Application Process - Redesign</td>
</tr>
<tr>
<td>SNB</td>
<td>Swiss National Bank</td>
</tr>
<tr>
<td>SNITIS</td>
<td>Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32 (independent Mexican labor union)</td>
</tr>
<tr>
<td>SNP</td>
<td>Scottish National Party</td>
</tr>
<tr>
<td>S.O.</td>
<td>Statutory Order (India)</td>
</tr>
<tr>
<td>SOCB</td>
<td>State Owned Commercial Bank (China)</td>
</tr>
<tr>
<td>SocGen</td>
<td>Société Générale (France)</td>
</tr>
<tr>
<td>SOE</td>
<td>State Owned Enterprise</td>
</tr>
<tr>
<td>SOF</td>
<td>Special Operations Forces</td>
</tr>
<tr>
<td>SOGI</td>
<td>Sexual Orientation and Gender Identity</td>
</tr>
<tr>
<td>SPD</td>
<td>Solar Power Developer</td>
</tr>
<tr>
<td>SPI</td>
<td>Seven Pillars Institute for Global Finance and Ethics (1st meaning)</td>
</tr>
<tr>
<td>SPI</td>
<td>Special Program Indicator (2nd meaning)</td>
</tr>
<tr>
<td>SPND</td>
<td>Sazman-e Pazhouheshhaye Novin-e Defa'i (Organization of Defensive Innovation and Research, Iran)</td>
</tr>
<tr>
<td>SPS</td>
<td>Sanitary and Phytosanitary (1st meaning)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
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</tr>
<tr>
<td>SPS (2nd meaning)</td>
<td>Single Payment Scheme</td>
</tr>
<tr>
<td>SPS Agreement</td>
<td>WTO Agreement on Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>SPV</td>
<td>Special Purpose Vehicle</td>
</tr>
<tr>
<td>SRAM</td>
<td>Static Random Access Memory (chip)</td>
</tr>
<tr>
<td>SRO</td>
<td>Special Remission Order (Canada)</td>
</tr>
<tr>
<td>SS</td>
<td>Special Session(s)</td>
</tr>
<tr>
<td>SSA</td>
<td>Sub-Saharan Africa</td>
</tr>
<tr>
<td>SSAC</td>
<td>Sub-Saharan African Country</td>
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<td>SSF Guidelines</td>
<td>Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (FAO)</td>
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<td>SSG</td>
<td>Special Safeguard</td>
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<td>SSM</td>
<td>Special Safeguard Mechanism</td>
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<tr>
<td>SSN</td>
<td>Resolutions of the National Insurance Supervisory Authority (Argentina)</td>
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<td>SST</td>
<td>State Sponsor of Terrorism</td>
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<tr>
<td>Stat.</td>
<td>United States Statutes at Large</td>
</tr>
<tr>
<td>Stat. Suf.</td>
<td>Statistical Suffix</td>
</tr>
<tr>
<td>STB</td>
<td>set-top box</td>
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<tr>
<td>STDF</td>
<td>WTO Standards and Trade Development Facility</td>
</tr>
<tr>
<td>STE</td>
<td>State Trading Enterprise</td>
</tr>
<tr>
<td>STIP</td>
<td>U.S.-Kenya Strategic Trade and Investment Partnership</td>
</tr>
<tr>
<td>STO</td>
<td>Special Trade Obligation</td>
</tr>
<tr>
<td>SUV</td>
<td>Sport utility vehicle</td>
</tr>
<tr>
<td>SVE</td>
<td>Small, Vulnerable Economy</td>
</tr>
<tr>
<td>SVP</td>
<td>surge voltage protector</td>
</tr>
<tr>
<td>SWAT</td>
<td>Strategic Worker Assistance and Training Initiative</td>
</tr>
<tr>
<td>SWIFT</td>
<td>Society for Worldwide Interbank Financial Telecommunications</td>
</tr>
<tr>
<td>T&amp;A</td>
<td>Textiles and Apparel</td>
</tr>
<tr>
<td>TAA (1st meaning)</td>
<td>Trade Adjustment Assistance</td>
</tr>
<tr>
<td>TAA (2nd meaning)</td>
<td>Trade Agreements Act of 1974, as amended</td>
</tr>
<tr>
<td>TAAEA</td>
<td>2011 Trade Adjustment Assistance Extension Act</td>
</tr>
<tr>
<td>TAARA</td>
<td>Trade Adjustment Assistance Reauthorization Act of 2015</td>
</tr>
<tr>
<td>TAA Reform Act</td>
<td>2002 Trade Adjustment Assistance Reform Act</td>
</tr>
<tr>
<td>TABC</td>
<td>Trans-Atlantic Business Council</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
</tr>
<tr>
<td>---------</td>
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</tr>
<tr>
<td>(TBC)</td>
<td>(also abbreviated TBC)</td>
</tr>
<tr>
<td>TABD</td>
<td>Trans-Atlantic Business Dialogue</td>
</tr>
<tr>
<td>TAC</td>
<td>Total Allowable Catch</td>
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<tr>
<td>TACB</td>
<td>technical assistance and capacity building (IPEF)</td>
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<tr>
<td>TAIPEI Act</td>
<td>2019 Taiwan Allies and International Protection and Enhancement Initiative Act</td>
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<tr>
<td>TB</td>
<td>tuberculosis</td>
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<tr>
<td>TBEA</td>
<td>Tebian Electric Apparatus Co., Ltd. (China)</td>
</tr>
<tr>
<td>TBI</td>
<td>traumatic brain injury</td>
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<tr>
<td>TBT</td>
<td>Technical Barriers to Trade</td>
</tr>
<tr>
<td>TBT Agreement</td>
<td>WTO Agreement on Technical Barriers to Trade</td>
</tr>
<tr>
<td>TCA</td>
<td>U.K.-EU Trade and Cooperation Agreement (EU-U.K. Trade and Cooperation Agreement, i.e., Christmas Eve 2020 Brexit Deal, effective 1 January 2020)</td>
</tr>
<tr>
<td>TCOM</td>
<td>Total Cost of Manufacturing</td>
</tr>
<tr>
<td>TCP</td>
<td>Third Country Price</td>
</tr>
<tr>
<td>TCP (1st meaning)</td>
<td>Third Country Price</td>
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<tr>
<td>TCP (2nd meaning)</td>
<td>El Tratado de Comercio entre los Pueblos, (“Trade Treaty for the Peoples”)</td>
</tr>
<tr>
<td>TCS</td>
<td>Tata Consulting Services</td>
</tr>
<tr>
<td>TD</td>
<td>Treasury Decision (U.S.)</td>
</tr>
<tr>
<td>TDA</td>
<td>2000 Trade and Development Act</td>
</tr>
<tr>
<td>TDDS</td>
<td>trade-distorting domestic support</td>
</tr>
<tr>
<td>TDEA</td>
<td>1983 Trade and Development Enhancement Act</td>
</tr>
<tr>
<td>TDI</td>
<td>Trade Defense Instrument</td>
</tr>
<tr>
<td>TDIC</td>
<td>Tourism Development and Investment Company (Abu Dhabi, UAE)</td>
</tr>
<tr>
<td>TEA (1st meaning)</td>
<td>Trade Expansion Act of 1962, as amended</td>
</tr>
<tr>
<td>TEA (2nd meaning)</td>
<td>Trade Enforcement Act of 2015, as amended (same as TFTEA, Trade Facilitation and Trade Enforcement Act)</td>
</tr>
<tr>
<td>TECRO</td>
<td>Taipei Economic and Cultural Representative Office</td>
</tr>
<tr>
<td>TED</td>
<td>Turtle Excluder Device</td>
</tr>
<tr>
<td>TEM</td>
<td>Technical Experts Meeting (MTCR)</td>
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<td>TEO</td>
<td>Temporary Exclusion Order</td>
</tr>
<tr>
<td>ter</td>
<td>third version (of a text)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
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</tr>
<tr>
<td>TESSD</td>
<td>Trade and Environmental Sustainability Structured Discussions (WTO)</td>
</tr>
<tr>
<td>TEU</td>
<td>Twenty Foot Equivalent Unit</td>
</tr>
<tr>
<td>TFA</td>
<td>WTO Agreement on Trade Facilitation (Trade Facilitation Agreement)</td>
</tr>
<tr>
<td>TFAF</td>
<td>Trade Facilitation Agreement Facility</td>
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<tr>
<td>TFP</td>
<td>Total Factor Productivity</td>
</tr>
<tr>
<td>TFR</td>
<td>Total Fertility Rate</td>
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<td>TGAAA</td>
<td>2009 Trade and Globalization Adjustment Assistance Act</td>
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<td>TGL</td>
<td>Temporary General License</td>
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<td>THAAD</td>
<td>Terminal High Altitude Area Defense system</td>
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<td>TIEA</td>
<td>Tax Information Exchange Agreement</td>
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<td>TIES</td>
<td>Threat and Imposition of Economic Sanctions database (University of North Carolina)</td>
</tr>
<tr>
<td>TIFA</td>
<td>Trade and Investment Framework Agreement</td>
</tr>
<tr>
<td>TIPA</td>
<td>Taiwan Invasion Prevention Act</td>
</tr>
<tr>
<td>TIPPI</td>
<td>Trade and Investment Partnership Initiative</td>
</tr>
<tr>
<td>TISA (TISA, TSA)</td>
<td>WTO Trade in Services Agreement</td>
</tr>
<tr>
<td>TKB</td>
<td>Transkapitalbank (Russia)</td>
</tr>
<tr>
<td>TMT</td>
<td>thousand metric tons</td>
</tr>
<tr>
<td>TN</td>
<td>NAFTA business visa</td>
</tr>
<tr>
<td>tn (second meaning)</td>
<td>trillion</td>
</tr>
<tr>
<td>TNC</td>
<td>WTO Trade Negotiations Committee</td>
</tr>
<tr>
<td>TOT</td>
<td>Terms of Trade</td>
</tr>
<tr>
<td>TPA (1st meaning)</td>
<td>Trade Promotion Agreement</td>
</tr>
<tr>
<td>TPA (2nd meaning)</td>
<td>Trade Promotion Authority (Fast Track)</td>
</tr>
<tr>
<td>TPBI</td>
<td>Thai Plastic Bags Industries</td>
</tr>
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<td>TPC</td>
<td>Technology Partnerships Canada</td>
</tr>
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<td>TPEA</td>
<td>2015 Trade Preferences Extension Act</td>
</tr>
<tr>
<td>TPF</td>
<td>United States – India Trade Policy Forum</td>
</tr>
<tr>
<td>TPL</td>
<td>Tariff Preference Level</td>
</tr>
<tr>
<td>TPM (1st meaning)</td>
<td>Trigger Price Mechanism</td>
</tr>
<tr>
<td>TPM (2nd meaning)</td>
<td>Technological Protection Measure</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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</tr>
<tr>
<td><strong>TPP</strong></td>
<td>Trans Pacific Partnership</td>
</tr>
<tr>
<td><strong>TPP</strong> (2nd meaning)</td>
<td>Tobacco Plain Packaging For example, Australia’s (1) <em>Tobacco Plain Packaging Act 2011</em>, (2) <em>Tobacco Plain Packaging Regulations 2011</em>, as amended by the <em>Tobacco Plain Packaging Amendment Regulation 2012</em> (Number 1), and (3) <em>Trade Marks Amendment (Tobacco Plain Packaging) Act 2011</em>.</td>
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<td><strong>TPP 11</strong></td>
<td>CPTPP (entered into force 30 December 2018)</td>
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<tr>
<td><strong>TPRB</strong></td>
<td>WTO Trade Policy Review Body</td>
</tr>
<tr>
<td><strong>TPRM</strong></td>
<td>WTO Trade Policy Review Mechanism</td>
</tr>
<tr>
<td><strong>TPSC</strong></td>
<td>Trade Policy Staff Committee (U.S., interagency led by USTR)</td>
</tr>
<tr>
<td><strong>TRA</strong> (1st meaning)</td>
<td>1979 <em>Taiwan Relations Act</em></td>
</tr>
<tr>
<td><strong>TRA</strong> (2nd meaning)</td>
<td>Trade Readjustment Allowance</td>
</tr>
<tr>
<td><strong>TRB</strong></td>
<td>Tapered roller bearing</td>
</tr>
<tr>
<td><strong>TRIA</strong></td>
<td><em>Terrorism Risk Insurance Act of 2002</em></td>
</tr>
<tr>
<td><strong>TRIMs</strong></td>
<td>Trade Related Investment Measures</td>
</tr>
<tr>
<td><strong>TRIMs Agreement</strong></td>
<td>WTO Agreement on Trade Related Investment Measures</td>
</tr>
<tr>
<td><strong>TRIPs</strong></td>
<td>Trade Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td><strong>TRIPs Agreement</strong></td>
<td>WTO Agreement on Trade Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td><strong>TRO</strong></td>
<td>Temporary Restraining Order</td>
</tr>
<tr>
<td><strong>TRQ</strong></td>
<td>Tariff Rate Quota</td>
</tr>
<tr>
<td><strong>TSA</strong></td>
<td>U.S. Transportation Security Administration</td>
</tr>
<tr>
<td><strong>TSMC</strong></td>
<td>Taiwan Semiconductor Manufacturing Co.</td>
</tr>
<tr>
<td><strong>TSUS</strong></td>
<td>Tariff Schedule of the United States (predecessor to HTSUS)</td>
</tr>
<tr>
<td><strong>TTC</strong></td>
<td>U.S.-EU Trade and Technology Council</td>
</tr>
<tr>
<td><strong>TTF</strong></td>
<td>Dutch Title Transfer Facility</td>
</tr>
<tr>
<td><strong>T-TIP</strong></td>
<td>Trans-Atlantic Trade and Investment Partnership</td>
</tr>
<tr>
<td><strong>TV</strong> (1st meaning)</td>
<td>Television</td>
</tr>
<tr>
<td><strong>TV</strong> (2nd meaning)</td>
<td>Transaction Value</td>
</tr>
<tr>
<td><strong>TVE</strong></td>
<td>Town and Village Enterprise</td>
</tr>
<tr>
<td><strong>TVPA</strong></td>
<td>2000 <em>Trafficking Victims Protection Act</em></td>
</tr>
<tr>
<td><strong>TWEA</strong></td>
<td>1917 <em>Trading With the Enemy Act</em></td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>--------------</td>
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</tr>
<tr>
<td>TWN</td>
<td>Third World Network</td>
</tr>
<tr>
<td>UAV</td>
<td>Unmanned Aerial Vehicle (drone)</td>
</tr>
<tr>
<td>UAW</td>
<td>United Auto Workers</td>
</tr>
<tr>
<td>UBC</td>
<td>University of British Columbia</td>
</tr>
<tr>
<td>UBS AG</td>
<td>Swiss bank resulting from 1998 merger of Union Bank of Switzerland and Swiss Bank Corporation (founded in 1872 and 1862, respectively)</td>
</tr>
<tr>
<td>UCC (1st meaning)</td>
<td>Uniform Civil Code (India)</td>
</tr>
<tr>
<td>U.C.C. (2nd meaning)</td>
<td>Uniform Commercial Code (U.S.)</td>
</tr>
<tr>
<td>UCLA</td>
<td>University of California at Los Angeles</td>
</tr>
<tr>
<td>UCP (1st meaning)</td>
<td>Uniform Customs and Practices</td>
</tr>
<tr>
<td>UCP (2nd meaning)</td>
<td>Unified Cargo Processing</td>
</tr>
<tr>
<td>UE</td>
<td>United Electrical, Radio and Machine Workers of America</td>
</tr>
<tr>
<td>UEFA</td>
<td>Union of European Football Associations</td>
</tr>
<tr>
<td>UES</td>
<td>United Engineering Steel (U.K.)</td>
</tr>
<tr>
<td>UETA</td>
<td>1999 Uniform Electronic Transactions Act</td>
</tr>
<tr>
<td>UF</td>
<td>Ultra-filtered (milk)</td>
</tr>
<tr>
<td>UF₆</td>
<td>Uranium Hexafluoride</td>
</tr>
<tr>
<td>UFLPA</td>
<td>2021 Uyghur Forced Labor Prevention Act</td>
</tr>
<tr>
<td>UHRP</td>
<td>Uyghur Human Rights Project</td>
</tr>
<tr>
<td>UI</td>
<td>Unemployment Insurance</td>
</tr>
<tr>
<td>UIEGA</td>
<td>2006 Unlawful Internet Gambling Enforcement Act</td>
</tr>
<tr>
<td>U.K.</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>U.K.CA (UKCA)</td>
<td>United Kingdom Conformity Assessed</td>
</tr>
<tr>
<td>U.K.CGCA</td>
<td>U.K. Carbon &amp; Graphite Company</td>
</tr>
<tr>
<td>U.K.SFTA (UKSFTA)</td>
<td>United Kingdom-Singapore Free Trade Agreement</td>
</tr>
<tr>
<td>UMR</td>
<td>Usual Marketing Requirement (FAO)</td>
</tr>
<tr>
<td>UMTS</td>
<td>Universal Mobile Telecommunications System</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCAC</td>
<td>United Nations Convention Against Corruption</td>
</tr>
<tr>
<td>UNCC</td>
<td>United Nations Compensation Commission</td>
</tr>
<tr>
<td>UNCDP</td>
<td>United Nations Committee for Development Policy</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>UNCTIRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Commission on Trade and Development</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environmental Program</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Cultural, and Scientific Organization</td>
</tr>
<tr>
<td>UNFCCC</td>
<td>United Nations Framework Convention on Climate Change</td>
</tr>
<tr>
<td>UNICA</td>
<td>Brazilian Sugarcane Industry Association</td>
</tr>
<tr>
<td>UNITA</td>
<td>National Union for the Total Independence of Angola</td>
</tr>
<tr>
<td>UNOCHA</td>
<td>United Nations Office for the Coordination of Humanitarian Affairs</td>
</tr>
<tr>
<td>UNODA</td>
<td>United Nations Office of Disarmament Affairs</td>
</tr>
<tr>
<td>UNOHR (OHCHR)</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
</tr>
<tr>
<td>UPA</td>
<td>United Progressive Alliance (India)</td>
</tr>
<tr>
<td>UPS (1st meaning)</td>
<td>uninterrupted power supply</td>
</tr>
<tr>
<td>UPS (2nd meaning)</td>
<td>United Parcel Service</td>
</tr>
<tr>
<td>UPU</td>
<td>Universal Postal Union</td>
</tr>
<tr>
<td>URAA</td>
<td>1994 <em>Uruguay Round Agreements Act</em></td>
</tr>
<tr>
<td>U.S.</td>
<td>United States</td>
</tr>
<tr>
<td>USAPEEC</td>
<td>USA Poultry and Egg Export Council</td>
</tr>
<tr>
<td>USC</td>
<td>United Shipbuilding Corporation (Russia)</td>
</tr>
<tr>
<td>USCBC</td>
<td>U.S.-China Business Council</td>
</tr>
<tr>
<td>USCCAN</td>
<td>United States Code Congressional and Administrative News</td>
</tr>
<tr>
<td>USCCB</td>
<td>United States Conference of Catholic Bishops</td>
</tr>
<tr>
<td>USD (1st meaning)</td>
<td>Union Solidarity and Development Party (Burma)</td>
</tr>
<tr>
<td>USD (2nd meaning)</td>
<td>United States Dollar</td>
</tr>
<tr>
<td>USDS</td>
<td>United States Data Security (division)</td>
</tr>
<tr>
<td>USICA</td>
<td><em>U.S. Innovation and Competition Act of 2021</em> (Senate bill)</td>
</tr>
<tr>
<td>USJDTA</td>
<td>United States – Japan Digital Trade Agreement (signed 7 October 2019)</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Term</td>
</tr>
<tr>
<td>--------------</td>
<td>------</td>
</tr>
</tbody>
</table>
| USJTA        | United States–Japan Trade Agreement  
(signed 7 October 2019, entered into force 1 January 2020) |
| USMCA        | United States-Mexico-Canada Agreement  
(revised FTA based on August 2017-September 2018 renegotiations, called CUSMA in Canada, USMCA in America, and informally called NAFTA 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020) |
| USML         | United States Munitions List |
| USP          | United States Price  
(Pre-Uruguay Round U.S. term encompassing both Purchase Price and Exporter’s Sales Price) |
| U.S.S.       | United States Ship  
(U.S. Navy) |
| U.S.S.R.     | Union of Soviet Socialist Republics |
| USTR         | U.S. Trade Representative |
| USVSST       | United States Victims of State Sponsored Terrorism Fund |
| USW (1st meaning) | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union |
| USW (2nd meaning) | United Steel Workers of America |
| UVL          | Unverified List |
| VAT          | Value Added Tax |
| VC           | Venture Capital |
| VCP          | Vietnamese Communist Party  
(or CPV, Communist Party of Vietnam) |
<p>| VCR          | Video Cassette Recorder |
| VEO          | Violent Extremist Organization |
| VER          | Voluntary Export Restraint |
| VEU          | Validated End User |
| VLCC         | Very Large Crude Carrier |
| VND          | Vietnamese dong |
| VNM (VNOM)   | Value of Non-Originating Materials |
| VOC          | volatile organic compound |
| VOD          | video on demand |
| VOM          | Value of Originating Materials |
| VPN          | virtual private network |
| VRA          | Voluntary Restraint Agreement |
| VSD          | voluntary self-disclosure |</p>
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>VW</td>
<td>Volkswagen AG</td>
</tr>
<tr>
<td>W120</td>
<td>WTO services classification list (based on CPC)</td>
</tr>
<tr>
<td>WA</td>
<td>1995 Wassenaar Arrangement</td>
</tr>
<tr>
<td>WAML</td>
<td>Wassenaar Arrangement Munitions List</td>
</tr>
<tr>
<td>WCF</td>
<td>World Cocoa Foundation</td>
</tr>
<tr>
<td>WCO</td>
<td>World Customs Organization (formerly CCC until 1994)</td>
</tr>
<tr>
<td>WFOE</td>
<td>Wholly Foreign-Owned Enterprise (China)</td>
</tr>
<tr>
<td>WFP</td>
<td>World Food Program</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WIV</td>
<td>Wuhan Institute of Virology</td>
</tr>
<tr>
<td>WMD</td>
<td>Weapon of Mass Destruction</td>
</tr>
<tr>
<td>WMO</td>
<td>World Meteorological Association</td>
</tr>
<tr>
<td>WRO</td>
<td>Withhold Release Order</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Agreement Establishing the World Trade Organization (including all 4 Annexes)</td>
</tr>
<tr>
<td>WWF</td>
<td>World Wildlife Fund</td>
</tr>
<tr>
<td>XITIC</td>
<td>Xiamen International Trade and Industrial Company</td>
</tr>
<tr>
<td>XPCC</td>
<td>Xinjiang Production and Construction Corps. (China)</td>
</tr>
<tr>
<td>XUAR</td>
<td>Xinjiang Uyghur Autonomous Region (China)</td>
</tr>
<tr>
<td>YMTC</td>
<td>Yangtze Memory Technologies Co. (China)</td>
</tr>
<tr>
<td>YoY</td>
<td>Year on Year</td>
</tr>
<tr>
<td>ZAC</td>
<td>zone d'aménagement concertée (France)</td>
</tr>
<tr>
<td>ZTE</td>
<td>Zhongxing Telecommunications Corp.</td>
</tr>
<tr>
<td>1916 Act</td>
<td>Antidumping Act of 1916, as amended (repealed)</td>
</tr>
<tr>
<td>1930 Act</td>
<td>Tariff Act of 1930, as amended</td>
</tr>
<tr>
<td>1934 Act</td>
<td>Reciprocal Trade Agreements Act of 1934</td>
</tr>
<tr>
<td>1934 FTZ Act</td>
<td>Foreign Trade Zones Act of 1934, as amended</td>
</tr>
<tr>
<td>1945 UNPA</td>
<td>United Nations Participation Act of 1945</td>
</tr>
<tr>
<td>1974 Act</td>
<td>Trade Act of 1974, as amended</td>
</tr>
<tr>
<td>1978 Act</td>
<td>Customs Procedural Reform and Implementation Act</td>
</tr>
<tr>
<td>1979 Act</td>
<td>Trade Agreements Act of 1979</td>
</tr>
<tr>
<td>Act Year</td>
<td>Description</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>1988 Act (1&lt;sup&gt;st&lt;/sup&gt; meaning, OTCA)</td>
<td>Omnibus Trade and Competitiveness Act of 1988</td>
</tr>
<tr>
<td>1988 Act (2&lt;sup&gt;nd&lt;/sup&gt; meaning)</td>
<td>United States – Canada Free Trade Implementation Act</td>
</tr>
<tr>
<td>1990 Act</td>
<td>Customs and Trade Act of 1990</td>
</tr>
<tr>
<td>1993 Mod Act</td>
<td>Customs Modernization Act of 1993</td>
</tr>
<tr>
<td>2002 Act</td>
<td>Trade Act of 2002</td>
</tr>
<tr>
<td>2010 Act</td>
<td>Omnibus Trade Act of 2010</td>
</tr>
<tr>
<td>3D</td>
<td>Three dimensional</td>
</tr>
<tr>
<td>3PLs</td>
<td>Third Party Logistics Providers</td>
</tr>
<tr>
<td>3Ts (3T Issues)</td>
<td>Taiwan, Tiananmen, and Tibet</td>
</tr>
<tr>
<td>4Ts (4T Issues)</td>
<td>Taiwan, Tiananmen, Tibet, and The Party (CCP)</td>
</tr>
</tbody>
</table>
Part One

DEVELOPMENT ECONOMICS
Chapter 1

MEASURING GROWTH, DEVELOPMENT, AND POVERTY

I. What is “Growth”?  

• GNP  

GNP is the broadest measure of income earned by nationals of a country. GNP is the total value of all finished output of goods and services produced by nationals of a country. *Per capita* GNP is the final value of all finished goods and services produced by nationals of a country in one year, divided by the number of nationals (*i.e.*, citizens) of that country.

It does not matter whether or where the output is consumed, invested, or if it used by a government. The value of the output is income to its producer. Therefore, GNP is defined equivalently as all income earned by nationals — but only nationals, *i.e.*, citizens, of a country — regardless of where the nationals earn the income. The letter “N” in “GNP” emphasizes nationals of the country earned the income being measured. GNP may be computed in terms of current (also called “nominal”) price levels in the country.

However, the prices of income-generating output (*e.g.*, agricultural commodities, manufactured goods, services) change over time. Consequently, a more reliable measurement than current GNP is “constant” GNP. “Constant” GNP is current GNP, corrected for price inflation (or deflation) using a numerical factor that sets a specific year as the base year from which to define a price index (*e.g.*, prices in 2005 equal 100).

For example, the income of a Filipino receptionist working at the Sheraton Hotel in Bahrain would be included in the GNP of the Philippines, but not of Bahrain, because the receptionist is a national of the Philippines. To the extent the receptionist repatriates the earnings, the economy of the Philippines directly benefits. In addition to the Philippines, Bangladesh, India, Sri Lanka, and various other poor countries send workers to Persian Gulf countries to earn income, which then is repatriated to the home countries.

Consider the income earned by the Sheraton Hotel in Bahrain. It would be included in the GNP of the U.S., but not of Bahrain. That is because, as an American-based MNC, Sheraton Hotels are a national of the U.S. Many such corporations rely for a large percentage of their revenues on foreign-generated income. Yet, for purposes of computing GNP, the location in which income is produced is irrelevant. What matters is the nationality of the owner of the asset producing the activities.

2 Documents References:  
(1) Havana (ITO) Charter Preamble  
(2) GATT Preamble  
(3) WTO Agreement Preamble

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*Volume Eight*  
*University of Kansas (KU)*  
*Wheat Law Library*
As for the letter “G,” standing for “Gross,” it indicates the calculation is an aggregate one, with no subtraction for items like consumption of capital. (“Capital consumption” refers to the decline in value of equipment, which occurs because as equipment ages, becomes obsolete, or is used, and because of technological enhancements.) The letter “P,” standing for “Product,” suggests only the value of real output produced is included in GNP. The value of output absorbed in the manufacturing process – namely, intermediate or semi-finished goods – is excluded.

As a practical matter, there are three ways to compute national income – the GNP or GDP – of a country: income approach; expenditure approach; and output approach. Under the income approach, the incomes derived from each type of economic activity, that is, the income accruing to all owners of factors of production, is summed. Thus, income from self-employment, trading profits, rent, and property income from abroad are added together. Only the incomes and profits of residents of the country are included in the calculation. Transfer payments (e.g., welfare), that is, payments that are not made to factors of production for current services, also are excluded.

Under the expenditure approach, spending on final goods and services is aggregated. The principal categories of spending are consumption (C), investment (I) (i.e., expenditures that add to the capital stock, as distinct from consumption), net government purchases (G) (i.e., government expenditures less Taxation, or G-T), and net exports (i.e., exports less imports, or X-M). These categories give rise to the familiar macroeconomic equation

\[ \text{GNP} = C + I + (G - T) + (X - M) \]

or, using “Y” to symbolize GNP,

\[ Y = C + I + (G - T) + (X - M) \]

Under the output approach, the values of products of each of the various sectors in the economy are summed. Thus, the value added by agricultural and extractive industries, manufacturing industries, construction, and services, along with net property income from abroad, are aggregated. GDP is reported both in “nominal” or “current” terms (i.e., uncorrected for inflation), and in “real” or “constant” terms (i.e., corrected for inflation).

- **GDP**

GDP is a slightly narrower measure of income earned than GNP. GDP is the total value of all finished output of goods and services produced in an economy. *Per capita* GDP is the final value of finished goods and services produced in the territory of a country in one year, divided by the number of persons (whether or not nationals) in that country.

It does not matter whether or where the output is consumed, invested, or used by a government. The value of the output is income to its producer. Therefore, GDP is defined
equivalently as all income earned within the territory of a country, whether or not produced by nationals (i.e., citizens) or non-nationals of that country. Like GNP, GDP may be measured at current price levels in a country, or at constant prices.

The letter “D” in GDP serves to emphasize the income measured is earned within the territorial jurisdiction of the country. That is, GDP measures economic activity within the domestic territory of a country. For example, income earned by a Filipino receptionist working at the Sheraton Hotel in Bahrain would be included in the GDP of Bahrain, but not in the GDP of the Philippines. That is true even if the receptionist repatriates all or some of the income. Likewise, income earned by Sheraton Hotel in Bahrain would be included in the GDP of Bahrain, not the U.S., even though Sheraton is an American-based multinational corporation. That is because the facility in question is located in Bahrain. In brief, for GDP, the owner of the asset producing income is irrelevant. Rather, the location of the income-generating activities matters.

As with GDP, the letter “G” in GNP indicates the calculation is an aggregate one. No subtraction is made for consumption of capital. Also, as with GNP, the letter “P” in GDP suggests the value of output absorbed in the manufacturing process – namely, intermediate or semi-finished goods – is excluded.

- **PPP**

PPP is a method of comparing national income – either GNP or GDP – and other economic growth statistics that accounts for different price levels across countries. There is an obvious problem when relying on any one of these measurements of “growth” in a country to make comparisons and contrasts across countries. Price levels differ across countries. The price of identical, like, similar, or substitutable merchandise – whether the good is a baseball, protein bar, or textbook – often differs across countries. The reasons for the variance include market conditions, such as competition among suppliers, demand and income levels among consumers, inflation, protection, and taxation. Such variations also exist for the same or comparable services, be they banking, dental, or legal.

Consequently, comparisons of growth – and, as a closely related matter, income levels – among countries using raw GNP or GDP data are misleading, insofar as cross-country differences may be explained in part by price variations. Typically, the raw data overstates the true extent of growth and income differences. The correction economists make is to put the data on PPP terms. That is, economists measure and compare growth and income using:

1. GNP (PPP terms)
2. *Per Capita* GNP (PPP terms)
3. GDP (PPP terms)
4. *Per Capita* GDP (PPP terms)

Measuring income at market prices means valuing the quantity of goods and services in a country at the price levels for those goods and services prevailing in that country during a
particular point or period in time. To make cross-country comparisons, the resulting figures must be converted from local currency (e.g., Chinese yuan) into a common currency (e.g., U.S. dollars). In contrast, PPP terms mean valuing the quantity of goods and services at price levels prevailing in a chosen country during a particular year – say the U.S. in the year 2020.

With income statistics put on a PPP basis, no exchange conversion is necessary, because from the outset goods and services from all countries are valued in terms of a common currency. Typically, that currency is the U.S. dollar. Essentially, PPP is a way to correct for differences in prices across countries, and for the possibility exchange rate fluctuations undermine the reliability of cross-country GNP comparisons. The device eliminates the need to convert valuation of goods and services in a foreign currency to valuation in a standard set of prices denominated in a major currency.

There is a second, subtle, advantage to measuring GNP and GDP in PPP terms. PPP helps correct for the fact not every type of good or service is traded across borders. For example, childcare services are not traded among countries, and in general, water is not traded across international boundaries either (though countries share boundary waters pursuant to treaties). Indeed, in many Third World countries, a large portion of national income is comprised of goods and services that are not traded internationally. That creates a problem if cross-country comparisons are made using GNP at market prices.

In each country, the ratio of the price of goods and services that are traded internationally to the price of goods and services that are not traded internationally will differ. The differences will depend in part on the importance of non-traded goods and services in each the economy of a country. Yet, at the same time, exchange rates are determined in part by the flow of goods and services that are traded internationally. That is to say, exchange rates do not embody economic activity in non-traded sectors.

As a result, when a GNP statistic measured at market prices (such as Chinese yuan) is converted to a major currency (such as U.S. dollars), the exchange rate used for the conversion is “incomplete.” In turn, the comparison of GNP statistics across countries is misleading. The PPP measure circumvents the problem by valuing goods and services produced in each country on the basis of prices prevailing in one country. Thus, the fact the ratio of prices in traded versus non-traded sectors differs from one country to the next does not matter, because the prices in only one country are used for valuation.

To understand how income-based measures of growth are calculated and compared in PPP terms, consider the following example involving the GDP of China and America. Generally speaking, when the OECD calculates GDP PPP for various countries, it does so for a basket of about 3,000 goods and services common to those countries. To simplify, suppose the output of the U.S. consists of rice (to represent all agricultural products), navigational equipment for long-haul commercial aircraft (to represent advanced manufactured products), and pediatric dental services for children age 5 or under (to represent the service sector). Suppose further the output of China consists of rice and dental
services, but not navigational equipment. Chinese manufacturing, at a less advanced stage, consists of H-shaped steel beams (used, for example, in building construction).

Table 1-1 presents the volume of output for each category and country in a given year. It also specifies the price of each good or service in the American market, measured in U.S. dollars, in a specified base year (2020). Using the PPP method, the output of each country is valued in dollars.

If the comparison of the value of the output of each country is in U.S. dollars, and if China’s output initially is measured in local currency at price levels prevailing in China, then the Chinese currency – the yuan – needs to be converted into dollars. No doubt that exchange rate, at any point in time, reflects only the goods and services China and the U.S. trade internationally. No doubt the exchange rate selected today might be different from the one tomorrow.

What if the yuan depreciates relative to the dollar after the conversion is made? Then, China’s GNP – in dollar terms – will be overstated. It will have been valued at the exchange rate just before the depreciation. Conversely, if the yuan appreciates after the conversion, then China’s dollar-denominated GNP will be understated. That output will have been valued at the lower rate, the one prevailing before the appreciation. Thus, when the comparison of China and the U.S. is done the next time, the results will differ – in part because of the exchange rate fluctuation that occurred since the last comparison.

Using PPP not only avoids the problem of traded versus non-traded sectors in different countries, but also helps ensure GNP comparisons are not adulterated by exchange rate fluctuations. After all, these fluctuations do not necessarily mean the real quality of life in the countries being compared has changed. At market prices, GNP, or per capita GNP, figures not measured in PPP terms can present a misleading picture of growth. But, getting the truest possible picture of the quality of life is what we must have if we are to draw reliable inferences about problems in less developed countries, and how (if at all) international trade law and policy can be altered to remedy the problems.

Accordingly, a PPP comparison is premised on a common set of prices in one currency. The common standard typically used by economists is dollar-denominated prices prevailing in America during a reference year. In the Table, the reference year is 2020. The Table sets forth the hypothesized prices prevailing in the U.S. during 2020, in U.S. dollars. The cells in the last row of the Table show the value of the good or service produced in the U.S. at those prices. The cells in the penultimate row show the value of the good or service produced in China, but the valuation is computed at those same prices. By using the common set of prices in one currency, the near-certainty that the prices of those goods and services in China, denominated in yuan, in 2020 were different, is immaterial. Likewise, any yuan-dollar exchange rate fluctuations have no effect on the valuation. The PPP GDP of each country, set forth at the bottom of the Table, simply is the sum of the cells in the row pertaining to each country.
### Table 1-1
Example of PPP GDP – China and U.S.

<table>
<thead>
<tr>
<th>Output (Good or Service)</th>
<th>Rice</th>
<th>H-Shaped Steel Beams</th>
<th>Navigational Equipment for Long-Haul Commercial Civil Aircraft</th>
<th>Pediatric Dental Services for Children Age 5 Or Under</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Country and Measurement</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Volume of Output in China</td>
<td>100 kilos</td>
<td>500 tons</td>
<td>China does not make this good, it relies on imports</td>
<td>1 million dental visits <em>(i.e., the number of dental visits in China by kids age 5 or under was 10 million)</em></td>
</tr>
<tr>
<td>Volume of Output in U.S.</td>
<td>200 kilos</td>
<td>The U.S. does not make this good, it relies on imports</td>
<td>100 units</td>
<td>5 million dental visits <em>(i.e., the number of dental visits in the U.S. by kids age 5 or under was 50 million)</em></td>
</tr>
<tr>
<td>Price of Output in U.S., in 2020, in U.S. dollars</td>
<td>$10 per kilo</td>
<td>$100 per beam (price of imported H-beams)</td>
<td>$1,000 per unit</td>
<td>$50 per visit</td>
</tr>
<tr>
<td>PPP Value of Output in China</td>
<td>100 x $10 = $1,000</td>
<td>500 x $100 = $50,000</td>
<td>Zero, because no domestic (Chinese) production</td>
<td>1 million x $50 = $50 million</td>
</tr>
<tr>
<td>PPP Value of Output in U.S.</td>
<td>200 x $10 = $2,000</td>
<td>Zero, because no domestic (American) production</td>
<td>100 x $1,000 = $100,000</td>
<td>5 million x $50 = $250 million</td>
</tr>
</tbody>
</table>

PPP GDP of China (Total PPP Value of Output): $50,051,000

PPP GDP of U.S. (Total PPP Value of Output): $250,102,000
To emphasize, because prices change from year to year with inflation or deflation, it is critical to select a particular year, such as 2020, as a basis for measurement. Comparisons of GDP (or GNP) over time would be distorted by inflation or deflation if the prices used to measure goods and services were those prevailing in the year of measurement. Thus, to measure “real” (as distinct from “nominal”) GDP (either at market prices or in PPP terms), economists typically select a “base” year and stick with it. That is, they calculate the value of goods and services produced in various countries on the basis of prices from only one year.

It should not come as a surprise that when GDP and per capita GDP are measured in PPP terms, the differences between low- and high-income countries are compressed. After all, the output volumes of poor countries measured at price levels prevailing in America. Almost certainly, those levels are higher than the prices for the same goods and services in poor countries. In turn, critics of the multilateral trading system should take heed. The lot of poor people anywhere is horrific, and in LDCs, by definition, they earn less than a dollar a day. Yet, the actual statistical gap between low- and high-income countries should not be exaggerated, and exaggerations ought not to be a basis for criticizing the trading system.

An important technical question is how the common currency and thus price levels are calculated. The answer, in essence, is a ratio that results in the elimination of nominal prices in each country, and thereby the valuation of the common basket of goods and services in a common currency, such as U.S. dollars as of a given year (such as 2020). That currency becomes the index. So, if the basket of goods and services costs $100 in the U.S., but would cost $86 in Malaysia and $124 in Luxembourg, that would mean the basket is 14% cheaper in Malaysia, and 24% more expensive, in Luxembourg. There is, of course, an arithmetic formula for this calculation.

II. What is “Development”?

- HDI

“Development” is a far broader concept than “growth.” The crux of the difference, as the Holy Father, Pope Francis (1936-, Pope, 2013-), suggests, is with respect to inclusiveness – “a gaze not turned in on itself,” but rather a gaze on others with a view to social justice:

the key expression “inclusive growth” brings to mind St. Paul VI’s [March 1967 Encyclical] Populorum Progressio where he states that “development cannot be restricted to economic growth alone” but to be authentic, “must be well-rounded” and “foster the development of each man and of the whole

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man.”

Here, Pope Francis stressed that “development is either inclusive or it is not development” and highlighted that it is the task, particularly of the lay faithful, to make economic reality “leaven” in an ethical sense, and promote growth in the sense of development.

“And you try to do that, starting from the vision of the Gospel,” the Pope said. “For everything comes from how you look at reality.”

…”

“Everything stems from how one looks and where you look,” affirmed Pope Francis, noting that Jesus’ gaze was able to see the gesture of total giving in the poor people who put two pennies in the offering box at the temple (Mk 12:41-44 [Mark, Chapter 12, Verses 41-44]).

He added that the only time it is permissible to look on another from above is in order to help him or her rise.4

If development is a far broader concept than growth, then it is appropriate to construct an index of development that takes into account more than just the hallmark of growth, which is income. In 1990, the UNDP began publishing just such an index – the HDI. In 1994, it revised the way it constructs the index to allow for comparison of countries over time, instead of static relative rankings, in part by defining a possible range of minimum and maximum values for each variable in the index.

The essential theory of the HDI is a country with a higher income is not necessarily more developed than one with a lower income. For example, in 1998 the U.S. sat atop the world in terms of per capita GDP ($29,605), but scored second to Canada on the HDI (0.929 for America, and 0.935 for Canada). Comparing the relative levels of development of countries depends on a mix of factors.

There are three variables on which the HDI focuses, as follows. Observe the HDI is not a complete break from orthodox measures of growth, as the third variable is income.

(1) Health: To measure the level of health of people in a country, the HDI examines average life expectancy at birth. A longer life expectancy indicates better health. The possible range is from 25 to 85 years.

(2) Knowledge: To gauge the level of education of people in a country, the HDI covers two factors: literacy rates and average number of years of schooling. The higher the literacy rate and average number of years of schooling, the higher level of education. Literacy rates may range from zero to 100%. Average years of schooling may range from zero to 15 years. They are measured using the combined primary, secondary, and tertiary enrollment ratios (in effect, the percentage of children in school at these levels).

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4 Pope: Inclusive Growth.
between these two factors, literacy is given a two-thirds weight, and enrollment a one-third weight.

(3) **Income**: Income matters, of course, and the HDI incorporates *per capita* GDP using the PPP method, with a deflator to account for price inflation (putting the income figure in real, as opposed to nominal, terms). The range is from U.S. $100 to $40,000. However, as explained below, an adjustment is made to take account of the law of diminishing marginal utility to income. The average world real *per capita* income, in PPP terms, establishes a threshold level. The actual income level of a country is not adjusted if it is below that threshold. If the actual income level is above the threshold, then it is discounted according to a formula (known among economists as “Atkinson’s formula for the utility of income”). The maximum figure of $40,000 requires discounting, and the discounted amount is $6,154.

Arithmetically, the UNDP calculates the value for each variable using a formula.

In the formula, $X_A$ is the actual value of the variable for a particular country, $X_{\text{MAX}}$ is the maximum value possible, and $X_{\text{MIN}}$ is the minimum value possible:

\[
\text{Value of Variable} = \frac{X_A - X_{\text{MIN}}}{X_{\text{MAX}} - X_{\text{MIN}}}
\]

For example, in 1994, life expectancy in Egypt was 64.3 years, the adult literacy rate was 50.5%, the combined enrollment ratio at the first, second, and third levels was 69%, and adjusted real *per capita* GDP on PPP terms was U.S. $3,846. (The world average real *per capita* income in PPP terms that year was $5,835. The actual figure for Egypt was below this threshold, so no adjustment was needed.) Using the formula, and the aforementioned minimum and maximum values, the variable scores are:

For Life Expectancy:

\[
\text{Egyptian Score} = \frac{64.3 - 25}{85 - 25} = 0.66
\]

For Adult Literacy:

\[
\text{Egyptian Score} = \frac{50.5 - 0}{100 - 0} = 0.51
\]

For Enrollment:

\[
\text{Egyptian Score} = \frac{69 - 0}{100 - 0} = 0.69
\]

For Education (combining Adult literacy and Enrollment):
For Income:

\[
\text{Egyptian Score} = \frac{3,846 - 0}{6,154 - 0} = 0.62
\]

Then, to compute the HDI for a country, the UNDP takes the average of the three variables. In the example of Egypt, the result would be:

\[
\text{HDI for Egypt} = \frac{0.66 + 0.57 + 0.62}{3} = 0.62
\]

Significantly, especially for the poor living in places like the Cairo slums (known as the “City of the Dead”), this HDI put Egypt at number 109 of 175 countries the UNDP ranked in 1994. Comparing the HDI against Egypt’s performance on real per capita GDP (PPP terms), the result was –22. The negative sign means Egypt’s HDI score was 22 notches worse than its ranking solely on income (which was 87 out of 175). Many countries in the Middle East, especially oil-exporting ones, score well on income charts, but lowly on indexes of social development like the HDI. Have they improved since the Arab Spring, which commenced in January 2011?

A key aspect of how the UNDP constructs the HDI is its weighting of the three factors, particularly income. In the jargon of economics, there is diminishing marginal utility of income. Accruing income (like consuming most goods or services) is subject to the law of diminishing returns. A person – or country – derives a great deal of satisfaction – or utility – from the first dollar of income earned. Levels of utility from incremental – or marginal – amounts of income are positive – but not forever. Each additional dollar of income brings a little less satisfaction than the previous one. At some point, a person (or country) has more than enough income needed or desired, and additional amounts do not confer much satisfaction at all. Indeed, after a large amount of income, the increments may cause more trouble than they are worth (e.g., because of time and energy consumed in managing the additional money and protecting it from theft and fraud). To a poor person, one dollar brings huge satisfaction, but to a billionaire, it means virtually nothing.

Thus, recognizing the phenomenon of diminishing marginal utility of income, the UNDP incorporates it by adjusting statistics on income. If a country has a high per capita income, the UNDP discounts that income. Conversely, it assigns a greater weight to the per capita income of poor countries. The higher the per capita income, the less the weight the UNDP gives it, in proportion to health and knowledge, in the HDI.
Despite that adjustment, the HDI has failed to impress many economists. Indeed, that adjustment is a source of criticism. The maximum real per capita income figure of $40,000, discounted to $6,154, effectively puts a cap on the contribution income can make to development in the HDI. Suppose a country moves from the income level of Laos to that of Singapore, and the upward trend continues. The HDI disregards increases beyond the maximum. Yet, surely those increases, to Singapore-style levels and beyond, matter, albeit with diminishing returns.

Among other deficiencies they cite are the weighting of the variables and positive correlation among the variables. Assigning coefficients to weigh health, education, and income ultimately depends on subjective preferences. Those preferences differ depending on a range of factors – time, culture, and so forth. For example, perhaps Americans do not experience diminishing returns to income to the same degree that Scandinavians do. Nonetheless, the UNDP essentially imposes its preferences when weighing variables. As for the variables themselves, health, knowledge, and income are not statistically independent of one another. People with higher incomes tend to be healthier and better educated than those with lower incomes, precisely because they can afford to spend on gym memberships and law school tuition. Consequently, the addition of two other variables may say little beyond what income data reveal.

- Sen and Development as Freedom

Amartya Sen (1933-) sets out a theory of development in his 1999 book bearing the rubric “development as freedom.” Professor Sen, winner of the 1998 Nobel Prize in Economics, accepts the risk of an expansive definition of “development,” and possible dilution of progress on basic human rights. Indeed, in Development as Freedom, he eagerly embraces the risk – or, perhaps better put, he rejects entirely that such a risk exists. As the book title suggests, he defines “development” as expansion of freedom.

Sen argues the expansion of freedom is not only the pre-eminent end of development, but also the principal means by which development occurs. That is, freedom

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is both constitutive of development and the instrument of development. As a goal, to develop is to remove different kinds of “unfreedoms” from the lives of people. The main unfreedoms are:

1. Poverty, and more generally poor economic opportunities, which robs a person of the freedom to satisfy hunger (sometimes because of famine) or achieve sufficient nutrition, remedy a treatable illness, obtain adequate clothing and shelter, have access to clean water and sanitation, and enter into gainful employment.

2. Tyrannical or authoritarian regimes, or overly active repressive states, which rob a person of political and civil liberties (such as participation and uncensored speech), and thereby of the freedom to participate in the economic, political, and social life of a community.

3. Systematic social deprivation, including the neglect of public facilities, which robs a person of the freedom to enjoy organized arrangements for functional education (leading to literacy and numeracy), health care (including epidemiological programs), and law and order, and forces a person to spend life fighting unnecessary morbidity.

4. Intolerance, which may be based on ethnic, gender, linguistic, racial, or religious grounds, and which robs a person of the ability to enjoy many kinds of freedom.

Why is the removal of unfreedoms the primary goal of development? The answer is the lack of substantive freedoms means the lack of choice and opportunity to exercise the reasoned agency inherent in each person.

Sen uses the term “agency” not in the economic or legal sense of one person employed to act on behalf of another (whether a disclosed or undisclosed principal). Rather, he harkens to the traditional sense of an “agent” as an individual who acts and brings about economic, political, or social change, and whose behavior in the spheres of economics, politics, and society may be judged either by the values and goals of that individual, or by an external set of criteria.

As for the term “freedom,” Sen focuses on five specific types of freedom:

1. Economic facilities, i.e., the opportunity to use economic resources for exchange, production, and consumption, including the freedom to make and exchange goods and services (i.e., to participate in economic production and interchange), made possible through opportunities created by the market mechanism, the freeing of labor from explicit or implicit bondage, made possible through an open labor market, the freedom of access to product markets to obtain inputs into production, and the availability and access to finance, whether the agent is a large enterprise or small establishment.
(2) *Political freedom*, in the sense of the civil liberty to participate in public discussions and scrutinize policy decisions, to exercise free speech and dissent, and enjoy an uncensored press, to engage in elections among competing candidates and parties to select legislative and executive leaders, to critique leaders, and to choose principles of governance.

(3) *Social opportunities*, in the sense of facilities like education and health care, which enhance the ability to make use of the other freedoms and thus allow for a better quality of life.

(4) *Transparency guarantees*, namely, the need for openness so that individuals can deal with each other, and their government, in a lucid manner in confidence all relevant material is disclosed, and so that irresponsible or corrupt behavior is prevented.

(5) *Protective securities*, which create a safety net to ensure an individual is not vulnerable to abject misery, such as starvation, and which typically consist of income supplements to indigent persons, unemployment benefits, emergency public works projects (to generate income and employment for indigents), and episodic relief programs.

These “real” freedoms, as Sen calls them, are crucial as ends in themselves.

Each real freedom advances human freedom in general, and the overall capability of an individual. Sen is not naïve about the need for appropriate public regulation, particularly of markets, to ensure some equity in the enjoyment of economic freedom. He emphasizes “development” is the process of expanding each type of real freedom enjoyed by people. This definition contrasts with orthodox approaches to development, which focus on growth, define growth in terms of increases in GNP or *per capita* GNP, and model the process of industrialization and technological change, is obvious.

To illustrate, Sen recounts the example of African-Americans, who enjoy a higher *per capita* income than people in many Third World countries. Yet, they suffer from a lower likelihood of reaching a mature age than people in many such countries, including China, Sri Lanka, and parts of India, such as the southern state of Kerala. Likewise, a rich person who is prevented from participating in public debates and decisions, and from speaking freely, is deprived of something she has reason to value. The process of development ought to include removal of that deprivation. Some illustrations are both shameful and stunning – for example, the fact a black male in Harlem has less of a chance of living beyond 40 years of age than a man in Bangladesh.

The real freedoms, Sen asserts, also are crucial as instruments of development. Hence, Sen also dubs them “instrumental” freedoms. The expansion of one kind of freedom promotes freedom of other types. That is because different freedoms are linked in a causal way that is empirically demonstrable. For example, social freedoms, such as the
opportunity for education and health care, complement individual economic and political freedoms. These opportunities help an individual to overcome economic and political deprivations. The point is simply that instrumental freedoms are interactive.

As another instance of interaction among instrumental freedoms, Sen urges economic and political freedoms are complementary, not competing – contrary to the so-called “Lee Thesis” (named after Singaporean Prime Minister Lee Kuan Yew (1923-2015, PM, 1959-1990)), which alleges harsher political conditions, meaning denial of certain civil liberties, stimulate rapid economic growth. Political freedom helps promote economic security. Sen – an expert on famines – observes that in world history, no famine has occurred in a functioning democracy. Famines plague colonial territories governed by distant rulers (e.g., in India and Ireland, when they were ruled by the British), in one-party states (like the Ukraine in the 1930s, China during the 1958-1962 “Great Leap Forward,” and Cambodia under the Khmer Rouge led by Pol Pot (Saloth Sûr, 1925-1998, in office, 1976-1979)), or in military dictatorships (e.g., in Ethiopia, North Korea, and Somalia across various decades). Rarely if ever are the political leaders in famine-stricken countries the victim of hunger. Political freedom means rulers are held accountable through elections and public criticisms, and thus have a strong incentive to take measures to avert potential economic catastrophes before they occur. In effect, political freedoms offer security for economic facilities.

Still another illustration is economic facilities can generate personal and public wealth to help fund social facilities, such as better schools and health care delivery. Interestingly, life expectancy increases with per capita GNP, but the causal chain is not direct. Rather, additional income, if spent on health care and poverty alleviation, helps boost life expectancy. This nexus – from greater income to higher life expectancy through spending on health care and poverty alleviation – explains why Korea and Taiwan, but not Brazil experienced increased life expectancy as per capita income grew.

What matters is not the fruits of economic growth per se, but how those fruits are used. Brazil – in contrast to the East Asian Tigers – largely neglected its public health care system. Brazil tolerated severe social inequalities and high levels of unemployment. In this area, the records of India (especially outside the Southern state of Kerala, which embarked on support-led strategies for education and health care, rather than on growth-mediated processes, i.e., waiting for the effects of fast growth to redound to social programs) and Pakistan, resemble that of Brazil.

A final example of the interactive effects of promoting instrumental freedoms concerns social opportunities and economic facilities. Adequate health care reduces mortality rates, which in turn can help reduce birth rates (as there is less necessity to have more children in the hope that some of them reach maturity). In turn, with lower birth rates women can take more full advantage of educational opportunities, enhancing their literacy and numeracy skills. With a stronger skill base, their fertility rate may drop, and they can enter and stay longer in the labor force, thereby earning income and improving their material well-being.
Is income important to development? Indeed, Sen acknowledges, but not as a narrow end in itself. Rather, income matters as a means to expanding substantive freedoms and the ability to enjoy them. The idea is not new. At the start of *Nicomachean Ethics*, which Sen quotes, Aristotle writes “wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else.” That “something else” is to exercise individual volitions, become fuller social persons, and influence the world.

Moreover, as the connections among instrumental freedoms indicate, these freedoms are not a hierarchy with economic facilities at the top. It is commonly believed, but flat wrong, Sen says, that social opportunities can wait until income has grown significantly. Japan raised social standards before it got rich. During the Meiji Era (1868-1911), Japan had a higher literacy rate than Europe, even though industrialization was more advanced in Europe than Japan at the time. Japan developed economically at a rapid pace, and reduced poverty, in part because it had skilled human resources – related to positive social opportunities. He adds a rebuttal to the oft-made argument poor countries cannot afford to spend on education and health care because of their low income: relative cost. In such countries, education and health care are low-cost and labor-intensive. Thus, a poor country – while it has less money – also needs less money to provide these services than a rich country.

Similarly, China in 1979, when economic reform began under Premier Deng Xiaoping (1904-1997, in office, 1978-1990), was better prepared, in a social sense, than India, when economic liberalization began there in 1991. After the Communist Revolution of 1949, China – while denying political as well as economic freedoms – improved basic education and health care. By 1979, its people were literate and in respectable health, and good educational and health care facilities existed in most parts of the country. In contrast, following Independence in August 1947, India failed to raise the educational or health care standards of its masses. By 1991, only half of the adult population was literate, and dreaded diseases plagued parts of the country. With elites well-educated and in good health, India in 1991 – in contrast to China in 1979 – was poorly positioned for broadly-based economic growth.

To be fair, denial of political freedoms in pre-reform China was a handicap both to avoidance and response to economic crises. The largest recorded famine in history occurred in China, when at least 30 million died in the Great Leap Forward. In contrast, following Independence, democratic India has not had a famine. Nonetheless, Sen’s encapsulation of the point – “The lesson of opening of the economy and the importance of trade has been more easily learned in India than the rest of the message from the same direction of the rising sun” – is a powerful reminder of the importance of non-economic variables like education and health care in readying a population to take advantage of economic liberalization.  

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Why is the expansion of freedom an instrument of development? Sen offers two justifications – the “evaluative” reason and the “effectiveness” reason. First, the extent to which freedom is advanced is a gauge by which to measure development progress. In a normative sense, the extent to which individuals in a society enjoy substantive freedoms determines the success of that society. Traditional economists give primacy to income, not to the characteristics of human life. Utilitarian philosophers focus on mental satisfaction, on discontent that is creative or dissatisfaction that is constructive. Libertarians are preoccupied with procedures, but forget about the consequences of procedures. Sen, however, urges the enhancement of freedom is (or the) an evaluative criterion for development. In effect, the process of development resembles the history of overcoming unfreedom.

Second, the enhancement of freedom translates directly into the enhancement of the ability of an individual to help herself and influence her society and the world. The fewer the arbitrary governmental hindrances on the exercise of substantive freedoms, the more able a person is to gain not only in income, but also in the complementary spheres of education and health. In a sense, the effectiveness justification emphasizes the favorable consequences of enhanced substantive freedoms.

For instance, the exercise of economic freedom, though individual transactions, can lead to higher income and greater efficiency. Also, the exercise of political freedom can lead to better public policy choices through robust debate. In this respect, Sen singles out for criticism ayatollahs and other religious authorities (acting in the name of Islam or another faith), governmental dictators (acting in the name of so-called Asian or other values), and cultural experts (acting as elitist guardians of culture). They insist on adhering to established traditions and obedience to their decisions about these traditions, thus choking off the participatory freedom to which individuals have a right.

The concept of “poverty,” as Sen sets out in Development as Freedom, follows logically from his definition of “development.” If “development” is about the expansion of freedom, then “poverty” is about “unfreedom.” In turn, “unfreedom” arises for either of two reasons: inadequate processes, or inadequate opportunities. To violate a political freedom, such as voting rights, is to create an inadequate process. To violate an economic freedom, like the right to be free from hunger, is to foster an inadequate opportunity. When these violations occur, it is not possible for an individual to achieve all, or any, of her capabilities.

Accordingly, Sen eschews a focus only on the adequacy of procedures, saying that libertarians (who focus only on appropriate procedures) forget about whether a disadvantaged person is systematically deprived of substantive opportunities). He also eschews a focus only on the adequacy of opportunities, saying consequentialists (who focus only on outcomes) neglect whether an individual has adequate opportunities or freedom of choice. “Poverty,” to Sen, has both a process and opportunity aspect. Inadequate processes and opportunities afflict the poor.
So, Sen defines “poverty” not as income deprivation, but as capability deprivation. To be “poor” is to lack more than just a high income, though lowness of income is both a handicap for the poor, as it is a leading cause of capability deprivation. To be poor is to lack basic capabilities, such as employment skills (leading to undernourishment), functional education (resulting in illiteracy), or health care (resulting in premature mortality). To inquire into “capability” is to inquire into whether a person can lead the kind of life she values, and has reason to value. Aggregating persons in a society, it is for each society to determine the capability most important to that society.

Sen’s definition of “poverty” as capability deprivation, like his definition of “development” as “freedom,” runs counter to modern orthodoxies in development economics (though, as he points out, classical economists like Adam Smith took the more expansive view he does). Much of the development economics literature focuses on, or assumes, low income is intrinsically important. Yet, capabilities matter more than income, as Adam Smith (1723-1790) suggested in *The Wealth of Nations* (1776). To have a relatively low income in a rich country can be a serious impediment to participation in the life of that country, and immediate community, even though the income level is high in comparison with poor countries. The lack of means makes it impossible to buy consumer electronics and other consumption items, join clubs, go to schools, and pursue ends common in the rich country. Thus, low income is only instrumentally important, whereas deprivations in certain basic capabilities have intrinsic importance.

Moreover, a number of factors call for attention to capability, not income. First, the relationship between low income and capability deprivation differs across individuals, communities, and countries. For instance, parametric variations (e.g., age, gender, proneness to natural disaster, proximity to civil unrest, and disease environment) can affect the relationship between income and capability (e.g., the relationship may be weaker for older people, women, individuals near flood, war-torn, or disease areas, because these parameters themselves affect capability). Some parameters (like age, gender, or illness) may be coupled, and thereby affect the relationship between income and capability. Second, there may be intra-family biases that affect this link. Such biases tend to afflict young girls in various poor countries, who may suffer from smaller food allocation, limited education, extra labor, and bodily degradations (e.g., sexual abuse and female genital mutilation). Third, factors other than low income cause capability deprivation. Instrumental freedoms – political freedoms, social opportunities, transparency guarantees, and protective security – are examples. Fourth, the causal link between income and capability goes in both directions. Enhanced capabilities can lead to higher income, as well as *vice versa*.

European countries, for instance, tend to select a social safety net over high unemployment. In contrast, the U.S. prefers low unemployment over social security and, more generally, a welfare system. Development “as freedom,” therefore, means each country is or ought to be free to order its priorities as to the capabilities. It does not mean freedom in the sense of individuals having maximum ability to pursue liberties in an American-style sense. Rather, the provision of basic capabilities provides for individual freedom. For instance, education helps a person find a job, prosper in it, and build a career.
Health care helps a person live well, and recover should illness strike. Significantly, Sen also argues only through a well functioning democracy is it possible to make such choices properly and wisely. That is because only democracy allows for a discourse among different members of society as to what the choices are, the criteria for selection, and the ultimate outcomes.

III. Absolute Poverty

There is no single definition of “poverty.” It is both an absolute and relative concept. And, it is measured in a variety of ways, some narrow, some broad. The leading such gauges are as follows.

Following the poverty-as-income deprivation approach (i.e., that “poverty” is simply a lack of income), development economists measure poverty using three principal methodologies. The first methodology, dubbed the “Poverty Line,” is to set a minimum income threshold. Then, a “poverty headcount” is taken, i.e., the number of people below the Poverty Line are counted and defined as “impoverished.”

The most commonly cited threshold is “a dollar a day,” meaning a person earning less than U.S. $1.00 per day lives in “absolute” poverty, and thereby is counted among the poorest of the poor. The second method (discussed below) is to calculate a Top/Bottom ratio. The third methodology (also discussed below) is a Gini Coefficient, which is derived from a Lorenz Curve.

As for the first measure, the World Bank introduced the dollar-a-day metric to gauge “absolute” (or “extreme”) poverty. It set the figure at U.S. $1.08 per day, at 1993 PPP terms, or one third of the average consumption level of a country, if that consumption level is above $1.08. (It defines “poverty” as living on less than $2.00 per day.) The World Bank first published the absolute poverty threshold of $1.08 per day in its 1990 *World Development Report*. The threshold is based on the work of Bank economists, specifically, Martin Ravallion and his co-authors, who observed the national poverty levels – lines established by six governments in developing countries for their particular societies – tended to cluster around $1.08. By using PPP terms instead of market exchange rates, the poverty line threshold accurately takes into account the fact that lower prices prevail in poor countries.

This Poverty Line reflects minimum levels of basic human needs, namely, staple foods, clothing, shelter, health and sanitation facilities (including access to safe drinking water), and primary education needed to earn an adequate income. The number of people living below the Line can be expressed as a percentage of a total population, or as an absolute figure. Of course, the percentage changes with the Line, but the results remain

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grim. For instance (as of August 2018), if the Line is set at $2.50 per day, then about one-half of the population of the world, *i.e.*, 3.3 billion, are below that Line, and about 17%, *i.e.*, over 1.3 billion, are below $1.25 per day. Of the people below any threshold drawn, the majority are in Asia, with India accounting for large numbers in that majority.⁹

The latter fact bespeaks a weakness in Asia’s generally strong economic record in the post-Second World War era.¹⁰ Most Asian countries have experienced rapid growth in GDP, and *per capita* GDP, over the last several decades, and the rates of growth have exceeded the rates in Africa, Latin America and the Caribbean, and the Middle East. The relatively faster growth in Asia has helped to eliminate extreme poverty in the region. Further, Asia was projected, between 2008 and 2015, to cut poverty by half, achieve universal primary education, and reach gender parity in education. It did not meet that

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⁹ Exactly how well has India performed in cutting poverty? That question engenders heated statistical debate:

The release of the Global Hunger Index … [in October 2022] cast a harsh light on India, which fell six places to rank 107th out of 121 nations, behind struggling neighbors Sri Lanka (64th) and Pakistan (99th) and just ahead of impoverished Afghanistan (109th).

India’s 19.3% rate of child wasting – described by the World Health Organization as when a child is too thin for his or her height due to rapid weight loss or a failure to gain weight – for the 2017-2021 period is “the highest of any country in the world, and drives up [South Asia’s] average owing to India’s large population,” the index report stated.

The Indian government, however, dismissed the report as “misinformation” intended to “taint India’s image.”

The government took issue with the methodology, saying it was too heavily focused on children and was not representative of the entire population. It also said the index “chooses to deliberately ignore efforts made by the government to ensure food security for the population, especially during the COVID pandemic.”

…

Other measures do show India in a more favorable light. A recent assessment of multidimensional poverty by the United Nations Development Program (UNDP) said 140 million people in India were lifted out of poverty between 2015-2016 and 2019-2022 – in other words, since [PM Narendra] Modi took office in 2014.

Going back further, India has brought 415 million out of poverty in the last 15 years, the report said.

…

Even so, partly owing to its large population, the release notes that “India continues to have the largest number of poor people worldwide (228.9 million), and the ongoing task of ending poverty remains daunting.”

…

… India has some of the world’s richest people – it had the third-most billionaires, after the U.S. and China, as of earlier this year – but also the world’s largest hungry population.

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projection. Indeed, Asia still has an absolute poverty rate of approximately 17% – higher than in, for example, Latin America and the Caribbean. Consequently, in Asia, hunger remains widespread, and infant mortality unacceptably high.

Gauging income poverty using an Absolute Poverty threshold like $1 per day, while simple, also is simplistic. First, because of inflation in the U.S., the original 1993 figure of $1.08 is (as of 2005) $1.45.

Second, governments tend to focus more on their own poverty lines – the national poverty lines developed for their own societies. Within a society, relative deprivation matters. Thus, notably, the original developer of the $1.08 threshold, Martin Ravallion, along with co-researchers, suggested in a 2008 World Bank Working Paper that a new line of $1.25 be established:11

They gather 75 national poverty lines, ranging from Senegal’s severe $0.63 a day to Uruguay’s more generous measure of just over $9. From this collection, they pick the 15 lowest (Nepal, Tajikistan, and 13 Sub-Saharan countries) and split the difference between them. The result is a new international poverty line of $1.25 a day.

Why those 15? The answer is philosophical, as well as practical. In setting their poverty lines, most developing countries aim to count people who are poor in an absolute sense. The line is supposed to mark the minimum a person needs to feed, clothe, and shelter himself. In Zambia, say, a poor person is defined as someone who cannot afford to buy at least two to three plates of nshima (a kind of porridge), a sweet potato, a few spoonful’s of oil, a handful of groundnuts and a couple of teaspoons of sugar each day, plus a banana and a chicken twice a week.

But even in quite poor countries, a different concept of poverty also seems to creep in… It begins to matter whether a person is poor relative to his countrymen; whether he can appear in public without shame, as Adam Smith put it.

This notion of relative deprivation seems to carry weight in countries once they grow past a consumption of $1.95 per person a day. Beyond this threshold, a country that is $1 richer will tend to have a poverty line that is $0.33 higher. … The authors thus base their absolute poverty line on the 15 countries in their sample below this threshold.12

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Changing the absolute poverty line from $1.08 to $1.25 affects the estimate of the number of people lifted out of poverty in recent decades, particularly in China.\(^\text{13}\) The higher the threshold, the larger the number of people falling below it.

Subsequently, the World Bank adopted the $1.25 threshold as the global standard for absolute poverty in August 2008.\(^\text{14}\) Again, that standard is based not on market exchange rates, but rather on PPP rates. The percentage of people in the world living below $1.25 per day in 1990 was 43%, and in 2012 was 22%.\(^\text{15}\) Moreover, applying this threshold, for the first time in recorded history, in 2012 less than half of Africans were below the poverty line.

Globally, the number of people beneath the old yardstick dropped by over 270 million between 1990 and 2004, to 969 million in 2004. The majority of that decrease – about 250 of the 270 million – occurred in China. With the new yardstick, in 2005 there were 204 million Chinese people subsisting in absolute poverty. Though the number fell between 1990 and 2004 (by 407 million instead of 250 million), the actual number of absolutely poor people in 2005 was roughly 130 million more than estimated earlier.

China is a key case. As *The Economist* reported in December 2011:

Since 1978, China has liberated more people from poverty than any other country in history, partly because China before 1978 consigned more people to poverty than anywhere in history.\(^\text{16}\)

In December 2011, the CCP adopted a new absolute poverty line near to that of the World Bank threshold of $1.25 per day. The result was that 128 million Chinese in rural areas were deemed poor, as they earned less than 2,300 yuan (about $361) annually.\(^\text{17}\) Until the revision, the CCP classified 26.9 million rural Chinese as poor, under the previous threshold of 1,196 yuan annually.

Third, even if a person has is at or above the line, it does not mean he or she has access to the infrastructure and institutions to lead a full life. There may be no schools for that person to attend, or the quality of the instruction may be dreadful. Health care may not be readily accessible, and when provided, may be sub-standard. Food, while available, may not have the right balance of proteins and carbohydrates to support normal physical and cognitive growth. The environment may be stressed, as in urban slums, drought-stricken rural areas, or famine-prone regions. In brief, an Absolute Poverty threshold says nothing about capability or empowerment.


\(^\text{16}\) *Poor by Definition*, *The Economist*, 3 December 2011, 56. [Hereinafter, Poor.]

\(^\text{17}\) See Poor.
Given these concerns about an absolute poverty threshold, *The Economist* wisely observed in May 2008 any number was statistically arbitrary:

Give or take a dime or two, it matters little where a poverty line is drawn. Like a line in the sand, an absolute poverty standard shows whether the economic tide is moving in or out. It does not matter too much where on the beach it is drawn.  

Nonetheless, in October 2015, the World Bank updated the definition of “extreme poverty” to approximately $1.90 per day. Doing so added 148 million to its ranks, with 136 million of the increase in Asia and 8 million in Africa.

IV. Top-Bottom Ratio

The second of three major methods to measure income poverty, the others being an absolute poverty threshold and a Gini coefficient, is the “Top/Bottom Ratio.” As its name suggests, the “Top/Bottom Ratio” is the ratio of the share of income the top 20% of the population in a country receives to the share of income the bottom 20% gets:

\[
\text{Top/Bottom Ratio} = \frac{\text{Income received by Top 20\%}}{\text{Income received by Bottom 20\%}}
\]

Clearly, a higher ratio connotes more severe inequality than a lower ratio. While 20% is the typical benchmark, others – such as 10% or 25% – can be used.

The poorest 10% of people in China control only 1.4% of total income (as of May 2008). In contrast, the top 10% own 45% of all assets. On the absolute poverty scale of $1 per day, between 130 and 200 million (according to different World Bank estimates) fall below the threshold. As of late 2006, 19 of China’s top 100 business tycoons (gauged by a Chinese publication akin to *Forbes*) were deputies to the National People’s Congress (NPC), double that number in one year. What do these data suggest?

The advantage of using a Top/Bottom Ratio over an absolute threshold is it comports with an important psychological fact about poverty. Poverty is not just about living below a minimum acceptable standard. Rather, it is a relational concept. To be “poor” has meaning in part because someone else is “rich.” Consequently there is a sense of deprivation in relation to a reference group. Accordingly, the Ratio in China is helpful in gauging poverty in this sense. But, the sheer number of people still below an absolute threshold is itself staggering. And, the number of tycoons in, or with easy access to, high

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20 See Dorothy J. Solinger, *Inequality’s Specter Haunts China*, 171 FAR EASTERN ECONOMIC REVIEW 19, 20, 22 (June 2008).
office, may indicate stronger efforts are needed to ensure poor people are not excluded from the political process.

The Top/Bottom Ratio, like an absolute poverty threshold and Gini coefficient, are measures of income poverty. But, again, as Sen points out in *Development as Freedom* (1999), poverty may be conceptualized in terms broader than just income. Poverty may be thought of as capability deprivation.

V. Gini Coefficient

The third of three major methods of measuring poverty in terms of income deprivation, along with Absolute Poverty (i.e., a Poverty Line) and a Top/Bottom Ratio, is the Gini coefficient, named after the early 20th century Italian statistician, Corrado Gini (1884-1965). A Gini coefficient (also called a “Gini Concentration Ratio”) is the most sophisticated tool for measuring income-based poverty. The coefficient:

ranges between 0 (signifying “perfect” or maximum equality), and 1 (signifying maximum inequality).

The coefficient indicates the gap between two percentages: the percentage of the population, and the percentage of income received by each percentage of the population. If, say, 1% of the population receives one percent of total income, and all subsequent percentages of the population receive the corresponding percentages of total income, the Gini coefficient is 0 – there is no gap between the income and the population percentages. If, at the other extreme, all of the economy’s income were acquired by a single recipient, the gap would be maximized, and the coefficient would be 1.21

The amount (and changes) in a Gini coefficient can have major social and political, as well as economic, consequences for a society.

If the coefficient approximates 0, income received by each individual (or family, or household) would be exactly the same – each percentage of the population would receive the corresponding percentage of income; the system’s survival would be jeopardized by an absence of pecuniary incentives for entrepreneurship, innovation and productivity. If … the coefficient approximates 1, all of the economy’s income would be acquired by a single recipient. The system’s survival would depend precariously on the altruism of that single recipient, with the risk of revolution if altruism is insufficient!22

(The multifarious implications of a Gini coefficient are considered below.)


22 *All Inequality.*
Mathematically, a Gini coefficient is derived from a Lorenz Curve. A Lorenz Curve, shown in the Graph 1-1, is plotted in a square box where the left-hand vertical side measures the cumulative percentage of income in a country, and the lower-horizontal side gauges the cumulative percentage of recipients of income (i.e., population percentiles). In the lower left-hand corner of the square, the zero point, there is no income and there are no recipients of income. At the upper right-hand corner of the square, 100% of the income, and 100% of the people, in a country are accounted for. The 45-degree “Equality Line” connecting the lower-left hand and upper-right hand corner shows perfect equality.

On the Equality Line, at each cumulative percentage of income, the same percentage of the population receives that income. For example, in the center of the square, on the 45-degree line, 50% of the income generated in the country is received by 50% of the people. Below the “50/50 Center Point,” 25% of the income is received by 25% of the people. Above that Center Point, 75% of the people get 75% of the income.

Not surprisingly, therefore, the 45-degree line is the benchmark against which to measure inequality of income distribution. In brief, plotting data on a country, the larger a curve is away (to the right) from this line, the greater the income inequality in that country. (What about points above, i.e., to the left, of the 45-degree line? They are not observed in reality. For instance, Point D would mean the bottom 25% of the population gets 50% of the income, suggesting an extreme redistribution that renders them no longer at the bottom.)

Graph 1-2 shows an example, with hypothetical data from Bangladesh (where income is stratified) and Sweden (where it is not). The curve LC\textsubscript{B} is the Lorenz Curve for Bangladesh, and LC\textsubscript{S} is the Lorenz Curve for Sweden. Using this example, LC\textsubscript{B} represents greater income inequality than LC\textsubscript{S}, because LC\textsubscript{B} deviates further from the 45-degree equality benchmark than LC\textsubscript{S}.

To read these curves, consider and contrast specific points on them, such as A\textsubscript{B} and A\textsubscript{S}. At A\textsubscript{B}, 50% of the population in Bangladesh receives less than 15% of the income. But, at A\textsubscript{S}, 50% of the Swedish population receives over 25% of the income. Or, contrast points C\textsubscript{B} and C\textsubscript{S}. At point C\textsubscript{B}, 50% of the income in Bangladesh goes to well over 75% of the population, implying the other 50% of income is shared by far less than 25% of the population. At point C\textsubscript{S}, however, 50% of the income in Sweden goes to about 70% of the population, indicating the remaining 50% of income accrues to about 30% of the people. Neither society is perfectly egalitarian, but poverty – in terms of the unequal distribution of income – is worse in Bangladesh than Sweden.
Gini coefficients are derived from a Lorenz Curve. Essentially, they are the area between the Lorenz Curve for a country and the 45-degree equality line, divided by the total area underneath (to the right and bottom of) that line.

Arithmetically, the formula is:

\[
\text{Gini Coefficient} = \frac{\text{Extent of Deviation from Perfect Equality}}{\text{Total Income}} = \frac{(\text{Area between Lorenz Curve and 45-degree line})}{(\text{Area underneath 45-degree line})}
\]

\[
= \frac{A}{A + B}
\]

where the areas “A” and “B” are shown in Graph 1-3, the Lorenz Curve.
Graph 1-2
Hypothetical Lorenz Curves for Sweden and Bangladesh

A Gini coefficient of zero represents perfect equality. Every person (or family) earns the same amount of income. There is no gap between the Lorenz Curve and the 45-degree line, hence the numerator in the ratio is zero. A Gini coefficient of one bespeaks complete inequality – in effect, all income is controlled by one person (or family). Thus, the lower the Gini coefficient, which is associated with a less “bloated” Lorenz Curve, the more equal the distribution of income in a country.

Depending on the country, Gini coefficients range from roughly 0.25 (in Japan and Scandinavia) to 0.60 (in some Latin American and Sub-Saharan African countries). Typically, higher income countries have lower Gini coefficients – an observation consistent with the Kuznets Curve. But, among middle- and low-income countries, it is hard to render a generic statement, as some have more, and some less, income inequality. Also, as a general matter, there is a high degree of correlation between the Gini coefficient for a country and the Top/Bottom ratio for that country.

When studying Lorenz Curves and Gini coefficients, four caveats should be observed. First, equality and equity are not synonymous, at least not to economists. Equality suggests every person earns the same income, but equity is a normative concept that distinguishes right from wrong using some philosophical or theological paradigm. Income equality may be – indeed, is – regarded in some paradigms as inequitable.
Second, Gini coefficients of zero or one are extreme referential standards. Neither perfect equality (zero) nor inequality (one) is observed in reality. However, seemingly modest changes – from, say, 0.42 to 0.36 – can indicate fairly important changes in a country in terms of increased income equality. Conversely, a modest redistribution of income, say 1%, from the top to the bottom 20% of the population might not change the Gini Coefficient by a large amount. But, the redistribution could mean a lot to poor people, in terms of the marginal difference it makes to their income. It is important not to focus on the extremes and thereby become insensitive to actual changes in distribution.

Third, the Lorenz Curves from which Gini coefficients are derived can intersect, i.e., cross over one another. In turn, the different income distributions evinced by the Curves can generate the same Gini Coefficient.

Graph 1-4 shows a hypothetical example of India and Canada. LC_{India}, for India, exhibits a steep slope at the top (upper right hand), but a gentle slope at the bottom (lower left hand). The steep portion indicates more extreme income inequality at the higher income range, but more equality at the lower income end. Poor people in India are poor, with few gradations among them. But, among the rich in India, there is considerable stratification. LC_{Canada}, for Canada, shows the opposite pattern. There is plenty of inequality at the lower range, but at the upper end, there is less inequality among rich people. Thus,
the caveat is two different Lorenz Curves can generate the same value for a Gini coefficient when each has different degrees of inequality along the Curve.

Fourth, an increase in the value of the Gini coefficient indicates worsening income inequality, but making a judgment as to whether that movement is “good” or “bad” requires some caution:

… [The] judgment [as to whether a shift in a Gini Coefficient closer to, or further from, equality is “good” or “bad”] depends on whether the strengthened incentives toward higher productivity that might be associated with a movement toward higher inequality are offset by the aggravation of social tensions that might be associated with the same movement.

In turn, such a judgment is likely to depend critically on how and why the change in inequality has occurred, rather than on the magnitude of the change. For example, whether the coefficient’s change is (or is perceived to be) due to favoritism, nepotism, and corruption, or instead to innovation, productivity, and entrepreneurship; whether the change is viewed as earned, fair and legitimate, or instead as connived, unfair and illegitimate.23

To be sure, the general presumption is an upward movement in the value of a Gini coefficient is likely to have adverse economic, social, and political ramifications. But, more than just the math must be checked. The degree of the change, and the reasons for it, must be examined.

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23 All Inequality.
Graph 1-4
Different Hypothetical Lorenz Curves Generating Same Gini Coefficient

Cumulative Percentage of Income

Cumulative Percentage of Population
Chapter 2

ECONOMIC GROWTH MODELS:
STAGES AND SOURCED OF GROWTH

I. 1960 Rostow Stages of Growth Theory

● Five Stages

Is there a pattern to the process of economic growth through which most poor countries proceed as they gain in riches? Economist Walt Whitman Rostow (1916-2003) answered “yes” in a famous book initially published in 1960, The Stages of Economic Growth.24 To be sure, the idea of modeling economic growth to highlight the progressive movement of a country through different levels and kinds of economic activity did not originate with Rostow. Karl Marx (1818-1883) and Vladimir Lenin (1870-1924) developed and refined, respectively, a deterministic model of economic development in which they categorized stages of production, namely, primitive, feudalism, capitalism, socialism, and communism.25 Rostow, however, was no communist – indeed, the sub-title of his book is “A Non-Communist Manifesto.”

Rostow marshaled a massive amount of historical evidence and found five stages characterize economic growth. Graph 2-1 summarizes them, and they are as follows:

Stage I:
Traditional Society

Poor countries have traditional societies stuck in a vicious cycle of poverty. Earnings are at a subsistence level, so saving is low or non-existent. With no sizeable savings pool, there is no investment. With no investment, there is no growth.

Stage II:
Pre-Conditions for Take Off

To break the vicious cycle of poverty, poor countries must create the pre-conditions for a “take off.” These pre-conditions, when in place, will lead to self-sustained growth. There are four key pre-conditions. First, a class of entrepreneurs must develop. By definition, an entrepreneur is willing to take risks in business. Second, people must accumulate savings, and their savings must be channeled into investments. These investments are in productive methods, in both the agricultural and manufacturing sectors. Entrepreneurs play the key role here, as they draw on the savings pool to make investments. Third, people work diligently, whether for themselves or as employees of others. In effect,

24 See W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH – A NON-COMMUNIST MANIFESTO 1960 (3rd ed. 1990); LYNN, STUART R., ECONOMIC DEVELOPMENT: THEORY AND PRACTICE FOR A DIVIDED WORLD 33, 47-49 (2003) (including Figure 3-2).
25 See LENIN, V.I., IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM (1917, 1969 ed.).
there is a strong work ethic dedicated to growth. Fourth, there is national unity. The fourth pre-condition allows for enlarged markets for output and specialization of production.

Graph 2-1
Rostow Stages of Growth Theory

Stage III: Take Off

Given the pre-conditions, at some point there is an increase in investment from less than 5% of total output to more than 10% of total output. When this 10% threshold is crossed, a country enters the Take Off stage. With higher investment, the growth rate of output accelerates. To be sure, growth may not be even across all sectors. It may be unbalanced (as discussed later), but leading sectors would grow rapidly. Improved technology leads to yet greater productivity and output, and profits are reinvested, as well as allow for new sectors. The financial system improves, in order to mobilize savings and channel them into investments more efficiently than before. The demand for output rises, so as to absorb increased production.

Stage IV: Drive to Maturity
In this stage, the ratio of investment to income increases to between 10% and 20%, and the savings rate correspondingly grows to that range. Output per capita rises, and the leading sectors of the economy change.

Stage V: High Mass Consumption

The final stage results from sustained high investment activity and savings rates. While income growth rates taper off, as the name of this Stage connotes, most people enjoy a high degree of material comfort. In comparison with the earlier Stages, especially the first three Stages, it is easy to see the change in the mix of employment and output.

To summarize, the concept of the “Take Off” signifies the point at which a traditional society begins the process of growth. Thereafter, a less developed country would drive toward maturity, and eventually experience high mass consumption. In a general sense, these stages correlate with a less developed country evolving from an agricultural economy and rural society, to a low-value added manufacturing economy with larger cities, to a high-value added manufacturing economy with major metropolises, and ultimately to a service-based economy.

There is a relationship between sources of national income and employment, on the one hand, and the stage at which a country is in, on the other hand. Among low-income countries (which are at earlier Stages in the Rostow Model), agriculture accounts for roughly 25% of total output, and two-thirds of employment. As these countries grow (i.e., move through the last two Stages), agriculture becomes a less significant source of income and employment in relation to manufacturing. Eventually, both agriculture and manufacturing account for a smaller proportionate share of aggregate income and employment than services.

Historical Examples

Looking at the historical evidence for major developed countries, Rostow argued they hit the Take Off and Drive to Maturity Stages at slightly different periods. Table 2-1 summarizes these periods.

Table 2-1: Major Developed Countries, Take Off, and Drive to Maturity

<table>
<thead>
<tr>
<th>Country</th>
<th>Take Off Stage</th>
<th>Drive to Maturity Stage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Great Britain</td>
<td>1783-1802</td>
<td>By 1850</td>
</tr>
<tr>
<td>Japan</td>
<td>1878-1900</td>
<td>By 1940</td>
</tr>
<tr>
<td>Russia/Soviet Union</td>
<td>1890-1914</td>
<td>By 1950</td>
</tr>
<tr>
<td>U.S.</td>
<td>1843-1860</td>
<td>By 1900</td>
</tr>
</tbody>
</table>
Four Critiques

As conceptually appealing as Rostow’s Stages of Growth Model may be, it is important to appreciate the critical questions that have been asked of the Model. First, is the Model too simplistic? Rostow paints with a broad brush. Not every country goes through the five stages in lock step. There is no single path of development that all less developed countries must tread. The more nuanced the review of the economic history of one country in comparison with that of another, the more likely differences will emerge. Another way to put this question is what level of generalization of comparative economic development history is too general?

Indubitably, the Stages of Growth Model is a helpful intellectual framework for considering the relative position of less developed countries, both against each other and vis-à-vis developed countries. Yet, if the Model is taken as determinism, it becomes an intellectual straitjacket. That is equally true for the Marxian stages – the Asiatic mode of production, feudalism, capitalism, socialism, and communism. They do not accurately capture the economic history of every country. Germany, China, and Russia are cases in point. Development does not proceed at a uniform pace for all countries, nor in a uniform manner. The precise nature of structural changes in Mexico is not the same as those in China. Indeed, the pace and nature of the changes often differ within a country. Some classes of people (not infrequently delineated by race or ethnicity), and some regions of a country, benefit more from the development process than others.

Moreover, in some countries, like Malaysia and Indonesia, there are periods in which the process seems to stall. Such countries are in the infamous “middle income trap,” stagnating at one Stage, unsure of how to vault themselves into the ranks of rich countries. In other countries, like Egypt and Pakistan, there are regressions. In fact, such examples highlight another limitation of stage theory: the impact of exogenous factors or internal instability.

The 1997-1999 Asian Economic Crisis struck all Southeast Asian countries hard. But, its effects – and even more so the responses to it – were somewhat varied in different countries. Malaysia reacted with controls on flows of financial capital, and experienced

26 As one observer notes:

Despite all the works on this subject, a general theory of capitalist development, valid across widely different cultures, remains a distant dream. There is also no clear-cut or universal relationship between democracy and development, or for that matter between dictatorship and development.


27 For a stimulating series of observations about the causes, effects, and implications of the causes of the Asian Financial Crisis, the turmoil from which redounded globally, by the former WTO Director General, and former Thai Deputy PM and Minister of Commerce, see Dr. Supachai Panitchpakdi, Reflections on World Trade, Finance, and Development (Bangkok, Thailand: SPN Printing Co. Ltd., October 1998). In view of the many crises that have transpired since that one, Dr. Supachai’s comments seem depressingly timeless (as in calling into question whether lessons from that Crisis have been learned):
On the edge of the new millennium, the world economy is facing its worst crisis after the Second World War. The severity of [the] financial crisis which began in Asia is bringing to an end an era of vigorous surge in growth and stability of the global economy. The global linkages and interdependence have, in effect, reinforced the devastating impacts of the [Asian Financial] Crisis, spreading them to other regions. The aggravated Crisis has also brought about a dramatic downturn in international trade and investment. The philosophy of unfettered Capitalism and globalization is now called into question. Faith and confidence in the virtue of free markets and liberalization seem to be on the wane.

From the outset of the Asian Financial Crisis, I repeatedly expressed [the] view that it should not be perceived as being a regional problem, and the effective solution required well-coordinated international cooperation. Indeed, the financial turbulence in Asia is persistent and contagious. Globally integrated financial markets make it extremely difficult, if not impossible, to contain the contagion. The Crisis has expanded to engulf the emerging markets in other regions and brought in a new threat of global recession.

We must acknowledge the urgency and importance of the need to tackle the whole range of problems at their root causes and contemplate lessons drawn from this Crisis.

The damages which have been inflicted on many Asian countries and are spreading to other parts of the world warrant immediate, international action to stem the global Crisis, assist the affected economies, and revive growth and stability in the world economy. More effective measures have to be mapped out and implemented.

Undeniably, the international flows of capital dominate the flows of trade. The Financial Crisis has impacted heavily on international trade, and consequently the well-being of the world populace. It is clear that finance, trade, and development intertwine.

In solving the financial problems, we may succeed in getting our balance of payments into surplus, our exchange rates stabilized and strengthened, and our financial system restructured; but, if market access is cut off, if other countries fail to adhere to their commitments, [then] all efforts of individual countries, as well as the ... IMF and ... World Bank, would be futile. Without the participation of the ... WTO, countries may be driven to unilateral protectionism. Without the WTO playing an active role in keeping markets open, there would be no lasting solution to the Crisis. It is therefore imperative that, on the basis of the Uruguay Round Declaration on Achieving Greater Coherence in Global Economic Policy Organizations, the three key organizations, i.e., the IMF, ... World Bank, and ... WTO, strengthen their coordination and exert concerted efforts to defuse the global crisis.

... It is essential that the IMF, ... World Bank, and ... WTO work more closely together to ensure that macroeconomic management of financial, trade, and development policies is more cohesive, and that international trade and finance are supportive of each other and flow smoothly without disruption. ... [I]n devising economic adjustment and restructuring plans, especially of WTO Members, close consultations between the IMF, ... World Bank, ... and WTO would be necessary to ensure compliance with multilateral trade rules and maintenance of market openness.

... [T]he economic revival of affected countries would be possible only if countries keep their markets open and not resort to protectionist measures. The principle of free and fair trade must be upheld within the framework of multilateral trade rules and disciplines.

... Assuming a substantial part of the world trading community, the developing countries are also the potential beneficiaries of more predictability and certainty provided by the open, rules-based trading system. However, the share of developing countries in
a decline in FDI. Indonesia imploded with political unrest and violent secessionist movements in some islands, though by the mid-2000s it emerged with robust growth. For all its democratic and human rights benefits, the Arab Spring, which began in January 2011 in Tunisia and spread quickly to Egypt and across the Middle East, created internal economic uncertainty, the effects of which will be felt for years and mitigated only with responsible governance. As for Pakistan, it has been cursed and cursed itself with a War on Terror following 11 September 2001 that it did not seek, and monstrously irresponsible and corrupt internal governance which it cannot seem to cure.

Second, how does a country get from one stage to another? The Model provides an exposition of the internal dynamics of capitalist economic development. It does not explain how the transition is made from one developmental stage to another. Is the story one of channeling increased savings into investment in capital equipment? Or, are other factors important, such as good governance? Are the transition mechanisms different from one country to another, or one region to the next? Is it possible to skip a stage?

Third, what role does international trade play in each Stage, and in the transition from one stage to another? The Model is largely silent as to imports and exports. Yet, in reality, imports are necessary for most countries to industrialize. Exports of surpluses are needed to generate revenues to pay for needed imports. In brief, a closer inspection of the link between trade and stages of income growth than the Model affords is desirable.

Oil exporters, particularly in the Arab Middle East, are an example of a group of countries that implicates all three critiques of Stages of Growth Theory. A cursory view of cities like Abu Dhabi and Dubai in the UAE, Doha in Qatar, Manama in Bahrain, and Riyadh in the Kingdom of Saudi Arabia suggests these countries are in the High Mass Consumption stage. They bear all the indicia of that stage, and more (including, for example, health problems like high obesity rates). A closer inspection of these countries reveals features of Traditional Society. There is little in the way of industrialization. Virtually all exports are energy or energy–related, and almost all other items are imported. There are large, poor rural and semi-rural areas where subsistence herding and farming occurs. Dependence on state subsidies, generated from oil and gas exports, means education and health care costs are covered. But, government nannying also creates

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world trade has been modest. The distribution of benefits derived from trade liberalization and globalization has not fully reached the developing countries and, among the developing countries, the distribution has been significantly unequal. There is also a serious problem of marginalization which limits the opportunities and potential[] of the least developed Members of the WTO. These are fundamental problems … which deserve serious attention. These problems must be specifically addressed and resolved.

Id. (Emphasis added.)

Much of what Dr. Supachai says fits easily within the contexts of Global Financial Crisis, which started in September 2008, 10 years after the Asian Economic Crisis hit, and the economic slump associated with the COVID-19 pandemic, which started in late 2019–early 2020. The themes he strikes – linkages among trade, finance, and development, contagion effects from one country to another, attention to poverty alleviation, and collaboration among the IMF, World Bank, and WTO – all remain true. His solution is that reflation occurs not with diminished trade, but from increased trade, i.e., not from too little trade wrought by protectionism, but from more trade via open markets. That solution also remains controversial.
disincentives to entrepreneurship.

Such countries, members of the OPEC have not passed through Rostow-type Stages the way Great Britain, Japan, or the U.S. did. Might the Arab OPEC countries be able to jump from Traditional Society to High Mass Consumption, i.e., skip industrialization and move straight to reliance on services? That surely is the aspiration of some of them, including Bahrain and the Emirates, which seek to be regional financial hubs and look to Singapore as a model of development.

Fourth, does Stages of Growth Theory “work” in a world beset by rising protectionism, the substitution of technology (including AI) for labor, climate change, and war? Consider these observations from an April 2024 article in The New York Times:

For more than half a century, the handbook for how developing countries can grow rich hasn’t changed much: Move subsistence farmers into manufacturing jobs [per the Fei-Ranis Labor Surplus Model, discussed below], and then sell what they produce to the rest of the world.

The recipe – customized in varying ways by Hong Kong, Singapore, South Korea, Taiwan and China – has produced the most potent engine the world has ever known for generating economic growth. It has helped lift hundreds of millions of people out of poverty, create jobs and raise standards of living.

The Asian Tigers and China succeeded by combining vast pools of cheap labor with access to international know-how and financing, and buyers that reached from Kalamazoo to Kuala Lumpur. Governments provided the scaffolding: They built up roads and schools, offered business-friendly rules and incentives, developed capable administrative institutions and nurtured incipient industries.

But technology is advancing, supply chains are shifting, and political tensions are reshaping trade patterns. And with that, doubts are growing about whether industrialization can still deliver the miracle growth it once did. For developing countries, which contain 85 percent of the globe’s population – 6.8 billion people – the implications are profound.

…

There are doubts that industrialization can create the game-changing benefits it did in the past. Factories today tend to rely more on automated technology and less on cheap workers who have little training.28

In effect, the 18th, 19th, and 20th century model of generating sustained increases in per capital GDP growth through industrialization is problematic in the 21st century.

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Put differently, the question is what is “Stage VI”? If industrialization is not the feasible process it once was, hence, the goals of Stages IV and V – driving to maturity and enjoying high mass-consumption, are not realistic, then what is the new development model? And, there are key corollary questions. What role should trade play in a new model is? To what extent should governments intervene in free markets through industrial (or better put, post-industrial) and human capital development policies to shepherd a new path? Might India point the way in emphasizing growth through service sector expansion?

II. Essential Growth Model Concepts

● Role of Trade in Growth

No right-minded economist would contend trade is a panacea for growth. Trade can be – and, in practice, often is – an engine of growth for a country. But, in neither theory nor practice is trade the only engine. Other engines, such as domestic consumption, are critical. Put simply, in the capitalist economic theory that underpins International Trade Law, trade matters, but not completely so, in Third World economic growth.

The compelling theory of growth emanates from grand modeling efforts of classic development economists like Sir Roy Harrod (1900-1978), Evsey Domar (1914-1997), Sir William Arthur Lewis (1915-1991), Robert Solow (1924-), John C.H. Fei (1923-1996), and Gustav Ranis (1929-). These great scholars explain how the economic structure of a Third World country changes, or would change, as the country grows, and what drives that growth. Their stories are captured in a few simple arithmetic and graphic models. Sadly, these theories receive less attention than they deserve from International Trade Law scholars, students, and practitioners, and academic and practicing economists.

The models of economic growth are venerable monuments to a key fact: in the history of development economics, growth always has been about more than just trade. In the single-sector growth models of Lewis and Solow, and of Harrod and Domar, and the dual-sector labor surplus models of Fei and Ranis, growth is a multi-variable process. Therefore, enthusiastic proponents and diehard opponents of trade liberalization system should take heed. Trade neither can solve all growth problems of a poor country, nor should be blamed for such problems.

In brief, what these classic models teach is growth never was just a trade story. Even the most widely cited example of trade as an engine of growth – East Asia – has been shown to be a story of more than just trade. That insight alone is a strong platform on which to reform International Trade Law as it relates to poor countries. The models highlight where trade can help the cause of developing and least developed countries, and in so doing, point the way to a more prudent and generous type of S&D treatment for them than generally exists.

• **Crude Specification of Aggregate Production Function**

The starting point for any model of growth is necessarily the concept of a “Production Function.” A Production Function is a mathematical relationship between the total output of a firm and the factors of production used to produce that output. If that relationship pertains to the economy of an entire country, then it is called an “Aggregate Production Function.”

Output is symbolized with the letter “Y.” At the level of a firm, Y is measured in appropriate units of the commodity in question, such as the number of cars (for an automobile company) or metric tons of rice (for a rice paddy). At the economy-wide level, Y is GNP or GDP. The inputs are likewise symbolized logically as follows:

\[
L = \text{ labor (e.g., number of workers)}
\]

\[
N = \text{ land (e.g., hectares or acres) and natural resources (e.g., oil)}
\]

\[
K = \text{ capital (i.e., the stock of capital, such as machine tools)}
\]

\[
H = \text{ human capital (e.g., educational attainment)}
\]

\[
T = \text{ technology (e.g., computer hardware and software)}
\]

Thus, the Aggregate Production Function is:

\[
Y = L + N + K + H + T
\]

“Y” is the “dependent variable” in this equation, because it is dependent on the factors of production. Logically, the factors are dubbed “independent variables.” Distinguishing separate independent variables, rather than focusing on one, and identifying their relative causal contributions to growth, are essential in identifying sources of growth. Yet, this Function is crude, hence development economists prefer a more refined version.

• **Aggregate Production Function with Coefficients (Ratios)**

Not all factors of production contribute to total output to the same extent. Consider an analogy to eating. Proteins, carbohydrates, and fats are the building blocks of food necessary for energy. But, these building blocks do not translate into energy to the same extent. The contribution of each differs, depending on the nature of the protein, carbohydrate, and fat, and depending on the type of energy in question. The precise mathematical formula is learned from nutritional science. So it is with economic output.

Each input contributes to total output, but not all inputs are helpful to the same degree. Based on engineering specifications (akin to the studies of nutritional scientists in the food example above) that differ from one commodity to another, the contribution of

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30 See Gillis et al., 41-51.
each input to “Y” differs. These contributions are expressed in terms of coefficients, that is, fixed numbers. Engineering specifications are needed in order to know the value of these coefficients. The coefficients are fixed numbers, though over time with developments in production engineering, they change.

In the abstract, the coefficients are symbolized by a small letter corresponding to each of the capital letters that stand for the inputs. So:

\[ \begin{align*}
    l &= \text{contribution made by a unit of labor to total output, known as the “labor-output ratio”} \\
    n &= \text{contribution made by a unit of land (or natural resource) to total output, known as the “land-output ratio”} \\
    k &= \text{contribution made by a unit of capital to total output, known as the “capital-output ratio”} \\
    h &= \text{contribution made by a unit of human capital (training) to total output, known as the “human capital-output ratio”} \\
    t &= \text{contribution made by a unit of technology to total output, known as the “technology-output ratio”}
\end{align*} \]

With these coefficients, a less crude mathematical version of an Aggregate Production Function is:

\[ Y = \frac{1}{l} \cdot L + \frac{1}{n} \cdot N + \frac{1}{k} \cdot K + \frac{1}{h} \cdot H + \frac{1}{t} \cdot T \]

(In the labor input term, the fraction is the number “1” divided by the letter “l.” Likewise, each of the other coefficients is a denominator, with the “1” in the numerator.)

This Aggregate Production Function expresses for a country the relationship between, on the one hand, GNP (or GDP) and, on the other hand, the size of the labor force, its productive land mass, its stock of physical and human capital, and its level of technological sophistication. (The concept of human capital was developed by economist Gary Becker (1930-), who won the 1992 Nobel Prize in Economics. It is the sum total of education and on-the-job training that gives a person greater command over knowledge, and thus allows the person to be more productive.\textsuperscript{31}) Moreover, the Function tells us the contribution that each factor of production makes to total output.

It is not evident why the reciprocal of the coefficients is used. That is, why do they express the coefficients as a ratio (a quotient), such as \(1/n\) or \(1/k\)? Why not express the coefficient directly as “n,” “k,” and so on. Why not express the aggregate production function in the following simple manner?

\textsuperscript{31} See Andy Rosenfield, The Internet Learning Dream, 12 LSE M\textsc{AGAZINE} 4, 5 (winter 2000).
There is no conceptual difference between this expression and the formula first laid out.

What matters in both is the basic insight of the direct dependence of total output on various factors of production, with each factor of production contributing to that output in a different amount in accordance with engineering specifications. These specifications are exogenously determined. Forces outside of the model determine their magnitudes; the model does not explain them, i.e., they are “independent” variables. (In contrast, an “endogenous” variable is one whose value is determined by the model in question, such as “Y” in the Production Function. It is the “dependent” variable, as it depends on the independent ones.)

● Why Ratios Matter

These coefficients in the Aggregate Production Function are known in development economics jargon as “ratios.” They include capital-output ratios, labor-output ratios, and so forth. For instance, “l” is the labor-output ratio, and “k” is the capital-output ratio. Of course, it is technically more precise to say 1/l is the labor-output ratio, 1/k is the capital-output ratio, and so on. There is an advantage to expressing each coefficient as a ratio. That advantage is arithmetic.

The reason for this terminology is straightforward: if all factors of production but one are held constant, and thus just one factor – say capital – is the focus, then “k” represents the contribution a unit of capital makes to total output.

\[ k = \frac{K}{Y} \]

The assumption of holding all other variables constant is known in Latin as “ceteris paribus.” Likewise, under the ceteris paribus assumption, the labor-output ratio is:

\[ l = \frac{L}{Y} \]

By expressing the ratios in this manner, it also is possible to see that the higher the value of the coefficient (“k,” “l,” etc.), the greater the contribution of the corresponding input to total output.

Thus, for a capital-intensive commodity (i.e., one that uses capital relatively more in its production than other inputs) the value for “k” would be higher than the other

---

Development economists happily invert variables whenever the inversion helps facilitate a discussion, sometimes at the risk of perverting rules of mathematics. In the context of the Fei-Ranis Labor Surplus Model (discussed in a separate Chapter), they also are wont to invert graphs to advance an argument.
coefficients. For example, suppose the stock of capital is 40 units, and total output is 100. That suggests a capital-output ratio of 0.3 (assuming other inputs held constant):

\[
0.4 = \frac{40}{100}
\]

If the capital stock were just 25 units, then the capital-output ratio would be 0.25. A 0.4 capital-output ratio indicates a more capital-intensive commodity than a 0.25 ratio. In contrast, for a labor-intensive commodity (i.e., one whose production uses labor to a greater extent than the other factors of production) the value for “l” would be higher for the other coefficients.

**Input-Output Relationships and Law of Diminishing Returns**

There is another point to observe: There is a direct relationship between the size of the input and the volume of output. That is, an increase in any one of the factors should result in an increase in total output. This direct relationship in the Aggregate Production Function rests on two hidden assumptions.

First, whether an increase in output occurs with an increase in a particular input depends on whether the coefficient associated with that input is a positive number. In most instances, that should be true. More laborers, for example, should result in more production. If engineering specifications indicate a particular input is counterproductive, then obviously that input would not be employed in the production process.

Second, in the input-output relationship, there is a point of “diminishing returns,” which is to say adding more factors of production just will not help coax out more output. The direct relationship between each input and total output, based on the ratio pertaining to that input, cannot go on forever, anymore than a student can study forever. At some point, adding more of an input does little to increase output, just as a student who is too sleepy cannot benefit much from yet another hour spent in the library studying.

This point is precisely where the famous Law of Diminishing Returns takes hold. Adding more inputs becomes counter-productive. It stands to reason that adding more farmers cannot increase agricultural yields in perpetuity, nor can putting more workers on an assembly line increase industrial output in perpetuity. Eventually, the farmers bump into each other, and the line workers are in each other’s way.

The Law of Diminishing Returns helps explain the shape of a Production Function when plotted on a graph. In theory, at early stages of development, an economy is learning how to organize all its inputs in an efficient manner to yield the maximum amount of output. In these stages, the input-output ratios are low. But, as the factors become more productive, and the overall economy becomes more efficient, the values of the coefficients increase. Adding more units of each input has a significant, positive effect on output, hence economic growth is strong. But, eventually, the Law of Diminishing Returns must operate (i.e., increasing or constant returns cannot be had in perpetuity). Adding more labor,
capital, etc. does little to boost output. If inputs continue to be added – and, in effect, thrown together on a farm or in a factory – then returns become negative, meaning that the additional factors of production produce less output than before they were added.

- **Graph of Aggregate Production Function**

  This growth pattern suggests that the shape of a Production Function, at least conceptually, is a gentle (or elongated) curve that loosely resembles the letter “S.” Graph 2-2 shows this Function. The vertical (or y-) axis measures “Y” (that is, output). The horizontal (or x-) axis measures time. The horizontal axis indirectly measures inputs (that is, all inputs), which are added over time. (While most input quantities are fixed in the short-term, they may be varied in the medium- and long-term. Sometimes, the “short-term” is defined as a period of six-to-12 months.) Where the axes intersect, no inputs are used, and no output is produced. Movement to the right on the horizontal axis corresponds to ever-increasing amounts of inputs. This movement correlates to an upward movement on the vertical axis, which indicates increases in aggregate output.

  Changes in the slope of the Production Function relate to the different stages of economic development of the economy. The first (i.e., left-hand most) section corresponds to a relatively earlier stage in development. The second (i.e., middle) section captures events when the economy has organized its factors of production efficiently and, therefore, is growing rapidly. The final (i.e., right-hand most) section depicts the economy afflicted by diminishing returns. These generic phases correspond, respectively, to an agrarian society, a society in the throes of industrialization, and a modern industrial and post-industrial society. Emphasis should be placed on the word “generic.” The picture is not a deterministic model of how the growth process invariably must proceed.

- **Krugman Total Factor Productivity Argument about East Asian “Miracle”**

  As intuitive and seductive as this Production Function model of growth is, it has been the source of great controversy among development economics. Consider the debate about the sources of post-Second World War growth in the Far East. Professor Paul Krugman (1953-) argued East Asian growth was less remarkable than most admirers thought.\(^33\) It was based simply on adding factors of production (more of everything, as it were) – in particular, more labor through population growth, more land through land reclamation projects, and more physical capital through investment. He said the growth of the Asian Tigers was bound to reach a plateau – that is, eventually, the Law of Diminishing Returns was sure to take effect. Professor Krugman’s analysis ran against the conventional wisdom that the growth of the Asian Tigers was an economic “miracle.”

Professor Krugman’s analysis did not sit well with some of the Far East’s most respected leaders. They had boasted of the “Miracle” over which they had presided, and presented their leadership as a model to the rest of the developing (and even developed) world, along with their purportedly “Asian” values. Professor Krugman was telling them their ostensible miracle was nothing more than adding factor inputs. If the Tigers were to sustain their growth, then they would have to increase productivity.

That is, the Tigers would have to get more output out of each additional input, and thus boost Total Factor Productivity. Professor Krugman argued the Tigers no longer could keep adding farmers or line workers and expect impressive growth rates. They would have to focus on TFP, *i.e.*, the residual (or portion) of growth not explained by increases in factors of production. Thus, for example, they would have to increase their input-output ratios, so that each farmer and each line worker contributed more to output than before. In return, the Tigers would have to find more efficient ways of producing – a far harder task than simply adding units of input. As any law or economics student knows, it is one thing to study for longer hours, but quite another to develop a plan of study that ensures each hour is well spent.

### III. Harrod-Domar One-Sector Growth Model

Understanding the Aggregate Production Function makes it easy to comprehend the famous Harrod-Domar Model. Two economists conceived of the Model independently,
publishing separate classic articles. Roy Harrod worked in England, Evsey Domar in the U.S., and their publications appeared in 1939 and 1945, respectively. They sought to explain the relationship between growth and unemployment in developed countries during the Second World War era, knowing full well the global Great Depression and German Weimar Republic hyper-inflation that preceded the War. There is no better testament to the potency of the Harrod-Domar Model than its extension to the Third World context to highlight the relationship between growth and capital.

At bottom, the Harrod-Domar Model is the simplest of Production Functions. It is a one-sector Model. The critical, indeed only, input into the production process is physical capital. Professors Harrod and Domar argued the key to economic growth is capital. Whether the unit of analysis is an individual firm or a macro-economy, the greater the investment in capital, the greater the output generated. Thus, the Model is expressed by the following equation:

\[ Y = \frac{1}{k} \cdot K \]

where “Y” stands for “Output” or “Income,” “K” stands for “capital,”

Or, because 1 multiplied by K is still K (by virtue of the mathematical Identity Field Axiom), the Model is

\[ Y = \frac{K}{k} \]

This equation can be expressed in the way set forth earlier that highlights “k” as the capital-output ratio:

\[ k = \frac{K}{Y} \]

Earlier, examples for possible values of “k” were given – 0.4 and 0.25 – depending on the contribution capital made to total output, which in turn depended on exogenously determined engineering specifications.

The earlier examples were static: a capital stock of 40 and total output of 100 led to a capital-output ratio of 0.4. Because the picture was a static one, it is more accurate to call “k” the “average” capital-output ratio. Likewise, the other ratios were average ones (e.g., the average labor-output ratio, and so forth.

---

The ratio can be put in dynamic terms, i.e., the change in total output associated with a change in the capital stock, is called the “Incremental Capital Output Ratio,” or ICOR. That is, the arithmetic definition of ICOR is:

$$\text{ICOR} = \frac{\Delta K}{\Delta Y} = \frac{I}{\Delta Y}$$

where “$\Delta$” means “change in” whatever variable this small triangle appears in front of.

Through mathematical manipulation, it can be shown that the Harrod-Domar Model can be re-expressed as: \(^{35}\)

$$g = \frac{\Delta s}{\Delta k} = \frac{\text{MPS}}{\text{ICOR}}$$

where “$g$” stands for the growth rate of total output, $\Delta s$ is the savings rate, i.e., the “Marginal Propensity to Save,” that is:

$$\text{MPS} = \frac{\Delta S}{\Delta Y}$$

where “$S$” stands for “Saving,” $\Delta S$ is the change in Saving, and $\Delta k$ is the change in the capital stock in relation to the change in total output, i.e., ICOR. Note carefully a high MPS indicates the marginal propensity to save an additional dollar of income is greater than does a low MPS. (For example, an MPS of 0.3 versus 0.1 means 30 cents versus 10 cents of an additional dollar earned is saved.) A low ICOR indicates a smaller amount of additional capital leads to a larger amount of output. (Consider an illustration.)

This expression is the powerful idea at the heart of the Harrod-Domar Model: the rate of growth of output ($g$) depends directly on the savings rate (MPS), and inversely on ICOR.

Intuitively, the higher the savings rate, the greater the output, because more funds are available for investment in productive capital. The lower ICOR, the more efficient capital is, that is, the greater the contribution an incremental unit of capital makes to output. So, growth in the Harrod-Domar Model depends directly on a generous savings rate, and inversely on inefficient use of capital (in effect, directly on efficient use of capital).

IV. Sources of Growth Accounting

- Limitation of Harrod-Domar Model

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The most obvious conceptual limitation of the Harrod-Domar Model is it dwells on capital as the key stimulant of economic growth. There are far more factors of production, and thus various sources of growth in addition to industrial plants and machine tools. Many great development economists – such as Robert Solow (1924–), Edward F. Denison (1915–1992), Dale W. Jorgenson (1933), Hollis B. Chenery (1918-1994), and Moises Syrquin (1944–) – tried to improve on the Harrod-Domar Model by using a more complex Production Function.

Their aim has been to identify with greater precision than is possible using that Model the different sources of growth, and the relative contributions of each source to growth. This inquiry is known as “Sources of Growth Analysis,” or “Growth Accounting.” It requires the more complex Aggregate Production Function presented earlier:

\[ Y = L + N + K + H + T \]

This Function is the first step in building any Sources of Growth Model. It embodies a relationship between aggregate output (\(Y\)) and various factors of production, namely, labor (\(L\)), land and natural resources (\(N\)), capital (\(K\)), human capital (\(H\)), and technology (\(T\)). However, even this specification is rather generic.

Each of the factors can be broken down into different categories. For example, within “L,” there is skilled labor and unskilled labor. Within “N,” there is arable land versus natural resources. Within “K” there are factories, and there are assembly lines within factories. Within “H,” there are different levels of human capital development: primary school; secondary (high school); tertiary (college); graduate and professional; adult education; and on-the-job training. Within “T,” there are a large variety of technologies that increase the efficiency with which inputs are used, from computers to lasers. Thus, in separating out the contributions different factor inputs make to growth, the conceptual design of the Production Function matters. Some designs are more precise than others, and the more precise the design, the more precise the possible delineations.

\[ \Delta L = \text{increases in the supply of labor} \]
\[ \Delta N = \text{increases in the availability of land and/or in the amount of natural resources} \]
\[ \Delta H = \text{increases in human capital} \]
\[ \Delta T = \text{improvements in technology} \]

These variables are almost certain to differ in value from one another, and to differ over time. For example, in a particular less developed economy in a given year, labor supply may grow at 4% a year, while arable land grows at 0.5%. The next year, labor supply may increase by 5.5%, and arable land may increase at 0.3%.

Also, the contribution each input makes to growth differs from one input to the next, and differs over time. Indeed, that is the whole point of the exercise: to build a model that can be used to distinguish among sources of growth, but also highlights and measures their differing contributions. As a crude example, in a particular less developed economy in a given year, the growth in *per capita* GDP will have resulted in part from increases in labor, land, and capital. The question is what is meant by “in part”?

The answer might be 50% labor, 10% land, and 40% capital. That is, 50% of the increase in *per capita* GDP can be explained by growth in the labor supply, 10% of output growth due to the increase in arable land, and 40% of growth from new capital equipment. That is the kind of insight all Sources of Growth Models seek to obtain.

Here, then, it is necessary to define the variables of keen interest – the shares of each factor input in growth as measured by aggregate income (GNP or GDP). Development economists define these shares associated with each factor input as follows.

\[ s_l = \text{share of labor in aggregate income, } i.e., \text{ the share of wages} \]
\[ s_n = \text{share of land and natural resources in aggregate income, } i.e., \text{ share of rents} \]
\[ s_k = \text{share of capital in aggregate income, } i.e., \text{ returns to capital} \]
\[ s_h = \text{share of human capital in aggregate income, } i.e., \text{ returns to human capital} \]

Development economists also point out technology is a variable that affects all factors of production. Depending on the nature of the technology, it makes any one of the factors more productive. The variable in question is productivity.

For instance, a computer makes labor more efficient, genetically-modified (GM) agricultural seeds make land more efficient, and better drilling technology makes the process of extracting natural resources more efficient. In all such instances, the effect of
technology is to shift the entire Production Function upward, because technology allows for greater output from a given input.

Accordingly, in constructing a Sources of Growth Model, development economists specify a variable to represent potential shifts in the Production Function that result from new technologies. They include a variable for “productivity.”

\[ p = \text{shifts in the Production Function due to technology that allows one or more factor inputs to be used more efficiently, i.e., improvements in productivity.} \]

- **Expression and Use of Model**

A classic Sources of Growth Model is expressed algebraically as follows:

\[ g = s_l \cdot \Delta L + s_n \cdot \Delta N + s_k \cdot \Delta K + s_h \cdot \Delta H + p \]

What does this expression say in common sense terms? It says to explain output growth, it is necessary to look at the growth rates of four factors of production, along with the potential impact of new technologies on these factors. Each input contributes to growth to a different extent. Those differing contributions, or shares, are represented by the coefficients attached to each input.

How do development economists put this theoretical Sources of Growth Model to practical, empirical use? They gather data on as many variables as they can, and use the equation to solve for a missing variable. Alternatively, they might use the equation to estimate the value for a variable based on a target growth rate.

Consider a hypothetical case. Suppose India has a 10% growth rate in *per capita* GNP (or, alternatively, that this rate is the target). (The same example could be used for China, though it must be kept in mind that many economic statistics published by the CCP are dubious, and many have been found to be erroneous.) Suppose further the following data (on an annual basis) are available about the Indian economy:

\[ \Delta L = \text{the size of the labor force increases by 6\%} \]
\[ \Delta N = \text{the amount of arable land, through land reclamation projects around Madras (Chennai), increases by 1\%} \]
\[ \Delta K = \text{the stock of capital increases by 9\%} \]
\[ \Delta H = \text{literacy rates, primary education enrolment, post-secondary education enrolment, and other measures of human capital are (taken together) improving at 7\% per year} \]
\[ s_l = \text{the share of labor in aggregate income, i.e., the share of wages, is} \]
40%

\( s_n = \) share of land and natural resources in aggregate income, \( i.e., \) share of rents, is 10%

\( s_k = \) share of capital in aggregate income, \( i.e., \) returns to capital, is 30%

\( s_h = \) share of human capital in aggregate income, \( i.e., \) returns to human capital, is 20%

Armed with these data, the Sources of Growth Model can tell Indian economic officials the productivity increases necessary to sustain (or achieve) a 10% growth rate. In the abstract, the Model is:

\[
g = s_l \cdot \Delta L + s_n \cdot \Delta N + s_k \cdot \Delta K + s_h \cdot \Delta H + p
\]

Using the Model empirically (\( i.e., \) plugging in the data, and remembering the data are percentages, hence they need to be expressed in decimal form,) results in the following:

\[
0.10 = (0.40) \cdot (0.06) + (0.10) \cdot (0.01) + (0.30) \cdot (0.09)
\]

\[
+ (0.20) \cdot (0.07) + p
\]

Clearly, the exercise is to solve the equation for \( p \):

\[
0.10 = 0.024 + 0.001 + 0.027 + 0.014 + p
\]

The result is:

\[
0.10 = 0.066 + p
\]

Hence:

\[
p = 0.034, \text{ or } 3.4%.
\]

This result means India must achieve a 3.4% increase in productivity to continue (or reach the target of) 10% growth.

Another way to look at this result is to see productivity as a source of growth. With an achieved or targeted growth rate of 10%, productivity is 3.4%. That means productivity accounts for about \( \frac{1}{3} \) of Indian growth.

To be sure, the example is a hypothetical one. Nevertheless, it illustrates an important fact about empirical results from Sources of Growth Analysis. Before “running the numbers,” it sometimes is thought that the principal contributors to aggregate income
growth in a Third World country would be a factor like capital. This view reflects what we might call a “capital bias,” that is, a bias among development planners in favor of capital. Mao’s China during the monstrously misnamed “Great Leap Forward” of 1958-1961 is a hideous example of this bias. Chinese planners focused all their efforts on rapid industrialization, partly through increases in plant and equipment. The result was mass starvation and the death of anywhere from 18 to 45 million people.\(^{36}\)

In fact, the consensus among development economists based on repeated empirical testing is increases in capital stock tend to account for less than one-half of the increase in output in Third World countries with rapid growth rates.\(^{37}\) By no means is this amount insignificant. Rather, the point is that a priori, what is sometimes underestimated is the impact of productivity. The consensus is increases in efficiency account for a much higher proportion of growth than is sometimes realized. Put simply, empirical tests suggest that in the growth story, productivity as well as capital play large roles.

**Reliability and Importance of Model Design**

The reliability of Growth Accounting depends on the conceptual design of the mathematical model, and the quality of the data plugged into that model. If the model is poorly specified, or the data are inaccurate, then little confidence can be put in the results. The point about the importance of productivity is a good example.\(^{38}\)

Productivity can be tied into new capital, or better-trained workers. How is it possible to separate out productivity in a generic sense from productivity embodied in this capital or these workers? That is, how is it possible to delineate a broad-based increase in efficiency from technological improvements that already are measured by increases in a factor of production? Without a precise model and data that are sufficiently disaggregated, the answer is that it will be difficult to make this delineation.

So, for example, in trying to account for the sources of American economic growth, economists such as Edward Denison and Dale Jorgenson have built into their models the difference between workers with a high-school education and those with just a primary-school education, counting 1 high-school educated worker as equal to two primary-school educated workers.\(^{39}\) In still other models, the contribution to productivity of workers is counted differently depending on whether the worker is employed in a low-productivity job in the agricultural sector, or in a high-productivity job in the manufacturing sector.

**Again, Role of Trade and International Trade Law in Perspective**

From a trade perspective, the remarkable aspect of Growth Accounting is how little trade seems to matter, at least in a direct sense. Sources of Growth Models do not ascribe


\(^{37}\) See Gillis et al., 46-47. The summary of these empirical tests draws on the discussion therein.

\(^{38}\) This example is mentioned in Gillis et al., 47.

an explicit role for imports and exports in the process of economic growth. In that respect, they are no different from the Harrod-Domar Model. Sources of Growth Models tell a story of economic growth in which trade does not play a prominent role, and hardly that of the protagonist. In turn, that puts the role of GATT-WTO agreements, FTAs, and CUs in a humbling light: their legal provisions can at best assist poor countries to grow, but they hardly can “cause” that growth in any significant sense.

To be sure, the failure to incorporate expressly in the Models a role for trade does not mean trade plays no role whatsoever, or that GATT and the WTO texts are utterly irrelevant. Sources of Growth Models (as with the Harrod-Domar Model) do not exclude the possibility of international trade, and by extension, International Trade Law, playing some role. For example, what might stimulate increases in productivity? Exposure to international competition could be one answer. What might be the origin of increases in capital? Imports could be one answer. The point is simply that whatever role trade does play in the Growth Accounting paradigm, it is an indirect one. The trade variable operates through other, expressly modelled, variables.
Chapter 3

ECONOMIC GROWTH MODELS (CONTINUED):
INDUSTRIALIZATION AND LABOR SURPLUS

I. Transformation from Agriculture to Industry

- Modern Economic Growth and Industrialization

The Harrod-Domar Model (discussed in a separate Chapter) is a simple Production Function approach to economic growth that emphasizes two variables, the savings rate and ICOR. Sources of Growth Models (also discussed in a separate Chapter) can provide insights into the catalysts for economic growth by distinguishing among the contributions of various factor inputs to productivity. But, what about the composition of aggregate output – the “stuff” being produced and measured as “growth”? Neither paradigm speaks directly about the constituents of GNP (or GDP). Put simply, neither paradigm tells much about different sectors of the economy.

This inquiry, which is a natural one, calls for a different kind of development theory, one that leads to Labor Surplus Models, principally the Fei-Ranis Model. Rather than proceed apace to these Models, it is better to appreciate their intellectual underpinning. That underpinning is, in brief, a theory about structural change in the composition of output during the development process of many, if not most, poor countries.

It is dramatic to say no country in human history has become wealthy and yet remained a purely agrarian society. That statement may be historically dubious, if grand civilizations of ancient times are included. Defending the statement (or not) is for economic historians. Mesopotamia, Egypt, Persia, Greece, and Rome were, at their peak, rich and powerful empires. But, even these Ancient civilizations were not purely agrarian: they traded internationally, and they produced a variety of simple manufactured items. Carthage is a quintessential ancient example of a great trading empire.

It is not necessary to begin in Ancient times. It is defensible to assert no country has experienced modern economic growth and remained purely agrarian. Since the Industrial Revolution, countries have distinguished themselves (or not) partly on their per capita economic growth performance. That performance, in turn, is linked critically to the changing share in aggregate output of the agricultural versus industrial sectors. The hallmark of growth, of membership in the First World club, is the increasing share of industry in GNP, the concomitant decreasing share of agriculture, and the attendant shift of labor from rural to urban areas. Graph 3-1 depicts this change in shares.

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40 This discussion draws on MALCOLM GILLIS, DWIGHT H. PERKINS, MICHAEL ROEMER & DONALD R. SNODGRASS, ECONOMICS OF DEVELOPMENT 47-51 (4th ed. 1996). [Hereinafter, GILLIS ET AL.]
Modern economic growth is about structural transformation from agriculture to industry. That is the intellectual underpinning of Labor Surplus Models. They tell a story of:

(1) mobilizing excess, unproductive labor, known as “surplus labor,” in the agricultural sector,
(2) shifting surplus labor from its rural homelands to the industrial sector, which tends to be concentrated around cities,
(3) using that surplus labor taken from the agricultural sector for manufacturing, and
(4) experiencing greater industrial relative to agricultural output in GNP.

Labor Surplus Models depict the story through simple graphs (presented below).

In the story, international trade plays no explicit role. Rather, the story is based on how the giants of development economics perceive the modern history of First and Third World nations. They look at Britain versus China, Germany versus India, and later at China versus India, and they seek an explanation for the patterns of growth. The heart of the explanation they offer is the agriculture-to-industry transformation: some countries had achieved it, albeit at different rates, while others had not yet made the change.
In this classic of development economics modeling, as with the Harrod-Domar and Sources of Growth Models, the growth story is not primarily a story about trade. That is not to say Labor Surplus models exclude trade entirely. That would be a libelous remark. The accurate inference to draw from the Labor Surplus Models is that to the extent they grant trade a role, it is a limited and rather indirect one. By extension, so, too, is the role of GATT and the WTO agreements.

- **Engel’s Law**

Also, by way background, it is worth contemplating why proponents of Labor Surplus Models see modern economic history in the way they do? That is, why are builders of these Models comfortable resting on the intellectual underpinning of an agriculture-to-industry transformation? There are two reasons, both of which are essentially empirical observations about economic behavior.

The first reason is an economic law developed in the 19th century by Ernst Engel (1821-1896) (not to be confused with Friedrich Engels (1820-1895), the colleague of Karl Marx (1818-1883)). “Engel’s Law” holds that as the income of a family increases, the proportion of its income that it spends on food declines. After all, an individual can (or should) eat only so much, and after an average threshold of about 2,000 to 2,500 calories per day has been reached, additional calories are stored as fat. Income growth does not necessitate an increase in caloric intake, although it may lead people to consume “richer” food and beverages (organic fruit and vegetables, high-quality meat, champagne, etc.). Engel observed that as family income grows, the family tends to spend more of its budget on non-food items, such as housing, education, durable goods (e.g., cars and appliances) and leisure activities (e.g., vacations, clubs, etc.). So invariable is this observation that it is dubbed a “Law” of economics. In every country that has experienced modern economic growth, Engel’s Law has operated.

The implication of Engel’s Law for the composition of aggregate output is clear. As per capita GNP (or GDP) rises, each person spends a smaller proportion of her income on food, and a larger proportion on non-food goods and services. The sector from which food comes is agriculture, and the sectors from which non-food items come are the manufacturing and service sectors. Thus, as per capita GNP rises, the proportion of that income spent on agricultural commodities falls, while the proportion spent on manufactured products and services rises. Stated differently, demand for agricultural output does not rise as quickly as demand for manufactured items and services. In brief, the rise in per capita GNP results in a transition from a largely agrarian-based economy to a modern, industrial and ultimately post-industrial economy.

The empirical reason pertains to productivity in the agricultural sector associated with GNP growth. While Engel’s Law mandates an increase in demand for output from that sector that grows more slowly than the demand for industrial products, another phenomenon also takes place during modern economic growth that catalyzes a transition from agriculture to industry. The agricultural sector becomes more productive than it was
before. Farmers no longer operate at subsistence level on inefficiently small patches of land that are left entirely vulnerable to natural disasters.

Rather, the farmers concentrate their holdings, planting on larger properties than before. They use new machinery. They take advantage of better seed, that is, seed that is resistant to various pests and that produces higher yields. They protect their crops with fertilizer. They benefit from large-scale public works projects, such as dams that prevent flooding (Egypt’s Aswan Dam is a prime example), power stations that provide electricity (Thailand’s Ratchaburi power plant is one illustration), and road networks that make transportation of fresh produce to urban markets and ports faster and safer than before (China’s Shenzhen Expressway, India’s Grand Trunk (GT) Roads, and Malaysia’s North-South Highway, have helped in this regard). Still another factor would be improvements in communication networks that enable farmers to arrange, in a quick and low-cost manner, for sales of their product. Cell phone technology (which, of course, obviates the need for laying land lines) that is common throughout Asia is a good example.

To be sure, some of the developments that benefit farmers are criticized by NGO for having negative externalities. High-technology crops that are GM may be averse to human or animal health, or to the health of other plants, or may render farmers dependent on multinational corporations from rich countries for expensive, patented seed and fertilizer. Public works projects may threaten certain animal or plant species. Some of these projects may require the involuntary (even forced) relocation of tens of thousands of people, and wipe out traditional local cultures in the process. Controversies as different as growth-stimulant beef hormones used in the U.S. and the Three Gorges Dam project in China illustrate a common point: the productivity gains in the agricultural sector, which are associated with strides in aggregate output, are not necessarily an unmitigated blessing. There are trade-offs to be made if these gains are to be had.

As with Engel’s Law, the implication of increased productivity in the agricultural sector is evident. Fewer and fewer workers are needed in this sector. By definition, each farmer is able to grow more, given the technology and machinery she has, and the benefits that flow from improved power, transportation, and communication infrastructures. Each farmer can support – that is, produce enough food for – a much larger number of people who live and work in the cities than before. Put differently, one farmer now can do the work of two, or perhaps of several. The other farmers become under- or unemployed. They are, to use the development economics jargon, “surplus” labor. Removing them from the farm sector would have no effect on the output of that sector.

II. Concept of Labor Surplus and Its Shift

Labor surplus and its shift is the heart of the story of transformation from agriculture to industry. This surplus of labor in the agricultural sector can be shifted from rural to urban areas, put to gainful employment in manufacturing (and, ultimately perhaps, service) industries, and yet be fed by the increasingly productive agricultural sector. The growth experience of the U.S. is a case in point: the average farmer supports at least 70-80
non-farm workers, hence only 3% of America’s work force is employed in farming. But, it is not just the mere movement of workers from one sector in which they are not needed to another sector in which they can be productively employed that matters. It is the expectation that this movement can occur without affecting wage rates in either the agricultural or industrial sectors, at least for the short- and medium-term.

That is, in the Labor Surplus paradigm, wage rates need not rise in either sector. A common-sense reason exists for each sector. In the agricultural sector, the surplus workers are under- or unemployed. Their withdrawal from that sector does not affect the wages of farmers who are gainfully employed. Only if those farmers leave would the agricultural sector begin to face a labor shortfall. In that case, wage rates would have to rise to attract farmers back to the rural areas.

In certain contexts, withdrawal of surplus labor from the agricultural sector actually helps improve productivity in that sector. Suppose all arable land in a less developed country is under cultivation, and farmers face diminishing returns. Marginal increases in an input, such as adding more farmers to work the land, results in ever-smaller harvest yields. Farms are crowded enough, and farmers get in each other’s way.

In this environment, marginal costs of production – the cost of producing an extra unit of output – are rising. Only by bringing new, fertile land into cultivation could farmers increase production efficiently. Unfortunately, the only land available in the country is desert or mountain terrain. Trying to settle farmers on that land, and have them cultivate it, would be expensive. Marginal costs of production would be high. In this context, moving redundant farmers out of the sector would enable the remaining farmers to use good quality land more efficiently. This land would not be “over-farmed,” and could lie fallow to allow for its restoration. No longer would farmers trip over each other in the fields. The net result might well be constant or even increasing returns.

As for the industrial sector, wage rates are sufficiently high to entice under- and unemployed workers off the farms and into the factories. They need not necessarily be high, because these workers face poor prospects if they stay in their traditional rural communities. But, industrial wages must be above subsistence level, and they must cover the costs of shifting from these communities to the cities.

Certainly, in the long term, assuming industrialization continues apace, for two reasons industrial wages are likely to rise. First, owners of capital may seek to expand their existing factories, and to open new factories. They will need to hire still more laborers to staff these factories. So, the demand for industrial labor will increase.

Second, the set of surplus agricultural workers is not infinite. That is, the supply of surplus labor will decline. Even allowing for population growth in rural areas, if factory expansion and creation is rapid enough, the owners of capital will have to compete with one another to attract laborers to their factories. Ultimately, these demand and supply forces are likely to conspire to cause an increase in industrial wage rates. At that juncture, the

\[\text{See GILLIS ET AL., 48.}\]
country may well be an industrialized one, or nearly so, and its legal system may contain a number of worker rights. Consequently, workers in both sectors may be sufficiently well organized to reinforce the demand and supply trends through political lobbying and, if necessary, protests and strikes.

Nevertheless, by definition, the “bottom line” result of the agriculture-to-industry transformation is that the proportion of GDP accounted for by agriculture falls relative to that of industry. Why? Because more and more of a country’s labor force works in the industrial sector, and industrial sector output starts growing at a more rapid rate than that of agricultural output. The differential growth rate is not just a supply phenomenon (*i.e.*, not just a result of more output being supplied in one sector versus another). It also is a result of the changes in the pattern of demand that Engel’s Law addresses.

### Rural-Urban Migration and Its Causes

To say surplus labor is shifted, or shifts itself, from the agricultural to the industrial sector is another way of putting the point that there is rural-urban migration. More and more people—a higher percentage of the country’s population—live in cities. The obvious result, as any traveler to a Third World city knows, is congestion, pollution, and squalid shanty-towns. Mel Gibson toured the squalid parts of Jakarta in *The Year of Living Dangerously* (1982), which is just one of many movies—*Salaam Bombay* (1988), *City of Joy* (1992) and *Slumdog Millionaire* (2009) are others—in which the monstrous plight of hundreds of millions is recounted. Why is life redolent like this in major cities of less developed countries?

A full answer to this question calls upon not only economics, but also most other social sciences, and probably theology too. It is possible to highlight 2 aspects of the economic dimension, namely, internal and external economies of scale. In general, an “economy of scale” exists whenever output per unit of input rises. In other words, there are increasing returns to scale. In the industrial sector, the search for economies of scale leads to larger firm sizes. As an enterprise grows, it hopes that for each dollar spent on production costs (that is, on factor inputs), it can realize a larger amount of output. This phenomenon is an “internal” economy of scale, one that is specific to an enterprise.

There also is the possibility of “external” economy of scale. Output per unit of input might rise for reasons exogenous to the enterprise itself, namely, because of where the enterprise is located. Imagine several firms in the same industry situating themselves near one another, such as the congregation of computer firms in Bangalore and Hyderabad. The firms may benefit from this closeness by availing themselves of common infrastructure support—power, communication and transportation networks, port facilities, security, and the like. There is no need for separate infrastructure facilities, one for each firm.

Hence, no firm is haunted by the specter of absorbing some or all of the costs (either directly, or indirectly through higher taxes) of constructing and operating a facility for itself. Rather, all of the firms can use the same infrastructure, and share the costs associated with construction and operation. In addition, the physical proximity might cause the
neighboring firms to learn new production techniques from one another, and spur them to innovate given the constant reminder of the competition.

What are the results? Greater efficiency, no doubt, and thus a greater share of industrial output in GNP relative to the share of agricultural output. To realize internal economies of scale, industrial behemoths that employ large numbers of workers evolve in urban areas. To realize external economies of scale, these behemoths tend to congregate in the same urban areas. Sometimes, government policy encourages this congregation. Pudong, in Shanghai, is one example. More and more surplus agricultural workers pack up and head for jobs in the big city. The industrial sector expands, and so do the cities with it.

But, in the long run, the Law of Diminishing Returns will take hold (imagine clogged communications and transportation networks due to excess traffic), and absent product innovation, comparative advantages will be lost to new market entrants. Even before then, there will be downturns in the business cycle, meaning layoffs and plant closures. In brief, the result is a transfer of surplus labor from agriculture to industry, with all the attendant benefits and costs.

● **Pace of Transformation**

The results discussed above are observed throughout the developing world, from Chile to China, Peru to Pakistan, with the caveat there is great diversity in the actual patterns from one country to another. They are the story of growth, and it must be stressed again that international trade, and by extension the law of GATT and the WTO – while having a role in that story – is not cast as the protagonist. What also must be stressed is that the transformation from an economy dependent on agricultural output to one relying on industrial output does not occur at the same rate in every country. The pace at which the story unfolds differs from one country to the next.

In fact, a central issue is the pace at which the story ought to unfold. Put differently, to what extent ought the government of a less developed country encourage an acceleration of the transformation, and how ought it to do so? A spectacular example with dreadful consequences is the 1958-1962 Great Leap Forward in China. The government of Mao Zedong (1893-1976, in office, 1949-1976) looked to emulate Soviet efforts at a rapid transformation. The CCP invested heavily in the industrial sector, particularly in industries such as steel and machinery. Simultaneously, the government raised production quotas for the agricultural sector, and ordered a transfer of a large percentage of the harvest to support urban workers and thereby the industrialization process.

In brief, Chairman Mao’s government sought to take a “Great Leap Forward” in the sense of turning China into an industrialized nation fast. The plan was simple: demand more and more of collective farms, and take a larger and larger chunk of farm output to feed the ever-growing number of laborers who toiled in factories concentrated in urban areas. That way, more workers could be hired, so factories could expand and multiply, and industrial output could increase. The example in Table 33-1, which is based on hypothetical
data for rice, illustrates the plan and the reality of its implementation. (All of the amounts are in tons, and the data pertain to total rice production in China.)

The fatal flaw with the plan was Chinese communes could not possibly meet the production targets set for them by the Communist Party. (The example assumes they could meet only 70% of the targets.) However, it was not possible to “just say no.” Local Communist Party cadres responsible for production on the communes were under enormous pressure to meet the quotas and supply the urban sector with the requisite amounts. When the farms could not meet unrealistically high quotas, the cadres concealed this failure. Yet, they still made sure the urban sector received the share demanded for it to support industrialization – in the hypothetical example, 60% of the production quota.

Clearly, if the amount to be siphoned off for the benefit of urban workers had been set on the basis of actual output, or on the basis of realistic targets, the shortfall in the last (right-hand most) column would not have existed. But, it was a formula for disaster to demand a fixed percentage of a quixotic target in a political environment where revising targets was impossible. The result was a Great Leap Backward in the agricultural sector: the sector languished, and tens of millions of Chinese peasants starved to death. The CCP covered up the debacle – a policy apparently repeated with respect to the true tally of deaths during the COVID-19 pandemic, but with less effect thanks to modern means of communication.\footnote{As a Professor of Government at Claremont McKenna College explains:}

\footnote{The Chinese government … is doing its best to conceal the toll in lives and suffering. A narrowing of definitions means most coronavirus-related deaths are not tallied as such. Partly as a result, the authorities have been reporting unbelievably low numbers of COVID fatalities.}

From Dec. 8 to Dec. 23, [2022,] the National Health Commission said China had only seven deaths attributable to COVID, an implausible number given reports of bodies suddenly piling up in crematoriums. Last Sunday, the commission reported only three people died of COVID that day and that the total number of deaths since the pandemic began had still only reached 5,267.

…

The magnitude of death and suffering attributed to the surge, which estimates say could reach 1 million or more fatalities in the coming months, would make this COVID surge the most lethal event in peacetime China since the 1959-61 famine that followed the Great Leap Forward. That horrific episode saw an estimated 36 million people perish from starvation.

To cover up the COVID catastrophe, Chinese leaders today may be tempted to repeat the same tactics used by Mao Zedong then.

… Mao’s regime imposed strict censorship. As a result, the extent of the disaster was largely concealed from the public.

After the famine was over, the Party propaganda machine blamed nonexistent natural disasters for the economic collapse that followed the Great Leap Forward. Even today, the Party euphemistically calls the period of the famine “the three difficult years.”
Judging from Column (4) alone, it may seem that the results could not have been too dreadful. After all, there was rice left in rural areas for the farmers to eat, and the amount of the balance grew from one year to the next. However, it must be remembered at the time, China’s population was expanding rapidly. Hence, there were more mouths to be fed each year. Furthermore, it is rather evil to require farmers to work harder and not improve the quantity and quality of their caloric intake. Thus, the last two (right-hand most) Columns illustrate why the results indeed were dreadful. The actual amount of rice left in the agricultural sector was less than the theoretical amount (compare Columns (7) and (4)), and the shortfall increased each year (Column (8)).

In fact, while aggregate food production grew during the Great Leap Forward, because China’s population grew at a rate of 2% per annum, per capita food consumption remained flat. Following the death of Mao in 1976, and the market reforms championed by Deng Xiaoping in the late 1970s and early 1980s, the Chinese government took major steps to re-invest in the agricultural sector. Most importantly, it abolished centralized planning and setting of production quotas, eliminated communes, and allowed farmers to own their own plots (sometimes as individuals, and sometimes in small groups through

… Except for a small number of researchers, most Chinese, especially the young, know little about the episode.

But if the Party thinks it can rely on falsehoods and censorship to cover up the COVID catastrophe, it is unlikely to succeed. Today’s China is a totally different country than Mao’s.

When the Great Leap famine ravaged the country, 80% of Chinese lived in the countryside and most victims were peasants without political power or means to record their suffering.

These days, 64% of the population lives in urban areas…. This means that most COVID deaths will be urbanites from a range of social backgrounds.

Social elites and members of the middle class are likely to account for a significant share of the fatalities. …

Unlike the impoverished peasants victimized by the Great Leap famine six decades ago, Chinese today, including those in the countryside, have the technological means to record and preserve their collective memories.

Due to censorship, poverty and undeveloped communications technologies, the Great Leap famine was the least well-documented tragedy of post-1949 China. Except for a small number of photos, no recorded oral history or documentary films of the famine exist. Books about the famine are still banned in China.

But with the widespread availability of digital technology, Chinese people now can easily document and disseminate the true extent of the devastation caused by the COVID surge. Despite censorship, savvy social media users are able to post pictures and video clips that put the lie to the official propaganda that only a tiny number of people have died of COVID.


See GILLIS ET AL., 49.
“Town and Village Enterprises” or “TVEs”), and sell their output for profit. So, agricultural output not only increased, but increased at an accelerated rate.

III. Background to Labor Surplus Models

● Two Preliminary Points

Aside from their intellectual underpinning, the first point to appreciate about 2-sector Labor Surplus Models is their rich intellectual heritage.\(^{44}\) John C.H. Fei (1923-1996) and Gustav Ranis (1929- ) were not the first scholars to develop such a Model. The classic book in which they lay out their Model, *Development of the Labor Surplus Economy*, published in 1964, was preceded by another classic, *The Theory of Economic Growth*. In this 1955 publication, Sir William Arthur Lewis (1915-1991) conceived of a Labor Surplus Model.

Their Models are somewhat different. Fei and Ranis focused on the connection between the agricultural and industrials sectors, while Lewis highlighted the distribution of income between these sectors. However, even Lewis owed a great debt to a predecessor, namely, the classical economist David Ricardo (1772-1823). More than 200 years earlier, in 1817, Ricardo published *The Principles of Political Economy and Taxation*. It was Ricardo who pioneered the concept of surplus labor in the agricultural sector and developed a two-sector model of the economy.

The second point to appreciate about Labor Surplus Models is neither of the two sectors is international trade. Imports and exports are not expressly incorporated into these Models. The two sectors are, of course, agriculture and industry. The story these Models tell is transformation from the former to the latter sector. Neither cross-border transactions nor International Trade Law is not banished from the story. But, they simply are not given a prominent (much less leading) role. The two-sector Labor Surplus Models seek to show how surplus labor from an agricultural sector experiencing diminishing returns can be redeployed to the industrial sector, leading to a change in the shares of agricultural and industrial output in GNP. That is, Labor Surplus Models tell a story of modern economic growth through industrialization.

\(^{44}\) This discussion draws on GILLIS, 51-57.
Table 3-1
Hypothetical Example of China’s Great Leap Forward,
Plan Versus Reality (Rice Market, in tons)

<table>
<thead>
<tr>
<th>(1) Target and Harvest Year</th>
<th>(2) Rice Production Quota (Target for Total Rice Output)</th>
<th>(3) Amount of Rice to be Transferred to Cities to Support Industrial Workers (60% of Target)</th>
<th>(4) Amount of Rice Supposed to Remain to Support Farmers (Assume 70% of Target)</th>
<th>(5) Actual Rice Production Achieved (Same as Column 3)</th>
<th>(6) Amount of Rice Actually Transferred to Cities (Difference between Columns 5 and 6)</th>
<th>(7) Actual Amount of Rice Left to Support Farmers (Difference between Columns 7 and 4)</th>
<th>(8) Shortfall of Rice in Agricultural Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>1,000</td>
<td>600</td>
<td>400</td>
<td>700</td>
<td>600</td>
<td>100</td>
<td>- 300</td>
</tr>
<tr>
<td>1960</td>
<td>2,000</td>
<td>1,200</td>
<td>800</td>
<td>1,400</td>
<td>1,200</td>
<td>200</td>
<td>- 600</td>
</tr>
<tr>
<td>1961</td>
<td>3,000</td>
<td>1,800</td>
<td>1,200</td>
<td>2,100</td>
<td>1,800</td>
<td>300</td>
<td>- 900</td>
</tr>
</tbody>
</table>
Therefore, one lesson to be drawn from a Labor Surplus Model is about the role international trade and law, in theory and practice, can play in economic growth. The lesson is to take a balanced perspective about that role. Unfortunately, critics of the modern multilateral trading system and its rules who espouse the claim that GATT and the WTO are “anti-Third World” tend not to have learned this lesson. Few of them even bother to examine development through Labor Surplus Models.

Rather, hidden under the “anti-Third World claim” is an assumption about the contribution of trade (and by extension, GATT and WTO agreements) to growth, and to development in general: the contribution – at least potentially – is great, even to the degree trade can be an engine of growth. That is why critics of GATT and the WTO find it easy to “blame” international trade and international trade law for many of the sufferings of less developed countries. The logic implicit in that claim is that trade plays a (if not the) leading role in growth and development, therefore it also is a (if not the) villain causing many problems in poor countries. This logic, such as it is, and the consequent ascription of blame, exaggerates the role of trade in growth and development.

As the Fei-Ranis Labor Surplus Model suggests, importing and exporting are not the protagonists in the story of growth or development. They are supporting actors. Whether they can play their supporting roles, namely, whether they are able to facilitate growth through industrialization, depends on a range of other factors a country (such as good governance, sound macroeconomic fiscal and tax management, appropriate monetary policies, the rule of law, and a strong physical infrastructure) are in place. But, in all instances, the story is about transformation away from an economy excessively dependent on agriculture for its income. The protagonist in that story, according to Labor Surplus Models, is industrialization itself. One reason Labor Surplus Models are appealing is their use to explain this role of trade, and thus to keep a fair perspective on what trade can and cannot do, and what trade can and cannot be blamed for.

That use is as true for pro- as for anti-globalization assertions. The intellectual dynamic of over-estimating the role of trade is not confined to the “anti-Third World claim.” Proponents of globalization, including enthusiastic advocates of GATT and the WTO sometimes err in giving trade more credit than is fair. If trade is not a villain for all the Third World’s woes, then it surely is not a panacea for them either. Put differently, care is needed to avoid over-selling the potential salubrious effects of trade. Both sides of the debate about the GATT–WTO system can learn from Labor Surplus Models.

- **Elements of Fei-Ranis Labor Surplus Model**

The Fei-Ranis Model is neatly expressed in a three-paneled picture, Graph 3-2. To understand that Graph, it is essential to be familiar with their elements, namely, (1) the Agricultural Production Function, (2) the concept of the marginal productivity of labor, and (3) supply and demand curves for the agricultural and industrial labor markets through which the wage rates of workers in those markets are established. Accordingly, it is necessary to spend a moment on 3 elements.
1st: Agricultural Production Function

A Production Function for any sector, or for the economy as a whole, relates the amount of output that can be expected from a specified amount of inputs into the production process. The Production Function for the agricultural sector, or “agricultural production function,” is no different. It reveals the expected output of agricultural commodities from a particular combination of land, labor, physical capital, human capital, and technology.

Thus, conceptually the equation used for the aggregate production function is similar to that for the agricultural production function. Recall the Aggregate Production Function specified earlier is:

$$ Y = \frac{1 \cdot L + \frac{1}{n} \cdot N + \frac{1}{k} \cdot K + \frac{1}{h} \cdot H + \frac{1}{t} \cdot T}{l} $$

The dependent variable, $Y$, stands for GNP (or GDP).

To derive the Agricultural Production Function, the key change is in the dependent variable, i.e., the variable on the left-hand side of the equation whose value depends on the values of the independent (right-hand side) variables. Instead of goods and services produced by the entire economy, the focus narrows to commodities produced in the agricultural sector, or Agricultural Output (AO):

$$ AO = \frac{1 \cdot L + \frac{1}{n} \cdot N + \frac{1}{k} \cdot K + \frac{1}{h} \cdot H + \frac{1}{t} \cdot T}{l} $$

AO is comprised of all commodities produced in the non-urban, non-industrial, non-service sector. Thus, it would include everything from apples to wheat, from chicken to veal, but would exclude the production of irrigation pipes or tractors. These latter items would be counted as industrial output.

2nd: Marginal Productivity of Labor

It is an axiom of economic theory that the marginal productivity of labor ultimately must diminish. Development economists do not use the term “marginal” in the sense of making a value judgment. They do not mean that the workers are of poor quality, or that their output is slipshod. Rather, for development economists, “marginal” and “additional” are synonymous. That is, “marginal labor” is the addition of one more unit of labor – one more worker – to the production process. The next worker who toils on a rice paddy farm in Laos, or the next worker who harvests wheat in the Pakistani Punjab – they are the “marginal” workers.

With time, it is quite possible that the size of the paddy farm, or the wheat-growing area, will expand. The landlord may acquire new lands, or bring lands lying fallow into
cultivation. However, that sort of transformation is done in the long term, i.e., over a period of longer than (at the very least). In the short and medium term, the marginal farm worker must plant, cultivate, and harvest crops on a piece of land that is fixed in size. Similarly, in the long term, the farmer may obtain (directly by purchase or through rural credit financing, or via a landlord) new technology and capital with which to work. For example, better seeds that are resistant to disease and produce high yields, better irrigation systems, and better machinery are possibilities for the future. But, for now, the farmer works with a given level of technology. The same is true with his human capital. In time, he may take classes on better farming techniques. But, in the short and medium term, he is limited to the education he already has received.

In sum, the stocks of land, technology, physical machinery, and human capital with which the farmer has to help him in his work are fixed in the short and medium run. Only with time, and money to cover the investment costs, can the size of these independent variables change.

Imagine what would happen if this worker were not the last person added to work on the rice paddy or cotton farm. Assuming the worker had been working alone, or one of just two or three people, then no doubt she would welcome the help. She could not possibly manage, say, a 500-acre paddy field or cotton farm without perhaps 10 workers total. At 10 workers, for example, let us suppose that the paddy or farm operates at its optimum efficiency. It produces the largest amount of output, for the lowest amount of labor input. Stated differently, labor is at its maximum productivity. But, what would happen if marginal labor went beyond this optimum point? What if an 11th, and then a 12th, and then a 13th, and so on, all the way to a 50th worker is added to the paddy or farm?

Surely, the land would be akin to a kitchen in which there are too many chefs. No single farmer would have the room to do her work properly. Moreover, there would be an insufficient number of other factors of production – tractors, for instance – to go around. Finally, the land itself would become over-cultivated. In the end, the output of rice and cotton would suffer, in the same way that the food from an over-crowded kitchen ultimately would diminish in quantity and quality.

To imagine this scenario (which can occur because of rapid population grown, through high fertility or immigration rates, recession in the industrial sector, or a variety of other causes) is to understand why the marginal product of labor must fall. In brief, it is a manifestation of the law of diminishing returns: after a certain optimality point, adding extra workers actually detracts from output. Each additional unit of farm labor produces less and less output, and eventually, total output levels off and even drops. This scenario is plotted in Graph 3-2.

The Graph shows the Agricultural Production Function, coupled with diminishing marginal productivity of labor. Total output in the agricultural sector is measured on the y- (vertical) axis, and the quantity of labor is measured on the x- (horizontal) axis. Initially, as workers are added to the agricultural sector (starting from zero workers, and rising), output increase. These workers make productive contributions to the farms. In particular,
each additional worker contributes more and more to total output. Put in the terms of
development economics, the marginal product of labor – the increment to total output
associated with an additional worker – rises.

However, eventually the extra workers are not able to contribute as much to total
output as their colleagues who had come to work on the farms earlier. The Law of
Diminishing Returns is beginning to set in, as outlined above. Hence, the Agricultural
Production Function levels off – equal increases in labor lead to smaller increases in output.
As workers continue to stream into the agricultural sector, output in that sector fails to
increase at all. At that point (as explained below), the marginal product of labor is zero, or
even negative, which is to say the increment to total output contributed by an additional
worker is nothing, or that worker even causes total output to fall.

3rd:
Wage Rates, Supply and Demand for Labor, and Essence of Growth

The third and final building block in Labor Surplus Models concerns the labor
market. Actually, because these Models are dualistic (i.e., because they emphasize two
sectors), rural and urban, there are two labor markets at issue: the agricultural and industrial
labor markets. The key points about these markets are to see how wage rates in each sector
are determined, and to understand how changes in the supply of labor to each sector affect
(or do not affect) wage levels.

David Ricardo (1772-1823) assumed rural wage rates never would fall below a
basic minimum level. That level is, of course, the minimum wage rate needed for a farm
worker to maintain herself, not in luxury, but at subsistence. The assumption is not
arbitrary. Rather, it is predicated on the view that a farm worker will entertain a rational
calculation: “how much can I earn from working on the land in comparison with what I
could earn in alternative pursuits?” It is assumed the farm worker would not take up a
different occupation unless she could earn more than the wage rate she gets in the
agricultural sector. (In truth, she also would include in the calculation the cost of moving
to a new occupation, and establishing herself in a new place.) At the same time, it is
assumed that there are wage levels in the farm sector that certainly would drive her off the
land, namely, any level below subsistence. Thus, the subsistence wage rate is the minimum
needed to keep her engaged in farming.

This assumption of a minimum wage rate in the agricultural sector has been retained
in all Labor Surplus Models developed since Ricardo’s time. In the language of
development economics, that minimum level is called an “institutionally fixed wage,”45
because the market forces of supply and demand for labor do not determine it. Exactly what
level is this minimum? Again, using the development economics terminology, it is “the
average product of farm labor in households with a labor surplus.”46 Those terms embody
two vital concepts – average product, and labor surplus.

45 GILLIS ET AL., 53. (Emphasis omitted.)
46 GILLIS ET AL., 52-53. (Emphasis omitted.)
Graph 3-2
Agricultural Production Function with
Diminishing Marginal Productivity of Labor

Horizontal movement rightward signifies increase in number of workers employed in agricultural sector.

Upward movement (bottom to top) signifies increase in total agricultural output.

The “average product” of labor is the total output in the agricultural sector, divided by the total number of workers in that sector. The contrast with marginal product should be clear: whereas the average product is precisely what its name suggests, the marginal product is (as defined earlier) the addition to total output resulting from the work of one
more worker. The marginal product may be above, below, or equal to the average product, depending on the number of workers in the sector, and their output.

Eventually, the marginal product of labor becomes zero if too many people migrate into the agricultural sector in relation to the amounts of other factor inputs available for them to use in farming. However, even when the marginal product of labor falls to zero, the average product is not zero. After all, farms still are producing some commodities. The problem is that additional workers are not boosting output. The point is that while the subsistence wage rate is assumed to be at the level of the average product of farm labor, the marginal product could be below that average level.

Consider this assumption in light of what happens in a free labor market in which there is perfect competition. In that scenario, the wage rate a worker earns equals the marginal product that worker contributes, i.e., he is paid in accordance with the additional to total output for which she is responsible. But, if the marginal product were zero (for the reasons discussed above), then the worker would receive nothing. Obviously, he could not live on a zero-wage rate – hence the need for an assumption about a minimum wage rate. The assumption means that a worker whose marginal product is below the average, or zero, still receives a wage equal to the average product.

What about the words “labor surplus,” which impart the name to the class of development models like the Fei-Ranis Model? As the words suggest, at bottom they mean that there are extra workers in the agricultural sector who are under-employed and/or unemployed. Stated differently, there is an excess supply of labor – too many chefs in the kitchen, to recall the metaphor used earlier.

This metaphor suggests the time is ripe to get some chefs out of the kitchen. That is, why not shift the under- and un-employed workers from the agricultural sector, to which they are making no meaningful contribution, and put them to work in the industrial sector? (In considering this question, the vexing negative externalities transition can cause, such as excess rural-urban migration, congestion, pollution, disease, and slums in cities, and family dysfunctions, are set aside.Indeed, if these under- and un-employed workers

47 Also set aside in Labor Surplus Models is the fact that in many developing and least developing countries, labor that migrates from rural to urban areas, and likewise from one rural area to another, is migrant. That is, the rural-to-urban transition is temporary, and potentially reversible. This reality and prospect became quite apparent in India amidst the 2020 COVID-19 pandemic, when rural workers who had migrated to India’s megalopolises for industrial jobs, or in many cases to work as domestic help, were locked down along with the rest of the nation. About three out of every four laborers in India “work casually for others, or at family firms or farms.” See Andy Mukherjee, Modi’s India Is Hurting. It Needs a Roosevelt, BLOOMBERG, 29 April 2020, www.bloomberg.com/opinion/articles/2020-04-29/india-s-small-business-aid-can-ease-suffering-of-rural-migrants?srref=7sxw9Sxl. For factory workers, who had migrated from villages to the city, and who desperately sought to return home amidst the lock-down, one issue was whether they would return to their urban jobs. History provided an example. From 1896-1907, in the aftermath of Bombay Plague of 1896, Bombay (Mumbai) depopulated. See Amol Agarwal, Mumbai And Epidemics: The Bombay Plague Of 1896, BLOOMBERG QUINT (Mumbai), 17 April 2020, www.bloombergquint.com/coronavirus-outbreak/coronavirus-covid-19-mumbai-and-epidemics-the-bombay-plague-of-1896. Even zero-marginal productivity farm workers who had left the agricultural sector for manufacturing, but who (when allowed) returned to their rural areas might not want to return to the cities. Higher urban wages were not worth the
could be taken off of the farms, the agricultural wage rate would not rise immediately. There are so many of them, that by assumption this rate is driven down to a subsistence level. Only when all of them are shifted out of the farm sector, and the remaining farmers contribute meaningfully to total production, do wage rates in the farm sector begin to climb.

To put the scenario in the terms of development economics, only when the marginal productivity of agricultural workers rises will the agricultural wage rate start to increase. All of the surplus labor from the farm sector shall have to be shifted into the industrial sector first. At that point, the workers left on the farms will be able to cultivate the land without over-taxing it, and they will be able to use their tractors effectively. In other words, the remaining farmers will be able to work effectively on the land with the other factors of production at their disposal. Each will add to total output, i.e., the marginal product of each will start rising. This scenario is set forth in Graph 3-3.

In that Graph, the marginal product of labor is plotted on the y- (vertical) axis, and the quantity of labor is plotted on the x- (horizontal) axis. The origin of the Graph, where the axes meet, is defined as the point at which all of the laborers in the economy are engaged in farming. That is, all of them are in the agricultural sector, and none is in the industrial (or service) sector. To understand Graph 3-3, think of the analogy to chefs in a kitchen. With the excess chefs gone, the remaining chefs can do what they do best, resulting in a higher quantity, better quality, meals for the patrons of the restaurant.

In sum, the scenario is one of decreasing the quantity of labor in the agricultural sector in order to realize increases in the marginal productivity of labor. Indeed, it is not merely a “scenario.” It is also a policy prescription for Third World economies plagued with labor surplus in rural areas.

But, how exactly will the industrial sector – specifically, the capitalists who own the factories in the urban areas – attract workers from farms to leave their rural homes and come to work on an assembly line? The answer lies in the wage rate. Farmers are assumed to make a rational calculation about the wages they can earn. They will not leave what they are doing, unless (on the one hand) their circumstances become so desperate that they cannot reach subsistence, or (on the other hand) they are paid above what they could earn on the farm. In brief, the captains of industry shall have to pay the surplus agricultural laborers a wage that makes it worth the while of those laborers to shift sectors.

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risks to their health and the prospect of future mandatory lock-downs that barred them from being with their families.
Graph 3-3
Marginal Product of Labor and Subsistence Wage in Agricultural Sector, as Labor Surplus is Withdrawn from that Sector

Marginal Product of Labor in Agricultural Sector

Subsistence Wage Rate (equals Average Product of Labor in Agricultural Sector)

0

Quantity of Labor in the Agricultural Sector

Movement from left to right on horizontal axis represents shift of workers out of agricultural sector, and into industrial sector, i.e., decline in size of agricultural labor force, and thus decline in labor surplus in agricultural sector.

Point at which all workers in economy are employed in agricultural sector. No worker is employed in industrial sector.

What would that industrial wage rate be? As long as subsistence wages prevail in the agricultural sector, then it will be the subsistence wage (or, in fact, a bit above it to compensate for the transition costs of moving). But, as surplus laborers continue to move off the farms, and into the cities, the agricultural wage rate will increase, because (as discussed above) the marginal product in the farm sector of the remaining workers rises. Consequently, the captains of industry will have to raise wages to attract workers from rural areas.
After all, the remaining farmers are doing quite nicely, earning a higher wage rate that is commensurate with their increased productivity. Their plots of land are not over-farmed, and they do not have to share tractors. Why leave for a factory in the big city, unless the job pays better than the current rural wage rate? Again, consider the kitchen metaphor. The first few chefs come cheaply, but once the remaining chefs are happy and productive, they will need to be paid more to entice them to stay, or to leave.

Not surprisingly, this point can be put in the language of development economics: the supply curve of labor to the industrial sector is the same as the marginal product curve, coupled with the subsistence level, associated with the agricultural sector. This scenario/prescription of extracting workers from the agricultural sector without affecting wage rates until marginal productivity in that sector rises is depicted in Graph 3-4. As in previous Graphs, the marginal product of labor is plotted on the y- (vertical) axis, and the quantity of labor is plotted on the x- (horizontal) axis. The origin of the Graph, where the axes meet, is defined as the point at which all of the laborers in the economy are engaged in farming. That is, all of them are in the agricultural sector, and none is in the industrial (or service) sector.

To be precise in the terminology associated with Graph 3-4, what is depicted is the Labor Supply curve to the industrial sector. It represents the workers who are able and willing to offer their labor to capitalists at alternative wage rates. The curve slopes upward, above subsistence wage level, for obvious reasons: the higher the wage rate, the larger the number of workers who are able and willing to leave their farms and go to work in urban factories. So, the Labor Supply curve is demarcated by the letters “ABC.”

Because it is not possible for an industrial to attract labor surplus from the agricultural sector at a wage level below the subsistence rate prevailing in that sector, the portion of the marginal product curve below the subsistence level is not viable. In other words, that portion is irrelevant as a practical matter. Thus, the Labor Supply curve is bounded by the flat line representing existence at subsistence level. Then, the curve rises once all labor surplus is withdrawn and marginal productivity in the agricultural sector.

Also, to be accurate with terminology, industrial wage levels equal the “marginal revenue product” of the workers. That is, in a competitive labor market, an employer such as a factory owner will pay an additional worker the value of the product that worker contributes to the total output of the factory. The words, “marginal product,” encapsulate the concept of the increment to factory output that the newly hired worker contributes. The additional word, “revenue,” encapsulates the value of that incremental output. Thus, the entire phrase “marginal revenue product” connotes the additional value to total output for which the new worker is responsible.
Graph 3-4

Supply of Labor to Industrial Sector as Labor Surplus is withdrawn from Agricultural Sector

- **Wage Rate in Industrial Sector**: Industrialists must offer at least subsistence wage rate prevailing in agricultural sector to recruit surplus agricultural labor.
- **Subsistence Wage Rate in Agricultural Sector**
- **Point at which all labor surplus is withdrawn from agricultural sector**: Point at which all workers in economy are employed in agricultural sector. No worker is employed in industrial sector.
- **Quantity of Labor in Industrial Sector**: Movement from left to right on horizontal axis represents shift of workers out of agricultural sector, and into industrial sector, i.e., decline in size of agricultural labor force, and thus decline in labor surplus in agricultural sector, but corresponding increase in industrial labor force.
- **To continue to recruit, industrialists must increase wages in line with marginal product of labor**

So, for example, suppose the capitalist owns a shoe factory. The question is what wage rate will the capitalist offer to lure labor surplus off of the farm? The answer – again, assuming a competitive labor market – is the marginal revenue product of an extra worker.
If a new worker adds 350 shoes per year to the factory output (i.e., roughly a pair of shoes per day), then the worker’s marginal product is 350 shoes. If those shoes are worth $3,500 (based on a per unit price of $10 per pair), then the capitalist would offer the worker $3,500. To be sure, the capitalist would sell the shoes for as much as possible, and in particular look to fetch a price that would earn a profit (revenue over and above labor and other costs).

A key point about Labor Surplus Models is the flat part of the Labor Supply curve, i.e., from points A to B on the ABC curve in Graph 3-4. Because the context of this curve is a Third World country at which subsistence wage rates are a sad reality (or, at the very least, a “threat”), the A-to-B portion is relevant. If the context were the U.S., EU, Australia, Canada, or Japan, then there would be no need to depict that portion of the Labor Supply curve, because it would be a highly unlikely contingency. In the language of development economics, the flat part of the Labor Supply curve (indeed, of any supply or demand curve) is called a “perfectly elastic” portion.

In general, “elasticity” is a measure of the percent change in quantity that results from a percent change in price.

\[
\text{Elasticity of Supply or Demand} = \frac{\text{Percent change in Quantity Supplied or Demanded}}{\text{Percent change in Price offered to supplier or in price of product offered for sale}}
\]

Put broadly, “elasticity” gauges responsiveness, i.e., the responsiveness of one variable to changes in another. Any two variables can be measured in terms of the responsiveness of one to changes in the magnitude of the other. For example, the ability and willingness of a lawyer to supply labor to a law firm might increase by 10% – there might be 10% more lawyers seeking law firm jobs – if law firm salaries rise by 5%. That would suggest an elasticity of 2 (10% divided by 5%).

In Labor Surplus Models, elasticity reveals the responsiveness of labor supply, meaning labor surplus in the agricultural sector that potentially could shift to the industrial sector, to changes in wage rates in the industrial sector.

\[
\text{Elasticity of Labor Supply to Industry} = \frac{\text{Percent change in Quantity of labor supplied to industry}}{\text{Percent change in Wage Rate offered to surplus laborers in agricultural sector}}
\]

Certainly, there are variables to which workers respond other than wages – quality of work, distance in commuting time, collegiality of the working environment, and so on. Elasticity captures only one such variable, but it is a highly important one.

To say that a portion of a line or curve is “perfectly elastic” is to say it has an elasticity of infinity. This value results from a zero value in the denominator (reflecting no percentage change in the wage rate), coupled with very large changes in the numerator (representing sizeable percentage increases in the supply of labor). (Conversely, perfect inelasticity would have a zero value – an infinitely large denominator, with no change in
the numerator.) In the present context, the infinite value means that factory owners can hire surplus laborers off of the farm, thereby increasing the industrial labor force, but need not increase wage rates. Depicted graphically in an earlier Graph, on the perfectly elastic portion of the Labor Supply curve, no matter what the change in quantity of labor, there is no need to raise wages to entice workers.

This phenomenon is highly significant. It means industrialists can continue to expand output, by increasing their labor force, and yet not face increasing wage rates. That is, they need not worry about a rise in wage rates. That freedom is a relief to them. It means they will not be compelled by rising wage rates to increase the price of their products. In turn, their product will not become less price competitive than rival goods. Rather, the industrialists can increase the supply of their product to consumers at competitive prices, and thereby increase sales.

By hiring more workers, the overall wage bill the industrialists must foot will rise. But, it will not go up on account of an increase in the wage rate. Instead, it will rise only because of the increase in the number of employees. Likewise, to manufacture more output, factory owners will need more raw materials and intermediate goods consumed in the production process. But, what is possibly the most important variable in the overall cost of production – the wage rate – holds constant. It will remain flat in the industrial sector as long as there exists a pool of surplus workers in the agricultural sector on which to draw. Thus, industrial product prices need not rise on account of the wage rate.

Herein lies the essence of the growth story told by Labor Surplus Models: extract the labor surplus from the agricultural sector, put it to work in industry, and thereby take advantage of the constancy of industrial wages to expand industrial production while remaining price competitive. In a nutshell, that is the industrialization process captured by the Fei-Ranis Model.

The very fact industrial wages remain flat on the elastic portion of the Labor Supply curve is an invitation for capitalists to increase output by hiring more workers off of the farm at the same wage. The fact that wages stay the same assures the price competitiveness of industrial output vis-à-vis other sectors, both domestically and overseas. In sum, the perfect elasticity of labor supply caused by surplus labor in the agricultural sector is the great economic incentive to industrialize.

One point implicit in the discussion of the Labor Supply curve is that it is limited by the population size of the country in question. A labor surplus economy is presumed to begin, at its initial stage of development, with all of its population in the agricultural sector. Obviously, not every person living in the rural areas of the country is a farmer. There are children and elderly, and there are family members who stay to care for these dependents. Fortunately, it is not particularly significant to distinguish between the (1) total labor supply available in the agricultural sector, and thus to the industrial sector, and (2) the total population size. The reason is that in most instances, these numbers are closely correlated – a large population size would suggest a large agricultural labor force and, therefore, a large pool of surplus labor.
It is evident from the above discussion that industrialization requires an increase in demand for labor on the part of factory owners. This increase can, and is, depicted graphically in the Fei-Ranis Model through a Labor Demand curve. That curve, along with the Labor Supply curve, is shown in Graph 3-5. As the captains of industry expand their demand for labor, the Demand curve shifts outward, to the right. Thus, four Labor Demand curves are shown. The outward movement represents successive increases in demand for labor by employers in the industrial sector.

Graph 3-5 builds on the earlier Graphs. Graph 3-5 shows the familiar Labor Supply curve developed in Graph 3-3 and depicted in Graph 3-4. Graph 3-5 extends the earlier ones by picturing the Labor Demand curve, and outward shifts in that curve.

In general, a demand curve represents the number of units of a good or service that consumers of that good or service are able and willing to buy at alternative prices. For any normal good or service, the demand curve slopes downward. The downward slope reflects the common-sense rationale that the lower the price, the larger the quantity of the good or service that consumers are able and willing to consume. Implicitly, this rationale assumes consumer preferences are governed by prices, which is to say that it abstracts from non-price determinants of demand like quality or snob appeal. In this respect, there is symmetry in assumptions underlying supply and demand curves. Supply curves dwell on price (in the labor context, the wage rate) as the critical determinant of the quantity of the good or service owners are able and willing to offer.

Here, there is no difference from the general case. In the market for labor in the industrial sector of a less developed country, factory owners are able and willing to hire more workers as the wage rate falls. That rationale explains the downward slope of each of the Labor Demand curves depicted in Graph 3-5.48

Also, in general, the intersection of a demand and supply curve sets the market equilibrium price at which the good or service is offered for sale, and sold. Again, Graph 3-5 is no different from the general case; rather, it is a specific instance – the industrial labor market in a less developed country. Thus, in Graph 3-5, the equilibrium wage rate – the price at which surplus workers from the agricultural sector offer their services in the industrial sector, and the price they receive for their services from industrialists – is set at the intersection points of the Labor Demand and Labor Supply curves.

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48 As a technical matter, it is possible to derive the Labor Demand curve from the Production Function for the industrial sector. That curve is based on the marginal productivity of labor in the industrial sector. This sort of derivation for the Labor Supply curve is provided earlier herein. The derivation is similar for the Labor Demand curve. However, these details are not needed for the discussion of the Fei-Ranis Model. See Gillis _et al._, 54-55.
Graph 3-5
Demand for, and Supply of, Labor in Industrial Sector
as Labor Surplus is Withdrawn from Agricultural Sector

Movement from left to right:
(1) shift of workers out of agricultural sector, and into industrial sector, i.e., decline in size of agricultural labor force, and thus decline in labor surplus in agricultural sector, but corresponding increase in industrial labor force; and
(2) successive increases in demand for labor.

Point B is the “Transition Point.” No wage increases are necessary along perfectly elastic portion of Labor Supply Curve (AB segment). Thereafter (after Point B, on BC segment), increases in demand for industrial labor cause rise in wage rates, and agriculture-industry terms of trade change.

Point at which all workers in economy are employed in agricultural sector.
No worker is employed in industrial sector.
Transition Point

What is critical in the Fei-Ranis Model, and other Labor Surplus Models, is the fact the demand for labor in the industrial sector can expand to a considerable degree without driving up wage rates. That fact results from the large pool of surplus labor in the agricultural sector that is available for work in the industrial sector. It is assumed that before modern economic growth commences, the entire population of the less developed country lives and works in agriculture. Hence, the large pool of surplus labor assures the perfect elasticity of the Labor Supply curve during the initial phases of industrialization (associated with the AB segment of that curve).

Yet, the set of workers considered labor surplus is not infinite. At some point – in particular, at Point B and after – industrialists must pay more if they are to continue expanding their labor force. The dashed lines in Graph 3-5, associated with increases in demand for labor shown by the third and fourth Labor Demand curves, trace out the higher wage levels industrialists must pay.

So, in the Fei-Ranis Model (and other Labor Surplus Models), Point B is critical for a less developed country. At that point, it is impossible to withdraw labor surplus from the agricultural sector without offering higher wages in the industrial sector. Why?

The answer is at Point B, the supply of surplus labor is exhausted. After point B, the marginal productivity of labor in the agricultural sector rises, which means agricultural workers – who are assumed to earn their marginal revenue product after this point – receive higher wages. With less crowded farms and more efficient use of factor inputs, the workers still on the farms are more productive. So, it is only natural they begin to command higher earnings. But, of course, higher earnings in the agricultural sector is a deterrent to moving to a factory job – unless the factory job pays more than what can be had from farm work.

The exhaustion of labor surplus at Point B has a significant implication for the less developed country in its growth process. After this Point, withdrawal of workers from the agricultural sector causes total output in that sector begins to fall. Industrialization cannot proceed by taking more workers off of the farm without causing a reduction in agricultural output. In other words, industrialization cannot continue without placing demands on the agricultural sector. Why?

As just indicated, simply because workers who are taken off of farms after Point B are productive, in the sense of making a meaningful contribution to total output. Losing them “hurts.” Until Point B, the marginal productivity of labor is negative or zero. Therefore, workers can be withdrawn from the agricultural sector without any loss in total farm output. The workers that are being withdrawn, represented by the segment AB on the Labor Supply curve in Graph 3-5, had no impact on this output in the first place.

But, after Point B, the economic climate changes. After this Point, the marginal product of labor no longer is negative or zero. Rather, it is positive and rising. Every additional worker removed leads to a decline in total output, because all the surplus workers
— those whose marginal product was negative or zero — have been withdrawn. Put bluntly, if more workers are lost from the agricultural sector, that sector begins to “feel the pinch” in terms of a “hit” to its output.

How would the remaining farmers respond to further labor losses from their sector? They would raise the price of their output, and thus earn more for themselves. As productive workers leave the agricultural sector, lured by higher wages in the industrial sector, the remaining farmers are in a position (assuming no government price controls or market distortions) to increase their wages by charging more for their product. That increase means the captains of industry shall have to boost what they offer to prospective workers if they hope to get any more of them off of the farm and into the factory.

Thus, Point B is when the TOT of agriculture relative to industry change. By “terms of trade,” development economists mean the price of the goods from one sector relative to the price of goods from another sector. Expressed as a ratio:

\[
\text{TOT of agriculture relative to industry} = \frac{\text{Price of agricultural goods}}{\text{Price of industrial goods}}
\]

These agriculture-industry TOT measures the price of agricultural output relative to the price of industrial output. If they “deteriorate” from the perspective of industrial workers, the price of agricultural goods rises relative to the price of industrial goods. (Conversely, that change would be an “improvement for agricultural workers.) After Point B, these terms rise, because the cost of labor in the agricultural sector (i.e., the farm wage rate) rises. In sum, Point B is called the “Turning Point.”

There is another common-sense explanation for what happens after the Turning Point, one which helps explain the link between rising industrial wages and the change in the terms of trade against industry. After Point B, the price of farm output rises. The price increase occurs because removal of productive workers from the agricultural sector after the pool of surplus labor is exhausted leads to a fall in agricultural output. (Plainly, as in any market, with less agricultural output, the price of each product rises, \textit{ceteris paribus}.)

How will the formerly surplus agricultural workers, who now work in the industrial sector, pay for the higher-priced food? They require higher wages from their factory jobs to do so. In brief, to compensate industrial workers for the decline in the terms of trade (i.e., in the rise in the price of food relative to industrial goods), capitalists who employ the workers shall have to pay them more than before. If they do not, then they hardly can expect their workers to be efficient on the assembly lines. But, capitalists suffer higher labor costs, which mean lower profits (again, \textit{ceteris paribus}).

This explanation sounds gloomy, but it need not be. With farm workers getting paid better, they have an incentive to increase output. Because of higher agricultural commodity prices, they are eager to produce, sell, and hence earn more. If this scenario materializes (that is, if the farm sector is more productive), then the terms of trade need not shift dramatically against industry. With more food coming to market, the price increases need
not be so dramatic. Depending on how much comes to market, these prices may even hold steady or decline. In sum, if the agricultural sector is more productive after the withdrawal of surplus labor, then total output from that sector may expand rapidly enough to support industrialization without a dramatic rise in food prices.

- **Size of Labor Surplus**

An interesting question that naturally arises from the Fei-Ranis Model is the availability of labor surplus. How big is the pool, or in terms of Graph 3-5, how long is that perfectly elastic segment AB? The answer depends on population growth in the rural areas of the less developed country in question. Assuming a close correlation between the country’s population size and its labor supply, then a larger population size suggests a larger pool of surplus labor.

This presumed correlation does not mean rapid population growth in rural areas is a “good” idea for poor countries. A clear implication of the Fei-Ranis Model is adding more surplus labor will not increase agricultural output, because surplus labor – by definition – has a zero or negative marginal productivity. In turn, with a larger population to feed, but no corresponding rise in commodity production, food consumption per capita would fall. Only imports of food, or use of other factors of production (say, technology, or land reclamation), would prevent this unhappy scenario. Moreover, David Ricardo worried that population growth would dampen food supply because it would result in over-farming and necessitate the use of poor-quality land.

Nevertheless, the overall repercussions of population growth are complex. They demand careful study beyond merely the effect on the pool of surplus labor. Indeed, not only are the repercussions a subject of inquiry, but so too are the factors that result in faster population growth (e.g., the average age at first marriage of women, and the education and income levels of women). Such studies often yield an eclectic position, revealing differences in causes and consequences that depend on the particular circumstances of the less developed country in question.

What can be said is a large pool of surplus labor, based on a large population size, will postpone the Transition Point. Industrial wages will remain low (and, correspondingly,

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50 Like Thomas R. Malthus (1766-1834), Ricardo also worried that higher urban wages would cause workers to have more children, thus not only exacerbating population pressures, but also diminishing profitability in the industrial sector. The consequence of the latter effect, reasoned Ricardo, could be a reduction in investible funds necessary to continue industrialization. See GILLIS ET AL., 57.

profits high) – hardly a happy event for the surplus workers who have moved to the cities. That is, the existence of a large pool will put off further into the future the moment when industrialization would cause agricultural output to decline and wages to rise. Industry can continue to expand, by absorbing the labor surplus, without putting demands on agriculture in terms of output. Put simply, as long as that pool is not exhausted, the productivity and overall output of the agricultural sector are not a concern. A less developed country operating at points before the Transition Point can focus on industrialization.

- **Transfer of Food from Rural to Urban Areas**

  One aspect of the withdrawal of labor surplus that is not expressly dealt with in the Fei-Ranis Model should be highlighted – namely, food distribution. In shifting surplus workers represented by the segment AB on the Labor Supply curve in Graph 33-5 from farms to factories, what matters (in an economic sense) is that the food produced in the agricultural sector by the remaining workers is transferred to the cities in which the factories are located. Labor surplus that has shifted from village to city can be fed.

  Whether food is distributed efficiently throughout the country is largely a question of whether the wholesale and retail markets for agricultural commodities function efficiently. If these markets do not function properly, and thus food does not get distributed properly to urban areas, then the industrialization process will be retarded. Worse yet, serious problems of malnutrition and even street-level anarchy can develop.

IV. **1964 Fei-Ranis Labor Surplus Model**

- **Three-Panel Fei-Ranis Labor Surplus Model**

  The Fei-Ranis Labor Surplus Model consists of the elements laid out above. Quite literally, the Model is depicted with three graphs, or panels, each of which has been

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52 A different graphical presentation of the Fei-Ranis Model, which appears in Raj Bhala, *Trade, Development, and Social Justice* (2003) at page 113, is possible. The difference is Panel I is inverted, *i.e.*, flipped over upside down. The advantage of that presentation is then there is an inconsistency in what a rightward shift means across all three Panels: an outward horizontal movement represents a shift in workers from the agricultural to the industrial sector. (In depictions of Agricultural and Industrial Labor markets, a movement from left to right often signifies a diminution in the quantity of labor in the agricultural sector, a corresponding transfer of labor to the industrial market, and thus an increase in labor employed in the industrial sector. In Graph 60-6, that is true for Panel III, but the opposite, *i.e.*, increasing labor employed in the agricultural sector, for Panels I and II.) Thus, in the top left-hand corner of an inverted Agricultural Production Function, it is assumed all workers are employed in farming. The marginal productivity of each worker is nil or negative.

  However, the disadvantage of this presentation is it can be confusing. For example, flipping the Agricultural Production Function in Panel I means the vertical (y-) axis must be read with care. A movement upward (from the zero point to the top of the axis) signified an increase in farm production. When this Panel is inverted in, moving from the bottom to the top of the page still represents an increase in total agricultural output. Conversely, by moving along the curve from the top to the bottom of the page, it is evident total agricultural output declines. This decline results from industrialization after the Transition Point, *i.e.*, the successive withdrawal of workers from the agricultural sector who are productive (as measured by a positive marginal productivity), and signifies a change in the terms of trade (the relative price) of industry to agriculture.
explained earlier. These graphs are the Agricultural Production Function, the Agricultural Labor Market (specifically, the Marginal Productivity curve), and the Industrial Labor Market (specifically, the Labor Supply and Demand curves).

In other words, the three panels are a composite of Graphs 3-3, 3-4, and 3-5. In its complete expression, the Fei-Ranis Model simply is the placement of the three Graphs – one on top of the other – on the same page. That placement is set forth in Graph 3-6.

- **Understanding Three-Panel Fei-Ranis Labor Surplus Model**

  Taken together, all three panels in Graph 3-6 portray the industrialization process made possible by a pool of surplus labor. The Agricultural Production Function, set forth in Panel One, shows initial increases in total agricultural output as labor increases in the farm sector, but also shows the Law of Diminishing Returns begins to operate as more and more farm workers are added to that sector. The marginal productivity of each additional agricultural worker declines. Hence, increases in total farm output level off.

  Farm output decreases after the Transition Point, when all farm workers are surplus labor, with zero productivity or worse. Adding more such workers compounds the problem, leading to further declines in farm output, as the labor surplus has negative marginal productivity and detracts from total output.

  Conversely, reading the Agricultural Production Function backward, from right to left, indicates the salubrious economic benefits of withdrawing labor surplus from the agricultural sector and re-allocating it to the industrial sector. By definition, labor surplus that is withdrawn from the agricultural sector has a zero or negative marginal product – hence, the label “labor surplus.” So, withdrawing these farm workers does not harm total agricultural output. To the contrary, getting these workers off the farm helps the remaining farmers plant, fertilize, cultivate, and harvest more efficiently than when the plots of land were over-worked, over-crowded, and thereby subject to diminishing, zero, and negative returns. Yet, once all surplus workers have moved out, and workers with positive marginal productivity are siphoned off, total farm output begins to suffer. It must, because the workers now shifting to industry had contributed positively to agricultural output.

  As for the middle panel (Panel II), what is shown is the familiar marginal productivity of labor curve. At the bottom left-hand corner, all workers are assumed to be engaged in industry, and none in agriculture. A rightward movement signifies an increase in the quantity of workers in the farm sector. Predictably, as more farmers are added, the marginal productivity of each additional farmer declines.
Graph 3-6
Fei-Ranis Labor Surplus Model

Panel I: Agricultural Production Function
Total Agricultural Output (increasing upward)

Total Output
Transition Point (labor beyond this Point has zero or negative marginal productivity)

Zero
Quantity of Agricultural Labor (increasing rightward)

Panel II: Agricultural Labor Market
Marginal Productivity of Agricultural Labor (increasing upward)

Transition Point
Labor Surplus (at and to the right of the Transition Point)

Zero
Quantity of Agricultural Labor (increasing rightward)

Panel III: Industrial Labor Market
Wage Rate in Industrial Sector (increasing upward)

Transition Point (labor surplus depleted)

Ws Subsistence Level (or just above)

Demand for Labor

Higher Demand for Labor

Zero
Quantity of Industrial Labor (increasing rightward)
Also, in the middle panel (Panel II), at the Transition Point, agricultural workers have zero marginal productivity, and thereafter, a negative marginal productivity. Conversely, moving backwards (from right to left) on the Marginal Productivity line indicates that withdrawing labor surplus from the agricultural sector, and redeploying it to the industrial sector, boosts marginal productivity in the agricultural sector. That is worth doing until industrialists have exhausted the pool of surplus farm labor, when the economy reaches the Transition Point. After this critical point, marginal productivity in the agricultural sector begins to rise, because the remaining farmers can do their jobs unfettered by workers who are essentially under-and unemployed, and make better use of the other factor inputs (land, technology, and so on).

Marginal productivity in the agricultural sector is the basis for the Labor Supply curve to the industrial sector (because workers are willing and able to sell their labor for the value of their marginal product, i.e., for their marginal revenue product). The Labor Supply and Labor Demand curves are portrayed at the bottom of Graph 3-6 (Panel III). For as long as the Labor Supply curve is perfectly elastic (the AB segment in Graphs 3-3 and 3-5), workers can be enticed away by the captains of industry for subsistence wages (or just above that level). When all labor surplus is gone, farm workers need a higher wage if they are to leave the idyllic countryside for an urban factory job. Hence, the industrial wage rate must rise if the demand on the part of capitalists for labor continues to increase.

Corresponding to this increase in wage rates in the industrial sector is an ineluctable decline in total agricultural output (a shift from right to left in Panel I). Recall that once past the Transition Point (Point B in Graphs 3-3 and 3-4), all labor surplus has been exhausted. Any more workers who shift from farms to factories are, by definition, productive farmers (in the sense of having a positive marginal productivity). Enticing these farmers to pack their bags for the bright lights and big city causes total agricultural output to fall (again, reflected in a shift from right to left on Panel I). In turn, that fall necessitates a rise in the price of farm goods. As in any market, if agricultural commodity output declines, then (ceteris paribus) agricultural prices rise. Hence, the terms of trade of industry relative to agriculture (i.e., the price of industrial versus farm goods) deteriorate. Put equivalently, urban factory workers must pay more for their food, which is all the more reason why they need higher wages.

Here, therefore, is why the Transition Point (Point B in Graphs 3-3 and 3-4) is so critical. Industrialization before the Point can continue apace on the backs of labor surplus transferred from the agricultural sector. After the Point, steady agricultural output no longer can be taken for granted. Continued industrialization will impose demands on the agricultural sector that shall have to be addressed if modern economic growth is to continue without straining that sector beyond its limits.

In sum, with respect to Panel I, the Agricultural Production Function indicates the total output in the agricultural sector. The vertical axis measures total output. An upward
movement indicates increased output. The horizontal axis depicts the quantity of workers in the agricultural sector, \textit{i.e.}, in effect, the number of workers on farms. A rightward movement on this axis is an increase in the quantity of those workers. The Production Function indicates total output falls as the quantity of labor in that sector rises. The reason, of course, is the declining marginal productivity of labor, which in turn is based on the Law of Diminishing Returns. The Transition Point indicates the point at which the marginal productivity of agricultural workers is zero. Therefore, output increases as labor is withdrawn from the agricultural sector, \textit{i.e.}, a leftward movement on the horizontal axis.

Thus, the Three-Panel Fei-Ranis Labor Surplus Model is a visual story of growth through industrialization, which movement of labor surplus from the agricultural to industrial sector fuels. Panel I shows the effect of industrialization on agricultural output, a rise (moving from right to left in the segment after the Transition Point) in total agricultural output as this surplus leaves agrarian lands for factory shop floors. Panel II depicts the rise (moving right to left) in marginal productivity of agricultural workers as labor surplus shifts to the industry. Panel III highlights the ability of capitalists to pay a subsistence wage (or just above that level) to attract labor surplus off the farm, but the necessity to increase wages (after the Transition Point) once that pool of workers is depleted.

### Yet Again, Role of Trade and International Trade Law in Perspective

What role exists for international trade in the Fei-Ranis Labor Surplus Model? The short answer is there is no explicit role. Industrialization through labor surplus takes the lead role. However, trade can play a supporting role. First, as industrial output expands, where do capitalists sell the output? They look to their domestic market. However, if and when this market becomes saturated, and profit margins thereby shrink, they look overseas. In other words, export markets may absorb increased industrial production. Second, exports of that production generate revenue that capitalists may use to import capital equipment. Indeed, as their labor costs rise after the transition point, they have an incentive to shift away from labor-intensive, and toward labor-saving, production processes.

In addition to exporting industrial products and importing capital equipment, trade may enter into the labor surplus growth story in two other ways. In the agricultural sector, as Panel I exhibits, output rises before the transition point, \textit{i.e.}, until additional farm workers become surplus labor and for as long as they are not withdrawn from farms and reallocated to factories. Who consumes the additional primary and processed farm goods?

One answer is factory workers. Typically, this group expands in size and is based in and around urban areas, such as Bombay, Jakarta, Mexico City, and Shanghai. To the extent surplus agricultural output exists, \textit{i.e.}, to the extent a country produces enough food for its own people, it may become a net exporter of agricultural products. That is, increased agricultural output, made possible by increased marginal productivity, enables the country to generate and export excess production. Naturally, it earns revenues from these exports. It might save these revenues, and channel them into capital investments in the industrial sector. It also might spend some of the revenues on agricultural commodities, in which it
does not specialize, i.e., in which it lacks a comparative advantage. For example, Vietnam might export rice to Kansas in exchange for beef.

In sum, in the process of industrialization in a labor surplus economy, exports and imports are not the principal catalyst. Can this process, made possible through the use of labor surplus, be enhanced (i.e., accelerated) by international trade? The answer is “of course.” They can support that process. By extension, so too can S&D treatment provisions in GATT-WTO law, FTAs, or CUs.

In particular, if the captains of industry have overseas markets to which they can export the output from their factories, then no doubt they will have all the more incentive to expand production. To do so, they will hire the labor surplus from the agricultural sector more quickly, and thus the transition from agriculture to industry will be hastened. However, this trade-enhancing effect on industrialization is not a predominant feature of Labor Surplus Models such as the Fei-Ranis Model. It is rarely mentioned. In other words, these Models neither highlight it, nor rule it out. They simply leave open the question of where industrial output is sold, i.e., they tend not to specify whether the consumers are at home or abroad.

Another potential role for trade is in mitigating the demands placed by industrialization on the agricultural sector after the Transition Point is reached. Domestic agricultural output falls after this point (i.e., moving leftward on Panel I in Graph 33-6), because of the enticement of non-surplus workers away from farming through higher industrial wages. How can this decline be addressed?

One answer is to provide the remaining farmers with better technology, in the form of high-yielding and disease-resistant seeds (some of which are likely to be genetically modified, which raises a separate set of concerns). A second answer is to make available better physical capital, in the form of mechanized tools (such as tractors). A third answer is to train the remaining farmers – raise their level of human capital through appropriate courses that will enable to farm in more intelligent ways. That expansion may occur through land reclamation (from the seas), or steppe farming (in mountainous areas). A fourth answer is to expand the land available for cultivation, so the remaining farmers can realize economies of scale.

All four answers involve changing the mix of factor inputs, so that farm labor is rendered more productive by virtue of better technology, physical capital, human capital, and more land. But, there exists still another answer – trade. The less developed country that has passed the Transition Point can export its excess industrial output, which results from continued expansion of the industrial sector. In exchange, it can import agricultural commodities. Indeed, that sort of bargain may enhance the process of industrial product specialization, thus hastening the agriculture – to – industry transformation.

● Surplus Labor, Rural Jobs Transfer, and Human Rights in China
Indeed, China adopted precisely this policy in the late 1970s.53 Faced with a labor surplus economy, Chinese economic planners sought to hasten the agriculture-to-industry transformation. Yet, they did not want to repeat the disastrous mistakes of the Great Leap Forward (1958-1962), where tens of millions died from starvation during an industrialization effort that all but neglected domestic food production. Thus, China increased food imports to cover the needs of its expanding urban factory labor force.

At the same time, the CCP’s “labor transfer policy” raised serious human rights concerns, particularly with respect to genocide of Uyghurs in Xinjiang:

The rural jobs transfer program has its roots in China’s hukou system, which restricted the movements of citizens into cities. In the late 1970s, leader Deng Xiaoping started opening the country to investment and made it easier for workers to move around. Even so, by the turn of the century the number of surplus rural laborers was still estimated at some 100-200 million people.

In 2002, the Communist Party decided to remove all movement restrictions, so long as population flows were “orderly” and “guided.” The Agriculture Ministry then urged local governments to boost vocational training for rural workers and link them with job opportunities in cities. Ever since the program has been hailed an important national tool for ending poverty.

In Xinjiang, however, the initiative took on an added political dimension following Xi’s crackdown on Uyghurs. According to the Xinjiang Papers, a collection of more than 400 internal Chinese documents leaked to The New York Times, Xi in 2014 called for ethnic groups to be put to work, arguing that large numbers of unemployed people would “provoke trouble” and integration with Han Chinese would help them “resist religious extremist thinking.”

“People without land, employment or a fixed income have nothing to do and wander around all day,” Premier Li Keqiang was quoted as saying in one document. “Not only will this breed dissatisfaction, but they will also be easily exploited by evildoers.”

The government then devised a strategy to put Uyghurs to work, both through canvassing villages directly and creating incentives for companies to hire them.

It took a while for those efforts to pay off. A 2019 study, co-authored by a Vice Dean at a branch of the Communist Party school in Xinjiang, detailed the struggles local officials faced in recruiting workers.

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53 See GILLIS ET AL., 59.
In some cases, the party assigned quotas for local officials to fill jobs and made those a key part of performance reviews, according to the study, which was published in a magazine run by the local branch of the Chinese Academy of Social Sciences in the central province of Shaanxi. Officials also required low-income households to participate in order to continue receiving government subsidies, it said, and offered extra cash to those who signed up.

The party also drew upon a strategy known as “fanghuiju,” shorthand for a slogan that translates as “Visit the People, Benefit the People, and Get Together the Hearts of the People.” Workers went door to door in impoverished villages, often armed with handbooks that instructed them how to influence parents through their children and deflect uncomfortable questions.

While some Uyghurs are allowed to choose their jobs, the threat of detention is often sufficient to secure cooperation, said Rune Steenberg, a Post-Doctoral Researcher at Palacky University Olomouc in the Czech Republic, who conducted anthropological fieldwork in Xinjiang between 2010 and 2016.

“If they don’t adapt to the party line and do everything the party asks them, then they’re in immediate danger of becoming branded as uncooperative,” he said. “And that can mean incarceration for you and your family.”

Companies also received perks for using Uyghur labor, including cheap land and favorable treatment from government officials. …

Once deployed, workers are accompanied by both a local party member and a police officer who ensures the management feels safe, according to Darren Byler, who has written books on Xinjiang and teaches Anthropology at Simon Fraser University in Vancouver. They are also separated from their families for months, he added.

“Workers that are sent to other parts of China are seen as the least politically sensitive,” Byler said. “You begin to see the way that life is circumscribed and controlled by the factory and the police and the government – that they’re not permitted to practice Islam, that they’re required to study Chinese and political thought at night. That they’re living in really unfree conditions.”
China’s government rejects those allegations, and regularly holds press briefings featuring Uyghurs who say they are free to do what they please. ...\(^{54}\)

Manifestly, a compulsory labor transfer policy raises to resolve surplus labor problems raises serious problems. (The genocide and U.S. legislative response, namely, UFLPA, are discussed in a separate Chapter).

To be sure, such a policy may rub against the wishes of some politicians – for example, in India – who prefer self-sufficiency in food production. For them, it is a matter not only of national pride, but also national security. Happily, the policy options are not necessarily mutually exclusive. In some parts of the Third World, finding a better mix of factor inputs, and formulating an appropriate trade strategy that eschews excessive dependence on food imports, may occur simultaneously in order to satisfy political and economic criteria.

V. Critique of Labor Surplus Models

- 1st:
  Does Labor Surplus Exist?

  At the heart of the Fei-Ranis Model – or, for that matter, any Labor Surplus Model – is the assumption that there is surplus labor whose marginal productivity is at, near, or even below zero in the agricultural sector. This assumption would seem to be quite safe for

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China\textsuperscript{55} or India.\textsuperscript{56} But, what about Laos or Kenya?\textsuperscript{57} Any traveler to less developed countries knows they are not all over-populated.

\textsuperscript{55} For the argument China has been a labor surplus country since (at least) the 1950s, and that the labor surplus was not falling in absolute numbers during the 1980s or 1990s because of population growth, see GILLIS ET AL., 59-60. Interestingly, by the early 2000s, many young Chinese rural workers rejected urban factory jobs because of their sheer boredom, and factory managers refused to raise wages to coax out additional labor supply:

Growing up in a Chinese village, Julian Zhu only saw his father a few times a year when he returned for holidays from his exhausting job in a textile mill in southern Guangdong province.

For his father’s generation, factory work was a lifeline out of rural poverty. For Zhu, and millions of other younger Chinese, the low pay, long hours of drudgery and the risk of injuries are no longer sacrifices worth making.

“After a while that work makes your mind numb,” said the 32-year-old, who quit the production line some years ago and now makes a living selling milk formula and doing scooter deliveries for a supermarket in Shenzhen, China’s southern tech hub. “I couldn’t stand the repetition.”

The rejection of grinding factory work by Zhu and other Chinese in their 20s and 30s is contributing to a deepening labor shortage that is frustrating manufacturers in China, which produces a third of the goods consumed globally.

Factory bosses say they would produce more, and faster, with younger blood replacing their ageing workforce. But offering the higher wages and better working conditions that younger Chinese want would risk eroding their competitive advantage.

And smaller manufacturers say large investments in automation technology are either unaffordable or imprudent when rising inflation and borrowing costs are curbing demand in China’s key export markets.

David Kirton, \textit{Younger Chinese are Spurning Factory Jobs that Power the Economy}, \textsc{Reuters}, 21 November 2022, \url{www.reuters.com/world/china/younger-chinese-are-spurning-factory-jobs-that-power-economy-2022-11-21/}.

\textsuperscript{56} See, e.g., Noah Smith, \textit{How India Can Get Growth Back on Track}, \textsc{Bloomberg}, 24 February 2020, \url{www.bloomberg.com/opinion/articles/2020-02-25/india-s-economic-revival-starts-with-banks-shedding-bad-loans?ref=7sxw9Sxl} (arguing that for India to resume high \textit{per capita} GDP growth rates, in addition to the short-term necessity that Indian banks clean up their balance sheets to free them to lend to creditworthy businesses, India needs long-term structural change, particularly urbanization; pointing out two-thirds of Indians live in rural areas; reasoning in (without expressly invoking) Fei-Ranis Labor Surplus Model terms, that (1) “[u]rbanization is a driver of growth,” (2) “[m]oving people from farms to cities would help alleviate India’s low agricultural productivity, because the same land would be farmed by fewer workers,” (3) “[i]f the new urban residents get jobs in labor-intensive manufacturing, incomes would rise very quickly, so India should couple urbanization with a drive to absorb some of the manufacturing jobs that are leaving China as a result of the [Sino-American] Trade War and coronavirus outbreak [both discussed in a separate Chapter], and (4) “even if city dwellers work in the service sector, it’s better than being on the farms”). \textit{But see} David Fickling & Andy Mukherjee, \textit{The Shadow of England in India’s Farm Protests}, \textsc{Bloomberg QUINT (Mumbai)}, 11 February 2021, \url{www.bloombergquint.com/opinion/india-s-farm-protests-have-parallels-in-18th-century-england-for-better-or-worse} (observing that by the mid-18th century, agricultural employment in England “accounted for not much more than a third of the total,” thus “the country hit its Lewis turning point – the moment when excess rural labor supply is soaked up, resulting in wage rises that eventually improve the productivity of both urban and rural businesses – earlier than anywhere else on the planet,” and

That is, China and India are candidates for the label “labor surplus economy.” Each has several hundred million people living in rural areas. However, China’s population is rapidly ageing one, and by no means do Labor Surplus Models capture reality in every developing country or LDC. Not all such countries evince labor surplus. Some are under-populated, albeit with fast-growing populations, and rely heavily on foreign workers. While not necessarily developing countries, the six GCC members – Bahrain, Oman, Qatar, Kuwait, Saudi Arabia, and UAE – illustrate the point. Even if a country has a large supply of labor, it does not mean that country has labor surplus at all times. Some farm workers may be needed, and have a positive marginal productivity, on a seasonal basis – e.g., when crops are planted or harvested. In the off-season, their productivity may be zero. Still, as a generalization, in varying degrees, several African, Asian, and Latin American poor countries demonstrate labor surplus features.

These observational insights suggest a shortcoming in the zero-marginal-productivity assumption underlying the Fei-Ranis Model. Maybe, for a particular Third World country, the assumption needs to be relaxed. The Neo-Classical Two-Sector Model (discussed below) does precisely this. Before entertaining a discussion of that Model, however, care should be taken not to abandon the assumption too quickly. While, indeed, there are under-populated parts of developing world, there is an unmistakable trend in that world of urbanization. Between 1980 and roughly 2000, more than a dozen new “mega-cities” have arrived.58 These cities are defined as urban areas with more than 10 million people, and there were no less than 20 of them – such as Buenos Aires, Lagos, Karachi, Dhaka, Manila, and Jakarta. More of them have and will come.

What relevance does the trend of mega-cities have for Labor Surplus Models? That question is answered by another inquiry: what explains the trend? One answer, which the U.K. Department for International Development suggests, is labor surplus in agricultural areas.59 The argument is rural areas of many less developed countries have reached their so-called “carrying capacity,” i.e., they no longer can support the population living in those areas. Improvements in medical care have extended life expectancies, and thereby contributed to population growth. Technological improvements in agriculture have meant each productively-employed farmer can produce more output with fewer factor inputs.

Therefore, some of the new population in rural areas is surplus. These surplus workers, who typically are young, can find no employment that is, in numerically positive terms, productive. The end result is a lower carrying capacity of rural areas. Where are those surplus workers to go for gainful employment but to cities, thus fueling the urbanization trend? In sum, the relevance of the trend for Labor Surplus Models is that from this trend, the existence of surplus labor in rapidly urbanizing countries can be

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57 For the argument Kenya was not a labor surplus country from the 1950s until the late 1970s, see GILLIS ET AL., 60.
59 See The Brown Revolution, 73, 74 (discussing the work of Michael Mutter, an urban planning advisor to the Department).
inferred. Put more colloquially, perhaps the Fei-Ranis characterization of less developed countries as being labor surplus economies is not so widely off the mark after all.

• 2nd:
  Is Agriculture Ignored?

  The Fei-Ranis Model has a rather uncomfortable implication. It suggests the agricultural sector can be ignored for as long as the labor surplus remains unexhausted. Maybe so, but is there not a possibility for a great deal of suffering in that neglected sector? The disastrous Great Leap Forward in China from 1958–1962 is a case in point.

  In a relentless drive to industrialize, the CCP demanded more and more output from the agricultural sector to support the expanding urban factory populations that had been transferred from rural areas. Farm output could not keep pace with central planning directives, yet local Party cadres were reluctant to admit their agricultural communes had not met output quotas. To cover up the failures, they had food output transferred from rural areas to support the factory workers as called for by the Party-dictated targets – even when that transfer meant leaving less and less food for the farmers themselves.

  So, for example, suppose the output target was 500 tons for a commune, of which 50% was to be transferred to a city for factory workers, but only 300 tons actually were produced. Rural Party bosses would transfer 250 tons (50% of the quota amount), thus indicating (falsely) the quota was met, rather than 150 tons (50% of actual output), which would signal failure. In so doing, the amount left over was only 50 tons (the difference between 300 tons of actual output and 250 tons sent to the city. The result was a human tragedy. Tens of millions of Chinese peasants died from starvation.

  To be sure, the cause was not the Fei-Ranis Model. Rather, it was unrealistic agricultural output targets set by central government planners, coupled with a political structure in which admitting failure to meet those targets hardly was encouraged. Still, the Model dwells on industrialization and conveys a high degree of comfort with the status quo in the agricultural sector until the Transition Point.

  Travel observations, coupled with the concern about ignoring an entire economic sector, have led to the development of a variation of the Labor Surplus Model. The variation is not radical, in the sense that the story remains the same – the transformation from an economy predicated on agriculture to one driven by industry. Hence, the focus remains on two sectors. The variation is called the “Neo-Classical Two Sector Model” (discussed below).

• 3rd:
  Should International Trade Be Highlighted?

  Another less-than-realistic aspect of Labor Surplus Models concerns international trade. As highlighted earlier, these Models do not ascribe any explicit role to exports or imports in the industrialization process. Most developing and least developed countries
engage in some trade, however small. In fact, the need to do so can be seen even within a Labor Surplus framework. These Models ascribe the most important role in the story of growth to industrialization, not trade.

As workers are pulled out of the agricultural sector, their consumption level may rise, because they are paid slightly higher wages in industry than the subsistence wage they got as farmers. Domestic production might not satisfy entirely their consumption demand. Some consumer goods may need to be imported to meet the wants of the burgeoning urban population. Were agricultural output to fall because industrialization proceeds beyond the point of extracting surplus labor, then it may be necessary to import food items. As for exports, they may result from higher industrial output. If not all output of a particular kind of merchandise can be consumed directly, then the excess may be exported abroad in exchange for needed imports. In brief, while trade is not the protagonist in a Labor Surplus Model, it could well be an important supporting actor.

VI. Neo-Classical Two-Sector Model

- Different Assumptions, Different Perspectives

In the Neo-Classical Two-Sector Model, the marginal product of labor never is zero. It cannot be, because by assumption there are no surplus workers. Every worker contributes something positive to total farm output. Thus, if the size of a less developed country’s population increases, and consequently the size of its agricultural labor force increases, then total farm output will rise. Conversely, if any workers are taken off of farms and put into factories, farm output will fall. No surplus labor exists for transfer to the industrial sector without diminishing agricultural output. In terms of Graph 3-5, and Panel III of Graph 3-6, no portion of the Labor Supply curve is perfectly elastic.

This assumption means that wages paid to industrial workers equal the marginal product of those workers, and there is no “breathing space” for the captains of industry to pay a wage rate that equals (or is just above) the subsistence wage in agriculture.

The distinction between the Fei-Ranis and Neo-Classical Two-Sector Models can be put in terms of population growth and its impact on the quantity of labor in rural areas and \textit{per capita} food consumption. In the Fei-Ranis Model, an increase in farm labor adds to the pool of surplus labor. Because that pool does not add to total agricultural output, the difficulty is one of having more mouths to feed without an increase in output. In the Neo-Classical Two-Sector Model, the increased population and agricultural labor force means more mouths to feed. But, the added agricultural workers are productive. Hence, there is more food to go around. In the first Model, the risk of population growth is that \textit{per capita} food consumption will fall. In the variant Model, this risk does not exist.

The difference between the two Models also can be seen on the Transition Point. In the Fei-Ranis Model, an increase in the pool of labor resulting from population growth means an extension further into the future of the Transition Point. That is, the Point at

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60 This discussion draws on GILLIS ET AL., 57-59.
which industrial wages must rise to attract workers off of the farms is deferred. In the Neo-
Classical Two-Sector Model, there is no Transition Point at such. All farm workers are
productive, hence industrialists must offer ever-higher wages if they are to attract these
workers into their factories. Put simply, the Fei-Ranis Model gives industrialists a perfectly
elastic segment of the Labor Supply gives during early phases of the transition. The Neo-
Classical Model does not give industrialists that luxury.

Still another way to see the difference between the Models is to consider the terms
of trade. Because there is a Transition Point in the Fei-Ranis Model, there is room to
industrialize without affecting the terms of trade of agricultural relative to industrial
products. That is not the case with the Neo-Classical Two-Sector Model. Because all
workers have a positive marginal productivity and output falls when they are transferred to
the industrial sector, agricultural commodity prices begin to rise immediately (ceteris
paribus) with the transfer of these workers.

The only way industrialization can proceed is to prevent a dramatic deterioration in
the terms of trade for industry by finding ways to maintain or increase agricultural output.
(An increase in other factor inputs, such as capital and technology, a better mix of factor
inputs, and food imports in exchange for industrial output, are the principal policy tools.)
Put bluntly, the gravest threat to industrialization in the Neo-Classical Two-Sector Model
is a stagnant or declining agricultural sector (owing to the transfer of workers from farms
to factories), coupled with rising industrial wage rates (owing to the need to attract
productive workers off of the farms). The end results can be too little to eat for a large
number of people, a decline in industrial profitability, a lack of funds for new capital
investments, and even widespread civil unrest.

● Model Depiction

The Two-Sector Neo-Classical Model is depicted in Graph 3-7. Like the Fei-Ranis
Labor Surplus Model in Graph 3-6, there are three panels. Panel One is the Agricultural
Production Function, Panel II is the Marginal Productivity of Labor in the Agricultural
Sector, and Panel III is the Industrial Labor Market (i.e., the Supply and Demand Curves
for Labor). Also like the Fei-Ranis Model, a movement horizontally (along the x-axis) of
any of the Panels represents an increase in the quantity of labor in the industrial sector, and
a concomitant decrease in the quantity of labor in the agricultural sector.

In Panel I of the Two-Sector Neo-Classical Model, the Agricultural Production
Function indicates a steady diminution in total farm output as workers are withdrawn from
the agricultural sector (i.e., moving rightward away from the origin (O) on the horizontal
(x-) axis corresponds to withdrawing workers from agriculture, and putting them into the
industry, so the Function declines). Recall that, as with the Fei-Ranis Model in Graph 3-6,
an upward movement along the vertical (y-) axis represents an increase in total output. The
Agricultural Production Function slopes downward, thus indicating an output decline.
Graph 3-7
Neo-Classical Two-Sector Model

**Panel I: Agricultural Production Function**

- **Total Output in Agricultural Sector**
  - Increasing output
- **Total workforce in agriculture**
- **Quantity of Labor in Agricultural Sector**
  - (decreasing number of workers in agricultural sector)

**Panel II: Agricultural Labor Market**

- **Marginal Productivity of Labor in Agriculture**
- **Total workforce in agriculture**
- **Quantity of Labor in Agricultural Sector**
  - (decreasing number of workers in agricultural sector)

**Panel III: Industrial Labor Market**

- **Supply and Demand for Labor in Industry**
- **Wage Rates in Industrial Sector**
- **Subsistence Wage (or just above)**
- **Labor Supply**
  - (fast-deteriorating terms of trade)
  - (slow-deteriorating terms of trade)
- **Demand Curve #1**
- **Demand Curve #2**
- **Quantity of Labor in Industrial Sector**
  - (increasing number of workers in industrial sector)
This decline in Panel I is a direct result of the trend in marginal productivity depicted in Panel II. By assumption, in the agricultural sector, there is no surplus labor. Hence, marginal productivity never falls to subsistence levels, much less zero or negative ranges. Every worker “matters,” in the sense of contributing positively toward total farm output. As workers are withdrawn from the agricultural sector, the marginal productivity of the remaining workers rises. The reasons are the same as those in the Fei-Ranis context: less crowded farms, less over-farming, and more efficient use of inputs.

The key departure from the Fei-Ranis context is that marginal productivity rises steadily and never is zero or negative. That departure has obvious implications for the industrial labor market, which is depicted in Panel III. There is no portion of the Labor Supply curve that is perfectly elastic. Because that curve is, in effect, the marginal productivity curve of Panel II, and because marginal productivity never is flat, it follows that the Labor Supply curve must slope upwards from the outset.

Likewise, there is no minimum subsistence wage in effect at any point. The wage rate in the industrial sector depends on the marginal productivity of workers in the agricultural sector, because it is those workers who must be attracted to urban factories if industrialization is to proceed. In common sense terms, Panel III highlights the implications of the assumption of no surplus agricultural labor.

Farm workers earn their marginal product, which is above subsistence. To entice them off of the farm, they must be paid a higher wage than what they are earning in the agricultural sector. They would be indifferent if paid exactly the same wage rate in both sectors. To coax them to move, they will need to receive a premium over the farm wage rate, which in turn depends on their marginal productivity in farming. At a minimum, that premium should cover the costs of moving to, and re-establishing in, the city.

The larger the number of farmers who leave for factories, and thus the smaller the quantity of labor in the agricultural sector, the higher the marginal product of the remaining farm workers. Moreover, because total farm output falls owing to the withdrawal of productive workers, agricultural commodity prices rise (ceteris paribus). In other words, the remaining farmers are both more productive and able to earn more for their output. These remaining farmers rationally ask themselves: “Why leave farming for a factory job unless it pays better, particularly when I am earning more because the food I grow is fetching higher prices than before given the overall decline in farm output?”

The “bottom line” result is that industrial wages must rise as demand for labor on the part of industrialists rise. This result is reinforced by the rise in agricultural commodity prices. Workers know they face these rising prices, hence they will require more from their factory jobs so as to ensure they can pay for food. In other words, the Labor Supply curve to industry rises for two reasons: rising marginal productivity, and hence rising wage rates, in the agricultural sector; and the worsening terms of trade of agriculture to industry (i.e., rising food costs relative to industrial products).
The second reason explains why two Labor Supply curves are depicted in Panel III. If food prices rise fast with industrialization, then urban factory workers require higher wages than if they rise slowly. That is, the more quickly the terms of trade of agriculture to industry deteriorate, the more quickly wages must rise. The upper Labor Supply curve reflects rapidly rising wages in consequence of fast-deteriorating terms of trade.

To be sure, it is important not to exaggerate the differences between the Fei-Ranis Labor Surplus and Neo-Classical Two-Sector Models. Both Models lead to the same end result: to continue industrialization, capitalists must pay more for workers to attract them away from the agricultural sector. In the Neo-Classical Model, capitalists face this problem from the outset, because they do not have a pool of surplus labor on which to draw, and hence cannot “get away with” paying subsistence wages (or just above them) during the early phases of industrialization. In the Fei-Ranis Model, capitalists do have this pool. They draw upon it and, ultimately exhaust it. When it is used up, then the capitalist in the Fei-Ranis world is in the same position in the Neo-Classical world.

VII. Patterns of Development and 1975 Chenery-Syrquin Study

Labor Surplus Models teach that transformation from agriculture to industry is the story of modern economic growth told for, and by, all countries. So, it is tempting to inquire whether there are quantitative patterns of growth true for all countries. For example, might it be the case that the share of agriculture in GNP remains at or above X% until per capita GNP rises above $Y, and that once the $Y per capita GNP threshold is reached, the share begins to fall below X%? This inquiry is precisely the one pursued by the great development economists, Hollis B. Chenery and Moises Syrquin.61

They answered the question in the negative. No pattern held true for all countries, though patterns could be discerned within three categories of countries: large countries (those whose population in 1960 exceeded 15 million), small countries that emphasized the export of primary commodities (i.e., agricultural and mining products), and small countries that focused on industrial exports. Since Chenery and Syrquin published their results, other development economists have pursued the same inquiry using similar methodologies. But, no constant, enduring quantitative relationship linking agricultural and industrial shares of GNP with per capita GNP levels exists. While the shares to change with per capita GNP growth, the precise transformation points are diverse.

To be sure, in any diverse pattern, an average can be calculated, and development economists have done just that.62 The average per capita GNP thresholds of note are $600 and $1,600 (in 1983 prices). At a per capita GNP level of $600, the share of primary commodities in GNP in large developing countries (those with a population of roughly 15-50 million) begins to fall below 32%. At a per capita GNP level of $1,600, that share averages 19%.

62 See GILLIS ET AL., 51.
There is a considerable risk in the calculation of an average. The average is what a country might expect, on the understanding that there is a large variance possible. But, it is not at all designed as a target that embodies an efficient allocation of productive resources. A height-weight chart on the wall in the office of a physician contains broad ranges for acceptable individual health. Averages in patterns of growth across countries and over time must be viewed with the same flexible attitude.
Chapter 4

TRADE, GROWTH, AND POVERTY: EXPORT ORIENTATION

I. Industrialization and Unbalanced Growth

Models of economic growth – including labor Surplus Models, such as the Fei-Ranis Model or of any other ilk (discussed in a different Chapter) – presume a clear understanding of what “industrialization” means. In a vague sense, the casual observer typically thinks of building factories and “making stuff.” But, it is important to be precise. What, exactly, is involved in the process of industrialization? The details of the answer vary from among less developed countries. And, the question raises the matter of emphasis – of balanced versus unbalanced growth, which is worth considering now.

Yet, there is a key question: “what economic benefit is there for a small, impoverished country to join, or participate in, the GATT-WTO system?” Typically, behind this question lies a hidden presumption: the country does not yet have a diversified economy. At best, it may be competent at exporting one or two products. WTO entry means relaxing tariff and NTBs, not only on those products, but also on a large number of other items. Participation means subjecting the country to the possibility of being named as a respondent in a remedial action – an AD, CVD, or safeguard suit – brought by a complainant. Often, the complainant will be a major export market for producers in the respondent – otherwise why bring the case in the first place?

The most obvious answer is membership in the WTO not only will help the small, impoverished country realize comparative advantages (because of existing and planned commitments of the Members to trade liberalization), but also will ensure rich, powerful countries are bound by the same set of rules for resolving disputes (namely, the Uruguay Round DSU). That is the answer that has been sold to SVEs, such as Tonga, which have acceded to the WTO. However, this answer rarely is persuasive, and it even may be naïve.

As for the idea of a level playing field created by the DSU in dispute resolution, the questioner advocating developing country interests is sure to rebut with two points.

First, the hegemonic powers do not always “play by the rules,” particularly as regards compliance – witness the 1997 Bananas, 1998 Beef Hormones, and 2000 Foreign Sales Corporations cases (discussed in separate Chapters) in the first five years of experience with the DSU. Second, Third World countries do not yet, for the most part, have the resources – finances or human capital – to prosecute or defend cases.

Documents References:
(1) Havana (ITO) Charter Preamble
(2) GATT Preamble
(3) WTO Agreement Preamble
More fundamentally, the answer is wanting because of a fear (sometimes unstated) in the mind of the questioner that the less developed country will lose its few comparative advantages, and never be able to develop any more advantages. Reciting the virtues of free trade based on the comparative advantage model actually can exacerbate these fears. In the Smith-Ricardo world, the focus is on development of a sector in which a less developed country has a comparative advantage, based on cost. But, what if making decisions based solely on relative cost advantages reinforces the country’s position of dependence on just one or a few sectors?


Among many leaders of less developed countries, the conventional wisdom is industrialization mandates a certain growth pattern, and that pattern typically requires emphasis on heavy industries like cars, steel, and petrochemicals. The consequent policy prescription is support for nurturing these infant domestic industries with subsidies and trade barriers. In a word, Chenery says “no” to this conventional wisdom.

Perhaps the most important insight from his studies is that no single pattern of industrialization exists that “must” be followed by a less developed country as it tries to climb out of poverty. Indeed, his work is a testament to the impossibility of identifying a handful of patterns of transformation from an agrarian economy to an industrial economy to which a poor country “must” adhere. To say that industrialization necessarily requires domestic car, steel, petrochemical industries, and therefore support and trade policies to ensure their success against potential foreign competition, simply is untrue. (It might be remembered here that Belgium, Denmark, Finland, Holland, Norway, and Switzerland have no domestic car, steel, or petrochemical industries, yet they are highly developed countries.) There are “horses for courses.” Each country can industrialize in a manner that best suits its circumstances.


At the time, Mr. Chenery was Vice President for Development Policy at the World Bank, and co-authored Patterns of Development with another famous development economist, Moises Syrquin, then a Senior Lecturer in Economics at Bar-Ilan University in Israel.

Mr. Chenery co-authored Industrialization and Growth with Professor Syrquin, and another acclaimed development economist, Sherman Robinson. See also Hollis B. Chenery & Lance J. Taylor, Development Patterns: Among Countries and Over Time, 50 Review of Economics and Statistics 391-416 (November 1968).
Chenery’s work is not a tribute to unplanned industrialization. As just intimated, there are certain factor endowments that might lead a country to stress growth in a particular industry early on. For example, the existence of a large pool of unskilled surplus agricultural workers, coupled with a lack of sophisticated machine tools, would suggest focusing on low-value added products. Garments made with foot-pedal sewing machines might be an example; civilian aircraft ought to be avoided for the time being.

Footwear might be another example. But, these sorts of examples bring us back to the problem of diversification. A less developed country that produces only garments or shoes surely will make more than it needs for domestic consumption. Worse yet, if farm incomes have not risen during this early phase of industrialization – because labor surplus still exists in the agricultural sector, hence in terms of the Fei-Ranis Labor Surplus Model, owners of the garment and shoe factories still face a perfectly elastic labour supply curve – then farmers might not be able to afford the domestically-made shoes. The result might be the garment and shoe factories go bankrupt, because there is insufficient domestic demand for their product. Inventories pile up in the factory warehouses.

There are two ways out of this problem. The first strategy is “balanced growth,” which may be coupled with an open economy. The second strategy is “unbalanced growth,” coupled with an economy open to international trade. The distinction between them is seen in Graph 4-1. The line representing a balanced growth strategy suggests that a Third World country produces output in different sectors simultaneously, such as T&A and consumer electronics. Neither sector is emphasized at the expense of the other. The line representing an unbalanced growth strategy is a path of focusing on the output of one sector at one phase of industrialization, and another sector at a later phase.

First, why not attempt a balanced growth strategy, which as its name suggests, means that more than just one or two industrial products are produced? It directly addresses the problem of a non-diversified economy. Advocates of this strategy include Ragnar Nurkse (1907-1959) and Paul Rosenstein-Rodan (1902-1985), who wrote about it in the 1940s and 1950s. Factories to produce other low-value added industrial products – say bicycles and calculators – could be built. Workers in the garment and shoe factories buy the domestically-made bicycles and calculators, and conversely the bicycle and calculator workers buy garments and shoes. Each sector supports the other, and industrialization proceeds in a balanced way.

67 This discussion of the balanced growth strategy draws on GILLIS ET AL., 62. The discussion of the unbalanced growth strategy draws on id. at 63. Graph 60-5, comparing the strategies, is found on id. at 64.  
Graph 4-1
Balanced versus Unbalanced Growth Strategies

Output of Industrial Sector A (e.g., textiles)

Balanced Growth Strategy

Unbalanced Growth Strategy

Output of Industrial Sector B (e.g., consumer electronics)

In addition, if the economy is open to international trade, industrial surpluses could be exported in exchange for agricultural commodities, or for industrial products the country is not yet producing. Note there also is balance on both the demand and supply side. The factories that are built respond to consumption patterns (the demand side), and also help alleviate shortages of necessary products (the supply side).

While it seems to be straightforward common sense, balanced growth strategy is not without critics. In the words of some development economists, it is “a counsel of despair.” It tells a Third World country that if it is not successful in starting up several industries simultaneously, then it is condemned to its status. That is a difficult task for less developed countries, which by definition face factor resource constraints and limited funding. When these problems are compounded by political instability, corruption, and a breakdown in law and order, balanced growth is a quixotic prescription. The balanced growth strategy demands a “big push,” or “critical minimum effort.” That “push” or “effort” must be sustained for years. Many countries cannot possibly meet this challenge.

Why not, then, fall back on the second strategy? This alternative also seems to accord with common sense economic ideas, namely, comparative advantage. A less developed country can specialize in the production of one or a few industrial products, and

69 GILLIS ET AL., 62.
70 GILLIS ET AL., 63.
then export the surplus of industrial goods in exchange for agricultural commodities. That way, any slack in domestic demand can be offset through export demand (assuming, of course, the export markets are open and not suffering from recession or depression). Overseas consumers recognize the comparative advantage of the less developed country in garments and shoes, and begin buying them. Inventory levels fall, and the incomes of the factory workers rise, because of an open economy, i.e., one that participates in the multilateral (or at least regional) trading system.

Clearly, the second strategy is one of unbalanced growth, because industrialization proceeds for one or a few goods, but not for several goods simultaneously. One of the greats in the theory of development economics, Albert O. Hirschman (1915-2013), argues in favor of it in his 1958 book, *The Strategy of Economic Development*. He calls forth several historical examples to make the case that many countries have specialized in a select few industrial sectors at the early stages of economic growth.

Contrary to the fears of balanced growth advocates like Nurkse and Rosenstein-Rodan, his work indicates that in most instances, Hirschman’s work suggests concentration has not led to over-production and under-consumption of industrial output. After all, in a Third World country in early stages of development, the problem is one of too few factories, not too many. Hence, excess production ought to be less of a worry than an inability to meet demand.

During early industrialization phases, the difficulties are setting factories up fast, accelerating the shift of surplus labor from the agricultural to industrial sector, training that surplus labor for factory jobs, positioning them in those jobs, ensuring a steady flow of output of satisfactory quality, and getting that output to market. These difficulties are yet more poignant because the output produced — say, garments and shoes — has millions of ready, willing, and able buyers, both domestically and overseas. That output tends to be simple, low-priced manufactured necessity items. Failure to meet demand in a timely fashion could mean that another less developed country will capture the market. Consider competition between Bangladesh and Vietnam in textiles, or Brazil and India in shoes.

Suppose this forecast proves wrong for a Third World country. It could be wrong for a variety of reasons. First, export demand might not materialize, or might slacken after a period of robustness.

Second, the industry in which the Third World country seeks a comparative advantage faces competition from imports. This competition might not be severe enough to undermine the possibility of gaining a comparative advantage in the future. But, it might be serious enough to give credence to calls for protection for a few years until the industry grows out of its infancy.

Third, to take a more politicized example, the leadership in a Third World country might seek to avoid depending on foreign markets in wealthy countries for industrial product demand? Following a school of thought in development economics called “Dependency Theory” (discussed later), which warns of excess reliance by peripheral (i.e.,...
Third World) countries on “center” (i.e., First World) countries through trade, the leaders may attempt to eschew export-import links with developed countries. The mixed political and economic aim is to avoid reliance for export earnings and, thereby, industrialization, on the center. To fall into dependence is to surrender to neo-colonialism, whereby modern economic growth in the developed country is held hostage to the interests of politicians and corporate chieftains in the First World.

One problem with both balanced and unbalanced growth is that they do not tell us what to do about the agricultural sector. Balance between this sector and the industrial sector is important too. The Fei-Ranis Labor Surplus Model teaches us that those incomes in the agricultural sector will remain flat, at subsistence level, until the Transition Point. Thereafter, it predicts the terms of trade of industry to agriculture will shift against the industrial sector. Exactly how to manage this transition, and deal with the shift in the terms of trade, is not immediately obvious from either strategy.

Possibly in the long run, most countries end up with a balanced growth strategy. Some countries might use this strategy throughout the course of modern economic growth. A large number of Third World countries might not, for the reasons mentioned above – namely, the reality of one or a few comparative advantages, coupled with an inability to mount a big push or critical minimum effort. In the end, however, even the countries that pursue unbalanced growth early on in the industrialization process will move towards a more balanced strategy. Why?

Because, to borrow Hirschman’s concept, there are “backward” and “forward” linkages in every economy. In brief, because of his confidence that linkages ultimately would compel balance in the industrialization process, Hirschman was not overly troubled with unbalanced growth early on in this process.

Suppose a country concentrates on the development of a steel industry. As steel output increases, economic actors – namely, entrepreneurs – will take note of this ability and set up factories producing goods that take advantage of the domestic steel output. So, for instance, they might set up factories making chain-link fences, pipes, and cars. The linkage is a forward one – forward from the steel sector to the steel-using sector. What about backward linkages? To make steel, the key inputs are iron, coke, and blast furnaces. Iron and coke must be mined, and blast furnaces must be produced. Thus, entrepreneurs will step into to provide the necessary inputs for the nascent steel industry – iron and coke mines will open up, as will blast furnace factories.

When, exactly, the linkages are made and balanced economic growth proceeds will vary from one less developed country to the next. Where there is unbalanced growth, international trade may play a role: steel output will be exported; and iron, coke, and blast furnaces will be imported. Where there is balanced growth, there may be less reliance on exports and imports, simply by virtue of domestic demand for steel output and domestic supplies of steel inputs. The point is that with unbalanced growth, entrepreneurial opportunities created by linkage pressures (the availability of steel output and the need for steel inputs) will serve as a check against long-run imbalances. To be sure, if entrepreneurs
are not free to seize these opportunities – for political or economic reasons – then the imbalances can remain.

II. Growth, Poverty, and Kuznets Inverted U Theory

Before addressing the relationship between trade and poverty, consider the relationship between growth and poverty. Here, two preliminary points are relevant. The first point concerns the relationship between growth rates and income levels. It is sometimes handy to know two mathematical relationships. One relationship is that if per capita GNP grows at 2% annually, then average per capita GNP will double in 35 years. A second relationship is that if per capita GNP grows at 4% annually, then average per capita GNP will double in less than one generation (which is roughly 20 years).

These relationships highlight the relevance of the rate of growth to rises in income levels. They also reinforce common sense, namely, faster growth means reaching a higher level of income faster. And, the relationships help us understand some of the tremendous gaps within the Third World. Since 1965, virtually all of less developed countries with annual per capita GNP growth rates in excess of 4% have been in Asia. In contrast, nearly all of the countries with declining average per capita GNP levels, which reflect declining growth rates, have been in Sub-Saharan Africa.

The second point is about the relationship between growth and poverty. As a brief account of Trade Liberalization and Poverty implies, during the last several decades, both academic and practicing development economists have devoted increasing attention not only to the relationship between growth and income, but also to the closely related subject of the relationship between growth and poverty. Thus, Professor Simon Kuznets (1901-1985) did far more than develop the title “modern economic growth.” He also invented the so-called “Inverted U Theory.” Graph 4-2 depicts this Theory, and the curve depicted therein is widely known as the “Kuznets Curve.”

As its name suggests, the Inverted U Theory states that the relationship between (1) growth in per capita GNP and (2) inequality in the distribution of income resembles the letter “U,” but upside down. In other words, as per capita GNP rises, with industrialization, inequality in the distribution of income also rises – at least initially, and for a while. This state of affairs is found in many growing less developed countries. However, the increases in inequality tend to level off over time, with continued and advanced industrialization, as per capita GNP continues to rise to intermediate levels. Thereafter, further advances in per capita GNP lead to declines in inequality. That state of affairs, in which income inequality is reduced with increases in per capita GNP, characterizes many developed countries.

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71 This discussion draws on GILLIS ET AL., 80-81.
A discussion of empirical tests of Kuznets Inverted U Theory is beyond the present scope. But, it is worth pointing out the Theory has received considerable support.\footnote{See \textit{Gillis et al.}, 81, and the studies cited therein.}

That support comes from cross-sectional data, especially drawn from Latin American countries. To be sure, the Theory remains controversial, and some time-series analyses do not reveal a discernible inverted U. Moreover, country case studies are not always consistent with the Theory. Consider Sri Lanka, a poor country with relatively equal income distribution. It can be contrasted with Korea and Taiwan, which have been able to achieve rapid economic growth without excessively unequal income distribution.

\section*{III. Piketty Critique of Kuznets Curve}

By no means is the Kuznets Inverted U Theory universally accepted. French economist Thomas Piketty (1971-), for example, takes issue with the argument of Kuznets that long-term inequality levels off thanks to structural economic changes, namely, the transformation of the labor force from low-productivity agriculture to high-productivity industry, and technological progress associated with that transformation. Piketty argues that wage inequality does not, in fact, decrease – only the values of estates do, if there are deliberate policy interventions such as progressive income taxation – and points to a bevy of data showing how (for example) inequality in late 20\textsuperscript{th} and early 21\textsuperscript{st} century America has returned to the level of the 1930s. His data, of course, are more up to date than those of Kuznets, who worked in the 1950s.

Thus, in \textit{Capital in the Twenty-First Century} (2013), Piketty argues inequality is endemic to Capitalism, and specifically that in developed countries, the rate of return to capital consistently exceeds the rate of economic growth, resulting in ever-greater wealth inequality. He calls for appropriate interventions, including a progressive, global tax on
wealth, without which this inequality not only will it persist, but also will undermine political stability.

IV. Terms of Trade

Does participation in the international trading system help or hinder a country’s economic growth? This question obviously concerns the trade-growth linkage. One statistic often examined is the TOT, or more technically, the “Net Barter TOT.”

International trade and development economists define the Net Barter TOT as the ratio of export to import prices. That is:

\[
\text{TOT} = \frac{\text{Index of prices of merchandise exported by a country}}{\text{Index of prices of merchandise imported by a country}} = \frac{P_{\text{EX}}}{P_{\text{IM}}}
\]

The TOT measures the purchasing power of a country, in the sense of how much it can buy (import) from what it sells (exports). Thus, the TOT as defined above also are known as the “net barter terms of trade.”

The TOT of a country are “unfavorable” or “deteriorating” if prices of imported merchandise rise, prices of exported merchandise fall, or both. The intuition is readily apparent. Import prices are akin to expenditures, and export prices are akin to revenue, whether of a household or firm. High or rising expenses, low or falling revenues, or both can imperil a family or business. So, too, it is for a country. One ill effect of unfavorable TOT is a decline in the share of world trade accounted for by a country.

Advocates of Export Orientation policy (discussed below) argue the TOT of a country rise through trade. In contrast, advocates of Import Substitution (also discussed below), being export pessimists, point out instances in which increased trade led to deteriorating TOT of a country. Notwithstanding this policy debate, TOT are a useful tool to explore the effects of trade on an economy.

Occasionally, international trade and development economists sometimes rely on a statistic known as the “Income TOT,” which is closely related to the Net Barter TOT. The arithmetic formula for Income TOT is:

\[
\frac{P_{\text{EX}} \times Q_{\text{EX}}}{P_{\text{IM}}}
\]

where \(Q_{\text{EX}}\) = quantity of goods exported

Hence, the numerator represents export revenues (the price of exports multiplied by the volume of those exports). Studying Income TOT is it reveals export revenues generated by
a country, which the country can use to pay for imports. That is, it gives a more direct sense than Net Barter TOT of what a country earns from trade and, thereby, what it can afford to spend.

V. Export Orientation versus Import Substitution

In their struggle to boost growth and cut poverty, developing and least developed countries have two basic choices about trade policy: Export Orientation or Import Substitution. That was true before the advent of GATT, and remains true with GATT and the WTO agreements. But, as the GATT-WTO system is predicated on free trade principles, they incline toward Export Orientation, while disciplining Import Substitution. The choices are radically different, in both underlying theory and practical implications.

Export Orientation is premised on Ricardo’s Law of Comparative Advantage, and on a presumed causal link between trade and growth. This policy calls for openness to trade, not only to implement the Law and thereby realize the net gains of which Ricardo wrote, but also to boost national income. Through free (or freer) trade, a country specializes in production of goods in which it has a comparative cost advantage, leading to an efficient division of labor and allocation of resources. It attains higher levels of social utility from a wider range of consumption choices at cheaper prices than would exist without trade.

Advocates of this policy generally agree with the proposition “the more trade, the better.” For them, trade is an engine of growth, a key stimulant for output. Their paragon is the East Asian “Tigers” – Hong Kong, Korea, Singapore, and Taiwan.73 Their policy is to expand overseas markets, and dismantle domestic trade barriers. They look for toward FTAs or CUs, and multilateral deals, and look askance at protectionist constituencies.

In contrast, Import Substitution is premised on a Marxist-oriented view trade with rich nations is inherently exploitative. Such trade reinforces an international division of labor that confines poor countries in agricultural endeavors. They plant, grow, and harvest primary products, and extract natural resources, the world market prices of which tend to be low and gyrate. Rich countries benefit from cheap food and natural resources coming from poor countries, and specialize in high-value added manufactured merchandise, as well as services. Whereas Export Orientation advocates agree trade is an engine of growth, Import Substitution proponents are “export pessimists.” Export pessimism means trade cannot propel a country to higher levels of growth.

Import Substitution advocates argue that for the Third World, “the more trade, the worse,” because it traps poor countries in the role of sending raw materials to the mighty industrial and service economies of the First World. Consequently, they call for tariff and non-tariff barriers against imports, and favor local production over foreign-made goods. That way, infant industries in poor countries have the chance to grow, and the risk of dependence on manufactured items and services from rich nations is minimized. They tout as successful exemplars India and some Latin American countries.

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73 The list of Tigers varies somewhat depending on the study. In a 1993 publication, the World Bank identified seven Tigers, and used yet another acronym, HPAEs, for “High Performing Asian Economies.”
VI. Market-Based Theory for Export Orientation

Export Orientation calls for reliance on international markets to stimulate growth. In contrast to the interventionist role of a government in implementing Import Substitution, with Export Orientation a government takes a neutral stance. Its primary focus is creation and maintenance of an environment favorable to the free market, with key features of this environment being the rule of law and transparency to create as level a playing field as possible for all economic actors (large or small, foreign or domestic).

In particular, a government does not encourage domestic industries to source inputs from in-country suppliers, nor does it promote (e.g., through protection, subsidies, or tax breaks) export-oriented over other industries. It minimizes trade barriers, ensuring tariffs and quotas are low or zero on inputs needed for finished products, and eliminates artificial disincentives to exportation (e.g., export licenses or taxes). The government relies on market forces – particularly world market price signals – to determine the most efficient, profitable allocation of factors of production (capital, human capital, labor, land, and technology). The result is the manufacture of goods in which a comparative advantage exists, or reasonably can be expected through private capital investment.

Export Orientation draws on the intellectual heritage of the Classical economist, David Ricardo (1772-1823), and Neo-Classical economists. Net gains to a country from trade liberalization matter. Specialization of production leads to an efficient allocation of factor resources based on comparative cost advantage. The source of relative cost advantages is relative endowments of factor resources among countries. Labor-rich countries focus on labor-intensive goods, land-abundant countries on land-intensive goods, and so on.

Initially, many developing countries find their comparative advantage in labor-intensive, low-value added manufactured products, along with primary agricultural products. As the skill level of the labor force develops, and as technology is imported, the country should be able to move into higher-value added manufacturing that relies more intensively on human capital than before. Overall, this focus contrasts with Import Substitution, which typically involves production of capital-intensive goods even if a country is not relatively well endowed with capital.

Moreover, Export Orientation takes advantage of a scale effect. The world market for virtually every product is by definition larger than the market in any one country (the rare exceptions being where a product is produced and consumed in only one country). Producers can, therefore, build productive capacity, employ more factors of production, become efficient and develop economies of scale, all with a view to serving a larger world, rather than a smaller domestic, market. In turn, production of an exportable surplus may be traded for products in which a comparative advantage is lacking.

Through exportation, an economy advances from an agrarian-based to a modern industrial one. Complementing it is FDI, which is attracted to a country in part by the
neutral stance of its government, and flows in response to market forces. In keeping with the Product Life Cycle Hypothesis, put forth by a leading scholar of MNCs, Professor Raymond Vernon (1913-1999), FDI may lead to shifts in the locus of production. After a product is invented and marketed in a developed country, and the manufacturing process becomes standardized, production moves to developing countries. IP the product embodies is transferred to local companies (or the original periods of protection expire). Then, developing countries move through, at a phase behind developed countries, the Cycle.

As for consumers, they have before them a wider array of alternatives from which to choose, at lower prices, than without trade. The gains from production specialization and higher consumption outweigh losses from tariff revenue or quota rents, which are no longer reaped with free trade, plus losses to producers whose enterprises are shut down or downsized because of a lack of comparative advantage. In principle, the “winners” from trade can compensate the “losers” by agreeing to share some of their gain.

Another point in favor of Export Orientation concerns TOT. In theory trade liberalization should improve the TOT of a country. In respect of import prices, $P_{IM}$, as well domestic like and substitute product prices, they should fall for two reasons. (Recall $P_{IM}$ is the denominator of the TOT ratio.) First, trade liberalization means a drop in tariff and non-tariff barriers. Second, this liberalization leads to increased competition. As regards export prices, $P_{EX}$, they should rise with freer trade. (Recall $P_{EX}$ is the numerator of the TOT ratio.) The demand of foreign consumers supplements demand by local consumers for the merchandise in question. With more consumers after the same products, the price of the products should rise (assuming all other factors are held constant, i.e., ceteris paribus, most notably, product supply). Thus, Export Orientation proponents argue greater openness should improve the TOT of a country.

Not surprisingly, the theory of Export Orientation also relies on the Classical and Neo-Classical Economic critique of tariffs and NTBs. To recap, this theory demonstrates such barriers impose a net welfare cost on a country in comparison with the free-trade equilibrium. Tariffs and quotas provide the protected sector with more producer surplus than before (i.e., producers earn more than the marginal cost of production), and offer the government tariff revenue or the protected sector quota rents. These benefits are outweighed by the loss of consumer surplus, which means there is a decline in the number of consumers willing and able to pay a higher price for the protected product than is charged. Protection raises that price, and consequently cuts into consumer surplus. The net negative effect counsels against increasing trade barriers, and indicates dismantling such barriers, even unilaterally, is economically rationale.

Export Orientation also is backed by the promise of dynamic gains from trade. When a country imports goods, it also imports ideas and IP the goods embody. Domestic entrepreneurs may be encouraged to enter the market and make a like product. Existing producers may be spurred by the competition from overseas. Foreign investors may enter the market to make the product. The result is higher output, which generates surplus income, and thereby savings to be channeled into investment. That new investment can improve production techniques and quality, leading to further output and innovation.
VII. Risk of Immiserizing Growth

To be sure, export orientation entails a risk of immiserizing growth, especially as regards primary commodities, if a country is a large enough supplier of a particular commodity (because increased exports of the product could drive down world market prices). Professors Harry G. Johnson (1923-1977), in 1955, and working independently, Jagdish Bhagwati (1934-), in 1958, developed the concept of “immiserizing growth,”74 They meant a scenario in which an exporting country becomes worse off after economic growth than before economic growth.

That scenario could occur from export-oriented growth that causes a fall in the TOT of the exporting country. Of course, TOT deterioration could happen only if that exporting country is sufficiently influential in one or more export markets to cause the TOT deterioration, i.e., it is such a large supplier of a commodity that its exports cause an outward shift in the world supply curve of that commodity, and thus a fall in the price of that commodity (ceteris paribus). Any benefit from GDP growth associated with exports is more than offset by the decline in the TOT. In effect, the country is a victim of its own success – its growth immiserates (i.e., impoverishes, or makes miserable) itself.

Nevertheless, the remedy for immiserizing growth is not import substitution. Rather, it is export diversification. That is, the country should diversify away from exports of the commodities that cause immiserizing growth, and into manufactured goods.

VIII. Evidence for Export Orientation

To what extent does empirical evidence support Export Orientation? The famously cited examples of success are the East Asian Tigers. Within each Tiger, the general cultural, economic, and political environment is favorable to Export Orientation. In particular, the Tigers benefit from a mix of factors:

1. **Sound Macroeconomic Management**
   Fiscal expenditures are sensible (not profligate or grossly imbalanced), taxation simple and reasonably low (sometimes involving a flat tax), and monetary policy stable to ensure low levels of inflation. Government commitment to these policies is credible, hence businesses can rely on certainty and predictability in macroeconomic management.

2. **Strong Infrastructure**
   Communication networks, port facilities, transportation links, and utilities support economic growth. The government attends to needed upgrades.

3. **Free Labor Markets**

Markets for factors of production, particularly labor, are flexible. Government do not impose minimum wages or working conditions, nor employment requirements, on businesses, and discourages (even fights) unionization. Consequently, labor can move fairly quickly to adjust to new incentives associated with changed economic conditions.

(4) **Strong Work Ethic**

Hard work, dedication, and sacrifice of personal interest for group and national benefits are long-standing cultural values.

(5) **Memories of Suffering**

Memories of devastation of the Second World War are poignant. No one wants a repeat of that suffering.

(6) **Anti-Communism**

The post-Second World War generation does not want to fall victim to communism, and a strong national economy is consistent with a strong defense. Former Singaporean Prime Minister Lee Kuan Yew (1923-2015, PM, 1959-1990) adds the American defense umbrella, including keeping communism at bay in North Korea and Vietnam, gave the Tigers the breathing space they needed to develop.

(7) **Pragmatism**

With few exceptions (e.g., rice), people do not hold a sentimental attachment to goods or industries. As their country moves up the value-added production chain, they know jobs are lost in one sector, but look forward to new opportunities in others.

(8) **Relatively Low Corruption**

While not free from corruption, and in many instances plagued by so-called “crony capitalism,” the Tigers have not inflicted the damage on themselves that the countries of the Indian Subcontinent and Sub-Saharan Africa have through monstrous levels of corruption.

Add to these factors a strong scaffolding of the rule of law, and it is hardly surprising the Tigers are “Exhibit A” for successful implementation of Export Orientation.

Also, not surprising is the large number of empirical studies about the Tigers, and Export Orientation more generally. Had the Tigers “figured it out”? Is Export Orientation “the way to go”? Among the near-classic studies, which tend to corroborate each other and support Tiger-style Export Orientation are the following:

(1) **1983 Krueger Study on Employment**

In 1983, renowned development economist Anne O. Krueger (1934-) examined
data on 10 countries for 1960-1973.\textsuperscript{75} Her focus was the relationship between trade policy and jobs: does Export Orientation generate more jobs than Import Substitution? She studied the ratio of (1) labor per unit of value added to a good that is exported to (2) labor per unit of value added to a good that competes with imports, \textit{i.e.}:

\begin{align*}
\text{Labor Used per unit of Value Added to Exportable Good} \\
\text{Labor Used per unit of Value Added to Import-Competing Good}
\end{align*}

In theory, if Export Orientation generates more jobs than Import Substitution, then the ratio should exceed one, \textit{i.e.}, there is more labor per dollar’s worth of exports than labor per dollar’s worth of import substitutes. This result should occur for two reasons.

First, export-oriented industries use a greater quantity of labor than import-competing industries. Second, export-oriented industries grow faster than import-substituting industries. To be sure, these ratios do not reveal the occupant profile or nature of the jobs. Happily, there is evidence to suggest in some countries the job-growth associated with Export Orientation benefits women. Unhappily, there is evidence to indicate in some countries the job growth is in low-pay, low-skill work. These shortcomings aside, Krueger’s 1983 results are clear: in 9 of the 10 countries studied, the average ratio was 1.57. Moreover, only 1 country had a ratio below 1 (0.8).

(2) \textit{1985 Krueger Study}

In 1985, Professor Krueger studied the overall economic performance of the East Asian Tigers – Hong Kong, Korea, Singapore, and Taiwan, against that of all countries also considered to be “middle income.”\textsuperscript{76} Does growth through industrialization and exportation “work”? The answer is clear. The Tigers grew more rapidly than the others in their income cohort. Despite two kinds of difficulties in the 1970s – a change in the TOT against middle income countries, and the oil price shocks of 1973 and 1979 – the Tigers boasted high growth rates and proved more resilient than the other countries. Moreover, income distribution remained fairly equitable in the Tigers.

However, Krueger offers an important caveat. The Tigers commenced their Export Orientation policies in the 1960s, but their success was made possible by more than just these policies. A combination of contributing factors mattered, including – significantly – the international economic climate.

First, for most of the 1960s and after, this climate was favorable to Export Orientation, because international trade in general expanded during this period. In part through successive GATT rounds, such as the Dillon, Kennedy, and Tokyo Rounds, tariffs and NTBs fell, especially in the markets of major countries. Conversely, when countries

\textsuperscript{75} ANNE O. KRUEGER ET AL., TRADE AND EMPLOYMENT IN DEVELOPING COUNTRIES – SYNTHESIS AND CONCLUSIONS (VOL. 3) (1983).

with large populations and purchasing power, like the U.S., EU, and Japan, adopt protectionism policies, particularly in certain product markets through trade remedies like safeguards in response to import surges, export-oriented developing countries may be vulnerable – particularly if their consumer markets are too small to pick up any slack in demand. In other words, the Tigers had access to key markets. This access existed when the Tigers most needed it, namely, when they were developing a comparative advantage – initially, low-value added, labor-intensive products (e.g., shoes and T&A), and later higher-value added, sophisticated products (e.g., cars, consumer electronics, semi-conductors, steel).

Second, the Tigers did not face much competition for most manufactured items in which they sought to develop an international comparative advantage. The world market for such items was not saturated. Dozens of other countries did not simultaneously set up factories to build and export radios, TVs, and other consumer electronic products. Hence, prices were robust, and demand in developed countries was strong. Many countries in the Caribbean, Latin America, and Sub-Saharan Africa remain largely dependent on primary goods for export revenues. Consequently, their revenues and TOT are vulnerable to commodity price movements. Asked about diversifying into manufactured goods, a response they offer is the market for such goods now is crowded.

Third, international banking and securities markets developed, so that the Tigers (and particularly businesses within them) could obtain financial capital from overseas quicker and more cheaply than ever before. While these businesses drew on extended family savings in their early stages, as they grew, they benefited from the flows of funds from developed countries channeled by the international capital markets. The former Merrill Lynch Dragon Fund was one of many examples of investing savings and retirement funds – at one point, roughly $1.5 billion – from developed countries in equities of approximately 120 East Asian companies.

Fourth, MNCs from developed countries became increasingly prominent actors in developing countries. The MNCs invested directly in countries like the Tigers. These countries had low trade barriers to inputs MNCs needed for production. They encouraged MNCs to source their inputs from them with a generally pro-business climate. As they established production facilities, they boosted local employment and transferred (to some degree) technology.

In sum, Krueger cautioned, the Tigers implemented the right policy at the right time. Their experience of the Tigers might well have been different had they tried Export Orientation during an era of declining values and volumes of trade.

(3) 1989 Balassa Study on Outward Orientation

Béla Balassa (1928-1991), another highly regarded development economist, examined data on a large number of developing countries, classifying them as (1) outward-
oriented economies, (2) inward-oriented economies, or (3) nearly closed economies. In the first category are East Asian Tigers, namely, Korea, Singapore, and Taiwan. In the second category are major Latin American countries, including Argentina, Brazil, and Mexico. The third category included Chile, India, and Uruguay. His data covers two periods, 1960-1973, and 1973-1983. The first oil price shock, engineered by OPEC, occurred at the break point, 1973, and a second OPEC shock occurred in the middle of the second period, 1979. Balassa asked two questions: (1) which kind of economy grew faster, and (2) how did the different kinds of economies react to the oil price shocks?

The answer to both questions was unambiguous. In both periods, countries with outward-oriented economies grew faster than countries with economies in the other two categories. Moreover, outward-oriented economies were able to generate more employment and needed less capital per unit of output (in effect, their ICORs were lower) than the other kinds of economies.

To be sure, the oil price shock caused greater economic damage to outward-oriented economies than to other kinds of economies. That result was unsurprising, as an outward-oriented economy by definition is more vulnerable to changes in the prices of energy and major commodities than economies insulated from world markets. But, Balassa found the outward-oriented economies are more resilient than inward-oriented or essentially closed economies. They rebounded from the 1973 and 1979 shocks relatively quickly, and regained growth rates that were higher than the other types of economies. In fact, they also generated relatively higher savings rates, were less dependent on external borrowing, and had lower inflation rates.

(4) **1987 World Bank Study**

The World Bank published a study in 1987 of 41 developing countries. Using Balassa-type categorization, the World Bank slotted them on a continuum depicted in Graph 4-3.

Consistent with the 1985 Krueger and 1987 Balassa studies, the World Bank found outward orientation associated with better economic performance than inward orientation. It concluded the evidence on this point is convincing. Similar follow-up studies show specific positive correlations between, on the one hand, openness to trade and FDI, and, on the other hand, growth in income, growth in productivity, investment in human capital, investment in physical capital, and technology transfer.

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Graph 4-3
Continuum of Openness

(5) **1992 Dollar Study**

In 1992, David Dollar published his analysis of data from 1976-1985.\(^\text{79}\) He compared Latin American and African countries against Asian countries. His question is counter-factual: if the Latin American and African countries had pursued Export Orientation and other policies similar to the policies implemented in Asia, what would their performance have been?

Professor Dollar estimated Latin America would have grown 1.5% faster, and Africa 2.1% faster, than they actually did. These countries would have been better off by mimicking pro-trade, Asian-style development strategy.

(6) **1995 Sachs-Warner Study**

Jeffrey Sachs (1954-), a high-profile, controversial economist in his own right, and Andrew Warner teamed up to publish a study in 1995 in which they developed criteria for the “openness” of an economy.\(^\text{80}\) They asked whether open economies grew faster than closed economies.

Their answer was unambiguously affirmative. Almost all open countries grew faster than closed economies. They found annual *per capita* GDP growth rate in open economies exceeded that in closed economies by between 2.2% and 2.5%. Sachs and Warner also considered whether the timing, or extent, of remaining closed made a difference. The answer, again, was affirmative. Countries that maintained closed economies up until the mid-1970s, or later, were considerably more likely to suffer from serious macroeconomic problems, even crises, in the 1980s, than countries that were open or abandoned their closed policies by the mid-1970s.

Arguably, Sachs and Warner defined “openness” and “closed” in too rigid a manner. They constructed a “dummy” variable (*i.e.*, and on-off indicator, whose value is 1 when a condition such as openness, is true, and 0 when it is false) for “openness.” To


determine if an economy is “open,” they looked at tariffs and quotas on intermediate and capital goods, the foreign exchange rate premium in the black (unofficial) market, the existence of export marketing boards, and whether a country was “socialist.” They considered “closed” any economy that was not open for 20 years, from 1970 through 1989.

Similarly, their data set started in 1970. Therefore, by definition they exclude countries that benefited from Import Substitution in the 1950s and 1960s, and countries that opened up thereafter. (For instance, South Korea had been open since 1968, but Brazil did not open up until 1991, and India not until 1994.) These concerns led to a more general one, namely, the lack of standardized definitions of “openness” and “closed.” In a June 1996 paper, Lant Pritchett pointed out there was no correlation among criteria for categorizing economies as outward- or inward-oriented.81

(7) 2012 International Collaborative Initiative on Trade and Employment (ICITE) Report

Ten international organizations teamed up to study whether countries that keep their markets open to trade boost their economic growth by doing so.82 Their 450-page Report, which drew on 14 studies conducted since 2000 in regions and countries across the globe, gave a resounding affirmative answer. Free trade, said the Report, can play a powerful role in driving growth and increasing employment. In particular, free trade improves labor productivity and, therefore, enhances average wage levels.

Between 1970 and 2000 manufacturing workers in countries with economies open to trade earned wages 3 to 9 times higher than their industrial counterparts in closed economies. This empirical evidence matches Neo-Classical Labor Economic Theory: wages should equal the marginal revenue product of labor, so, the greater the marginal contribution of a worker to the total revenue of a firm, the greater the wages of that worker, and this enhanced contribution reflects higher productivity stimulated by trade. The Report even argued that offshoring and outsourcing of jobs from developed to developing countries actually complement jobs in developed countries, and create new, higher-wage opportunities in developing one. Conversely, protectionist and discriminatory measures thwart growth and clog up labor markets.

Arguably, this result was predictable given the authors: AfDB, ADB, ECLAC, IADB, ILO, OAS, OECD, UNCTAD, World Bank, and WTO. In the wake of the 2008 global economic slump, these organizations were eager to promote a free trade agenda.

(8) 2012 Interagency Report on Agricultural Productivity Growth

Also, in 2012 came an Interagency Report to the G-20 nations on the positive effects of free trade on productivity in the agricultural sector.\footnote{See Sustainable Agricultural Productivity Growth and Bridging the Gap for Small-Family Farms, www.wto.org.} This Report argued (1) substantial reductions in farm subsidies that distort patterns of production and trade, (2) eliminating export subsidies, and (3) strengthening disciplines on export restrictions boost growth in agricultural productivity, and do so in a sustainable way. This direct relationship is particularly pronounced for small, family farms.

Of course, as with the ICITE Report, given the authors of the research, perhaps the results were unsurprising. The research was coordinated by the OECD and FAO, was a collaborative effort among various non-governmental and international organizations, including the World Bank and WTO.

To be sure, the evidence is not all one way, as explained below.

IX. Evidence Questioning Export Orientation

- 1986 Bradford Critique

Impressive as it is, the large volume of empirical data for openness is not unchallenged. A clever line of argument against it is historical revisionism. Were the East Asian Tigers as free trade oriented as their advocates and evidence suggests?

Among others, Colin Bradford, whose study appeared in 1986, tries to discern fact from fiction.\footnote{See Colin I. Bradford, Jr., East Asian “Models:” Myths and Lessons, in DEVELOPMENT STRATEGIES RECONSIDERED 115-128 (John P. Lewis & Valerina Kallab eds. 1986).} A closer inspection of the policies of the Four Tigers shows that only one of them – Hong Kong – followed Export Orientation in its pure form. The other three Tigers intervened to help their export industries, suggesting implementation of Export Orientation does not mean a \textit{laissez-faire} approach to the economy.

Among the sins of the other three Tigers were the following:

1. Korea pursued some Import Substitution policies, and extended preferential, subsidized credit to export industries.
2. Singapore gave tax incentives to certain industries engaged in exportation.
3. Taiwan also gave tax incentives to certain export industries, controlled imports in a way to encourage exportation, and used government enterprises to provide one-third of all fixed investment.

Bradford concludes it is erroneous to give all the credit for the success of the Tigers to Export Orientation. A fuller, more accurate rendition of their history reveals effective public–private partnerships to create conditions in which Export Orientation could be successful. In some instances, such as Korea, trade policy evolved, or switched, from Import Substitution in early stages of growth to Export Orientation in more advanced
states. In other instances, trade policy involved a mix of the two policies, with Export Orientation predominating, but Import Substitution used to protect a one or a few infant industries. In sum, the Tigers benefited from good governance focused on economic growth, plus a national consensus in favor of making sacrifices to achieve growth.

A second significant thrust at the Export Orientation evidence is methodological and quantitative in nature. Critics point out much of the evidence is correlative, not causal, in nature. Because growth and other favorable macroeconomic trends accompany trade does not mean trade causes them. In turn, it is unclear exactly how strong the relationship between trade and growth is. That is, it is not easy to attribute a specified percentage of growth to trade, as distinct from other pro-growth factors (like, as in the Harrod-Domar and Solow Models, capital investment).

In fact, the causal direction is not clear. Perhaps growth is associated with, or causes trade. Empirical evidence about Israel and Mexico shows a causal relationship from trade to growth, but from growth to trade in Pakistan. To add to the confusion, evidence concerning some countries (e.g., Colombia and Morocco) shows causation in each direction. Concerning other countries (e.g., Brazil and Korea), data point to the importance of exogenous factors, and industrialization, in boosting trade and growth.

Even if growth causes trade, the precise causal path is not yet certain. A leading hypothesis is “trade causes growth,” because trade means any or all of the following:

1. Competition from imports.
2. Greater FDI.
3. Improved productivity.
4. More learning (and, therefore, higher human capital)
5. More efficient allocation of resources.

However, the relative importance of these causal chains is not clear. Of course, if the arrow runs in the opposite direction, then these factors, which occur with growth, could generate trade. Ultimately, there may be no single answer for all developing countries.

- **2014 Abbas Study**

Trade liberalization can distort economic growth, depending on the relative share of imports and exports. For example, a 2014 study by Shujaat Abbas of the University of Karachi, Pakistan examined the impact between 1990-2011 of trade liberalization on economic growth of developing countries (including Indonesia, Pakistan, Philippines, and Turkey) and LDCs (including Bangladesh, Botswana, Mauritius, and Morocco).\(^{85}\) Abbas’ review of the literature reveals that while most empirical studies show trade liberalization stimulates economic growth, that result depends on the country or regions studied (with greater positive effects for Asia and Latin America than for Africa), the ability of a country or region to take advantage of the benefit of openness (e.g., by aligning the allocation of resources with social marginal cots and benefits, providing access to technology, utilizing economies of scale, and responding to competitive stimuli). Overall, he finds the

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used a standard production function model, wherein growth of GDP, the dependent variable, depends on (i.e., is a function of, f) 4 independent macroeconomic variables: the real capital stock (K), labor force (L), exports (X), and trade liberalization (TL). Abbas measured TL with a proxy, the ratio of total trade to GDP:

$$\text{GDP} = f(K, L, X, TL),$$

or in terms of a multivariable regression equation

$$\text{GDP} = \beta_i + \beta_1 \cdot K + \beta_2 \cdot L + \beta_3 \cdot X + \beta_4 \cdot TL + e$$

where the first $\beta$ term is the intercept, the remaining $\beta$ are coefficients on the respective macroeconomic variables and capture the significance, if any, of the causal effect of those variables on GDP, and $e$ is the error term.

Using World Development Indicators data published by the World Bank, Abbas found a significant positive effect of the macroeconomic variables on GDP, except for TL. Indeed, TL had contradictory negative impacts, which Abbas said were consistent with economic theory: exports boosted GDP, whereas imports entailed an outflow of national income. So, if a higher degree of TL is due to exports over imports, then economic growth increases. Conversely, if TL rises because of an excess of imports over exports – that is, a balance of trade deficit – then economic growth deteriorates. For his sample of developing countries and LDCs, Abbas found TL adversely affected economic growth, because of increased imports and sluggish exports.

What policy advice does Abbas give? Developing countries need to correct their trade deficits by accelerating exports. To do so, they must reform domestic constraints on exports, and allocate scarce capital to labor-intensive production sectors based on their comparative advantages. Vitally, foreign trade barriers to their products must be reduced. “Let the market freely work,” he concludes.

**Export Orientation and Poverty Alleviation?**

Perhaps most importantly of all to the issue of poverty alleviation is that the aforementioned studies do not focus on the link between trade and poverty. As impressive as they may be in showing trade generates growth, they do not resolve the question of whether that growth leads to a reduction in poverty. Yet, whether economic growth, and increased trade in particular, contribute to decreases in poverty rates is an extraordinarily important question – as the example of Mexico suggests.

This question is ably discussed in a large number of sources. One is the excellent

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book *Trade Liberalization and Poverty: A Handbook* (2001), by Neil McCulloch, L. Alan Winters, and Xavier Cirera of the University of Sussex. *Trade Liberalization and Poverty* argues trade liberalization ultimately assists in poverty alleviation, and that it does so by stimulating growth. However, *Trade, Liberalization and Poverty* also explains poverty alleviation through trade is more effective if complimented by policies aimed directly at poverty reduction, *i.e.*, by policies that target the poor as beneficiaries. Such policies relate to education, infrastructure development (*e.g.*, transportation), financial services, prices of goods, wage levels, and employment opportunities.

Especially since roughly the 1990s, there is mounting evidence that growth associated with trade has led to greater socioeconomic stratification, particularly in terms of higher Gini coefficients. In other words, the belief “the rich get richer while the poor get poorer” has not been put to rest. Quite the contrary.

Even if that belief is true, trade *per se* is not necessarily to blame. Consider the following insights about the U.S. economy from *The Atlantic*:

In the 2010s, the national unemployment rate dropped from a high of 9.9 percent to its current [February 2020] rate of just 3.5 percent. The economy expanded each and every year. Wages picked up for high-income workers as soon as the Great Recession ended, and picked up for lower-income workers in the second half of the decade. … The headline economic numbers looked good, if not great.

But beyond the headline economic numbers, a multifarious and strangely invisible economic crisis metastasized: … the Great Affordability Crisis. This crisis involved not just what families earned but the other half of the ledger, too – how they spent their earnings. In one of the best decades the American economy has ever recorded, families were bled dry by landlords, hospital administrators, university bursars, and child-care centers. For millions, a roaring economy felt precarious or downright terrible.

Viewing the economy through a cost-of-living paradigm helps explain why roughly two in five American adults would struggle to come up with $400 in an emergency so many years after the Great Recession ended. It helps explain why one in five adults is unable to pay the current month’s bills in full. It demonstrates why a surprise furnace-repair bill, parking ticket, court fee, or medical expense remains ruinous for so many American families, despite all the wealth this country has generated. Fully one in three households is classified as “financially fragile.”

Along with the rise of inequality, the slowdown in productivity growth, and the shrinking of the middle class, the spiraling cost of living has become a central facet of American economic life. …

… [H]ousing cost crises in the [San Francisco] Bay Area and New York
might be the country’s most obscene. But the problem is national, driven by a combination of stagnant wages, restrictive building codes, and underinvestment in construction, among other trends. Home prices are rising faster than wages in roughly 80 percent of American metro regions. In 2018, housing affordability declined in every one of the 160-some urban areas….

The problem now even extends to rural areas, where income growth has lagged in the post-recession period. …

The cost-of-living crisis extends beyond housing. Health-care costs are exorbitant, too: Americans pay roughly twice as much for insurance and medical services as do citizens of other wealthy countries, but they don’t have better outcomes. In the post-recession period, premiums, deductibles, and out-of-pocket costs in general just kept rising, eating away at families’ budgets, casting millions into debt, and consigning millions more to bankruptcy.

The “cost burden” of health coverage climbed through the 2010s; just from 2010 to 2016, family private-insurance premiums jumped 28 percent to $17,710, while median household incomes rose less than 20 percent. That meant less take-home pay for workers. Deductibles – what a family has to fork over before insurance kicks in – also soared. From 2010 to 2016, the share of employees in health plans with a deductible jumped from 78 percent to 85 percent. And the average annual deductible went from less than $2,000 to more than $3,000.

…

Next up is student-loan debt, a trillion-dollar stone placed on young adults’ backs. Or, to be more accurate, the $1.4 trillion stone, up 6 percent year over year and 116 percent in a decade; student-loan debt is now a bigger burden for households than car loans or credit-card debt. Half of students now take on loans of one kind or another to try for a higher-ed degree, and outstanding debts typically total $20,000 to $25,000, requiring monthly payments of $200 to $300 – though … many students owe much more. Now nearly 50 million adults are stuck working off their educational debt loads, including one in three adults in their 20s, erasing the college wealth premium for younger Americans and eroding the college earnings premium.

Finally, child care. Spending on day care, nannies, and other direct-care services for kids has increased by 2,000 percent in the past four decades, and families now commonly spend $15,000 to $26,000 a year to have someone watch their kid. Such care is grossly unaffordable for low-income parents in metro areas across the country, causing many people to drop out of the labor force. But one in four American mothers returns to work within two weeks of giving birth, so heavy are the other cost burdens of living in this country. The whole system is broken.
The effects are wide-ranging. High costs are preventing workers from moving to high-productivity cities, thus smothering the country’s economic vibrancy and putting a drag on its GDP; … GDP would be as much as 10 percent bigger if more workers could afford to live in places like San Jose and Boston. High costs are forcing families to delay getting married and to have fewer children, and putting the dream of owning a home out of reach.

… [T]he Great Affordability Crisis is amenable to policy solutions – one most other rich countries adopted decades ago. In other developed economies, child care, early education, and higher education are public goods, and do not require high-interest-rate debts or endless scrambling by exhausted young parents to procure. Other wealthy countries have public-health systems that cover everybody at far lower cost, whether through socialized or private models. And numerous proposals would transform residential construction in this country….  

Nothing in this remarkably sad-but-true story relates directly to international trade. That is, trade is not the cause of higher housing, medical, educational, or child care costs. Thus, the final paragraph does not call for a new trade policy paradigm. Rather, domestic policies – or the lack thereof – at central and sub-central government levels are to blame, hence solving the Great Affordability Crisis lies in those spaces. And yet, trade typically is blamed for the well-chronicled woes. The result can be populist protectionism, even ugly economic nationalism, which deny opportunities for improvement through globalization, and thereby damages the common good and fails to give a preferential option for the poor.

Simply put, “getting causation right,” meaning understanding the nexus between trade liberalization and poverty, is essential. A host of other non-trade variables influence whether gains from trade are captured by a cabal of elites, or distributed widely across a society. As Trade Liberalization and Poverty suggests, they include good governance, low corruption, and prudent policies on government infrastructure and social welfare spending, and appropriate taxation. Indeed, a 2016 internal World Bank briefing document illustrates these points.  

The World Bank admitted global free trade exacerbates inequality: “the effects of globalization on advanced economies is ‘often uneven’ and ‘may have led to rising wage inequality.’” To address “adjustment costs” associated with trade, and avoid downward intra- and inter-generational socioeconomic mobility, the World Bank called for robust social security mechanisms and appropriate skills training to prepare for the jobs of the future. Yet, the Bank did not put all the blame for rising inequality in high-income countries on trade. The Bank linked about 20% of jobs lost in advanced economies to trade.

(especially, in the U.S., positions exposed to import competition from China), and the other 80% to technological change, automation, and the weakening of unions and worker groups that traditionally represent labor interests.

**EPZs**

An important qualification to the theory of Export Orientation is how this policy is implemented in practice. It would be naïve to think every government takes a wholly laissez-faire approach to building export industries. In fact, many governments adopt modest measures of support. A common example is the creation of FTZs or EPZs. Led by Premier Deng Xiaoping (1904-1997), China commenced its movement away from strict socialism in the late 1970s by establishing four “special economic zones” in which market-oriented liberalizations took place.

Generally speaking, an FTZ or EPZ is a geographic location, or a firm or group of enterprises with acknowledged legal standing, to which special governmental treatment applies. This treatment consists of some or all of the following measures:

1. **Lower Taxes**
   Tax rates and/or valuations of assets to which tax rates are applied may be reduced or even eliminated. In the alternative, or in addition, tax holidays may be declared whereby no taxes are paid for a certain period (the holiday). Tax deductions from gross income, tax credits against tax liability, and/or accelerated tax write-offs (e.g., depreciation schedules) may be offered.

2. **Lower Trade Barriers**
   Tariffs may be reduced or eliminated for goods imported for use as inputs in the production of exported products. Quotas, import licenses, and other non-tariff barriers may be liberalized or eliminated.

3. **Rebates**
   Refunds may be offered on all or a portion of certain taxes or tariffs paid, particularly for finished products that are exported.

4. **Subsidies**
   Certain infrastructure facilities, such as buildings, and utilities like power and water, as well as training programs for workers, may be subsidized.

The *quid pro quo* for special treatment is, of course, exportation of goods produced in the FTZ or EPZ. In effect, an FTZ or EPZ is a bargain between the public and private sectors. The government hopes to grow the economy and, in the process, create backward linkages and enhance the level of technology in the country. Businesses hope to grow in size and profitability, and gain market access overseas.

Whether this bargain – or, perhaps better put, partnership – between public and private sectors works depends on the overall political, economic, and legal environment of
the FTZ or EPZ. In addition to China, Korea and Taiwan are cited as successful examples. However, in certain countries, exploitative working conditions (e.g., long hours, low pay, and occupational health and safety risks), environmental damage, and gender discrimination (namely, excessive reliance on young female workers) have been concomitant with FTZ or EPZs. Moreover, preferences granted can create resentment within a country, and generate concerns about differential, or dualistic, economic development and widening domestic income gaps, as the Indian experiment with SEZs under reformist Prime Minister Manmohan Singh (1932-, PM, 2004-2014) suggested.
Chapter 5

TRADE, GROWTH, AND POVERTY (CONTINUED): IMPORT SUBSTITUTION

I. Marxist Intellectual Heritage of Import Substitution

● Trade and Colonialism

Like Export Orientation, Import Substitution has a powerful (if flawed) intellectual tradition. The inspiration is Marxist theory, and its various incarnations, which offer a radically different perspective on international trade from Capitalist models.

Few better articulated the Marxist maxim that trade is needed by capitalists to obtain inputs for finished goods, and as an outlet for over-production, than Cecil Rhodes (1853-1902), namesake of both Rhodesia (now Zimbabwe) and the Rhodes Scholarship. He declared:

We must find new lands from which we can easily obtain raw materials and at the same time exploit the cheap slave labor that is available from the natives of the colonies. The colonies would also provide a dumping ground for the surplus goods produced in our factories. 90

Similarly, in March 1899, a delegate to the French Association of Industry and Agriculture intoned that colonial power must be exercised:

to discourage in advance any signs of industrial development in our colonies, to oblige our overseas possessions to look exclusively to the mother country for manufactured products and to fulfill, by force if necessary, their natural function, that of a market reserved by right to the mother country’s industry. 91

The term “development,” urge Marxists, is a euphemism for imperialism and colonialism.

Marxists see continuity between the colonial era of the 1600s through 1960s, and the era of development following the independence of former colonies. For example, the Asian colonial experience included Britain bullying Siam, and France bullying Annam, into signing treaties in 1855 and 1862, respectively, and European powers and Japan

89 Documents References:
(1) Havana (ITO) Charter Preamble
(2) GATT Preamble
(3) WTO Agreement Preamble


91 Quoted in Development as Colonialism.
carving China up into spheres of influence. Through such arrangements, the colonial powers had access to markets of most Asian coastal regions, special rights for their expatriates working in Asia, and the freedom to build transportation networks and extend their enterprises inland. The renowned English Marxist historian, Eric Hobsbawm (1917-2012), reports that in the 1800s, Britain held direct imperial control over one-fourth of the world’s surface, the Royal Navy controlled sea lanes to protect trade routes, and London was the financial capital of the world. Britain made one-third of all manufactured goods in the world, and produced two-thirds of the world’s coal, half its iron, half of the world’s factory-made cotton, 40% of the world’s hardware, and five-sevenths of the world’s steel.

What has changed, other than the identities of some bullies and the form of the bullying? MNCs act in lieu of (or as if they were) sovereigns, rely not so much on official “gun boat diplomacy” as on playing off small countries against one another, and if need be bribing officials to extract trade and investment concessions. Exhausted by two world wars, Britain’s economic might has declined – but America’s has risen. Significantly, like Britain before her, the U.S. preaches the virtues of free trade to achieve commercial goals. These hegemonic powers contend free trade ensures competitiveness.

Marxists also deride free trade for strangling infant industries in the Third World. The European colonial powers made industrial organization among local populations difficult, partly by taxing products consumed by locals, such as alcohol, animals, opium, or salt. To get income to meet their tax obligations, colonized peoples had little choice but to work on plantations or in mines owned by colonial masters. When the colonies gained independence, they lacked diversified economies. With few goods to export, other than primary products, their export revenues were vulnerable to market vicissitudes. They also were not hedged against First World protectionism. Sugar is one example. Poor countries sought to market access for sugar exports, yet America maintained since the late 1940s tight QRs on sugar imports, which generally are controversial if not illegal under GATT Article XI, and encouraged sugar substitutes like artificial sweeteners. The EU subsidized sugar beet production.

Countries throughout Latin America, as well as India, resorted to Import Substitution policies in the 1950s through 1980s. Indeed, notwithstanding its dramatic 1991 reforms (discussed in a separate Chapter), the “Make in India” industrial policy of Prime Minister Narendra Modi (1950-, PM, 2014-) has strong hints of import substitution. Consider, for example, India’s solar panel industry policy:

The Government of India is going all-in on trying to build a domestic solar equipment manufacturing sector. It is not clear if it will succeed. It is even less clear that it will be worth it.

Almost a decade ago, the Government of India concluded that imported Chinese solar equipment was cheaper because of unfair support that Chinese manufacturers got from their government. In response, it imposed anti-dumping duties on Chinese modules and panels. It also included domestic content requirements or DCRs in certain Indian solar tenders and
late last year, the central government announced

production-linked incentives for domestic solar manufacturing, under which Rs. 4,500 crore was allocated for the solar photovoltaics sector. …

Most recently [in March 2021], the government notified the imposition of basic customs duty of 25% on solar cells and 40% on solar modules, effective from April 2022. Despite these measures, domestically manufactured solar equipment remains more expensive and of poorer quality than imported equipment. And logically, any policy to promote the use of such costlier domestic panels will lead to solar power becoming more expensive.

India is currently well behind its target of achieving 175 GW of renewable energy capacity by December 2022, as the Ministry of New and Renewable Energy also accepted recently.

In addition, there are climate concerns. If India is to achieve net-zero greenhouse gas emissions in a reasonable time frame, the share of renewables has to increase significantly, potentially to over 80% of the energy mix by 2050. Achieving this largely through domestically produced modules and cells, at current levels of capacity growth, will be near impossible.

The likelihood of the government’s protectionist policies leading to the cost of solar power going up has been concerning.¹²

Not surprisingly, mainstream economists criticized countries for pursuing import substitution. In India’s case, for instance:

Conventional wisdom in trade theory posits that free or cheap imports are better for an economy in the aggregate through more efficient allocation of labour and capital. In fact, trade liberalization and reduced customs duties since 1992 have had a positive effect on GDP and tax collection.

Arvind Panagariya, … Professor of economics at Columbia University concurs. He makes a powerful case for free trade in his [2019] book Free Trade and Prosperity: How Openness Helps Developing Countries Grow Richer and Combat Poverty.…

Panagariya cautions the central government from reversing 30 years of trade and tariff liberalization since 1992. He recently said “The simple fact we must keep in mind is that when we expand imports in the wake of trade

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liberalisation, we also expand exports to pay for the extra imports. As import and export expansion proceeds, we replace low-paid jobs in small import-competing firms by better-paid jobs in export-oriented firms.”

…

Beyond trade barriers, a clear lesson of the recent Indian economic history is that making industrial policy work well is hard. Until liberalization in 1992, the government was attempting, with limited success, to choose winners instead of allowing the market to select the most efficient manufacturers.

…

… [O]ne suspects that current policy is aimed at fulfilling aspirational goals such as “replacing the Chinese in the global supply chain” or “self-sufficiency in solar manufacturing” rather than building a coherent strategy to keep the cost of solar power as low as sustainably possible and grow the solar power sector fast, while laying the long-term foundations for domestic manufacturing.

There is no silver bullet. Building domestic solar manufacturing requires a focus on mundane reforms, aimed at reducing friction in the Indian manufacturing eco-system as a whole. This means improving the general ease of doing business - contract enforcement, regulatory stability, reducing avenues for rent-seeking and the cost of long-term finance, and lots more. These are measures all businesses will benefit from. This is not new wisdom. Jagdish Bhagwati and V.K. Ramaswami famously pointed out in 1963 that it was more effective to address domestic distortions than resort to protectionism.93

Moreover, efforts to prefer local raw materials and intermediate goods, and local production, to imports are inconsistent with the national treatment obligation found in GATT, and abandonment of import substitution policies has been a condition for receiving funds from the World Bank.

Nevertheless, critics like Walden Flores Bello (1945-), a Filipino Professor and member of the Philippine House of Representatives, in his 1994 study Dark Victory, argue a poor country receiving a structural adjustment program loan experiences an increase in commodity exports, but not always an increase in GNP. Why not? Because abandoning Import Substitution led to a net contraction in the domestic economy.

More generally, such critics see lending as a technique of colonialist control. In the mid-1800s, France lent money to the bey of Tunis, particularly through bonds, to help the bey develop an army and loosen ties with Turkey. (“Bey” is a Turkish word for the governor of a province in the Ottoman Empire.) The French bondholders obtained the help of the French Foreign Office to supervise finances in the bey’s economy. In the great game against the Ottoman Empire for control in the Middle East, the Foreign Office was happy to oblige. In 1869, a Franco-Tunisian Commission imposed stringent conditions on the bey,

93 Solar Power Manufacturing.
and took the right to collect and distribute state revenues to ensure bondholders were preferred over other creditors. With public finance under foreign control, Tunisia slid into colonial status. When the bey needed to raise taxes to pay interest on the bonds and other loans, popular unrest ensured. France responded in predictable fashion. In 1881, to secure its interests, it annexed Tunisia.

Critics charge the formalities of lending are different in contemporary times, but not the underlying control relationships. In exchange for emergency lending to Mexico during the peso crisis in 1995, President Bill Clinton imposed similar terms on the Government of Mexico as the French had on the bey over a century earlier, namely, conditions to ensure the priority of Wall Street creditors. The IMF and World Bank, through their lending programs, effectively takes over management of the economy of a borrower to ensure timely repayment of principal and interest. The result now is de facto colonial control. Conversely, countries such as Singapore and Taiwan, which have been able to minimize external debt, have performed well. Korea, which did take on debt, resisted pressures from the IMF and World Bank to eliminate trade barriers and capital controls until it, essentially, had exported its way out of the debt.

Furthermore, say Marxists, it is hypocritical for the U.S. to advocate free trade given its early history. No less than Alexander Hamilton (1755-1804), in his famous 1791 Report on Manufacturers, called for protectionism in the service of economic nationalism. The U.S. maintained high duty rates through 1832, gradually reducing them between 1832 and 1860. To this day, America resorts to protectionist measures to serve powerful domestic constituencies, as the sugar example indicates.

Even temporary, episodic retreats from free trade did not stop colonialism. Marxists point out that whenever a colonial power implemented protectionist measures, capitalist entrepreneurs simply relied on FDI, and the overt colonial control by their home-country governments, to secure new markets. This process occurred in Africa, Asia, Latin America, and the Pacific in the 1870s and 1890s, when economic depression led some European countries (other than Belgium, the Netherlands, and Britain) to raise tariffs. By 1878, Europeans had colonized 67% of the land surface of the planet. By 1914, Europeans colonized 84.4%.

- **Dualism and Vent for Surplus**

Within individual poor countries, some scholars surmise this process has resulted in dualistic economic growth. Dualism, or the creation of a dual economy, refers to a phenomenon in which there are two different sectors. Typically, one sector is capital-intensive and relatively wealthy, and the other sector is labor-intensive and relatively poor. The sectors are not integrated with one another. Writing in the 1950s, the renowned Burmese economist, Hla Myint (1920-2017), argued colonialism led to dualism. He finds the theory explaining exports from developing countries is not Ricardo’s Law of Comparative Advantage, but rather a pre-Adam Smith theory (i.e., associated with Mercantilism) known as “Vent for Surplus.”
As the rubric suggests, Professor Mynt saw export markets as a “vent” for “surplus” production. He advocated for exports to be an engine of growth for developing countries. (Ironically, as the BSSP of his home country rejected his argument and turned inward after the 1962 military coup d’état, the Four Tigers (or Dragons) – Korea, Hong Kong, Singapore, and Taiwan – embraced it.) Without foreign markets, a domestic economy of a developing country would be saturated with its own output, insofar as it produced more than it could consume – a surplus. The mismatch would necessitate cut-backs in output. Factors of production would become under-utilized because they had no vent for surpluses of merchandise they otherwise could produce. Thus, the Production Possibilities Frontier of that country would shift inward – a disastrous circumstance, as both actual and potential output declined. Conversely, surplus production not consumed domestically could be exported, which would maintain and expand the PPF.

To be sure, at early stages of growth, poor countries have little if any surplus production to export. They lack an integrated national market that would generate sizeable demand for products. But, as foreign businesses enter a country, often as part of a colonial linkage or legacy, they build an infrastructure to support expanded production. They do so because foreign demand would support output growth, i.e., overseas buyers (especially in colonial countries) would consume the surplus. Yet, Mynt observed the infrastructure they built does not serve to integrate a labor-intensive agricultural sector with a capital-intensive industrial sector in the host country.

To the contrary, the infrastructure served to integrate one or the other sector directly to the home, i.e., colonial, country (e.g., in Europe, or the U.S.). Specifically, road networks and railway lines, plus attendant communication lines, led directly from farm areas or mines to port facilities to facilitate shipment of crops and natural resources to the home country. The routes were not designed to link these input sources with emerging industrial producers in other parts of the host country. Consequently, the agricultural and natural resource sector generated an exportable surplus, and became the export sector. Products from this sector were land-intensive, and in some instances even capital-intensive. In contrast, industrial production stagnated, hence so too did demand for skilled labor. The end result was two different, non-integrated sectors.

Likewise, the economist Karl Gunnar Myrdal (1898-1987) wrote in his classic Asian Drama (1968) and in other works, about dualism. Myrdal, who shared the 1974 Nobel Prize in Economics with Friedrich A. Hayek (1899-1992), pointed out dualism results in increased income inequality within a poor country, as owners of factors of production in the export sector become wealthier, but factor resources in the rest of the economy see no real increases in demand for their services.

Classic examples are tea plantation owners in Ceylon (Sri Lanka) and India, palm oil, rubber and tin plantation owners in Indonesia and Malaysia, and mine owners in Sub-Saharan African countries. The large supply of labor in agriculture and mining ensures wage rates are low, and thus profits to owners high. The emphasis on this sector leads to dualistic development, as no integrated national market develops and local industries are neglected, even deliberately suppressed. In turn, dualism means the economy and export
base of the poor country remain undiversified – a problem plaguing virtually all least developed countries.

- Divide and Rule

Marxist-oriented scholars view international trade law as part of an overall free-trade framework that creates optimum conditions for First World businesses. From their perspective, this law is a control device in favor of capitalist enterprise, not an empowerment mechanism for the Third World. In most Third World countries, raw power exercised from major trading nations is not necessary to enforce the laws in the framework. The political influence of the hegemons, felt through free-trade oriented rules articulated in and enforced through WTO agreements and FTAs, does the job. Indeed, this legal network is far more extensive than the British Empire ever was.

Ostensibly, this framework is palatable because the field on which trading nations compete is said to be level. Even if it were, the imbalance in political and economic might render the result of any competition unfair. In fact, the field is anything but level. Marxist-oriented critics argue the rules of the GATT-WTO game are designed to create favorable conditions for MNCs. The rights of MNC entry and establishment, removal of restrictions on repatriating earnings, abolition of tariff and non-tariff barriers (particularly for components used by MNCs in production), liberalization of the labor market (to ensure cheap labor unprotected by unions), and national treatment are oft-cited examples of such rules. The favorable conditions are low costs of production, docile laborers, un-enforced environmental standards, and little if any competition. Consequently, roughly 20% to 30% of world trade occurs within MNCs (i.e., between different parts of a vertically integrated MNC, such as a parent and one of its subsidiaries). Many world commodity markets are characterized by monopoly or oligopoly conditions, with 40% or more of a particular market being controlled by less than five companies.

Official American and European trade delegations consistently advocate for these rules. They do so behind a self-serving veil that the rules are needed to attract trade and FDI, which, in turn, will propel development in poor countries. If and when a poor country resists, the response from representatives of the major powers is “fine, our businesses will go elsewhere.” They play poor countries off against one another to tilt the field in their favor. As few such countries are large or powerful enough to continue resisting, the result is global corporate colonialism protected by International Trade Law.

Aside from this corpus of law, another feature of the free-trade framework – one that also bespeaks continuity between colonial and post-independence eras – concerns elites. For a capitalist in the First World, what better way to safeguard long-term market access than to have allies in the private and public sectors of the Third World? The British understood the point clearly after the 1857 Indian (or Seapoy) Mutiny, thereafter focusing on the creation of an Anglicized Indian elite that would keep the Indian populace under control and thereby support British commercial interests.

To what extent are the interests of elites in developing countries and LDCs any
more aligned with the needs of the majority of their countrymen than in the 1800s? Marxists argue the elites of today are akin to the colonial administrators of yesteryear. The large percentage of foreign aid that consists of security assistance of one kind or another (e.g., military training, weapons) is designed to promote the rule of law, not as goal in its own right, but as a means to the aim of advancing neo-colonial interests. When a Third World leader threatens this aim, the First World – led by America, Britain, continental European countries, or some coalition of the interested – takes action.

Examples involving the U.S. to which Marxists point include:

1. The American military intervention in Guatemala in 1954, which resulted in the overthrow of a government that nationalized American-owned banana plantations.

2. The American-inspired military coup d’état in Brazil in the 1960s, which led to the overthrow of a government that tried to limit the amount of currency a foreign corporation could withdraw from Brazil, initiate a land-reform program that would have returned control of mineral resources from such corporations to locals, and raise wages (leading to higher labor costs for these corporations).

3. Efforts throughout the 1960s and 1970s to remove Fidel Castro from power in Cuba, as he had not only nationalized American business property, but also had agreed to the positioning of Soviet nuclear weapons on Cuban soil.

4. Overt and covert military engagements in Latin America and the Caribbean in the 1980s, including El Salvador, Grenada, and Nicaragua, all of which had Marxist-oriented governments threatening American business interests.

5. High- and low-intensity conflicts in the Middle East, including the 1991 Gulf War and the 2003 Iraq invasion, which at bottom were at least as much about securing oil supplies as fighting terrorism.

Indubitably, each one of these examples, and perhaps any illustration Marxists trot out, is open to considerable debate.

To reduce every instance of the use of force as motivated by a search for new markets, cheap labor, raw materials, or the need to shore up faltering elites is simplistic. Neither the Korean nor Vietnam War is well explained by those rationales, as neither Korea nor Vietnam was a major market or input source at the time of the conflicts. The Marxist perspective also implicitly degrades the contribution of military personnel from the U.S. and its partners. They might be surprised to learn they are helpless, gullible soldiers in the service of an international capitalist conspiracy manipulated by misguided patriotism and rhetoric about spreading peace and democracy abroad.

Nonetheless, the perspective matters, because it resonates in contemporary trade debates. For instance, Marxist-oriented critics fault FTAs, especially for poor countries (e.g., in Latin America) or countries with natural resources (e.g., in the Middle East), as being more about neo-colonialism and less about development. Similarly, FTAs between countries like America and Australia, or America and Singapore, are rewards to countries
that act as deputy sheriffs to enforce American commercial interests.

II. Frank and Dependency Theory

One of the most provocative schools of thought in development economics to emerge in the 20th century is known as “Dependency Theory.” Dependency Theory (in one form or another) resonates in many contemporary debates about trade liberalization and its purportedly salutary implications. This intellectual debt, however, sometimes goes unrecognized or ignored by economists. For example, while one prominent textbook *(Economic Development (2003) by Professor Stuart Lynn of Assumption College)* covers the theory, another higher-profile text *(Economics of Development (4th ed. 1996) by Professor Malcolm Gillis of Rice and Professors Dwight H. Perkins, Michael Roemer, and Donald R. Snodgrass of Harvard)* devotes not a word to it.

The father of Dependency Theory is Andre Gunder Frank (1929-2005). Writing in the 1960s, Frank’s target was a large one: world capitalist development from the 1400s onwards. Frank did not believe in Marxian historical stages of economic growth. Ironically, his dissertation supervisor at the University of Chicago was none other than the free-market champion and 1976 Nobel Economic Prize Winner Milton Friedman (1912-2006).

But, the studies by Frank, along with the work of Immanuel Wallerstein, drew on Marxian ideas, and showed a division of the world into two categories:

1. A small number of developed or “metropolitan” countries, collectively called the “center” or “core.” The G7 (or G8) countries would be considered the center.
2. A large number of under-developed, or “satellite” countries, collectively called the “periphery.” Most developing and all least developed countries would be considered the periphery.

This division draws on Marxist-Leninist theory. Karl Marx (1818-1883) saw capitalist growth occurring through the accumulation of capital at home and, later, abroad. Vladimir Lenin (1870-1924) argued as capitalists produce ever-increasing amounts of goods and thereby drive down profit rates in their domestic markets, they force themselves to search overseas for new markets.

Frank and other Dependency Theorists elaborate on and extend these ideas. The center drives the development process in the periphery, and that process is a capitalist one. The center uses military power, directly or indirectly, to secure supplies of raw materials and cheap labor for its enterprises. Typically, those enterprises export raw materials back to the center for use in manufacturing, or if engaged in production in the periphery, use labor-intensive methods of production. The enterprises repatriate their profits, or leave them in the hands of local business elites. These elites become a capitalist class in the periphery reliant on the enterprises for their wealth and privileges. Over time, the center gets relatively more developed, taking resources from the periphery, and the periphery

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relatively less-developed, being drained of those resources. The capitalist class in the periphery facilitates the disparate development.

Frank devised a memorable caption for the process: the “development of underdevelopment.” The caption embodies the hallmark of Dependency Theory: a peripheral country can develop economically, but only in inverse relation to the strength of its ties to the center. The stronger the ties that bind a peripheral country to the center, the harder it is for that country to develop.

Frank argued the world’s least developed regions are the ones with the closest historical ties to Europe and the U.S. Only a large dose of autonomy from the center allows for real development. Hence, Dependency Theory holds that expanded trade is orthogonal to the development interests of poor countries, because it is innately exploitative in favor of rich countries. By implication, the Theory (in contrast to Marxist-Leninist ideology) does not stress class struggle as the force driving historical progress.

This conclusion is entirely contrary to the pro-globalization, pro-free trade tide that has dominated mainstream legal, business, policy, and academic circles in most countries since the end of the Cold War. It suggests developing and least developed countries are foolish to enter FTAs or CUs with developed countries. Yet, the conclusion resonates favorably among an influential group of thinkers and activists in various IOs and NGOs, and in parts of the academy. To be sure, they are not all so radical as to counsel a complete break of economic linkages with the major powers, as ardent Dependency Theorists would. But, they advise a re-balancing of the interactive relationships, and are more patient with Import Substitution, infant industry protection, and trade policies that carve out space for poor countries.

Frank’s conclusion, in particular, is based on historical and empirical research focusing on Brazil and Chile. Until the late 1920s, the center-periphery pattern existed, meaning the center countries established the conditions under which peripheral countries developed, or better put, remained underdeveloped. The break from this pattern came when two cataclysmic events distracted the major powers. Between 1929 and 1945, Europe and the U.S. could not dictate the conditions of development, because of the Great Depression and Second World War. During this period, Frank said, the likes of Brazil and Chile were able to develop autonomously. But, when the War ended, dominance by the major powers resumed. Interestingly, Frank also observed in some regions, there were small center-periphery patterns, for example Brazil and its neighbors.

III. Prebisch-Singer Thesis

Along with the work of Dependency Theorists, the scholarship of the Argentine economist Raúl Prebisch (1901-1986) provides critical theoretical footing for Import Substitution. 95 Prebisch – sometimes called “Latin America’s Keynes” – was a major figure

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95 For an excellent biography of this important development and trade economist, see Edgar J. Dosman, The Life and Times of Raúl Prebisch 1901-1986 (Montreal, Canada: McGill-Queen’s University
in international trade and development economics from the 1940s through 1970s. He
served with the U.N. Economic Commission for Latin America, and was the first Secretary
General for the UNCTAD, and coined the term “NIEO.”

Some observers in America and Europe regarded Prebisch as a dangerous radical.
In fact, he was a moderate, preferring reform to revolution, advocating a mixed economy
in which the private sector played a leading role, central bank independence, fiscal stability,
and vigilance against inflation. He was of two minds about Dependency Theory, and never
put himself in the camp of Latin American Marxists. Rather, he was pro-American,
inspiring President John F. Kennedy’s (1917-1963, President, 1961-1963) Alliance for
Progress aid program for Latin America.

Writing in the 1950s, Prebisch argued trade causes deterioration in the price of
primary products exported by poor countries. In contrast, prices of manufactured goods –
the main exports from rich to poor countries – are stable or rising over time. After all,
manufactured goods embody higher productivity than do primary products. Therefore, the
TOT of poor countries deteriorate.

Faced with lower export earnings and higher import costs, they are unable to
generate savings necessary for capital investment, and thus to industrialize. Participation
in trade actually reinforces the international division of labor in which they are trapped in
a pattern of producing and exporting primary commodities and natural resources. The
solution? Structural change of the international trading system, and industrialization in
poor countries through inward development, import substitution, and regional integration.

The research of another great scholar, the British economist Sir Hans Wolfgang
Singer (1910-2006), echoed these conclusions. Together, their argument about declining
TOT and entrapment in the trading system is called the “Prebisch-Singer Thesis,” or
“Singer-Prebisch Thesis.” (Regrettably, Prebisch himself never systematized his theories
into a major book.) Succinctly put, the Thesis states the TOT move against producers and
exporters of primary products.

This Thesis runs counter to a standard classical and neo-classical prediction in favor
of free trade. That prediction is free trade ought to lead to an improvement in the TOT of a
country. Increased demand in several other countries for the exports of one country should
result in higher prices for those exports. At the same time, lower trade barriers (i.e., a fall
in tariffs and quotas) in that country should mean a drop in prices of imported merchandise,
as well as in the price of like or directly competitive domestically-made goods. Thus, the
ratio of export prices, $P_{EX}$, to import prices, $P_{IM}$, which is the definition of the TOT, should
rise. However, when Prebisch examined data from 1870 to 1936, he found the TOT rose
for developed countries, but not developing countries. Singer’s findings supported the
conclusions Prebisch reached.

Empirical evidence from the 20th century concerning primary product exports, in

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which developing countries tend to specialize, indicates long-term price declines. Overall, during the First World War (1914-1918) and Great Depression (1929 through the early 1930s), prices of primary commodities fell. They recovered during the Second World War. During the 1950s and 1960s, there was no general trend. In the mid-1970s, these prices spiked, and thereafter remained constant at higher levels during the 1980s and 1990s. In 1997, Peruvian economist Hernando De Soto (1941-) published a study of prices of 24 different major commodities from 1900 to 1992. He found the prices trended downward for 17 commodities, increased for four commodities, and exhibited no pattern (downward or upward) for three commodities. In the same period, prices of merchandise imported by developing countries rose steadily, indicating a TOT decline for many such countries.

Naturally, Prebisch asked why the TOT of developing countries deteriorate as a result of trade. One answer is known as “immiserizing growth” (discussed in a separate Chapter): if a country exports a product in sufficiently large volumes, and if those exports account for a substantial share of total world supply of the product, then the exports may cause a fall in the world market price of the product. The country is a large player in the market – such as, for instance, Brazil in the coffee market – and this size redounds to its detriment. The more it exports, the greater the downward pressure on the price of the product, which in turn means \( P_{EX} \) deteriorates. Put in graphical terms, the world market supply curve for the product shifts outward, and assuming all other factors are unchanged \((ceteris paribus)\), the price falls.

Is it possible to apply the immiserizing growth answer to small developing countries? The response depends on the product in question. Suppose several small developing countries make the same or a substitutable product, and their cumulated exports account for a sizeable portion of world supply. Primary commodities, like banana, cocoa, rubber, and tea provide classic examples. Then, should they increase their exports, the world supply by definition increases substantially, and the product price falls.

Prebisch offered four other possible reasons for the decline in developing country TOT associated with trade:

(1) **Engel’s Law**

A well-known microeconomic principle, which empirical evidence bears out, is as income rises, the portion of income spent on necessities – particularly food – falls. This principle is “Engel’s Law.” Simply put, as people become richer, they spend a smaller percentage of their overall budget on food than they did in the past. Engel’s Law is based on a behavioral tendency to consume different goods in different proportions as income rises – in particular, as consumers obtain higher levels of income, their spending patterns shift toward luxury items. Stated in economic terms, there are differences in the income elasticity of demand for products. The income elasticity of demand is the percent change in the quantity demanded of a product that is associated with a given percent change in income.
Expressed arithmetically, it is:

\[
\text{Income Elasticity} = \frac{\text{Percentage \ Change \ in \ Quantity \ Demanded \ of \ a \ Product}}{\text{Percentage \ Change \ in \ Income \ of \ a \ Consumer}}
\]

Income inelasticity occurs if the ratio is less than 1, and income elasticity exists if the ratio exceeds 1. Thus, if income rises by 10%, and demand increases by more than 10%, then the product is said to be “income elastic.” If a 10% rise in income leads to an increase in demand of less than 10%, then it is “income inelastic.”

Primary commodities, which are and go into food products, and which are necessity items, tend to be income inelastic. Manufactured goods, which typically are not necessities, tend to be income elastic. Thus, Prebisch argued, as income rises, the demand for products in which developing countries specialize (primary commodities) rises less rapidly than the demand for products in which developed countries specialize (manufactured goods). Increases in income may occur in developed countries (as they get richer), in developing countries (as segments of their society grow richer), or both.

2) *Asymmetric Benefits from Technology*

Prebisch alleged technological gains do not have the same impact in developed and developing countries. In developed countries, improved technology helps bolster labor productivity. Wage rates tend to be “sticky downward” for structural reasons, including organized worker groups (e.g., unions). Likewise, product prices tend to remain strong, because of imperfect competition among suppliers (i.e., monopolistic or oligopolistic product markets).

In contrast, in developing countries, technological enhancements do more than increase productivity. They also replace labor, and result in lower product prices. Structural features in place to keep wages from sliding do not exist in most poor countries. Some product markets in those countries may be characterized by monopoly or oligopoly, yet the world market for the product is competitive, thereby allowing for price declines with increased exports of the product.

Therefore, urged Prebisch, the net effect of technological enhancement on relative TOT is asymmetric. For developing countries, technological improvements lead to a fall in export prices and, hence, falling TOT. For developed countries, these improvements do not put downward pressure on the price of their exports, so there is no adverse effect on their TOT.
(3) **Substitution Effects**

Prebisch pointed out substitutes have been invented for several products in which developing countries specialize. Examples include petrochemicals (e.g., plastics), which substitute for rubber, and synthetic fibers (e.g., nylon and rayon), which substitute for natural fibers (like cotton). Consequently, the demand in developed countries for the specialty of developing countries has slowed or fallen. In turn, from the perspective of developing countries, the price of that product, $P_{EX}$, has not increased, and possibly declined. This price is $P_{IM}$ from the perspective of developed countries. The effect on relative TOT is apparent – the TOT of developing countries (where $P_{EX}$ is the numerator of the TOT ratio) is stagnant or drops, and the TOT of developed countries (where $P_{IM}$ is the denominator) stays the same or rises.

(4) **Protectionism**

Prebisch argued the trade policies of developed countries are to blame, in part, for the failure of the TOT of developing countries to improve with international trade. These policies tend to work against trade liberalization on products of keen export interest to developing countries. Tariff and non-tariff barriers remain high, and tariff escalation exists, on such products. Demand for these products does not increase markedly. Hence, $P_{EX}$, as viewed by developing countries, does not rise.

The Prebisch-Singer Thesis has not gone without challenge. Three basic categories of questions are put to it.

First, as a conceptual matter, is it appropriate to focus on the Net Barter TOT (i.e., the ratio of $P_{EX}$ to $P_{IM}$) rather than Income TOT (i.e., the ratio of $P_{EX} \times Q_{EX}$ to $P_{IM}$, where $Q_{EX}$ is the quantity of goods exported, hence the numerator represents export revenues, the price of exports multiplied by the volume of those exports)? Focusing on income TOT reveals export revenues a country generates, which it can use to pay for imports.

Second, how good are the data Prebisch used? A number of problems existed with these data. For example, the period examined, 1870 to 1936, ended during the Great Depression, before world agricultural process recovered. Had the period been different (either shorter, ending before the Depression, or longer, ending after it), prices of developing country exports, $P_{EX}$, might not have been so low. Further, the price data included transportation costs (e.g., shipping charges), which may have distorted the underlying values for $P_{EX}$ and $P_{IM}$. Indeed, between 1870 and 1936, transportation costs fell considerably. During this period, the quality of certain goods improved, but these improvements were not necessarily reflected in increased prices.

Still another illustration of data problems concerns missing data. Prebisch did not have statistics on exports from Argentina to Great Britain, so he had to infer the value and
volume of these exports by examining British statistics on imports from Argentina. Additionally, there are periods of boom in commodity prices, such as the early part of the new millennium. Thus, the choice of the period of investigation can support, or undermine, the Prebisch-Singer Thesis.

Third, is it insightful to speak of the TOT of developing countries generally? When data are disaggregated by region, not every developing region shows declining TOT. For example, the TOT for Asia are stable or improve. For Latin America, the trend is improvement in the mid-1970s, followed by long-term decline. The TOT for Middle East countries, particularly oil exporters, depends heavily on oil prices. The point is developing countries are heterogeneous in what they export, and to where. Measuring TOT for this diverse group risks obfuscating success stories with problem cases.

IV. Policy Implications of Prebisch-Singer Thesis

Notwithstanding the challenges to the Prebisch-Singer Thesis, the policy implications of the Thesis are clear: developing countries should diversify their export base by industrialization. That is, rather than rely on exports of agricultural products, they should move into markets for manufactured products – and, by extension of the Thesis, into services. Once they establish a position in certain finished goods markets, these countries can “work backwards” and develop industries in intermediate goods. That is, they can build linkages in their economy, with the end results being vertically integrated industries, improved human capital and technology through industrial development, and less dependence on certain imports from major countries.

Exactly what manufactured products (and services) a particular developing country specializes in depends on its comparative advantages. The Heckscher-Ohlin Theorem lends help on this matter. The Theorem predicts a country will specialize in the production and export of a product that uses intensively in its production the factor (capital equipment, human capital, labor, land, or technology) with which the country is relatively well endowed. Still, answering “what to export?” is a challenge for many countries. This question relates directly to market access in developed countries. Suppose a developing country aspires to specialize in refined chocolates (and thereby lessen its dependence on cocoa exports) and dress shoes (and thereby lessen its dependence on leather exports). But, suppose also the tariffs on these products in major markets are high (e.g., there are tariff spikes), or there is tariff escalation (i.e., the tariff on a finished product exceeds that on inputs). The developing country will have little luck in penetrating these markets, unless it can orchestrate barrier reduction through multilateral trade negotiations under WTO auspices, or through talks to form an FTA or CU.

Not surprisingly, in considering “what to export?” a closely related question arises, namely, “how to diversify?” Might it be better for a developing country to eschew trade liberalization temporarily? The logic is that of the infant industry: new industries in a developing country cannot withstand international competition at early stages. In contrast with established industries in developed countries, infant industries in developing countries have not yet achieved low-cost production methods or realized economies of scale (i.e.,
declining long-run average costs of production), and their output is not of high quality. If faced with direct competition from developed country industries, the infants will not survive, as consumers in developing countries would prefer cheaper, better imports rather than domestically-made like or directly competitive products. Private sector financiers would be unwilling to lend funds to the infant industries, because their high costs and low profits render them risky borrowers. In this scenario, a period of protection from import competition will allow the infants to mature, at which point they can compete globally. Financing from development banks, and the government (of the developing country), either directly through grants or “soft” (i.e., low-interest, long-term) loans, or indirectly through guarantees, may be needed.

To be sure (as mentioned earlier), after the American Revolution, Alexander Hamilton (1755-1804), in Report on Manufactures (1791), offered this logic for high tariffs. A developing country at the time, America needed to establish an industrial base. Hamilton said it should do so through such protection. In the process, it could gain economic independence from Europe, an aspiration dubbed “economic nationalism.” However, free-trade oriented economists point out problems with the infant industry-economic nationalism argument.

First, protection tends not to be removed after its economic purpose is served. Political lobbying from leaders in the protected industry results in mollycoddling long after the infant has matured. The end result of protection may be the creation of a domestic monopoly. Relatedly, the initial imposition of protection, as well as its continuation, presumes the government of the developing country is astute at picking an industry with strong potential to develop an international comparative advantage. Not all such governments, and not all such planners, are skilled at this strategic thinking.

Second, if developing country officials furnish information to private financiers about the long-term viability of infant industries, then they may adjust the tenor of loans. Specifically, lenders may permit long maturity dates sufficient to encompass the time needed to realize economies of scale. Also, a government can subsidize either interest rates or production, and either policy is more efficient than protection.

Third, the challenge infant industries face in some developing countries is not production cost or quality, but infrastructure in a country. Most of the Indian Subcontinent, in contrast to China, is a case in point. Throughout much of the Subcontinent, roads, utilities, and port facilities range from mediocre to decrepit. (Not surprisingly, the Subcontinent attracts service-based businesses like call centers, which rely less on infrastructure than traditional manufacturing.) Protection will not address this challenge. Only government-led initiatives will make a difference. Dismantling trade barriers may facilitate infrastructure improvement, as foreign-based providers of heavy equipment and expertise needed to build roads, utilities, and ports flow in.

V. Evidence for Import Substitution

Export pessimism, Dependency Theory, and the Prebisch-Singer Thesis have been
important rationales used by many developing countries to justify Import Substitution. They imposed high tariffs and non-tariff barriers (especially quotas and import licenses) to make imports more expensive or restrict the availability of imports, and thereby gave preference to domestic producers.

Brazil is a notable example. It opted for Import Substitution in response to the Great Depression and Second World War. Table 5-1 shows its consequent shift to domestically-made goods. Arguably, because of that strategy, Brazil advanced from reliance on primary products and T&A to intermediate goods.

Likewise, Korea employed Import Substitution in the 1950s and 1960s. Eschewing dependence on foreign firms for technology, Korea honed its own know-how. Table 5-2 shows the impact of the strategy on industrial output and industrial exports. Both statistics rose considerably. Import Substitution proponents point to the strategy as a, if not the, key reason.

| Table 5-1 |
| Brazil and Import Substitution, 1939-1958 |
| **Sector and Year** | 1939 | 1958 |
| **Percent of Total Industrial Output Accounted for by Sector** | 63% | 18% |
| **Intermediate Goods** (e.g., equipment, metal goods, machinery, and minerals) | 44% | 33% |

| Table 5-2 |
| Korea and Import Substitution, 1950s and 1960s |
| **Statistic and Year** | 1960 | 1965 |
| Share of Industrial Output in GDP | 19% | 24% |
| Share of Manufactured Goods in Total Exports | 13% | 61% |

Obviously, Import Substitution is one strategy in an overall policy mix. A developing country implements it along with policies on exchange rates, interest rates, wages, prices in various markets, and the balance of payments. For example, it may make little sense for a country with a large population, indeed labor surplus, to embark on an Import Substitution strategy that favors capital-intensive production, without further

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policies to employ the large labor pool and develop its skills. Yet, this result can occur, by
design or effect, through exchange rate policies (e.g., keeping them artificially high to
facilitate imports of capital equipment) or interest rates (e.g., keeping them artificially low,
or subsidizing them, to encourage borrowing for capital equipment purchases). Proper
policy coordination, and adaptation of policies to changing economic circumstances, both
of which imply a sound policy formation process, are necessary for the right integration of
Import Substitution and supporting initiatives.

India is a case in point of good and bad results from Import Substitution. From its
Independence on 15 August 1947 to approximately 1991, it pursued this strategy in many
sectors. Protection of domestic industries took the form of high tariff rates and the
requirement of a license to import. On the one hand, India achieved some degree of
independence from imports of certain chemicals, fertilizer, iron, some machinery,
petroleum, and steel. Indians are proud (sometimes excessively so) of their innovative and
self-reliant economy. On the other hand, corruption abounded with the so-called “License
Raj” system, as would-be importers offered bribes to obtain a precious license to import
and thereby, in effect, become a monopolist.

Moreover, protection led to diversification into product lines in which India lacked
a strong potential for comparative advantage, and dependence on some kinds of foreign
technology. A domestic producer, once it obtained a license to import technology, was safe
from foreign competition for the product in which it incorporated the technology – it had
no incentive to innovate.

Nevertheless, for most mainstream economists, the success stories do not amount
to persuasive evidence for Import Substitution. They reiterate the well-known classical and
neo-classical arguments about the net costs associated with tariffs and quotas: the
protection necessary for Import Substitution imposes a dead weight loss caused by
inefficient allocation of factors to producing the protected good, and by diminished
consumption opportunities. Further, the economic consensus points to counter-evidence on
failures in specific countries, and to repeated mistakes associated with this strategy.

As for failed cases, Ghana, Mexico, Pakistan, Tanzania, and Uruguay are among
the examples. They experimented with Import Substitution, but implementation was poor
and accompanied by inappropriate policies that distorted exchange rates, interest rates and
wages, as well as the prices of various imported and domestic goods. Ghana, Mexico, and
Pakistan are particularly worthy of note.

Ghana gained independence from Britain in 1957. In 1961, it adopted Import
Substitution. The average tariff rate jumped from 17% to 25%, and import licenses were
mandatory. Table 5-3 shows some near-term results, through 1966. The long-term effects
of Import Substitution, which Table 5-4 shows, were unequivocally negative.

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97 Tables 5-3 and 5-4 are constructed from data presented in Stuart R. Lynn, Economic Development:
Table 5-3
Near-Term Effects of Import Substitution in Ghana

<table>
<thead>
<tr>
<th>Statistic and Year</th>
<th>1962</th>
<th>1966</th>
</tr>
</thead>
<tbody>
<tr>
<td>Composition of Imports</td>
<td>Over 50% of imports are consumer goods</td>
<td>30% of imports are consumer goods</td>
</tr>
<tr>
<td></td>
<td>65% of imports are capital goods and materials</td>
<td></td>
</tr>
<tr>
<td>Growth in Manufacturing</td>
<td>Growth of 10% per year between 1962-1966</td>
<td>Growth of 10% per year between 1962-1966</td>
</tr>
</tbody>
</table>

Table 5-4
Long Term Effects of Import Substitution in Ghana

<table>
<thead>
<tr>
<th>Statistic and Year</th>
<th>1950s</th>
<th>1980</th>
</tr>
</thead>
<tbody>
<tr>
<td>Per capita GNP</td>
<td>20-year decline starting in 1950s</td>
<td>20-year decline starting in 1950s</td>
</tr>
<tr>
<td>Investment Rate (Investment as a percent of GDP)</td>
<td>20%</td>
<td>5%</td>
</tr>
<tr>
<td>Exports (Exports as a percent of GDP)</td>
<td>30%</td>
<td>12%</td>
</tr>
</tbody>
</table>

A coup d’état in 1966 changed political leadership. It also ushered in modest trade policy changes, though not until the 1980s did Ghana abandon Import Substitution. Its roughly 20 million people remain poor by any measure – low per capita GNP (U.S. $400, ranking it 166 in the world), low life expectancy (57 for men and 59 for women), and low literacy rates with a large gender gap (79% and 61% for men and women, respectively).

Why did Ghana fail to grow through Import Substitution? There are at least four reasons. First, tariff rates were not coordinated. Consequently, the Effective Rate of Protection (ERP) was over 200% for some domestic industries, but negative for export industries. Some export industries were faced with the ridiculous situation of having to pay an amount for imported raw materials and components greater than the value of the exported finished product they made.

Second, obtaining an import license depended on arbitrary and capricious behavior by government officials. Worse yet, officials solicited – and got – bribes in exchange for licenses. Corruption in license administration, and the trade regime generally, became rampant.

Third, the local currency was fixed against foreign currencies. It could not depreciate when Ghana experienced inflation (as market forces would require, because of the increase in supply of local currency that contributed to inflation). With an over-valued exchange rate, exports other than cocoa did not rise. Cocoa export revenues slumped as
world market prices for cocoa fell. This environment discouraged entrepreneurs from investing in businesses that could help diversify the export base of the country.

Fourth, on manufacturing, two policies encouraged capital-intensive production: minimum wages and interest rate ceilings. Minimum wages raised the cost of labor relative to capital. Credit cost caps encouraged borrowing for capital equipment expenditures. Yet, with a growing population, Ghana needed labor-intensive investments.

Mexico is an important case of policy change. Following Import Substitution for decades, in the early 1980s, Mexico reversed course. It began liberalizing its restrictive trade and investment regime, and withdrawing from state intervention in the economy. In 1986, Mexico acceded to GATT. Commencing free trade negotiations with Canada and the U.S. in the early 1990s, Mexico impressed its partners with its commitment to reform, manifest in new IP protection laws. It became a Party to NAFTA 1.0 as soon as NAFTA took effect (1 January 1994).

Mexico has well over 50 FTAs. They cover its key export markets, including Japan. These accords evince Mexico’s dedication to trade liberalization. They entail international legal commitments to openness and reform. Not surprisingly given their experience and sophistication, Mexican trade officials and practitioners assist countries in Central America in their trade negotiations, such as for with the U.S. on CAFTA-DR.

As for Pakistan, Dorosh and Valdes construct a model of its economy. They apply data from 1983-1987 to the model, not only on Import Substitution, but also agricultural price and exchange rate policies. They conclude the combined effects of these policies lowered wheat production by 24%, and rice production by 52%. Posing the counterfactual, if Pakistan had not adhered to Import Substitution and the other policies, then incomes of farmers from five major crops would have been 40% higher. Another interesting counterfactual is whether and how better economic performance might have altered subsequent history, including the October 1998 military coup d’état by General Pervez Musharraf (1943-), and internal battles against Islamic extremism (especially in the North West Frontier Province (NWFP, renamed Khyber Pakhtunkhwa in 2010), Baluchistan, and Karachi).

As for often-repeated mistakes with Import Substitution, critics point first and foremost to the political difficulty of removing trade barriers and subjecting domestic industries in developing countries to import competition. The period of protection is one in which captains of the domestic industry become adept at rent-seeking behavior, leading them to lobby for continued protection rather than enhance the competitiveness of their businesses. Insofar as these businesses produce consumer goods, consumers in the developing country are stuck with high-priced, low-quality goods. If a developing country has a small market, then it may not be able to support a large number of producers, which reinforces the tendency toward monopoly (or oligopoly).

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Yet, at the same time, the country remains dependent on imports for capital equipment. To finance such imports, the country may need to borrow from official or private sources, especially if its performance in export markets for consumer goods is lackluster, leading to an increase in foreign debt. In brief, Import Substitution often is a recipe for inefficient, even corrupt, imperfect competition in consumer goods markets, plus increased dependence on foreign physical and financial capital.

A second set of mistakes concerns the relationship of the agricultural to industrial sector. Import Substitution raises the cost of imported seeds, fertilizers, and equipment used by farmers in a developing country. Moreover, this approach sometimes is coupled with maintenance of an overvalued exchange rate. A higher-than-market exchange rate allows a developing country to reduce the cost of imports of approved items, such as capital goods needed for industrialization (because at the higher rate, the country can convert a unit of its currency into more units of foreign currency than the market would justify, and then use the foreign currency to buy needed items). But, the overvalued exchange rate makes agricultural exports less attractive to foreign buyers (because they get less units of the developing country currency per unit of their currency than a free currency market otherwise would allow, and thus their purchasing power is reduced).

The result is TOT deterioration, not internationally, but domestically, namely, between the rural and urban sectors within a country. That is, farmers are worse off because their costs are higher, and sales lower, relative to the industrial sector. This situation, if pronounced or prolonged, can lead to social unrest in rural areas. Economically, it can cause a decline in the balance of trade, and create dependence on borrowing from overseas, thereby leading to (or exacerbating) debt problems.

What, then, is the “bottom line” about Import Substitution versus Export Orientation? The debate is highly contentious, yet it may be said the consensus of economists favor Export Orientation. “Consensus” here does not mean essential unanimity, as it does in WTO decision-making. Rather, it means the majority of economists, and perhaps the caveat should be added that the pool of economists involved is trained in Neo Classical Economic Theory. The consensus would agree trade is not the only engine of growth, but it can be an engine of growth, if other complementary factors exist, not the least of which is good governance and a strong rule-of-law framework.

VI. 1981 Lord Bauer Rebuttal

One of the most provocative economists to comment on development issues is England’s Lord Peter T. Bauer, a long-time professor at the London School of Economics and Cambridge University. Born in Budapest in 1915, Lord Bauer wrote in the mid-and latter half of the 20th century and was a fellow of the British Academy. (He passed away in 2002.) Lord Bauer’s research, while not all directly bearing on trade, both raises and attempts to rebut criticisms often made about the world trading system, and more generally, of globalization. His perspectives demonstrate the charges and counter-charges heard today are not new.
In *Equality, The Third World and Economic Delusion* (1981), Lord Bauer considered the accusation the First World (*i.e.*, developed nations), manipulate international trade to the detriment of the Third World (*i.e.*, developing and least developed nations). In specific, the First World stood accused of inflicting unfavorable and deteriorating TOT. That is, following the accusation, the First World was charged with orchestrating a decline in the share of international trade held by the Third World. The obvious policy implication from this accusation is Export Orientation is not a viable growth strategy. However, Lord Bauer offered five arguments in rebuttal to this accusation.

First, the poorest areas of the Third World have little or no external trade. It makes little sense to blame the First World for manipulating trade against largely autarkic countries. They are poor for domestic reasons, not because of First World manipulation. Virtually any external commercial contracts would be beneficial, *i.e.*, expanded trade would benefit such countries. Indubitably, Lord Bauer would agree with the proposition espoused by former U.N. Secretary General, Kofi Annan, and others, namely, the poor are poor not because of too much globalization, but because of too little.

Second, most countries are developing or least developed, *i.e.*, the bulk of the world is the Third World. Roughly 80% of the WTO Membership consists of such countries. Accordingly, said Lord Bauer, it is not possible to consider the TOT of the Third World in the aggregate. The TOT for any one such country may move favorably during one period, but may deteriorate in another period. Much depends on the period selection for measurement. OPEC countries enjoyed high export prices for their key commodity, oil, in the 1970s, but had to reassess lavish government spending programs in the late 1990s as those prices – and the revenues from them to fund expenditures – shrank. The point is that TOT for the entire Third World makes little sense.

Third, it is simplistic to draw inferences from the TOT alone. Many factors affect the economic performance of Third World countries. For example:

1. **Cost of Production**
   The TOT cannot be inferred simply from the ratio of import and export prices. This ratio does not take into account the cost of production of exports. The higher the cost of production of exports, the more expensive it is for a Third World country to engage in international trade. High costs of production are based on the cost of factors of production, *i.e.*, land, labor, physical capital, human capital, and technology.

2. **Export Diversification**
   The diversity of the export base of a country, and quality of its imports, are critical determinants of economic success.

3. **Trade Volume**
   The volume of trade in which a country is engaged affects its success.

4. **Import Purchasing Power**
The amount of imports a country can purchase with a unit of domestic resources also affects its success.

Moreover, Bauer argued, Third World countries contribute significantly to their own dismal performance. Corruption, war and conflict, and economic mismanagement are self-inflicted wounds readily apparent in many poor countries. It is difficult to blame developed countries in every instance.

For example, the U.S. has had since 1977 the Foreign Corrupt Practices Act and Antibribery Provisions, which bars bribery of foreign government officials. On 21 November 1997, the OECD agreed to an Anti-Bribery Convention (formally, the Convention Combating Bribery of Foreign Public Officials in International Business Transactions). (Both regimes are discussed in a separate Chapter.) Neither the U.S. nor any other OECD country plausibly can be blamed for every war, conflict, or poor policy choice. There is far more to the problem than TOT.

Fourth, in the vast majority of markets, it is naïve to believe major trading countries can manipulate international prices. Most markets are too broad and deep for price cartels or other anti-competitive practices to work. Prices are the outcome of innumerable individual decisions of market participants. The result is what economists chart as supply and demand curves, not conspiracies to distort TOT.

Fifth, the accusation major powers inflict bad and worsening TOT on the Third World wrongly presumes the share of a country in world trade is, by itself, a gauge of its prosperity or wealth. That share is just one such indicator. Some high-income countries like Brunei, Singapore, Switzerland, and the UAE have small shares. Still, as a general trend, the Third World share of world trade has increased. By 2004, it approximated 31%, the highest figure since 1950, and continues to grow.

A second accusation leveled not directly at the GATT-WTO system, but rather at the related international financial order, concerns external debt. Many developing and least developed countries owe staggering amounts of debt to official creditors (e.g., governments of developed countries), private lending institutions (e.g., commercial banks), and international organizations like the World Bank and IMF. The accusation is this debt reflects exploitation by hegemonic powers of poor countries (if the debtors are sovereign) and businesses in those countries (if the debtors are private enterprises).

The loans, it is said, were thrust on the Third World (particularly in the 1970s, to re-cycle petrodollars deposited by oil exporting countries in western and Japanese financial institutions). The loans help ensure debtor countries buy products from the creditor countries, and thereby remain dependent on them. Many debtors cannot hope to emerge from the burden in a reasonable period of time, and need new funds to repay previously-contracted debt. The link to the trade regime is these debtors are forced to use a large portion of their export revenues to repay principal and interest, rather than for reinvestment in productive assets. Not surprisingly, many scholars, governments, think tanks, and so

forth have offered proposals since the 1970s, when the debt problem emerged, to alleviate the burden. Serious talk of canceling African debt began in 1987.

Debt forgiveness, advocated by (inter alia) the Holy See and Her Majesty’s Government, is the most dramatic proposal. In the summer 2005, British Prime Minister Tony Blair and Chancellor of the Exchequer Gordon Brown persuaded the Group of 8 (G-8, i.e., the rich countries, the G-7, plus Russia) to endorse a plan to cancel all debts of 18 highly indebted poor countries (HIPCs) owed to the World Bank, IMF, and AfDB. The face value of the debt is $40 billion, on which average service payments are $1 to $1.5 billion. The intended beneficiaries were Bolivia, Guyana, Honduras, Nicaragua, and 14 African countries. Nine other debtor-countries could become eligible for relief, and a further 11 countries would be if they reduced ineptitude and corruption.

There were two “catches” to the G-8 plan. First, the amount of loans or grants a debtor-country receives from the World Bank or ADB is “adjusted” (i.e., cut) by the amount of money the country saves in debt servicing. For example, in 2006, Rwanda was supposed to pay $4.5 million to the World Bank and AfDB, and $2.9 million to the IMF. The G-8 proposal eliminates these repayment obligations. But, it also cuts World Bank and AfDB (but not IMF) funding to Rwanda by $4.5 million. The net saving to Rwanda, then, is $2.9 million it does not have to repay the IMF. Second, the G-8 (or any member thereof) could cut funding to the World Bank and AfDB, or their bilateral aid budgets. It is not apparent they all will allocate taxpayer funds to multilateral lenders, as opposed to setting off amounts they might have given against forgiven debt.

Lord Bauer addressed head on the accusation the external debt of the Third World is the result of exploitation by the West. First, he counters this debt represents resources supplied, namely financial capital from commercial and investment banks, and ultimately saver-investors in the U.S. and other wealthy countries, to the Third World. It is the responsibility of the debtors to channel the funds into productive investments. If they make poor investment choices, or if they allow some of the funds to be skimmed off to corrupt ends, then the creditors hardly are to blame.

To be fair, a country receiving $100 million in aid and paying $50 million in debt service is not necessarily as well off as a country receiving $50 million in aid. Former IMF Chief Economist and RBI Governor, Raghuram Rajan (1963-), pointed out the stock of liabilities matters, not just the amount of net inflow of funds. The stock of debt, in particular, can deter FDI. Would-be private investors may be concerned the debtor-government will over-tax their profits to cover debt service obligations. If they elect not to invest, and the investment rate in the debtor-country falls, then growth in the country will fall. In turn, the country will be less able to service its debt than a debt-free country.

Second, Lord Bauer explained the difficulties Third World countries have in servicing their debt do not reflect external exploitation generally, nor unfavorable TOT in particular. Rather, the causes lie in:

(1) Wasteful use of the funds supplied (i.e., living beyond the country’s means).
Corruption.

(3) Inappropriate fiscal or monetary policies (e.g., maintaining overvalued exchange rates).

(4) The need to import raw materials, intermediate goods, and capital goods (machine tools) to support industrialization.

Regarding the last-listed cause, Lord Bauer pointed out as Third World countries industrialize, they typically run large overall BOP deficits (though certain bilateral relationships may be in surplus). Malaysia and China are examples (though, for instance, China has had large trade surpluses with the U.S.). In brief, Lord Bauer’s response is to differentiate an exploitative lending relationship from the normal process of economic development, and from bad choices by borrowers.

Finally, Lord Bauer dubbed condescending an aspect of the allegation about debt, namely, that imports from major countries ultimately damage people in the Third World. These people exercise free choice to import goods, based on their economic wants. If they did not want the imports, then the goods could not be sold. Yet, they are, and people are willing to produce goods to export and thereby pay for the imports. To allege otherwise is to take no account of the preferences of people in the Third World, and how they organize their economic lives in expressing their preferences.

To these points it is worth adding most poor countries receive many times more in multilateral, regional, and bilateral aid than they pay in external debt servicing. In the 1990s, reports the World Bank, HIPCs received roughly twice as much aid as they paid to service their debts. Mozambique, an extreme example, paid $71.8 million to service its debts in 2003, but got 14 times that amount in aid.

VII. 2019 Brazil Taxes Case

• Facts

100 See Brazil Taxes Appellate Body Report, ¶¶ 1:4-1:13.

It is a disappointment that after 23 years of jurisprudence, the Appellate Body still failed to write a clear summary of the facts in its decisions. It labelled Part I of its opinions “Introduction,” and dedicated several paragraphs to what properly is known as the “procedural posture” of a case. That posture has little to do with the underlying facts that generated the issues of the case. The Appellate Body tends to bury those facts in footnotes, and render those footnotes all the less accessible with unconscionably small font. That is exactly what it did with respect to the disputed Brazil tax measures. Readers were forced to pour over (with high-power reading glasses) footnotes 17-20, 25, 27, 36 of the Report, in addition to the pertinent paragraphs in the text, to learn what the case is all about.

The disappointment was all the greater, because a general trend in WTO litigation has been the increasing complexity of the cases, that is, of the facts, and the fact-intensive, fact-dependent nature of Appellate Body conclusions and rationales. It is difficult to understand those holdings and the reasons for them without a grasp of the facts, and a simple adjustment in how the Appellate Body constructs its Reports would go far in enhancing their value, both practical and pedagogical. So, too, would a few simple summary tables, along the lines of those provided above.

In addition, the 154-page Brazil Taxes manuscript is one of the least well-organized among the Appellate Body’s prodigious corpus of opinions. The logical flow of issues, holdings, and rationales – following a clear statement of the facts – would have been to cover (as here) the GATT Article I MFN violation and its possible excuse under the Enabling Clause, Article III national treatment violation and its
To comprehend the specific tax measures at issue in the *Brazil Taxes* case, it is helpful to appreciate the underlying types of taxes with which those measures were associated. Brazil maintained four types of taxes affecting the information and communication technology (ICT), automotive, and export sectors. It also is helpful to appreciate that, at bottom, all of the controversial tax measures served a single policy goal: import substitution. Table 5-5 summarizes the four tax types, which are explained below:

1. **Tax on Industrialized Products (known by its Portuguese acronym, the “IPI” Tax):**

   This Federal tax applied to all manufactured products, whether produced by Brazilian or foreign companies. The *IPI* Tax rates were product-specific and depended on the price or value of the industrial product on which the tax is imposed. However, the tax base differed, depending on whether a product was made in Brazil or imported into the country.

   For a domestically-made product, the tax base was the transaction value of the merchandise. For an imported good, the tax base was the customs value plus the import duties and charges paid. The *IPI* Tax was not paid by the party that ultimately bore the burden of the tax. For domestically-made product, the industrial entity selling the product charged the tax to the buyer of that product, and then remitted the retained taxes monthly to Brazil’s Federal Revenue Service. For an imported good, Brazil’s customs authorities charge the tax to the importer of good during the customs clearance process.

   For both domestically-made and imported items, the *IPI* Tax was a value-added tax (VAT), not a cumulative tax. So, the Tax due at each supply chain stage was adjusted by a credit (deduction) for taxes paid at earlier stages in that chain.

2. **Social Integration Program/Civil Service Asset Formation Program Contribution, and Contribution to Social Security Financing (known respectively by their Portuguese acronyms, “PIS/PASEP” and “COFINS”):**

   These Contributions were made by all legal entities to Federal authorities based on the gross revenues earned by those entities. Like the *IPI* Tax, the Contributions were non-cumulative, *i.e.*, prior supply chain stage payments of the *PIS/PASEP* and possible excuse under Article III:8(b), and finally – if necessary – the Red Light subsidy issues (plus the attendant *DSU* Article 11 claims). In other words, why not start with the non-discrimination claims that lie at the core of GATT? With a finding against Brazil on any of them (as the Appellate Body rendered), then why not exercise judicial economy on the subsidy contentions? Finding Brazil’s measures violated the MFN and national treatment rules ought to have been enough to recommend that Brazil annul them. That several measures constituted import substitution subsidies perhaps was not necessary to dispense with the case, nor to have Brazil change its ways.

   Regrettably, the Appellate Body members started with national treatment, then moved to the Red Light subsidies, then to MFN and the *Enabling Clause*, and then to subsidy-related *DSU* Article 11 issues. The result was a jarring, post-modern, stream-of-seemingly endless technical points, not a concise, cogent linear narrative.
COFINS were deducted (debited) from current stage liabilities. This Contribution scheme (as distinct from (3), below) applied to domestically-produced goods.

(3) Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services (“PIS/PASEP-Importation”) and Contribution to Social Security Financing Applicable to Imports of Goods or Services (“COFINS-Importation”):

These contributions were variants of the PIS/PASEP and COFINS Contributions for the context of individual import transactions. They were imposed on the importation of goods, and their taxable base was the customs value of the imported merchandise. Like the Contributions for goods made in Brazil, these Contributions were non-cumulative, which means an importer could offset the amounts it owes on imports with its liability for domestic PIS/PASEP and COFINS Contributions. And, importers paid these Contributions on a value-added basis, that is, on the difference between the customs value of the merchandise (what the importer paid for the good) and the importers’ sales price (what the importer sold the good for).

(4) Contribution of Intervention in the Economic Domain (also known by its Portuguese acronym, “CIDE”):

The CIDE Contribution was made to Federal authorities and was applicable, at a 10% tax rate, to remittances and royalty payments abroad. The taxpayers were any legal entity with a license to acquire or use technological knowledge of, or an agreement involving technology transfer from, a person residing or domiciled abroad, which involved technology transfer from that person. The tax base was the amount paid or remitted monthly by the taxpayer to the person overseas.

Essentially, Brazil granted whole or partial relief from one or more of these four tax measures through trade-related measures for qualifying companies engaged in the ICT or automotive sectors, or in exportation. These four tax measures allowed benefits in three sectors (ICT, automotive, or export) through seven detailed schemes for which only certain companies could qualify.
Table 5-5
Synopsis of Four Brazilian Tax Measures

<table>
<thead>
<tr>
<th>Tax Measure Acronym</th>
<th>Explanation of Tax Measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>IPI Tax</td>
<td>A value added (that is, non-cumulative) tax on all manufactured products.</td>
</tr>
<tr>
<td>PIS/PASEP and COFINS Contributions</td>
<td>Contributions (non-cumulative) for social integration, civil service assets, and social security, applicable to domestically-manufactured goods.</td>
</tr>
<tr>
<td>PIS/PASEP-Importation and COFINS-Importation Contributions</td>
<td>Contributions (non-cumulative) for social integration, civil service assets, and social security, applicable to imported goods.</td>
</tr>
<tr>
<td>CIDE</td>
<td>A 10% tax on remittances and royalties abroad.</td>
</tr>
</tbody>
</table>

Table 5-6 summarizes those schemes, that is, the seven trade-related measures that are the controversial ones at stake in the WTO case. They are explained below:

(1) Tax benefits targeting the ICT sector under one of four trade-related measures: 101

(a) The Informatics Program

This Program granted exemptions or reductions on the IPI Tax for sales of ICT goods. It also allowed for suspensions of the IPI Tax on purchases of imports of raw materials, intermediate goods, and packaging used to produce ICT and automation goods. To receive these benefits, a company had to obtain accreditation, and companies eligible for accreditation had to satisfy two criteria.

First, they needed to develop or produce ICT or automation goods in compliance with Brazil’s Basic Productive Processes (“PPBs,” following the Portuguese acronym), which were the minimum stages or steps of operations, i.e., of an industrial process, which performed at a manufacturing facility in Brazil. Second, they needed to invest in ICT R&D in Brazil. Further, once a product gained the status of “Developed in Brazil,” then it was eligible for additional IPI Tax reductions. This status was earned only if the product was developed in Brazil by skilled technicians who were residents or domiciled in Brazil, and the product complied with specifications set forth in Brazilian legislation.

(b) The Program of Incentives for the Semiconductors Sector (called, following its Portuguese acronym, the “PADIS” Program)

The PADIS scheme exempted accredited companies from taxes (via a zero-tax rate for them) with respect to finished semiconductors and information products.

101 See Brazil Taxes Appellate Body Report, ¶¶ 1:7-1:10.
displays, and inputs, tools, equipment, and software used to make these items. To become an accredited company, a legal person had to invest in R&D, and engage in certain activities, in Brazil.
### Table 5-6
Synopsis of Seven Trade-Related Measures Conferring Tax Benefits in Three Sectors

<table>
<thead>
<tr>
<th>Sector</th>
<th>Trade-Related Measure Conferring Tax Benefits</th>
<th>Explanation of Trade-Related Measure</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICT</td>
<td>Informatics Program</td>
<td>Exemptions or reductions from the <em>IPI</em> Tax on ICT goods sales, and suspensions of the Tax on imports of items used to produce those goods, for accredited companies. Accreditation requires production in Brazil (in compliance with a <em>PPB</em>, or <em>Basic Productive Process</em>) and R&amp;D in Brazil. A good “Developed in Brazil” gets further <em>IPI</em> Tax benefits.</td>
</tr>
<tr>
<td></td>
<td><em>PADIS</em> Program</td>
<td>Exemption from taxes for finished semiconductors and information displays, and inputs, tools, equipment, and software used to make these items, for accredited companies. Accreditation requires R&amp;D and certain other activities in Brazil.</td>
</tr>
<tr>
<td></td>
<td><em>PATVD</em> Program</td>
<td>Exemption from taxes on digital TV transmission equipment and items used to make this equipment, for accredited companies. Accreditation requires R&amp;D and manufacturing in Brazil, and compliance with relevant <em>PPB</em> to obtain “Developed in Brazil” designation.</td>
</tr>
<tr>
<td></td>
<td>Digital Inclusion Program</td>
<td>Exemption from <em>PIS/PASEP</em> and <em>COFINS</em> contributions, for certain digital consumer goods that are made in Brazil, for Brazilian retailers.</td>
</tr>
<tr>
<td>Automotive</td>
<td><em>INOVAR-AUTO</em> Program</td>
<td>Reduction of <em>IPI</em> Tax burden on certain motor vehicles via tax credit, or reduced <em>IPI</em> Tax rates on imported vehicles from certain countries, and on certain domestic (<em>i.e.</em>, Brazilian-made) vehicles, to three types of accredited companies. For accreditation, a domestic manufacturer must engage in engineering and manufacturing activities in Brazil; an importer-distributor must invest in R&amp;D in Brazil, source basic industrial technology and engineering from Brazilian suppliers, and participate in a government labeling program for vehicles; and, an importer must submit plans to the government to make vehicles in, or import them into, Brazil.</td>
</tr>
<tr>
<td>Export</td>
<td><em>PEC</em> Program</td>
<td>Suspension of <em>IPI</em> Tax, <em>PIS/PASEP</em>, <em>COFINS</em>, <em>PIS/PASEP</em>-Importation, and <em>COFINS</em>-Importation contributions for purchases by exporters of raw materials, imported goods, and packaging materials.</td>
</tr>
<tr>
<td>RECAP Program</td>
<td>Suspension of PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions for purchases by exporters of apparatus, equipment, instruments, and new machinery.</td>
<td></td>
</tr>
</tbody>
</table>
(c) The Program of Support for the Technological Development of the Industry of Digital TV Equipment (called the “PATVD” Program)

The PATVD Program exempted accredited companies from certain taxes in respect of digital television transmission equipment (i.e., equipment used to transmit radio frequencies for digital TV) and production goods for this equipment (i.e., machinery, apparatus, instruments, inputs, and software). To gain accreditation, a legal person had to invest in R&D, and develop and manufacture digital TV transmission equipment, in Brazil, plus must meet the relevant PPB for its product to be deemed “Developed in Brazil.”

(d) The Program for Digital Inclusion (i.e., the Digital Inclusion Program)

This Program exempted from taxes (via a zero-tax rate), a Brazilian retailer from the PIS/PASEP and COFINS contributions, for certain digital consumer goods that were made in Brazil.

(2) Tax benefits targeting the automotive sector, under one trade-related measure called the “Incentive to the Technological Innovation and Densification of the Automotive Supply Chain” (known as the “INOVAR-AUTO Program”).

The INOVAR-AUTO Program lowered the IPI Tax burden for accredited companies on certain motor vehicles. It did so by granting them a tax credit, or by reducing the IPI Tax rates on vehicles they imported from certain countries, and on certain domestic (i.e., Brazilian-made) vehicles they sold. To be eligible for accreditation, an entity needed to be a domestic manufacturer, an importer-distributor, or an investor. To earn accreditation, an eligible entity had to fulfill two general requirements, plus additional specific requirements that depended on the type of entity.

(a) A domestic manufacturer needed to meet three out of four specific requirements, one of which was the performance of a minimum number of engineering and manufacturing activities in Brazil.

(b) An importer-distributor needed to comply with three specific requirements, namely, invest in R&D in Brazil, source basic industrial technology and engineering from Brazilian suppliers (in effect, build their capacity to provide these goods and services), and participate in a vehicle labeling program sponsored by Brazil’s National Institute of Metrology, Quality, and Technology (known by its Portuguese acronym, “INMETRO”).

(c) An investor needed to submit its plan for importing and manufacturing vehicles, with respect to each factory, plant, or industrial project it intended

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102 See Brazil Taxes Appellate Body Report, ¶ 1:11.
(3) Tax benefits targeting exporters, under one of two trade-related measures, namely: 103

(a) A scheme for Predominantly Exporting Companies (called the “PEC” Program).

Under this Program, the IPI Tax, PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions were suspended for purchases by exporting companies of raw materials, imported goods, and packaging materials.

(b) A Special Regime for the Purchase of Capital Goods for Exporting Enterprises (called the “RECAP Program”)

Under this Program, the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions were suspended for purchases by exporters of apparatus, equipment, instruments, and new machinery.

Despite the intricacy of the facts, and the jargon of the names and acronyms of the scheme, the gist of what Brazil was attempting through its tax benefits was easy to spot: Brazil advanced a policy of import substitution, by advantaging companies that engage in local economic activity.

Indeed, the shorthand case name could be the Brazil Import Substitution case. Brazil’s import substitution policy was a throwback to the heyday of that economic development strategy in the 1950s-1970s, was doomed to be attacked at the WTO with the familiar multilateral legal weapons against discrimination under GATT and the WTO SCM Agreement. And, so it was, by the EU and Japan.

Table 5-7 summarizes the European and Japanese claims of which the Appellate Body approved, i.e., the points on which Brazil lost the case. And, of those points, the genuinely interesting ones concern Paragraphs 2(b) and 2(c) of the 1979 Tokyo Round Enabling Clause, and GATT Article III national treatment. In other words, across the 154-page Report, the Appellate Body holdings and rationales at pages 125 therein onward are the most noteworthy, and thus emphasized in the analysis that follows this Table. 104

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103 See Brazil Taxes Appellate Body Report, ¶ 1.12.

104 As the Table indicates, the Appellate Body considered whether any of Brazil’s disputed measures were illegal Red Light subsidies. See Brazil Taxes Appellate Body Report, ¶¶ 4:1(c) and 6:20-6:21 with respect to Red Light export subsidies (subsidies contingent on export performance), and ¶¶ 4:1(d) and 6:22-6:32 with respect to Red Light import substitution subsidies (contingent on the purchase of domestic or foreign goods). Summarized briefly here (but not discussed in detail herein), Brazil was found not guilty of export subsidization, but guilty of import substitution subsidization. These verdicts followed logically from the nature of the disputed programs and national treatment violations (discussed in detail below), and consistent with the way WTO subsidy jurisprudence has evolved, the outcomes in this case depend on a
highly complex set of mind-numbing facts. It is not an overstatement to suggest that nearly any subsidy case today is akin to complex civil litigation in U.S. courts.

On Red Light export subsidies under SCM Agreement Article 3:1(a) for accredited or registered companies under the PEC and RECAP Programs, the Appellate Body disagreed with the Panel’s choice of benchmarks for three categories of treatment (involving tax suspensions, which constitute government revenue otherwise foregone, and are financial contributions under Article 1:1(a)(i)(ii) of the Agreement) under Programs. The Panel looked for a general rule of taxation, whereas the Appellate Body said the correct legal standard (under Article 1:1(a)(i)(ii)) should have been the tax treatment of comparably situated taxpayers (that is, purchases of the relevant goods by non-accredited companies). Thus, the Appellate Body reversed the Panel finding that these Programs constituted unlawful Red Light support. For the Appellate Body’s detailed discussion (spanning 10 pages, from pages 60-70, which is not reviewed herein), see Brazil Taxes Appellate Body Report, ¶¶ 5:139-5:176.

While Brazil won that battle, it lost the Article 3:1(b) fight over whether its ICT Programs constituted import substitution subsidies. They did, and the above discussion on the nature of those Programs implicitly explains why. Essentially, Brazil argued that the Panel was wrong in comparing the treatment of intermediate ICT goods under the ICT Programs with benchmark treatment in which the Panel arbitrarily, rather than selectively, distinguished among taxpayers. The Appellate Body disagreed with Brazil, saying the Panel correctly examined all relevant factual scenarios. Brazil also argued against the Panel finding that cash availability and implicit interest are revenue otherwise due under Article 1:1(a)(i)(ii) of the SCM Agreement. Again, the Appellate Body disagreed, finding that tax exemptions and reductions that the Brazilian government does not collect at the time normally due under the benchmark treatment (for non-accredited companies) constitute funds that the beneficiaries (the accredited companies) enjoy. For the Appellate Body’s detailed discussion (spanning eight pages, from pages 70-78, which is not reviewed herein), see Brazil Taxes Appellate Body Report, ¶¶ 5:177-5:211.

Thus, ruled the Appellate Body, each of the disputed tax exemptions, reductions, and suspensions that Brazil granted to accredited companies for (1) sales of intermediate ICT goods they manufactured, (2) their purchases of raw materials, intermediate goods, and packaging materials (under the Informatics Program), and (3) inputs, capital, and computational goods (under the PADIS and PATVD Programs) were “financial contributions,” in form of “government revenue that is otherwise due [but] is foregone,” within the meaning of SCM Agreement Article 1:1(a)(i)(ii). (In mind-numbing detail, the Appellate Body distinguished, as it had to, given the complex facts of the case, the scope of this holding: for ICT items, PPBs that incorporated so-called “nested PPBs” under the Informatics Program, were import substitution subsidies, but not those that entailed only production steps, nor those for autos under the INOVAR-AUTO Program; and, PPBs under the PATDV Program, though not those under the PADIS or Digital Inclusion Programs, were illegal.) Moreover, the PPBs were conditions requiring the use of domestic components and sub-assemblies, and this condition must be fulfilled for the pertinent merchandise to obtain a tax benefit. This requirement is illegal under Article 3:1(b), as it is a contingency for the use of domestic like products instead of imported items. For the Appellate Body’s detailed discussion (spanning 33-pages, from pages 78-111, which is not reviewed herein), see Brazil Taxes Appellate Body Report, ¶¶ 5:212-5:340. The DSU Article 11 issues (also not treated herein) are at ¶¶ 5:437-5:464.
Table 5-7:  
Synopsis of Successful GATT-WTO Claims Against Brazil

<table>
<thead>
<tr>
<th>Successful Claim</th>
<th>Relevant GATT-WTO Provision</th>
<th>Appellate Body Holding</th>
<th>Appellate Body Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Treatment Violations Not Excused by Domestic Subsidy Exception</td>
<td>GATT Article III:8(b)</td>
<td>Majority Opinion: Government revenue otherwise foregone is not a “payment of subsidy” within the meaning of Article III:8(b), thus this exception to the national treatment obligations of Article III is inapplicable.</td>
<td>Majority Opinion: Government revenue otherwise foregone must be excluded from GATT Article III:8(b) concept of “payment of subsidy” so as to avoid rendering the Article III:2 prohibition against discriminatory taxation meaningless or redundant. Separate Opinion: Majority decision renders GATT and SCM Agreement inconsistent.</td>
</tr>
<tr>
<td>National Treatment for Fiscal Measures Violation</td>
<td>GATT Article III:2, First Sentence</td>
<td>IPI Tax violates GATT Article III:2, first sentence. Credit-debit system associated with IPI Tax also violates this provision.</td>
<td>IPI Tax reduces or exempts taxes for domestic like products, but not for foreign ICT merchandise, which bear a higher burden than those products. The difference arises because foreign-origin articles are ineligible for accreditation under the ICT Programs.</td>
</tr>
<tr>
<td>National Treatment for Non-Fiscal Measures Violation</td>
<td>GATT Article III:4</td>
<td>ICT Program for finished and intermediate ICT goods, and INOVAR-AUTO Program, violate GATT Article III:4</td>
<td>ICT Program for finished goods imposes differential accreditation requirements on imported versus domestic ICT merchandise. ICT Program imposes a higher administrative burden on non-incentivized intermediate merchandise than domestic like products, and also imposes PPBs and other production-step rules that incentivize the use of domestic intermediate goods. INOVAR-AUTO Program accreditation requirements impose a differential burden on importers/distributors and foreign</td>
</tr>
</tbody>
</table>
Manufacturers that are not typical for the transactions at issue. In all instances, the differences modify the conditions of competition in a manner adverse to foreign versus like domestic products.

<table>
<thead>
<tr>
<th>MFN Violation</th>
<th>GATT Article I</th>
<th>Not at issue</th>
<th>Not at issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enabling Clause Does Not Excuse MFN Violation</td>
<td>Enabling Clause, Paragraph 2(b)</td>
<td>MFN violation not excused by Paragraph 2(b)</td>
<td>A non-tariff measure, such as tax reductions under the INOVAR-AUTO Program for auto imports from Argentina, Mexico, and Uruguay, does not come within the scope of Paragraph 2(b), unless it is governed by specific provisions on special and differential treatment that are distinct from the provisions of GATT. There are no such distinct provisions from the Tokyo or Uruguay Rounds on internal tax reductions.</td>
</tr>
<tr>
<td>Enabling Clause Does Not Excuse MFN Violation</td>
<td>Enabling Clause, Paragraph 2(c)</td>
<td>MFN violation not excused by Paragraph 2(c)</td>
<td>There is no “close” or “genuine” relationship between the INOVAR-AUTO Program tax reductions for autos from Argentina, Mexico, and Brazil, and any regional or global preferential trading agreement.</td>
</tr>
<tr>
<td>Unlawful Subsidy</td>
<td>SCM Agreement Article 3:1(a)</td>
<td>PEC and RECAP tax suspensions are not Red Light export subsidies.</td>
<td>The Panel used the wrong benchmark under SCM Agreement Article 1:1(a)(1)(ii)</td>
</tr>
<tr>
<td>SCM Agreement Article 3(b)</td>
<td>Most ICT Programs are Red Light import substitution subsidies.</td>
<td>The ICT Programs entail government revenue that is otherwise foregone, which is a “financial contribution” under SCM Agreement Article 1:1(a)(1)(ii), and entail a contingency on the use of domestic like products over imported merchandise to receive tax benefits, which is illegal under Article 3:1(b)</td>
<td></td>
</tr>
</tbody>
</table>
• **Issue 1:**

**MFN Treatment Exception Under Tokyo Round *Enabling Clause* Paragraph 2(b)-(c)**¹⁰⁵

The 1979 Tokyo Round *Enabling Clause* is a permanent waiver from a core non-discrimination rule in multilateral trade law, namely, the GATT Article I:1 general MFN obligation. This Article states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, *and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* *Ad Article omitted* any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like

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¹⁰⁵ *See Brazil Taxes Appellate Body Report, ¶¶ 4:1(e)(ii)-(iii) and 6:39-6:42.*

The issues of whether the EU and Japan had the burden of proof under Paragraph 4(a) of the 1979 Tokyo Round *Enabling Clause*, and associated issues of the Panel’s terms of reference and notification, are not discussed herein. *See id., ¶¶ 4.1(e), 5:341-5:397, 6.33-6.38.* All *Enabling Clause* issues pertained to the same set of facts, namely, the differential and more favorable treatment, in the form of internal tax reductions, Brazil granted to auto imports from Argentina, Mexico, and Uruguay, under Brazil’s *INOVAR-AUTO* Program.

Essentially, Brazil argued the Panel was wrong to rule the GATT Article I:1 MFN claim the EU and Japan raised were within the Panel’s terms of reference. This argument involved (inter alia) procedural questions under Paragraph 4(a) of the *Enabling Clause*, in particular, its notification requirement. Did Brazil properly notify the WTO of its differential tax treatment, under Paragraph 4(a), as having been adopted under Paragraphs 2(b) and 2(c) of that *Clause*? If so, then the EU and Japan were on notice, and these complainants could have been expected to raise the *Enabling Clause* and identify its relevant provisions in their requests for formation of a Panel – which they did not do. *See id., ¶¶ 5:341-5:351.*

Brazil disputed the Panel’s interpretation of the notification requirement under Paragraph 4(a) of the *Enabling Clause*, and the Panel’s finding that Brazil did not notify the WTO of differential tax treatment favoring auto imports from Argentina, Mexico, and Uruguay under the *INOVAR-AUTO* Program under Paragraph 2(b). *See id., ¶¶ 5:352-5:382.* Brazil offered similar arguments with respect to Paragraph 2(b). *See id., ¶¶ 5:383-5:397.*

The Panel found Brazil failed to notify the WTO of its disputed tax measures under Paragraph 4(a), thus the EU and Japan had no such notice, and could not have been expected to mention Paragraphs 2(b) or 2(c) in their request for formation of a Panel. In other words, there was no burden on the complainants to invoke these Paragraphs in their initial pleadings, precisely because they had no notice from Brazil under these Paragraphs. Hence, their claims involving them were appropriate and inside the Panel’s terms of reference.

The Appellate Body upheld all related Panel findings: Brazil did not satisfy the *Escape Clause* notification obligations in Paragraph 4(a), so the EU and Japan had no burden to mention their Paragraphs 2(b) and 2(c) points when they called for a Panel to be established. Once established, the complainants could make these points, and the Panel could consider them within its terms of reference. These procedural losses for Brazil mattered in that, had Brazil won, then Brazil would knocked out the European and Japanese *Enabling Clause* claims.
product originating in or destined for the territories of all other contracting parties.\textsuperscript{106}

The key provisions (for purposes of the Brazil Taxes case) of the Clause, however, say:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries,\textsuperscript{1} without according such treatment to other contracting parties.

\footnotesize{\textsuperscript{1} The words “developing countries” as used in this text are to be understood to refer also to developing territories.}

2. The provisions of Paragraph 1 apply to the following:\textsuperscript{2}

   (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,\textsuperscript{3}

   (b) Differential and more favorable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

   (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

   (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries.

\footnotesize{\textsuperscript{2} It would remain open for the CONTRACTING PARTIES to consider on an \textit{ad hoc} basis under the GATT provisions for joint action any proposals for differential and more favorable treatment not falling within the scope of this paragraph}

\footnotesize{\textsuperscript{3} As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries” (BISD 18S/24) \textit{[i.e., GATT B.I.S.D. (18\textsuperscript{th} Supp.) 24 (1972).]}}

4. Any contracting party taking action to introduce an arrangement...
pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favorable treatment so provided shall:4

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.107

4 Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

The substantive *Escape Clause* questions in the *Brazil Taxes* case were:

1. Whether the Panel was wrong – as Brazil contended – in its interpretation and application of Paragraph 2(b);108
2. Whether Brazil’s differential tax treatment, in the form of internal tax reductions, for auto imports from Argentina, Mexico and Uruguay under Brazil’s INOVAR-AUTO Program was – as Brazil claimed – within the scope of Paragraph 2(b);109 and
3. Whether – again as Brazil claimed – Brazil could justify under Paragraph 2(c) its differential taxation under a trade arrangement that had a genuine link to the INOVAR-AUTO Program internal tax reductions.110

On all three questions, Brazil lost at the Panel and Appellate Body stage. Thus, Brazil could not excuse with the *Enabling Clause* its MFN violation, *i.e.*, its differential and more favorable tax treatment, in the form of tax reductions, for Argentine, Mexican, and Uruguay motor vehicles, but not like products originating from all other WTO Members.

- **Brazil’s Losing Argument on *Enabling Clause* Paragraph 2(b)**

  The Appellate Body began by examining Paragraph 2(b) of the *Enabling Clause*, specifically the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.” What is the scope of this

107 Emphasis added.
phrase? Was Brazil correct in arguing the differential tax treatment of the *INOVAR-AUTO* Program fell within that scope?

Brazil urged tax reductions are a NTM, *i.e.*, an NTB, within the scope of Paragraph 2(b). That is because they constitute internal taxes, and “internal taxes” are expressly referenced in the first sentence of GATT Article III:2 (quoted and highlighted below). In turn, matters covered by Article III:2 subject to Article I, thanks to the fourth clause of Article I (quoted and highlighted above). Conceptually, Brazil’s argument was to trace the thread of its tax reductions to the *Enabling Clause* through the national treatment obligation, and then back to the MFN obligation. Brazil had to make this argument, because the *Clause* is an excuse for – a waiver from – the MFN obligation. Brazil needed to fit its disputed measure inside the coverage of the *Clause*. But, that fit was not explicit (because the *Clause* does not mention taxes), so Brazil needed to trace through a connection. Brazil supplemented this argument with the point that internal taxes are NTMs governed – in the language of Paragraph 2(b) – by “*instruments negotiated multilaterally under the auspices of GATT*.” Significantly, there is no specific multilateral instrument on internal taxes; rather, that instrument (said Brazil) is GATT itself.

Brazil’s argument hinged on its starting point, that a tax reduction is a type of NTM. The Panel eschewed a general, conceptual, isolated definition of “NTM,” and instead examined the term in the context of Paragraph 2(b). At the time the GATT contracting parties adopted the *Enabling Clause*, they meant the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” to connote NTMs other than those NTMs that GATT exclusively governed. During this time, the 1976-1979 Tokyo Round, the contracting parties negotiated and agreed to several plurilateral accords, namely, the Tokyo Round *Codes* (listed below). They intended to limit the scope of application of Paragraph 2(b) to discrimination expressly allowed in the S&D treatment provisions of those *Codes*.

That is, the *Enabling Clause* drafters wanted Paragraph 2(b) to excuse MFN violations that took the form of discrimination via S&D treatment that a *Code* authorized. Simply put, they wanted the Paragraph to complement the Codes: if a *Code* carved out S&D treatment, then it should be matched by a waiver from the MFN obligation under the *Enabling Clause*. In contrast, GATT Article III:2 and III:4 do not introduce S&D treatment, whether in the original GATT 1947, or the GATT 1994 of the Uruguay Round. So, if an NTM were to come within the scope of Paragraph 2(b), then it must be governed by a specific S&D treatment rule that is not in GATT (either GATT 1947 or GATT 1994). Brazil was wrong to look to those Articles, and indeed to GATT, *i.e.*, the Panel and Appellate Body were correct to think the Paragraph 2(b) phrase “*instruments multilaterally negotiated under the auspices of the GATT*’ must be ‘distinct from the provisions of the GATT 1994 incorporating GATT 1947.’”

Brazil hoped the Panel would agree with it that (1) GATT 1994 itself is an “instrument” that was “multilaterally negotiated under the auspices of the GATT” as an institution, (2) GATT 1994 is the covered agreement that governs internal taxation,

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111 Brazil Taxes Appellate Body Report, ¶ 5:403.
Article III, (3) the *Enabling Clause* was incorporated into the Uruguay Round agreements as part of GATT 1994, and (4) the *Clause* itself thus an “instrument multilaterally negotiated under the auspices of the GATT.”\footnote{Brazil Taxes Appellate Body Report, ¶ 5:403.} The Brazilian argument was confusing, if not circular, or as the EU politely put it, an “over-creative reading” of the relevant texts.\footnote{Brazil Taxes Appellate Body Report, ¶ 5:404.}

**Appellate Body Holding on *Enabling Clause Paragraph 2(b)***

Brazil did not bamboozle the Panel or Appellate Body. These judges in Geneva appreciated (as the EU and Japan argued) that Brazil erroneously viewed the scope of Paragraph 2(b) as too expansive, covering any provision in GATT that relates to any NTM negotiated under the auspices of GATT or the WTO. This view, said the judges, had no foundation in the text, context, or object and purpose of Paragraph 2(b) of the *Enabling Clause*. Hence, Brazil’s tax reductions for merchandise originating in three WTO Members (Argentina, Mexico, and Uruguay), but none others, was not excepted from the GATT Article I:1 obligation. Simply put, the inconsistency of the INOVAR-AUTO Program with the MFN rule did not fit within Paragraph 2(b).

**Appellate Body Rationale on *Enabling Clause Paragraph 2(b): Text, Context, and Object and Purpose***

As to the textual rationale, Paragraph 2(b) is not a general endorsement of all exceptions to the MFN principle with respect to NTMs *per se*. It also is not an exception that permits differential and more favorable treatment on NTMs governed by GATT itself. Rather, the text carves out only a narrow exception to the MFN obligation. If Paragraph 2(b) were read the way Brazil wished, then the phrase “provisions of instruments multilaterally negotiated under the auspices of GATT” would have no meaning. Neither the Panel nor the Appellate Body is free to read words of a GATT-WTO instrument out of existence; to the contrary, the judges must figure out what the text with which they are confronted means.

A careful reading of the text indicates it allows for S&D treatment with respect to provisions in GATT only if those provisions (1) concern an NTM, and (2) that NTM is itself governed by a treaty other than GATT (or a WTO agreement) that has been negotiated by the contracting parties (or WTO Members). Further, as to the textual rationale, neither GATT Article III:2 nor Article III:4 introduce any S&D treatment, in the form of differential taxation, into GATT, and there is no specific WTO agreement that deals with internal taxation. So, the scope of Paragraph 2(b) excludes Brazil’s disputed tax measure: that measure is not imported into the Paragraph 2(b) by Article III, and it is not the subject of any multilateral instrument referenced in that Paragraph.

As for the contextual rationale, the context in which the *Enabling Clause* was negotiated was the 1976-1979 Tokyo Round. During this Round, the CONTRACTING PARTIES adopted several plurilateral agreements dealing with NTMs, and those agreements are – in the language of Paragraph 2(b) – the “instruments multilaterally negotiated under the auspices of the GATT.”\footnote{Brazil Taxes Appellate Body Report, ¶ 5:403.}
negotiated under the auspices of … GATT.” Indeed, there were nine such instruments, or Codes:114

1. Agreement on Technical Barriers to Trade (TBT Agreement)
2. Agreement on Government Procurement (GPA)
3. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies and Countervailing Duties)
4. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Agreement)
5. Agreement on Import Licensing Procedures
6. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement)
7. Agreement on Trade in Civil Aircraft
8. International Dairy Agreement
9. International Bovine Meat Agreement

(Several of these plurilateral Codes, indeed, all of them except for (2) and (7)-(9), would become multilateral instruments through the 1986-1994 Uruguay Round.) As the Appellate Body indicated in the crucial part of its Report, this context also framed the purpose for Paragraph 2(b).

On context and purpose, the Appellate Body rightly explained:

5:408 [A] number these plurilateral agreements sought to further the objectives of and/or build upon existing provisions of the GATT 1947, and contained provisions on S&D treatment for developing countries. The reference in Paragraph 2(b) to differential and more favorable treatment “with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” was in relation to these plurilateral agreements [the Tokyo Round Codes] that were negotiated [by the contracting parties] under the auspices of the GATT, as an institution, and furthered the objectives of and/or build upon existing provisions of the GATT 1947. Moreover, in using the phrase “provisions of instruments multilaterally negotiated under the auspices of the GATT,” as opposed to “instruments multilaterally negotiated under the auspices of the GATT,” Paragraph 2(b) referred to specific provisions of these plurilateral agreements, in particular, the S&D treatment provisions, and not the entire agreements themselves.

5:409. We find additional support from contemporaneous decisions adopted during the Tokyo Round of multilateral trade negotiations.

114 See Brazil Taxes Appellate Body Report, footnote 1093 at ¶ 5:408.
In particular, we recall the Decision entitled “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations,” which recognized in Paragraph 2 thereof that “as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures … have been drawn up.” We observe that Paragraph 1 of that Decision provided that the CONTRACTING PARTIES “reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate.” Paragraph 3, in particular, stated that “[t]he CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements.”

5:410. In other words, the GATT CONTRACTING PARTIES addressed the issue of MFN treatment arising out of Article I of the GATT 1947 by reaffirming “their intention to ensure the unity and consistency of the GATT system” and expressly confirming that the benefits of the Tokyo Round plurilateral agreements were to accrue to all the contracting parties to the GATT, even those that were not parties to the plurilateral agreements, insofar as the subject matter of those agreements were covered by Article I of the GATT 1947. [In technical parlance, the Tokyo Round Codes were “open” plurilateral agreements, creating the free-ridership problem.] Therefore, at the time of the conclusion of the Tokyo Round Codes, absent the Enabling Clause, a Contracting Party who [sic] was not a party to a Tokyo Round plurilateral agreement could have challenged a measure taken by a party to that plurilateral agreement pursuant to a S&D treatment provision thereof in favor of a developing country as being inconsistent with Article I of the GATT 1947.

5:411. The adoption of the Enabling Clause, particularly Paragraph 2(b), addressed this situation. Paragraph 2(b) provided an umbrella by excepting differential and more favorable treatment concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT, i.e., differential and more favorable treatment accorded pursuant to the S&D treatment provisions of the Tokyo Round Codes, from the purview of a challenge under Article I of the GATT 1947.

[For example, assume Canada but not the U.S. was a measure of the Tokyo Round Customs Valuation Agreement, and Canada provided S&D treatment under this Agreement to India and other less developed contracting parties. The U.S. could have sued Canada for
violating the Article I:1 MFN rule, because Canada did not give the U.S. the S&D treatment it gave to poor countries. However, Canada would successfully defend the suit, invoking Paragraph 2(b).]

5:412. The foregoing considerations therefore suggest that the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” in Paragraph 2(b), at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes and not the provisions of the GATT 1947.

5:413. … [W]ith the entry into effect of the WTO Agreement [on 1 January 1995], the Tokyo Round Codes are no longer in force. The Enabling Clause, however, stands incorporated as an “integral part” of the GATT 1994. The Appellate Body considered in EC – Tariff Preferences [i.e., European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R (adopted 20 April 2004)] that “Members reaffirmed the significance of the Enabling Clause … with [its] incorporation … into the GATT 1994.” The Uruguay Round of multilateral trade negotiations culminated in the establishment of the WTO, following which GATT as an institution was replaced by the WTO. Article II:1 of the WTO Agreement expressly recognizes that “[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.” The Enabling Clause as an “integral part” of the GATT 1994 falls within the scope of Article II:1 of the WTO Agreement. Therefore, while at the time of its adoption, Paragraph 2(b) of the Enabling Clause speaks of “instruments multilaterally negotiated under the auspices of the GATT” as an institution, following the entry into force of the WTO Agreement, Paragraph 2(b) refers to “instruments multilaterally negotiated under the auspices of the [WTO]” as an institution. Paragraph 2(b) of the Enabling Clause, following the entry into force of the WTO Agreement, thus provides for the adoption of a limited category of differential and more favorable treatment, namely treatment that concerns non-tariff measures governed by provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the WTO Agreement, was not negotiated under the auspices of the WTO as an institution.¹¹⁵

¹¹⁵ See Brazil Taxes Appellate Body Report, ¶¶ 5:408-5:413.

Accordingly, the Appellate Body, upholding the Panel, ruled that Paragraph 2(b) applies only to S&D provisions in a covered agreement other than GATT (1947 or 1994) itself:

5:414. These considerations, read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause and thereafter the establishment of the WTO, indicate that Paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, Paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of “instruments multilaterally negotiated under the auspices of the [WTO].” Brazil’s contention that Paragraph 2(b) applies to non-tariff measures taken pursuant to the provisions of the GATT 1994 incorporating the GATT 1947, in our view, calls for Paragraph 2(b) to be given a meaning that was not ascribed to it either at the time of its adoption or thereafter with the establishment of the WTO. We therefore uphold the Panel’s finding … that “a non-tariff measure within the scope of Paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.116

Summarizing its holding and rationale on Paragraph 2(b), the Appellate Body said:

5:432. … [P]aragraph 2(b) provides for the granting of “[d]ifferential and more favorable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.” Paragraph 2(b) provides for the adoption of a limited category of differential and more favorable treatment, namely treatment that concerns “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” as an institution. The phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT,” at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes, and not the provisions of the GATT 1947. Following the entry into force of the WTO Agreement, Paragraph 2(b) of the Enabling Clause provides for the adoption of a limited category of differential and more favorable treatment, namely treatment that concerns non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the WTO Agreement, was not negotiated under the auspices of the WTO. These considerations read in light of the text, context, and

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circumstances surrounding the adoption of the Enabling Clause and thereafter the establishment of the WTO indicates that Paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, Paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of “instruments multilaterally negotiated under the auspices of the [WTO].”

5:433. We therefore uphold the Panel’s finding … that “a non-tariff measure within the scope of Paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.” We also uphold the Panel’s findings … that the tax reductions accorded under the INOVAR-AUTO program to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(b) of the Enabling Clause.117

Thus, because the internal tax reductions Brazil accorded to Argentine, Mexican, and Uruguayan imports, but not to imports from other WTO Members, were not distinct from GATT 1994 – they were unconnected to any S&D treatment in any non-GATT instrument – they were not within the scope of Paragraph 2(b) of the Clause. As they were not excused by the Enabling Clause waiver, they were illegal under the MFN rule of GATT Article I:1. What Brazil needed to save its differential tax reductions from this violation did not exist: an NTM, specifically a tax reduction, set out in a Tokyo Round Code, or a Uruguay Round agreement, other than GATT 1947 or GATT 1994.

• Appellate Body Holding and Rationale on Enabling Clause Paragraph 2(c): “Genuine” Relationship of Preference to an RTA

Paragraph 2(c) of the Enabling Clause excuses from the Article I:1 MFN obligation preferences connected with RTAs, i.e., FTAs or CUs, and also global arrangements between or among developing countries (as distinct from GSP, which Paragraph (a) covers, and which concerns preference grants by developed to developing countries), which a preference-granting WTO Member enters into with one or more developing country Members. The RTAs or global scheme must concern the mutual reduction or elimination of tariffs, and likewise for NTMs.

The Appellate Body disagreed with the Panel view that for differential and more favorable treatment to be justified under Paragraph 2(c) of the Enabling Clause, there must be a “close and genuine link” between that treatment, on the one hand, and a regional agreement entered into among less developed WTO Members, on the other hand.118 Both are not required, i.e., it is not necessary to show a “close” plus a “genuine” link. That said, the Appellate Body upheld the Panel’s finding against Brazil. For differential tax treatment

118 Brazil Taxes Appellate Body Report, ¶ 5:417. (Emphasis added.)
under the INOVAR-AUTO Program to be excused by Paragraph 2(c), Brazil needed to show it entered into an RTA with the beneficiaries, Argentina, Mexico, and Uruguay. That is, Brazil had to show either a “close” or “genuine” relationship between an FTA, CU, or GSP-like scheme with those countries and the internal tax reductions on motor vehicle imports from those countries. Brazil could not do so.

As the Appellate Body indicated in its key passages about Paragraph 2(c) of the Enabling Clause:

5:423. Paragraph 2(c) excepts differential and more favorable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) limits the kind of differential and more favorable treatment to the: (i) mutual reduction or elimination of tariffs; and (ii) mutual reduction or elimination of non-tariff measures. In case of the latter, Paragraph 2(c) adds that the “mutual reduction or elimination of non-tariff measures” have to be “in accordance with criteria or conditions which may be prescribed” by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under Paragraph 2(c) for the differential and more favorable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO. Therefore, we disagree with the Panel to the extent it considered that, in order for any differential and more favorable treatment to be justified under Paragraph 2(c), there must exist both a “close” and “genuine” link to a “regional arrangement entered into amongst” developing country Members.

5:424. … Brazil submits that the Panel rested its finding on its “flawed conclusion that because the [1980] Treaty of Montevideo and the provisions of the relevant ECAs do not expressly make reference to internal taxation, they did not have a genuine link with Paragraph 2(c).” … Brazil mischaracterizes the Panel’s finding. The Panel did not find, as Brazil contends, that the 1980 Treaty of Montevideo and the relevant ECAs do not bear a genuine link with the requirements of Paragraph 2(c). Instead, the Panel found that “Brazil has not demonstrated how the relevant tax reductions [under the INOVAR-AUTO Program] found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the Treaty of Montevideo) or the ECAs allegedly implementing that RTA.” Consequently, the Panel was not satisfied
“how the relevant differential and more favorable treatment could be justified under Paragraph 2(c).” In reaching this conclusion, the Panel examined the provisions of the 1980 Treaty of Montevideo and found that “none of the provisions cited to in the [1980] Treaty of Montevideo” had any relation “in and of themselves” to the differential tax treatment under the INOVAR-AUTO Program (in the form of internal tax reductions accorded to some but not other Members) found to be inconsistent with Article I:1 of the GATT 1994. Turning to the relevant ECAs referred to in Articles 21 and 22(I) of Decree 7,819/2012, the Panel noted that it “could not discern any … relationship” that would attest to “the fundamental premise of Brazil’s argument, namely that the INOVAR-AUTO program is implementing the objectives of the ECAs.”

5:427. … [W]e uphold the Panel’s finding … to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO Program. Consequently, we also uphold the Panel’s finding … that the internal tax reductions accorded under the INOVAR-AUTO Program to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(c) of the Enabling Clause.

5:434. … [P]aragraph 2(c) excepts differential and more favorable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under Paragraph 2(c) for the differential and more favorable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO.

5:435. … [T]he Panel did not find, as Brazil contends, that the 1980 Treaty of Montevideo and the relevant ECAs do not bear a genuine link with the requirements of Paragraph 2(c). Instead, the Panel found that Brazil has not demonstrated how the internal tax reductions under the INOVAR-AUTO Program found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA (the 1980 Treaty of Montevideo) that Brazil has notified to the WTO or the ECAs allegedly implementing that RTA. Consequently, the Panel was not satisfied how the relevant differential and more favorable treatment under the INOVAR-AUTO Program could be justified under
Paragraph 2(c). Therefore, to the extent that the Panel relied on its earlier analysis concerning whether or not the \textit{INOVAR-AUTO} Program, according the differential and more favorable treatment (\textit{i.e.}, the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to “the arrangement notified to the WTO” in determining if the differential and more favorable treatment was substantively justified under paragraph 2(c), we find no error in the Panel’s approach. Indeed, if there is no genuine link between the measure at issue according the differential and more favorable treatment and the arrangements notified to the WTO, we find it difficult to see how the measure at issue could be substantively justified under Paragraph 2(c).

5:436. We therefore uphold the Panel’s finding … to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the \textit{INOVAR-AUTO} program. [Emphasis original.] Consequently, we also uphold the Panel’s findings … that the tax reductions accorded under the \textit{INOVAR-AUTO} program to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(c) of the \textit{Enabling Clause}.\footnote{Brazil Taxes Appellate Body Report, ¶¶ 5:423-5:424, 5:427, 5:434-5:436. (Emphasis original.)} As the Appellate Body intimated, Brazil’s best argument, but a losing one because of a lack of factual support, was it participated in the 1980 \textit{Treaty of Montevideo} and \textit{Economic Cooperation Agreements (ECAs)}.

But, Brazil could not point to any provision in that \textit{Treaty} or the \textit{ECAs} that referenced tax preferences. Those agreements made no reference to internal taxation. And, Brazil could not explain how the \textit{INOVAR-AUTO} Program tax breaks related to the \textit{Treaty} or the \textit{ECAs}. Indeed, the pertinent Brazilian Decrees spoke only in general terms about tax treatment, with no specific identification of countries receiving preferences. In other words, reasoning in either direction – from the agreements to the Program, and from the Program to the agreements – Brazil failed to show a “close” or “genuine” link.


Brazil’s threshold national treatment argument was its disputed measures were exempt from GATT Article III:1-2 and 4, thanks to the exception for domestic subsidies to those rules in Article III:8. Brazil viewed this exception as prophylactic, that is, as applying
automatically in all instances of domestic subsidies paid solely to domestic producer. Brazil lost.

The Panel held a subsidy provided exclusively to a domestic producer pursuant to the GATT Article III:8(b) is not *per se* exempted from the national treatment disciplines of Article III. Paragraph 8(b) of this Article states:

The provisions of this Article shall not prevent the payment of subsidies *exclusively to domestic producers*, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.¹²¹

In a minor victory for Brazil, the Appellate Body disagreed with the Panel, and overturned its finding, which it characterized as “overly broad and unqualified,” and not based on an assessment of whether Brazil’s disputed measures constituted the “payment of subsidies.”¹²²

5:123. … [T]he Panel’s interpretation of Article III:8(b) and its application to the measures at issue obfuscate the distinction between the effects of the payment of a subsidy to a domestic producer on the conditions of competition in the relevant product market(s) and the conditions for eligibility attaching thereto, on the one hand, and any other effects arising from requirements to use domestic over imported inputs in the production process, on the other hand. …

5:124. By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III.

The Appellate Body observed Brazil’s disputed measures entailed requirements to use domestic over imported goods in order to be eligible for receipt of a subsidy. Article III:8 does not cover such requirements.

In other words, said the Appellate Body, there is a distinction between what a beneficiary must do to receive a subsidy, and payment of the subsidy. Article III:8 exempts from the national treatment non-discrimination rule payments of subsidies to domestic, but not foreign producers. But, it does not exempt the rules with which a beneficiary must comply to get the subsidy. Those rules must be non-discriminatory. In this case, they patently discriminated against foreign imported inputs in favor of domestic ones, *i.e.*, they called for import substitution. Obviously, if Article III:8 allowed a preference to buy local

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¹²¹ Emphasis added.
¹²² *Brazil Taxes* Appellate Body Report, ¶ 4:1(a).
over foreign goods as a condition for eligibility to get a subsidy, then that allowance would undermine seriously the national treatment rule.

So, the Appellate Body looked to the text and context of Article III:8(b), in light of its object and purpose, and checked the negotiating history of the provision – the familiar algorithmic interpretative methodology under Article 31 of the 1969 Vienna Convention on the Law of Treaties. Requirements to obtain a subsidy exclusively available to domestic entities are not exempt from the Article III national treatment disciplines. Rather, the exemption covers the narrow fact that the subsidy – the expenditure of revenue by a government – is paid exclusively to domestic producers. As support for these propositions, the Appellate Body cited its precedent in the 1997 Canada Periodicals case.123

Though the Appellate Body overturned the Panel holding under GATT Article III:8, Brazil still lost the overall battle under this provision. That is because the Appellate Body found that none of Brazil’s disputed measures could be justified by Article III:8.124 They all involved the exemption or reduction of internal taxes that affected the conditions of competition between like products. Applying a Vienna Convention analysis into the text, context, object and purpose, and negotiating history, and considering the Canada Periodicals precedent, the Appellate Body confirmed the phrase “payment of subsidies” in Article III:8(b) does not include the exemption or reduction of internal taxes that alter the conditions of competition between like products. Some of Brazil’s disputed schemes were tax exemptions or reductions that tilted the competitive playing field in favor of Brazilian and against foreign like product producers. Such schemes were not “subsidies” that were “paid” to domestic producers. Simply put, none of Brazil’s measures fit within the key phrase of this exception.

Unfortunately, this ruling is incongruous with the definition of a “financial contribution” in Article 1:1(a)(ii) of the SCM Agreement, which expressly lists government revenue otherwise foregone as a potential type of subsidy. The Appellate Body did not attempt to square the point, but perhaps it can be said that the incongruity is explicable by virtue of the fact that two different treaties are involved – GATT and the SCM Agreement. What it did do, unsurprisingly, is render a tedious, unedifying 42-paragraph long discussion of Article III:8(b), spanning 14 single-spaced, small-font pages.125

Arguably, then, the truly intellectually stimulating and legally intriguing portion of the Report on this issue is in the Separate Opinion of one Appellate Body member.126 The gist of this four-paged concurrence is support for the majority’s reversal of the Panel’s “overly broad and unqualified” findings about GATT Article III:8(b), but disagreement on the interpretation of the term “payment of subsidies.” The Separate Opinion points out that though the term “subsidy” is defined nowhere in GATT (not even in Article XVI), it is

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123  See Brazil Taxes Appellate Body Report, ¶ 6:19 (citing Appellate Body Report, Canada – Certain Measures Concerning Periodicals, WT/DS31/A/R (adopted 30 July 1997)).
124  See Brazil Taxes Appellate Body Report, ¶ 5:124.
125  See Brazil Taxes Appellate Body Report, ¶¶ 5:80-5:122 at pages 41-55. Little (if anything) of importance is found in these Paragraphs that is not already summarized above.
defined in Article 1:1 of the SCM Agreement. The Opinion acknowledges that the definition is (as per the Article 1 chapeau) “for purposes of this Agreement,” but also observes that the Agreement contains several references and textual linkages to GATT (especially Article XVI), including with respect to government revenue that otherwise due if forgone (for instance, through tax credits), as in Article 1:1(a)(ii) and footnote 1 thereto. In addition to this textual argument, the Separate Opinion reasons that the object and purpose of both GATT and the SCM Agreement are to enhance and improve disciplines on subsidies. So, they should be viewed together as part of a package that defines the rights and obligations of WTO Members with respect to subsidies. Thus, the Opinion persuasively argues the term “subsidies” as used in GATT (be it Article III:8(b) or XVI) should be defined in the same manner as in Article 1:1 of the Agreement.

In respect of the term “payment” as used in GATT Article III:8(b), the Separate Opinion reasoned from the OED, the 1997 Canada Periodical case, and the 1999 Canada Dairy case. The OED clearly does not define “payment” as restricted to a monetary transfer, because it explicitly refers to monetary equivalents. The Canada Periodicals precedent identified the scope of Article III:8(b) as exempting from the Article III national treatment disciplines the payment of a subsidy, meaning the expenditure of revenue by a government. And, the Canada Dairy precedent clarified the Canada Periodicals precedent by stating a “payment” need not be a direct monetary transfer, but rather can be provision of a good or service, or any charge on the public account, or foregone government revenue. Thus, said the Opinion, the majority view was wrongly narrow: a “payment” can be through foregone revenue, such as reducing, exempting, or suspending taxes otherwise due, as that entails a charge on the public account, and thus involves governmental expenditure of revenue. In turn, Brazil’s disputed measures would be covered as “payments.” They are non-monetary transfers and have the equivalent “subsidy effect as do monetary transfers, and would be justified by Article III:8(b).

That interpretation, said the Separate Opinion, both of “payment” and “subsidy” is consistent with the Vienna Convention, and creates a single, harmonized package of rights and obligations about subsidies across both treaties, GATT and the SCM Agreement. Moreover, the Opinion rebutted the Majority’s view about the phrase in GATT Article III:8(b), namely, “including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article [III]….” This phrase is one example in a non-exclusive list of programs that qualify as “payments of subsidies exclusively to domestic producers.” The Majority limited the phrase in an unduly narrow manner, to exclude foregone government revenue, because foregone revenue is not “derived from the proceeds of internal taxes or charges.” But, that limitation represents a misreading of the phrase because it excludes the context of the phrase, which, again, is just an illustrative, not exhaustive, list of “payment of subsidy” schemes that

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qualify for the Article III:8(b) exemption from the national treatment rules of Article III.\(^{128}\)

Finally, under the Majority’s narrow approach, staying only within the confines of GATT, the disciplines on actionable (Yellow Light) subsidies, with respect to foregoing of government revenue, would be undermined.

- **Issue 3:**
  **National Treatment for Fiscal Measures, GATT Article III:2 (First Sentence)\(^{129}\)**

  For both finished ICT products and intermediate goods, the *IPI* Tax presented a textbook violation of GATT Article III:2. This provision (coupled with its companion provisions, Paragraph 1 and the *Ad Article*) states:

  1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

  2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise

\(^{128}\) The Separate Opinion also disputed the Majority view that interpreting “payment of subsidies” to include “revenue foregone” would render the GATT Article III:2 prohibition against tax discrimination meaningless, and consequently disagreed with the Majority’s conclusion that “revenue foregone” is not a “payment of [a] subsid[y].” See *Brazil Taxes* Appellate Body Report, ¶¶ 5:132-5:136. The Separate Opinion pointed to Article 1:1(a)(1)(ii) of the *SCM Agreement*, which lists “government revenue that is otherwise due but which is foregone as a type of financial contribution, and to the 2000 *FSC* precedent in which the Appellate Body explained that “foregoing” revenue “otherwise due” means the government raises less revenue that it would have against a benchmark comparison under the tax rules of the government in question. See Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/AB/R (adopted 20 March 2000).

The Majority rather bizarrely and unfathomably reasoned that “revenue foregone” that is “otherwise due” is a concept coextensive with discriminatory taxation, because discrimination in favor of a domestic producer of a like product against a foreign import (e.g., in the form of a lower tax rate, or a tax deduction, deferral, or exemption) is revenue the government otherwise could have collected, but opted to forego. So, thought the Majority, any discriminatory taxation is *ipso facto* foregone government revenue. In turn, including foregone government revenue within the meaning of “payment of subsidies” in Article III:8(b) renders the prohibition against discriminatory taxation in Article III:2 meaningless.

To the contrary, said the Separate Opinion, government revenue otherwise foregone is a narrower concept than discriminatory taxation. Including foregone government revenue within the meaning of “payment of subsidies” gives effect to both Article III:8(b) and Article III:2, and to the key terms of the *SCM Agreement*.

\(^{129}\) See *Brazil Taxes* Appellate Body Report, ¶ 4:1(b)(i), 5:1-5:42, 6.2-6.5.
apply internal taxes or other internal charges to imported or
domestic products in a manner contrary to the principles set forth in
paragraph 1. *

*Ad Article III

…

Paragraph 2

A tax conforming to the requirements of the first sentence of
paragraph 2 would be considered to be inconsistent with the provisions of
the second sentence only in cases where competition was involved between,
on the one hand, the taxed product and, on the other hand, a directly
competitive or substitutable product which was not similarly taxed.

Thanks to the criteria for accreditation, finished ICT products that were imported into
Brazil were ineligible for both tax reductions and exemptions.

The ICT Programs – the Informatics, *PADIS, PATVD*, and Digital Inclusion
schemes – the did not allow finished foreign ICT products to qualify for those tax benefits,
hence the imports bore the full brunt of Brazilian taxes. In contrast, finished ICT goods,
which were like products with the imports, enjoyed tax reductions and/or exemptions. In
specific, if an importer of finished ICT articles sold them to a wholesaler, retailer, or
distributor, the importer charged (i.e., passed on) the *IPI* Tax to that purchaser, and then
remitted the taxes due to the Brazilian government. However, for a like domestic product,
no such passing on of the *IPI* Tax from the Brazilian-based producer-seller to the
wholesaler, retailer, or distributor occurred; that is, the seller either charged no taxes,
because of the tax exemption for locally-made goods, or charged a lower tax (in
comparison with that due on an imported item), because of the tax reduction.

Manifestly, the tax rate on imported merchandise exceeded that on like domestic
products. The difference fit squarely within the language of “in excess of” in GATT Article
III:2, first sentence. Because the first sentence brooks no difference whatsoever – there is
*a de minimis* exception for a violation of the second sentence, but not the first – the Panel
and Appellate Body holdings were inevitable: a defeat for Brazil.

Likewise, for intermediate goods, the credit-debit system required tax payments
upfront if non-incentivized intermediate ICT articles were used in lieu of incentivized
domestic intermediate goods. The latter group was exempt from taxes to which the former
group were subject, or at least faced a lower tax burden than the former group. That is,
buyers of imported intermediate ICT products had to pay a tax under the relevant ICT
Program from which buyers using Brazilian-made intermediate goods were entirely or
largely free. The Appellate Body wrote of the “effect” of this difference, in terms of a
reduced cash flow for companies purchasing the non-incentivized imported intermediate
ICT articles. 130 But, as the 1996 *Japan Alcoholic Beverages* case dispensed with any “aims

130 *Brazil Taxes* Appellate Body Report, ¶ 6.4.
or effects” test for national treatment violations, the Appellate Body took care to observe that the limitations on cash flow availability result in – in effect, are evidence of – the “higher effective tax burden on imported intermediate ICT products.”

Still more evidence of the discriminatory tax burden against non-incentivized imported intermediate goods was the value of any tax credit generated from the up-front payment of taxes. When such a good was sold, a tax credit connected to the tax payment was created, but its value depreciated over time until it was used (or adjusted). The “time lag” between the establishment and use of the tax credit meant that the value of the money – the sum total of accrued tax credits – declined over time. So, as with finished goods, on intermediate ones the tax burden was higher under all of the ICT Programs for foreign than for like domestic products. The Panel and Appellate Body saw through the jungle of Brazil’s ICT tax rules to Brazil’s import substitution efforts. They held that Brazil’s push to get ICT producers in Brazil to source intermediate goods from Brazilians rather than foreigners, was a national treatment violation.

**Issue 4:**
National Treatment for Non-Fiscal Measures, GATT Article III:4

The ICT Programs – all of them, the Informatics, PADIS, PATVD, and Digital Inclusion schemes – also ran afoul of GATT Article III:4. Further, the Automotive Programs – specifically, the INOVAR-AUTO scheme – also violated this national treatment rule. Article III:4 states:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic

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operation of the means of transport and not on the nationality of the product.

The ICT Programs accorded to imported ICT merchandise, and the INOVAR-AUTO Program to imported auto goods, treatment less favorable than that to like domestic products.

One GATT Article III:4 problem with the ICT Programs lay in their accreditation requirements, which were more administratively burdensome on companies that imported finished ICT merchandise vis-à-vis companies that bought like domestic products. If those requirements were fulfilled, then a company would qualify for a tax exemption, reduction, or suspension on purchases or sales of finished ICT products. Conversely, failure to meet these requirements rendered a company ineligible for the tax benefits. The discriminatory accreditation requirements (which constitute the Article III:4 violation) obviously were associated with the differential tax burden (which constitute the Article III:2, first sentence, violation): foreign producers cannot be accredited under the ICT Programs, hence they never were able to qualify for a tax benefit. The Appellate Body used the familiar test for defining “treatment no less favorable,” namely, it inquired whether the competitive playing field was un-leveled thanks to the disputed measure. The answer was obvious. Brazil’s ICT tax incentives were restricted to domestic ICT products, and it was the accreditation requirements that cause this restriction “modify the conditions of competition to the detriment of imported products.”

Another GATT Article III:4 problem concerned the credit-debit system of the ICT Programs, which affected non-incentivized intermediate ICT merchandise. The analysis and conclusion of the Appellate Body on this problem was essentially the same as it was for the accreditation requirements affecting finished ICT products. Under the credit-debit system, an importer or other purchaser of intermediate ICT merchandise paid the full amount of tax due on that merchandise upon importation (or purchase) of that merchandise. To be sure, the importer received a tax credit associated with the tax it paid. But, it also confronted an administrative burden to utilize that credit that a purchaser of an incentivized, domestic ICT product did not face. The importer had three taxation periods in which to accumulate debits against which it could offset its accrued credits. If the importer did not do so within three periods, then it could be compensated for its unused tax credit through reimbursement by the Brazilian government of other taxes it incurred. However, to obtain that compensation was burdensome, and domestic intermediate ICT

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135 *Brazil Taxes* Appellate Body Report, ¶ 6.7. At this point in its Report, the Appellate Body failed to clarify whether the accreditation requirements were less of an imposition on companies that bought incentivized domestic intermediate ICT articles than on those ones that used foreign inputs, i.e., whether its holding that the accreditation requirements violate GATT Article III:4 pertained to finished and intermediate goods, or just finished goods. Logically, the Appellate Body holding with respect to accreditation requirements would not apply to intermediate goods, because (as per the discussion above), importers of those goods were eligible for a tax credit (albeit only if they surmounted the relatively higher administrative burden), which is a kind of benefit, whereas this holding indicates that importers never could qualify for any tax benefit.
products had no such hurdle. The differential administrative impositions meant Brazil accorded treatment less favorable to imported versus domestic intermediate ICT goods.

A third GATT Article III:4 problem with the ICT Programs – the Informatics, *PADIS*, *PATVD*, and Digital Inclusion schemes – lay in their *PPBs* and other production-step requirements. These requirements were contingencies, namely, conditions obliging the use of domestic over foreign goods. Here, too, the underlying Brazilian government policy was one of import substitution, redolent of its mid-20th century approach. That policy, as implemented through the *PPBs* and production-steps, accorded less favorable treatment to imported intermediate ICT articles than to like domestic products.

As for the *INOVAR-AUTO* Program, its accreditation requirements imposed a more severe headache for companies that sought accreditation as importers or distributors of imports than on domestic producers. Accreditation entitled a company to accrue and use *IPI* Tax credits, which would reduce *IPI* Tax liability. The accreditation requirements affected three categories of entities: importers (or distributors of imports); investors; and manufacturers.

A firm that was an importer (or distributor of imports), or a domestic manufacturer, could not gain accreditation unless it was located and operated in Brazil. Moreover, in locating and operating in the country, the importer (or distributor) needed to:

1. Invest in R&D in Brazil.
2. Purchase basic industrial technology, and engineering goods and services, in Brazil, plus expend funds to enhance the capacity of Brazilian suppliers.
3. Participate in a vehicle-labeling program (sponsored by *INMETRO*).
4. Performance of certain manufacturing steps in Brazil.

No domestic manufacturer faced these requirements to qualify for *IPI* Tax credits. And, none of these requirements were normally associated with foreign direct investment, *i.e.*, “[t]hese activities cannot be considered to be typical for foreign manufacturers seeking to import motor vehicles into Brazil.”

If a firm hoping for *IPI* Tax credits was an investor, then it could not obtain accreditation unless it was in the process of establishing itself in Brazil as a domestic manufacturer. What about a purely foreign manufacturer – how could it become accredited, and thereby enjoy *IPI* Tax credits? It would have to become accredited as an importer (or distributor), and thus would have to locate (or relocate) itself, and operate, in Brazil, plus meet the above-listed four requirements.

Therein lay the GATT Article III:4 national treatment violation: a domestic manufacturer already is located in Brazil, and thus gets the *IPI* Tax credit immediately, but a foreign producer has the burden of setting up in Brazil, and only if it satisfies this condition, and all the corollaries that go with this condition, gets that credit. Here again, “[t]he fact that foreign manufacturers have to undertake these activities to get accredited...”

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as importers/distributors implies that foreign manufacturers face a burden that domestic manufacturers do not face.” These activities are “typical” of a domestic manufacturer, as “any domestic manufacturer will carry out and perform a minimum number of manufacturing activities in Brazil.” A domestic – but not foreign – producer would be likely to invest in R&D locally, buy industrial technology and engineering items locally. This difference in “accreditation requirements … modified the competitive conditions,” and it was “adverse” to imports in comparison with like domestic products, because the requirements were atypical for foreign entities.

In reaching this correct conclusion, the Appellate Body was careless in one respect. The Appellate Body spoke of the “design” of the INOVAR-AUTO Program. Yet, it did not clarify whether or why “design” matters in finding a GATT Article III:4 violation. The modification of the conditions of competition, the playing field, as it were, is what traditionally matters, and should matter. Studying “design” can be a slippery slope into searching for legislative intent, a search endeavor for which the Appellate Body is ill situated.

Note, too, the Appellate Body equated “adversity” against foreign manufactures with “typicality.” If a transaction is typical for foreign and like domestic producers, then – following the Appellate Body logic – there is no adverse burden imposed on the foreign ones. After all, the mere modification of competitive conditions is not a violation of Article III:4. Article III:4 permits favoritism in favor of foreign players, and if there are differences in requirements that leave the playing field level between them, then the situation is one of “no harm, no foul.” A violation occurs only when the field is imbalanced against the foreigner, and that means finding an adversity that the foreigner uniquely faces. Here, the Appellate Body considered the typical behavior of foreign and domestic players. In other cases, the Appellate Body impliedly left open the possibility to measure “adversity” by a yardstick that is different, i.e., which does not evaluate typicality.
Part Two

SPECIAL AND DIFFERENTIAL TREATMENT
Chapter 6

ORIGINS AND GATT ARTICLES XXXVI-XXXVIII

I. Prebisch, Baran, and Intellectual Background for Non- Reciprocal Trade Preferences and GATT Part IV

From 30 October 1947, when the original contracting parties signed GATT, until 1966, there were no specific rules in multilateral trade law designed for the benefit of poor countries. Part IV of GATT, which was added to GATT in 1966, bears the rubric “Trade and Development.” This Part consists of the final three Articles in GATT – XXXVI, XXXVII, and XXXVIII (along with Ad Articles). These Articles grew out of concern for

Documents References:
(1) Havana (ITO) Charter Articles 1, 8-15, 24, 55-70
(2) GATT Preamble and Articles XXXVI-XXXVIII
(3) Tokyo Round Enabling Clause
(4) WTO Agreement Preamble

For an economic perspective on the relationship between the WTO and developing countries authored just three years after the birth of the WTO, including a review of the S&D provisions in GATT and the Uruguay Round Agreements, see J. Michael Finger & L. Alan Winters, What Can the WTO Do for Developing Countries? in The WTO as an International Organization 365-400 (Anne O. Krueger, ed., Chicago, Illinois: The University of Chicago Press, 1998). This paper controversially concludes:

Special and differential treatment as commonly interpreted in the WTO agreements does not do much for developing countries. Special access to developed-country markets transfers revenues to them, but at the expense of discouraging effective efforts to integrate into the world economy. Exemptions from WTO rules – inadequate as some of these are – and exemption from the need for reciprocal trade liberalization [per GATT Article XXXVI:8, discussed below], merely exacerbate the difficulties of pursuing satisfactory policies at home. They should be phased out as soon as possible.

The one element of special and differential treatment that does seem to us potentially beneficial is to offer assistance in the business of being a WTO Member. Meeting the full procedural requirements of the WTO is very burdensome and can absorb disproportionate amounts of human capital. To the extent that they can be implemented without compromising substance or transparency, the elements of special and differential treatment that permit developing countries to use streamlined procedures and/or lighter notification burdens seem, to us, desirable. By the same token, the actual delivery of the technical assistance referred to so frequently in the Uruguay Round agreements would be beneficial, especially if it can be devoted to training and capacity building rather than just to producing a product.

Id., 390. On the one hand, this argument anticipates the problem of legal capacity that plagued developing countries and LDCs long before the birth of the WTO. On the other hand, this argument fits the mold of “blame the poor, don’t mollycoddle them, rather, make them grow up,” and thus could be viewed as naïve as to the power asymmetries in the world trading system that skew the GATT-WTO regime against poor countries and, indeed, as uncharitable.

development challenges facing Third World countries after the Second World War. The challenges prompted calls to re-balance the trading system to help poor countries.

Specifically, Third World countries called for a complete overhaul of the rules governing world trade. They wanted rules to construct a system that took account of their interests. The unfettered free flow of goods across borders, prescribed by Adam Smith’s (1723-1790) logic of Absolute Advantage and David Ricardo’s (1772-1823) Law of Comparative advantage, was unacceptable. Free trade seemed somehow to reinforce inequality between rich and poor countries, and to facilitate neo-colonization, through economic rather than political or military might, of the Third World by the First World.

Leading the calls on behalf of the Third World were the renowned economists, Rául Prebisch (1901-1986) and Paul Baran (1909-1964). In the 1950s and 1960s, Prebisch spoke from two influential positions, Executive Secretary of ECLAC, and Secretary General of the UNCTAD. In 1964, during Prebisch’s tenure (which lasted until 1968) as the first UNCTAD Secretary General, UNCTAD published a highly influential document – *Towards a New Trade Policy for Development*, commonly known as the “Prebisch Report.” Baran was a Stanford University economist and exponent of Marxist-Leninist thinking. Baran issued the call most impressively in writing, publishing *The Political Economy of Growth* in 1957. Now largely forgotten in the American economic academy, at the time it probably was the most widely read book on development in the world.

The likes of Prebisch and Baran argued Third World countries could not compete in the great game of cross-border trade on an equal basis with developed countries. Poor countries needed tariff preferences to ensure access for its goods to developed country markets. Through special market access, poor countries could increase their exports and FX earnings. In turn, they could use those earnings, and the opportunities, linkages, and know-how from increased exports, to diversify their economies. The consequence would be reduced dependence on foreign trade, specifically, on imports from the developed countries of the western world.

In a highly charged debate, the Prebisch-Baran side called for six specific reforms to world trade rules, designed as a package to help Third World countries achieve an “attainable minimum” level of participation in the trading system, and thereby of development through that participation:

- **1st:**
  **Market Access for Primary Commodities**

  Primary commodities should be given easier access to the markets of major industrial countries. True, some developed countries, such as the U.S., Canada, and Australia, are big exporters of primary commodities. However, many less developed countries are major producers and net exporters of primary commodities.

- **2nd:**
  **Purchasing Power and Price Stabilization**
The purchasing power generated from export earnings of less developed countries should be higher, and it should be stabilized. Stabilization should occur through two devices: commodity agreements designed to influence prices; and compensatory financing mechanisms. (The first device implicates the exception in GATT Article XX(h) for international commodity agreements). The rationale behind this proposal was many less developed countries rely for FX earnings on one or a few commodities. The earnings of such countries are adversely affected by swings in the prices of their exports. But, commodity price pacts can be fragile, and break apart. (Cases in point are the near-constant controversies in OPEC over production quotas.)

* 3rd:
  **Preferences for Industrial Products**

There should be preferences for industrial products from less developed countries, particularly from infant industries in these countries. Preferences would assist emerging industries in less developed countries find external markets for their output, and thereby facilitate the industrialization process in these countries. The early rounds of multilateral trade negotiations under GATT auspices succeeded in reducing tariffs on goods produced by developed countries, particularly advanced manufacturers such as cars, machine tools, and computers.

However, for lower value-added manufactured items (e.g., textiles, shoes, etc.) trade barriers did not fall so dramatically or rapidly. Developed countries produced these items, but the industries making them were marginally profitable. These industries successfully lobbied for protection from relatively low-cost manufacturers in less developed countries. Put bluntly, rich countries were reluctant to lower barriers to overseas low-value added manufacturing industries, and sought to protect themselves from low-wage competition. And, in spite of the non-reciprocity rule in Article XXXVI:8, rich countries observed most poor countries had little of value to offer in return for expanded market access for exports from less developed countries.

* 4th:
  **Import Substitution**

Less developed countries should be allowed to protect their industries from foreign competition. Again, the rationale was to assist new industries in those countries, particularly ones that make components, in securing a customer base among domestic producers of finished products. Moreover, producers of intermediate goods in less developed countries might benefit from protection from foreign competition in the sense of being able to find external markets for their products.

* 5th:
  **Trade with Socialist countries**
Trade with Socialist countries should be expanded under long-term accords. Clearly, this proposal is outdated. It reflected the era in which it was made, when a large number of Third World development thinkers had faith in state planning.

- 6th:
  Trade in “Invisibles” and Debt Servicing

More attention should be paid to trade in intangible items, and the burden of servicing external debt should be reduced by re-adjusting loan periods and terms. Given the importance of IP and services, and the continued (indeed worsened) Third World debt problem, this proposal is as relevant today as when offered.

Few of these proposals found their way into “hard law.” Developed countries and their advocates rejected (or diluted to the point of meaninglessness) some (cynics would say most) of the proposed reforms. Viewing through the lens of Cold War politics, they tended to dismiss UNCTAD as a polemical forum for attacking the U.S. and Europe, and to condemn the economic ideology of Prebisch and Baran as leftist and anti-free market.

Still, Prebisch, Baran, and their supporters could point to two “hard law” victories. First, in the 1970s, some developed countries implemented preferential tariff schemes for imports from less developed countries. The GSP is the leading example. Second, in 1966, GATT contracting parties elevated S&D treatment to a new level, adding Part IV to their constitutional document.

II. 1958 Haberler Report

More than the work of Baran and Prebisch was behind the second achievement. In November 1957, the CONTRACTING PARTIES created a three-person group of experts, and appointed Dr. Gottfried Haberler as Chair of this Panel. The terms of reference of the Haberler Panel were to examine “past and current international trade trends and their implications.” The Panel was to make “special reference” to:

- certain trends in international trade, in particular the failure of the trade of less developed countries to develop as rapidly as that of industrialized countries, excessive short-term fluctuations in prices of primary products, and widespread resort to agricultural protection.

The Panel issued a document in October 1958, formally entitled Trends in International Trade, but colloquially known as the “Haberler Report.”

The Haberler Report “galvanized” the GATT community “to examine ways in which developing countries could achieve greater access for their exports in world markets.” During the next few years, discussions about trade and development intensified, as did negotiations about ways to adjust GATT obligations to ensure trade could realize its full potential in contributing to the economic growth of poor countries. The tangible result
of this activity of the late 1950s and early 1960s was Part IV, *i.e.*, Articles XXXVI, XXXVII, and XXXVIII.

On 8 February 1965, in Geneva, the GATT CONTRACTING PARTIES agreed to the “Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development.” By that Protocol, Part IV was enshrined in GATT, and it entered into force in 1966. (For the U.S., Part IV took effect on 17 June 1966.) In GATT history, it was the largest, most significant, and last amendment.

Neither the GATT Contracting Parties nor WTO Membership has resolved the problem of subjectivity in self-proclamations of “developing” country status. While relatively objective metrics (discussed in a separate Chapter) define the contemporary term “least developed,” designation as “developing” – and, therefore, entitlement to the S&D treatment that comes with this status – is up to each Member. Tired of what it perceives as abusive invocations of this status by large emerging countries, notably, Brazil and China, the USTR, Ambassador Robert Lighthizer (1947-) told Members at the 11th WTO Ministerial Conference in Buenos Aires, Argentina in December 2017:

[W]e need to clarify our understanding of development within the WTO. We cannot sustain a situation in which new rules can only apply to the few, and that others will be given a pass in the name of self-proclaimed development status. There is something wrong, in our view, when five of the six richest countries [including Qatar and Singapore] in the world presently claim developing country status. Indeed, we should all be troubled that so many Members appear to believe that they would be better off with exemptions to the rules. If in the opinion of a vast majority of Members playing by current WTO rules makes it harder to achieve economic growth, then clearly serious reflection is needed.

We need to clarify our understanding of development within the WTO. We cannot sustain a situation in which new rules can only apply to a few and that others will be given a pass in the name of self-proclaimed development status. Is the underlying problem a legal one, namely that GATT-WTO rules are ill-equipped to deal with the real-world complexities in some countries wherein there are pockets of jaw-dropping wealth amidst swaths of heart-rending poverty?

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140 See generally Andrew D. Mitchell, A Legal Principle of Special and Differential Treatment for WTO Disputes, 5 WORLD TRADE REVIEW issue 3, 445-469 (November 2006) (arguing the principle of S&D
Mumbai is a case in point of the juxtaposition of developed and developing in close proximity within a single WTO Member. Malabar Hill is the city’s exclusive residential neighborhood, with Hanging Gardens and Arabian Sea views, but 14 kilometers away is Dharavi, depicted in the 2008 hit British drama film, *Slumdog Millionaire*, one of the world’s five largest slums, and one of the world’s most densely populated areas. Multilateral trade rules do not allow for intra-country distinctions (other than in the SPS Agreement, as discussed in a separate Chapter, which considers regions within a Member afflicted by disease or disease-bearing pests versus ones that are certified free of such infestations, as discussed in a separate Chapter).

Perhaps India’s case for “developing” country status is more obvious than China’s, insofar as its poverty is both more widespread and deeper than that of China. But, what is the “line” to say that one WTO Member is, and the other Member is not, “developing”? And, who should draw that line?

### III. Substantive Content of Article XXXVI:8

- **Overview**

  Is Part IV of GATT a set of meaningless platitudes? Arguably, “no.” There is substantive “hard law” content in its three Articles. Broadly speaking, Articles XXXVI, XXXVII, and XXVIII call for exceptional – or “special and differential” – treatment for “less developed countries.” When, in 1966, the Articles were added to GATT, the distinction between “developing” and “least developed” countries was not made. The 1979 *Enabling Clause* formally introduced this distinction into multilateral trade law. So, the term “less developed countries” is understood as an umbrella one, to refer to both types of poor countries – developing and least developed.

  What kind of S&D treatment for less developed countries does Part IV envision? In brief, Article XXXVI identifies objectives concerning the link between trade and development, distinguishes between earnings generated by primary product exports and market access for industrial products, and establishes the important principle of non-reciprocity. Article XXXVII lays out commitments of developed contracting parties (WTO Members) to less developed contracting parties (Members), and even establishes a skeletal framework for resolving disputes about whether a country in the first category meets its obligations. Article XXXVIII links the objectives set forth in Article XXXVI with by the CONTRACTING PARTIES *(i.e., joint action by the Members)*, calling for collective action to further those objectives.

- **Non-Reciprocity and GATT Article XXXVI:8**

  Perhaps the most famous, and likely the most abused, provision in all of Part IV of GATT, which concerns Trade and Development, is Article XXXVI:8. This Paragraph treatment ultimately is incoherent, and “developing” countries are an amorphous group, hence it is of limited value in dispute settlement).
contains a “non-reciprocity rule,” or more accurately, a “non-expectation of reciprocity rule.” The mandate (and, it is a mandate) is that developed contracting parties do not expect reciprocity in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties. An Interpretative Note, Ad Article XXXVI Paragraph 8, reinforces the language of the Paragraph itself, and clarifies the context for the rule is trade negotiations.

The rule is forgotten or neglected in the public pronouncements of plenty of trade policy officials from developed countries, when they opine about what impoverished countries should do. The rule has been forgotten or neglected for so long, some less developed country officials seem either unaware of it, or no longer put any hope in it. The tendency in practice is to adhere to the tradition of conducting and evaluating trade negotiations on the basis of reciprocity. Yet, to forget about Paragraph 8 is to forget about the most significant substantive provision of Part IV, because it is a hard law commitment vis-à-vis less developed countries.

Paragraph 8 is a quintessential example of a rule embodying an unconditional benefit for poor countries. In exchange for whatever a developed country offers, nothing is to be expected. Money is given, though in an indirect manner. Developed countries are obligated not to ask for a reciprocal reduction, or for elimination, in a tariff or NTB. When a rich country offers concessions on protectionist measures, Paragraph 8 tells it not to ask for equivalent concessions from poor countries.

Accordingly, rich countries give up a customary and legal right to ask — indeed, to demand or else withdraw their concession offers — for reciprocity. That right is inherent in any kind of negotiations, other than (perhaps) a pure charitable donation. Yet, the fact of legal history is they held onto that right until the 1964-1967 Kennedy Round. At that juncture, they took the major step of codifying a new practice through Article XXXVI:8.

Article XXXVI:8 is more than just a rule by which developing countries are obligated to forgo a legal right to insist on reciprocity. It is a rule mandating they acquiesce in continued protectionism by poor countries. To be sure, according to standard capitalist economic theory, including Ricardo’s principle of comparative advantage, it is almost never in the interest of a less developed country to maintain high tariff or non-tariff barriers. There are net gains from increased trade, even if the increases result from unilateral dismantling of barriers. Still, Paragraph 8 allows a less developed country to maintain these measures, while developed countries tear down their barriers. Consequently, a less developed country can continue to accrue revenue from tariffs, and reap rents from quotas and other NTBs (e.g., import licensing requirements). The permitted revenue and rents are a financial transfer from rich to poor countries.

Specifically, they are a transfer of funds from exporters in developed countries (on whose goods tariffs are imposed, or whose goods are affected by quotas or licensing requirements) to the governments of less developed countries. It cannot be assumed these funds will be managed properly or put to good use. Quite possibly, a certain percentage (in some Third World contexts, 10%) is vulnerable to misappropriation by unscrupulous
behavior. Corruption aside, accrued revenues and rents are available to the governments to help their countries industrialize. For example, they can be deployed for industry-enhancing infrastructure, like roads, power plants, ports, and schools.

Moreover, it may be argued the protection afforded by the permitted tariffs and NTBs gives time to “infant” industries in the Third World for growth and maturation. During the period of protection, the infants may mature into strong, profitable, job-generating industries. Absent the protection, the infants might die from premature exposure to foreign competition. In effect, foreign competitors incur not only the direct costs of protection (e.g., higher tariff liabilities on their exports to Third World countries), but also an opportunity cost. Lost profits (i.e., potential profits foregone in favor of the infant industries as a result of the protection) are the opportunity cost. Here, then, is another financial transfer.

Significantly, Paragraph 5 of the 1979 Tokyo Round Enabling Clause relates closely to Article XXXVI:8. Paragraph 1 of the Clause contains the waiver from the Article I:1 MFN principle for contracting parties (i.e., WTO Members) to grant “differential and more favorable treatment to developing countries.” Paragraph 2 defines such treatment to include tariff preferences, and specifically mentions GSP programs, and non-tariff preferences. Tariff and non-tariff preferences are a form of assistance to poor countries. Paragraph 5 of the Enabling Clause is a reaffirmation – indeed, reincarnation – of Article XXXVI:8.

Are financial benefits transferred via practice of Article XXXVI:8 obtained by poor countries without any condition whatsoever? The question is rather difficult. A careful reading of Paragraph 8 reveals no condition put upon less developed countries. They are to benefit from “no expectation of reciprocity,” regardless of their existing array of tariffs and NTBs, and regardless of their offers (or lack thereof) to reduce these barriers. Simply put, rich countries are not to demand reciprocity, period.

An Interpretative Note to Article XXXVI:8. Ad Article XXXVI, Paragraph 8 elaborates on what “do not expect reciprocity” means. This Ad Article says:

“do not expect reciprocity” means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments. (Emphasis added.)

The use of the very “should” is sloppy drafting. The main Paragraph uses an imperative construction that creates an obligation (namely, that developed countries “do not expect reciprocity”). Careful drafting of the Ad Article would have conveyed the same obligatory sense as the main Paragraph.
Consequently, the *Ad Article* suggests a developed country could expect a less developed country to offer some reciprocal trade concession. Does this suggestion mean the rule in the main Paragraph is conditional? No.

The suggestion is carefully limited. The *Ad Article* is not an unrestricted license for a developed country to demand concessions of poor countries. It merely allows a developed country to take into account the specific economic circumstances – the “individual development, financial and trade needs” – of the poor country with which it is negotiating. It also allows it to consider past trade developments. In some circumstances, it may be fair for the rich country to ask of the poor country some modest reduction in tariffs or NTBs, subject to the highly significant caveat the reduction is consistent with the specific circumstances and trade trends relevant to that poor country.

Suppose, then, a poor country maintains prohibitive barriers in a particular product market. In a recent three-year period, that country has gained a large share in many foreign markets for the product. Suppose, further, a drop in the barriers to imports of that product from a “prohibitive” level to a “stiff” level (e.g., from a 100% tariff to a 20% tariff) would not affect adversely the performance of producers and exporters. Would it be reasonable for a developed country to ask for that kind of drop? *Ad Article XXXVI, Paragraph 8* says “yes.” Put differently, this Interpretative Note provides some guidance as to when the “do not expect reciprocity” rule of the main Paragraph terminates. It does not make the rule conditional. Rather, it helps identify the outer limits of the scope of application of the rule.

IV. **Collaboration, GATT Article XXXVIII, and 1980 Sugar Refunds Case**

Among adopted GATT panel reports attracting little attention, one concerns Part IV, and deals specifically with Paragraph 1 of Article XXXVIII. It is the 1980 case of *EC – Refunds on Exports of Sugar (Sugar Refunds)*. A complaint Brazil lodged in November 1978 against subsidization by EC of sugar exports triggered the *Sugar Refunds* case. Australia, Cuba, India, and Peru supported the complaint. Australia had brought a case against the EC on essentially the same facts, and Brazil cited that case in its favor (though the result of that case was somewhat inconclusive). The thrust of Brazil’s complaint did not involve Part IV. Brazil focused on Article XVI:3, arguing refunds on sugar exports granted by the EC resulted in European exporters obtaining more than an equitable share of world export trade in sugar.

Brazil decried the EC’s substantial sugar subsidies, which consistently exceeded international prices of the product. These subsidies were one part of the CAP. Brazil alleged the EC was “unrestrained” in its “use of massive subsidies.” The EC “had turned from a net importer into a sizeable net exporter of sugar by displacing more efficient producers, mostly less developed countries, at a time of world over-production.” (The EC retorted such a change was irrelevant under Article XVI.)

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142 GATT Sugar Refunds Panel Report, ¶ 2.6 at 72.
After its six findings under Article XVI, the Panel came to its final conclusion:

The Panel recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the ISA [International Sugar Agreement] to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII.143

What constitutes joint collaboration? Might it be said that while Article XXXVIII is rarely invoked, when it is used, it can have real significance?

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143 GATT Sugar Refunds Panel Report, conclusion (h) at 97-98. (Emphasis added.)
Chapter 7

OVERVIEW AND SUMMARY TABLES

I. Typology

Special and differential treatment is not limited to Part IV of GATT. In June 2013, the WTO reported there were nearly 150 provisions on S&D treatment for developing countries and LDCs in GATT and the many other WTO agreements. Table 7-1

Documents References:
(1) Havana (ITO) Charter Articles 1, 8-15, 24, 55-70
(2) GATT Preamble and Articles XXXVI-XXXVIII
(3) Tokyo Round Enabling Clause
(4) WTO Agreement Preamble

For an economic perspective on the relationship between the WTO and developing countries authored just three years after the birth of the WTO, including a review of the S&D provisions in GATT and the Uruguay Round Agreements, see J. Michael Finger & L. Alan Winters, What Can the WTO Do for Developing Countries? in The WTO as an International Organization 365-400 (Anne O. Krueger, ed., Chicago, Illinois: The University of Chicago Press, 1998). This paper controversially concludes:

Special and differential treatment as commonly interpreted in the WTO agreements does not do much for developing countries. Special access to developed-country markets transfers revenues to them, but at the expense of discouraging effective efforts to integrate into the world economy. Exemptions from WTO rules – inadequate as some of these are – and exemption from the need for reciprocal trade liberalization [per GATT Article XXXVI:8, discussed below], merely exacerbate the difficulties of pursuing satisfactory policies at home. They should be phased out as soon as possible.

The one element of special and differential treatment that does seem to us potentially beneficial is to offer assistance in the business of being a WTO Member. Meeting the full procedural requirements of the WTO is very burdensome and can absorb disproportionate amounts of human capital. To the extent that they can be implemented without compromising substance or transparency, the elements of special and differential treatment that permit developing countries to use streamlined procedures and/or lighter notification burdens seem, to us, desirable. By the same token, the actual delivery of the technical assistance referred to so frequently in the Uruguay Round agreements would be beneficial, especially if it can be devoted to training and capacity building rather than just to producing a product.

Id., 390. On the one hand, this argument anticipates the problem of legal capacity that plagued developing countries and LDCs long before the birth of the WTO. On the other hand, this argument fits the mold of “blame the poor, don’t mollycoddle them, rather, make them grow up,” and thus could be viewed as naïve as to the power asymmetries in the world trading system that skew the GATT-WTO regime against poor countries and, indeed, as uncharitable.


Table 7-1 is adapted from World Trade Organization, Committee on Trade and Development, Note by the Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/196, Table on Special and Differential Treatment Provisions by Type and Agreement, 5 (14 June 2013), www.wto.org.
summarizes them. Under Column 1, each row of the Table identifies a particular GATT-WTO text contained in Annex 1 (including 1A, 1B, and 1C), 2, 3, or 4 to the WTO Agreement. The subsequent columns categorize S&D provisions into one of six types:

The typology distinguishes the nature, purpose, and design of the different provisions:

**Column 2:** Trade Enhancement –

Boost trade opportunities of developing countries and LDCs.

**Column 3:** Special Interests –

Encourage or obligate developed countries to take account of the special interests of developing countries and LDCs.

**Column 4:** Flexibility –

Give flexibility to developing countries and LDCs to implement and enforce their commitments and pursue policies.

**Column 5:** Extra Time –

Grant additional time to developing countries and LDCs to implement and enforce their commitments.

**Column 6:** Technical Assistance –

Call for or offer technical aid by developed countries to developing countries and LDCs.

**Column 7:** LDCs Only –

Help for LDCs exclusively (not developing countries).

The 8th (right-hand most) column tallies the number of S&D provisions in each text.

**II. Analytical Questions**

In reviewing Table 7-1 and consulting the textual provisions it references, consider whether the 1986-1994 Uruguay Round heralded a change in the substantive nature – the generosity – of S&D treatment? That is, what patterns emerge from the S&D treatment afforded by the WTO texts? Does it appear that much of that treatment consists of the length of time a developing country or LDC is allowed to phase in an obligation, or phase out a trade barrier? How does this kind of treatment compare with the treatment GATT Part IV affords? Might it be argued persuasively that GATT, dating from 1947, provides more generous S&D treatment than the WTO texts that emerged from the Uruguay Round? What would be the basis for such an argument – non-reciprocity, and the relief from obligations, perhaps?
A few WTO texts afford no, or hardly any, S&D treatment. One example is the Antidumping Agreement. Essentially, aside from a higher negligible volume threshold for poor countries, it treats all WTO Members alike.

Other WTO texts were intended to help poor countries. The ATC is an example. It removed (effective 1 January 2005) all quotas on T&A. These quotas, set forth under the 1974 MFA, had regulated global T&A trade, and thereby constrained growth in T&A exports from any one country. Producers sourced merchandise in many countries, so that if the quota for a T&A article (e.g., the U.S. quota on ties from China) were filled, they could ship from another country (e.g., ties from Thailand). Most Third World countries lobbied for, and heralded, the opening of markets – particularly developed country markets – to their T&A articles. Exporters could compete in developed country markets based on price and quality, without worrying whether shipments of their merchandise were subject to a quota, and if so, whether the applicable quota had been filled. As of 1 January 2005, when all MFA quotas were abolished, the playing field in the T&A market appeared level.

As that date neared, small players like Lesotho and Sri Lanka realized large players, like China, India, and Vietnam would dominate the playing field. No longer needing to spread manufacturing operations across dozens of countries to meet quota limitations, T&A producers responded to the ATC by consolidating operations in the large countries. The decision where to open or maintain operations was driven by business concerns (e.g., input sources and transportation costs) and legal risks (e.g., rule of law and the risk of expropriation), not artificial distortions of trade (aside from occasional special safeguard actions, or the threat thereof, particularly against Chinese T&A exports). Had the smaller less developed countries sought and obtained an agreement during the Uruguay Round that now haunted them? Or, had they simply failed to use the decade-long transition period (1 January 1995, when the ATC took effect, until 21 December 2004, the last day of MFA quotas) wisely by enhancing their attractiveness to multinational producers as a place in which to operate facilities?

III. Text-Specific Tables

Tables 7-2 through 7-16 identify the specific provisions in each GATT-WTO text, on an agreement-by-agreement basis, based on the type of those provisions as categorized in Table 7-1.\(^{146}\) Table 7-2 also provides a brief comment on the specific provisions.

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\(^{146}\) Tables 7-2 through 7-16 are adapted from World Trade Organization, Committee on Trade and Development, Note by the Secretariat, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/196, Sections 2-6, at 6-83 (14 June 2013), www.wto.org. Documents referenced in the Tables indicate their WTO Document Number, and are posted on the WTO website, www.wto.org. Updates to various items in the Tables are from the WTO. See, e.g., World Trade Organization, WTO Members Review Preferences Granted to LDCs’ Service Suppliers, 30 October 2019, www.wto.org/english/news_e/news19_e/serv_30oct19_e.htm (concerning usage of the Services Waiver).

None of the Tables cover three other instances of S&D treatment: (1) amendments to Article 31 of the TRIPs Agreement concerning compulsory licensing approved at the December 2005 Hong Kong Ministerial, (2) Trade Facilitation Agreement approved at the December 2013 Bali Ministerial Conference, or (3) Decision on Monitoring Mechanism on Special and Differential Treatment approved at the Bali Conference. The first two texts are discussed in separate Chapters, and the third is discussed later in this Chapter. The Tables do include other pertinent Decisions taken at the Bali Ministerial Conference.
None of these Tables needs to be memorized (a nearly impossible task). Rather, as indicated earlier, the goal is to study them for the patterns (or lack thereof) that emerge across time, and across texts, in respect of the legal treatment afforded to poor countries, and the generosity of that treatment, under the multilateral trade regime. Moreover, as a practical matter, understanding these Tables helps identify opportunities and constraints with respect to importation and exportation transactions between developed countries, on the one hand, and developing and least developed countries, on the other hand.

So, work through the Tables carefully, to get a lawyer-like understanding of what the law “is” and what it “should be.” Consider not only how the S&D provisions are designed to work, but also whether they work at all. How many of them are useless, in the sense of not being used? Why are they not used? How might they be improved?

Finally, consider the relationship between S&D treatment, on the one hand, and fulfilling U.N. SDGs, on the other hand. For example, in April 2020, 90 WTO developing country Members, led by South Africa, recalled the difficulties they had in complying with TBT measures, as well as their lack of customs administration resources to ensure proper merchandise valuations. They advocated for additional flexibilities in the TBT Agreement, and funding to assist customs authorities. Such reforms to the extant stock of over 150 S&D provisions would, they argued, help them meet three SDGs: (1) SDG 17:11, which deals with sustainable development, implicating efforts to increase significantly the share of developing countries in global exports; (2) SDG 8:A, concerning decent work and economic growth, implicating the Aid for Trade initiative to enhance the trade infrastructure in poor countries; and (3) SDG 10:A, which urges reduction of inequality, not only with respect to income, but also as regards gender, indigenous persons, children, and the elderly, in part through adherence to the principle of S&D treatment for developing and least developed countries.

III. Summary Tables of GATT-WTO S&D Treatment in GATT-WTO Texts

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Table 7-1
Types of S&D Treatment Provisions in GATT-WTO Agreements

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<th>Text(^{151})</th>
<th>Increase Trade Opportunities for Developing Countries and LDCs</th>
<th>Exhort or Require Developed Countries to Account for Developing Country and LDC Interests</th>
<th>Provide Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies</th>
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\(^{151}\) There are no S&D provisions in the WTO Agreement on Rules of Origin. At the December 2013 Bali Ministerial Conference, WTO Members agreed to a Decision on Preferential Rules of Origin for Least Developed Countries. See WT/MIN(13)/42 or WT/L/917, [www.wto.org](http://www.wto.org). This Decision sets out guidelines (such as simplicity, ease of compliance by LDCs, and transparency) for Members to adopt their own preferential ROOs (e.g., for GSP schemes), and calls on the WTO Committee on Rules of Origin to review developments annually. At the December 2015 Nairobi Ministerial Conference, Members urged each other to base their preferential ROOs on common guidelines, and notify the WTO of their ROOs. They also called on preference-granting Members to consider allowing LDCs to use non-originating materials up to 75% of the final value of the product, and still qualify for a preference. See World Trade Organization, Ministerial Conference, Tenth Session, Nairobi, 15-18 December 2015, *Preferential Rules of Origin for Least-Developed Countries – Ministerial Decision of 19 December 2015*, WT/MIN(15)/W/38, [www.wto.org](http://www.wto.org).

At an April 2015 WTO meeting, Bangladesh spoke for the “LDCs Group” and pointed out there was no one system of preferential ROOs that preference-granting Members used, and no single system was better than all others. Rather, “unequivocal evidence” showed ROOs need to “reflect current global value chains and commercial realities” so as to benefit LDCs by allowing them to make increased use of preferences, attracting factories to relocate to LDCs, and increase manufacturing capacity and generate skilled jobs in LDCs. See World Trade Organization, *LDCs Urge Movement on Implementing Bali Decision on Preferential Rules of Origin*, 30 April 2015, [www.wto.org/english/news_e/news15_e/roi_01may15_e.htm](http://www.wto.org/english/news_e/news15_e/roi_01may15_e.htm).
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</tbody>
</table>

152 There are 9 provisions classified in more than 1 category: 1 provision in the Agreement on Agriculture; 1 in the TRIMs Agreement; 3 in the SCM Agreement; 2 in GATs; and 2 in the GPA (the details can be found in the relevant sections). The total of 139 over all the Agreements counts these provisions only once, while the total of 148 is the total of all listed provisions.
Table 7-2
25 Specific S&D Treatment Provisions in GATT

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>XXXVI:2</td>
<td>There is need for a rapid and sustained expansion of the earnings of the less-developed contracting parties.</td>
<td></td>
</tr>
<tr>
<td>XXXVI:3</td>
<td>There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.</td>
<td>Thanks to implementation of Uruguay Round industrial tariff cuts, the average trade weighted tariff imposed on industrial goods exported by developing countries fell by 37%.</td>
</tr>
<tr>
<td>XXXVI:4</td>
<td>Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favorable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.</td>
<td></td>
</tr>
<tr>
<td>XXXVI:5</td>
<td>The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favorable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.</td>
<td>The GSP schemes maintained by some WTO Members may be viewed as their response to Article XXXVI:3-5.</td>
</tr>
</tbody>
</table>
### XXXVII:1(a)

The developed contracting parties shall to the fullest extent possible – that is, except when compelling reasons, which may include legal reasons, make it impossible give effect to the following provisions:

(a) Accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;

Some WTO Members attempted to apply this provision in the Doha Round negotiations in agriculture and NAMA, as regards goods in which developing countries and LDCs have a keen export interest, for example, cutting tariffs on tropical products.

### XXXVII:4

Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

### XXXVIII:2(c)

… collaborate in analyzing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required; …

The Aid-For-Trade Initiative of the WTO, launched at the December 2005 Hong Kong Ministerial Conference, aims to boost production and exports of goods and services from developing countries and LDCs. In collaboration with the IMF, World Bank, and regional development banks, the WTO helps poor countries implement their WTO commitments, and build trade-related infrastructure, a lack of which is a key supply-side, or capacity-side, constraint on increasing production and
| XXXVIII:2(e) | … collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; … | The joint WTO-UNCTAD International Trade Center seeks to implement this provision. |
| 13 Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests | Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development. | Several Decisions calling for greater coherence in global economic policymaking emerged from the Uruguay Round and are included in the Final Act from that Round, such as the Decision on Relationship of the WTO with the International Monetary Fund, which essentially maintains their pre-WTO, GATT era relationship. Topics in these Decisions include FX rate stability to contribute to trade expansion and sustainable growth and development. Likewise, the Final Act includes a Declaration on the Contribution of the World Trade Organization to
Achieving Greater Coherence in Global Economic Policy Making, which admits that the WTO cannot address problems arising from non-trade causes.

In November 1996, the WTO General Council approved stronger inter-agency ties with the IMF and World Bank. (See WT/L/194.)

The Enhanced Integrated Framework (EIF), initially established in 1997 as the “IF,” illustrates collaboration among these 3 IOs, plus UNCTAD and UNDP, for LDCs. So, too, does Aid-For-Trade.

XXXVI:7 There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

In September 1995, the WTO exchanged letters with the UN on cooperation. (See WT/GC/W/10.)

XXXVI:9 The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

XXXVII:1(b) … refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and…

XXXVII:1(c) … (i) refrain from imposing new fiscal measures, and (ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal
measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

| XXXVII:2 | (a) Whenever it is considered that effect is not being given to any of the provisions of subparagraph (a), (b) or (c) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.  
(b)(i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of subparagraph (a), (b) or (c) of paragraph 1 shall be examined.  
(ii) As the implementation of the provisions of subparagraph (a), (b) or (c) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.  
(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV. |

| XXXVII:3 | The developed contracting parties shall:  
(a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the | The Antidumping Agreement incorporates Article XXXVIII:3(c). |
| XXXVII:5 | In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise. |
| XXXVIII:1 | The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI. |
| XXXVIII:2(a) | In particular, the CONTRACTING PARTIES shall: … where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products; | Some WTO Members attempted to raise the problem of declining primary commodity prices in the context of the Doha Round agriculture and NAMA negotiations. |
| XXXVIII:2(b) | seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any | Same Comment as for Article XXXVI:7. |
| XXXVIII:2(d) | keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate; | The WTO CTD regularly reviews the performance of developing countries in world trade, the results of which are published on the WTO website. |
| XXXVIII:2(f) | establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part. | The CTD is the key WTO body dealing with Trade and Development. Established in 1995 when the WTO was born, its terms of references are in WT/L/46. |

<table>
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<tr>
<th>4 Provisions Providing Developing Countries and LDCs Flexibility in Commitments, Actions, and Policy</th>
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<tr>
<td>Section A, XVIII:7(a)</td>
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<td>Section B, XVIII:8</td>
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Since that birth, 14 developing countries have invoked Section B. In the 1989 *Korea Beef* case, the GATT Panel looked askance at Korea’s argument that its import restrictions on beef were justified as necessary to secure an adequate level of FX reserves. Economic data showed Korea’s development was robust, so the Panel said Korea should phase out its BOP restrictions on beef. In the 1999 *India Quantitative Restrictions* case, the Appellate Body rejected India’s that its BOP restrictions satisfied the Article XVIII, Section B criteria, and held they were not justified by Article XIII.

| Section C, XVIII:13 | If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section. | Before the birth of the WTO, Section C was invoked 14 times. Since that birth, through July 2002, Bangladesh, Colombia, and Malaysia have invoked it. Malaysia cited it in its defense to the first complaint ever brought under the DSU, Singapore’s claim against a |
Malaysian import prohibition on polyethylene and polypropylene. Singapore withdrew its complaint, perhaps accepting the Malaysian Section C defense.

| XXXVI:8 | The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties. |

This non-reciprocity expectation is provision is discussed earlier in the Chapter. To what extent, if any, was it taken into account during the Uruguay and Doha Rounds? Consider average tariff levels in developing countries and LDCs, and the extent of their bindings on agricultural and industrial goods.

At the 9th WTO Ministerial Conference in December 2013 in Bali, Indonesia, WTO Members adopted a Decision on Duty-Free and Quota-Free Market Access for Least Developed Countries (WT/MIN(13)/44 or WT/L/919). This Decision repeats calls for developed countries to grant DFQF treatment to at least 97% of the exports of LDCs, with a target date of the 10th Ministerial Conference in December 2015. Not all developed countries met the target.
Table 7-3
2 Specific S&D Treatment Provisions in Uruguay Round Understanding on BOP

<table>
<thead>
<tr>
<th>Paragraph</th>
<th>Content</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td><strong>1 Provision to Increase Trade Opportunities for Developing Countries and LDCs</strong></td>
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<tr>
<td>8</td>
<td>Members, Recognizing the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (B.I.S.D. 26S/205-209, referred to in this Understanding as the &quot;1979 Declaration&quot;) and in order to clarify such provisions; Hereby agree as follows: … Procedures for balance-of-payments consultations: Consultations may be held under the simplified procedures approved on 19 December 1972 (B.I.S.D. 20S/47-49, referred to in this Understanding as “simplified consultation procedures”) in the case of least-developed country Members or in the case of developing country Members which are pursuing liberalization efforts in conformity with the schedule presented to the Committee in previous consultations. Simplified consultation procedures may also be used when the Trade Policy Review of a developing country Member is scheduled for the same calendar year as the date fixed for the consultations. In such cases the decision as to whether full consultation procedures should be used will be made on the basis of the factors enumerated in paragraph 8 of the 1979 Declaration. Except in the case of least-developed country Members, no more than two successive consultations may be held under simplified consultation procedures.</td>
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<tr>
<td><strong>1 Provision on Technical Assistance</strong></td>
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<tr>
<td>12</td>
<td>Notification and documentation: The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat</td>
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</table>
shall, at the request of a developing country Member, assist in preparing the documentation for the consultations.
Table 7-4
13 Specific S&D Treatment Provisions in *Agriculture Agreement*

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>1 Provision Designed to Increase Trade Opportunities for Developing Countries and LDCs</strong>&lt;br&gt;<strong>Preamble</strong>&lt;br&gt;Having agreed that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops; …&lt;br&gt;The WTO says Schedules of developed countries show reductions in tariffs on various goods of keen export interest to developing countries that are greater than average, as well as accelerated implementation of commitments on those cuts. Their average tariff cut of 43% on tropical agricultural goods is an example.&lt;br&gt;But, most rich countries are not in the tropics, whereas most poor ones are. So, steep cuts in such tariffs tend not to threaten domestic producers of a like product.</td>
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<tr>
<td><strong>9 Provisions Providing Developing Countries and LDCs Flexibility in Commitments, Actions, and Policies</strong>&lt;br&gt;<strong>6:2 Domestic Support Commitments:</strong>&lt;br&gt;In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programs of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members when providing data for computation of their Current Total AMS for their Schedules. Examples include: Bahrain; Bangladesh; Barbados; Botswana; Brazil; Burundi; Chile; Colombia; Costa Rica; Cuba; Ecuador; Egypt; Fiji; Gambia; Honduras; India; Indonesia; Jordan; Korea; Malawi; Malaysia; Maldives; Mauritius; Mexico; Morocco; Namibia; Nepal; Oman; Panama; Paraguay; Peru;</td>
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<td></td>
<td>Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member’s calculation of its Current Total AMS.</td>
<td>Philippines; Qatar; Sri Lanka; Thailand; Tunisia; Turkey; UAE; Uruguay; and Venezuela. Such Members are listed in WTO documents in the G/AG/N/… series.</td>
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<tr>
<td>6:4(b)</td>
<td>Domestic Support Commitments – Calculation of Total AMS: For developing country Members, the de minimis percentage under this paragraph shall be 10%.</td>
<td>Several developing countries have invoked this de minimis clause when computing their Base Total AMS (for both product- and non-product specific support) so as to schedule their domestic support reduction commitments. Examples include: Bangladesh; Barbados; Brazil; Chile; India; Israel; Jordan; Korea; Mexico; Pakistan; Panama; Peru; Philippines; Saudi Arabia; Thailand; Tunisia; Turkey; and Uruguay. Such Members are listed in the WTO GA/AG/N/… series.</td>
</tr>
<tr>
<td>9:2(b)(iv)</td>
<td>The Member’s budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64% and 79% of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76% and 86%, respectively.</td>
<td>Every developing country that has scheduled an export subsidy reduction commitment has invoked this flexibility to apply a lower rate of reduction. Examples include: Brazil; Colombia; Indonesia; Israel; Mexico; Romania; Turkey; Uruguay; and Venezuela. Such Members are listed in the WTO GA/AG/N/… series.</td>
</tr>
<tr>
<td>9:4</td>
<td>During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) [i.e., for costs of marketing exports] and (e) [i.e., for internal transport and freight charges for exports] of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments: Several developing countries (e.g., Barbados, India, Korea, Mauritius, Mexico, Morocco, Pakistan, Sri Lanka, Thailand, and Tunisia, all of which, and others, are listed in the WTO GA/AG/N… series), have notified the WTO they provide Article 9:1(d) and/or (e) subsidies.</td>
<td></td>
</tr>
<tr>
<td>12:2</td>
<td>The provisions of [Article 12.1] shall not apply to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned. No developing country has ever notified the WTO that it has used export restrictions and prohibitions. So, there are no formal invocations of this provision.</td>
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<tr>
<td>15:1</td>
<td>In keeping with the recognition that differential and more favorable treatment for developing country Members is an integral part of the negotiation, S&amp;D in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments. Schedules of developing countries and LDCs indicate recourse to flexibilities on ceiling bindings, extended implementation periods, and lower reduction commitments on market access, domestic support, and export subsidies.</td>
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<tr>
<td>Annex 2, Paragraph 3 and Footnote 5</td>
<td>Public Stock Holding for Food Security Purposes: For the purposes of paragraph 3 of Annex 2, governmental stockholding programs for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines shall be considered to be in conformity with the provisions of this paragraph, including programs under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS. Developing countries (listed in the WTO GA/AG/N… series) have utilized this provision. At the 9th Ministerial Conference in December 2013 in Bali, WTO Members adopted the Decision on Public Stockholding for Food Security Purposes. (WT/MIN(13)/38 or WT/L/913.) This Decision, and possible Green Box reform under it, is a major issue between India and the U.S., and other poor and rich countries, respectively. In July 2014, the U.S. agreed it would not sue India for</td>
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</table>
| Annex 2, Paragraph 4, Footnotes 5-6 | Domestic Food Aid:  
For the purposes of paragraphs 3 and 4 of Annex 2, the provision of foodstuffs at subsidized prices with the objective of meeting food requirement of urban and rural poor in developing countries on a regular basis at reasonable prices shall be considered to be in conformity with the provisions of this paragraph. | alleged breach of Indian domestic farm support limits caused by India’s food security purchases and stockpiling until final resolution of the issue. |
| --- | --- | --- |
| Annex 5, Section B, Paragraphs 7, 10 | 7. The provisions of paragraph 2 of Article 4 shall also not apply with effect from the entry into force of the WTO Agreement to a primary agricultural product that is the predominant staple in the traditional diet of a developing country Member and in respect of which the following conditions, in addition to those specified in paragraph 1(a) through 1(d), as they apply to the products concerned, are complied with:  
(a) minimum access opportunities in respect of the products concerned, as specified in Section I-B of Part I of the Schedule of the developing country Member concerned, correspond to 1% of base period domestic consumption of the products concerned from the beginning of the first year of the implementation period and are increased in equal annual installments to 2% of corresponding domestic consumption in the base period at the beginning of the fifth year of the implementation period. From the beginning of the sixth year of the implementation period, minimum access opportunities in respect of the products concerned correspond to 2% of corresponding domestic consumption in the base period and are increased in equal annual installments to 4% of corresponding domestic consumption in the base period until the beginning of the | Developing countries (listed in the WTO GA/AG/N… series) have utilized this provision. |
|  | Korea, Philippines, and Taiwan have made recourse to this flexibility, as manifest in their Schedules. |  |
10th year. Thereafter, the level of minimum access opportunities resulting from this formula in the 10th year shall be maintained in the Schedule of the developing country Member concerned;
(b) appropriate market access opportunities have been provided for in other products under this Agreement.

…

10. In the event that special treatment under paragraph 7 is not to be continued beyond the 10th year following the beginning of the implementation period, the products concerned shall be subject to ordinary customs duties, established on the basis of a tariff equivalent to be calculated in accordance with the guidelines prescribed in the attachment hereto, which shall be bound in the Schedule of the Member concerned. In other respects, the provisions of paragraph 6 shall apply as modified by the relevant S&D accorded to developing country Members under this Agreement.

### 1 Transitional Time Period

<table>
<thead>
<tr>
<th>Article 15:2</th>
<th>Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments.</th>
<th>Article 15:2 is listed twice, as it also is under provisions for LDCs only. But, it is counted just once as to the total number of S&amp;D Treatment provisions in the Agriculture Agreement.</th>
</tr>
</thead>
</table>

### 3 Provisions for LDCs Only

| Article 16:1 | Developed country Members shall take such action as is provided for within the framework of the Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries. | This provision also applies to NFIDCs. |
| Article 16:2 | The Committee on Agriculture shall monitor, as appropriate, the follow-up to this Decision. | This provision also applies to NFIDCs. |
Table 7-5
6 Specific S&D Treatment Provisions in *SPS Agreement*

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>10:1</strong></td>
<td>In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.</td>
<td>Poor countries have difficulty managing information on changes in the SPS measures of other WTO Members (which may not always be transparent), often resulting in shipments of their exports held up at ports in those other Members. They also struggle with basis SPS Agreement obligations (owing partly to a lack of legal capacity). In March 2011, the WTO Secretariat launched the SPS Notification Submission System (NSS), to address these concerns. NSS is a centralized, online database into which authorities in WTO Member countries can input notifications of their SPS measures. The Secretariat also has a Standards and Trade Development Facility (STDF).</td>
</tr>
<tr>
<td><strong>10:4</strong></td>
<td>Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.</td>
<td>Increasing the active engagement of poor countries in IOs such as the FAO, OIE, and WHO was a topic at the margins of the Doha Round. A key barrier is the lack of finances in those countries to enhance their capacity to participate.</td>
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</table>

2 Transitional Time Periods
| 10:2 | Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports. | The November 2001 Doha Ministerial Conference Decision on Implementation-Related Issues clarified that “longer time frame for compliance” normally means at least 6 months. The Decision set the same 6-month period for the gap between publication and entry into force of an SPS measure under Annex B, Paragraph 2, of the SPS Agreement. |
| 10:3 | With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exception in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs. | No developing country has made a request under this provision. |

### 2 Provisions on Technical Assistance

| 9:1 | Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets. |  
| 9:2 | Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved. | See comment concerning Article 10:1.  
Among the key scientific and technical matters with which poor countries need assistance are laboratory facilities and technologies to provide |
<p>| | proper risk assessments in compliance with the SPS Agreement. |</p>
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<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</td>
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<tr>
<td>10:6</td>
<td>The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.</td>
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<tr>
<td>12:1</td>
<td>Members shall provide differential and more favorable treatment to developing country Members, through the provisions of this Article, as well as through the relevant provisions of other Articles of this Agreement.</td>
<td>Article 2:12 obligates Members to allow a “reasonable internal” between publishing and enforcing a TBT measure so as to allow exporters, especially in developing countries, time to adapt their products or production methods. The November 2001 Doha Ministerial Conference Decision on Implementation-Related Issues and Concerns defines “reasonable interval” to mean normally no less than 6 months, unless that period would be ineffective to fulfill the objectives of the measure.</td>
</tr>
<tr>
<td>12:2</td>
<td>Members shall give particular attention to the provisions of this Agreement concerning developing country Members’ rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement’s institutional arrangements.</td>
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<td>Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.</td>
<td>It is unclear whether and how developed countries actually account for the needs of developing countries and LDCs when they draft, implement, and enforce TBT measures. In November 2003, the WTO TBT Committee encouraged developed countries to provide more than a 60-day comment period developing countries and LDCs on proposed TBT measures. <em>(See G/TBT/13, ¶ 26.)</em></td>
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<tr>
<td>12:5</td>
<td>Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.</td>
<td>As the WTO TBT Committee stated in Section F of its November 2000 Decision, international standard-setting bodies need to operate in a transparent, impartial manner, on the basis of consensus, if they are to account for the interests of poor countries. Otherwise, those countries are de facto excluded from the decision making process. <em>(See G/TBT/1/Rev.9; November 2001 Doha Decision on Implementation-Related Issues and Concerns.)</em></td>
</tr>
<tr>
<td>12:6</td>
<td>Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.</td>
<td></td>
</tr>
</tbody>
</table>
Devising international standards that account for the interests of poor countries also is important for goods in which those countries are likely to gain a keen export interest as they ascend the value-added chain.

| 12:9 | During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development. |

| 12:10 | The Committee shall examine periodically the Special and Differential Treatment, as laid down in this Agreement, granted to developing country Members on national and international levels. | No developing country or LDC has made a request under Article 12:8 for a “specified, time-limited exception.” |

### Provision Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies

| 12:4 | Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs. |

### Transitional Time Period Only

| 12:8 | Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade should waive or extend the provisional provisions for another specified period of time. | This provision has never been invoked. |
Trade provided for in Article 13 is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

### 8 Provisions on Technical Assistance

| 11:1 | Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations. |
| 11:2 | Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise. |
| 11:3 | Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:
(i) the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and
(ii) the methods by which their technical regulations can best be met. |
| 11:4 | Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment | WTO Members have acknowledged that technical assistance must be provided in a timely, predictable, and sustainable manner if it is to be efficient and effective. (See G/TBT/19, ¶ 74.) |
of bodies for the assessment of conformity with standards adopted within the

| 11:5 | Members shall, if requested, advise other Members, especially the developing
country Members, and shall grant them technical assistance on mutually agreed
terms and conditions regarding the steps that should be taken by their
producers if they wish to have access to systems for conformity assessment
operated by governmental or non-governmental bodies within the territory of
the Member receiving the request. |
| 11:6 | Members which are members or participants of international or regional
systems for conformity assessment shall, if requested, advise other Members,
especially the developing country Members, and shall grant them technical
assistance on mutually agreed terms and conditions regarding the establishment
of the institutions and legal framework which would enable them to fulfill the
obligations of membership or participation in such systems. |
| 11:7 | Members shall, if so requested, encourage bodies within their territories which
are members or participants of international or regional systems for conformity
assessment to advise other Members, especially the developing country
Members, and should consider requests for technical assistance from them
regarding the establishment of the institutions which would enable the relevant
bodies within their territories to fulfill the obligations of membership or
participation. |
| 12:7 | Members shall, in accordance with the provisions of Article 11, provide
technical assistance to developing country Members to ensure that the
preparation and application of technical regulations, standards and conformity
assessment procedures do not create unnecessary obstacles to the expansion
and diversification of exports from developing country Members. In
determining the terms and conditions of the technical assistance, account shall
be taken of the stage of development of the requesting Members and in
particular of the least-developed country Members. |

1 Provision for LDCs Only
| 11:8 | In providing advice and technical assistance to other Members in terms of Article 11:1 to 11:7, Members shall give priority to the needs of the least-developed country Members. |
### Table 7-7

3 Specific S&D Treatment Provisions in TRIMs Agreement

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>1 Provision Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, or Policies</strong></td>
<td>1 developing country cited this provision in a TRIMs Committee meeting, but other Members cast doubt on its invocation. (See G/TRIMS/M/9 ¶¶ 30-37, G/TRIMS/M/10 ¶¶ 16-22.)</td>
</tr>
<tr>
<td>4</td>
<td>A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (B.I.S.D. 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td><strong>2 Transitional Time Periods</strong></td>
<td>This provision is categorized also as for LDCs only, but is counted only once in the aggregate number of S&amp;D treatment provisions in the TRIMs Agreement. 47 Members have submitted notifications under Article 5:1. For most of them, the Article 5:2 transition period to eliminate the TRIMs they notified on 1 January 2000. (See G/L/860.) Members remain uncertain as to (1) what TRIMs should be notified under Article 5:1, and (2) whether a TRIM notified after the deadline still may benefit from the transition period. (See WT/G/TRIMS/M/2-7.)</td>
</tr>
<tr>
<td>5:2</td>
<td>Each Member shall eliminate all TRIMs which are notified under Article 5:1, within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.</td>
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<tr>
<td>5:3</td>
<td>On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under Article 5:1 for a developing country Member, including a</td>
<td>10 developing countries asked for extensions of the transition period in which to eliminate TRIMs.</td>
</tr>
</tbody>
</table>
least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

On 31 July 2001, the WTO Council for Trade in Goods gave 8 developing countries transition period extensions through year-end 2003, 7 of them via Article 5:3 (see G/L/460-466 and G/L/497-504), and 1 of them via a waiver under WTO Agreement Article IX (see W/L/410).

<table>
<thead>
<tr>
<th>Provision for LDCs Only</th>
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<tr>
<td>5:2</td>
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<td>As above.</td>
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</table>

Only 1 LDC has notified TRIMs under Article 1, and no LDC has requested an extension.
Table 7-8
1 Specific S&D Treatment Provision in Antidumping Agreement

<table>
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<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tr>
<td>15</td>
<td>It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.</td>
<td>In some AD cases, such as Bed Linens (DS 141) Steel Plates (DS 206), and Tube or Pipe Fittings (DS 216) developing country respondents have invoked this provision. Panels, but not the Appellate Body, have examined (1) when and to which Member “special regard” must be given, (2) what “explore” means, and (3) what “before applying anti-dumping duties” means. Paragraph 7:2 of the November 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns called this provision mandatory, and noted the need for its clarification.</td>
</tr>
</tbody>
</table>
Table 7-9
8 Specific S&D Treatment Provisions in *Customs Valuation Agreement*

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Provision Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</td>
<td>Certain developing countries may have problems in the implementation of Article 1 of the <em>Agreement</em> in so far as it relates to importations into their countries by sole agents, sole distributors and sole concessionaires. If such problems arise in practice in developing country Members applying the <em>Agreement</em>, a study of this question shall be made, at the request of such Members, with a view to finding appropriate solutions.</td>
<td>No request for this study has ever been made.</td>
</tr>
<tr>
<td>Annex III:5</td>
<td></td>
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<tr>
<td>2 Provisions Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, or Policies</td>
<td>Developing countries which consider that the reversal of the sequential order at the request of the importer provided for in Article 4 of the <em>Agreement</em> may give rise to real difficulties for them may wish to make a reservation to Article 4 in the following terms: “The Government of ..... reserves the right to provide that the relevant provision of Article 4 of the <em>Agreement</em> shall apply only when the customs authorities agree to the request to reverse the order of Articles 5 and 6.” If developing countries make such a reservation, the Members shall consent to it under Article 21 of the <em>Agreement</em>.</td>
<td>40 developing countries and 13 LDCs have invoked this provision. (<em>See</em> G/VAL/W/70, G/VAL/70/Corr.1.)</td>
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<tr>
<td>Annex III:3</td>
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<td>Developing countries may wish to make a reservation with respect to Article 5:2 of the <em>Agreement</em> in the following terms: “The Government of ..... reserves the right to provide that Article 5:2 of the <em>Agreement</em> shall be applied in accordance with the provisions of the relevant note thereto whether or not the importer so requests.”</td>
<td>40 developing countries and 11 LDCs have invoked this provision. (<em>See</em> G/VAL/2/Rev.10/Corr.2, G/VAL/2/Rev.24.)</td>
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<tr>
<td>Annex III:4</td>
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<tr>
<td>4 Transitional Time Periods</td>
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<tr>
<td><strong>20:1</strong></td>
<td>Developing country Members not party to <em>the Agreement on Implementation of Article VII of the GATT</em> (Tokyo Round), may delay application of the provisions of this <em>Agreement</em> for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members. Developing country Members who choose to delay application of this <em>Agreement</em> shall notify the Director General of the WTO accordingly.</td>
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<tr>
<td><strong>20:2</strong></td>
<td>In addition to Paragraph 1, developing country Members not party to <em>the Agreement on Implementation of Article VII of the GATT</em> (Tokyo Round), may delay application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this <em>Agreement</em>. Developing country Members that choose to delay application of the provisions specified in this paragraph shall notify the Director General of the WTO accordingly.</td>
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<tr>
<td><strong>Annex III:1</strong></td>
<td>The five-year delay in the application of the provision of the Agreement by developing country Members provided for in paragraph 1 of Article 20 may, in practice, be insufficient for certain developing country Members. In such cases a developing country Member may request before the end of the period referred to in paragraph 1 of Article 20 an extension of such period, it being understood that the Members will give sympathetic consideration to such a request in cases where the developing country Member in question can show good cause. 20 Members requested extensions, 1 Member asked for a second extension, and 13 of the requests were granted. (See G/VAL/2, G/VAL/2/Rev.1-24.)</td>
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<tr>
<td><strong>Annex III:2</strong></td>
<td>Developing countries which currently value goods on the basis of officially established minimum values may wish to make a reservation. 17 developing countries reserved the right to retain minimum values. (See G/VAL/2, G/VAL/2/Rev.1-24.)</td>
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</table>
reservation to enable them to retain such values on a limited and transitional basis under such terms and conditions as may be agreed to by the Members. (See also Decision on texts relating to minimum values and imports by sole agents, sole distributors and sole concessionaires.)

24.) The WTO Customs Valuation Committee authorized 4 Members to use minimum values. In March 2009, this provision expired.

<table>
<thead>
<tr>
<th>1 Provision on Technical Assistance</th>
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<tr>
<td>20:3</td>
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<tr>
<td>Developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programs of technical assistance which may include, inter alia, training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this Agreement.</td>
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</table>
### Table 7-10

4 Specific S&D Treatment Provisions in Import Licensing *Procedures Agreement*

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>3 Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</strong></td>
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<tr>
<td>1:2</td>
<td>General Provisions: Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members.</td>
<td>This provision has been invoked in 3 cases. <em>(See WT/DS/27, WT/DS/169/R, and WT/DS/334.)</em> It has not been the subject of an Appellate Body Report.</td>
</tr>
<tr>
<td>3:5(a)(iv)</td>
<td>Non-Automatic Import Licensing: (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning: (iv) where practicable, import statistics (i.e., value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account.</td>
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<tr>
<td>3:5(j)</td>
<td>Non-Automatic Import Licensing: In allocating licenses, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licenses issued to applicants in the past have been fully utilized during a recent representative period. In cases where licenses have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licenses. Consideration shall also be given to ensuring a reasonable distribution of licenses to new importers, taking into account the desirability of issuing licenses for products in economic quantities. In this regard, special consideration should be given</td>
<td>This provision has been invoked in 7 cases. <em>(See WT/DS/27, WT/DS/69, WT/DS/90, WT/DS/113, WT/DS/161, WT/DS/169, and WT/DS/334.)</em> It has not been the subject of an Appellate Body Report.</td>
</tr>
<tr>
<td>1 Transitional Time Period</td>
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<td><strong>2:2, Footnote 5</strong></td>
<td><strong>Automatic Import Licensing:</strong> A developing country Member, other than a developing country Member which was a Party to the [Tokyo Round] Agreement on Import Licensing Procedures done on 12 April 1979, which has specific difficulties with the requirements of Article 2:2 subparagraphs (a)(ii) and (a)(iii) may, upon notification to the Committee, delay the application of these subparagraphs by not more than two years from the date of entry into force of the WTO Agreement for such Member.</td>
<td>24 developing countries invoked this provision to delay application of Articles 2:2(a)(ii)-(iii). (See WT/LT/Rev. 2, 14, 19, 24, 41, 48, and 72.) Their 2-year delay period has expired. During that period, they were obligated to provide notifications under Articles 1:4(a), 7:3, and 8:2(b).</td>
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</table>
Table 7-11  
16 Specific S&D Treatment Provisions in SCM Agreement

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>2 Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</strong></td>
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<tr>
<td>27:1</td>
<td>Members recognize that subsidies may play an important role in economic development programs of developing country Members.</td>
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<td>27:15</td>
<td>The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of 27:10 and 27:11 as applicable to the developing country Member in question.</td>
<td>The SCM Committee has never received such a request.</td>
</tr>
<tr>
<td><strong>10 Provisions Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies</strong></td>
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<tr>
<td>27:2(a)</td>
<td>The prohibition of paragraph 1(a) of Article 3 shall not apply to: (a) developing country Members referred to in Annex VII.</td>
<td>This provision is applicable only to a subset of developing countries.</td>
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<td>On 15 December 2000, the General Council decided, through the Director General, to include Honduras on the Annex VII(b), as it was omitted even though it was the only founding WTO Member with a GNP of less than $1,000.</td>
</tr>
<tr>
<td>Annex VII</td>
<td>Developing Country Members Referred to in Article 27:2(a): (a) Least-developed countries designate as such by the United Nations which are Members of the WTO. (b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to Article 27.2(b) when GNP per capita has reached $1,000 per annum; Bolivia, Cameroon, Congo, Côte d’Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India,</td>
<td>In the November 2001 Doha Ministerial Conference Decision on Implementation-Related Issues and Concerns, WTO Members agreed a Member can remain on the Annex VIII(b) list until its GNP per capita reaches $1,000 in constant 1990 dollars for 3 consecutive years. A Member may be re-included on that list, if its GNP</td>
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<td>Article</td>
<td>Text</td>
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<td><strong>Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.</strong></td>
<td>per capita falls back below $1,000. <em>(See WT/MIN(01)/17.)</em></td>
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<tr>
<td><strong>27:4</strong></td>
<td>Any developing country Member referred to in Article 27:2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.</td>
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<td><strong>27:6</strong></td>
<td>Export competitiveness in a product exists if a developing country Member’s exports of that product have reached a share of at least 3.25% in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either (a) on the basis of notification by the developing country Member having reached export competitiveness or (b) on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purposes of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the <em>WTO Agreement.</em></td>
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*See comment under Transitional Time Periods.*
| 27:7 | The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of Article 27:2 through 27:5. The relevant provisions in such a case shall be those of Article 7. | This provision was invoked in 1 case. (See WT/DS/46/R.) |
| 27:8 | There shall be no presumption in terms of Article 6:1 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of Article 27:9, shall be demonstrated by positive evidence, in accordance with the provisions of Article 6:3 through 6:8. | Article 31 limited the application of Article 6:1 to 5 years from the entry into force of the WTO Agreement, unless the SCM Committee by consensus extended that period. No such consensus was reached, so Article 6:1 lapsed on 31 December 1999. In a case lodged by 2 developed countries, a Panel found that subsidies granted by a developing country exceeded the 5% threshold allowed under Article 6:1, so a claim of serious prejudice could be brought against that country. The Panel found those subsidies caused serious prejudice in the form of significant price undercutting. (See WT/DS54/R, WT/DS55/R, WT/DS59/R, and WT/DS64/R.) |
| 27:9 | Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in Article 6:1, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs. | |
| 27:10 | Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:
(a) the overall level of subsidies granted upon the product in question does not exceed 2% of its value calculated on a per unit basis; or
(b) the volume of the subsidized imports represents less than 4% of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4% collectively account for more than 9% of the total imports of the like product in the importing Member. |
| 27:11 | For those developing country Members within the scope of Article 27:2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the *WTO Agreement*, and for those developing country Members referred to in Annex VII, the number in Article 27:10(a) shall be 3% rather than 2%. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the *WTO Agreement*. (Article 27:10(a): Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that: the overall level of subsidies granted upon the product in question does not exceed 2% of its value calculated on a per unit basis.) |
| 27:12 | The provisions of Article 27:10 and 27:11 shall govern any determination of de minimis under Article 15:3. |
| 27:13 | The provisions of Part III (Actionable Subsidies) shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a | This higher de minimis subsidization threshold provision expired on 31 December 2002. The SCM Committee has ever received and discussed only 1 notification, from Brazil. (See G/SCM/N/13/BRA and G/SCM/N/13/BRA/Corr.1.) |
privatization program of a developing country Member, provided that both such program and the subsidies involved are granted for a limited period and notified to the Committee and that the program results in eventual privatization of the enterprise concerned.

### 7 Transitional Time Periods

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<tr>
<th>Paragraph</th>
<th>Description</th>
<th>Notes</th>
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| 27:2(b)   | The prohibition of Article 3:1(a) shall not apply to: (b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in Article 27:4. | See Comment to Article 27:4
In addition to the 7 Article 27 transitional time periods, Article 29 contains rules for Members in transition from a centrally-planned to free market-oriented economy. |
| 27:3      | The prohibition of Article 3:1(b) shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement. | The 5- and 8-year transition periods expired on 31 December 1999 and 2002, respectively. |
| 27:4      | Any developing country Member referred to in Article 27:2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies, and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the eight-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the 8-year phase out period expired on 31 December 2002. However, some WTO Members obtained extensions of this transition period. Article 27:4 is discussed in detail in a separate Chapter. | |
developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

<table>
<thead>
<tr>
<th>Article</th>
<th>Text</th>
<th>Notes</th>
</tr>
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<tbody>
<tr>
<td>27:14</td>
<td>The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.</td>
<td>The SCM Committee has never received such a request.</td>
</tr>
<tr>
<td>27:5</td>
<td>A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.</td>
<td>No developing country ever notified that it had reached export competitiveness. However, other Members requested calculations that certain developing countries had reached that threshold. (See G/SCM/Q3/COL/12, G/SCM/46, G/SCM/103, G/SCM/103/Add.1 and Add.2, G/SCM/47 - G/SCM/Q3/THA/16, G/SCM/48, G/SCM/132 and G/SCM/132/Add.1/Rev.1.)</td>
</tr>
<tr>
<td>27:6</td>
<td><em>See</em> above.</td>
<td><em>See</em> comment for Article 27:5.</td>
</tr>
<tr>
<td>27:11</td>
<td><em>See</em> above.</td>
<td><em>See</em> comment for Article 27:11.</td>
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</tbody>
</table>
Table 7-12
2 Specific S&D Treatment Provisions in Safeguards Agreement

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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</thead>
<tbody>
<tr>
<td>1 Provision Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</td>
<td>Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3%, provided that developing country Members with less than 3% import share collectively account for not more than 9% of total imports of the product concerned.</td>
<td>One GSP-granting Member excluded a developing country from eligibility under Article 9:1, arguing that country was not on the list of GSP beneficiaries of the granting Member. This exclusion triggered opposition. (See G/SG/M/9, G/SG/M/14.)</td>
</tr>
<tr>
<td>9:1, and Footnote 2</td>
<td>Footnote 2: A Member shall immediately notify an action taken under Article 9.1 to the Committee on Safeguards.</td>
<td></td>
</tr>
<tr>
<td>1 Provision Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies</td>
<td>A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in Article 7:3. Notwithstanding the provisions of Article 7:5, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.</td>
<td>Brazil and Philippines invoked this provision to extend their safeguard measures for up to 10 years. (See G/SG/N/10/BRA1 and 2, and G/SG/N/10/PNL/1 and G/SG/N/14/PNL, and supplements thereto.)</td>
</tr>
</tbody>
</table>
### Table 7-13
13 Specific S&D Treatment Provisions in GATS

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tbody>
<tr>
<td><strong>Preamble</strong></td>
<td>Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries; Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their services exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness.</td>
<td>Section I of the Doha Round Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) reflects this provision.</td>
</tr>
<tr>
<td>VI:1</td>
<td>The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to: (a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia through access to technology on a commercial basis; (b) the improvement of their access to distribution channels and information networks; and (c) the liberalization of market access in sectors and modes of supply of export interest to them.</td>
<td>Section I, Paragraphs 1–4, and Section II, Paragraph 5, of the Doha Round Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) reflect this provision.</td>
</tr>
<tr>
<td>VI:2</td>
<td>Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate every developed country, and many developing ones, have established contact points, and notified them to the Council for</td>
<td></td>
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</table>
the access of developing country Members’ service suppliers to information, related to their respective markets, concerning:
(a) commercial and technical aspects of the supply of services;
(b) registration, recognition and obtaining of professional qualifications; and
(c) the availability of services technology.

Trade in Services. The Council periodically publishes the list of contact points. (See, e.g., S/ENQ/78/Rev. 13 (4 December 2012).)

<table>
<thead>
<tr>
<th>4 Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</th>
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<tbody>
<tr>
<td><strong>Preamble</strong></td>
</tr>
<tr>
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<tr>
<td>XII:1</td>
</tr>
<tr>
<td>XV:1</td>
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<tr>
<td>XIX:3</td>
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</table>
Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

### 4 Provisions Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies

<p>| III:4 | Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the “WTO Agreement”). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations. |
| V:3 (a) Where developing countries are parties to an agreement of the type referred to in Article V:1, flexibility shall be provided for regarding the conditions set out in Article V:1, particularly with reference to Article V:1(b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors. (b) Notwithstanding Article V:6, in the case of an agreement of the type referred to in Article V:1 involving only developing countries, more favorable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement. | Members have never clarified what S&amp;D treatment in the context of RTAs means. |</p>
<table>
<thead>
<tr>
<th>XXV:2</th>
<th>Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.</th>
<th>The Doha Round <em>Guidelines and Procedures for the Negotiations on Trade in Services</em> (S/L/93) reflect this provision.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annex on Telecommunications, Paragraph 6</td>
<td>In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.</td>
<td>In May and July 2000, respectively, the WTO Council for Trade in Services and ITU adopted an accord to collaborate on technical assistance.</td>
</tr>
<tr>
<td>2 Provisions for LDCs Only</td>
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<td>---------------------------</td>
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</tr>
<tr>
<td><strong>IV:3</strong></td>
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<tr>
<td>Special priority shall be given to the least-developed country Members in the implementation of Article IV:1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.</td>
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Section I, Paragraph 2, of the Doha Round Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) reflect this provision.

WTO Members adopted a Decision of 17 December 2011 on Preferential Treatment to Services and Service Suppliers of Least Developed Countries (also called the “2011 Waiver Accord”), and at the December 2013 Bali Ministerial Conference adopted a Decision for the Operationalization of the Waiver Concerning Preferential treatment to Services and Service Suppliers of Least Developed Countries (referred to as “operationalizing the LDC Services Waiver,” WT/MIN(13)/W/15, WT/L/918).

Under these Decisions, a Member may grant special priority to LDC services and service suppliers that otherwise would violate the MFN rule in GATS Article II. That is, they can give non-MFN (i.e., preferential) access to their markets to services and service suppliers from LDCs. The non-reciprocal preferences would last for as long as a Member remains on the U.N. list of LDCs.
In February 2014, over 24 Members (but not the U.S.) agreed to do so, covering Modes I, II, and III in the following sectors or sub-sectors: professional; IT and computer; other business; construction; distribution; financial; transportation and logistics; tourism; recreational and sporting. These developed countries also agreed to expand LDC services access on Mode IV, waive fees for business and employment visas for LDC service persons, waive economic needs and labor market tests for LDCs services, and extend the duration of stay in their (developed) countries permitted to LDC professionals.

Yet, by the 31 July 2015 deadline, just 11 developed countries (Australia, Canada, China, Japan, Hong Kong, Korea, New Zealand, Norway, Singapore, Taiwan, Switzerland), notified the WTO of specific services preferences for LDCs. Whether they responded in a commercially meaningful manner to the July 2014 collective request from LDCs was uncertain, insofar as LDCs were not players in the sectors in which they were granted preference. For example, Australia pledged to provide preferential access for business (computer, professional and others), tourism, and transport (maritime, air, rail, road and auxiliary) services from LDCs.
In September 2015, the U.S. agreed to a waiver, offering preferential access to LDC service providers in the following sub-sectors: accounting, auditing and bookkeeping; engineering; environmental services; foreign legal consulting; higher education; motion picture and video home entertainment; physical well-being; radio and television; road freight transport and cargo handling; research and development; technical testing and analysis; and telecommunications.

But, the American offer did not cover Mode IV, and query whether LDCs did or could provide these services to America in a commercially meaningful sense.

At the December 2015 Nairobi Ministerial Conference (MC 10), Members adopted a Decision on LDC Trade in Services, WT/Min(15)/W/39, and a Decision on Implementation of Preferential Treatment in Favor of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade, WT/MN(15)/48-WT/L/982, in which they urged non-LDC Members that had not offered preferential access to LDC service suppliers to
By February 2018, the WTO received 24 notifications, representing 51 Members, granting preferences under the Waiver. As of November 2018, that figure was unchanged: 51 Members, both developed and developing, accounting for 86% of global GDP and 86% of global trade, had notified the WTO they had granted one or more preferences to LDCs.

| XIX:3 | ... Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article 4. | Section III, Paragraph 13 of the Doha Round Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) reflect this provision. Members adopted services negotiation modalities for developing countries and LDCs on 3 September 2003 (TN/S/13). |
### Table 7-14
6 Specific S&D Treatment Provisions in *TRIPs Agreement*

<table>
<thead>
<tr>
<th>Article</th>
<th>Content</th>
<th>Comment</th>
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<tr>
<td><strong>2 Transitional Time Periods</strong></td>
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<tr>
<td>65:2</td>
<td>A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.</td>
<td>Developing countries extensively use of this transition period. This period expired on 1 January 2000.</td>
</tr>
<tr>
<td>65:4</td>
<td>To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.</td>
<td>Some developing countries used this transition period for technology fields not subject to product patent protection. This period ended on 1 January 2005.</td>
</tr>
<tr>
<td><strong>1 Provision on Technical Assistance</strong></td>
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<tr>
<td>67</td>
<td>In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.</td>
<td>The WTO Council on TRIPs dedicates considerable attention to technical cooperation, particularly on issues of information sharing, monitoring compliance, and needs of poor countries.</td>
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</table>

| **3 Provisions for LDCs Only** | | |


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| **Preamble** | Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base. | 1 January 2006 was the initial expiry date for the Article 66:1 transition period for LDCs. On 29 November 2005, the TRIPs Council extended it until 1 July 2013 (see IP/C/40), and further extended it on 11 June 2013 to 1 July 2021 (see IP/C/64), because of the special needs of LDCs. Via a 1 July 2002 Decision to implement Paragraph 7 of the Doha Declaration on the TRIPs Agreement and Public Health (WT/MIN(01)/DEC/2), the TRIPs Council extended until 1 January 2016 the LDC transition period to protect and enforce patents and undisclosed information. On protecting and enforcing patents and undisclosed information, the General Council on 19 July 2002 waived Article 70:9 obligations of LDCs as to exclusive marketing rights for pharmaceutical products until 1 January 2016. (See WT/L/478.) |
| 66:1 | In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under Article 65:1. The Council for TRIPs shall, upon duly motivated request by a least-developed country Member, accord extensions of this period. | Under the Decision of the TRIPs Council of 20 February 2003, there is a monitoring mechanism for implementation of Article 66:2 obligations, whereby developing countries submit annual reports the Council reviews. Under the Decision of the General Council on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health (see WT/L/540 and WT/L/540/Corr.1) and the Protocol Amending the TRIPs Agreement (see WT/L/641), Members pledged to pay special attention to technology transfer and capacity building in the pharmaceutical sector pursuant to Article 66:2. |
| 66:2 | Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base. |  |
### Table 7-15
11 Specific S&D Treatment Provisions in *DSU*

<table>
<thead>
<tr>
<th>Article</th>
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<th>Comment</th>
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<tr>
<td>7</td>
<td>Provisions Exhorting or Requiring Developed Countries to Account for Developing Country and LDC Interests</td>
<td><strong>4:10</strong> During consultations Members should give special attention to developing country Members' particular problems and interests. Among the problems developing countries and LDCs face in respect of <em>DSU</em> participation are: (1) reasonable timeframes for proceedings in light of their legal capacity; (2) adjustment of remedies to induce effective compliance by developed countries when developing countries or LDCs win a case; (3) costs of litigation; and (4) regulating access to proceedings to ensure positive outcomes. In one case, a developing country alleged a developed country disregarded its request for consultations, thereby discriminating against it and impairing its interests in violation of Article 4:10. (<em>See</em> WT/DSB/M/7, at 2.)</td>
</tr>
<tr>
<td><strong>8:10</strong> When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member. There have been 249 different individuals serving as Panelists, of whom 118 are from developing countries, but just 2 from LDCs. Panelists from developing countries are common in cases between developing and developed countries. (<em>See, e.g.,</em> WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R.) In the 2003 <em>Steel Safeguards</em> case, the Director General was asked to compose the Panel with Article 8:10 in mind.</td>
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In several cases, Panels have taken into account the status of a respondent as a developing country when setting and revising the schedule for the proceedings. (See, e.g., EC-Bananas III (Article 21:5-Ecuador II), WT/DS27/RW2/ECU, ¶¶ 2.74-2.76; 2007 Turkey – Rice, WT/DS344/R, ¶ 7.305; Philippines – Distilled Spirits, WT/DS396/R, WT/DS403/R, ¶ 7.190; Dominican Republic – Safeguard Measures, WT/DS417/R, WT/DS418/R, ¶ 7.443.) India invoked Article 12:10 in the 1999 India Quantitative Restrictions case for extra time to review the interim Panel Report.

In one case, the developing country respondent argued the process raised 3 fundamental DSU S&D treatment issues: (1) difficulties developing countries face when a developed country insists consultations be held only in Geneva; (2) the meaning and significance of the consultations stage; (3) whether a developed country may decide unilaterally consultations are finished, in light of the Article 12:10 statement that “in the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the period established in paragraphs 7 and 8 of Article 4.” (See WT/DSB/M/21, at 4.)

In the 2007 Turkey – Rice case (WT/DS334), Turkey invoked Article 12:10 for a longer consultation period. At the 22 October 2007 meeting at which the DSB adopted the Panel Report, the U.S, with Australia and Canada, argued against inclusion in the Report of Part VII.G, on S&D treatment, because neither Party had requested a finding on
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<th>Time</th>
<th>Statement</th>
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<tr>
<td>12:10</td>
<td>In the context of consultations involving and measures taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall allow sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.</td>
</tr>
<tr>
<td>12:11</td>
<td>Where one or more of the parties is a developing country Member, the panel’s report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favorable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.</td>
</tr>
<tr>
<td>21:2</td>
<td>Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.</td>
</tr>
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</table>

Several Panel Reports contain an Article 12:11 statement. (See, e.g., WT/DS27/R; WT/DS27/RW2/ECU; WT/DS46/R; WT/DS90/R; WT/DS204/R; WT/DS217; WT/DS234/R; WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R; WT/DS308/R; WT/DS334/R; WT/DS396/R; WT/DS403/R; WT/DS417/R; WT/DS418/R.)

Several arbitration awards under Article 21:3(c) refer to Article 21:2. (See, e.g., WT/DS54/15; WT/DS55/14; WT/DS59/13; WT/DS64/12; WT/DS87/15; WT/DS110/14; WT/DS207/13; WT/DS217/14; WT/DS234/22;
| 21:7 | If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances. |
| 21:8 | If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned. |

In one arbitral decision in the 1997 Bananas case, this provision was invoked. (See EC-Bananas III (Article 21:5-Ecuador II), WT/DS27/RW2/ECU.)

### 1 Provision Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies

| 3:12 | Notwithstanding Article 3:11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail. |

In the 1997 Bananas case, in 2007, Colombia and Panama invoked Article 3:12 in their consultation request, reserving the right to ask the Director General to use his good offices to facilitate a solution to their compliance dispute with the EU. (See WT/DS361/1 and 2.) They did so. Through those offices on 15 December 2009 they, with 8 other Latin American countries, announced a comprehensive solution, the General Agreement on Trade in Bananas (GATB). (See WT/L/784.) On 8 November 2012, the EU and 10 Latin American companies reached a final settlement, encompassing the GATB.
### 1 Provision on Technical Assistance

| 27:2 | While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat. | The WTO Secretariat provides 2 consultants to offer legal aid to developing countries and LDCs. |

### 2 Provisions for LDCs Only

<p>| 24:1 | At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures. | Only 1 LDC, Bangladesh, has initiated a dispute settlement proceeding. (See India Antidumping Measure on Batteries from Bangladesh, WT/DS306.) 8 LDCs have participated in DSU proceedings as a third party: Bangladesh, (DS243) Benin, (DS267) Chad, (DS267) Madagascar, (DS27, DS265, DS266, DS283) Malawi, (DS265, DS266, DS283, DS434) Senegal, (DS27, DS58) Tanzania, (DS265, DS266, DS283) Zambia, (DS434) Of the above-listed cases, 6 were appealed, hence LDCs participated as third parties in 6 Appellate Body cases. |</p>
<table>
<thead>
<tr>
<th>24:2</th>
<th>In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.</th>
</tr>
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<tr>
<td></td>
<td>The Director General has suggested procedural steps to operationalize the DSU Article 5 provision on use of his good offices, conciliation, and mediation. (See WT/DSB/25.)</td>
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</table>
Table 7-16
10 Specific S&D Treatment Provisions in GPA

<table>
<thead>
<tr>
<th>Article</th>
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<tr>
<td>V:1</td>
<td>In negotiations on accession to, and in the implementation and administration of, this Agreement, the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries (collectively referred to hereinafter as “developing countries,” unless specifically identified otherwise), recognizing that these may differ significantly from country to country. As provided for in this Article and on request, the Parties shall accord S&amp;D to: (a) least developed countries; and (b) any other developing country, where and to the extent that this S&amp;D meets its development needs.</td>
<td>The thrust of GPA S&amp;D treatment provisions is to give poor countries more flexibility to negotiate for sui generis exclusions from and exceptions to the GPA when scheduling commitments. That flexibility is an inducement to join this plurilateral accord. On 30 March 2012, GPA Members adopted revisions to the accord, including its S&amp;D provisions, pursuant to GPA Article XXIV:7.</td>
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<tr>
<td>V:2</td>
<td>Upon accession by a developing country to this Agreement, each Party shall provide immediately to the goods, services and suppliers of that country the most favourable coverage that the Party provides under its annexes to Appendix I to any other Party to this Agreement, subject to any terms negotiated between the Party and the developing country in order to maintain an appropriate balance of opportunities under this Agreement.</td>
<td></td>
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<td>V:10</td>
<td>The Committee shall review the operation and effectiveness of this Article every five years.</td>
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6 Provisions Providing Developing Countries and LDCs Flexibility in Their Commitments, Actions, and Policies

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<th>Article</th>
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<td>V:3</td>
<td>Based on its development needs, and with the agreement of the Parties, a developing country may adopt or maintain one or more of the following transitional measures, during a transition period and in accordance with a</td>
<td>This provision identifies specific kinds of flexibilities, and requires that flexibilities used by developing countries or LDCs, i.e., specific measures be (1) negotiated</td>
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<td>Schedule, set out in its relevant annexes to Appendix I, and applied in a manner that does not discriminate among the other Parties:</td>
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<td>(a) a price preference program, provided that the program:</td>
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<td>(i) provides a preference only for the part of the tender incorporating goods or services originating in the developing country applying the preference or goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement, provided that where the other developing country is a Party to this Agreement, such treatment would be subject to any conditions set by the Committee; and</td>
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<td>(ii) is transparent, and the preference and its application in the procurements are clearly described in the notice of intended procurement;</td>
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<td>(b) an offset, provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement;</td>
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<td>(c) the phased-in addition of specific entities or sectors; and a threshold that is higher than its permanent threshold.</td>
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V:4 In negotiations on accession to this Agreement, the Parties may agree to the delayed application of any specific obligation in this Agreement, other than Article IV:1(b), by the acceding developing country while that country implements the obligation. The implementation period shall be: |
| (a) for a least developed country, five years after its accession to this Agreement; |
| (b) for any other developing country, only the period necessary to implement the specific obligation and not to exceed three years. |

V:5 Any developing country that has negotiated an implementation period for an obligation under paragraph 4 shall list in its Annex 7 to Appendix I the agreed implementation period, the specific obligation subject to the implementation period and any interim obligation with which it has agreed to comply during the implementation period.
After this Agreement has entered into force for a developing country, the Committee, on request of the developing country, may:
(a) extend the transition period for a measure adopted or maintained under paragraph 3 or any implementation period negotiated under paragraph 4; or
(b) approve the adoption of a new transitional measure under paragraph 3, in special circumstances that were unforeseen during the accession process.

A developing country that has negotiated a transitional measure under paragraph 3 or 6, an implementation period under paragraph 4 or any extension under paragraph 6 shall take such steps during the transition period or implementation period as may be necessary to ensure that it is in compliance with this Agreement at the end of any such period. The developing country shall promptly notify the Committee of each step.

The Committee may develop procedures for the implementation of this Article. Such procedures may include provisions for voting on decisions relating to requests under paragraph 6.

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<th>1 Provision on Technical Assistance</th>
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<td>V:8</td>
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<th>2 Provisions for LDCs Only</th>
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<td>V:1(a)</td>
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<td>V:4(a)</td>
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Chapter 8

PROBLEMS AND PROSPECTS

I. Reciprocity and European Preferences for Former Colonies

In addition to its GSP program (discussed in a separate Chapter), the EU (and its predecessor, the EC), has maintained a PTA for countries in the ACP regions that had been colonies of European powers. The first such program, known as the Yaoundé Convention, was signed in 1963 in Yaoundé, Cameroon. The next version was the Lomé Convention, signed in 1975 in Lomé, Togo. The preferences afforded by this Convention were the

Documents References:
(1) Havana (ITO) Charter Articles 1, 8-15, 24, 55-70
(2) GATT Preamble and Articles XXXVI-XXXVIII
(3) Tokyo Round Enabling Clause
(4) WTO Agreement Preamble

For an economic perspective on the relationship between the WTO and developing countries authored just three years after the birth of the WTO, including a review of the S&D provisions in GATT and the Uruguay Round Agreements, see J. Michael Finger & L. Alan Winters, What Can the WTO Do for Developing Countries? in The WTO as an International Organization 365-400 (Anne O. Krueger, ed., Chicago, Illinois: The University of Chicago Press, 1998). This paper controversially concludes:

Special and differential treatment as commonly interpreted in the WTO agreements does not do much for developing countries. Special access to developed-country markets transfers revenues to them, but at the expense of discouraging effective efforts to integrate into the world economy. Exemptions from WTO rules – inadequate as some of these are – and exemption from the need for reciprocal trade liberalization [per GATT Article XXXVI:8, discussed below], merely exacerbate the difficulties of pursuing satisfactory policies at home. They should be phased out as soon as possible.

The one element of special and differential treatment that does seem to us potentially beneficial is to offer assistance in the business of being a WTO Member. Meeting the full procedural requirements of the WTO is very burdensome and can absorb disproportionate amounts of human capital. To the extent that they can be implemented without compromising substance or transparency, the elements of special and differential treatment that permit developing countries to use streamlined procedures and/or lighter notification burdens seem, to us, desirable. By the same token, the actual delivery of the technical assistance referred to so frequently in the Uruguay Round agreements would be beneficial, especially if it can be devoted to training and capacity building rather than just to producing a product.

Id., 390. On the one hand, this argument anticipates the problem of legal capacity that plagued developing countries and LDCs long before the birth of the WTO. On the other hand, this argument fits the mold of “blame the poor, don’t mollycoddle them, rather, make them grow up,” and thus could be viewed as naïve as to the power asymmetries in the world trading system that skew the GATT-WTO regime against poor countries and, indeed, as uncharitable.

subject of the WTO Appellate Body Report in the *Bananas War.* The *Convention* lapsed in 2000, and was replaced by the *Cotonou Convention,* signed that year in Cotonou, Benin. The *Cotonou Convention,* or *Cotonou Agreement,* was signed by 78 countries – Anglophone, Francophone, and Lusophone nations – took effect in 2003, and revised in 2005 and 2010. Set to lapse in 2020, it was extended to 2023, and replaced in 2023 with an umbrella, or framework, arrangement called the *Post-Cotonou Agreement,* or *Samoa Agreement.*

Neither the *Yaoundé* nor *Lomé Convention* required reciprocity of ACP beneficiaries in return for preferential access to the European market. However, the *Bananas War* (discussed in a separate Chapter) compelled the EU to re-think discriminatory treatment created by such accords, particularly insofar as poor countries that had not been colonized were disfavored. Accordingly, the *Cotonou Convention* demanded ACP countries cut tariffs on “substantially all” imports from the EU over a “reasonable” period. In practice, “substantially all” may meet 2/3 of EU imports, and a “reasonable” period could be 12 years or more. Failure to follow through meant loss of privileges after 2007.

Is reciprocity justified as a condition for benefits? Critics argue “no,” partly because it amounts to Mercantilism. Interestingly, in March 2005, Her Majesty’s Government renounced all “Mercantilist” ambitions in British relations with the ACP. Further, reciprocity offends the principle of GATT Article XXXVI:8, and perhaps social justice precepts. But, advocates of reciprocity reiterate the neo-classical economic analysis of free trade, namely, the net benefit accruing to society from tariff reductions, because of the gain to consumers that overwhelms the loss to producers. True, ACP countries faced a significant loss in tariff revenue if they lowered barriers, but perhaps that loss would stimulate advancements, and reduce corruption, in income and sales tax regimes. Advocates also point out three decades after the 1975 *Lomé Convention,* most infant ACP industries had yet to mature. The share held by ACP countries in the EU market had dropped from 8% in 1975 to less than 3% in 2000.

Does cancellation of one-way preferences catalyze economic reform? A World Bank study by Caglar Ozden and Eric Reinhardt argues “yes,” using Chile as an example. In 1988, the U.S. struck Chile from its GSP beneficiary list. Chile dropped its average tariff rate from 20% to 15%, partly to cut the cost of imported inputs. Later, Chile embraced an across-the-board 6% MFN duty. Coincidence, or cause and effect?

II. December 2013 Bali Monitoring Mechanism Decision

At the launch of the Doha Round in 2001, WTO Members stated in Paragraph 44 of their Declaration:

> We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by

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developing countries, particularly least developed countries. In that connection, we also note that some Members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). 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 program on special and differential treatment set out in the Decision on Implementation-Related Issues and Concerns.\textsuperscript{155}

The first sentence was anodyne, containing no hard law commitment. The second sentence was an admission that WTO Members do not practice what they preach: they profess to provide S&D treatment; in reality, they do not do so. That incongruity triggered the third sentence, i.e., a demand by poor countries to breathe life into S&D provisions. For the next 12 years, aside from their June 2013 Report summarizing S&D rules in GATT-WTO texts, (referenced earlier) Doha Round negotiators did next to nothing in terms of following the penultimate and final sentences.

At the December 2013 Ministerial Conference in Bali, Indonesia, WTO Members considered a proposal first submitted by the African Group in 2002 to establish a “Monitoring Mechanism.” In July 2002, the General Council agreed to establish the Mechanism. The next decade of Doha Round talks proved fruitless, so at the 2011 Ministerial Conference in Geneva, Members pledged to expedite their work to finalize the Mechanism. At the Bali Conference, the Members finally accepted a draft, adopting a Decision on Monitoring Mechanism on Special and Differential Treatment.\textsuperscript{156}

The Mechanism does not create stringent, enforceable obligations mandating developed countries to practice S&D treatment. As its rubric indicates, it does nothing more than establish a process to monitor – that is, analyze – the extent to which S&D rules are implemented. Paragraph 3 admits it is merely a “focal point,” and Paragraph 5 makes plain it “will not alter, or in any manner affect, Members’ rights and obligations” under the GATT-WTO accords.

The monitoring process is conducted through bi-annual meetings of the WTO Committee on Trade and Development (CTD). If monitoring uncovers problems, then they are to be spelled out in a review, which may lead to recommendations. One recommendation could be to start negotiations under the auspices of the WTO body responsible for the rule at issue. For example, a problem of implementing S&D treatment under the Agreement on Agriculture would be referred to the Committee on Agriculture.

That it took a dozen years following the adoption of Paragraph 44 to create an essentially toothless Mechanism is one reason why poor countries are frustrated, if not cynical, about S&D treatment in the GATT-WTO regime. Ironically, in launching the Bali


\textsuperscript{156} See WT/MIN(13)/W/17 (5 December 2013), www.wto.org; World Trade Organization, 9\textsuperscript{th} WTO Ministerial Conference, Bali, 2013, Briefing Note: Monitoring Mechanism (November 2013) www.wto.org.
Conference, WTO Director General Roberto Azevêdo (1957-) warned that failure of Members to reach at least a slimmed down package of Doha Round agreements would do more than weaken the multilateral trading system. It would make that system “look like a jungle,” in which the “law of the jungle” prevails, and “the poor would suffer the most.”\(^{157}\)

Query whether the Monitoring Mechanism is enough to bring modern social justice precepts – equal human dignity, pursuit of the common good, subsidiarity, and a preferential option for the poor – to the jungle.

III. Graduation from “Least Developed” to “Developing Country” Status

**WORLD TRADE ORGANIZATION, TRADE IMPACTS OF LDC GRADUATION, EXECUTIVE SUMMARY 5-8, 10 (MAY 2020)**\(^{158}\)

LDC graduation is an overarching objective of the international community.

… Graduation from the … U.N. LDC category is seen as an important milestone in the development path of each LDC. It demonstrates strong performance in key macroeconomic indicators and broad-based social developments. At the same time, the phasing-out of benefits associated with the LDC status could present challenges for graduating LDC governments to integrate into global economy.

At present 12 LDCs are at different stages of their path to graduation from LDC status.

Five LDCs are recommended to graduate over the next five years (Vanuatu in 2020; Angola in 2021; Bhutan in 2023; Sao Tomé and Principe, and Solomon Islands in 2024). Bangladesh, … Lao PDR and Myanmar met the graduation criteria for the first time in 2018 and are envisaged to graduate in 2024. The other LDCs on the graduation path are Kiribati, Nepal, Timor-Leste and Tuvalu. The decision regarding graduation from LDC status is taken by members at the U.N. at the recommendation of the Committee for Development Policy, an advisory body of the United Nations Economic and Social Council (ECOSOC).

Seven of the graduating LDCs are WTO members, and three are in the process of accession to the WTO. These LDCs differ in relation to their status in the WTO.

Angola, Bangladesh, Myanmar, and Solomon Islands represent original LDC members (joined in 1995). Lao PDR, Nepal, and Vanuatu are among the group of recently acceded members that underwent the accession process under Article XII of the Marrakesh Agreement Establishing the WTO and undertook higher levels of commitments than the original LDC members. Bhutan, Sao Tomé and Principe, and Timor-Leste have observer


status at the WTO, as they are at various stages of their accession process. Kiribati and Tuvalu do not have a status with the WTO.

The LDCs are accorded special treatment by the international community, mainly in areas such as trade and development cooperation, which is broadly known as “international support measures.” Trade is one of the key areas where LDCs enjoy exclusive preferences, both in the context of market access as well as in the implementation of WTO rules and disciplines. Graduation from the LDC category will eventually result in the loss of this special treatment, although the degree to which this will impact individual graduating LDCs differs.

While the graduating LDCs represent a group of countries meeting certain socio-economic thresholds for graduation, they represent diverse development situations.

All of these LDCs vary in terms of population size (e.g., Bangladesh – 160 million people; Tuvalu – 12,000), size of gross domestic product, export values (Angola – U.S. $38 billion; Nepal – less than U.S. $1 billion). They are qualitatively different in terms of their trade profile or export structure; some are highly integrated in international trade (e.g., with manufacturing exports), while the majority of graduating LDCs export unprocessed or semi-processed products, and some graduating LDCs like Tuvalu do not have consistent export records.

The impact of graduation will be different for each graduating LDC, both in scope and in magnitude – be it participation in the WTO, market access opportunities or development cooperation.

Bangladesh stands out among all graduating LDCs as the largest economy and exporter, and as the graduating LDC that is likely to confront more challenges than others. This disparity among graduating LDCs suggests that support should be tailored to the needs and development strategy of each country.

A. LDC graduation and matters related to WTO agreements

The main trade-related challenges in LDC graduation may stem from a loss of preferences and reduced flexibility in the implementation of WTO rules.

The … MTAs governed by WTO contain several types of … S&D provisions for LDCs, which are over and above the flexibilities accorded to developing countries, such as market access, transition periods, and exemptions from certain rules. In addition, since the establishment of the WTO in 1995, WTO members have taken important decisions to facilitate market access for both goods and services originating in LDCs (i.e., decisions on duty-free and quota-free market access, decisions on preferential rules of origin for LDCs, and decisions on LDC Services Waiver and its operationalization). These are implemented, inter alia, through members’ preference schemes designed for the LDCs.
Graduation does not result in changes to the level of concessions and commitments made by the graduating LDCs.

The LDCs that acceded to the WTO during the Uruguay Round have a lower level of commitments, reflected by higher bound rates and lower binding coverage compared to LDCs that acceded to the WTO more recently under the Article XII process. For instance, Lao PDR, which joined the WTO in 2013, offered liberal concessions by binding all of its tariffs (i.e., binding coverage of 100%) and at a relatively low average level (19%). In contrast, Bangladesh has a binding coverage of only 17%, which implies that the remaining 83% of its tariffs are unbound. Myanmar has also a low level of concessions with a binding coverage of only 19% and an average bound tariff of 83%. These graduating LDCs would continue to enjoy this flexibility related to tariff bindings granted at the time of joining the organization in 1995.

The transition periods enjoyed by the LDCs to delay the implementation of the TRIPs Agreement have been a defining feature of LDC flexibility in the WTO.

At present, LDCs benefit from a general transition period (until 1 July 2021) as well as a transition period for patents and undisclosed information for pharmaceutical products (until 1 January 2033). [WTO Members regularly extend this period as the expiry date approaches. Thus, for example, on 30 June 2021, they agreed to extend the date by which LDCs must implement the TRIPs Agreement for another 13 years, to 1 July 2034 – meaning 39 years from 1 January 1995, when the WTO was born.] Graduated LDCs would not be covered by these decisions, which expressly provide for the transition period to end earlier in the event of such members ceasing to be LDCs, though general WTO processes would allow graduated LDC members to seek a waiver of certain obligations. Most LDC members have at least some … IP laws in place or are covered by regional IP regimes. The degree to which graduation would have an impact depends on the state of IP legislation in each LDC. For instance, recently acceded LDC members – Lao PDR, Nepal, and Vanuatu – have already enacted laws and regulations in most areas covered under the TRIPS Agreement; those laws and regulations, and their administration and enforcement, will be subject to a review of implementing legislation in the Council for TRIPs.

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159 See World Trade Organization, WTO Members Agree to Extend TRIPs Transition Period for LDCs until 1 July 2034 (30 June 2021), www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm (observing: “Since the inception of the TRIPs Agreement, LDCs have benefitted from an extended transition period to apply provisions of the TRIPs Agreement, in recognition of their special requirements, their economic, financial and administrative constraints, and their need for flexibility in order to create a viable technological base. The transition period for LDC members under Article 66:1 of the TRIPs Agreement had been extended twice before (in 2005 and 2013). The decision adopted was the result of intensive consultations over several months. Members were broadly in agreement on the principle of the extension but were unable to reach a decision due to their differences on the additional request that members graduating from LDC status should be accorded additional flexibilities under the TRIPs Agreement after their graduation. LDCs favoured extending the transition period for as long as the member remains categorized as an LDC, and for an additional period of 12 years from the date of graduation of a member from the LDC category. A group of delegations expressed a preference for extending the period for a limited time, while others argued that a transition period for members that have graduated from LDC status went beyond the TRIPs Council’s mandate under Article 66:1.”).
Exemption from the prohibition of export subsidies for non-agricultural products, as provided for under the SCM Agreement, is another important policy flexibility for the LDCs.

This represents a carve-out as long as a Member remains an LDC, or a Member’s per capita income remains below U.S. $1,000 (in 1990 constant dollar terms). While a proposal has been tabled by the LDC Group in the WTO to allow graduating LDCs to continue to be exempted from these disciplines, the impact of graduation will depend in large part on the trade policy and practices of individual graduating LDCs. Deriving information from national authorities, it appears that, with the exception of Bangladesh and Nepal, graduating LDCs do not have export subsidy programmes in force.

With respect to agriculture, LDC Members and Members that were considered Net-Food Importing Developing Countries (NFIDCs) at the time of the December 2015 Nairobi Decision on Export Competition have a longer transition period (until 2030) to continue to benefit from the flexibility under the AoA, with respect to certain agricultural export subsidies (e.g., subsidies to reduce the costs of marketing exports). This flexibility will not be available after graduation, unless graduating LDCs are given specific consideration by members.

Several LDC members have benefitted from the LDC accession guidelines, which were adopted in 2002 and further strengthened in 2012 (i.e., Afghanistan, Lao PDR, Liberia, Samoa, and Yemen). The graduating LDCs that are in the process of accession to the WTO (i.e., Bhutan, Sao Tomé and Principe and Timor-Leste) may not maximize the benefits from these guidelines (e.g., specific benchmarks for accessing LDCs for market access negotiations) if they are unable to conclude their accession negotiations before they leave the LDC category.

B. Impact on market access

Loss of preferences under LDC schemes of developed and developing country members has been one of the concerns of graduating LDCs, though the impact on market access for a large majority of graduating LDCs is rather limited.

The extent to which the loss of preferences after graduation would impact an LDC depends on the export structure (i.e., products exported and destination markets), the trade arrangements under which such exports take place, the degree to which these preferences are actually utilized, and, more broadly, the level of integration in world trade. Hence, the stakes are not necessarily the same across all graduating LDCs.

While most of the graduating LDCs share the typical feature of a narrow export base, they differ substantially in their merchandise export structure.

Exports of Angola, Bhutan, Lao PDR, Myanmar, and Timor-Leste are concentrated in primary commodities (including fuels and minerals); Bangladesh is overwhelmingly dependent on clothing, and Nepal’s reliance on certain textile items such as carpets is very
high. Kiribati, Sao Tomé and Principe, Solomon Islands, Tuvalu, and Vanuatu mainly export agricultural and fishing products.

... Most graduating LDCs have been eligible for developed country Members’ GSP schemes designed for the LDCs. In certain cases, non-reciprocal preferences are not tied to LDC status. For instance, the four LDCs in the Pacific currently benefit from duty-free market access in Australia and New Zealand.

**In terms of loss of preference margins, the most relevant developed country market for the graduating LDCs is the EU, and to some extent Canada and Japan.**

In these markets, most of LDC exports enter duty free. Close to two-thirds of Bangladesh’s exports (mainly clothing) are destined for these markets. The European Union is also a key market for other graduating LDCs in a number of products: it accounts for the majority of exports of clothing by Lao PDR, certain textile items by Nepal, tuna loins by Solomon Islands and molluscs by Vanuatu. The loss of preference margins of LDCs in the EU market – transitioning from the EU’s ... EBA scheme to standard GSP – would be around 10% in clothing and in the range of 6–10% in certain fish products, unless arrangements are made to continue maintaining current market access conditions.

**The impact on tariffs from the loss of preferences varies substantially across graduating LDCs due to differences in products exported, destination markets, and preferential market access after graduation.**

Assuming full preference utilization, graduating LDCs are expected to face a trade-weighted average tariff increase of 4.2% in the various preference-granting markets (i.e., the difference between the LDC duty rate and the next best alternative rate). Average tariff increases for Bangladesh and Nepal would be the highest (8.9% and 8.1%, respectively), while exports of Angola, Kiribati, Sao Tomé and Principe and Timor-Leste are likely to see only marginal increases in tariff rates (below 0.5%).

**LDCs are faced with dual erosion of preferences in certain developed country markets – loss of preference margin and loss of favourable rules-of-origin conditions.**

The utilization of unilateral preferences by the LDCs also entails compliance with rules-of-origin conditions that are usually more flexible and liberal than in other preference schemes. For example, with regard to clothing exports to the EU, LDC firms are only required to undertake a “single stage transformation” from fabric to clothing under the EBA scheme, while a “double stage transformation” from fibres to fabric to clothing would be required under the standard GSP. The single stage transformation, which was introduced in 2011, had been instrumental for certain LDCs to dramatically improve their utilization of EBA preferences. Loss of this particular flexibility would require LDC clothing exporters to perform more complex manufacturing processes.
For some graduating LDCs, trade is mostly intra-regional and covered by regional trade agreements (RTAs) including bilateral agreements, so that the impact of graduation is likely to be limited. Important developing country markets for graduating LDCs include China, India, and Thailand.

Intra-regional trade is the predominant form of trade for graduating LDCs in Asia. For instance, in terms of merchandise exports, India accounts for 81% of Bhutan’s exports and 56% of Nepal’s exports; Thailand accounts for 44% of Lao PDR’s exports and 20% of Myanmar’s exports; and China accounts for 28% of Lao PDR’s exports and 27% of Myanmar’s exports.

Some LDCs enjoy multiple RTA options to access the same market. For instance, India extends duty-free treatment to LDC participants of … SAFTA for nearly all products (except tobacco and alcohol). At the same time, India, China and the Republic of Korea provide preferential market access to LDC parties to … APTA. Thailand provides preferences to Lao PDR and Myanmar under … AFTA, and to Lao PDR also under a bilateral agreement. Bhutan and Nepal’s trade with India is mostly governed by their respective bilateral agreements. Three graduating LDCs – Angola, Sao Tomé and Principe, and Timor-Leste – have so far no RTA in place with members that provide LDC schemes.

Tariff concessions to LDCs under most RTAs are the result of reciprocal negotiations, and in certain cases the margin of preferences is granted through less-than-full reciprocity modalities. Whether the tariff concessions received by graduating LDCs in certain RTAs will be maintained after their graduation remains an open question. However, there are other elements associated with these RTAs that are likely to be affected following graduation. For instance, a majority of these RTAs have longer periods for LDCs to implement tariff concessions. …

A number of RTAs have provisions giving special consideration for LDCs in terms of rules of origin conditions. For instance, the minimum requirement for local value content under APTA is 35% for LDCs compared to 45% for other participants. Similarly, under the SAFTA rules of origin, LDC participants are allowed up to 70% of non-originating material, compared to 60% for non-LDC parties. Graduation from LDC status would therefore not allow graduating LDCs to avail of such liberal treatment, although the variations of rules of origin within RTAs for LDCs and non-LDC parties are not widespread.

The data on preference utilization submitted by preference-granting members under the preferential trade arrangement (PTA) transparency mechanism reveal that the exports of graduating LDCs display a limited dependence on LDC-specific preferences.

In the ultimate analysis, preferences – whether non-reciprocal or reciprocal in nature – hold value if they are utilized. Across the 12 graduating LDCs, an average of 12% of exports enter preference-granting markets under LDC schemes. However, there are significant differences across countries. While the share of exports that uses LDC-specific preferences is 70% for Bangladesh, it is between 10% and 20% for Myanmar, Nepal and
Solomon Islands, between 5% and 10% for Bhutan and Lao PDR, and below 5% for Angola, Kiribati, Sao Tomé and Príncipe, Timor-Leste, Tuvalu, and Vanuatu. Specialization in primary commodities with low or zero MFN duties, or the use of alternative preferences, could be some of the factors behind the low use of LDC schemes by the majority of graduating LDCs.

…

Graduation is unlikely to cause significant impact on graduating LDCs services and service suppliers.

The graduating LDCs account for 0.22% of world services exports, with a 31% share in LDC exports. As for the area of goods, the service trade profiles of these graduating LDCs are not necessarily identical, although travel services largely represent the most important export category for all graduating LDCs. Due to the limited availability of bilateral statistics, the direction of LDC exports of services is difficult to determine, and a large share of income from services reflects the expenditure of foreign tourists on goods and services in the economies of graduating LDCs.

While there have been notable developments to further enhance the participation of LDCs in the services trade – including through the adoption of the LDC Services Waiver and decisions relating to its operationalization – the assessment of notifications made by 24 WTO Members pursuant to the LDC Services Waiver reveals that a large majority of measures notified reflect members’ applied MFN regime with little preference margin for LDCs. However, continued support from development partners remains vital for graduating LDCs to build their productive capacity in services.

…

D. Options for graduating LDCs

…

It is widely acknowledged that graduation should not become a force for disruption in the development trajectory of the graduating LDC.

There is a three-year transition period from graduation eligibility to actual graduation. In addition, special extensions have been allowed, depending on the individual circumstances of graduating LDCs. Hence from the moment it meets the graduation criteria for the first time to the year of its actual graduation, a graduating LDC has the required time to prepare strategies and engage with development partners to ensure smooth integration into the global economy following graduation.

WORLD TRADE ORGANIZATION, MINISTERIAL DECISION ON WTO SMOOTH TRANSITION SUPPORT MEASURES IN FAVOR OF COUNTRIES GRADUATED FROM THE LDC CATEGORY, WT/MIN(24)/W/14/REV.1 (19 FEBRUARY 2024), MINISTERIAL CONFERENCE, THIRTEENTH SESSION, ABU DHABI (26-29 FEBRUARY 2024) (DRAFT, COMMUNICATION FROM THE LDC GROUP, REVISION)¹⁶⁰

The Ministerial Conference,

Having regard to Paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (WTO);

Taking note of the proposals submitted by the least developed country (LDC) Group at the General Council (WT/GC/W/807, WT/GC/W/829, and WT/GC/W/807/Rev.2) as well as the extensive engagement by Members on this matter;

Recalling the General Council Decision (WT/L/1172) adopted on 23 October 2023;

Further recalling the Paragraph 5 of the WTO MC12 Outcome Document (WT/MIN(22)/24, WT/L/1135) adopted by Ministers on 17 June 2022;

Decides as follows:

1. A Member that graduates from the LDC category shall continue to benefit from the application of the Special Procedures Involving LDCs set out in Article 24 of the Dispute Settlement Understanding for a period of three years after the date on which the decision of the U.N. General Assembly to graduate that Member from the LDC category becomes effective.

2. A Member that graduates from the LDC category shall continue to be eligible for LDC-specific technical assistance and capacity building provided under WTO’s Technical Assistance and Training Plan for a period of three years after the date on which the decision of the U.N. General Assembly to graduate that Member from the LDC category becomes effective. The participation of existing LDCs shall be prioritized in activities under this plan.

3. The Sub-Committee on LDCs, under the guidance of the General Council, shall continue its work on the remaining provisions listed in Annex 2 of the document WT/GC/W/807/Rev.2, including Annex VII of the Agreement on Subsidies and Countervailing Measures (ASCM), which are not addressed by the present decision or the General Council Decision WT/L/1172, with a view to making recommendations, if any, by December 2024.


[In reading this MC 13 Decision, query what actually was decided – other than to continue to talk for another two years.]

IV. Qualification for “Developing Country” Status

● July 2019 Presidential Directive
What countries in the WTO should qualify for status as “developing,” and therefore be eligible for S&D treatment under the GATT-WTO treaty system? That question does not arise with respect to LDCs, because “least developed country” status is defined by objective economic criteria the UNDP establishes. Yet with a large – indeed majority – of WTO Members claiming “developing” country status, including some that laypersons would regard as “developed” countries, the U.S., in July 2019, pressed the question. No longer, argued the U.S., should Members be able to self-select as “developing.” President Donald J. Trump (1946-, President, 2017-) issued the following directive:

MEMORANDUM FOR THE UNITED STATES TRADE REPRESENTATIVE (26 JULY 2019), REFORMING DEVELOPING COUNTRY-STATUS IN THE WORLD TRADE ORGANIZATION, 84 FEDERAL REGISTER NUMBER 147, 37555-37557 (31 JULY 2019)\(^\text{161}\)

Section 1. Policy.

The … WTO was created to spur economic growth and raise standards of living by establishing international trade rules premised on principles of transparency, openness, and predictability. Although economic tides have risen worldwide since the WTO’s inception in 1995, the WTO continues to rest on an outdated dichotomy between developed and developing countries that has allowed some WTO Members to gain unfair advantages in the international trade arena. Nearly two-thirds of WTO Members have been able to avail themselves of special treatment and to take on weaker commitments under the WTO framework by designating themselves as developing countries. While some developing-country designations are proper, many are patently unsupportable in light of current economic circumstances. For example, 7 out of the 10 wealthiest economies in the world as measured by Gross Domestic Product per capita on a purchasing-power parity basis – Brunei, Hong Kong, Kuwait, Macao, Qatar, Singapore, and the United Arab Emirates – currently claim developing-country status. Mexico, South Korea, and Turkey – members of both the G20 and … OECD – also claim this status.

When the wealthiest economies claim developing-country status, they harm not only other developed economies but also economies that truly require special and differential treatment. Such disregard for adherence to WTO rules, including the likely disregard of any future rules, cannot continue to go unchecked.

China most dramatically illustrates the point. Since joining the WTO in 2001, China has continued to insist that it is a developing country and thus has the right to avail itself of flexibilities under any new WTO rules. The United States has never accepted China’s claim to developing-country status, and virtually every current economic indicator belies China’s claim. After years of explosive growth, China has the second largest Gross Domestic Product in the world, behind only the United States. China accounts for nearly 13 percent of total global exports of goods, while its global share of such exports jumped five-fold between 1995 and 2017. It has been the largest global exporter of goods each year since

2009. Further, China’s pre-eminent status in exports is not limited to goods from low-wage manufacturing sectors. China currently ranks first in the world for exports of high-technology products, with such exports alone increasing by 3,800 percent between 1995 and 2016.

Other economic figures tell a similar story. Valued at nearly $1.5 trillion, China’s outbound … FDI exceeds that of 32 of 36 OECD countries, while its inbound FDI of nearly $2.9 trillion exceeds all but one OECD country. China is home to 120 of the world’s 500 largest companies, and its defense expenditures and total number of satellites in space are second only to those of the United States.

Notwithstanding these facts and other evidence of economic vibrancy, China and too many other countries have continued to style themselves as developing countries, allowing them to enjoy the benefits that come with that status and seek weaker commitments than those made by other WTO Members. These countries claim entitlement to longer timeframes for the imposition of safeguards, generous transition periods, softer tariff cuts, procedural advantages for WTO disputes, and the ability to avail themselves of certain export subsidies – all at the expense of other WTO Members. These countries have also consistently sought weaker commitments than other WTO Members in ongoing negotiations, which has significantly stymied progress. Moreover, many of the world’s most advanced economies have used developing-country status as an excuse not to comply with the most basic notification requirements under WTO rules, depriving United States traders of vital trade data. The status quo cannot continue.

The WTO is in desperate need of reform, without which the WTO will be unable to address the needs of workers and businesses, or the challenges posed by the modern global economy. The United States is also pressing for critical reforms in other multilateral international organizations to help ensure that those organizations recognize the economic development of their members and can work within their mandates to address important challenges. The need to reform international economic institutions is not just a challenge for the United States but for all countries that participate in the global marketplace.

With respect to the WTO, there is no hope of progress in resolving this challenge until the world’s most advanced economies are prepared to take on the full commitments associated with WTO Membership. To help ensure that those countries live up to their commitments, it shall be the policy of the United States to make trade more free, fair, and reciprocal by devoting all necessary resources toward changing the WTO approach to developing-country status such that advanced economies can no longer avail themselves of unwarranted benefits despite abundant evidence of economic strength.

Section 2. Changing the WTO Approach to Flexibilities Associated with Developing-Country Status.

(a) To advance the policy set forth in Section 1…, the … USTR shall, as appropriate and consistent with applicable law, use all available means to secure changes at the WTO that would prevent self-declared developing countries from availing
themselves of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators. Where appropriate and consistent with law, the USTR shall pursue this action in cooperation with other like-minded WTO Members.

(b) Within 60 days of the date of this memorandum, the USTR shall update the President on his progress under subsection (a) of this section.

Section 3. Ending Unfair Trade Benefits.

(a) If, within 90 days of the date of this memorandum, the USTR determines that substantial progress has not been made toward achieving the changes described in Section 2 of this memorandum, the USTR shall, as appropriate and to the extent consistent with law:

(i) no longer treat as a developing country for the purposes of the WTO any WTO Member that in the USTR’s judgment is improperly declaring itself a developing country and inappropriately seeking the benefit of flexibilities in WTO rules and negotiations; and

(ii) where relevant, not support any such country’s membership in the OECD.

(b) Before taking any action under Sub-Section (a) of this Section, the USTR shall:

(i) consult with the Trade Policy Committee established under Section 242 of the Trade Expansion Act of 1962 (19 U.S.C. 1872);

(ii) consult with the National Security Council and the National Economic Council as to the advisability of interagency coordination …; and

(iii) consider the WTO Member’s involvement in global trade, membership in key economic decision-making groups, placement within relative economic and other indicators, and any other factors the USTR deems appropriate.

(c) The USTR shall publish on its website a list of all self-declared developing countries that the USTR believes are inappropriately seeking the benefit of developing-country flexibilities in WTO rules and negotiations.

...
still another point to consider is how best to evaluate “developing” country status. Should it be income-based? Or, should it encompass U.N. HDI type metrics, or perhaps even broader freedom indices? This point is raised in the February 2020 announcement (discussed below).

● Scaling Back S&D Treatment

Following the July 2019 Presidential Directive, in February 2020 the U.S. announced it no longer would grant S&D treatment under Article 27:10(a) of the SCM Agreement to several countries.162 Such countries, it said, were not authentically “developing” ones. This Article doubles the de minimis threshold from 1%, set out in Article 11:9, to 2% in CVD cases, meaning a developed country should not pursue a CVD investigation against subject merchandise from a developing (or least developed) country if the value of the alleged subsidy does not exceed 2% of the total value (ad valorem) of that merchandise.163

 Likewise, under SCM Agreement Article 27:10(b), developed countries must refrain from CVD actions against subject merchandise from developing (or least-developed) ones if the volume of subject merchandise is “negligible.” Article 11:9 sets the usual negligibility threshold, which applies in CVD cases against developed countries, at less than 3% of total imports of a product into the importing country (e.g., U.S.). Subject merchandise imports are considered non-negligible if the aggregate volume of imports from all countries whose individual volumes are less than 3% exceeds 7% of all such merchandise. But, Article 27:10(b) raises these thresholds for “developing” (and least-developed) countries: imports from such countries are deemed negligible if the import

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As the USTR indicated in its February 2020 Designations, Congress delegated to it in the 1994 Uruguay Round Agreements Act the authority to decide what countries qualify as “developing” for purposes of CVD law: “in the statute [i.e., Tariff Act of 1930, as amended] itself, Congress did not identify by name those WTO Members eligible for special treatment. Instead, Section 267 of the URAA added Section 771(36) to the Act, which delegates to the U.S. Trade Representative the responsibility to designate those WTO Members subject to special standards for de minimis and negligible import volume [discussed above].” Id., 7614.

Technically, U.S. CVD law speaks of a “Subsidy Agreement country.” See Section 701(b) of the Trade Act of 1930, as amended, 19 U.S.C. 1671(b). This term includes, but is not limited to, WTO Members.163 In U.S. CVD law, Section 703(b)(4)(B)–(D) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671(b)(4)(B)–(D), incorporates the de minimis standards.
volume is less than 4% of total imports, unless the aggregate volume of imports from countries whose individual volumes are less than 4% exceeds 9%.\footnote{In U.S. CVD law, Section 771(24)(B), 19 U.S.C. § 1677(24)(B), incorporates the negligible import standards.}

In effect, the action revoked the 2 June 1998 USTR designation of WTO Members eligible for special \textit{de minimis} countervailable subsidy and negligible import volume standards under CVD law, declaring the 1998 list of countries “obsolete.”\footnote{\begin{footnotesize} \begin{enumerate} \item February 2020 \textit{Designations}, 7613. \end{enumerate} \end{footnotesize}}

The change in the list of countries eligible for S&D treatment under the SCM Agreement affected only developing countries. How did the USTR come to its conclusion as to what WTO Members qualified as “developing”? The answer is it relied on (1) \textit{per capita} GDP data, (2) share in world trade, and (3) selected other factors (namely, membership in the OECD, EU, or G-20):

In making the designations, the U.S. Trade Representative relied on per capita gross national income (GNI) data from the World Bank and trade data from the Trade Data Monitor, which contains official data from national statistical bureaus, customs authorities, central banks, and other government agencies.

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\ldots \quad \text{[T]he U.S. Trade Representative relied on the World Bank threshold separating “high income” countries from those with lower \textit{per capita} GNIs. This means that \textit{WTO Members with a per capita GNI below $12,375} \text{ were treated as eligible for the 2 percent \textit{de minimis} standard, subject to the other factors described below. Advantages of relying upon the World Bank high income designation include that it is straightforward to apply, based on a recognized GNI dividing line between developed and developing countries for purposes of the world’s primary multilateral lending institution, and consistent with the test for beneficiary developing country status set out in the U.S. \textit{Generalized System of Preferences} statute, Section 502(e) of the \textit{Trade Act of 1974} [discussed in a separate Chapter].}
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\ldots \quad \text{The U.S. Trade Representative also considered whether countries account for a significant share of world trade and, thus, should be treated as ineligible for the 2 percent \textit{de minimis} standard. In the 1998 rule, the U.S. Trade Representative considered a share of world trade of 2 percent or more to be “significant” because of the commitment in the Statement of Administration Action (SAA), approved by the Congress along with the \textit{URAA}, that Hong Kong, Korea, and Singapore would be ineligible for developing country treatment, and each of these countries accounted for a share of world trade in excess of 2 percent. \textit{The U.S. Trade Representative now considers 0.5 percent to be a more appropriate indicator of a}}
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“significant” share of world trade. According to the most recent available data from 2018, relatively few countries account for such a large share (i.e., more than 0.5 percent) of world trade, and those that do include many of the wealthiest economies. For purposes of U.S. CVD law, the U.S. Trade Representative therefore considers countries with a share of 0.5 percent or more of world trade to be developed countries. Thus, Brazil, India, Indonesia, Malaysia, Thailand, and Viet Nam are ineligible for the 2 percent de minimis standard, notwithstanding that … each country has a per capita GNI below $12,375.

[Regarding other factors,] the U.S. Trade Representative took into account EU membership, which indicates a relatively high level of economic development. In addition, under Section 771(3) of the Act [i.e., Trade Act of 1930, as amended], the EU may be treated as a single country for purposes of the CVD law and, while uncommon, there have been CVD investigations against merchandise from the European Communities, rather than EU Member States. Because the EU is ineligible for the 2 percent de minimis standard, it would be anomalous to treat an individual EU Member as eligible for that standard. Accordingly, for purposes of U.S. CVD law, the U.S. Trade Representative considers all EU Members as developed countries. Thus, Bulgaria and Romania are ineligible for the 2 percent de minimis standard, notwithstanding that, based on the most recent World Bank data, each country has a per capita GNI below $12,375. The U.S. Trade Representative also took into account OECD membership and applications for OECD membership. The characterization of the OECD as a grouping of developed countries has been confirmed throughout its existence in a number of published OECD documents, and the OECD consistently has been viewed as, and acts itself in the capacity of, the principal organization of developed economies worldwide. Thus, by joining or applying to join the OECD, a country effectively has declared itself to be developed. Although the 1998 rule considered OECD membership only, given the significance of this self-designation, the act of applying to the OECD, in addition to joining, indicates that a country is developed. Accordingly, the U.S. Trade Representative has determined that an OECD member or applicant should not be eligible for the 2 percent de minimis standard. Thus, Colombia and Costa Rica are ineligible for the 2 percent de minimis standard, notwithstanding that, … each country has a per capita GNI below $12,375. The U.S. Trade Representative also took into account G20 membership. The G20 was established in September 1999, and so was not considered in the 1998 rule. The G20 is a preeminent forum for international economic cooperation, which brings together major economies and representatives of large international institutions such as the World Bank and International Monetary Fund. Given the global economic significance of the G20, and the collective economic weight of its membership (which accounts for large shares of global economic output and trade), G20 membership indicates that a country is developed. Thus,
Argentina, Brazil, India, Indonesia, and South Africa are ineligible for the 2 percent de minimis standard, notwithstanding that each country has a per capita GNI below $12,375.

The U.S. Trade Representative did not consider social development indicators such as infant mortality rates, adult illiteracy rates, and life expectancy at birth, as a basis for changing a designation. The U.S. Trade Representative did consider that if a country considers itself a developed country, or has not declared itself a developing country in its accession to the WTO, it should not be considered a developing country for purposes of the SCM Agreement. Therefore, Albania, Armenia, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova, Montenegro, North Macedonia, and Ukraine are ineligible for the 2 percent de minimis standard, notwithstanding that each country has a per capita GNI below $12,375.

Furthermore, the 1998 rule omitted WTO Members that in the past had been, or could have been, considered as nonmarket economy countries not subject to the CVD law. Because nonmarket economies may now be subject to CVD law, the lists set forth in this notice do not omit nonmarket economies.\footnote{February 2020 Designations, 7614-7615. (Emphasis added.)}

Note that the three criteria apply in the alternative. That is, if a purported developing country breaches any single criterion, then the USTR considers it “developed,” even if it does not merit that designation under the other two criteria. Also note several of the delisted countries – including Brazil, Korea, and Singapore – were unaffected by the change, because they previously had relinquished their “developing” country status.\footnote{See U.S. Revokes.}\footnote{See February 2020 Designations, 7615.}

So, which countries did the USTR leave on the list of “developed” ones eligible for S&D treatment in CVD cases? They were: Bolivia, Botswana, Cabo Verde, Cameroon, Cuba, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eswatini, Fiji, Gabón, Grenada, Guatemala, Guyana, Jamaica, Jordan, Maldives, Mauritius, Mongolia, Morocco, Namibia, Papua New Guinea, Paraguay, Peru, Philippines, St. Lucia, St. Vincent & Grenadines, Samoa, Sri Lanka, Suriname, Tajikistan, Tonga, Tunisia, and Venezuela.\footnote{The U.S. continued its S&D treatment, pursuant to Article 27:11 of the Agreement, to least developed countries. Accordingly, countries designated by the UNDP as not yet reaching a per capita U.S. $1,000, remained eligible for the S&D treatment. They included Afghanistan, Pakistan, Cambodia, Laos, and many SSA countries.}

- **June MC 12 Geneva Package S&D Treatment Provision and Biden Administration Policy**

The June 2022 *Outcome Document* (excerpted in a separate Chapter) contained, in Paragraph 2, a resolute endorsement of S&D treatment:
2. We reaffirm the provisions of special and differential treatment for developing country Members and LDCs as an integral part of the WTO and its agreements. Special and differential treatment in WTO agreements should be precise, effective and operational. In addition, we recall that trade is to be conducted with a view to raising standards of living, ensuring full employment, pursuing sustainable development of Members, and enhancing the means for doing so in a manner consistent with Members’ respective needs and concerns at different levels of economic development. We instruct officials to continue to work on improving the application of special and differential treatment in the CTD SS and other relevant venues in the WTO, as agreed and report on progress to the General Council before MC13.169

This language, the Outcome Document, and the entire Geneva Package was endorsed by all WTO Members under the standard consensus-decision making rule (discussed in a separate Chapter). But, was the Biden Administration sincere in joining the consensus? That is, on the one hand, was it subtly declaring a reversal of Trump Administration policy on S&D treatment by agreeing to Paragraph 2? Or, on the other hand, was it agreeing to it but not planning to take any meaningful steps to implement it, and thereby continue the policy of the prior Administration?

Consider also Paragraph 13, along with footnote 2 thereto:

13. We recognize women’s economic empowerment and the contribution of MSMEs to inclusive and sustainable economic growth, acknowledge their different context, challenges, and capabilities in countries at different stages of development, and we take note of the WTO, UNCTAD, and ITC’s work on these issues.2

2. These are general messages on cross cutting issues that do not change the rights or obligations of WTO Members (and do not relate to any Joint Statement Initiatives).

How sincere was the U.S. in promoting women’s rights through trade policy?

Consider this question in light of the provision concerning women in new disciplines on domestic services (discussed in a separate Chapter), which entered into force in February 2024 at MC 13 in Abu Dhabi. Consider it, too, in light of a point made by the USTR, Ambassador Katherine Tai, at MC 13. In discussions about S&D treatment, she

reportedly indicated “[t]he U.S. also want[ed] the negotiations to cover the issues of poor people in rich countries and they should be equated with the poor in poor nations.” That point was almost bizarrely radical: America rarely, if ever before, called for GATT-WTO rules to penetrate sovereign boundaries in respect of S&D treatment for poor people, and allow preferences for poor people in rich countries just as they should be granted to poor people in poor country. Was the USTR extrapolating the Biden Administration’s so-called “worker-friendly” trade policy, or was this statement a genuine expression of solidarity with all the world’s poor?

Note also at MC 13, “Ministers adopted a Ministerial Decision that responds to a 23-year-old mandate to review special and differential treatment (S&DT) provisions for developing and least developed countries (LDCs) with a view to making them more precise, effective and operational.” Yet this Decision does nothing else but to “request” improvements in training, technical assistance, and informational mechanisms on SPS and TBT matters, and “instruct” continued discussions.

V. SVEs

Small, vulnerable economies face unique challenges in international trade. Among them are a lack of scale – precisely because they are small, they cannot realize economies of scale in production and exportation. They also suffer from a dearth of natural resources. And, some are land-locked, thus needing to rely on port facilities of neighboring countries for imports and exports, which raises costs. Still others are vulnerable because they are island nations surrounded by rising sea levels owing to climate change (discussed in a separate Chapter).

Accordingly, the first consensus agreement reached on a text for adoption at the WTO’s 12th Ministerial Conference, initially scheduled to be held in Geneva from 30 November-3 December 2021, yet postponed and extended by two days to 12-17 June 2022, concerned small economies. On 19 October 2021, the WTO Committee on Trade and Development agreed on a Decision, which SVE Members sponsored, to help further the integration of those economies into the world trading system. The Decision had three key features.

First, the Decision called “for WTO Members to address the issue of integrating

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small economies into post COVID-19 economic recovery by looking at the impact of the pandemic and the underlying challenges and opportunities faced by small economies.”

Second, the Decision tasked the “Dedicated Session on Small Economies [under the auspices of the Committee on Trade and Development] to continue monitoring the progress of the small economies’ proposals in WTO bodies and negotiating groups.” Arguably, these first two points are unimpressive. They do not amount to S&D treatment. Rather, they speak only of more study and monitoring.

Third, the Decision asked Members “to take note of the work undertaken to date in the Work Program on Small Economies.” That Program emerged from the November 2001 Doha Ministerial Conference (specifically, Paragraph 35 of the Doha Ministerial Declaration), wherein Members agreed to establish it. They did so in the following years, particularly with a July 2003 Report of the Committee on Trade and Development in Dedicated Session to the General Council, the WTO General Council Decision of 1 August 2004 and the Framework for the Work Program on Small Economies, several Committee Dedicated Sessions on small economies, and various Ministerial Conference Decisions on the topic, including a Decision on Small Economies at the 11th Ministerial Conference in Buenos Aires in 2017. The fundamental objective of the Program “is to frame responses to the trade-related issues regarding the integration of small, vulnerable economies into the multilateral trading system.” Query, however, what specific help the program has been for SVEs, aside from calling attention to their plight?

WORLD TRADE ORGANIZATION, WORK PROGRAM ON SMALL ECONOMIES, DRAFT MINISTERIAL DECISION, WT/MIN(24)/W/2 (7 FEBRUARY 2024), MINISTERIAL CONFERENCE, THIRTEENTH SESSION, ABU DHABI (26-29 FEBRUARY 2024) (DRAFT, COMMUNICATION FROM THE LDC GROUP, REVISION)

The Ministerial Conference decides as follows:

174 Members Agree on Draft.
178 Members Agree on Draft.
We reaffirm our commitment to the Work Program on Small Economies and take note of all the work conducted to date. … [W]e note that document WT/COMTD/SE/W/22/Rev.11 and its previous revisions reflect the work of the Dedicated Session up to the Thirteenth Ministerial Conference.

We take note of the work carried out by Members since 2022 in the CTD’s Dedicated Session on Small Economies in response to the Ministerial Decision of 17 June 2022 in document WT/MIN(22)/25.

Furthermore, we instruct the Dedicated Session on Small Economies to consider in further detail the various submissions that have been received to date, examine any additional proposals that Members might wish to submit and, where possible, and within its mandate, make recommendations to the General Council on any of these proposals. The General Council shall direct relevant subsidiary bodies to frame responses to the trade-related issues identified by the CTD with a view to making recommendations for action.

We instruct the WTO Secretariat to provide relevant information and factual analysis for discussion among Members in the CTD’s Dedicated Session on Small Economies, including through cooperating with relevant international organizations, inter alia, in the areas identified in item k of Paragraph 2 of the Work Program on Small Economies and, in particular, on:

1. Challenges and opportunities for small economies in using e-commerce and digital ecosystem to drive competitiveness;

2. Addressing the importance of resilient, accessible, open, reliable and transparent supply chains for small economies given food security issues, and the impact of non-tariff measures on trade costs;

3. Exploring with other relevant WTO bodies how to integrate trade related climate change adaptation and mitigation policies into the trade policies of small economies.

The CTD in Dedicated Session shall continue monitoring the progress of the small economy proposals in WTO bodies and in negotiating groups with the aim of providing responses, as soon as possible, to the trade-related issues identified for the fuller integration of SVEs in the multilateral trading system as well as assessing the effectiveness of the responses framed so far to integrate the SVEs in the multilateral trading system.

VI. Investment Facilitation

WORLD TRADE ORGANIZATION, INFORMAL DISCUSSIONS, INVESTMENT FACILITATION FOR DEVELOPMENT (UNDATED)180

In December 2021, 112 WTO members co-sponsored a *Joint Statement on Investment Facilitation for Development*, in which they recognize the Consolidated Document by the Coordinator (so-called “Easter Text (Revision 5)”) as the basis for their ongoing negotiations and state their objective to conclude the text negotiations by the end of 2022.

Launched in 2017 by a group of developing and least-developed WTO members, the *Joint Initiative* aims at developing a multilateral agreement on Investment Facilitation for Development that will improve the investment and business climate, and make it easier for investors in all sectors of the economy to invest, conduct their day-to-day business and expand their operations. Facilitating greater participation of developing and least-developed members in global investment flows also constitutes a core objective of the future *Agreement*. The initiative does not cover market access, investment protection and investor-state dispute settlement.

[The IFD was concluded on 6 July 2023.]

**AMBASSADOR ALAN WM. WOLFF, WTO MEMBERS FIND A NEW (AND SUCCESSFUL) APPROACH TO NEGOTIATIONS, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (PIIE) (16 AUGUST 2023)**

*Why Did This Negotiation Succeed When Others Failed?*

First, the *IFD*, like the *TFA*, does not constrain any government’s regulation of investment. It does not provide any additional market access. In an era of anti-globalization, the absence of formal liberalization is an essential feature. This is an implicit nod to governments wishing to maintain their freedom to screen more intensively inward foreign direct investment.

Second, the *IFD* is clearly pro-development. The *IFD* has generated substantial enthusiasm among developing economies. Over two-thirds of the WTO’s Members consider themselves to be developing economies, and of these, 35 are classified as least developed. Of the WTO’s 164 Members, 110 participated in the IFD negotiation. Over 70 of these are developing economies and 20 of them are least developed.

Third, it is, like the *TFA*, an agreement that is largely about process. It is also less about constraints on behavior as much as it is about encouraging positive conduct. This departs from the structure of the … GATT, a central part of the WTO rulebook negotiated in 1947, which is centered very heavily on binding commitments to refrain from inhibiting trade. Under the GATT, all WTO Members must not, for example:

1. Discriminate among imports based on country of origin.
2. Raise tariffs above contractually bound levels.
3. Discriminate through domestic measures against imports as they compete with domestic products.

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(4) Apply quantitative restrictions to imports or exports.
(5) Interfere with goods in transit.

Where the TFA and IFD find common purpose with the GATT rules is in requiring Members, for example, to:

(1) Be transparent by notifying and publishing their measures.
(2) Consult when another member seeks consultations.

Fourth, the taking on of obligations is multispeed, determined by the member itself upon joining the agreement.

Fifth, the negotiation was joined by those who were interested in an agreement on this subject. The normal hostage-taking, or put more delicately, horse-trading, of a major multi-subject negotiation was not a central feature of the IFD talks. As opposed to the GATT rules, the TFA [sic, IFD] applies only to Members that have accepted the agreement.

Lastly, it may have helped that the IFD negotiations, like other JSIs [Joint Statement Initiatives], were convened and brought to a successful conclusion by “middle grounders” (not the largest WTO Members) – in this case, Chile and South Korea. The major rounds of GATT multilateral negotiations were largely dominated by the U.S. and Europe, with results often dictated by the two. The JSIs are far more democratic in origin and in their proceedings. As for big power involvement in this negotiation, China was a strong supporter, and the U.S. did not join.

[In February 2024, at MC 13 in Abu Dhabi, three-quarters of WTO Members (123 of them, including nearly 90 developing countries 26 LDCs) published a proposed text of the IFD Agreement, and called for its inclusion in Annex 4 to the WTO Agreement – i.e., as a new plurilateral agreement, which would bind only Members that accepted it.182]

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Chapter 9

GENERALIZED SYSTEM OF PREFERENCES: OVERVIEW

I. Theoretical and Historical Background

The idea for a GSP springs from development economics work in the 1950s and 1960s, and particularly in 1964 by UNCTAD and its then-Director General, Raúl Prebisch (1901-1986). Tariff preferences granted temporarily and unilaterally by a developed country would increase exports from less developed countries of merchandise in which those countries were not yet competitive. More exports would mean more export earnings (preferably in hard currency, such as U.S. dollars), which less developed countries could use to diversify their economies (e.g., by investing in productive assets in new industries) and reduce their dependence on foreign aid (assuming the revenues are not used for debt servicing or siphoned off by corruption). In the end, the world trading system would become more level, in that all countries could have the opportunity to compete.

By 1968, the U.S. embraced the GSP concept, along with other developed countries. They did so on the understanding that preferences would be subject to safeguard mechanisms to protect domestic industries sensitive to competition from imports that otherwise qualified for tariff-free, quota-free treatment. America was not the first developed country to establish a GSP program. It did so on 1 January 1976, pursuant to Sub-Chapter V of the Trade Act of 1974, as amended. The authority provided by the Act for duty-free treatment on eligible merchandise from beneficiary developing countries took effect on 3 January 1975, but implementation by the U.S. did not occur for another year.) Earlier, in 1971, both Japan and the EC instituted GSP schemes, and Norway did so in 1972. Canada commenced its General Preferential Tariff (GPT) on 1 July 1974. Indeed, by the early 1970s 19 countries in the OECD had GSP schemes.

183 Documents References:
(1) Havana (ITO) Charter Articles 1, 8-15, 24, 55-70 1-12
(2) GATT Preamble and Articles XXXVI-XXXVIII
(3) Tokyo Round Enabling Clause
(4) WTO Agreement Preamble


185 Post-Brexit, in August 2022, the U.K. supplemented its long-standing trade preference scheme for poor countries:

The U.K. is to cut import taxes on hundreds more products from some of the world’s poorest countries to boost trade links.

The Developing Countries Trading Scheme comes into force in January [2023] and builds on a scheme the U.K. was first part of while a member of the European Union.

Goods such as clothes, shoes, and foods not widely produced in the U.K. will benefit from lower or zero tariffs.
So, there is no single or universal GSP program. The WTO maintains a Database on Preferential Trade Arrangements, which contains entries for GSP schemes of 11 Members (as of 2015). While each is a non-reciprocal grant of preferences, they differ from one developed country sponsor to the next. In particular, depending on eligibility criteria and margins of preference, some countries are more generous in opening their markets to beneficiary countries than others. The more rigorous the criteria for qualification as a beneficiary and product eligibility, the less generous the market access. The smaller the margin of preference, i.e., the difference between duty-free tariff treatment under a GSP program and the normally applied MFN rate, the less generous.

As a preliminary matter, it should be readily apparent non-reciprocal, preferential treatment, such as duty-free and quota-free benefits, for some but not all WTO members violates the MFN obligation in GATT Article I:1. Certain poor WTO Members get the benefits, which are not offered by the developed country Member sponsoring the program to all other WTO Members. That is, there is discrimination against exports originating in a non-beneficiary Member, which are charged the MFN rate and subject to permissible quotas. Without a special dispensation from the WTO Members, or the GATT

The scheme covers 65 developing countries.

It is on top of the thousands of products [from fruit to T&A] which developing nations can already export to the U.K., without tariffs, and will affect around 99% of goods imported from Africa.

The [new] scheme includes powers to suspend a country on the grounds of human rights or labor violations, as well as for not meeting their climate change obligations.

The scheme removes some seasonal tariffs on products like cucumbers, which cannot be grown in the U.K. in the winter, so they are tariff-free during this period for the majority of countries under the scheme.

It also simplifies trade rules such as rules of origin, which dictate what proportion of a product must be made in its country of origin.

Mohammed Jabbar, Managing Director of DBL Group, a textile business from Bangladesh, said this was a “game changer” for his company.

“[The changes] mean we will be able to source our cotton from many more countries than we could before, which will make the business more competitive and our supply chains a lot more resilient,” he said.

_U.K. to Cut Import Taxes from Some of World’s Poorest Countries_, BBC NEWS, 16 August 2022, [www.bbc.com/news/business-62557128](http://www.bbc.com/news/business-62557128). Note Mr. Jabbar’s comment in light of AGOA ROOs (discussed in a separate Chapter), which SSAC T&A companies found restrictive as they had to procure cotton either from within their region or the U.S.


CONTRACTING PARTIES before them, a GSP-type program would be actionable, regardless of whether or to the extent the program embodies a preferential option for the poor consistent with social justice principles.

II. 1979 Tokyo Round Enabling Clause

Until the Tokyo Round (1974-1979), developed countries seeking to sponsor a GSP program dealt with the MFN issue by obtaining a waiver, under GATT Article XXVII, from their Article I obligations. In June 1971, they obtained a 10-year waiver. During the Tokyo Round, an “Enabling Clause” was drafted, and agreed to, to assure developed and developing countries that the GSP is a permissible exception to the Article I and Article III obligations of GATT. In effect, the Enabling Clause, which has no expiry date, made permanent the 10-year waiver granted in June 1971. The Enabling Clause, which is contained in the Tokyo Rounds “Texts Concerning a Framework for the Conduct of World Trade,” provides the legal basis for S&D treatment” for developing countries. The Clause is known formally as the Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979.

The Enabling Clause is not an obligation to establish, maintain, or expand a GSP program. Any Member can do so – or not. A GSP program is something of a gift, of varying generosity, not an entitlement, much less unconditional charity. Moreover, the Enabling Clause contains the “principle of graduation,” whereby less developed countries agree to assume “increased GATT responsibilities as their economies progress.”

Conferral of GSP benefits means certain products originating in an eligible country come into the benefactor country (e.g., the U.S.) free of duty or quota. However, the key words are “certain,” “originating,” and “eligible.” Not all countries qualify as beneficiaries. Not all products are eligible. Only an eligible product from a beneficiary that fulfills a preferential rule of origin receives the preference. For example, if gold jewelry from Bangladesh received GSP treatment, then this result would occur because Bangladesh is eligible to be a beneficiary country, gold jewelry is an eligible product, and the shipment of jewelry in question is made in Bangladesh under the applicable rule of origin.

Put simply, GSP benefits are akin to a gift that must be earned by fulfilling conditions. Moreover, the gift is temporary. Limitations on the income level of a beneficiary and the market access of a product connote impermanence: the benefits can be withdrawn if a country gets too rich, or a product competes too successfully, in the judgment of the benefactor country.

As indicated at the outset, the American GSP program is set out in Title V of the Trade Act of 1974. This legislation has been modified, with important amendments occurring through Section 1111 of the Trade Agreements Act of 1979, Title V of the Trade and Tariff Act of 1984, and Sections 111(a)-(b) and 114 of the African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000). Overall, the program is a temporary, unilateral, non-reciprocal grant of preferences to eligible countries on merchandise in sectors of those countries that are not yet competitive internationally.
program includes safeguard mechanisms to protect American industries sensitive to import competition. Hence, there is an underlying tension between extending unilateral assistance to poor countries, on the one hand, and safeguarding American industries, on the other hand. From a practical standpoint, the USTR administers the GSP program, though the ITC plays a role.

III. Non-Discriminatory Discrimination or Divide and Rule?
   1979 Tokyo Round Enabling Clause Paragraph 2(a) Defense and 2004 EU GSP Case

- European GSP Scheme and War on Drugs

WTO APPELLATE BODY REPORT, EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES, WT/DS246/AB/R (ADOPTED 20 APRIL 2004)

I. Introduction

1. … The Panel was established to consider a complaint by India against the European Communities regarding the conditions under which the European Communities accords tariff preferences to developing countries pursuant to Council Regulation (EC) No. 2501/2001 of 10 December 2001 “applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004” (the “Regulation”).

2. The Regulation provides for five preferential tariff “arrangements,” namely:

   (a) general arrangements described in Article 7 of the Regulation (the “General Arrangements”);
   (b) special incentive arrangements for the protection of labor rights;
   (c) special incentive arrangements for the protection of the environment;
   (d) special arrangements for least-developed countries; and
   (e) special arrangements to combat drug production and trafficking (the “Drug Arrangements”).

3. All the countries listed in Annex I to the Regulation are eligible to receive tariff preferences under the General Arrangements, which provide, broadly, for suspension of Common Customs Tariff duties on products listed as “non-sensitive” and for reduction of Common Customs Tariff ad valorem duties on products listed as “sensitive.” … The four other arrangements in the Regulation provide tariff preferences in addition to those granted under the General Arrangements. [For instance, the tariff preferences include further reductions in the duties imposed on certain “sensitive” products.] However, only some of the country beneficiaries of the General Arrangements are also beneficiaries of the other arrangements. Specifically, preferences under the special incentive arrangements for the protection of labor rights and the special incentive arrangements for the protection of the environment are restricted to those countries that “are determined by the European Communities to comply with certain labor [or] environmental policy standards.”
respectively. Preferences under the special arrangements for least-developed countries are restricted to certain specified countries. Finally, preferences under the Drug Arrangements are provided only to 12 predetermined countries, namely Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela.

4. India is a beneficiary of the General Arrangements but not of the Drug Arrangements, or of any of the other arrangements established by the Regulation. In its request for the establishment of a Panel, India challenged the Drug Arrangements as well as the special incentive arrangements for the protection of labor rights and the environment. However, in a subsequent meeting with the Director-General regarding the composition of the Panel – and later in writing to the European Communities – India indicated its decision to limit its complaint to the Drug Arrangements, while reserves its right to bring additional complaints regarding the two “special incentive arrangements.” Accordingly, this dispute concerns only the Drug Arrangements.

5. The Panel summarized the effect of the Drug Arrangements as follows:

   The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted duty free access to the European Communities’ market, while all other developing countries must pay the full duties applicable under the Common Customs Tariff. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed “sensitive” under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted duty-free access to the European Communities’ market, while all other developing countries are entitled only to reductions in the duties applicable under the Common Customs Tariff. (original italics)

6. India requested the Panel to find that “the Drug Arrangements set out in Article 10” of the Regulation are inconsistent with Article I:1 of the General Agreement on Tariffs and Trade 1994 (the “GATT 1994”) and are not justified by the Decision on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the “Enabling Clause”) [GATT Document L/4903, 28 November 1979, BISD 26S/203.]

…

● Holdings and Rationales

WTO APPELATE BODY REPORT, EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES, WT/DS246/AB/R (ADOPTED 20 APRIL 2004)
Omitted is the finding of the Appellate Body, upholding that of the Panel, on the relationship between the MFN obligation of GATT Article I:1 and the Enabling Clause. The Appellate Body, agreeing with the Panel, concluded the Clause is an exception to the obligation.

Omitted, too, is the Appellate Body’s modification of the finding of the Panel that the EC bears the burden of invoking the Enabling Clause and justifying the Drug Arrangements under the Clause. The Appellate Body said it was incumbent on India to raise the Enabling Clause in forging its claim of inconsistency under the GATT Article I:1 MFN provision. Then, the EC had the burden of proving the Drug Arrangement satisfied the Clause. The Appellate Body said India did, to a sufficient extent, invoke the Clause, specifically, Paragraph 2(a) thereof.

V. Whether the Drug Arrangements Are Justified Under the Enabling Clause

... B. Interpretation of the Term “Non-Discriminatory” in Footnote 3 to Paragraph 2(a) of the Enabling Clause

143. ... Paragraph 1 of the Enabling Clause authorizes WTO Members to provide “differential and more favorable treatment to developing countries, without according such treatment to other WTO Members.” Such differential treatment is permitted “notwithstanding” the provisions of Article I of the GATT 1994. Paragraph 2(a) and footnote 3 thereto clarify that Paragraph 1 applies to “[preferred]ential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,” “[a]s described in the [1971 Waiver Decision], relating to the establishment of ‘generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries.’”

144. The Preamble to the 1971 Waiver Decision in turn refers to “preferential tariff treatment” in the following terms:

Recalling that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;

Considering that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries[.]. (original italics; underlining added)

145. Paragraph 2(a) of the Enabling Clause provides, therefore, that, to be justified
under that provision, preferential tariff treatment must be “in accordance” with the GSP “as described” in the Preamble to the 1971 Waiver Decision. “Accordance” being defined in the dictionary as “conformity,” only preferential tariff treatment that is in conformity with the description “generalized, non-reciprocal and non-discriminatory” treatment can be justified under Paragraph 2(a). [Again, the Appellate Body cited to the Shorter Oxford English Dictionary.]

146. In the light of the above, we do not agree with European Communities’ assertion that the Panel’s interpretation of the word “non-discriminatory” in footnote 3 of the Enabling Clause is erroneous because the phrase “generalized, non-reciprocal and non-discriminatory” in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries. …

148. Having found that the qualification of the GSP as “generalized, non-reciprocal and non-discriminatory” imposes obligations that must be fulfilled for preferential tariff treatment to be justified under Paragraph 2(a), we turn to address the Panel’s finding that:

... the term “non-discriminatory” in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations. (Emphasis added.)

149. The European Communities maintains that “‘non-discrimination’ is not synonymous with formally equal treatment” and that “[t]reating differently situations which are objectively different is not discriminatory.” The European Communities asserts that “[t]he objective of the Enabling Clause is different from that of Article I:1 of the GATT.” In its view, the latter is concerned with “providing equal conditions of competition for imports of like products originating in all Members,” whereas “the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries.” The European Communities derives contextual support from Paragraph 3(c), which states that the treatment provided under the Enabling Clause “shall … be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.” The European Communities concludes that the term “non-discriminatory” in footnote 3 “does not prevent the preference-giving countries from differentiating between developing countries which have different development needs, where tariff differentiation constitutes an adequate response to such differences.”

150. India, in contrast, asserts that “non-discrimination in respect of tariff measures refers to formally equal[] treatment” and that Paragraph 2(a) of the Enabling Clause requires that “preferential tariff treatment [be] applied equally” among developing countries. In support of its argument, India submits that an interpretation of paragraph 2(a) of the Enabling Clause that authorizes developed countries to provide “discriminatory tariff treatment in favor of the developing countries but not between the developing
countries gives full effect to both Article I of the GATT and Paragraph 2(a) of the Enabling Clause and minimizes the conflict between them.” India emphasizes that, by consenting to the adoption of the Enabling Clause, developing countries did not “relinquish[] their MFN rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them.”

151. We examine now the ordinary meaning of the term “non-discriminatory” in footnote 3 to Paragraph 2(a) of the Enabling Clause. As we observed, footnote 3 requires that GSP schemes under the Enabling Clause be “generalized, non-reciprocal and non-discriminatory.” Before the Panel, the participants offered competing definitions of the word “discriminate.” India suggested that this word means “‘to make or constitute a difference in or between; distinguish’ and ‘to make a distinction in the treatment of different categories of peoples or things.’” The European Communities, however, understood this word to mean “‘to make a distinction in the treatment of different categories of people or things, esp. unjustly or prejudicially against people on grounds of race, color, sex, social status, age, etc.’” [In both instances, the Panel quoted from (quoting The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689].

152. Both definitions can be considered as reflecting ordinary meanings of the term “discriminate” and essentially exhaust the relevant ordinary meanings. [The Appellate Body, again, pointed to the Shorter Oxford English Dictionary.] The principal distinction between these definitions, as the Panel noted, is that India’s conveys a “neutral meaning of making a distinction,” whereas the European Communities’ conveys a “negative meaning carrying the connotation of a distinction that is unjust or prejudicial.” Accordingly, the ordinary meanings of “discriminate” point in conflicting directions with respect to the propriety of acceding differential treatment. Under India’s reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities’ reading, differential treatment of GSP beneficiaries would not be prohibited per se. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term “non-discriminatory,” on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

153. Nevertheless, … we are able to discern some of the content of the “non-discrimination” obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is per se discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of discriminate” converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member’s GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have “similar development needs.” Although the European Communities acknowledges that
differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the Enabling Clause, it submits that there is no inconsistency in differentiating between GSP beneficiaries with “different development needs.” Thus, based on the ordinary meanings of “discriminate,” India and the European Communities effectively appear to agree that, pursuant to the term “non-discriminatory” in footnote 3, similarly-situated GSP beneficiaries should not be treated differently. The participants disagree only as to the basis for determining whether beneficiaries are similarly-situated.

[In an edifying footnote following the penultimate sentence of Paragraph 153, the Appellate Body observed:

We note that the contrasting definitions proffered by the participants, as well as the convergence of those definitions on the fact that similarly-situated entities should not be treated differently, find reflection in the use of the term “discrimination” in general international law. In this respect, we note, as an example, the definitions of “discrimination” provided by the European Communities, in footnotes 56 and 57 of its appellant’s submission:

56 … Mere differences of treatment do not necessarily constitute discrimination … discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way.


57 … Discrimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right, or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made.


154. Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of “non-discriminatory,” however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries.

155. We continue our interpretive analysis by turning to the immediate context of the term “non-discriminatory.” We note first that footnote 3 to Paragraph 2(a) stipulates that, in addition to being “non-discriminatory,” tariff preferences provided under GSP schemes must be “generalized.” According to the ordinary meaning of that term, tariff preferences
provided under GSP schemes must be “generalized” in the sense that they “apply more generally; [or] become extended in application.” [The Appellate Body, here too, cited the Shorter Oxford English Dictionary.] However, this ordinary meaning alone may not reflect the entire significance of the word “generalized” in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel’s finding that, by requiring tariff preferences under the GSP to be “generalized,” developed and developing countries together sought to eliminate existing “special” preferences that were granted only to certain designated developing countries. Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies.

156. It does not necessarily follow, however, that “non-discriminatory” should be interpreted to require that preference-granting countries provide “identical” tariff preferences under GSP schemes to “all” developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily “result [in] the collapse of the whole GSP system and a return back to special preferences favoring selected developing countries.” To us, this conclusion is unwarranted. We observe that the term “generalized” requires that the GSP schemes of preference-granting countries remain generally applicable. Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. … [P]rovisions such as Paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.

157. As further context for the term “non-discriminatory” in footnote 3, we turn next to Paragraph 3(c) of the Enabling Clause, which specifies that “differential and more favorable treatment” provided under the Enabling Clause:

… shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

158. … [U]se of the word “shall” in Paragraph 3(c) suggests that Paragraph 3(c) sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to “respond positively” to the “needs of developing countries.” Having said this, we turn to consider whether the “development, financial and trade needs of developing countries” to which preference-granting countries are required to respond when granting preferences must be understood to cover the “needs” of developing countries collectively.

159. The Panel found that “the only appropriate way [under Paragraph 3(c) of the Enabling Clause] of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their [GSP] schemes have sufficient
breadth of product coverage and depth of tariff cuts to respond positively to those differing needs.” In reaching this conclusion, the Panel appears to have placed a great deal of significance on the fact that Paragraph 3(c) does not refer to needs of “individual” developing countries. The Panel thus understood that Paragraph 3(c) does not permit the granting of preferential tariff treatment exclusively to a sub-category of developing countries on the basis of needs that are common to or shared by only those developing countries. We see no basis for such a conclusion in the text of Paragraph 3(c). Paragraph 3(c) refers generally to “the development, financial and trade needs of developing countries.” The absence of an explicit requirement in the text of Paragraph 3(c) to respond to the needs of “all” developing countries, or to the needs of “each and every” developing country, suggests to us that, in fact, that provision imposes no such obligation.

160. Furthermore, … the participants in this case agree that developing countries may have “development, financial and trade needs” that are subject to change and that certain development needs may be common to only a certain number of developing countries. We see no reason to disagree. Indeed, Paragraph 3(c) contemplates that “differential and more favorable treatment” accorded by developed to developing countries may need to be “modified” in order to “respond positively” to the needs of developing countries. Paragraph 7 of the Enabling Clause supports this view by recording the expectation of “less-developed contracting parties” that their capacity to make contributions or concessions under the GATT will “improve with the progressive development of their economies and improvement in their trade situation.” Moreover, the very purpose of the special and differential treatment permitted under the Enabling Clause is to foster economic development of developing countries. It is simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.

161. In addition, the Preamble to the WTO Agreement, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” The word “commensurate” in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the WTO Agreement further recognizes that Members’ “respective needs and concerns at different levels of economic development” may vary according to the different stages of development of different Members.

162. In sum, we read Paragraph 3(c) as authorizing preference-granting countries to “respond positively” to “needs” that are not necessarily common or shared by all developing countries. Responding to the “needs of developing countries” may thus entail treating different developing-country beneficiaries differently.

163. However, Paragraph 3(c) does not authorize any kind of response to any claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to “development, financial and trade needs.” In our view, a “need” cannot be characterized as one of the specified “needs of developing countries” in the sense
of Paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with Paragraph 3(c) is made, the existence of a “development, financial [or] trade need” must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.

164. Secondly, Paragraph 3(c) mandates that the response provided to the needs of developing countries be “positive.” “Positive” is defined as “consisting in or characterized by constructive action or attitudes.” [The Appellate Body relied again on the Shorter Oxford English Dictionary.] This suggests that the response of a preference-granting country must be taken with a view to improving the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will “respond positively” to the “needs of developing countries” suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant “development, financial [or] trade need”. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the “positive” manner suggested, in “response” to a widely-recognized “development, financial [or] trade need,” can such action satisfy the requirements of Paragraph 3(c).

165. … [B]y requiring developed countries to “respond positively” to the “needs of developing countries,” which are varied and not homogeneous, Paragraph 3(c) indicates that a GSP scheme may be “non-discriminatory” even if “identical” tariff treatment is not accorded to “all” GSP beneficiaries. Moreover, Paragraph 3(c) suggests that tariff preferences under GSP schemes may be “non-discriminatory” when the relevant tariff preferences are addressed to a particular “development, financial [or] trade need” and are made available to all beneficiaries that share that need.

166. India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 vis-à-vis other developing countries, and we make no such presumption. In fact, we note that the Enabling Clause specifically allows developed countries to provide differential and more favorable treatment to developing countries “notwithstanding” the provisions of Article I. With this in mind, and given that Paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary vis-à-vis other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.

167. Finally, … pursuant to Paragraph 3(a) of the Enabling Clause, any “differential and more favorable treatment … shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.” This requirement applies, a fortiori, to any preferential treatment granted to one GSP beneficiary that is not granted to another. Thus, although
Paragraph 2(a) does not prohibit per se the granting of different tariff preferences to different GSP beneficiaries, and Paragraph 3(c) even contemplates such differentiation under certain circumstances, Paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.

168. Having examined the context of Paragraph 2(a), we turn next to examine the object and purpose of the WTO Agreement. We note first that Paragraph 7 of the Enabling Clause provides that “[t]he concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT 1994] should promote the basic objectives of the [GATT 1994], including those embodied in the Preamble.” … [T]he Preamble to the WTO Agreement provides that there is “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Similarly, the Preamble to the 1971 Waiver Decision provides that “a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development.” These objectives are also reflected in Paragraph 3(c) of the Enabling Clause, which states that the treatment provided under the Enabling Clause “shall … be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.”

169. Although enhanced market access will contribute to responding to the needs of developing countries collectively, we have also recognized that the needs of developing countries may vary over time. … [T]he objective of improving developing countries’ “share in the growth in international trade,” and their “trade and export earnings,” can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, as well as at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of “non-discriminatory” that does not require the granting of “identical tariff preferences” allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be “generalized” and “non-reciprocal.” We therefore consider such an interpretation to be consistent with the object and purpose of the WTO Agreement and the Enabling Clause.

170. The Panel took the view, however, that the objective of “elimination of discriminatory treatment in international commerce, found in the Preamble to the GATT 1994, “contributes more to guiding the interpretation of ‘non-discriminatory’” than does the objective of ensuring that developing countries “secure … a share in the growth in international trade commensurate with their development needs.” We fail to see on what basis the Panel drew this conclusion.

[The Appellate Body considered the relevance of Paragraph 2(d) of the Enabling Clause to the interpretation of the term “non-discriminatory.” This Paragraph deals with special
treatment of LDCs. The Panel characterized Paragraph 2(d) as an exception to Paragraph 2(a), and used Paragraph 2(d) to support its view that paragraph 2(a) requires “formally identical treatment.” The Appellate Body found otherwise, stating Paragraph 2(d) is not an exception to Paragraph 2(a), and the reliance of the Panel on Paragraph 2(d) was misplaced. The Paragraphs of the Escape Clause are not mutually exclusive, and no one of them is an exception to the other. The critical, independent function of Paragraph 2(d) is to highlight least developed countries as a sub-category of developing countries, and authorize distinct preferences for these poorest-of-the poor countries. Thus, because of Paragraph 2(d), a preference-granting country need not establish that differentiating between developing and least-developed countries is “non-discriminatory.”

173. Having examined the text and context of footnote 3 to Paragraph 2(a) of the Enabling Clause, and the object and purpose of the WTO Agreement and the Enabling Clause, we conclude that the term “non-discriminatory” in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term “non-discriminatory,” to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the “development, financial and trade needs” to which the treatment in question is intended to respond.

174. For all of these reasons, we reverse the Panel’s finding … that “the term ‘non-discriminatory’ in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations.”

[The Appellate Body also reversed the Panel holding that the term “developing countries” in Paragraph 2(a) means “all developing countries, except as regards a priori limitations.” The Appellate Body reasoned that because footnote 3 and Paragraph 3(c) do not ban granting of differential tariffs to different sub-categories of GSP beneficiaries, as long as the remaining conditions of the Escape Clause are met, the term “developing countries” should not be read to mean “all.” In effect, the Appellate Body held “developing countries” can mean less than all of them.]

D. Consistency of the Drug Arrangements with the Enabling Clause

180. We found above that the term “non-discriminatory” in footnote 3 to paragraph 2(a) of the Enabling Clause does not prohibit the granting of different tariffs to products originating in different sub-categories of GSP beneficiaries, but that identical tariff treatment must be available to all GSP beneficiaries with the “development, financial [or] trade need” to which the differential treatment is intended to respond. The need alleged to be addressed by the European Communities’ differential tariff treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. … Therefore, the Drug Arrangements may be found consistent with the “non-discriminatory” requirement in footnote 3 only if the European Communities proves, at a minimum, that the preferences
granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem. [In the case, the EU argued the Drug Arrangements are non-discriminatory because designation of beneficiary countries depends only and exclusively on their development needs, and all developing countries that are similarly affected by the drug problem have been included in the Drug Arrangements.] We do not believe this to be the case.

181. By their very terms, the Drug Arrangements are limited to the 12 developing countries designated as beneficiaries in Annex I to the Regulation. Specifically, Article 10:1 of the Regulation states:

Common Customs Tariff \textit{ad valorem} duties on [covered products] which originate in a country that according to Column I of Annex I benefits from [the Drug Arrangements] shall be entirely suspended.

182. Articles 10 and 25 of the Regulation, which relate specifically to the Drug Arrangements, provide no mechanism under which additional beneficiaries may be added to the list of beneficiaries under the Drug Arrangements as designated in Annex I. Nor does any of the other Articles of the Regulation point to the existence of such a mechanism with respect to the Drug Arrangements. … This contrasts with the position under the “special incentive arrangements for the protection of labour rights” and the “special incentive arrangements for the protection of the environment,” which are described in Article 8 of the Regulation. The Regulation includes detailed provisions setting out the procedure and substantive criteria that apply to a request by a beneficiary under the general arrangements described in Article 7 of the Regulation (the “General Arrangements”) to become a beneficiary under either of those special incentive arrangements.

183. … [T]he Drug Arrangements themselves do \textit{not} set out any clear prerequisites – or “objective criteria” – that, if met, would allow for other developing countries “that are similarly affected by the drug problem” to be \textit{included} as beneficiaries under the Drug Arrangements. … Similarly, the Regulation offers no criteria according to which a beneficiary could be \textit{removed} specifically from the Drug Arrangements on the basis that it is no longer “similarly affected by the drug problem.” … [E]ven if the European Commission found that the Drug Arrangements were having no effect whatsoever on a beneficiary’s “efforts in combating drug production and trafficking,” or that a beneficiary was no longer suffering from the drug problem, beneficiary status would continue. Therefore, even if the Regulation allowed for the list of beneficiaries under the Drug Arrangements to be modified, the Regulation itself gives no indication as to how the beneficiaries under the Drug Arrangements were chosen or what kind of considerations would or could be used to determine the effect of the “drug problem” on a particular country. …

186. Against this background, we fail to see how the Drug Arrangements can be distinguished from other schemes that the European Communities describes as “confined \textit{ab initio} and permanently to a limited number of developing countries.” As we understand it, the European Communities’ position is that such schemes would be discriminatory,
whereas the Drug Arrangements are not because “all developing countries are potentially beneficiaries” thereof. In seeking a waiver from its obligations under Article I:1 of the GATT 1994 to implement the Drug Arrangements, the European Communities explicitly acknowledged, however, that “[b]ecause the special arrangements are only available to imports originating in [the 12 beneficiaries of the Drug Arrangements], a waiver … appears necessary.” This statement appears to undermine the European Communities’ argument that “all developing countries are potentially beneficiaries of the Drug Arrangements” and, therefore, that the Drug Arrangements are “non-discriminatory.”

187. We recall our conclusion that the term “non-discriminatory” in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a “closed list” of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

188. Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. … As such, the European Communities cannot justify the Regulation under Paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are “similarly affected by the drug problem,” because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not.

189. For all these reasons, we find that the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be “non-discriminatory.” Accordingly, we uphold, for different reasons, the Panel’s conclusion … that the European Communities “failed to demonstrate that the Drug Arrangements are justified under Paragraph 2(a) of the Enabling Clause.”

IV. Renewal Problems

- Period, Criteria, and Posture

As a practical matter, the U.S. GSP program is not permanent. It must be renewed by Congress, which occurs periodically, and which are opportunities for Congress to amend the program. In this respect, there are three general patterns.

First, the renewal periods vary considerably, from 10 years to 10 months. Second, in some renewal legislation, criteria are added that make receipt of GSP benefits
increasingly difficult. Third, the renewal legislation is not always a provision of a trade bill. At times, its posture is that it is a small piece in a large budget package.

- Generosity?

Do the aforementioned observations suggest America is less than wholeheartedly committed to the GSP concept? To be sure, it is quite unlikely the U.S. would abolish its GSP scheme, or that Congress would fail forever to renew it. But, on a number of occasions, renewal occurs after the sunset date in the statute, and the renewal operates retroactively. To importers, a renewal that is not timely is costly.

When GSP expired (again) on 31 July 2013, importers in the U.S. paid an average of $2 million daily in tariffs (through January 2014). That was because, as is typical when Congress has yet to renew the program, CBP requires importers to post cash deposit or bond for a shipment of GSP-eligible merchandise. That way, CBP is assured duty payment if renewal does not occur. When it occurs, CBP returns the deposit to the importer. For SMEs on thin profit margins, absorbing the MFN levy by posting cash deposit or bond can force layoffs or cuts in medical and other benefits. For other companies, the alternative is to boost prices, but that may put them at a disadvantage relative to competitors. Getting back the deposit or bond entails the time and expense of proper record keeping, as CBP must ascertain which importers are owed what amounts.

The problem recurred in 2018, when GSP lapsed as of 31 December 2017. In 2017, GSP saved American importers $865 million in tariffs on thousands of eligible articles from 121 BDCs. Unsurprisingly, over 400 companies and business associations supported renewal. Finally, in February 2018, Congress renewed GSP (retroactively to 1 January, with reimbursements to importers that had to pay tariffs) through 31 December 2020. Thereafter, renewal efforts continued:

… [L]awmakers in the U.S. House of Representatives proposed [on 3 October 2022] a bipartisan bill aimed at providing relief to U.S. importers who paid tariffs on goods that would have been eligible for preferential treatment under the …GSP, which expired on December 31, 2020. This bill would retroactively apply preferential treatment to products that entered the U.S. between Dec. 31, 2020, and Sept. 1, 2022, if they would have been eligible for benefits under GSP, while not reauthorizing the program. The legislation would apply to approximately 3,400 products from 120

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188 See Len Bracken, Expiration of GSP Costly for Importers, No Immediate Resolution, Coalition Says, 31 International Trade Reporter (BNA) 152 (23 January 2014).
189 See Len Bracken, House Passes Three-Year Extension of Tariff Preference Program, 35 International Trade Reporter (BNA) 254 (22 February 2018). Support for renewal was bipartisan. The House voted 400-2 on the bill (115th Cong., 2d Sess., H.R. 4979, 8 February 2018). The expiry date is found at 19 U.S.C. § 2465. GSP-like programs, such as CBERA, also lack a permanent statutory footing and require periodic reauthorization by Congress. For example, CBERA was renewed on 10 October 2020 for a decade, through 30 September 2030.
developing countries, refunding an estimated $1.8 billion worth of GSP-related tariffs.

... GSP is a preference program that allows duty-free imports for certain products from beneficiaries, which are predominantly lower-income and developing countries. U.S. imports from China on GSP-eligible goods have increased by hundreds of millions of dollars since the program’s expiration – imports of sports and duffle bags have increased by $50 million, trucks and suitcase materials have increased by $200 million, and air conditioner parts have increased by $600 million. Supporters of the new legislation argue that both the GSP program and the Miscellaneous Tariff Bill (MTB’s) incentivize U.S. trade investment outside of China and aid American companies in attaining component parts and other items free of duty if they are not readily available in the U.S. These signature trade items currently contribute to the inflation problem and their renewal would have a profound positive impact on the U.S. economy.

... Representatives from more than 60 major companies, including Target, Home Depot, and Samsonite ... urge[d] Congress to consider the proposed legislation. Supporters of the bill claim that it will discourage imports from China while benefiting other developing economies throughout the world, being most helpful to companies that rely on specialized commodities from countries such as Indonesia, Thailand, and Brazil. House Oversight Committee member Rep. Debbie Wasserman Schultz (Democrat-Florida), who proposed the bill alongside fellow Florida Reps. Mario Diaz-Balart (Republican) and Darren Soto (Democrat), highlighted in an email statement that GSP’s expiration has “caused our businesses to pay roughly $2 billion in excess tariffs, harming companies and workers in all 50 states,” adding that “it’s cost over $178 million in my home state of Florida alone, and small businesses were hit the hardest. I look forward to continuing to work together toward our shared goal of GSP reauthorization and to truly helping American businesses not just survive, but thrive.”

Here, then, was a new argument made in favor of renewal, namely, GSP incentivizes trade diversion, indeed decoupling, from China amidst the Sino-American Trade War (discussed in a separate Chapter).

Alas, the position of GSP in the overall fiscal architecture of the U.S. Federal government matters. In 1980, President Jimmy Carter (1924-, President, 1977-1981) reported to Congress on the progress of the first five years of operation of GSP. Since then, the program has been criticized for several reasons, including the loss of revenue for the...
U.S. of tens of millions of dollars. Indeed, budgetary concerns may be the gravest concern, at least *prima facie*.

Whenever the program comes up for renewal, respect must be given to the “pay-as-you-go” requirement in Federal budget rules. If the government foregoes some tariffs on goods from poor countries, then how will it make up the revenue deficiency? This question leads to larger questions about the efficacy of the program, and the criteria under which duty-free treatment is accorded to countries and articles. Such questions were asked in 1993, when the Clinton Administration lobbied for GSP renewal and extension of benefits to Russia. At the time, Congress thought seriously about dropping the scheme.

- **2024 Renewal?**

Several of these renewal problems were manifest and addressed in April 2024, when the U.S. House of Representatives proposed the *Generalized System of Preferences Reform Act*.\(^{191}\) This Act, H.R. 7986, was the most sweeping set of changes to the GSP program since inception. The noteworthy provisions included:

1. *GSP* had expired at year-end 2020, so the *Reform Act* proposed an extension until 31 December 2030 (with retrospective effect to 31 December 2020).

2. Amidst the Sino-American Trade War (discussed in a separate Chapter), the PRC would be banned permanently from eligibility as a *GSP* BDC.

3. New, explicit, national security criteria would be added for BDC eligibility, including “the extent to which such country allows, … construction of military bases by a covered nation (as such term is defined in Section 4872 of title 10, United States Code)….”

4. New, explicit, mixed economic-political-national security criteria would be added for BDC eligibility, including “the extent to which such country is deepening its economic, diplomatic, and military relations with covered nations….”

5. New, explicit, political criteria would be added for BDC eligibility, including “the extent to which such country has established, or is making continual progress toward establishing … the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law….”

6. New, explicit economic development criteria would be added for BDC eligibility, including “the extent to which such country has established, or

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\(^{191}\) See H.R. 7986, *To modify and reauthorize the Generalized System of Preferences, and for other purposes*, 118th Congress, 2d Session. [www.congress.gov/bill/118th-congress/house-bill/7986/text](http://www.congress.gov/bill/118th-congress/house-bill/7986/text). The above-quoted provisions are from this source, Section 3, Modifications to Designations of Beneficiary Countries.”
is making continual progress toward establishing … economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs….”

(7) New, explicit criteria would be added for BDC eligibility concerning digital trade, including “the extent to which such country has … imposed unreasonable digital trade barriers, such as unnecessary or discriminatory data localization or data transfer restrictions, discriminatory treatment of digital products, or forced disclosure of proprietary source code; and … has taken steps in the digital environment to support consumer protections, the privacy of personal information, and open digital ecosystems….”

(8) The Value-Added Test ROO would be raised from 35% to 50%, as that would (inter alia) help ensure meaningful economic activity is occurring in a BDC (and not, say, in China). The increases would be staged across several years.

(9) CNLs would be increased from $215 million to $500 million, thus possibly allowing for eligibility for a longer period (though inflation surely necessitated this update).

(10) ITC would present an economic analysis about changes to products eligible for duty-free treatment.

The Renewal Act was bundled with several trade bills presented by the House Ways and Means Committee.

To what extend did the changes evinced a “get tough” approach to poor countries? Did they basically signal that if a poor country was not pro-U.S. in multiple respects, then it would not qualify for BDC status?
Chapter 10

GENERALIZED SYSTEM OF PREFERENCES (CONTINUED): PRACTICAL OPERATION

I. Four Conceptual Steps

There are four conceptual steps when representing counsel to a client (e.g., exporter in a developing or least developed country, or importer of merchandise from such a country) seeking GSP benefits for merchandise.

*Step 1: Country Eligibility?*
Is the country of exportation a Beneficiary Developing Country (BDC)?

*Step 2: Merchandise Eligibility?*
If the country is a BDC, then is the good a GSP-eligible article?

*Step 3: Origination?*
If the article is eligible for GSP treatment, does it originate in the country of exportation, under the applicable preferential rule of origin?

*Step 4: General Criteria?*
Even if a country is a BDC and merchandise is both eligible and originating, are general criteria for extending preferences satisfied?

As of January 2014, the U.S. granted GSP treatment to 126 BDCs and up to 5,000 eligible products. Of course, when in doubt as to any step, the safest legal advice is to file a ruling request with the CBP.

The USTR conducts an annual review of the GSP program to determine continued or new country and merchandise eligibility. For example, in its 2011 review, the USTR examined the worker rights practices of Sri Lanka in response to a petition from the AFL-CIO. The USTR decided to maintain Sri Lanka as a BDC because Sri Lanka enhanced its procedures for union certifications, increased fines for labor violations, resolved unfair labor practices cases, and set up trade union facilitation centers in the three largest Export Processing Zones (EPZs). But, four other countries were not so fortunate as Sri Lanka in the 2011 annual review: the USTR said it would investigate the BDC status of Fiji and Iraq, because of alleged worker rights abuses by the AFL-CIO, and of Indonesia and Ukraine, because of failure to provide IP protection as alleged in a petition by the International IIPA. Likewise, when Laos joined the WTO in 2013, the U.S. decided not to

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192 Documents References:
1. *Havana (ITO) Charter* Articles 1, 8-15, 24, 55-70 1-12
2. *GATT Preamble* and Articles XXXVI-XXXVIII
3. Tokyo Round *Enabling Clause*
4. *WTO Agreement Preamble*
confer BDC status on it owing to its poor human and labor rights record, including with respect to child and forced labor, and human trafficking.

At the outset of Sub-Chapter V, four general criteria concerning the authority to extend preferences are stated.¹⁹³

(1) **Effect?**
What effect would granting duty-free status to eligible articles from developing countries have on their economic development, specifically, export expansion?

(2) **Other Efforts?**
What comparable efforts (if any) do developed countries other than the U.S. make to assist developing countries by granting preferences on their imports?

(3) **Domestic Producers?**
What impact is anticipated on American producers of like or directly competitive products if preferences are extended?

(4) **Competitiveness?**
To what extent is a BDC already competitive as regards an eligible article?

These criteria are general not in the sense of channeling Presidential discretion as to the creation of a *GSP* program - Congress already has done that.

Rather, the criteria are about whether an eligible article from any BDC ought to get *GSP* treatment. In effect, the criteria presume a country is a BDC, and merchandise from that country is eligible. Put differently, they give interested parties, such as American producers of substitute products, an opportunity to contest against the extension of *GSP* benefits. The general criteria are one illustration of the less-than-unconditional-generosity that characterizes the *GSP* program.

A related and significant point is there are two analytical steps in ascertaining eligibility for *GSP* treatment that do not exist: ownership of an enterprise in a BDC producing eligible merchandise; and distribution of *GSP* benefits. For example, suppose a major Japanese consumer electronics company, like Sony, produces cameras on the Indonesian island of Batam (off the coast of Singapore, a deep-water port from which the cameras can be exported). Suppose a small family-run business also produces cameras on Batam. Assuming cameras originating in Indonesia are eligible for treatment, the ownership (and, for that matter, structure) of the producer is irrelevant.

Likewise, it does not matter how the benefits of tariff savings from *GSP* treatment actually are used. Whether Sony and the small Indonesian enterprise pass them to workers, invest them in new capital equipment, or pay them to shareholders in Japan, the U.S., and

¹⁹³ *See* 19 U.S.C. § 2461.
elsewhere does not affect GSP eligibility. Beyond identification of country and product eligibility, there are no more specifically intended beneficiaries. How, then, is it possible to assure the benefits of GSP treatment flow to people most in need? Or, does that question rest on a misunderstanding of what a GSP program ought to do?

II. **BDC Designation:**

**Income and Political Criteria**

The authority delegated by Congress to the President to designate a country as a BDC is set forth in Section 502 of the 1974 Act.\(^{194}\) A BDC designation occurs through either an Executive Order or Presidential Proclamation.\(^{195}\) A BDC can be a country, territory (such as an overseas dependent territory or possession of a foreign country), or group of countries in a FTA or CU treated as a single country.\(^{196}\) For example, on 21 March 1995, President Bill Clinton designated the West Bank and Gaza Strip a BDC. On 7 September 2004, President George W. Bush designated Iraq a BDC (effective 15 days later). The President must notify Congress of any designation (or termination), and give supporting reasons.\(^{197}\) Once the President grants BDC designation, that country is (along with other BDCs) listed in General Note 4(a) of the HTSUS.

Of course, the delegation from Congress is not unconstrained. There are three kinds of statutory limits on eligibility for BDC designation: income criteria; political considerations; and additional factors:

- **Income Criteria**

  The “D” in “BDC” stands for “Developing,” so it is logical enough that a country that is not poor is ineligible for GSP treatment. Two criteria assure this result:

  1. **Developed Countries.**
     Developed countries are not eligible for preferential trade treatment under the GSP program. These countries are Australia, Canada, all EU states, Iceland, Japan, Monaco, New Zealand, Norway, and Switzerland.\(^{198}\) The obvious justification for excluding these countries is they do not need it. However, this justification might be somewhat less persuasive for certain regions with new countries that have joined the EU, and potentially to certain countries or regions therein that might join the EU in the future.

  2. **Graduation:**
     A BDC designee may become a “high income” country as defined by the World Bank. (Indeed, it is hoped a designee does not remain poor.) The cut-off the World Bank used for “high income” is a *per capita* GNP of approximately U.S. $9,206.

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\(^{194}\) See 19 U.S.C. § 2462.

\(^{195}\) See 19 U.S.C. § 2467(1).

\(^{196}\) See 19 U.S.C. § 2467(2).


\(^{198}\) See 19 U.S.C. § 2462(b)(1).
which covers less than one-sixth of the population of the world (roughly 29 countries with a population of one million or more, totaling 0.9 billion people). If a BDC graduates into this rarified cohort, then the President must terminate its BDC status effective on 1 January of the second year after the World Bank defined it as “high income.” 199 Thus, for example, Bahrain, Brunei, Bermuda, and Nauru were dropped from the list of BDCs, because their per capita GNP surpassed the statutory limit. Seychelles, Uruguay, and Venezuela graduated effective 1 January 2017, and in the case of Seychelles, that graduation meant the country lost AGOA benefits, too. That is because qualifying as a GSP BDC is a pre-condition for AGOA eligibility. Likewise, in March 2019, the U.S. announced Turkey, to which it had granted GSP benefits in 1975, no longer qualified as a BDC, because of its increased GNP, as well as declines in its poverty rates and diversified export base. 200

Query whether there is an argument against the graduation requirement?

On the one hand, earlier iterations of the GSP statute did not refer to World Bank cohorts. Rather, the U.S. defined a per capita GNP threshold, which periodically adjusted. Reference to the groupings of an international economic organization is less susceptible to domestic political manipulation. On the other hand, the World Bank’s cohorts presume an income-based approach to poverty. They say nothing about income distribution or broader measures of development. Thus, a BDC could graduate after crossing into the “high income” cohort, notwithstanding a high and increasing Gini coefficient (indicating greater income inequality) or lower female educational enrollments and labor force participation rates.

● Eight Political Considerations

There is an eight-point list of factors that render a country ineligible for designation by the President as a BDC. This list might be dubbed limitations on eligibility based on American political interests:

(1) Communism

A communist country is ineligible. There is one exception: the country, albeit communist, already receives non-discriminatory (i.e., MFN) treatment from the

199 See 19 U.S.C. § 2462(e).
U.S., is a WTO Member and a member of the IMF, and is “not dominated or controlled by international communism.”

Until China became a WTO Member effective 11 December 2001, and received permanent normal trade relations (PNTR) status with the U.S., it was ineligible for GSP treatment. Vietnam sought and obtained PNTR status in connection with its bid for WTO Membership (effective 11 January 2007). Could it be said Vietnam is “dominated or controlled by international communism”? Is there any such thing left as “international” communism?

(2) Cartels

A country is ineligible if it is a party to an arrangement, the goal of which is “to withhold supplies of vital commodity resources from international trade or to raise the price” of the commodity “to an unreasonable level,” and the effect of which is “to cause serious disruption of the world economy.”

This limitation is for cartels, particularly, OPEC. Insofar as most OPEC members boast high per capita incomes, this exception is sensible. However, there are a few notable poor countries in OPEC, such as Nigeria.

(3) Reverse Preferences

A country is ineligible if it affords preferential trade treatment to exports from a developed country other than the U.S., and this treatment “has, or is likely to have, a significant adverse effect” on American commerce. This constraint is for “reverse preferences.”

For example, if a country in the ACP grant DFQF to merchandise from the EU, under an accord like the Cotonou Agreement, and this grant adversely affects America, then the country is ineligible for GSP treatment.

(4) Property Rights

A country is ineligible if it has nationalized or expropriated American property, including IP, or has taken action that is similar in effect to a nationalization or expropriation (namely, nullifying or repudiating an existing contract, or imposing or enforcing taxes or restrictive maintenance or operational conditions). There are three exceptions: the country has provided adequate and effective compensation to the property owner, is in negotiations to provide compensation, or is engaged in arbitration over a compensation dispute.

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The “property rights” limit on eligibility protects not only individual American citizens, but also any corporations, partnerships, or association that is 50% or more owned by a citizen. This constraint is redolent of the behavior against which Title III of the Helms-Burton Act was aimed, namely, trafficking in American assets confiscated by Fidel Castro’s regime in Cuba. That Act created a secondary boycott against, and called for treble damage liability for, such trafficking. (Of course, in December 2014, the U.S. announced an end to its trade embargo of Cuba.)

(5) Enforcement

A country is ineligible if it fails to recognize as binding, or enforce, an arbitral award in favor of the U.S. This “arbitration” limit protects individual American citizens, and also any corporation, partnership, or association that is 50% or more owned by an American citizen. For example, in 2012, the U.S. suspended Argentina because it failed to pay several long-standing international arbitration awards to American firms. The U.S. restored the benefits effective 1 January 2018, after Argentina resolved those arbitration award disputes, plus agreed to enhanced market access for American farm products and IP protection.

(6) Terrorism

A country is ineligible if it aids or abets international terrorism (e.g., by granting sanctuary from prosecution for an alleged act), or fails to support the efforts of the U.S. to combat terrorism. This limitation is consistent with the Iran and Libya Sanctions Act of 1996, as amended, which takes aim at terrorist sponsorship, and at the proliferation of nuclear, biological, and chemical weapons.

(7) Worker Rights

A country is ineligible if it fails to afford “internationally recognized worker rights.” These rights track the five most important ones set forth by the ILO: the right of association; the right to organize and bargain collectively; a prohibition on forced or compulsory labor; a minimum age for the employment of children (as well as a prohibition on the worst forms of child labor); and acceptable conditions of work (specifically, as to minimum wages, work hours, and safety and health standards). In the GSP context, however, this list is not exclusive. The President must report annually to Congress on the status of internationally recognized worker rights in each BDC.

(8) Child Labor

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A country is ineligible if it “has not implemented its commitments to eliminate the worst forms of child labor.”\textsuperscript{210} There are four “worst forms:” slavery in any form (e.g., sale, trafficking, debt bondage, forced or compulsory labor generally or for the armed forces); prostitution and pornography; illicit activities (e.g., narcotics production and trafficking); and work that by its nature “is likely to harm the health, safety, or morals of children.”\textsuperscript{211} The President’s annual report on the status of internationally recognized worker rights in each BDC must include discussion of efforts to eliminate the worst forms of child labor in that country.\textsuperscript{212}

Not all political limitations on the President’s discretion are equally severe.

The President cannot waive the first three limits. However, the President can designate a country as a BDC if it is not in full compliance with any one of the last five restrictions, if that designation “will be in the national economic interest of the United States.”\textsuperscript{213} While the President must report to Congress on what would amount to a waiver of one or more of these eligibility criteria, the words “national economic interest” seem intended to give the President flexibility to escape a restriction. Further, the President must withdraw or suspend designation (by Executive Order or Presidential Proclamation) of any country as a BDC under “changed circumstances,” i.e., a country no longer satisfies the political considerations.\textsuperscript{214}

Interestingly, the list of political considerations has grown longer over time. For instance, Section 412 of the \textit{Trade and Development Act of 2000} added the eighth restriction. Section 4102(a) of the \textit{Trade Act of 2002} prohibited designation of beneficiary status to any country that has not supported the U.S. in combating terrorism. Section 4102(b) of the \textit{Act} added “prohibition on the worst forms of child labor” to the definition of “internationally recognized worker rights.” As a general proposition, to what extent is it accurate to say GSP benefits have become more, not less, conditional?

Demands from politicians to add yet more considerations continue. For example, in September 2013, Representative Lee R. Terry (Republican-Nebraska) introduced the \textit{Playing Fair on Trade and Innovation Act} (H.R. 3167).\textsuperscript{215} He was particularly vexed at India for engaging in what he claimed was unfair and discriminatory treatment that hurt American companies and workers. So, his bill called for two amendments to the GSP consideration: a country would not be treated as a BDC if it (1) fails to provide adequate and effective IPR protection, or (2) maintains local content requirements (other than for government procurement for non-commercial purposes).\textsuperscript{216}

\textsuperscript{210} 19 U.S.C. § 2462(b)(2)(H).
\textsuperscript{211} 19 U.S.C. § 2467(6).
\textsuperscript{212} See 19 U.S.C. § 2464.
\textsuperscript{213} 19 U.S.C. § 2462(b).
\textsuperscript{214} 19 U.S.C. § 2462(d)(2).
\textsuperscript{216} in 19 U.S.C. § 2462(b)(2)
III. BDC Designation (Continued):
Additional Factors

There are seven further requirements the President must consider in deciding whether to grant BDC status to a particular country. That is, even if a country is not a developed one, and even if it satisfies the aforementioned political considerations, the President must consider the following factors:

(1) Desire?

Has the country expressed a desire to be designated a BDC?\(^{217}\) In most instances, this factor ought to be a mere formality.

(2) Development Level?

Does the level of economic development of the country, measured by per capita GNP, living standards, and other economic factors the President deems appropriate, make it an appropriate designee for BDC status?\(^{218}\) This factor leaves some room for discretion, as it essentially calls for a decision by the President as to whether the country “is poor enough” for the GSP program.

(3) Other Countries?

Do other major developed countries extend GSP treatment to the country?\(^{219}\) Arguably, this factor can be used in favor or against a designation of eligibility.

On the one hand, getting benefits from other developed countries helps the case of a country for BDC status. It shows other wealthy countries judge the country worthy for such benefits. On the other hand, it hurts the case, because it supports a conclusion that the burden of giving is appropriately shared, or that others have done enough.

(4) Market Access?

To what extent has the country assured the U.S. “it will provide equitable and reasonable access to the markets and basic commodity resources” of the country, and also assured the U.S. “it will refrain from engaging in unreasonable export practices.”\(^{220}\) It is difficult to see this factor as other than an expression of American self-interest, i.e., a kind of *quid pro quo*, contrary to the letter and spirit of GATT Article XXXVI:8, calling for “something in return” for a designation of BDC status.

\(^{217}\) See 19 U.S.C. § 2462(c)(1).
\(^{218}\) See 19 U.S.C. § 2462(c)(2).
\(^{219}\) See 19 U.S.C. § 2462(c)(3).
\(^{220}\) 19 U.S.C. § 2462(c)(4).
America applied this criterion against India in March 2019, with President Donald J. Trump (1946–, President, 2017–2021) announcing he would withdraw GSP treatment to India effective 2 May (but postponed to 5 June), because India failed to provide U.S. companies with equitable and reasonable access to Indian markets.\(^{221}\) Petitions from America’s dairy industry (the U.S. Dairy Export Council and National Milk Producers Federation) and medical device manufactures (the Advanced Medical Technology Association) had triggered the GSP review of India. The petitioners argued Indian trade barriers impeded (e.g., high tariffs and onerous safety checks on dairy products, and price controls on medical devices) their exports. Also upsetting the U.S. was India’s new e-commerce legislation mandating data localization for credit card payment companies (e.g., MasterCard and Visa), restrictions on e-commerce businesses (e.g., Amazon and Flipkart, disallowing them from selling goods made by companies in which they have an equity interest), plus higher tariffs on electronic items and smartphones.

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\(^{221}\) See Proclamation 9902 of May 31, 2019, To Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974, 84 Federal Register Number 108, 26323-26329, (5 June 2019), www.govinfo.gov/content/pkg/FR-2019-06-05/pdf/2019-11986.pdf; The White House, Proclamation to Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974, 31 May 2019, www.whitehouse.gov/presidential-actions/proclamation-modify-list-beneficiary-developing-countries-trade-act-1974-2/ [hereinafter, May 2019 Proclamation]; The White House, Text of a Letter to the Speaker of the House of Representatives and President of the Senate, 4 March 2019, www.whitehouse.gov/briefings-statements/text-letter-speaker-house-representatives-president-senate-8/; Neha Dasgupta, India Plays Down Trump Decision to Remove U.S. Trade Privileges, REUTERS, 1 June 2019, www.reuters.com/article/us-usa-india-trade-india-plays-down-trump-decision-to-remove-u-s-trade-privileges-idUSKCN1T2300; India Again Extends Deadline to Impose High Import Duties on 29 U.S. Products Till 2 May, BLOOMBERG QUINT (Mumbai), 30 March 2019, www.bloombergquint.com/global-economics/india-again-extends-deadline-to-impose-high-import-duties-on-29-us-products-till-may-2#gs.3up7jr; Trump Plans to Scrap, Donald Trump Plans. Via the May 2019 Proclamation, the President also withdrew the exemption for India from the January 2019 Section 201 Escape Clause Action against crystalline silicon photovoltaic cells and large residential washing machines (discussed in a separate Chapter). That is because, as per Paragraph 8 of the Proclamation, those safeguards “exempt[ed] imports of covered products from developing countries that are [WTO] Members …, including India, if such a country’s individual share of total imports of the product does not exceed 3 percent and if imports of all such countries with less than 3 percent import share do not collectively account for more than 9 percent of total imports of the product.” With India no longer a BDC for GSP purposes, the President “determined to remove it from the list of developing country WTO Members exempt from application of the safeguard measures.”

The day before the U.S. initially was set to cancel India’s GSP preferences, 24 members of Congress requested the President not to end India’s GSP preferences. See Nandita Bose, U.S. Lawmakers Urge Trump Administration To Not End India’s Trade Privileges, REUTERS, 3 May 2019, www.reuters.com/article/us-usa-trade-india/u-s-lawmakers-urge-trump-administration-to-not-end-indias-trade-privileges-idUSKCN1S91VI. Led by Jim Himes (Democrat-Connecticut), the bipartisan signatories emphasized not the benefits to India, but rather the harm to America, which would result, such as the payment of hundreds of millions of dollars in tariffs by American importers of Indian merchandise, which could lead those importers to cut wages and salaries, lay off employees, and curtail domestic investment. Moreover, India could well retaliate by raising its applied MFN duties on U.S. merchandise. Likewise, led by Senators John Cornyn (Republican-Texas) and Mark Warner (Democrat-Virginia), Co-Chairs of the Senate’s India Caucus, over 30 Senators wrote to the USTR that ending GSP benefits for India would cost raise costs of Indian merchandise to American consumers, as the tariffs would be passed onto them. See Scrapping India’s Trade. They called for postponing a decision on withdrawal until after the Indian General Election results were known on 23 May 2019.
India argued such measures were necessary to protect data privacy, provide health care products at affordable prices, and ensure a level playing field for Indian SMEs. Though India was the largest GSP beneficiary, with about 1,900 eligible articles (including certain agricultural goods, auto parts, chemicals, certain leather items, cosmetic jewelry, pharmaceuticals, and plastics) exported to the U.S. annually (as of 2017) worth $5.7 billion, the tariff savings amounted only to about $260 million. In other words, withdrawing GSP benefits from India was of limited commercial significance, though to be sure Indian SME producer-exporters (e.g., of engineering goods) would be harmed.

America’s withdrawal of GSP benefits for India caused India to move forward, effective 16 June 2019, with counter-retaliatory tariffs of up to 70% on 28 U.S. product categories; India had been putting off since 21 June 2018 in connection with the Section 232 25% steel and 10% aluminum tariffs (discussed in a separate Chapter) America had imposed effective 23 March 2018 in the hopes of settling that dispute. Taking aim at India’s data localization rules, the U.S. threatened to restrict the number of visas (specifically, H-1B skilled foreign worker permits) for Indians, cutting them from roughly 70% to 10%-15% (of 85,000 total) that the U.S. normally allocates annually to Indian IT service professionals. Fears of an Indo-American Trade War circulated.

India has not been the only GSP beneficiary targeted by the U.S. over a market access dispute. Thailand, the largest GSP beneficiary in 2019, allegedly failed to grant U.S. pork products equitable and reasonable market access. Effective 30 December 2020, the U.S. slashed the list of Thai-origin products eligible for GSP treatment, revoking benefits for one-sixth of Thailand’s GSP trade (including for

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example, certain auto parts, chemicals, latex mattresses, and plastic glasses frames.\textsuperscript{226}

Query whether is it appropriate to use the threat of GSP treatment withdrawal as leverage to force changes in trade laws that may not be in the interests of a BDC? Consider this question in light of the non-reciprocity expectation in Paragraph 5 of the 1979 Tokyo Round \textit{Enabling Clause}, which casts doubt on the American market-access criterion as a condition for GSP benefits:

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, \textit{i.e.}, the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters’ development, financial and trade needs.

India certainly did not think the U.S. withdrawal was proper, and contemplated the imposition of tariffs on over 20 American products, such as apples, in retaliation.\textsuperscript{227} It did not actually do so, perhaps thinking a more constructive approach might be both to negotiate improved reciprocal market access terms with the U.S., and consider how to capitalize on the Sino-American Trade War by increasing “Make in India” merchandise it could export to the U.S. that otherwise was subject to America’s 25% Section 301 tariffs against Chinese-origin merchandise (discussed in a separate Chapter).\textsuperscript{228}

\textit{(5) IP?}


\textsuperscript{228} See \textit{India Roiled}; Debashis Chakraborty, Sourabh Maheshwari & Sushil Parashar, \textit{Recent U.S. – China Tariff War: Opportunities for Indian Pharmaceutical Exports?}, Indian Institute of Foreign Trade (Kolkata), Munich Personal RePEC Archive, MPRA Paper No. 89643, 21 October 2018, \url{https://mpra.ub.uni-muenchen.de/89643/}.
To what extent does the country provide “adequate and effective” IP rights?\(^\text{229}\) Once again, query the extent to which American self-interest is at play? Query, also, whether this is necessary given the WTO TRIPs Agreement and Special 301 in U.S. trade law? Notably, there are lobbying groups carefully monitoring which countries are designated BDCs.

For instance, the Coalition for GSP (based in Washington, D.C., and on line at [www.tradepartnership.com](http://www.tradepartnership.com)), is comprised of businesses, trade associations, and consumer organizations. It lobbies for the longest possible extension of the GSP program. However, some of its members have a particular interest in the IP sector (e.g., entertainment and pharmaceutical companies). For them, GSP renewal may be an opportunity to pressure actual or prospective BDCs to tighten enforcement of IPs, by conditioning their support for renewal on such action.

\(^{(6)}\) *Investment and Services?*

To what extent has the country reduced trade distorting investment practices (e.g., export performance requirements) and barriers to trade in services?\(^\text{230}\) The strong American interest in FDI and market access for services again raises the questions of self-interested conditions and insertion of reciprocity into the GSP program.

For instance, this factor empowers the President to deny designation of BDC status to a country that offers service schedule liberalization commitments that the President judges insufficient to meet the interests of U.S. financial institutions, telecommunications firms, and other service providers.

\(^{(7)}\) *Worker Rights?*

To what extent is the country taking steps to afford its workers internationally recognized worker rights?\(^\text{231}\) While not to be read as such under basic statutory construction rules, this factor appears superfluous in light of the seventh political consideration above. Still, it is used. For instance, Belarus lost GSP benefits because of its failure to afford its workers internationally recognized worker rights (declared by President Clinton (1946, President, 1993-2000) on 6 July 2000). So, too, did Burma in 1989, but effective November 2016 they were restored thanks to what the U.S. said were improvements by Burma’s government (which was democratically elected in November 2015) in fighting child and forced labor, and human trafficking. In 2019, America made clear that it considered combatting human trafficking to fit within the meaning of affording internationally recognized worker rights: following an AFL-CIO petition, the U.S. suspended GSP privileges for Thailand, because of its tolerance for such trafficking, and concomitantly,

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\(^{229}\) 19 U.S.C. § 2462(c)(5).
\(^{230}\) See 19 U.S.C. § 2462(c)(6).
\(^{231}\) See 19 U.S.C. § 2462(c)(7).
forced labor and slavery, especially in the fishing and seafood industries.\textsuperscript{232} Items from these industries, as well as lumber and textile products, lost \textit{GSP} benefits.

The President may designate particularly poor countries as “least developed beneficiary developing countries” (LDBDCs). To receive this status, a country must be a BDC, and thus must meet all eligibility requirements.\textsuperscript{233} General Note 4(b) of the HTSUS lists these countries. For example, on 10 January 2003, President George W. Bush (1946, President, 2001-2009) designated Afghanistan a BDC (with retroactive effect to 29 January 2001), and an LDBDC (effective 13 February 2003). The benefit (as it were) of LDBDC status is a modestly expanded eligible product list applies to that country.

Summing the limitations above, there are 17 in total – two income criteria, eight political considerations, and seven additional factors. Are these limitations justifiable, and by what rationale? If the aim of the \textit{GSP} program is, or ought to be, assistance to poor countries and the promotion of them into healthy trading partners, then what sort of limitations, if any, are justifiable, and why? Should least developed countries have fewer eligibility requirements?

\section*{IV. Case Study of Bangladeshi Worker Rights}

Is it appropriate to base \textit{GSP} eligibility on worker rights criteria? One argument is such rights naturally accrue, or trickle down, as a country grows in prosperity. Oxfam International, however, counters that “[t]he trickle-down discourse of trade incorrectly sees good labor standards as an outcome of economic development, rather than a contributing factor towards it.”\textsuperscript{234} So, Oxfam urges “workers’ rights and the enforcement of these rights should be seen as crucial determinants of poverty alleviation.”\textsuperscript{235}

Is Bangladesh a case in point for both arguments? That country has been in trouble for allegedly not demonstrating progress on affording internationally recognized worker rights. In 2007, the AFL-CIO petitioned the USTR to review compliance by Bangladesh with labor laws. The union was concerned about systemic problems, such as the Bangladeshi government thwarting efforts by workers in that country to unionize, putting up baseless criminal charges against labor activists, and failing to enforce laws on election of worker representatives, minimum wages, mandatory employer contributions to social security funds, and safety. The USTR still had not completed the review by October 2012, when the AFL-CIO filed a petition with the Administration of President Barack H. Obama (1961, President, 2009-2017) calling for removal of the BDC status because of concerns about the failure of Bangladeshi authorities to enforce labor laws, and fire safety.

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\textsuperscript{232} See James Politi & John Reed, \textit{U.S. to Halt Preferential Treatment for $1.3 bn. of Thai Goods}, \textit{Financial Times}, 26 October 2019, www.ft.com/content/2ba34aaa-f7d1-11e9-a354-36acbb0d9b6?shareType=nongift.
\textsuperscript{233} See 19 U.S.C. §§ 2462(a)(2), 2467(5).
\textsuperscript{235} Oxfam International.
\end{flushright}
Those concerns proved tragically prescient. In November 2012, there was a fire at the Tarzeen Fashions clothing factory in Dhaka in which 112 workers were killed. That factory made apparel for the American market, including Marine Corps-branded clothes. It also made clothes for Wal Mart on an unauthorized basis, as Wal Mart had de-authorized it as a supplier. In December 2012, 12 Democratic Members of the House of Representatives joined the AFL-CIO, urging the USTR to finish its review of the BDC status of Bangladesh. Then, in April 2013, the collapse of the Rana Plaza garment factory on the outskirts of Dhaka took the lives of 1,129 workers. Pressure from Congress, including a letter from 9 Democratic Senators, increased: GSP benefits from Bangladesh should be suspended because of its failure to satisfy the statutory worker rights criteria. And, so they were, by President Barack H. Obama in June 2013. But, query whether the move was wrong-headed. T&A merchandise accounts for 96% of Bangladeshi exports to America (as of 2012), none of which receives GSP treatment. Most T&A items are excluded from the GSP product eligibility list. Indeed, less than 1% of Bangladeshi merchandise shipped to America gets GSP treatment. Specifically, 0.5% of Bangladeshi exports got that treatment, whereas T&A merchandise were subject to duty rates of 15-32%. So, the suspension penalized that tiny fraction of Bangladeshi exporters, and they likely had little if anything to do with the RMG factory disasters. Conversely, the suspension did not target the guilty T&A producers.

In July 2013, the U.S. and Bangladesh signed an “Action Plan” to bolster worker rights and safety, with a view to reinstatement of GSP benefits. One year on, Bangladesh remained ineligible.

The EU took a different, two-pronged approach. First, rather than annul Bangladesh GSP treatment under its scheme, it issued a caution in the form of a “compact.” The compact took a form of a July 2013 trilateral deal to enhance workers’ safety among the EU, Bangladesh, and ILO. Pointedly, the EU said it was not willing to strike Bangladesh from DFQF treatment, partly out of concern for Bangladesh: shipping 60% of its clothing exports to the EU, it is dependent on that market, and its RMGs get duty-free treatment under the European EBA scheme. Rendering millions of Bangladeshis in the RMG sector was not on for the Europeans, and counterproductive for both sides.

Second, in May, EU retailers signed with Bangladesh an “Accord on Fire and Building Safety in Bangladesh” to improve workplace safety and enhance labor rights in the RMG sector, including EPZs. Under it, Bangladesh agreed to address structural building and fire safety schemes by June 2014, recruit 200 additional inspectors by the end of 2013, and strengthen rights of freedom of association and collective bargaining. Notably, no less than 72 large clothing retailers, most of them European (e.g., Carrefour and Marks and Spencer), signed the Accord. Other signatories included fashion brands (e.g.,

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236 Such items may be eligible for DFQF treatment by the U.S. under other, limited GSP-like schemes, in particular, the CBPTA for Caribbean countries. On 10 October 2020, President Donald J. Trump signed House Resolution 991, which renewed this scheme for 10 years, retroactive to 30 September.
Benetton), labor unions (e.g., Industriall, UNI union), and non-governmental organizations (NGOs, e.g., Clean Clothes Campaign and Worker’s Rights Consortium).

Under the Accord, all factories used by the retailers are inspected, with the results published. Any facility with a failing grade is ordered to cease operations, and devise remedial plans. The workers therein are informed of their right to refuse to enter that facility, but while it is closed, to be paid for up to 6 months. If a company owning the facility does not make the necessary repairs, thus remaining in breach of its commitments under the Accord, then the other signatories to the Accord can lodge a complaint against it. (Of course, they also can boycott the violator and its facility). The complaint initially is heard by a steering committee, and then (failing resolution) by an arbitration panel. The outcome of the arbitral process is enforceable in a court of law in the home country of the relevant company. However, the Accord does not contain any penalties.

So, the Accord is legally binding under Bangladeshi law, meaning foreign retailers are responsible for safety lapses in the Bangladeshi factories from which they source, even if those facilities are owned and managed by Bangladeshis. It also is binding under the law of the home country of the company owning a factory in question. The binding nature of the Accord and specter of legal accountability proved too much for many North American retailers, like Gap and Wal-Mart, which refused to sign the Accord. They developed their own action plan, the provisions of which resembled those in the Accord, but which were unenforceable. Wal-Mart argued that “[i]f you have to find $10 m[illion] for factory safety, and put aside another $10 m for lawyers, you will really start to suck the energy out of this.”

To be sure, the increase in well-being of Bangladeshi RMG workers, especially women, and the multiplier effects thereof, is undeniable. Robbing Bangladesh of its comparative advantage by increasing its costs prematurely will help only other countries, such as China and Vietnam, with substantial RMG industries. Disney said it would shift production out of Bangladesh.

But, query whether an unenforceable obligation will compel foreign multinationals to deal with dangerous conditions in their Bangladeshi suppliers. They have promised to reduce the high human cost of cheap garments since 1993, but the sanction of reputational integrity seems not to have made much difference.

V. Eligible Articles and Extensive Ineligibility List

Under authority delegated by Congress to the President, the President may designate articles—i.e., a category of merchandise—as eligible for GSP preferences, namely, duty-free treatment. The designation occurs by Executive Order or Presidential Proclamation. The USTR announces both designations and denials of eligibility in the Federal Register. An article denied designation may not be reconsidered for at least 3 years.

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237 Accord, Alliance, or Disunity?, THE ECONOMIST, 13 July 2013 at 57 (quoting Wal-Mart executive Jay Jorgensen).
after the denial. The President also is authorized to designate eligible articles from LDBDCs.

Procedurally, before any designation of eligibility with respect to articles, public hearings must be held, and advice must be obtained from the ITC (and other Executive Branch agencies) on the probable domestic economic impact of granting eligibility to a particular category of merchandise. This process is an opportunity for lawyers representing exporting countries, importers, domestic producers, and consumers to make arguments in favor or, or against, an eligibility designation.

By no means is a petition for eligibility accepted without controversy, at least not unless there is no American producer of a like product that could fear competition from the foreign merchandise if it received eligibility. In December 2012, the Administration of President Barack H. Obama denied a petition to add pinch-seal plastic bags to the GSP product eligibility list. Might there have been a good environmental reason for this denial?

For some kinds of merchandise, the room for argument is focused. The GSP statute renders seven categories of “import sensitive” merchandise as ineligible for duty-free treatment – the “Ineligible List,” outlined below. Arguments about eligibility, then, focus on as a factual and legal matter an article is properly classified within an ineligibility category.

Arguments also may focus on whether an article is, in fact, “import sensitive.” That is because it is not clear from the statutory language whether an article properly classified in one of the categories on the Ineligible List is deemed, by virtue of that classification, to be import sensitive. On the one hand, the chapeau to the List says “The President may not designate any article as an eligible article … if such article is within one of the following categories of import-sensitive articles.” That text appears to presume an article within a category is import-sensitive. On the other hand, some of the categories on the List (identified below) repeat the adjective “import-sensitive,” which suggests room for an argument about import sensitivity.

Obviously, advocates for preferential treatment (typically, counsel for exporters and importers, and some consumer groups) will argue against a finding of import sensitivity and a classification of ineligibility, and advocates against preferential treatment (typically, counsel for domestic producers) will argue the contrary positions.

The Ineligible List is as follows. Consider the extent to which a BDC may have a keen export interest in articles on the list. (Consider, too, the List in relation to the development model Walt Rostow presents in The Stages of Economic Growth (1960), discussed in a separate Chapter.) Is it likely a BDC may have an export interest in ineligible articles as it proceeds from lower- to higher-value added manufacturing? Finally, is production of any of these articles in an advanced, services-based economy worth

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Is the American comparative advantage in these articles all but lost? If so, then is adjustment assistance for dislocated American workers, rather than protection against the products made by workers and poor countries, a better policy choice?

(1) **T&A Articles**

All T&A articles are ineligible for GSP treatment.242 There are two minor exceptions. First, articles are eligible if they were eligible before a specific date (1 January 1994). In other words, the date operates as a closure — if an article was not eligible as of the date, then it remains ineligible. Second, certain carpets, based on their method of production, are eligible. They are ones that are hand-loomed, hand-woven, hand-hooked, hand-tufted, or hand-knotted and classified under specific 8-digit categories in Chapter 57 of the HTSUS.

(2) **Watches**

All watches are ineligible for GSP treatment, with one exception. A watch entered into the U.S. after a specific date (30 June 1989) is eligible, but only if the President determines it will not cause “material injury” to U.S. manufacturing and assembly operation of watches, watch bands, straps, or bracelets.

(3) **Import-Sensitive Electronic Articles**

Any electronic article that is “import sensitive” is ineligible for GSP treatment. The reference to import sensitivity creates the possibility of arguing a class of electronic merchandise does not affect domestic producers, and thus ought to receive GSP treatment.

(4) **Import-Sensitive Steel Articles**

Any steel article that is “import sensitive” is ineligible for GSP treatment. Again, reference to import sensitivity creates the possibility of arguing no adverse effect on, or threat to affect adversely, domestic producers exists.

(5) **Import-Sensitive Glass Products**

Any glass (whether semi-manufactured or finished) article that is “import sensitive” is ineligible for GSP treatment. Once again, the reference to import sensitivity creates the possibility of arguing there is no adverse effect on domestic producers or threat thereof, and thus ought to receive GSP treatment.

(6) **Other Import-Sensitive Articles**

Any other article the President determines is “import sensitive” in the context of the GSP program is ineligible.\(^{247}\) This “catch all” category of the Ineligible List is a potentially large, as it is unrestricted to the type of merchandise, the production process, or its classification in the HTSUS.

(7) **Footwear**\(^ {248}\)

All shoes and other footwear are ineligible for GSP treatment. There is a minor exception, namely, for footwear that was eligible on or before a specific date (1 January 1995). That is, footwear ineligible as of that date remain ineligible.

(8) **Leather Goods**\(^ {249}\)

All leather goods are ineligible for GSP treatment. Such goods include handbags, luggage, flat goods (e.g., change purses, eyeglass cases, and wallets), and work gloves, as well as apparel and shoes. The same minor exception exists for these goods as for footwear, namely leather goods are eligible if they were eligible on or before a specific date (1 January 1995).

(9) **Articles Subject to a Safeguard**\(^ {250}\)

An otherwise eligible article subject to a safeguard action under Section 201 of the Trade Act of 1974 (i.e., the Escape Clause\(^ {251}\)) is ineligible. During the Tokyo Round, less developed countries worried developed countries would use GATT Article XIX to protect their domestic industries. The U.S. ensures GSP benefits do not undermine safeguard relief by putting articles targeted for this relief on the Ineligible List.

(10) **Articles Subject to a National Security Sanction**\(^ {252}\)

Any otherwise eligible article subject to a national security action under Section 232 or 351 of the Trade Expansion Act of 1962, as amended is ineligible.\(^ {253}\) This exception came into play in the Section 232 actions (discussed in separate Chapters) on steel, aluminum, and steel and aluminum derivative products brought by the Trump Administration and continued during the Presidency Joseph R. Biden (1942, President, 2021-)

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\(^{250}\) See 19 U.S.C. § 2463(b)(2).
\(^{251}\) See 19 U.S.C. §§ 2251-2254.
\(^{252}\) See 19 U.S.C. § 2463(b)(2).
(11) **Agricultural Products**

There is no prophylactic ban on agricultural commodities (either primary or processed) from **GSP** treatment. However, there are two considerations. First, appropriate governmental agencies are required to assist BDCs to ensure their agricultural sectors are not oriented to export markets to the detriment of producing foodstuffs for their own people. Second, if an agricultural product is subject to a **TRQ**, then any shipment of that product above the in-quota threshold is ineligible for **GSP** treatment. In other words, over-quota shipments do not get a preference.

The limit on agricultural products affects sugar. Sugar is subject to a **TRQ** set by the Secretary of Agriculture. Once the Agriculture Secretary establishes the quota quantity that can be entered at a lower-tier duty, the USTR allocates the quantity among sugar exporting countries. These countries get a “Certificate of Quota Eligibility” (CQE), which must be returned with a sugar shipment to receive in-quota treatment. Under the **GSP**, a sugar-exporting BDC gets duty-free treatment for the in-quota quantity allocated to it, but not for any above-quota shipments. Of course, sugar is a product in which many developing countries and LDCs have a keen export interest, and for which (thanks to U.S. quotas) Americans pay a far-higher than world market price (resulting in considerable use of high fructose corn syrup (HFCS) as a substitute, yet HFCS is of dubious health value).

Manifestly, the fact there are 11 broad categories on the Ineligible List illustrates the proposition that **GSP** treatment is not about duty-free entry of all merchandise from every poor country. Preference is only for certain products originating in eligible countries.

Significantly, even if an article is on the Ineligible List, it might be eligible for **GSP** treatment if the country of origin is a LDBDC. Specifically, six categories of otherwise ineligible merchandise remain ineligible even if they are from a least-developed beneficiary, namely: (1) **T&A**; (2) watches; (3) footwear; (4) leather goods; (5) articles subject to a safeguard remedy, national security sanction, or emergency tariff adjustment, or (6) agricultural products. That leaves a few categories from the Ineligible List as eligible if they are from a LDDC: (1) import-sensitive electronics, (2) import-sensitive steel, (3) import-sensitive glass, and (4) other import-sensitive articles. There is a “catch:” the ITC must advise the President that the article in question is “not import sensitive in the context of imports from least-developed beneficiary developing countries.” So, even as to the poorest of countries, product eligibility is conditional.

**VI. Sleeping Bags, Import Sensitivity, and Politics**

Manifestly, the more extensive the list of **GSP**-ineligible products, the less generous the **GSP** program is. A longer list adduces the exaltation of the self-interest of the rich over the needs of the poor. Yet, is there an argument for caution?

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Consider the debate that raged over whether to designate sleeping bags as an import-sensitive article and, therefore, ineligible for GSP treatment. Following the 1989 fall of the Berlin Wall, in 1992, to help the textile industry of the former Czechoslovakia, sleeping bags, the U.S. designated sleeping bags as not being import sensitive. So, they became eligible for duty free treatment, though ironically, Czechoslovakia never manufactured them. Subsequently, one of the world’s poorest countries, Bangladesh, began exporting this product to the U.S. Because of GSP treatment, Bangladeshi sleeping bags were not subject to the U.S. MFN duty rate of 9%.

In 2010, when the GSP program required another Congressional renewal, Senator Jeff Sessions (Republican-Alabama) vigorously opposed such action unless President Barack H. Obama agreed to designate non-down sleeping bags as import sensitive, and thereby remove them from GSP eligibility. Why? Because in Alabama was a sleeping bag manufacturer that purportedly prospered once the GSP scheme lapsed and its Bangladeshi competitors had to pay a 9% tariff. The Senator responded that those competitors were not Bangladesh, but Chinese. That is, a Chinese company established manufacturing and export operations in Bangladesh to avoid the 9% rate.

Ultimately, to secure renewal of not only the GSP program, but also of TAA, and to obtain passage of implementing legislation for FTAs with Colombia, Korea, and Panama, President Obama did as Senator Sessions asked. To critics, the President appeased the Senator, setting an adverse precedent that could prompt other legislators to hold hostage trade bills unless their protectionist demands were met. The legal reality is GSP eligibility depends on the country of origin of merchandise, based on rules of origin. It does not depend on the country of origin of the owners of the production and export facilities located overseas in a BDC. Hence, the fact the owners of the sleeping bag facility in Bangladesh are Chinese (or American, or of any other nationality) is irrelevant; what matters is the value added to the product in Bangladesh.

VII. First GSP Preferential ROO: 35% Statutory Value-Added Test

Even if a country qualifies as a BDC, and even if a merchandise category is eligible, it does not follow automatically a shipment of that merchandise will receive GSP duty-free treatment. The shipment must satisfy a rule of origin to ensure the article is “the growth, product, or manufacture” of a BDC.257 This preferential ROO has two prongs.

First, there must be no transshipment.258 The shipment of merchandise at issue must be imported directly from a BDC into the customs territory of the U.S. Thus, for example, assuming Mauritania is eligible for GSP treatment, Toyota cannot make cars in Japan, ship them to Mauritania, and thereby qualify those cars for GSP treatment. After all, the benefits of the treatment supposedly are directed at a poor country, and designed to encourage meaningful economic activity in that country.

Second, a Value-Added Test must be met. This test is designed to answer the question: “How much economic activity is ‘meaningful’?” The answer is 35%. The value added to merchandise in a BDC must be 35% or more of the appraised value of the article when it enters the U.S. The formula for the GSP Minimum Value-Added Test is:

\[
\text{If } (1) \quad \text{Cost or value of materials produced in the BDC} \\
\quad + \quad (2) \quad \text{Direct costs of processing operations in the BDC} \\
\quad = \quad or > 35\% \text{ of total value as appraised by the CBP at time of entry,}
\]

then merchandise satisfies the Test. If < 35%, then fails.

The extreme cases are easy ones. If all inputs used to produce merchandise are from a BDC, and all processing occurs in the BDC, then the Test is met. Conversely, the GSP statute expressly excludes (1) simple combining or packaging operations, and (2) mere dilution with water or another substance that does not materially alter the characteristics of an article. These operations alone do not qualify an article for originating in a BDC. However, difficulties and disputes arise when sourcing and production is multinational. Then, meaningful economic activity, in the sense of value added to merchandise, occurs both within and outside the BDC.

Should the location in which value is added matter? On the one hand, conferring a GSP preference on merchandise made largely outside of a BDC undermines country eligibility criteria. The 35% Value Added Test works in tandem with those criteria. On the other hand, as long as a BDC is not a mere transshipment platform, then at least some useful activity is undertaken there, and at least a few people are employed, even if all they do is minor assembly. By denying GSP treatment because less than 35% of the value is added in a BDC, is there a risk no work will be performed in the BDC, and no jobs will be created? Or, does the Test operate to shift – even distort – sourcing and production patterns to take advantage of GSP benefits?

Observe the 35% Test does not inquire into the nationality of the workers. It does not matter whether they are legal or illegal residents, or permanent or migrant workers. In theory, a group of American law students could be the employees on a farm, or in a factory, in a BDC producing GSP eligible merchandise. Put simply, what is done where, but not who does what, matters.

What happens if materials are imported into a BDC, and then incorporated into the production of an eligible article? Do imported materials qualify toward the 35% Test? This question is treated in the 1985 Torrington case (excerpted below). (See also the discussion of the Torrington case in Part I of the decision of the U.S. Court of Appeals for the Federal

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In brief, the answer is “yes, but only if the materials imported into a BDC are substantially transformed into a new and different article in that BDC before they are incorporated into the eligible article.” Stated differently, there must be (at least) two substantial transformations – of the imported materials into some intermediate product, and then of that product into the finished article, which is eligible for GSP treatment. This requirement is known as the “Dual Substantial Transformation” requirement, and it arises out of the Torrington case.

What, then, constitutes “substantial transformation”? Further, what difference should the number of substantial transformations make? Is the rationale, once again, that the U.S. seeks to ensure real economic activity takes place in a BDC, that the BDC is not a mere assembly operation? If so, consider a poor country in which, depending on the type of merchandise, even an assembly operation is a substantial activity.

Suppose two or more BDCs are members of an FTA or CU. An example might be Indonesia and Vietnam, which are in ASEAN, and ASEAN has an FTA, called “AFTA.” Assume an eligible article comes from Vietnam, but components come from Indonesia. Can the Indonesian components qualify in calculating the 35% minimum local content requirement? The answer is “yes.” Two or more BDCs that are members of the same FTA or CU may be treated as one BDC and cumulated to meet this requirement.

VIII. Second GSP Preferential ROO:
1985 Torrington Case Dual Substantial Transformation Requirement

TORRINGTON COMPANY v. UNITED STATES, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 764 F.2D 1563, 1565-1572 (1985)

Davis, Circuit Judge:

The Government appeals from a decision of the United States Court of International Trade ... holding that certain industrial sewing-machine needles imported from Portugal by appellee (Torrington) are entitled to enter the United States duty free under the Generalized System of Preferences (GSP). ... Agreeing that the imported articles meet the prerequisite for duty free entry under the GSP statute, ... we affirm.

I

Background

The GSP statute ... represents the United States’ participation in a multinational effort to encourage industrialization in lesser developed countries through international
trade. The [1974] Act authorizes the President (subject to certain restrictions) to prepare a list of beneficiary developing countries (BDCs), and to designate products of those countries which are eligible for GSP treatment. ... A designated product imported from a listed country may enter the United States duty free. ... One problem with this general program is that it could be used to allow a non-eligible country to conduct minimal finishing operations in a BDC, thereby reaping the benefits of the GSP at the expense of American manufacturers, but without the salutary effect of fostering industrialization in the designated country. Congress therefore provided that products from BDCs must meet certain minimum content requirements in order to qualify for duty-free treatment. To this end, 19 U.S.C. § 2463 [re-worded and re-codified at § 2463(a)(2)(A) as a result of amendments in 1996] provides:

(b) The duty-free treatment provided under section 2461 of this title with respect to any eligible article shall apply only –

(2) If the sum of (A) the cost or value of the materials produced in the beneficiary developing country ... plus (B) the direct cost of processing operations performed in such beneficiary developing country ... is not less than 35 percent of the appraised value of such article at the time of its entry in the customs territory of the United States.

... [T]he Customs Service has promulgated regulations interpreting the operative phrase ... “materials produced in the beneficiary developing country.” 19 C.F.R. § 10.177(a) (1984) states that

the words produced in the beneficiary developing “country” ... refer to constituent materials of which the eligible article is composed which are either:

(1) Wholly the growth, product or manufacture of the beneficiary developing country; or

(2) Substantially transformed in the beneficiary developing country into a new and different article of commerce.

Thus, if the value of the materials described in § 10.177(a)(1) and (2) plus the direct cost of processing operations performed in the BDC account for 35% of the appraised value of the merchandise, the merchandise is entitled to enter duty-free....

The question in this case is whether industrial sewing-machine needles which Torrington imported met these minimum content requirements. ...

The sewing machine needles at issue were exported from Portugal to the United States by Torrington Portuguesa, a manufacturing subsidiary of Torrington. The needles are classifiable under item 672.20 of the Tariff Schedules of the United States (TSUS), “Sewing machines and parts thereof.” At the time of the exports, Portugal was designated as a BDC and articles classifiable under item 672.20 were eligible products.
Torrington Portuguesa produced the needles from wire manufactured in a non-BDC and brought into Portugal. On this ground the Customs Service denied duty-free treatment to the needles because they did not incorporate any “materials produced” in Portugal, and the direct cost of producing the needles does not account for 35% of their appraised value. In Customs’ view the needles failed to meet the minimum content requirements of 19 U.S.C. § 2463(b). Torrington agrees that if Customs’ decision not to include the non-BDC wire in the calculation is correct, then the needles do not satisfy the 35% BDC content requirement. On the other hand, if the other requirements are met, then the 35% BDC content prerequisite is also satisfied.

... Initially, the wire runs through a swaging machine, which straightens the wire, cuts it to a particular length, bevels one end of the wire segment and draws out the straightened wire to alter its length and circumference at various points. The result is known in the needle industry as a “swaged needle blank,” a “needle blank,” or merely a “swage.” In an exhibit before the trial court, the parties included a linear drawing of a swage. The first quarter of a swage has roughly the same circumference as the wire segment from which it was made; the second quarter narrows from that size down to roughly half that circumference; the other half then extends straight out from the second quarter. At this point, the swage is useful solely in the production of sewing-machine needles with a predetermined blade diameter, though the resulting needle may vary in other respects (e.g., eye placement, eye size, and needle length).

The next process in the production of needles is “striking.” Striking involves pressing an eye into the swage, forming a spot to provide clearance for the thread, and bending the swage at a particular point. At this stage, the articles are known as struck blanks. The struck blank enters a mill flash machine which removes excess material around the eye and forms a groove along the length of the needle which carries the thread while the needle is in use. The merchandise is then pointed (i.e., sharpened) and stamped with a logo or other information. Finally, the needles are hardened, tempered, straightened, buffed, polished, cleaned and plated. Upon completion, the needle has a sharp point at the narrow end, a long groove running down three-quarters of its body ending near the point, and an eye somewhere in the groove with an indentation in the groove near the eye.

... In 1973-74, Torrington Portuguesa twice shipped large amounts of swages to Torrington to correct production imbalances between the two companies. Torrington Portuguesa realized no profit on the exchange, and the transfer was accounted for through appropriate entries in the two companies’ inventory and receivables accounts. These are the only transactions in swages in which Torrington (now the only U.S. manufacturer of these needles) has participated.

Based on these facts, the Court of International Trade held the needles to be entitled to duty-free entry under the GSP. ... [T]he Court ruled that, under Customs’ regulations, the non-BDC wire must undergo two substantial transformations when it is manufactured into a needle if the value of the wire is to be included in the 35% calculation, and that each of these transformations under 19 C.F.R. § 10.177(a)(2) must result in an “article of
commerce.” The Court stated:

It is not enough to transform substantially the non-BDC constituent materials into the final article, as the material utilized to produce the final article would remain non-BDC material. There must first be a substantial transformation of the non-BDC material into a new and different article of commerce which becomes “materials produced,” and these materials produced in the BDC must then be substantially transformed into a new and different article of commerce.

... The Court noted that the Customs Service and Treasury Department have consistently interpreted the regulations to require a dual transformation (i.e., two successive substantial transformations) in order to be eligible for GSP treatment, and that the requirement of a dual transformation advances the GSP’s goals by requiring greater work in the BDC and by thwarting manipulation of the GSP (which the content requirements were designed to avoid).

The court then turned to the question of whether the production of needles in Portugal satisfied the dual transformation requirement. The court determined that a substantial transformation occurs if a manufacturing process results in an article of commerce which has a distinctive name, character, or use. ... Here, the court held, the swaging process constitutes an initial transformation, and the succeeding processes constitute the second. The swage blanks, the court said, have a distinctive name, a different character from the wire segments from which they are made, and a specific use. Moreover, the swages are “articles of commerce” because, on the two documented occasions set forth in the stipulations, they have been the object of large transactions. Thus, the court concluded that the swaged needle blanks are constituent materials of which the needles are made, and their value (which includes the value of the non-BDC wire) should be included in the 35% value added calculation.

II

The dual transformation requirement

The parties disagree whether the GSP statute and regulations mandate a dual transformation between raw material and finished product if the latter is to be granted duty-free entry. Torrington contends that its transformation of the non-BDC wire into sewing machine needles – even if considered only a single transformation – was in itself sufficient. The Government counters that a single transformation is insufficient to change the non-BDC wire into a material “produced in the developing country” which, if used in the BDC, may then be considered in the BDC-content evaluation.

Like the CIT, we think that the statutory language of 19 U.S.C. § 2463(b) leads to the Government’s position. Congress authorized the Customs Service to consider the “cost or value of materials produced” in the BDC. (Emphasis added.) [See 19 U.S.C. § 2463(a)(2)(A)(ii)(I).] The parties agree that the wire clearly was not a BDC product. As wire, therefore, it may not be considered a BDC material. However, if Torrington
Portuguesa transformed the wire into an intermediate article of commerce, then the intermediate product would be an article produced in the BDC, and the value of that product (including the contribution of the wire to the value of that intermediate product) would be included.

The legislative history of § 2463 supports this reading. Congress used the content requirement to protect the GSP program from untoward manipulation:

The percentage ... assure[s] that, to the maximum extent possible, the preferences provide benefits to developing countries without stimulating the development of “pass-through” operations the major benefit of which accrues to enterprises in developed countries.

... In the absence of a dual transformation requirement, developed countries could establish a BDC as a base to complete manufacture of goods which have already undergone extensive processing. The single substantial transformation would qualify the resulting article for GSP treatment, with the non-BDC country reaping the benefit of duty-free treatment for goods which it essentially produced. his flouts Congress’ expressed intention to confer the benefits of the GSP fully on the BDC and to avoid conferring duty-free status on the products of a “pass-through” operation.

Moreover, Torrington’s contentions, if accepted, would tend to render the 35% requirement a nullity. If only a single transformation were necessary, then the “material produced” in the BDC as a result of this transformation would be the imported product itself. Customs would then face the problem of determining how much of the appraised value of the import resulted from materials produced in the BDC, when the only material produced was the import. The result would always be 100% since the product would always be a constituent material of itself. Congress clearly envisaged some way of separating the final product from its constituent materials, and the dual transformation requirement achieves this end.

III

The swages – substantial transformation into a new and different article of commerce

A. In Texas Instruments [v. United States, 681 F.2d 778 (CCPA 1982)] ... the Court of Customs and Patent Appeals adopted the rule, well-established in other areas of customs jurisprudence, that a substantial transformation occurs when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original material subjected to the process. ... Anheuser-Busch Brewing Assn. v. United States, 207 U.S. 556 (1908).... The CIT determined here that this substantial transformation test was satisfied when Torrington Portuguesa manufactured needle swages from the wire.

... Two critical manufacturing steps separate three items (wire, swage and needle) each of which is markedly different from the others. The initial wire is a raw material and
possesses nothing in its character which indicates either the swages or the final product. The intermediate articles – the swages – have a definite size and shape which renders them suitable for further manufacturing into needles with various capabilities. At that phase of the production process the material which emerges is more refined, possesses attributes more specifically applicable to a given use, and has lost the identifying characteristics of its constituent material. It is a new and different article.

... Manufacturing processes often differ in detail, but we must consider these differences in light of the GSP’s fundamental purpose of promoting industrialization in lesser developed countries. Trivial differences in manufacturing processes or techniques will not affect the overall benefit conferred upon the BDCs from the manufacturing conducted in those countries.

B. The CIT also concluded correctly that the swages were “articles of commerce.” The Government attacks this determination principally by arguing that the two incidents in which Torrington Portuguesa transferred swages to Torrington in this country should not count in deciding whether swages are articles of commerce. We note initially that the phrase “article of commerce” is found only in the regulation, not in the GSP statute, and therefore we interpret the “of commerce” requirement of the regulation in light of the statute’s purpose to further BDC industrialization. By emphasizing that the article must be “of commerce,” the Customs regulation imposes the requirement that the “new and different” product be commercially recognizable as a different article, i.e., that the “new and different” article be readily susceptible of trade, and be an item that persons might well wish to buy and acquire for their own purposes of consumption or production.

... Our conclusion is that an “article of commerce” – for the purposes of the pertinent Customs regulation – is one that is ready to be put into a stream of commerce, but need not have actually been bought-and-sold, or actually traded, in the past. Indeed, by requiring proof of actual arms-length transactions by unrelated parties, the Government implies that a new article (never before produced) can never be an article of commerce entitled to GSP treatment – a result not envisaged by Congress. In this instance, we agree with the CIT that the transfer of over four million swaged needle blanks from Torrington Portuguesa to Torrington is an adequate showing that swaged needle blanks are articles of commerce. There is no reason to believe that those articles could and would not be sold to other manufacturers of needles who wanted to purchase them for further manufacture into the final product.

IV

The needles – substantial transformation into a new and different article

The Government urges that, even if the production of swages from wire constitutes a substantial transformation, the manufacture of the needles from the swages does not. We are referred to ... the parties’ stipulations, in which they note that swages “are dedicated for use solely as sewing machine needles with a predetermined blade diameter.... In the majority of cases, a particular type of swaged needle blank becomes only a single particular type of needle.” The Government concludes from this that the swages are actually
unfinished needles, and do not undergo a substantial transformation into a new article in order to reach their final form. Torrington, also reading from the stipulations, notes that the swages lack the key characteristics of a needle since they have no points or eyes, and that a given swage can be processed into needles with different properties, e.g., eye size.

The Government relies for its position that swages are merely unfinished needles on cases such as *Avins Industrial Products Co. v. United States*, 515 F.2d 782 (1975) ... and *Lee Enterprises, Inc. v. United States*, 84 Cust. Ct. 208 (1980). These decisions concern the proper classification of imports under the rule that an item in the TSUS covers the article mentioned in finished or unfinished form. The courts ruled that a product is an unfinished form of an article if the product has been manufactured to the point where it is dedicated solely to the manufacture of that article. ... However, the Government’s reliance on these cases is not pertinent. The proper tariff classification is not dispositive of whether the manufacturing process necessary to complete an article constitutes a substantial transformation from the original material to the final product. ... Instead, we look – keeping in mind the *GSP’s* fundamental purpose of fostering industrialization in BDCs – to the actual manufacturing process by which the intermediate article becomes the final product.

In *Midwood Industries v. United States*, 313 F. Supp. 951 (1970), ... the Customs Court (now the CIT) determined that forgings for flanges could enter the United States without permanent country-of-origin markings because the importer substantially transformed the forgings in the United States into pipe. In one case, the importer cut the edges; tapered, beveled and bored the ends; and removed die lines and other imperfections from the surface of the final article. ... The court also heard testimony that, in their imported state, the forgings are useless unless processed into the final flange. ... The decision in that case was that the importer’s efforts resulted in a substantial transformation from the rough forgings into “different articles having a new name, character and use.” ... The court noted that the “imports were producers’ goods, and the flanges are consumers’ goods,” and held: “While it may be true, as some of the testimony of record indicates, that some of the imported forgings are made as close to the dimensions of the ultimate finished form as possible, they, nevertheless, remain forgings unless and until converted by some manufacturer into consumers’ goods.” ... The production of needles from swages is a similar process. The swages are bored (to form an eye), the ridge is carved, and the needle is pointed, cleaned, hardened, plated, etc. The swage is also the approximate size necessary to create the final needle, but, like the forgings in *Midwood*, they are producers’ goods. The final needles are consumers’ goods. The production of needles from swages is clearly a significant manufacturing process, and not a mere “pass-through” operation as the Government apparently contends. Portugal certainly reaps the benefit of this manufacturing process; indeed, short of manufacturing the wire itself, Torrington *Portuguesa* could do no more than it already does in the production of needles. In these circumstances, we think that Congress intended the *GSP* statute to apply.

For these reasons, we conclude: (1) that a dual substantial transformation in a BDC is a prerequisite for *GSP* treatment under the *GSP* statute and Customs regulations, (2) that
the swages which Torrington Portuguesa produced are a separate, intermediate “article of commerce,” and (3) that the industrial sewing-machine needles imported by Torrington are entitled to duty-free entry. The decision appealed from is therefore affirmed.

IX. **Third GSP Preferential ROO: Direct Shipment Requirement**

Some WTO Members that sponsor preferential schemes for developing and least developed countries impose, in connection with ROOs to define where merchandise is made, a direct consignment requirement. That means to qualify for a preference (e.g., tariff-free treatment), a producer-exporter in a beneficiary country must ship (transport) the merchandise directly to the preference granting importing country. Trans-shipment is essentially barred.

Yet, direct shipment may be difficult for some poor Members, especially landlocked ones (which have no choice but to ship their merchandise through a third country to a preference-granting Member), or ones with no significant port facilities that plug into major markets. How, exactly, are Laos (the only Southeast Asian landlocked country) or Gambia (whose only major port is Banjul) to move huge volumes of cargo to major markets like China, EU, India, and U.S. directly? So, at MC 10, the December 2015 Nairobi Ministerial Conference, WTO Members published a *Decision on Preferential Rules of Origin* that set out guidelines to facilitate LDC export qualification for preferences.262

In May 2019, the WTO Secretariat observed that even many LDCs cannot fully utilize preferences because of direct consignment requirements (as well as certification of origin and transportation rules) — even if the preferential ROO applicable to their merchandise is simple. Indeed, 82% of eligible LDC fruit, plant, and vegetable exports to preference-granting Members do not get a tariff preference.263 In October 2019, the Secretariat found a marked difference in under-utilization rates between LDCs that are landlocked and those with sea access.264 The utilization rate of preferences for landlocked LDCs was just 48%, i.e., the under-utilization rate is 52%, meaning 52% of their eligible merchandise gets no tariff preference. For LDCs with sea access, the under-utilization rate is 21%. Clearly, direct consignment requirements hinder tariff preference utilization, albeit with differential effects depending on the geographic position of an LDC.


**X. Discretionary Graduation**

- **Presidential Authority to Exercise Discretionary Graduation**

  The President may withdraw, suspend, or limit the application of duty-free treatment as regards a particular article, or indeed all articles from a country (in effect, the entire country). This process is known as “discretionary graduation,” and it has occurred annually since 1981 after an inter-agency review. Under amendments to the discretionary graduation rules in the *Trade and Tariff Act of 1984*, the President is required to engage in an annual review of all GSP-eligible products to determine whether they are sufficiently competitive to graduate. For any individual BDC, the outcome can be graduation of just one product (with the other products remaining eligible), or graduation of all products (meaning the country loses its status as a BDC).

  So, discretionary graduation can apply to a product, several products, or a whole country. The central question in the review is whether the article still needs GSP treatment, *i.e.*, does it need duty-free treatment to stay competitive in the American market? After all, there may be more worthy products and BDCs to which preferences should be shifted or focused. Technically, the President must take into account the general factors for GSP treatment, and the seven additional factors for country-eligibility criteria. In practice, discretionary graduation occurs for certain products from particular BDCs that demonstrate competitiveness, and thus allows a shift of preferences to lesser developed countries.

- **Instances of Discretionary Graduation of Countries**

  Examples of discretionary graduation of entire countries are Hong Kong, Korea, Singapore, and Taiwan. President George H.W. Bush (1924-, President, 1989-1993) graduated these countries (on 29 January 1988, effective 2 January 1989), because of their impressive level of economic development and competitiveness. (In October 2018, Taiwan self-declared for WTO purposes that it was a “developed” country.) He decided they could sustain their performance without GSP treatment. President Clinton graduated Malaysia (on 17 October 1996, effective 1 January 1997) because of its sufficient advancements in economic development and improved trade competitiveness.

  Discretionary graduation does not impact only NICs in East Asia. President Clinton also graduated (effective 1 January 1998) Aruba, Cayman Islands, Cyprus, Greenland, Macau, and Netherlands Antilles, as they met the definition of “high income” country set by the World Bank. For the same reason, he also graduated (on 6 July 2000, effective 1 January 2002) French Polynesia, Malta, New Caledonia, and Slovenia. Likewise, President Barak H. Obama graduated Saint Kitts and Nevis (effective 1 January 2014), because this country had attained “high income” status.

- **Russia and Appearance versus Reality**

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265 *See 19 U.S.C. § 2463(c)(1).*
President Obama did the same (on 7 May 2014) with respect to Russia, removing it entirely from the list of countries eligible for American GSP treatment. With a per capita GNP (in 2012) of $12,700, Russia satisfied World Bank criteria for being a “high income” country, and, as the President put it to Congress, Russia is “sufficiently advanced in economic development and improved trade competitiveness.” But, reality and appearance in Washington, D.C. often differ: was that the reason, or was it an “economic power play against Russia,” because of its actions in the Ukraine?

Consider the fact the only other high-income BDC, Uruguay, with a higher per capita income ($13,580) than Russia, stayed on the BDC list of 123 countries and territories. Could Russia complain against the U.S. in the WTO that America discriminated against it in withdrawing GSP benefits? What might be the American defenses: that the EU, too, excluded Russia from its GSP scheme; that there was no discrimination against high-income countries, because only Russia and Uruguay from that cohort were BDCs; and, that among high-income countries, only Russia was among the top 10 beneficiaries of the U.S. GSP?

- MFN Snap Back

In every instance, the result of withdrawal or suspension of duty-free treatment is re-imposition of the duty otherwise applicable, which in most instances is the MFN rate. That is because Congress – not the President – has the Constitutional authority (under the Foreign Commerce Clause, Article I, Section 8, Clause 3) to regulate foreign commerce, and thus establish tariff rates.

XI. Competitive Need Limitations

- Policy Logic

A major constraint on product eligibility for GSP treatment is known as “competitive need,” or a competitive need limitation (CNL). If (in any year beginning after 31 December 1995) a BDC exports to the U.S. (directly or indirectly) a product receiving duty-free benefits under the GSP program, and that product becomes competitive in the American market, then the President must terminate duty-free treatment. Here again, termination results in imposition of the normally-applied duty, which in most cases is the MFN rate. So, for example, in June 2013, President Barack H. Obama eliminated GSP benefits based on the breach of CNLs for a corn product from Brazil, and tires from Indonesia.

CNLs support the same policy goals served by discretionary graduation. First, they establish a benchmark for determining when products are successful in the American market against domestic and other foreign products and, therefore, no longer warrant preferential tariff treatment. Second, they ensure GSP benefits are allocated, or re-

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266 Quoted in Ken Monahan, Russia First GSP BRIC to Fall; Brazil, India Next? BGOV Insight, 31 International Trade Reporter (BNA) 934 (22 May 2014).

allocated, to less competitive articles and less well-off countries. Of course, from the perspective of a BDC, the concern is punishment for market success. Do both discretionary graduation and competitive need limitations serve an ulterior third goal, namely, to provide import protection to domestic producers of like or directly competitive products?

- **Defining “Competitive Need”**

A critical practical question is how the GSP statute defines “competitive needs.” Not surprisingly, it calls for an examination of the quantity, value, and relative import penetration of the eligible article shipped to the U.S.:

1. **Value Limitation**

The quantity of an eligible article has an appraised value in excess of the applicable amount for the calendar year in which the article is exported. In 1996, the threshold was $75 million. Each year thereafter, the threshold rises by $5 million. Thus, for example, in 2012 the threshold was $155 million, indicating it took 15 years (from 1996 to 2010) for the threshold to double. By 2016, the CNL was $175 million. No adjustment is permitted for the nature of the article. That is, the same threshold applies, whether the merchandise is a low-value added product like woven baskets, or a higher-value added product like batteries. Interestingly, earlier versions of the GSP statute used a different value benchmark, namely, an absolute level (which in 1994 was $114.1 million) adjusted annually in relation to changes in the U.S. GNP.

2. **Import Percentage Limitation**

The quantity of an eligible article equals or exceeds 50% of the appraised value of total imports (from all countries) of that article into the U.S. in any calendar year. No adjustment is permitted for the number of other foreign countries exporting the product into the U.S., or for the size of foreign competitors. From the perspective of a BDC avoiding this competitive need limitation, it is better to be one of many small exporters to the U.S. However, the long-term economic interests of the BDC may be to be a major player in the world market for the product.

The two restrictions are simultaneously applicable. Suppose a BDC ships eligible merchandise below the value threshold, but exceeds 50% of the total value of imported merchandise. In that scenario, the BDC is not necessarily a large player in the American market, but it is successful in competing in this market against other foreign countries. The consequence is removal of GSP treatment. Termination also is the consequence of the opposite scenario, where the BDC accounts for less than half of American imports of the article, but individually exceeds the value threshold.

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Termination under the competitive need limitations occurs no later than 1 July of the year after the BDC breached a limitation. Is termination permanent? The answer is “no.” Eligibility can be reinstated to a product if in a later year the competitive need ceilings are not reached. That is, a BDC that loses GSP eligibility for a particular article can apply for re-designation of benefits. The same eligibility criteria apply as on an initial designation, plus the BDC must have stayed within the competitive need limits in the calendar year preceding re-designation.

Are there exceptions to the competitive need limitations? In other words, is there no choice but to terminate GSP benefits for an eligible product from a BDC that exceeds these limitations? The answer is there is room for maneuver. Indeed, there are two “full” exceptions, and one “partial” exception.

First, neither of the competitive need limitations applies to a LDBDC. Second, neither limitation applies to a beneficiary Sub-Saharan African country (BSSAC), i.e., a country eligible under the African Growth and Opportunity Act for AGOA benefits, which also meets the GSP country-eligibility criteria. There also is a “partial” exception, namely, an exception known as “short supply” to the import percentage limitation. This limitation does not apply to an article if there is no like or directly competitive good produced in the U.S. (as of 1 January 1995). It would be against the self-interest of the U.S. to deny GSP treatment based on competitive need for an eligible article that not only poses no competitive threat to an American producer, but also is in short supply in the American economy.

- CNL Waivers

A follow-up matter is how much room there is for maneuver? Are there circumstances under which the President may waive CNLs? The answer is “yes.”

The ITC reviews the GSP Program annually, and issues a public report. A portion of that review is dedicated to the probable economic effects of the prospective addition of merchandise to the GSP eligibility list by granting a waiver of the relevant CNL. The President, of course, is free to accept or reject the ITC advice. Indubitably, political calculations may enter into consideration.

Specifically, there are three waiver possibilities. First, the President may issue a de minimis waiver of the import percentage (but not value) limitation. Waiver is based on the aggregate appraised value of imports into the U.S. of an eligible article during the preceding calendar year not exceeding a de minimis threshold for that year. In 1996, the threshold was $13 million. For each calendar year thereafter the threshold has been raised.

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by $500,000. Thus, in 2012 the *de minimis* threshold was $21 million. (Earlier versions of the *GSP* statute implied adjusting the threshold annually with changes in U.S. GNP.)

It takes more than 15 years for the *de minimis* threshold to double to $26 million, and that the absolute dollar value ($500,000) by which the threshold grows is 10% of the amount by which the value limit rises ($5 million). Are these facts a basis to claim the threshold is not generous to BDCs? The answer is “probably not.”

It is important to consider the size of the threshold in relation to the value limitation. In 1996, the threshold was 3.85% of the value limitation ($500,000 divided into $13 million). In 2012, the threshold is 13.5% of the value limit ($21 million divided into $155 million). In other words, the *de minimis* threshold rises as a percentage of the value limitation. Is this rise consistent over time?

Second, there is what might be called a “self-interest waiver” of the competitive need limitations.275 This waiver involves a two-pronged test:

1. The ITC advises the President (under Section 332 of the *Tariff Act of 1930*, as amended) that an industry in the U.S. would be adversely affected by loss of *GSP* benefits. For example, short supply induced by loss of the benefits would be relevant. As another example, an industry may rely on duty-free access to an article it uses as an input into production, and would be damaged by the higher cost associated with an MFN tariff imposed on the article.

2. The President must also determine that a waiver of the limitations “is in the national economic interest of the United States.” Here again, short supply considerations would be relevant. In making this determination, the President must examine (or reexamine) the country-eligibility criteria, and consider the advice of the ITC. The President also must “give great weight” to two factors: the extent to which the BDC assures the U.S. it “will provide equitable and reasonable access to the markets and basic commodity resources” of that country and “provides adequate and effective protection of intellectual property rights.”

These waiver criteria authorize the President to ensure continuous flow of duty-free imports to support domestic needs, and provide leverage on BDCs seeking a waiver to provide American (and other foreign) business interests market access and IP protection.

Third, the President can waive the CNL if there is a special preferential relationship, and formal agreement, between the U.S. and a BDC. This waiver is designed for possible use with respect to the Philippines. It mandates the Philippines neither “discriminate” against American commerce, nor impose any “unjustifiable” or “unreasonable” barriers to American commerce.276 No President has used this waiver.

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In sum, there exists considerable room for maneuver in the authority delegated by Congress to the President to waive the competitive need limitations. But, the room is restricted. The President cannot exercise the waiver “too much,” and cannot concentrate waivers on just one or a few BDCs. “Too much” and “concentration” are defined according to two quantitative tests:

1\textsuperscript{st}: 30\% Restriction:

There is an overall limit on the total value of waivers granted to all BDCs.\footnote{See 19 U.S.C. § 2463(d)(4)(A).} In any calendar year (after 1995), total waivers for all BDCs above existing competitive need limitations cannot exceed 30\% of the aggregate appraised value of all articles imported into the U.S. duty-free under the GSP program in the previous calendar year.

Thus, to establish the dollar value of this restriction, it is necessary to calculate the aggregate appraised value in a calendar year of eligible merchandise imported into the U.S., and compute 30\% of the aggregate appraised value for articles entered duty-free in the previous year. The 30\% figure from the previous calendar year sets the threshold against which the current calendar year value is measured. The President cannot grant a waiver on an article if doing so would mean the value of articles for which the competitive need limitation is waived crosses the overall 30\% threshold.

2\textsuperscript{nd}: 15\% Restriction:

There also is a restriction to ensure waivers of competitive need limitations are distributed among BDCs, rather than being focused on just one or a few beneficiaries.\footnote{See 19 U.S.C. § 2463(d)(4)(B).} The President may not grant waivers to more than 15\% of the aggregate appraised value of all articles imported into the U.S. entered duty-free under the GSP program from BDCs with a per capita GNP of $5,000 or more, or from BDCs that account for at least a 10\% share of total GSP imports.

Thus, to establish the dollar value of this restriction, it is necessary to identify these 2 categories of BDCs, calculate the aggregate appraised value in a calendar year of eligible merchandise imported into the U.S., and compute 15\% of the aggregate appraised value of articles entered duty-free in the previous year. The 15\% figure from the prior year sets the benchmark for measuring current GSP imports. The President cannot grant a waiver on an article if doing so would mean the value of articles for which the CNL is waived exceeds 15\% of the value of imports from the two types of BDCs.

Calculating the 30\% and 15\% boundaries can be tricky.\footnote{See 19 U.S.C. § 2463(d)(4)(C).}
Recall that a CNL, if imposed, applies prospectively, specifically, as of 1 July of the following calendar year. Waiver of a CNL is based on the 30 and 15% thresholds, which are calculated using data from the previous calendar year. In that previous calendar year, the article in question received duty-free treatment under the GSP program, and the issue is whether that treatment must be withdrawn in the next year because the CNL is exceeded – and, if so, whether a waiver is appropriate.

To calculate the waiver thresholds, it is necessary to add three figures:

1. the amount of the article that actually entered the U.S. duty-free in the previous year, when the CNL was inapplicable;
2. the amount of the article that would have entered the U.S., had the CNL applied, and thus the MFN rate imposed; and
3. the difference between figures (1) and (2).

In calculating the waiver threshold, the first and third figures – that is, the amount actually entered duty-free, and the extent to which the amount actually entered exceeds what would have been entered had the competitive need limitation been imposed – are both included. The “bottom line” is that it is somewhat easier to reach the waiver threshold because both the first and third figures are included.

There is no time limit on a waiver of a CNL. A waiver lasts until the President determines it is no longer warranted because of “changed circumstances.” What might constitute such circumstances, and thereby call for removal of a waiver?

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Chapter 11

SPECIAL HELP FOR AFRICA?  

I. Background on AGOA

On 18 May 2000, Congress passed the “Trade and Development Act of 2000.” Signed by President Bill Clinton (1946-, President, 1993-2001) on that date, the legislation took effect on 1 October 2000. Title I is the “African Growth and Opportunity Act,” or “AGOA.” The function of AGOA is to provide preferential trade treatment for certain products originating in eligible SSACs for a limited period. But, the protectionist devil is in the details.

Thanks to AGOA, exports from SSACs that qualify as Beneficiaries qualify for DFQF treatment. That treatment extends to 97.5% of all tariff lines in the HTSUS, meaning just 316 out of 10,700 lines are dutiable (as of August 2014). Eligible products and SSACs include cashews and cocoa from Ghana, petrochemicals from Angola, and textiles from Mauritius. In that respect, AGOA is more generous than any other American preference scheme for poor countries.

Yet, AGOA is anything but an unconditional grant of assistance for Africa. The devilish statutory details reveal the limits of American generosity. AGOA is not social justice in action, or put metaphorically, not an International Trade Law expression of the Parable of the Good Samaritan. Consider the positive fact that over 6,000 products (as of December 2018) are eligible for DFQF treatment under AGOA. The flip side is that about 4,000 are not, given that the HTSUS lists about 10,000 product lines. So, for example, several farm and fisheries products of keen export interest to SSACs, like groundnuts, sugar, tobacco, and tuna, are subject to TRQs with low in-quota limits and high tariffs on above-quota shipments.

Moreover, at any time, an SSAC can lose its status as a Beneficiary, or a product it ships can be stricken from the roster of eligible merchandise, to suit U.S. interests. For instance, in June 2017, the USTR investigated the status of Rwanda, Tanzania, and Uganda. (The USTR agreed not to investigate Kenya, after Kenya agreed not to forbid importation of used clothing and reversed its tariff hikes on that merchandise.) Their sin was to ban imports of, or raise tariffs on, used clothing and footwear from the U.S. under

Documents References:
(1) Havana (ITO) Charter Articles 1, 8-15, 24, 55-70 1-12
(2) GATT Preamble and Articles XXXVI-XXXVIII
(3) Tokyo Round Enabling Clause
(4) WTO Agreement Preamble

See 19 U.S.C. §§ 3701-3741, with the provisions on trade policy and SSAC benefits in §§ 3701-3724.
a March 2016 EAC decision. They did so to protect their local garment industries, which they hoped would help elevate them to middle-income countries. Local producers could not compete with cheap second-hand clothes imports from America and Europe.

An American lobbying group – Secondary Materials and Recycled Textiles Association (SMART) – petitioned the USTR for it to conduct an Out-of-Cycle Review of those countries. SMART argued the ban imposed significant economic hardship on the U.S. used clothing industry. It said 40,000 American jobs were jeopardized by that decision, adversely affecting charitable organizations (e.g., Goodwill and Saint Vincent de Paul) that rely on selling donated used clothing. Yet whether the significance of that hardship had to be weighed against the sufferings of those three countries:

Representatives of the African countries under review said that their new policies on used clothing did not amount to a ban but rather a phase out of used clothing that will allow domestic textile manufacturing to increase and improve quality of life. The phase out did not target the U.S. and remained in line with AGOA obligations by aiming to reduce poverty, witnesses at the hearing said.

Uganda Minister of Trade, Industry, and Cooperatives Amelia Kyambadde said during the hearing that secondhand clothing raised sanitary concerns and kept individuals impoverished by necessitating the frequent purchasing of clothes because of used clothing’s shorter lifespan and decreased quality.

“If we’re talking about poor people, we’re actually impoverishing them with these second-hand clothes,” Kyambadde said.

Thus, the questions posed above seem to answer themselves. Yet, as a legal matter under AGOA, are those questions relevant?

As another example, in July 2018, the U.S. suspended the eligibility of Rwanda for DFQF treatment of T&A merchandise under AGOA. The U.S. said Rwanda failed to eliminate duties on a sufficient number of American exports to that country. Said the USTR:

When Congress first passed AGOA in 2000, it imposed certain eligibility criteria to encourage recipient countries to adopt free market-oriented development models and to ensure fair market access for United States firms. The AGOA eligibility requirements include: “making continual progress toward establishing ... a market-based economy ... [and] the

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elimination of barriers to United States trade and investment.” 19 U.S.C. 3703(1)(A), (C). The USTR is charged with enforcing AGOA’s requirements.

An AGOA issue relating to new barriers to United States trade and investment first arose in 2015 when the East African Community (EAC) established a plan to ban imports of used clothing and footwear. The USTR’s engagement on this issue intensified in 2016 when the EAC announced it would phase in the ban by 2019. Thereafter, three EAC AGOA beneficiaries – Kenya, Tanzania, and Uganda – worked with the United States and took actions to revise their policies. As a result, they continue to receive full benefits under AGOA. Unfortunately, Rwanda has insisted on keeping in place a policy that has raised tariffs on imports of used apparel and footwear by more than one thousand percent, effectively banning imports of these products.

United States efforts over the past two years to address this issue with the Government of Rwanda have been unsuccessful. As a result, on March 29, 2018, the President determined that Rwanda was not making sufficient progress toward the elimination of barriers to United States trade and investment and was, therefore, out of compliance with AGOA’s eligibility requirements. The President informed the Government of Rwanda of his decision in March, giving Rwanda an additional 60 days to engage with the United States to resolve this problem before the suspension of its apparel benefits under AGOA. Rwanda has, however, continued to insist on retaining its tariffs. The President, therefore, has decided to suspend Rwanda’s duty-free access to the United States for apparel products until Rwanda comes back into compliance with AGOA’s eligibility requirements.

The President believes suspension of AGOA’s benefits, instead of termination of Rwanda’s status as an AGOA beneficiary, is the appropriate remedy in this instance. The Administration supports continued engagement with the aim of restoring market access for used apparel and bringing Rwanda into compliance with AGOA’s eligibility requirements. The President can reinstate full AGOA benefits for Rwanda once he has determined that Rwanda is meeting the eligibility criteria laid out by Congress.287

The suspension followed from the same SMART OCR petition.

Conversely, the extent to which an SSAC can enjoy the full benefits of AGOA depends on itself; however generous a giver America may be, not all recipients can absorb that generosity, *i.e.*, in economic terms, there are supply-side constraints. Does the SSAC suffer from decrepit infrastructure, especially in energy and transportation, thus adding to the cost of import-export transactions? Does the SSAC lack a robust supply of skilled, productive, competitive labor, thus inhibiting the establishment and operation of quality export operations? Does the SSAC impose burdensome customs procedures, thereby impeding its integration into its regional, must less the world, trading system? Does the merchandise the SSAC seeks to export meet high SPS and TBT standards that developed countries impose?

As intimated, the President must designate an SSAC as eligible for AGOA duty-free benefits, and the article of merchandise must be eligible for such benefits. There are eligibility requirements for both designations. Neither is automatic.

For instance, with respect to the first designation, in December 2012, President Barack H. Obama (1961-—President, 2009—2017) designated South Sudan (which became independent in July 2012) as an eligible country. But, he terminated the AGOA beneficiary status of Guinea-Bissau and Mali, because they failed to make continual progress to satisfy AGOA criteria. Likewise, in November 2015, he terminated that status for Burundi. Home to 6% of the world’s nickel reserves, Burundi did not show good governance: violence erupted after its President (Pierre Nkurunziza (1963—President, 2005—)) declared in April he wanted to be re-elected for a third term, notwithstanding a July 2005 peace agreement to the contrary, plus criticisms elections were neither free nor fair.

As regards the second designation, both the USTR and ITC must agree an article at issue is not import-sensitive. Essentially, that means if DFQF treatment for exports of that article from a Beneficiary SSAC would cause economic or political problems in the U.S., because of domestic production of a like product, then the article will not be given a preference.

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To be sure, the GSP and AGOA are not the only scheme of trade preferences the U.S. offers to developing countries and LDCs. In 1983, the U.S. enacted the Caribbean Basin Economic Recovery Act, commonly known as the “CBI.” The CBI provides zero- or low-duty treatment to certain merchandise originating in a beneficiary country. But, the GSP provides the broadest array of benefits (in terms of beneficiary countries and commodities), and AGOA concerns the poorest of the poor countries. So, they merit special attention.

AGOA details concern the words “certain,” originating,” “eligible,” and “limited.” The legislation authorizes the President to grant unilateral preferential trade benefits to an SSAC, but only if it pursues economic and political reform, and satisfies other criteria, only with respect to its exports that satisfy an array of technical requirements, and only up through a sunset date. Thus, certain – but not all – T&A merchandise from a SSAC may receive duty-free, quota-free treatment from the U.S. (In addition, eligible SSACs may receive enhanced GSP benefits, such as the waiver of CNLs.)

II. Devilishly Protectionist Details

- Specified Processes in T&A Production

A key set of requirements a Beneficiary SSAC must satisfy under AGOA to receive duty-free treatment from the U.S. on T&A shipments are a dizzying array of preferential ROOs of origin. (There are four additional sets of requirements, concerning documentation, visas, “findings and trimmings,” and “interlinings.” What are the details of, and justifications for, each of these requirements?) There is little doubt the rationale for such rules is protection of T&A interests in the U.S. producing articles that are like or directly competitive with merchandise from a T&A Beneficiary.

To understand the different AGOA categories of rules of origin for apparel articles, it is important to recall the six basic steps in making T&A. That is because the AGOA T&A ROOs are specified process rules, not value-added rules. In other words, in order for the finished merchandise to qualify for preferential treatment, these rules demand that particular production activity occur in a T&A Beneficiary:

**Step 1:** Growing cotton or other fiber as raw materials, or manufacturing synthetic fibers, such as nylon or rayon

A rule of origin demanding all production activity from this Step onward occur in one location is called a “Fiber Forward Rule.” This kind of Rule is the most restrictive of all T&A specified process requirements. All economic activity must occur in one country, otherwise the finished article is considered not to originate in that country and, therefore, is disqualified from preferential treatment. In turn, the more restrictive a preferential ROO, the more protectionist it is. By making it difficult to obtain DFQF treatment, a tighter rule confers greater protection on domestic (e.g., American) producers of like merchandise.

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In theory, a “Seed Forward” or “Fertilizer Forward” Rule could be devised to afford even greater protection than a Fiber Forward Rule. The idea would be to require the seeds used to plant cotton (or other fiber), or the fertilizer used to help the crop grow, to originate in the same country in which all further activity occurs. Failure would mean the finished article would not qualify as originating in that country, hence DFQF treatment would be devised. In practice such a Rule does not exist.

**Step 2:**
*Spinning yarn from fiber*

A requirement that all activity from this Step onward occur in a particular country is a “Yarn Forward Rule.” A Yarn Forward Rule is the second most restrictive – and thereby protectionist – type of specified process requirement. In effect, it is used in AGOA, for instance, in the 1st or 2nd of the Preference (i.e., Preferential Treatment) Categories, in combination with Assembly Rules (discussed below).

**Step 3:**
*Making fabric (also called cloth) from yarn*

A mandate that all activity from this Step onward occur in a particular country is a “Fabric Forward Rule.” A cursory glance at the 1st, 2nd, 3rd, 7th, and 8th AGOA Preferential Treatment Categories suggests they rely (to varying degrees) on Fabric Forward Rules. However, in fact the categories are constructed in a protectionist manner, because of requirements about yarn.

A garment that is knit does not technically go through the fabric stage. The original AGOA legislation did not specify knit-to-shape garments as eligible for duty-free treatment, and the CBP issued draft regulations stipulating they were ineligible. AGOA II contained a “knit-to-shape amendment” clarifying knit-to-shape apparel is eligible.

**Step 4:**
*Cutting fabric into pieces (or knitting to shape)*

A rule calling for all activity from this Step onward to occur in a particular country is called “Cutting Forward.” Generally, a Cutting Forward origin rule is more liberal than Fiber, Yarn, or Fabric Forward Rules, because it allows activity in the early stages of the chain of production to occur in countries other than the potential beneficiary of preferential treatment. The 2nd and 6th AGOA Preference Categories use a variant of a Cutting Forward Rule. However (as discussed below), in AGOA, the variants are protectionist because of requirements concerning yarn. The 4th AGOA Preference Category also uses a Cutting Forward Rule, albeit for knitting to shape sweaters.

Depending on the garment, cutting may occur in more than one country – so-called “hybrid cutting.” The original AGOA legislation, did not specify that apparel made in a hybrid cutting process was eligible for duty-free treatment. The CBP issued draft
regulations that would have denied eligibility. AGOA II contained amendments allowing for preferential treatment for apparel cut both in the U.S. a Beneficiary SSAC.

**Step 5:**
**Sewing pieces of cut fabric together**

An obligation that all activity from this Step onward to occur in a particular country is a “Sewing Forward Rule.” This kind of rule is relatively liberal, i.e., not as protectionist as the previous rules, as it permits all previous Steps to occur in other countries. Sometimes, cutting and sewing are considered parts of the same operation, and the attendant rule is “Cutting and Sewing Forward.”

A variation of the Sewing Forward Rule exists in AGOA, namely, in the 2nd and 6th Preference Categories. However, the variations are protectionist. In the 2nd Preferential Category, the sewing thread must come from the U.S., and in the 6th Category, non-American fabric or yarn may be used only if it is in short supply in the U.S.

**Step 6:**
**Assembling pieces into a finished article (i.e., final assembly)**

A rule calling only for assembly to occur in a particular country – an “Assembly Rule” – is the most liberal of all specified process rules, in that it requires the least amount of economic activity to occur in the country seeking preferential treatment. The 4th AGOA Preference Category essentially fits this type. Ostensibly, the 1st and 3rd Categories are Assembly Rules. However (as explained below), strictures embedded in these categories concerning where fabric is from and cutting occurs render them considerably more restrictive than a simple Assembly Rule.

Overall, the AGOA preference categories are not pure in the sense of relying entirely on one kind of process forward occurring in a T&A Beneficiary. Rather, the categories are hybrids, blending different specified process rules.

- **Eight AGOA Preferential ROOs**

There are eight groupings of apparel articles potentially eligible for DFQF treatment under AGOA. (The italicized titles below are unofficial. They are mnemonic aids to summarize the gist of the Category.) Apparel from a T&A producer/exporter in a Beneficiary SSAC must fit within a Category if, upon entry into the U.S., its apparel exports are to benefit from DFQF treatment. Examining each Category reveals how the devil operates, and why the rules are properly characterized – from the perspective of T&A Beneficiary SSACs – as a “devil.”

Briefly, of the 8 Preferential Treatment Categories, the first 4 of them, and the 8th one, call for some activity to occur in a T&A Beneficiary using inputs from the U.S. (or, in the 3rd and 7th Category, from a Beneficiary). The 6th Category obviates the need for

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American inputs only if they are in short supply. The 5th and 7th Categories, dealing respectively with sweaters and cultural products, are not as commercially important as the other categories. While the rules of origin are highly technical, the theme emerging from them is evident enough: generosity. Query how generous the U.S. is toward Sub-Saharan Africa. Consider also whether generosity should matter in U.S. trade policy, and if so, why.

In the details of the origin rules of the 1st, 2nd, 3rd, 4th, 6th, and 8th AGOA Preference Categories, lives (indeed, thrives) the protectionist devil – and, in turn, is manifest America’s generosity, or lack thereof, toward T&A Beneficiaries. A donor shows most poignantly its generous spirit in areas in which it faces the largest potential sacrifice, as does America in these categories. Generosity in a preferential trading program does not demand economic martyrdom. But, generosity is greater when it is not convenient or easy for a donor, and when it does not put undue strictures on a beneficiary to suit the commercial self-interest of the donor. Yet, again, the 1st, 2nd, 3rd, 4th and 6th Categories bear the most restrictive origin rules. Might the explanation lie in the prospect U.S. producers are considerably less likely to produce merchandise that is like or directly competitive with articles in the 5th and 7th Categories?

After all, as the examination below reveals, at least prima facie, the 5th Category appears drafted in a way to exclude sweaters made in a T&A Beneficiary that could substitute for American-made sweaters. Possibly, a rule about using American cashmere or wool whose diameter is 21.5 microns or less does not exist in AGOA, because it would be unnecessary, as few (if any) such inputs are made in the U.S. As for the 7th Category, while there no doubt are American-made hand-loomed, hand-made, or folklore articles, and ethnic printed fabrics, such production is of small volume and not substitutable with African-made handicraft items. In contrast, precisely where American producers are most likely to be challenged – in the 1st, 2nd, 3rd, 4th, 6th, and 8th Categories, which have the broadest potential array of merchandise – the origin rules are crafted to confer not generosity toward African producer/exporters, but protection for American producers of like or directly competitive products.

It is important to appreciate the relevance of the 1st, 2nd, 3rd, 4th, and 6th Categories. Their relevance is evident in terms of commercial potential. These categories may contain the broadest array of T&A merchandise. By definition, the 5th Category is limited not just to sweaters, but specifically to sweaters of a certain weight of cashmere, or of a certain weight and diameter of wool. By definition, the 7th Category is restricted to handicraft type articles. In contrast, the 1st, 2nd, 3rd, 4th, and 6th Categories may contain articles as diverse as sleepwear for babies and neckties for men. Yet, it is in the categories of greatest potential commercial significance where the ROOs are tightest.

1st Preference Category:
U.S. Yarn Forward with Beneficiary Assembly

Essentially, this Category is for apparel articles sewn together in a T&A Beneficiary SSAC using American fabric, which is from American yarn. Specifically, to qualify for

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291 See 19 U.S.C. § 3721(b)(1); HTSUS Chapter 98, U.S. Note 7(a) at 98-II-3.
duty-free treatment under this Category, an article must meet five requirements:

1. The article must be sewn (or otherwise assembled) wholly in a T&A Beneficiary (or in multiple such Beneficiaries).

2. The article must be made from fabric (cloth) wholly formed in the U.S. (or, if knit, must be from components knit-to-shape in the U.S.). (The article could be made from both fabric and knit-to-shape components.)

3. The article must be wholly cut in the U.S. (or, if knit, the components knit-to-shape in the U.S.).

4. The fabric itself must be from yarns wholly formed in the U.S. (or, if knit, the components must be from yarns wholly formed in the U.S.).

5. Upon entry, the apparel must be classified in either one of two categories in the HTSUS. The 1st Category is Sub-Heading 9802.00.80. This Sub-Heading appears in Chapter 98, which consists of special classifications for articles exported and returned, having been advanced or improved abroad. Items covered by this Chapter may enter the U.S. duty-free, or partially duty-free, under certain circumstances. These circumstances include re-importation of an article that was exported from the U.S. (without improvement in the condition of the article), articles subject to a personal exemption brought back to the U.S. by a citizen or permanent resident who traveled overseas, government importations, goods used for religious, educational, or scientific institutions, samples, and articles admitted under bond. As for Sub-Heading 9802.00.80, it covers articles exported from and returned to the U.S., having been advanced or improved abroad. The 2nd Category is Chapter 61, which covers “Articles of Apparel and Clothing Accessories, Knitted or Crocheted,” and Chapter 62, which covers “Articles of Apparel and Clothing Accessories, Not Knitted or Crocheted.” The 2nd Category applies only to apparel that would have been classified in the 1st Category, but for the fact they were embroidered, or subjected to a particular process. The processes include acid washing, enzyme washing, or stone washing, perma-pressing, oven baking, bleaching, garment dyeing, and screen printing.²⁹²

This Category also includes apparel articles made from fabrics that are not from yarns, as long as the fabrics are wholly formed and cut in the U.S., and the fabrics are classified under Heading 5602 or 5603 of the HTSUS. Chapter 56 of the HTSUS deals with T&A articles from “wadding,” “felt,” “non-wovens,” and “special yarns.” Heading 5602 contains “felt articles” (“whether or not impregnated, coated, covered, or laminated”). Heading 5603 consists of non-woven articles (“whether or not impregnated, coated, covered, or laminated”).

²⁹² See HTSUS Chapter 98, Sub-Heading 9819.11.03 at 98-XIX-4 (concerning these articles).
An understandable immediate reaction to this Category is to ask why the U.S. insists on a T&A Beneficiary SSAC using American fabric that itself is made of American yarn? One answer is some Beneficiaries do not have the spinning and weaving capacity to produce enough fabric to supply their domestic apparel industry. This scenario is true, for instance, in Bangladesh (in which T&A exports accounted in 2001 for 85.8% of merchandise exports, the highest figure in the world). But, even if the same supply constraint exists in a Beneficiary SSAC, it does not follow that AGOA must mandate use of American fabric and yarn. Indeed, as Oxfam International points out:

Rich countries try to justify these heavy requirements [preferential rules of origin for T&A] by saying that they encourage poor countries to develop textile production to supply their clothing sector. However, historical experience and contemporary production patterns undermine this argument. No small, poor country with a significant clothing industry has ever succeeded in developing a matching supply-capacity in textiles.293

Why not, then, let apparel producers in the Beneficiary choose input sources based on market considerations like price and quality? Does this query suggest there are deep economic and social justice concerns about the ROO?

2nd Preference Category:  
U.S. Yarn-Forward with Beneficiary Cutting and Sewing Forward Using American Thread

Essentially, this Category is for apparel articles cut in a T&A Beneficiary SSAC from American-made fabric. The fabric must be made of American yarn, and then sewn together in the Beneficiary with American thread.294 Specifically, to qualify for duty-free treatment under this Category, an article must satisfy five requirements.

(1) The article must be sewn (or otherwise assembled) entirely in a T&A Beneficiary SSAC (or in multiple such Beneficiaries).

(2) The article must be made from fabric (cloth) wholly formed in the U.S. (or, if knit, must be from components knit-to-shape in the U.S.). (The article could be made from both fabric and knit-to-shape components.)

(3) The fabric itself must be from yarns wholly formed in the U.S. (or, if knit, the components must be from yarns wholly formed in the U.S.)

(4) The fabric must be cut in the T&A Beneficiary SSAC (or in multiple such Beneficiaries).


294 See 19 U.S.C. § 3721(b)(2); HTSUS Chapter 98, Sub-Heading 9819.11.06 at 98-XIX-4.
After cutting, the article must be sewn (or otherwise assembled) using sewing thread from the U.S.

The 2nd Preference Category also includes apparel articles made from fabrics that are not from yarns, as long as the fabrics are wholly formed (but not cut) in the U.S., and the fabrics are classified under Heading 5602 or 5603 of the HTSUS (explained above).

The first three requirements are the same as in the 1st Preference Category. But, the latter two requirements distinguish the categories. In brief, the 2nd Preference Category is a cutting forward rule, whereas the 1st Category is an Assembly (Sewing) Forward Rule.

In both categories, American fabric made of American yarn must be imported into the T&A Beneficiary SSAC. In the 1st Preference Category, the items imported already are cut in the U.S. They can be sewn with or without U.S. thread, but this flexibility comes at a cost: they must satisfy enter into particular HTSUS classifications. In the 2nd Preference Category, fabric is imported, and cutting goes on in the T&A Beneficiary SSAC. That is advantageous to the Beneficiary, as more goes on there than sewing. But, when it is time to sew the cut fabric pieces, the thread must be American. The trade-off for using U.S. thread is no HTSUS classification is mandated for the finished article.

3rd Preference Category: Regional or Other Fabric

The first two Preference Categories mandate use of American fabric, which in turn is made of American yarn. The 3rd Category affords flexibility on the origin of the fabric and yarn, essentially providing duty-free treatment for apparel articles from regional fabric and yarn, but subject to quantitative limits, and only for a limited period. In particular, to qualify, an apparel article must satisfy three requirements:

1. The article must be assembled wholly in a T&A Beneficiary SSAC (or multiple such Beneficiaries).

2. The article must be made of fabric (cloth) wholly formed in a T&A Beneficiary SSAC (or multiple such Beneficiaries). The T&A Beneficiary in which assembly occurs need not be the same one as the Beneficiary in which fabric is made.

3. The fabric (cloth) must be from yarn originating either in the U.S. or a T&A Beneficiary SSAC (or multiple such Beneficiaries, or a former Beneficiary, i.e., one that is party to an FTA with the U.S.). If the fabric originates in

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295 See 19 U.S.C. § 3721(b)(3); HTSUS Chapter 98, Sub-Heading 9819.11.09 at 98-XIX-4 (concerning these articles).

296 As of August 2021, America had no FTAs with any SSAC. However, the Trump Administration indicated an interest in a bilateral FTA with Kenya, and its successor, the Biden Administration, appeared to look favorably upon the African Continental Free Trade Area.
Eager to tap into a promising market while burnishing his Administration’s credentials on free trade now that re-joining the Trans-Pacific Partnership looks as distant as ever, U.S. President Joe Biden appears ready to engage a new free trade zone in Africa.

The … AfCFTA, which took effect [with staged implementation] in January [2021], is the largest such zone by number of countries since the creation of the World Trade Organization. Fifty-four of the African Union’s 55 members – Eritrea excluded – have signed on to the idea of creating a single market on the continent.

“The future of African markets, it will be shaped by the cellphone,” Aubrey Hruby, a Senior Fellow at the Atlantic Council, told members of the Senate Foreign Relations Subcommittee on Africa and Global Health Policy.

The U.S. wants to see those youngsters watching shows on Netflix and downloading songs from Apple Music. Instead, one of the biggest mobile money platforms in Africa is M-Pesa, which is operated by Kenya’s Safaricom and runs on technology provided by China’s Huawei Technologies. Many Africans listen to music through Boomplay, a streaming app owned by Shenzhen-based mobile phone manufacturer Transsion Holdings.

“Our competitors are doing a much better job,” said Florizelle Liser, president and CEO of the Corporate Council on Africa.

“In the next 10 to 20 years, Africa’s importance to world markets will grow significantly in many of the sectors that drive American prosperity, including ICT [information and communications technology], energy, finance, infrastructure and health,” Liser said.

Landry Signe, a Professor at Thunderbird School of Global Management, noted that Africa is expected to be home to 40% of the world’s population by 2100. The AfCFTA offers a “new regional momentum” that the U.S. can build on.

The U.S. can appeal to young Africans by defending open internet standards and policies, she [Hruby] said.

“In 2019, there were 36 incidents in 19 countries of internet shutdowns lasting longer than seven days,” Hruby noted, citing a report by Access Now. These include eight African nations.

The demand by African citizens for accountability, democracy and stability aligns with U.S. core values, Signe said.

“Per Afrobarometer surveys, seven out of 10 Africans support democracy and accountable governance, and approximately two-thirds are opposed to a single party or military government,” he said.

But winning the hearts and minds of Africans will be a long-term battle.

Hruby told lawmakers that 20% of current African leaders, Presidents and Heads of State studied in the U.S. But “in 2015, we lost out that position of hosting the most English-speaking African students to China.”


As for a bilateral agreement with Kenya, in May 2023, USTR published a three-page summary of texts it proposed during the first round of negotiations on a proposed U.S.-Kenya Strategic Trade and
a T&A Beneficiary, then it need not be the same Beneficiary as the one in which the yarn originates.

This Preference Category also is called “Apparel assembled from regional and other fabric.” A more accurate rubric would be “U.S. Yarn Forward or Beneficiary Yarn Forward with Beneficiary Fabric Forward.” With the words “regional” and “other fabric,” this appellation obscures the requirement that not all other fabric qualifies.

“Regional” refers only to fabric from yarn spun in a T&A Beneficiary SSAC, and “other” is restricted to fabric from American yarn. For example, men’s dress shirts assembled in Kenya from cotton cloth derived from cotton yarn spun either in the same or another Beneficiary, or in the U.S., would qualify. The shirts would not qualify if the cotton cloth came from Egypt or Pakistan, or if the cloth came from a Beneficiary or the U.S., but the yarn came from Egypt or Pakistan.

Significantly, duty-free treatment of articles in this Category is subject to an annual quota. In effect, this Category is a TRQ, which subjects over-quota shipments to the MFN rate. To what is the cap – the specific percentage figure for a particular year – applied? The answer is “square meter equivalents” (SMEs), a denomination that allows for comparison among different kinds of apparel articles, as diverse (for example) as wool sweaters and nylon tights. Thus, for instance, the initial cap, for the 12 months commencing 1 October 2000, was 246,500,393 SMEs. In that year, no more than this amount of apparel from T&A Beneficiary SSACs could obtain preferential treatment in the form of a zero tariff.

The “bottom line,” then, is the 3rd Preference Category is not as generous as it first appears. It promises flexibility to T&A Beneficiary SSACs by allowing them to use fabric made of yarn from either the U.S. or a Beneficiary. But, it imposes serious limits on the volume of apparel made from such fabric, in the form of a TRQ with caps allowed to grow modestly to low ceiling levels. Lest there be any doubt about this verdict, consider the fact that a special safeguard remedy applies to this Category.

In particular, if imports from Beneficiaries surge, then the U.S. can remove duty-free treatment. The Secretary of Commerce is authorized to determine whether “there has

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The timing of STIP assuredly was driven by the Sino-American Trade War: in 2022, Kenya signed trade agreements with China. See Zainab Usman & Aline Abayo, Will U.S.-China Competition Shape Kenya’s Trade Trajectory?, Carnegie Endowment for International Peace, Quick Take (15 September 2022), https://carnegieendowment.org/2022/09/15/will-u.s.-china-competition-shape-kenyas-trade-trajectory-pub-87919. And, the competition between the two hegemonic powers to advance their trade interests in Kenya suggested competitive imperialism (discussed in a separate Chapter).
been a surge in imports of an article [qualifying under the regional fabric Preference Category] … from a” Beneficiary SSAC.\textsuperscript{297} Specifically, under this provision, the Secretary must decide whether the article

is being imported in such increased quantities as to cause serious damage, or threat thereof, to the domestic industry producing a like or directly competitive article.

The list of factors the Secretary considers in making an injury determination is open-ended, and includes any economic variable with an effect on imports, such as capacity utilization, domestic production, employment, exports, inventories, investment, market share, prices, profits, and sales. If the answer is affirmative, then the President must suspend duty-free treatment.

Any “interested party” can request a ruling from the Secretary. The definition of this term includes not only producers (including workers, unions, and worker groups, as well as trade or business associations) of a like or directly competitive product, but also anyone (producers, workers, unions, and worker groups, and trade or business associations) “engaged in the manufacture, production, or sale of essential inputs for the like or directly competitive article.” In other words, the universe of potential claimants with standing to bring a surge mechanism case includes most of the commercial chain, upstream and downstream.

The surge mechanism might be dubbed (diplomatically) “noteworthy.” It is a weapon against exports containing regional fabric, yet the weapon targets the apparel sectors of desperately poor countries. The legal aspects of this weapon make it all the more “noteworthy.” That is evident by contrasting this mechanism with the legal criteria for an escape clause action under Section 201 of the \textit{Trade Act of 1974}.\textsuperscript{298} These criteria accord (though not completely) with the general safeguard remedy in Article XIX of GATT. The contrast shows the criteria associated with an AGOA surge mechanism are less rigorous than the requirements for an Escape Clause action, meaning it appears comparatively easier to get relief against African apparel.

To invoke the escape clause, increased imports must be “a substantial cause of \textit{serious} injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article....” The investigation is conducted not by one executive branch official, but rather by an independent agency – the ITC. An affirmative determination results in a recommendation to the President for relief, but the President may choose not to raise trade barriers, because such action is “appropriate and feasible.” As indicated, the causation test in the surge mechanism is unmodified, \textit{i.e.}, it does not have the descriptive adjective “substantial.” Any causal contribution is enough to justify relief.

\begin{footnotes}
\item[298] See 19 U.S.C. §§ 2251-2254.
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In contrast to a Section 201 case, in a surge mechanism case, it is not necessary to show there is no cause more important than the imports from a Beneficiary.

Also in contrast to a Section 201 case, in a surge mechanism case, one member of the President’s cabinet makes the decision. The President has no choice but to suspend duty-free treatment if the decision is positive. Finally, the universe of potential petitioners in a Section 201 case does not expressly include upstream producers, workers, or associations. Rather, the petitioner must be “an entity, including a trade association, firm, certified or organized union, or group of workers, which is representative of an industry.” In turn, the industry must be the one subject to actual or threatened serious injury.

4th Preference Category:
Third Country Fabric

One dimension of the regional fabric grouping is, in effect, a separate ROO category. There is a special rule for a T&A Beneficiary SSAC designated as “lesser developed,” sometimes called the “Third Country Fabric Provision,” or “Third Country Fabric Exception for Apparel.” ²⁹⁹ The basic rule for qualifying as “lesser developed” is a per capita GNP of less than $1,500 (as of 1998, measured by the World Bank). However, AGOA identifies three countries by name as “lesser developed” – Botswana, Namibia, and Mauritius – that have higher per capita incomes. Indeed, the per capita income of Mauritius, at $10,186 (in 2017), is considerably higher (indeed, it is 81% of the global average per capita GDP), and that country sometimes is cited as a success story.³⁰⁰

The special rule is an apparel article wholly assembled (or knit-to-shape) in a lesser developed Beneficiary (or multiple such Beneficiaries) may qualify for duty free treatment, regardless of the country or origin of the fabric or yarn used to make the articles. In effect, the lesser developed Beneficiary can source inputs from anywhere in the world: its apparel can qualify for an AGOA preference regardless of the origin of the fabric it uses to make the apparel. However, this special rule is subject to two limitations.

First, the special rule initially applied only through 30 September 2007, which is just half the length of extension of other AGOA benefits.³⁰¹ The special rule was extended to September 2012, and then again through 30 September 2015. Uncertainty created by whether and when Congress might extend this rule is difficult for T&A businesses. They are part of a global supply chain and operate on thin margins. Typically, they make decisions about sourcing fabric six-to-nine months before actual importation and use of the fabric. When Congress fails to extend the third-country fabric provision in a timely fashion, they plan on moving T&A factories out of AGOA beneficiary countries, thus threatening jobs and incomes in those countries.

²⁹⁹ See 19 U.S.C. § 3721(b)(3)(B); HTSUS Chapter 98, Sub-Heading 9819.11.12 at 98-XIX-4 (concerning these articles).
Second, there is a cap on third-country fabric imports. It is defined in terms of an “applicable percentage” of SMEs of all apparel articles imported into the U.S. in the previous 12-month period for which data are available. The cap rises, then falls. For example, initially under AGOA, in the first year (1 October 2003 through 30 September 2004), the applicable percentage was 2.3571%. In the second year, (1 October 2004 through 30 September 2005), it was 2.6428%. In the third year (1 October 2005 through 30 September 2006), it peaked at 2.9285%. In the final year (1 October 2006 through 30 September 2007), the cap dropped to just 1.6071%.

5th Preference Category:
Beneficiary Knit to Shape-Forward for Certain Sweaters

Certain kinds of sweaters potentially qualify for duty-free treatment. To qualify, the sweaters must satisfy two requirements:

1. The sweaters are knit-to-shape in a T&A Beneficiary SSAC.
2. The sweaters are made either of cashmere or fine merino wool.

If the sweaters are cashmere, then their chief weight must consist of cashmere. They also must be classified under Sub-Heading 6110.10 of the HTSUS, which covers sweaters, pullovers, sweatshirts, waistcoats (i.e., vests), and other similar articles that are knitted or crocheted. If the sweaters are wool, then they must contain 50% or more merino wool, and the diameter of that wool must be no finer (i.e., not exceed) 21.5 microns. As indicated earlier, this Preference Category is narrow and not of great commercial significance.

6th Preference Category –
Short Supply and NAFTA Parity

Are there any circumstances in which the U.S. will accord duty-free treatment to apparel from a T&A Beneficiary SSAC, which is not a lesser developed country, even though the fabric, or the yarn making up the fabric, is from neither America nor a Beneficiary? That is, can apparel made of third country fabric or yarn qualify? Yes, under the 6th Preference Category, the origin or fabric or yarn is irrelevant.

The usual rubric for this Category is the “Third Country Fabric” provision. A full (but cumbersome) title for this Category might be “Beneficiary Cutting and Sewing Forward with a NAFTA Rule of Origin or with Short-Supply Fabric or Yarn.” That is because to qualify, the apparel must be cut (or knit to shape), sewn, and further assembled in a Beneficiary. But, duty-free treatment depends on satisfaction of a short-supply test, plus the applicable NAFTA rule of origin. (Generally, NAFTA sets out a yarn-forward rule of origin for garments to obtain DFQF treatment.)

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303 See 19 U.S.C. § 3721(b)(4); HTSUS Chapter 98, Sub-Headings 9819.11.15, 9819.11.18 at 98-XIX-5.
304 See 19 U.S.C. § 3721(b)(5); HTSUS Chapter 98, Sub-Headings 9819.11.21 and 9819.11.24 at 98-XIX-5.
The short supply test is that the fabric, or the yarn used in the fabric, is “not available in commercial quantities in the United States.” The exact NAFTA rule of origin depends on the customs classification of the apparel article. They are (for the most part) CTH rules, also known as “tariff shift” rules. In theory at least, this kind of rule of origin determines whether a sufficient amount of economic activity occurred in a country to justify conferral of origin in that country. Generally, the greater the shift (e.g., at the 4-digit HTS classification level), the greater the economic activity in a country. Conversely, the smaller the shift (e.g., at the 8-digit level), the more modest the activity.

To apply a CTH rule, two sets of records must be available to answer two questions. First, what HTS classification applied to the imported components before they were manufactured into a finished apparel article? Second, what HTS classification applied to the finished apparel article?

The first question concerns customs classification by a Beneficiary (i.e., when the materials imported were imported into the Beneficiary). The second question concerns classification upon entry of the finished article into the U.S. Of course, applying the rule also presumes an exporter in a T & A Beneficiary SSAC has access directly, or through counsel, to NAFTA. Annex 401 of NAFTA contains the rules of origin (including for Chapters 50-63 of the HTS, which cover T & A merchandise), and they are reproduced in the General Notes to the HTSUS. While this may be true for prominent, well-connected exporters, it is difficult to imagine either NAFTA or the HTSUS is a bestseller anywhere on the African continent. Put simply, aside from the complexity of the CTH rules, access to them is difficult, and both problems raise the cost of compliance with AGOA to qualify for duty-free treatment.

No less important significant a concern is the oddity of AGOA incorporating by reference the Annex 401 origin rules. True, it may be preferable to creating a whole new set of origin rules. But, why give the relatively poorer countries of SSA the same treatment as Mexican apparel exporters? The origin requirement creates a kind of legal parity between two patently unequal categories of exporters whenever fabric or yard is neither American nor African, subjecting the poorer ones to the same origin strictures as the comparatively better-off ones. Evidently, the scale of relative deprivation plays no role in this Preference Category.

Implicit in the short-supply test is permanence, i.e., that the fabric or yarn in question is unavailable in commercial quantities in the U.S. now and in the long run. Silk is an example of such a fabric. However, what if the fabric or yarn is available, but not immediately, nor in the short or medium term? In that instance, if an “interested party” requests, the President may proclaim duty-free treatment for yarns or fabrics that “cannot be supplied by the domestic industry in commercial quantities in a timely manner.”

To qualify, such apparel must come from fabric or yarn not available in commercial

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quantities in the U.S. (the first prong), and that American producers cannot supply in commercial quantities in a timely manner (the second prong). In brief, the apparel qualifies, despite consisting of non-American fabric or yarn, if the inputs are in short supply in the U.S. The President makes the short-supply determination, though in practice the President delegates this authority to the DOC Office of Textiles and Apparel (OTEXA). The criteria applied are the fabric or yarn in question “cannot be supplied by the domestic [American] industry in commercial quantities in a timely manner.”

7th Preference Category:
Cultural T&A

Certain T&A goods, specifically, ones that are hand-loomed, handmade, or folklore articles, or ethnic printed fabrics, potentially qualify for preferential treatment. (See 19 U.S.C. § 3721(b)(6); HTSUS Chapter 98, Sub-Heading 9819.11.27 at 98-XIX-5.7) Conceptually, there are three stages for qualification.

First, the prospective T&A Beneficiary SSAC must consult with the U.S. as to the eligibility of the good. Second, the U.S. must decide whether the good indeed qualifies as a hand-loomed, handmade, or folklore article, or an ethnic printed fabric. Third, if the U.S. renders an affirmative determination in the second step, then a competent authority in the beneficiary country must certify the good as an eligible hand-loomed, hand-made, or folklore article, or ethnic printed fabric.

This Preference Category poses virtually no competitive threat to any American producer. Almost by definition, African cultural T&A articles do not have like or directly competitive products. Generosity through duty-free treatment in this Category hardly is self-giving. The practical benefit from this generosity, for exporters, depends on the value and volume of exports in this Category. Once again, by definition, small, cottage-industry-like producers, are among the likeliest of beneficiaries. How significant they are in a national economy, and the role they play in boosting growth, is dubious. Few if any countries reached developed country status through a handicrafts industry.

8th Preference Category:
Multi-Jurisdictional Apparel

The final AGOA Preference Category covers apparel assembled in a T&A Beneficiary SSAC from components originating in both a Beneficiary and the U.S.7 Accordingly, the Category might be called “Beneficiary Assembly Forward with Beneficiary or American Components.” In specific, sewing may occur in a Beneficiary using American thread, where the components stitched together come from, and are cut in, the U.S. and a Beneficiary (or former Beneficiary) SSAC. The fabric must be American. This fabric must consist of American yarn (or components knit-to-shape in the U.S. and one or more Beneficiary or former Beneficiary, or both).

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8 See 19 U.S.C. § 3721(b)(7); HTSUS Chapter 98, Sub-Heading 9819.11.30 at 98-XIX-5.
So, suppose the apparel article in question is a 100% cotton men’s dress shirt. The pockets and sleeves are cut in the U.S., while the body is cut in one Beneficiary. In a second Beneficiary, with U.S. thread, the pockets, sleeves, and body, are stitched together (along with other components, like collars and cuffs, which may come from any country). The pockets, sleeves, and body are from cotton fabric made of cotton spun in the U.S. The article would qualify for duty-free treatment under this Category.

This Category gives a T&A Beneficiary SSAC a modicum of flexibility in sourcing components. It can choose from multiple jurisdictions, without sourcing all components from one jurisdiction. But, it is constrained to choose from the U.S., a fellow Beneficiary, or a domestic source. Insistence on American fabric made of American yarn is a familiar stricture. A similar one exists in the 1st and 2nd Preference Category. Thus, the flavor of all three categories is – put colloquially – “you (the Beneficiary) can have duty-free treatment, but only if you use our (American) fabric and yarn.”

III. AGOA Amendments, Ford Kansas City Case Study, and Overall Effects

Congress amended AGOA often, most notably with the 2004 AGOA Acceleration Act and 2006 Africa Investment Incentive Act, generally with a view to expanding preferential access for merchandise from Beneficiary SSACs. The 2004 legislation extended AGOA until 30 September 2015. The 2006 legislation added over 700 HTSUS tariff lines eligible for AGOA preferences, especially for T&A articles, and granted greater DFQF treatment to T&A articles originating entirely in one or more lesser developed Beneficiary SSACs. The 2006 changes had special rules for fabrics or yarns a Beneficiary SSAC country makes in commercial quantities as inputs for T&A articles.

Have these changes helped African countries develop vertically integrated T&A industries? Have they resulted in increased exports from them to America? Have they caused American companies to outsource jobs and use SSACs as an export platform?

Consider the following case study: thanks to AGOA, Ford Motor Company invested over $300 million in its South African engine manufacturing plants. From them, Ford exports engines world-wide, including DFQF to America. Secretary of State John Kerry (1943-) declared to the August 2014 AGOA Forum at the World Bank that: “the efficiencies of the South African operation have allowed Ford to create 800 new jobs at its Kansas City, Missouri, plant as part of the global production line.”

But, should these sectoral successes be weighed against the overall, the effect of AGOA, which has been small?:

AGOA provides duty-free access to the U.S. market for exports across 1,800 product lines from eligible African countries. It is meant to help increase trade and investment with the continent, promote sustainable economic growth and encourage the rule of law and market-oriented reforms. …

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Since the program’s launch in 2000, Africa’s minuscule share of U.S. global trade has barely budged. The aggregate U.S.-Africa trade volume reached a peak of $142 bn in 2008 and has been declining since, falling to $72 bn in 2022.\textsuperscript{310} Why not, then, replace AGOA with “a few bilateral trade agreements with countries such as Kenya and South Africa”?\textsuperscript{311}

IV. Trade Distortion?

Apparel articles are quintessential examples of low-value-added manufactured items economists such as Walt Whitman Rostow (1916-2003) in his The Stages of Economic Growth (1960) (discussed in a separate Chapter) identify as significant to countries advancing to and beyond the “take off” for industrialization. For a poor country, these products tend to be ones in which they have a keen export interest, and thus ones for which preferential rules of origin matter greatly.

Trade in T&A constitutes roughly 8% of all trade in manufactured goods. The leading example of “high dependence” on T&A (defined as earning more than 50% of export revenue from one sector) is Bangladesh, for which T&A account for 85.8% of the merchandise export revenue. In India, 20% of industrial production comes from T&A, and this sector employs 15 million people. Exports in this sector play prominent roles in many SSACs and North African countries. In all such economies, there are multiplier effects from T&A production and exports. Businesses develop around this activity, from fruit and newsagents to haircutting and pharmacies. There also are externalities, including the employment and potential empowerment (as well as exploitation) of women.

To pick up the question of “why?,” why is it appropriate to characterize the preferential ROOs for these articles as “devilish,” from the vantage of a prospective Beneficiary SSAC? Surely, the rules are defensible on the ground many SSACs lack the capacity to weave, cut, or assemble fabric, and indeed do not even have significant domestic yarn production. In brief, inputs into apparel articles are not readily available anyway, so what is wrong with ROOs requiring use of U.S. inputs?

One answer, in brief, is distortion. This response arises out of conventional Neo-Classical economic theory. These rules create an artificial distortion about sourcing inputs. Consider the reality of global T&A production as seen by Victor Fung, the Chairman of Li & Fung, the major garment supplier in Hong Kong to American and European clothing brands:

We might decide to buy yarn from a Korean producer but have it woven

\textsuperscript{310} Zainab Usman, America Should Not Allow its Trade Program with Africa to Die, FINANCIAL TIMES, 7 February 2024,\texttt{www.ft.com/content/9a758373-4c5b-40e7-859e-04e5beaa7e4f?shareType=nongift}. (Emphasis added.) [Hereinafter, America Should Not Allow.]

\textsuperscript{311} America Should Not Allow.
and dyed in Taiwan. So we pick the yarn and ship it to Taiwan. The Japanese have the best zippers and buttons, but they manufacture them mostly in China. Okay, so we go to YKK, a big Japanese manufacturer, and we order the right zippers from their Chinese plants. Then we determine that … the best place to make the garments is Thailand. So we ship everything there. … We’re not asking which country can do the best job overall. Instead, we’re pulling apart the value chain and optimizing each step – and we’re doing it globally. … If you talk to the big global consumer-products companies, they are all moving in this direction – toward being best on a global scale.\textsuperscript{312}

Yet, the \textit{AGOA} preferential ROOs seem either oblivious to, or flout deliberately, this free market logic.

It will not do to criticize an SSA for lacking globally-minded entrepreneurs like Victor Fung, or to castigate African rulers for bad governance and corruption, without also engaging in introspection. What technical American trade rules impede the likes of Victor Fung in SSA? In \textit{AGOA}, the 1\textsuperscript{st} and 3\textsuperscript{rd} Preference Categories are not based on pure assembly rules. Rather, they combine assembly operations in an SSA T&A beneficiary with Yarn Forward requirements. Likewise, the 2\textsuperscript{nd} Preference Category is not a pure Cutting Forward Rule. Rather, it contains a yarn-forward requirement. The 8\textsuperscript{th} Category suffers from the same problem.

These strictures discourage would-be African entrepreneurs in a T&A SSAC Beneficiary from obtaining fabric from the cheapest cost or highest quality sources, and creating an efficient, vertically integrated, global production chain like that of Li & Fung. Rather, under the 1\textsuperscript{st} and 3\textsuperscript{rd} Categories, they must pay attention to the country of origin of yarn, not its price or quality. Under the 2\textsuperscript{nd} Category, they must focus on the source of the thread, not its price and quality. Under the 8\textsuperscript{th} Category, they most focus on the source of fabric, yarn, and thread. If fabric, yarn, or thread is not American, then any hope of duty-free, quota free treatment from the U.S. is lost. The economic fact substitute material from a third country, such as Egypt or Pakistan, may be cheaper or better quality than the American inputs, is legally irrelevant.

One response to the trade distortion critique is the \textit{AGOA} preferential ROOs encourage regional development. Some of them allow for use of fabric or yarn from more than one Beneficiary. The 3\textsuperscript{rd} and 8\textsuperscript{th} Preference Categories are illustrations. Such allowance is known as “regional cumulation,” indicating via a mathematical RVC rule that a proportion of the inputs into a finished garment may come from other countries in the region of the beneficiary, yet not vitiate eligibility for preferential treatment.

However, Oxfam International dubs regional cumulation a “flawed trade instrument,” stating “there is no development rationale for promoting regional rather than global cumulation. It adds:

\textsuperscript{312} Quoted in Oxfam Briefing Paper, 20.
The USA’s *African Growth and Opportunity Act* … contains imperfect rules on cumulation. The Act stipulates that apparel exported from African countries to the USA must use either US or African fabrics to qualify for *AGOA* benefits, notably discriminating against fabrics produced in Asia. One recent study [by the World Bank] estimates that Mauritius would have seen its total exports increase by 36 percent between 2001 and 2004 under *AGOA*, rather than 5 percent, had restrictive rules of origin not been in place.\(^{313}\)

Whether the points Oxfam makes are true generally, or depend on the industry and regional in question, is a matter best left to development economists.

For now, five points should be emphasized. First, not all *AGOA* rules encourage regional development. If they did, then why are they (as Oxfam International puts it) “unreasonably demanding”? Second, the rules are inconsistent, if not disingenuous, in helping SSA. They address development in the American T&A industry as much as in SSA. Arguably because of fears of competition from Asian suppliers, there is no analog to *AGOA* for developing or least developed countries in Asia. Third, whether a ROO is an appropriate tool to encourage regional development is questionable. Surely there are more direct, efficient legal instruments. Fourth, the *AGOA* cumulation rules are not unconditionally generous. They are subject to limits, specifically, on the cumulation of labor costs. So, the degree to which labor inputs from one Beneficiary can count toward satisfying the pertinent ROO are limited. Moreover, for certain products, satisfying the ROO depends on having a specified percentage of American content. Fifth, and most fundamentally, there may well be strong arguments against promoting regional versus global development.

V. Economic Dependency?

Applying Dependency Theory, *AGOA* preferential ROOs tie a T&A Beneficiary SSAC to the U.S., or at least encourage that outcome. As Oxfam International observes, “agreements [like *AGOA* and the European “*Everything But Arms*” (*EBA*) program] that are supposed to benefit poor countries actually serve to promote the production of textiles in rich countries, to the detriment of the developing world as a whole.” In *AGOA*, this tying is patent in all but the 5\(^{th}\) and 7\(^{th}\) Preference Categories. It is operationalized through hybrid specified process rules of origin. Rather than, for example, a pure assembly rule in the 1\(^{st}\) and 3\(^{rd}\) Categories, or a pure cutting forward rule in the 2\(^{nd}\) and 8\(^{th}\) Categories, there are added mandates about the American origin of fabric, yarn, or thread. Such mandates encourage a Beneficiary to become dependent on the U.S. for inputs.

\(^{313}\) Oxfam Briefing Paper, 22. See also The President, *Proclamation 10692 of December 29, 2023, To Take Certain Actions Under the African Growth and Opportunity Act and for Other Purposes*, 89 Federal Register number 3, 437-441 (4 January 2024), www.govinfo.gov/content/pkg/FR-2024-01-04/pdf/2024-00051.pdf (reinstating Mauritania as an *AGOA* beneficiary and terminating the *AGOA* beneficiary status of Central African Republic, Gabon, Niger, and Uganda, while – per Paragraphs 9-10 of the *Proclamation* – extending the DFQF treatment of Israeli agricultural products following the Fifth Israel-Hamas War, which began on 7 October 2023).
This encouragement is ironic. In the aftermath of the 1939-1945 Second World War, when the U.S. actively engaged in the drafting of GATT at the 1946 London Preparatory Conference and the 1947 Geneva Preparatory Conference, it argued strongly against the preferential trading arrangements of the European colonial powers. Tying peripheral countries in Africa, Asia, and the Caribbean to the center countries like the U.K. and France was incongruous with free trade and the development interests of the poor countries. The American argument was not entirely successful. But, it did at least limit the schemes to the parameters set forth in Article I:2 of GATT, a restricted exception to the MFN obligation in Article I:1.

Does AGOA bespeak an historic reversal of American efforts to resist center–periphery type links? Does it reveal a neo-colonial tolerance (indeed, support) for vertical integration of the T&A production through such links? Why does AGOA confer no meaningful reward for economic integration among poor countries, for instance, where a Beneficiary SSAC seeks high-quality, low-cost cotton from Egypt or Pakistan? Is it too cynical a response to say AGOA is about divide and rule? These questions are not pleasant to pose, nor should an ideologically-driven answer be presumed. But, AGOA is not pleasant reading for an international trade lawyer or scholar who believes, perhaps mistakenly or foolishly, that International Trade Law can be about more than politically-motivated protection, that it can be a policy instrument to assist poor countries.

Another irony about AGOA is the first and second rationales may be practically inconsequential. From a legal standpoint, the rules of origin are complex. The cost of understanding and complying with them surely are high, all the more so for an African producer/exporter with limited resources to spend on competent trade counsel (if it even exists nearby). The cost may approach the margin of preference, cut into that margin, or even dwarf it. If compliance costs discourage use of AGOA benefits, then neither trade distortion nor dependency occurs. The consequence is “missing preferences” – a poor country does not develop a T&A industry capable of meeting the requirements for duty-free access to the markets of rich countries. Missing preferences is the heart of the irony. The ostensible purpose of AGOA – to provide a preference – is unfulfilled.

The problem of missing preferences may be even more likely to arise when an African producer-exporter seeks to ship merchandise to multiple importing countries. Suppose the producer/exporter aspires to gain a foothold not only in the American market, but also the EU market. To gain preferential access, it will be necessary to satisfy AGOA origin rules for the American market, and EU origin rules for the European market. To the extent the rules differ, the problem of understanding and applying them increases. If the producer-exporter seeks entry for its merchandise into still more markets, and the importing countries have non-harmonized rules, then the problem is yet worse. Heterogeneous rules of origin are dubbed the “spaghetti-bowl effect.” The point is to see the interaction between this effect and missing preferences, as producer-exporters simply – and rationally, from a cost-benefit perspective – elect not to seek preferential access.

VI. Social Justice?
To analyze preferential programs like AGOA in terms of trade distortion or Dependency Theory is to employ Development Economics. There also is a non-economic basis to brand as “devilish” AGOA ROOs for apparel articles. That reason is moral, indeed, religious: these rules are at variance with the preferential option for the poor, which is a tenet of Catholic social justice theory (and of justice criteria in other faiths). This tenet is grounded in Gospel teaching and articulated and elaborated, for example, in the Magisterium of the Roman Catholic Church through (inter alia) Papal encyclicals starting in 1891 with Rerum Novarum (On the Condition of the Working Classes), by Pope Leo XIII (1810-1903, 256th Pope, 1878-1903), and emphasized by Pope Saint John Paul II (1920-2005, 264th Pope, 1978-2005) in encyclicals such as Laboureum Exercens (On Human Work) (1981), Sollicitudo Rei Socialis (On Social Concern) (1987), and Centesimus Annus (On the Hundredth Anniversary of Rerum Novarum) (1991).

In brief, it demands primacy in public policy choices be given to the interests of the poor over the well-to-do. America has moved from a generic 35% Value Added Test in its GSP program to product-specific rules of origin namely specified processes. Is that move selfish? Is it the case each U.S.-based company can insert into what is or ought to be a charitable program its own special device to make sure generosity stops where its self-interest, however real or remote, begins?

In contrast, Canada adopted in 2003 an “Initiative for Least Developed Countries,” making it the only major developed country to fulfill its promise at the Doha Ministerial Conference in November 2001 to provide DFQF treatment on T&A articles from LDCs. This Initiative imposes a two-pronged test to qualify for such treatment, and only one prong need be satisfied. Either:

1. An article is made in a LDC, regardless of value added at the final stage of production (i.e., there is no value-added threshold at that stage), or

2. At least 25% of the value added to an article occurs in the final stage in a least developed country, but inputs may come from any other country in the world, and there is no dual substantial transformation requirement concerning yarn-to-fabric and fabric-to-clothing).

Yet, under AGOA, the keen export interest in T&A of Beneficiary SSACs is subordinated to producers of T&A producing like merchandise made in the U.S.

Understandably, the American T&A sector feels besieged by cheaper imports. Hundreds of thousands of jobs have been lost in recent years, as some politicians, especially from the Southeast (the epicenter of the sector), intone. From their vantage, to give GSP treatment to T&A imports exacerbates decline, or at least complicates orderly contraction. The GSP statutory product exemptions are right to calculate generosity to poor countries. The 4th Preference Category, for the poorest SSA countries, with early its sunset rule and TRQ thresholds, is a good balance. American willingness to give DFQF treatment should extend only to the line of potential threat to U.S. producers.
However, is the socially just response to cut back on generosity toward the poorest countries? Is it better to help the shrinking American T&A sector through more generous TAA? Ought not generosity to be a positive sum game? And, should it be subject to periodic renewals? AGOA was set to expire in September 2025, though the Biden Administration supported its renewal.

Zainab Usman, Senior Fellow and Director of the Africa Program at the Carnegie Endowment for International Peace, considered AGOA renewal through the lens of the Sino-American Trade War (discussed in a separate Chapter):

It is often said that Africa does not matter to America. Unlike China, the U.S. does not pursue a policy of exporting surplus industrial capacity to low-income regions of the world. Accounting for less than 2 per cent of U.S. global commerce, Africa remains more the target of aid programming than an economic priority for Washington.

In an era of renewed great power competition, a revitalized U.S.-Africa trade relationship will be crucial. … China has been steadily expanding its commercial engagement with Africa, becoming the continent’s largest bilateral trade partner in 2009.

However, Africa has a significant trade deficit with China (it stood at roughly $47 bn in 2022). Since it is aimed specifically at increasing African exports to the American market, AGOA hands the U.S. a latent advantage in its competition with China, given its potential for helping African countries reduce pressures on their foreign exchange supplies and government budgets.

However, for it to succeed in this geopolitically fraught era, AGOA must be recast to advance American strategic interests in synergy with African development priorities. First, a key objective of reauthorization should be the diversification of U.S. sources of “critical” minerals supplies. AGOA can be a tool for expanding the existing minerals trade between the U.S. and Africa by encouraging investment from G7 countries in the refining and processing that African countries require before export of critical minerals for final use in battery packs and solar panels.

Second, AGOA should have a narrower focus on achieving specific geostrategic commercial goals rather than a wide array of governance-related objectives. … [S]ince 2021, the Biden Administration has expelled a record eight African countries from AGOA for governance challenges, while human rights infractions in countries such as India and Saudi Arabia

have not elicited a punitive response. The Treasury Department’s Office of Foreign Assets Control is the best vehicle for imposing sanctions on perpetrators of electoral or human rights abuses, rather than suspending AGOA privileges, which cripples nascent export-oriented industries.…

Finally, AGOA should be rebranded. I propose changing its name to the Strategic Economic Partnership with Africa, or the Step with Africa Act, to convey the shift from a quasi-aid instrument to a strategic trade partnership fit for today’s geopolitical realities.315

Compelling as the argument and three proposals may be, notice that they shift the paradigm from economic development to geopolitics. To accept them would mean American national security interests should drive U.S. trade relations with SSACs – not social justice. If those interests shift, would America abandon the SSACs?
Part Three

UNDERSTANDING MODERN INDIAN TRADE POLICY
Chapter 12

AUGUST 1947 PARTITION TO 1991\(^{316}\)

\(^{316}\) Literature on Indian economic reforms is sizeable and growing. Beyond references cited later, excellent sources include:

**Books** –
5. GULATI, Ashok & Tim Kelley, Trade Liberalization & Indian Agriculture (1999).
15. SRINIVASAN, T.N. & Suresh D. Tendulkar, Reintegrating India with the World Economy (March 2003).

**Articles** –

Additionally, for three thought-provoking books on India’s future in the world, see –
1. Meenakshi Ahamed, A Matter of Trust: India-U.S. Relations from Truman to Trump (2021) (touring the history of post-Partition relations, with insightful anecdotes, including quoting President Truman: “I can smell these Communists a mile away, and this man Nehru sure looked like a Communist to me,” arguing: “Seventy years of India-U.S. relations has shown that despite the two countries being democracies, not only are they far apart culturally but the intersection of their critical interests is relatively modest. The only time when the relationship has developed any real momentum is when one of the leaders has been willing to make a leap of faith,” and concluding:
I. 15 August 1947 British Partition of Indian Subcontinent

An ancient civilization, the modern Indian nation was born at the stroke of midnight on 15 August 1947. At that moment, the British Partition took effect, creating “India” in Hindu-majority areas, and “Pakistan” in Muslim-majority areas. Partition hardly was perfect. Hindus and Sikhs on the Pakistan side of the line streamed into the Indian Punjab, while some Muslims on the Indian side shifted to Pakistan. Ten million people moved, the largest exodus in human history. One million were killed in communal violence, Hindus and Sikhs on Muslims, and vice versa. Ghost trains pulled into Amritsar and Multan, the occupants having been slaughtered.

Visually, Partition scenes are depicted in the epic film *Gandhi* (1982), which won 8 of the 11 Academy Awards for which it was nominated, including Best Picture, Best Director (Sir Richard Attenborough (1923-2014)), and Best Actor (Ben Kingsley (1943-) as the Mahatma). Many writers have chronicled the Partition: Sir Penderel Moon (1905-1987), the former Chief Commissioner for Himachal Pradesh, in *Divide and Quit – An Eyewitness Account of the Partition of India* (1961); Anita Inder Singh, an international affairs scholar, in *The Origins of the Partition of India: 1936-1947* (1987); and, Yasmin Khan (1977-), a historian, *The Great Partition – The Making of India and Pakistan* (2007). But no book on the Partition bests *Freedom at Midnight* (1975), by journalists Larry Collins (1951-) and Dominique Lapierre (1931-).

The debate strewn across thousands of pages about the cataclysmic events and repercussions of the Partition continues. Why did it occur? Was it necessary? And, the

“Nehru’s policy of non-alignment may still be the gold standard that plots a safe course for India through the uncharted waters that lie ahead.”

2. Rahul Sagar ed., *To Raise A Fallen People – The Nineteenth Century Origins of Indian Views on International Politics* (2022) (containing a essays, including from Mahatma Gandhi and Rabindranath Tagore, on a range of topics such as imperialism and the Opium trade, and asking whether India, now in the “waiting room of history,” as Sagar puts it, will behave like a traditional great power by focusing on the advancement of its own national interests amidst the rough and tumble of international relations).

3. Shyam Saran, *How China Sees India and the World* (2022) (analyzing the ways in which the rise of China complicates India’s national security and chronicling the limited understanding of each side for the other).

These books are reviewed in James Crabtree, *What Kind of Great Power Will India Become?,* FINANCIAL TIMES, 23August 2022, [www.ft.com/content/4be4b8-001c-4556-9453-6ebb127f33f?shareType=nongift](http://www.ft.com/content/4be4b8-001c-4556-9453-6ebb127f33f?shareType=nongift).

For an excellent summary of Partition (including key maps) on its 75th anniversary of Partition (15 August 2022), see *Partition: Why Was British India Divided 75 Years Ago?,* BBC NEWS, 15 August 2022, [www.bbc.com/news/world-south-asia-62467438](http://www.bbc.com/news/world-south-asia-62467438) (recounting (inter alia): “In 1946, Britain announced it would grant India independence. No longer able to afford to administer the country, it wanted to leave as quickly as possible. The last Viceroy, Lord Mountbatten, set the date as 15 August 1947. The population was about 25% Muslim, with the rest mostly Hindu but also Sikh, Buddhist, and other religions. ‘The British used religion as a way of dividing people in India into categories,’ Prof. Navtej Purewal, Indian Fellow for the Arts and Humanities Research Council, says. ‘For example, they created separate Muslim and Hindu lists of voters for local elections. There were seats reserved for Muslim politicians and seats reserved for Hindus. Religion became a factor in politics.’ Dr. Gareth Price, at the U.K.-based Chatham House Foreign Policy
debate about the giant figures of Partition continues: Jawaharlal Nehru (1889-1964), the first Indian Prime Minister (1947-1964) and an intellectual giant; Muhammad Ali Jinnah (1876-1948), the first Pakistani leader (1947-1948), its Quaid-i-Azam (Great Leader) and Baba-i-Qaum (Father of the Nation); Lord Mountbatten (1900-1979), the last British Viceroy of India (1947) and first Governor-General of the Independent Union of India (1947-1948, from which the Republic of India emerged in 1950); and, of course, the Mahatma, Mohandas Karamchand Gandhi (1869-1948) or Bapu (Father of the Nation). What were their motives, their strokes of genius, and their tragic mistakes? The legacy of Partition lives on in the children (such as your author) and grandchildren of the parents who lived and died in that era through countless family stories, mementos, and novels like Train to Pakistan (1956), by Khushwant Singh (1915-2014), and Midnight’s Children (1980) winner of the 1981 Booker Prize, by Salman Rushdie (1947-).

The legacy of Partition also lives on in International Trade Law. GATT provided a sui generis provision, Article XXIV:11, for India and Pakistan, in light of the

Institute, says: ‘When it looked likely that India would get independence, many Muslim Indians became worried about living in a country ruled by a Hindu majority. They thought they would be overwhelmed. They started to support political leaders who campaigned for a separate Muslim homeland.’ Congress Party independence-movement leaders Mohandas Gandhi and Jawaharlal Nehru wanted a united India that embraced all faiths. But All-India Muslim League leader Muhammad Ali Jinnah demanded Partition as part of the independence settlement. ‘It would have taken a long time to get agreement about how a united India would work,’ Dr. Price says. ‘Partition seemed to be a quick and simple solution.’ British civil servant Sir Cyril Radcliffe drew up the borders between India and Pakistan, in 1947, dividing the Sub-Continent very roughly into: (1) a central and southern part, where Hindus formed the majority; and (2) two parts in the north-west and north-east that were mostly Muslim. But Hindu and Muslim communities were scattered throughout British India. About 15 million people travelled, often hundreds of miles, to cross the new frontiers. … Between 200,000 and one million people are estimated to have been killed or died of disease in refugee camps. Tens of thousands of women, both Hindu and Muslim, were raped, abducted, or disfigured.’

Radcliffe, who had no prior experience with or in the Sub-Continent, destroyed his Partition-drafting records.

For a fascinating account of how India’s Independence leaders projected their speeches to large crowds, see Soutik Biswas, India Independence Day: The Surprising DIY Tech that Powered India’s Freedom, BBC NEWS, 15 August 2022, www.bbc.com/news/world-asia-india-62390087 (observing: “In 1929, a young volunteer of the Indian National Congress party had a moment of epiphany. Nanik Motwane was watching the venerated national hero Mahatma Gandhi struggling to get himself heard at huge public meetings. The leader would be ‘going from platform to platform’ at the same venue to ‘enable his weak voice to be heard by large numbers [of people],’ Motwane recounted later. That’s when the 27-year-old second-generation migrant businessman decided to find a way to ‘amplify the voice’ of the leader so that ‘all who were anxious, more to hear than to see him, would be able to hear him clearly.’ Two years later, Motwane was ready with a public address system at the Congress Party’s session in Karachi…. One of his earliest surviving photographs shows the beaming businessman wearing the trademark white Gandhi cap and showing the leader the branding on his microphone: Chicago Radio. For the next two decades, Chicago Radio became synonymous with the loudspeakers that relayed India’s struggle for freedom from imperial rule to the masses. ‘We called our loudspeakers the ‘Voice of India,’’ says Kiran Motwane, son of Nanik, and third-generation scion of the family.’

For an overall optimistic spin on India’s post-Partition, particularly recent, growth and development prospects, see Ruchir Sharma, At 75, India is Finally Ready to Join the Global Party, FINANCIAL TIMES, 14 August 2022, www.ft.com/content/dec674c5-9009-4da1-a857-c2e68473c9ae?shareType=nongift (arguing: “With its entrepreneurial spirit and an increasingly efficient welfare state, the country can thrive in a slowing world”).

“exceptional circumstances arising out of” their creation.\footnote{GATT Article XXIV:11. (Emphasis added.)} Seeing the two newly independent countries had “long constituted an economic unit,” the GATT contracting parties granted India and Pakistan special dispensation from multilateral trade disciplines to enter into “special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.”\footnote{GATT Article XXIV:11. (Emphasis added.)} They forgot this special mercy, this permission naming only them to “depart from particular provisions of” GATT as long as they fulfilled its objectives.\footnote{GATT Article XXIV:11, Ad Article XXIV, Paragraph 11.}

Never taking advantage of it, never establishing definitive trade arrangements, they instead fought three wars. India won them all: in 1965; 1971, resulting in the split of West and East Pakistan, the latter becoming the new nation of Bangladesh; and 1999, an undeclared war fought in the icy climbs of the Himalayas in Kashmir, the key Muslim-majority area the British left to India.\footnote{For a primer on the nearly 7 decades of conflict between the rivals, see Stanley Wolpert, \textit{India and Pakistan – Continued Conflict or Cooperation?} (Berkeley, California: University of California Press, 2010).} To this day, mutual suspicion over-rides what obviously is a geographically and culturally free trade region. Though original contracting parties to GATT, only recently did each side even grant MFN treatment to the other.

\section*{II. Socialism, Nationalism, and Anti-Colonialism}

In 1949, Prime Minister Nehru spent several weeks travelling across the U.S., giving lectures at universities, and meeting Albert Einstein. “[S]hocked by the commercialism he saw,”\footnote{Charming, Disarming, \textit{THE ECONOMIST}, 4 October 2014, 48. [Hereinafter, Charming.]} the Prime Minister quipped: “one should never visit America for the first time.”\footnote{Quoted in Charming.} Speaking at Columbia University, he worried about unsustainable inequities: if the hopes of poor people remain unmet, “then there is the apathy of despair or the destructive rage of the revolutionary.”\footnote{Charming.}

Given the \textit{Pandit Ji}’s observations, coupled with the intellectual influences from his student days in England, it is unsurprising that he and his economic leadership team were enamored with Socialism.\footnote{See SHASHI THAROOR, NEHRU – THE INVENTION OF INDIA 240 (New York, New York: Arcade Publishing, Inc., 2003). [Hereinafter, THAROOR.]} This romance became deeply “embedded in the Indian freedom struggle:”\footnote{THAROOR, 239.}

\[\text{[S]ince the British had come to trade and stayed on to rule, Nehruvian nationalists were deeply suspicious of foreigners approaching them for commercial motives.}\]

\[\text{Nehru, like many Third World nationalists, saw the imperialism that had subjugated his people as the logical extension of international}\]
capitalism, for which he therefore felt a deep mistrust. As an idealist profoundly moved by the poverty and suffering of the vast majority of his countrymen under colonial capitalism, Nehru was attracted to non-capitalist solutions for their problems. ... As a democrat, he saw the economic well-being of the poor as indispensable for their political empowerment, and he could not entrust its attainment to the rich. 328

The February 1927 Brussels International Congress Against Colonial Oppression and Imperialism, at which Jawaharlal Nehru represented the Indian National Congress Party, is said to have “confirmed his conversion to Socialism.” 329

He, like many leaders in the Quit India Movement seeking independence from Britain had been schooled in England. Fabian Socialism was popular in the early 20th century, the way laissez-faire economics was in the 1980s, and continues to be in some ideological circles. And, though from a supremely privileged background, Nehru was acutely aware of the desperate poverty of India. Nehru was well aware that Colonialism had much to do with that impoverishment. As Shashi Tharoor (1956-), an Indian MP, former U.N. Under Secretary General, and author of Inglorious Empire: What the British Did to India (2017), said in a July 2015 speech to the Oxford Union:

"India's share of the world economy when Britain arrived on its shores was 23 per cent. By the time the British left it was down to below four per cent. Why? Simply because India had been governed for the benefit of Britain. Britain's rise for 200 years was financed by its depredations in India.

In fact, Britain's industrial revolution was actually premised upon the de-industrialisation of India." 330

So, searching for a development path in a post-Colonial India, Nehru, at the 1936 annual Congress Party meeting in Lucknow, confessed:

"I am convinced that the only key to the solution of the world’s problems and of India’s problems lies in Socialism.... I see no way of ending the poverty, the vast unemployment, the degradation and the subjection of the Indian people except through Socialism. That involves vast and revolutionary changes in our political and social structure, ... a new civilization radically different from the present capitalist order. Some glimpse we can have of this new civilization in the territories of the USSR [Union of Soviet Socialist Republics].... if the future is full of hope it is largely because of Soviet Russia." 331

328 THAROO, 239-240.
329 THAROO, 55.
331 Quoted in THAROO, 174.
So:

[...]ike many others of his generation, Nehru thought that central planning, state control of the “commanding heights” of the economy, and government-directed development were the “scientific” and “rational” means of creating social prosperity and ensuring equitable distribution.\textsuperscript{332}

Yet, Nehru was nothing if not independent of mind, and nothing if not an Indian above a Socialist.

He declared after the 1927 Brussels International Congress Against Colonial Oppression and Imperialism, at which he represented the Indian National Congress Party, that “[p]ersonally I have the strongest objection to being led by the nose by the Russians or anyone else.”\textsuperscript{333} He wrote in 1919 that:

Present-day democracy, manipulated by the unholy alliance of capital, property, militarism and an overgrown bureaucracy, and assisted by a capitalist press, has proved a delusion and a snare. [But,] Orthodox Socialism does not give us much hope…. [A]n all-powerful state is no lover of individual liberty…. Life under Socialism would be a joyless and soulless thing, regulated to the minutest detail by rules and orders.\textsuperscript{334}

Thus, when confronted with a trade-off between Nationalism and Socialism, he chose the former, indeed being the glamorous face of Indian nationalism and modernity to complement the other-worldly, deific status of the Mahatma.\textsuperscript{335}

Not surprisingly, when their quarters changed from the jails of Colonial India to government offices, and their work changed from challenging the British Empire through non-violent means to running a nation, Nehru and his Independence movement colleagues put into practice economic strategies that were de rigueur in their era, but refused the political step of entering the Soviet or Chinese Communist orbit. For his entire tenure as Prime Minister, Nehru would strive for a middle path, picking the best of Socialist economic strategies for the Indian context and avoiding capitalist extremes, but equally avoiding the excesses of Socialism. In that effort, he was avant garde: how many critics of global economic order and the world trading system understand the failures of Socialism, but are repulsed by American Capitalism and its current crop of ignorant and petty champions?

\textbf{III. Three Hallmarks of Post-Partition Socialist Style Planning}

In respect of international trade, steering a middle course did not mean autarky, or

\textsuperscript{332} THAROOR, 240. \\
\textsuperscript{333} Quoted in THAROOR, 57. \\
\textsuperscript{334} Quoted in THAROOR, 174. \\
\textsuperscript{335} THAROOR, 100-101, 175.
free trade. It meant self-sufficiency and self-reliance, “twin mantras” that disallowed western corporations from entering India to exploit its resources and oppress its people.\textsuperscript{336} In turn, self-sufficiency and self-reliance translated into a trade strategy of import substitution, a preference for the use of domestic inputs into finished manufactured goods, rather than imports.\textsuperscript{337} To implement import substitution, India set up a system that came to be known as the “License Raj,” a term coined in 1959 by statesman and scholar Chakravati Rajagopalachari (1878-1972), or “Rajaji,” a lawyer, veteran of the Quit India Movement, and the last Governor-General of India (1948-1950).\textsuperscript{338} Tariffs were levied at high rates to impede importation, and QRs were imposed. Licenses and quotas, anathema to free market economists as being inefficient, were the key QRs used. To import or export most categories of merchandise, a government-granted license was needed, and the government fixed by quota quantities of imports or exports. Only private enterprises favored by the government were granted such licenses, and favoritism often resulted from historic pre-Partition relations between political officials in the Indian National Congress, on the one hand, and agricultural landowners and capitalist industrialists, on the other hand. Corruption and nepotism characterized many such linkages. Indeed, corruption, plus a decrepit physical infrastructure, remain India’s greatest barrier to robust growth and sustained poverty alleviation.

Import substitution, however sorry its effects in historical and Neo-Classical economic perspective, was not a fanciful Fabian or economically irrational strategy. In agriculture, reflected concerns about food security, which given the country’s history of famines, and its dependence on Britain even for salt – an injustice Gandhi poignantly laid bare with his famous 12 March-6 April 1930 Salt March – was understandable. India pursued self-sufficiency in food. To feed its growing population, India did not want to be a “peripheral” country reliant on food imports from “center” countries like Great Britain, much less food aid from the U.S. or Soviet Union that those donor countries could use to pressure India to support one or the other side in the Cold War.\textsuperscript{339} Indeed, it did grow from 361.1 million in 1951, just four years after Partition to 447.8 million in 1960 to 1.241 billion in 2011.\textsuperscript{340}

In industry, how else could India industrialize, develop vertically integrated

\begin{itemize}
  \item \textsuperscript{336} Tharoor, 240.
  \item \textsuperscript{339} The references to “center” and “peripheral” countries, and “dependency” or “reliance,” are of course to Dependency Theory and World Systems Theory. See Dudley Seers Ed., Dependency Theory – A Critical Reassessment (London, England: Francis Pinter Publishers, 1981), and Immanuel Wallerstein, The Essential Wallerstein (New York, New York: The New Press, 2000). These Marxist-tinged Theories are out of favor in the present era of free market economics and global supply chains. Yet, query whether such chains, which link low-valued added operations in poor countries with higher value-added activities in rich ones, actually are evidence in favor of these Theories.
manufacturing, mature to developed country status, and thereby avoid dependence as a “peripheral” country on “center,” but through import-substituting production? India had just endured over a century of dependence on England for manufactured garments, being confined to the role of providing British T&A mills with cotton. Here again, the Mahatma had poignantly demonstrated the injustice with his khadi (homespun) campaign.

Import substitution was one of three hallmarks of Socialist-style economic planning that characterized India in its first four decades of independence. The second was widespread use of SOEs. The government reserved large swathes of the economy – such as airlines, banking, electricity, insurance, oil and gas, shipping, telephones – entirely for SOEs. There they held monopoly positions. SOEs even had monopoly positions on importation of bulk consumer goods. In other sectors, SOEs played a significant, sometimes pre-eminent, role: bakeries, fertilizers, heavy chemicals, hotels, infrastructure, machine tools, and steel. Across all sectors, the government imposed strict investment licensing requirements, akin to its QRs in international trade. These licenses, too, were part of the License Raj system: to engage in private direct investment or technological development, a private enterprise needed a license. Via them, the government directed private economic activity toward its overall aims of food self-sufficiency and industrialization.

Conservatism in fiscal and monetary policies was the third hallmark of post-Partition Indian economic strategy. For the first 35 years of Independence, i.e., from 1947 to 1982, these policies were less expansionary than in other developing countries. Only in the mid-1980s did Indian fiscal policy turn expansionary, contributing to annual economic growth of over 5%. Yet, having been too conservative for too long, that policy became too liberal. Inflation rose above 13%, foreign debt increased dramatically, and in 1991 India faced a BOP crisis, with FX reserves covering less than two weeks’ worth of critical imports. In that crisis, “India had to pledge 67 tonnes of gold to stave off a default on sovereign debt,” and that debt “was downgraded to junk status.” So, this unsustainable course had to be reversed. Therein was a catalyst for the 1991 reforms.

Underlying these hallmarks was fear. India was afraid of world markets and foreign and portfolio investors. To rely on their markets for export revenues from sales of Indian agricultural or industrial output, or for inputs into Indian goods, was to be vulnerable to their exploitation. Emerging from centuries of foreign control, why should Indians risk

\[341\] See Krueger & Chinoy, 1.
\[342\] See Krueger & Chinoy, 1.
\[343\] See Krueger & Chinoy, 1.
\[344\] See Krueger & Chinoy, 1.
\[345\] See Krueger & Chinoy, 1.
\[347\] For an excellent account of how the 1991 reforms changed the lives of Indians by facilitating routine transactions such as making a phone call or depositing a check, see Soutik Biswas, 1991 Reforms: “A Long Distance Call Was Like and Endurance Sport,” BBC NEWS, 28 July 2021, www.bbc.com/news/world-asia-india-57897688.
neo-colonial dependence, “neo” in the sense that such dependence was via the so-called “free” market?

In sum, “[f]or more than four decades after India attained independence in 1947, Indian economic policy was governed by a philosophy that emphasized inward-oriented, state-led development.” Yet, notwithstanding the prominence of Communist parties in a few states, especially Kerala and West Bengal, India rejected Communism, that is, full public ownership of the means of production, in contrast to the China of Mao Zedong (1893-1976). “Red” China, which became independent under the CCP on 1 January 1949, and the Soviet Union, which fell under Bolshevik control in November 1917. Indians would never accept the human rights cost incurred by Communist central planning (and never will), nor would they agree to unbridled Capitalism with its excesses. India sought a third way, and championed the Non-Aligned Movement (NAM), a highpoint of which was the April 1955 Bandung Conference, attended by India and 28 other newly independent Asian and African countries representing roughly 25% of the surface of the earth and 1.5 billion people.

During the Cold War, India became adept at balance of power politics. In August 1971, Prime Minister Indira Gandhi (1917-1984) signed the 20-year Indo-Soviet Treaty of Peace, Friendship, and Cooperation with Soviet General Secretary Leonid Brezhnev (1906-1982), which helped India offset the American alliance with Pakistan. Yet, as a democracy with a large NRI population in the U.S. and its former colonial master, the U.K., Indians – while not wanting to be a proxy for either the American or Soviet superpower – had no strong hostility towards, but rather warm links to, the non-Communist west.

IV. 1960s-1980s Inefficiencies

Indian economic policy in the first few decades after Partition achieved some successes. India became self-sufficient in food, and even a net exporter of certain farm products. That was thanks to the Green Revolution, particularly in Punjab.

However, by the 1970s, it was clear Indian economic growth and development lagged that of its East Asian counterparts. India was anything but an international trade powerhouse under the License Raj system:

The result [of the system and its drive for self-sufficiency and self-reliance] was a state that ensured political freedom but presided over economic stagnation; that regulated entrepreneurial activity through a system of licenses, permits, and quotas that promoted both corruption and inefficiency but did little to promote growth; that enshrined bureaucratic power at the expense of individual enterprise. For most of the first five decades since Independence, India pursued an economic policy of subsidizing unproductivity, regulating stagnation, and distributing poverty. Nehru

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348 See Krueger & Chinoy, 1.
called this socialism.350

Indeed, the contrast between its performance, and the export-oriented growth of East Asian countries, especially the Four Tigers (or Dragons), Hong Kong, Korea, Singapore, and Taiwan, was vivid. Bloated with underemployed, low-human capital workers, and plagued by politicized decision-making, Indian SOEs were infamously inefficient. During the Thatcher-Reagan Era (1979-1991), as other Asian countries began liberating their SOEs from government controls and converting them into private enterprises operating on commercial principles, India stood out as a laggard in privatization.

So, for all its fascinating ancient ethnic, culinary, linguistic, and religious traditions and pluralism, for all its lively post-Partition democratic elections, in the first 40 years after Partition, India had marginalized itself in the world economy.351 Between 1950 and 1973, world exports grew at an annual average rate of 7.9%. Exports from India rose only 2.7% in that period.352 The ratio of Indian exports to GDP fell from its high of 7.3% in 1951 to its low of 3% in 1965, and stayed under 4% until 1973.353 In that respect, at least, import substitution was working. Among its neighbors to the east, India had fallen behind economically the likes of the Four Tigers, and indeed most of East Asia. The gap between the Elephant and Tigers seemed to be widening as the decades after the Second World War and Partition passed. To be sure, Bollywood churned out movies and songs, but with poor quality, and only to the Sub-Continent, Middle East, and Africa.

While major MNCs like Honda, Toyota, and Sony emerged from Japan, and Hyundai and Samsung from Korea, no household name or brand emerged from India:

The mantra of self-sufficiency might have made some sense if, behind these protectionist walls, Indian business had been encouraged to thrive. Despite the difficulties placed in their way by the British Raj, Indian corporate houses like those of the Birlas, Tatas, and Kirloskars had build impressive business establishments by the time of Independence, and could conceivably have taken on the world. Instead they found themselves being hobbled by regulations and restrictions, inspired by Nehru’s socialist mistrust of the profit motive, on every conceivable aspect of economic activity: whether they could invest in a new product or a new capacity, where they could invest, how many people they could hire, whether they could fire them, what sort of expansion or diversification they could undertake, where they could sell and for how much. Initiative was stifled, government permission was mandatory before any expansion or diversification, and a mind-boggling array of permits and licenses were

350 THAROOR, 241. (Emphasis added.)
352 See Srinivasan, 17. The year 1973 was a watershed, because of the Arab oil embargo and its adverse effects on the world economy.
353 See Srinivasan, 17.
required before the slightest new undertaking.\textsuperscript{354}

Conversely, none of the foreign household names thought much of investing in India: at the start of the 1990s, of all FDI attracted by developing countries around the world, India got less than 1\% of it.\textsuperscript{355}

India fared no better as a destination for portfolio investment, attracting just 3\% of all investment funds obtained by developing countries at the start of that decade.\textsuperscript{356} The lack of financial capital flows into India, coupled with socialist-style central government planning, doomed prospects for most would-be Indian private sector entrepreneurs. With foreign capital going to the likes of the Tigers, and with the Indian government taking loans from state-run banks, unless an entrepreneur had a pool of personal savings or family capital on which to draw, how could she establish and build a business? Even if she could, her company would have to navigate decrepit physical infrastructure and a stultifying, corrupt political bureaucracy. Small wonder millions of Indians left the country, a major brain drain in the first 40 years after Independence.

Most tellingly, but unsurprisingly, was the bottom line statistic on economic growth: from the late 1940s to 1980, Indian GDP at a pathetically low 2\% \textit{per annum}, nowhere close to the rates in East Asia.\textsuperscript{357}

The combination of internal controls and international protectionism gave India a distorted economy, underproductive and grossly inefficient, making too few goods of too low a quality at too high a price. Exports of manufactured goods grew at an annual rate of 0.1 percent until 1985; India’s share of world trade fell by four-fifths. Per capita income, with a burgeoning population and a modest increase in GDP, anchored India firmly to the bottom third of the world rankings. The public sector, however, grew in size though not in production, to become the largest in the world outside the Communist bloc. Meanwhile, income disparities persisted, the poor remained mired in a poverty all the more wretched for the lack of means of escape from it in a controlled economy, the public sector sat entrenched at the “commanding heights” and looked down upon the toiling, overtaxed middle class, and only bureaucrats, politicians, and a small elite of protected businessmen flourished from the management of scarcity.\textsuperscript{358}

As intimated, under the License \textit{Raj} system, well-connected families prospered. Names like “Ambani,” “Birla,” and “Tata” were household ones in India. Decades later, new names would emerge – notably, if not notoriously, Adani.

These titanic industrial families played a role in India’s foreign economic policy.

\textsuperscript{354} \textsc{Tharoor}, 242-243.
\textsuperscript{355} \textit{See} Srinivasan, 17-59.
\textsuperscript{356} \textit{See} Srinivasan, 17-59.
\textsuperscript{357} \textit{See} Krueger & Chinoy, 1.
\textsuperscript{358} \textsc{Tharoor}, 243-244.
Unable to match China’s financial muscle for foreign dealmaking, they could step in at the behest of Raisina Hill (i.e., the Indian government) and each could help the other. For example:

The Adani Group, whose owner Gautam Adani has longstanding ties with [Indian PM Narendra] Modi, has in recent years clinched deals everywhere from Myanmar to Israel as part of an ambitious overseas expansion. The tycoon said last year [2022] his group had “laid the foundation to seek a broader expansion beyond India’s boundaries.”

The Adani Group’s overseas forays face intense scrutiny following allegations last month [January 2023] by U.S. short seller Hindenburg Research that it has for decades used fraud and market manipulation to fuel its rise. The conglomerate denies the allegations unequivocally.

Modi’s supporters deny the prime minister is intervening on Adani’s behalf even as they acknowledge that the broader efforts to promote companies such as Adani overseas can pay off strategically. But Indian opposition politicians and critics overseas see it differently.

Rahul Gandhi, a leader of India’s main opposition Congress party, this month said that Modi’s government was using its diplomatic corps to advance Adani’s interests over India’s. “This is not India’s foreign policy. This is Adani Ji’s foreign policy,” Gandhi said, using a common honorific [Ji] to refer to Adani. “This is a policy to build his businesses.”

“India’s Ministry of External Affairs has been turned into Adani Group’s international expansion department by Prime Minister Modi,” said Praveen Chakravarty, a senior Congress Party office bearer.

…

Under Modi, who came to office in 2014, India ramped up promotion of overseas infrastructure projects. But with India’s state lacking China’s financial clout, New Delhi has often used diplomatic sway and cheap financing to help private Indian companies, including Adani, in addition to state-owned ones.

Analysts say such co-ordination between state and corporations is not uncommon. “Helping Indian infrastructure companies abroad is part of a broader approach to deal-making in international geopolitics,” said Rohit Chandra, an Assistant Professor at the IIT Delhi School of Public Policy.

But he added that “there’s a fine line between bilateral infrastructure development and predatory infrastructure contracting.”

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359 John Reed & Benjamin Parkin, Gautam Adani’s Ties with Modi Spur Scrutiny of Overseas Deals, FINANCIAL TIMES, 22 February 2023, www.ft.com/content/38ff5ff6-aebe-46ae-bb97-c8071818b55d?shareType=nongift.
So, worryingly for India was the prospect that its economy was less of a free market and more of a plutocracy, or perhaps an odd combination of both, with millions of “mom and pop” SMEs above which politically well-connected oligarchs dominated key good and services sectors. In any event, few Americans would have recognized the titans of Indian industries, let alone analogized the families to the Carnegies or Rockefellers. India had proved itself a power on the Subcontinent in its victories over Pakistan, and even shown its scientific and military potential with its 1974 successful nuclear test – though it was no match for China, which it found out in a brief 1962 border war.

In sum, in a haunting phrase purportedly heard among the U.S. State Department, India was “the biggest country that didn’t matter.” Query whether that phrase remained apt into the second decade of the 21st century:

It is hard to imagine the United States going for two years without an Ambassador representing its interests in Beijing, Berlin, Moscow or Tokyo. Yet Roosevelt House, the American Ambassador’s residence in New Delhi, has remained unoccupied since January 2021 – the longest gap on record.

... American Ambassadors to India have often played a vital role in advancing relations between the two countries. In 1962, when India was invaded by China, John Kenneth Galbraith was the American ambassador. Galbraith, who was close to President John F. Kennedy and had good relations with Prime Minister Jawaharlal Nehru, was instrumental in getting the United States to ship arms and supplies to India.

Until then, Nehru had been lukewarm to American overtures. By swiftly coming to India’s aid, Galbraith changed how Indians saw America and brought Kennedy and Nehru closer. American support for India in 1962 would prove to be a turning point in the relations between the two countries. Galbraith remains a beloved figure in India.

... The shared challenge of China has pushed America and India closer. For the past two decades, Republican and Democratic Administrations have made India an essential partner in the American strategy to contain China.

... There are significant economic reasons for greater American engagement with India, which recently surpassed Britain as the world’s fifth largest economy. While India remains poor in per capita terms (it has roughly $2,200 in G.D.P. per person), it is one of the fastest growing major economies and a vital market for trade and investment.

... As concern mounts over China’s outsized role in global supply chains, American companies have begun to seek manufacturing hubs outside that country. J. P. Morgan estimates that by 2025, Apple may make roughly 25
percent of its iPhones in India. [This prediction proved reasonably accurate. Between 2021 and 2023, the output of Apple’s iPhone production in India, as a percentage of Apple’s aggregate global iPhone production, rose from 1% to nearly 7%.360] The U.S. Embassy will need to provide support to American companies trying to enter India.

…

And India plays an important role in difficult global negotiations on global health, climate change, or technology policy. …

… [T]he [PM Narendra] Modi government’s onslaught against minorities, freedom of the press, and the independence of the judiciary has been relentless.

The United States will need to continuously assess the degree to which it and India still share liberal, democratic values. Ambassadors such as Galbraith, Chester Bowles, Daniel Patrick Moynihan, and Frank Wisner, mixing with civil society, the press, bureaucrats and politicians of all stripes, were able to provide an informative and nuanced assessment about the country’s trajectory.

In April 1977, President Jimmy Carter appointed Robert Goheen, a former President of Princeton, as his Ambassador to India. Mr. Goheen had been born in India and was in a position to observe if India’s experiment with democracy had survived the “Emergency,” the difficult period between June 1975 and March 1977 when Prime Minister Indira Gandhi suspended Constitutional rights, assumed extraordinary powers, jailed opposition leaders and silenced the press.

… One of the critical responsibilities of an Ambassador is to provide accurate assessments about the political landscape of the host country and to be his government’s eyes and ears on the ground. The absence of an American Ambassador today may actually suit policymakers in New Delhi. It allows them to avoid careful scrutiny of its domestic affairs.

…

A U.S. Ambassador is the symbolic projection of American power. During the decades when India was strategically unimportant to the United States, Washington still sent important Ambassadors to India. Today there is a glaring absence at the Roosevelt House in New Delhi.361
In sum, if judged solely from Ambassadorial appointments, then India did not matter to the Trump or Biden Administrations, despite their protestations about India’s renewed strategic significance vis-à-vis China.
Chapter 13

1991 FIRST GENERATION REFORMS AND AFTERMATH

I. Genius of Manmohan Singh

Dr. Manmohan Singh (1932-2014), whose party, the Indian National Congress had led the Quit India Movement and governed India for most of the post-Independence period, understood the need for reform. He came to the position of Finance Minister in 1991 under Prime Minister P.V. Narasimha Rao (1921-2004, PM, 1991-1996), and became Prime Minister in 2004. As Finance Minister, he faced the 1991 BOP crisis. He was well prepared. He had trained as an economist, culminating with a dissertation he wrote at Oxford entitled “India’s Export Performance, 1951-1960,” under the supervision of renowned development economist I.M.D. Little (1919-2012). (The dissertation became a book in 1964, *India’s Export Trends and Prospects for Self-Sustained Growth*.)

In 1991, Singh ushered in the dramatic, First Generation economic reforms. They were dramatic in that they were “structural,” dismantling many post-Partition socialist-style policies. The changes aimed to unshackle Indian firms and entrepreneurs from red tape, foster competition, and open India to the global economy.

The reforms may be put into three broad categories: External Sector Reforms, FDI Reforms, and Financial Sector Reforms. Each is discussed in turn below, with greatest emphasis on the first category. Across these categories were three common denominators: de-regulation; privatization; and, rationalization.

II. External Sector Reforms

The “external sector” refers not only to international trade (imports and exports), but also to exchange rates and capital flows. Indian reforms on trade were particularly

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362 This Chapter is drawn from Raj Bhala, *Indian Trade Policy Trilogy*, first published in the *Manchester Journal of International Economic Law*:


Special thanks are owed to that *Journal* and its Editor in Chief, Professor Dr. Asif H. Qureshi.

impressive, even dramatic:

Some of the most far-reaching reforms were focused on restoring the health of the external sector. They included the transition to a market-determined exchange rate, major reductions in customs tariffs, phased elimination of quantitative restrictions on imports, decisive opening up to foreign direct and portfolio investment, strict controls on external debt, and the deliberate build-up of foreign exchange reserves.\(^{364}\)

More precisely, with respect to traditional international trade law matters, there were five dimensions to the 1991 reforms: (1) cutting the average level of tariffs; (2) reducing maximum tariff levels (peaks) in a phased manner; (3) attacking tariff dispersion and tariff escalation; (4) simplifying the tariff schedule; and (5) dismantling the License Raj. A sixth dimension, closely related to trade but not conventionally considered within the boundaries of multilateral trade rules, concerned exchange rate liberalization.

**1st:**

*Average Tariff Levels*

So, India cut its applied (as distinct from bound) MFN tariffs on industrial goods from an overall average of 15% to an average of 12.5%. In 1990-1991, across all merchandise categories, the average Indian import-weighted tariff was 87%, and 164% on consumer goods.\(^{365}\) But, by 1996-1997, the average imported-weighted tariff tumbled to 24.6%.

**2nd.**

*Tariff Peaks*

In these reductions, India addressed its tariff peaks (extremely high tariffs on particular products). In 1990-1991, the highest duty level hit 355%.\(^{366}\) In 1997-1998, the highest duty level was 45%.

**3rd.**

*Tariff Dispersion and Escalation*

India also dealt with its problem of tariff dispersion (the spread of tariffs across large wide numerical ranges), which created a bias against the use of imports in domestic agriculture and manufacturing, distorted incentives in resource allocation, and ultimately discouraged exports. India did so by slashing the standard deviation of tariff levels to one-


\(^{366}\) See Srinivasan, 20.
quarter of their 1990-1991 levels on intermediate and capital goods, and one third of those levels on agricultural goods.\(^{367}\)

In so doing, India also began to address the problem of tariff escalation, whereby tariffs on merchandise increase with the degree of processing, with lower tariffs on raw materials, higher tariffs on intermediate items, and the highest tariffs on finished goods. (Escalation is designed to promote vertically integrated manufacturing, and higher value-added production, domestically. It provides a higher level of effective protection for finished manufactured goods in comparison with the simple tariff on those goods, because of the tariffs at each earlier stage of processing.)

**4\(^{th}\): Simplification**

By 2000-2001, India had simplified its tariff schedules, and narrowed the duty levels, to just 4 categories: 35%; 25%; 15%; and 5%.\(^{368}\) To be sure, most merchandise fell into the 35% and 25% categories. Nevertheless, after decades of protectionism, the change was remarkable—and, it may be added, one for which American trade negotiators in the Doha Round rarely if ever publicly credited India, choosing instead to castigate it for not doing enough.\(^{369}\) All the more remarkable was the price tag: In 1990-1991, government revenue from import tariffs equaled 3.6% of Indian GDP, and total tax revenue accounted for 9.5% of GDP.\(^{370}\) India had taken the difficult step of starting to wean itself off customs duties as a key source of government financing.

**5\(^{th}\): License Raj**

As part of its First Generation reforms, India also began to dismantle the License Raj system and expose the country not to complete free trade, but freer trade. For most categories of merchandise, India abolished many import licensing requirements.\(^{371}\) In

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\(^{367}\) See Srinivasan, 18-21.

\(^{368}\) Srinivasan, 20. India also cut the number of exemptions, also called use-based concessions, on tariff rates. See id.


\(^{370}\) See Srinivasan, 19.

\(^{371}\) See Krueger & Chinoy, 3; Srinivasan, 18-21.
particular:

In true Narasimha Rao style, the most potent economic reform was also the most silent. On July 24, 1991 – a mere 20 days after the dramatic devaluations – even as Rao was holding the industries portfolio, he permitted his low-profile Minister of State, P.J. Kurien, to table “The New Industrial Policy of 1991” in Parliament. It was an explosive document. Except for 18 controlled industries, licenses were abolished across the board. Industrialists were free to enter any sector and expand capacities without bothering with New Delhi’s approvals. Foreign ownership, hitherto restricted to 40%, was taken above the critical threshold of 51%.... The Monopolies Law was abolished. The state was allowed to sell public sector shares. The pace of change was breathless.  

By 1998, seven years after the launch of the First Generation reforms, roughly 32% of all Indian tariff lines were subject to import licensing. That figure, while still too high, was significant, because Indian import licensing had functioned in practice as an import ban.

Just before commencing the reforms, in 1988-1989, 95% of all products imported into India, and 80% of all manufactured products (excluding basic metals and certain miscellaneous items), were subject to one type of NTB or another. More specifically, consider the percentage of internationally tradable goods India protected by QRs or NTBs in terms of total tradable GDP: at the end of the 1980s, it was 93% overall, and 90% for manufactured goods. By May 1995, it fell to 66% overall, and by May 1996, to 36% for manufactured items. These staggering facts bespeak how pervasive the License Raj system had become in the decades following Partition: QRs had become the “dominant means for control of imports.” They also show how dramatic the 1991 reforms to the License Raj system were.

To be sure, they could have been yet more dramatic. Most remaining QRs were on consumer goods, and the reforms still left the agricultural sector protected: the pre-1991 share of tradable agricultural goods as a percentage of total tradable GDP was 94%, and in May 1994 it was down only to 84%. Indeed, it was not until November 2020 that India “dismantled the Licence Raj on agriculture, [thus] freeing farmers from the stranglehold of Agricultural Produce Market Committees.” Through that legislation, plus two other

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374 See Srinivasan, 19.
376 Srinivasan, 19.
377 See Srinivasan, 21.
378 Shankkar Aiyar, Farm Reforms: Green Revolution II Needs Kisan Camps, BLOOMBERG QUINT (Mumbai), 29 October 2020, www.bloombergquint.com/bq-blue-exclusive/farm-reforms-green-revolution-ii-needs-kisan-camps (also pointing out “[t]he freeing of markets and freedom to contract, in theory, affords the farmer to use the contract to raise resources,” including “credit for operating expenses based on contracts

Volume Eight Wheat Law Library
bills, India finally “enabled [farmers to enter into] contracts with private buyers, and lifted limits on stocks of essential commodities.”\textsuperscript{379} Simply put, Indian farmers had to wait three decades after the 1991 reforms to be free to link backward and forwards, to input and user markets, even though they represent India’s largest private sector enterprise.\textsuperscript{380}

All this delay despite the legal reality that under GATT Article XI:1 and Uruguay Round agreements, India was obliged to eliminate all QRs. Regrettably, it sought to retain many of them under the BOP exceptions of GATT Article XVIII. On 1 April 1999, India still had QRs on 1,200 tariff lines. It fought to keep them, but lost the 1999\textit{ India Quantitative Restrictions} case (discussed in a separate Chapter) at the WTO Appellate Body.\textsuperscript{381} So, on 1 April 2000, it cut QR-protected tariff lines to 600, and on 1 April 2001 eliminated all QRs. In brief, India phased out its QRs – albeit with external WTO adjudicatory pressure – across 10 years following the 1991 reforms.

Still another type of NTB India addressed in its 1991 reforms were government import monopolies. On 50 categories of commodities, Indian government agencies long had held import monopolies: save for agricultural products and petroleum, India eliminated them.\textsuperscript{382} Concomitantly, in government procurement, India eliminated preferences (stated in terms of partial purchases or prices) for domestic suppliers of goods, thus opening opportunities for foreign bidders.\textsuperscript{383}

The 1991 reforms dealt not only with QRs on imports, but also on exports. India (as of 1 April 2001) eliminated them (\textit{e.g.}, quotas) on agricultural exports, and dropped minimum export price requirements.\textsuperscript{384} It also reduced the size of the list of merchandise subject to export restrictions or bans.

\textbf{6th: Market-Determined Exchange Rate}

Finally, as for the rupee, the Indian government had allowed it to depreciate against hard currencies (such as the U.S. dollar and British pound sterling) ever since the Bretton Woods fixed exchange rate system ended in 1971.\textsuperscript{385} Official devaluation was part of the 1991 reforms: in July of that year, India reduced its value by 22.8% against a basket of currencies where each currency was weighted by Indian exports to the country of that currency.\textsuperscript{386} Specifically:

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or orders,” to resolve the problem that “[f]or decades, farmers have suffered due to poor access to credit”). [Hereinafter, \textit{Farm Reforms}.]

\textsuperscript{379} \textit{Farm Reforms}.

\textsuperscript{380} \textit{Farm Reforms}.


\textsuperscript{382} See Srinivasan, 20.

\textsuperscript{383} See Srinivasan, 20.

\textsuperscript{384} See Srinivasan, 20.

\textsuperscript{385} See Srinivasan, 17-20.

\textsuperscript{386} See Srinivasan, 19-20. India also withdrew most of its subsidies to exports, so the devaluation of the real effective exchange rate for exporters was 16.3 percent. \textit{See id.} at 20.
On Monday, July 1, 1991, India’s pegged rupee was devalued 9% by a government order. It was a straw-clutching move to stop a run on rapidly dwindling foreign currency reserves. But a nervous market began to panic even more. So, two days later, on July 3, 1991, the rupee was devalued another 11%, with a promise to stop. That calmed the market and stanched the outflow. Eventually, two years later, India put its tightly controlled currency on a “managed float.”

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India’s closed, clubby, and scam-prone stock markets were thrown open to foreign investors. The sheltered, fragile rupee was made partially convertible on the capital account. Two new institutions, the Securities and Exchange Board of India and the National Stock Exchange, were inaugurated to clean the Augean stables. Soon, India’s remarkably-digitized stock market, perhaps the most modern in the world at that time won over the foreigners. India’s equity cult was born.  

India also dismantled the dual exchange rate system it had created to cope with the 1991 BOP crisis, eliminated foreign exchange licensing, and requirements concerning export-based imports and import compression.  

By 1993, and since then, the rupee was freely convertible for all current account transactions (i.e., for purposes of Article VIII of the Articles of Agreement of the International Monetary Fund). To be sure, the float is a managed one, but that hardly is peculiar to India. And, full capital account liberalization has yet to occur, which again is not an expectation unique to India.  

Still, the result of exchange rate regime changes was predictably positive. Indian exports (in terms of volume) grew faster than the world average after 1973, though (as explained below) were insignificant in overall world trade.  

Notably, the aforementioned external sector reforms did not occur all at once, in 1991. India did not choose the shock therapy treatment that Poland used in 1989. Rather, it deferred tariff cuts and QR elimination on consumer goods until the mid-1990s. Also, of significance, India sought to build up its reserves of hard foreign currency. It did so with difficulty, particularly in the late 1990s and the rounds of nuclear tests vis-à-vis Pakistan, and the imposition by the U.S. of sanctions against both India and Pakistan in response to those tests.  

III. FDI Reforms

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387 Three “Shock” Lessons.
388 See Srinivasan, 20.
390 See Srinivasan, 17.
391 See Srinivasan, 19.
392 See Acharya, 57.
Amidst the First Generation reforms were legal and policy changes to encourage FDI. Egregious regulations were wiped away in favor of aggressive inducements to attract MNCs to open, expand, and operate production facilities in India, and hire Indian workers. Three such clusters of measures stood out.393

First, India relaxed investment (equity share ownership) limits on FDI in certain (albeit not all) sectors, such as telecommunications. In particular, reversing pre-1991 strictures, India dropped its insistence on restricting FDI entry to government-determined priority sectors, and eliminated its 40% cap on foreign equity participation in JVs.394

Second, India eliminated trade-related FDI restrictions. No longer was a foreign direct investor obligated to export a certain percentage of its production. That obligation had been as high as 100% in some sectors, and manifestly was designed to protect Indian producers of like products. India also dropped domestic production content obligations, so foreign investors could source inputs and intermediate items from the most efficient suppliers, be they Indian or not. Again, that pre-1991 rule had been designed to protect domestic suppliers.

Third, India created Special Economic Zones (SEZs). They were modeled loosely after the famous SEZs in China inaugurated in the late 1970s in the Deng Xiaoping era. By 2022, their results were mixed:

Special Economic Zones are viewed as engines of industrial and economic growth worldwide as they have played critical roles in the regional development of economies across the globe. India was one of the first countries in Asia to recognise the effectiveness of the Export Processing Zone model in promoting exports, with Asia’s first EPZ set up in Kandla in 1965.

The success of SEZs is dependent on multiple factors such as strategic focus, regulatory framework, governance, and value proposition. As India targets becoming a $5 trillion economy by FY 2025, both manufacturing and services sectors must contribute to this growth in proportion to the total GDP as it stands today. One of the stated objectives of the SEZ Act enacted in 2005 was the encouragement of manufacturing. However, data suggests that the policy has not completely delivered the desired results.

India’s SEZ scheme also came under the World Trade Organization’s scanner for violating the WTO norms of restrictive trade practice. In order to overcome these challenges, the union budget mentioned that the SEZ Act of 2005 would be replaced by the Development (Enterprises and Services) Hubs Bill, 2022.

393 In this respect, the observation that “[t]he 1991 reforms did not significantly liberalize FDI” is arguable. Srinivasan, 23.
394 See Srinivasan, 18-19.
The *DESH* Bill proposes to enable states to become partners in the development of enterprise and service hubs and will cover all large existing and new industrial enclaves to optimally utilize the available infrastructure and enhance the competitiveness of exports.

The proposal is to change the focus from exports to economic activity, employment, investment, and global value chains interlinkage among others, apart from the greater involvement of the states.*395*

Small wonder why these reforms were needed: as of July 2022, of the 376 SEZs officially notified to the Indian government, only 268 were operational.*396*

So, SEZ reform through legislation like the 2022 *DESH* Bill sought to lock in export-oriented benefits that would accrue across India’s economy, such as:

(1) “Indian Rupee billing and free flow of goods or services to the domestic market” (which would “do[] away with barriers to domestic supplies and allow[] the movement of goods and provision of services to the domestic market”)

(2) “Repayment of only duty foregone for domestic clearances” (so as to “allow companies to make use of underutilised capacity to serve the domestic market and incur duties only on imported inputs and raw materials instead of on the final product”)

(3) “Broad-banding and push for multi-sector spaces” (“to emphasize promoting not only manufacturing, but [also] trading and provisions of services too, by broad-banding the definition of services and allowing multiple services to come together”)

(4) “Continuation of indirect tax duty and GST benefits” (and thus “to extend customs duty exemptions to the hubs/units, enabling them to remain competitive in the global space”)

(5) “One-stop-shop portal and ease of doing business” (“to have increased automation through a single integrated portal for all compliances and approvals,” and “encourage the integration of the customs portal with the platform for such hubs”).*397*

But, after nearly five decades of EPZ / SEZ sub-par experience, could India do better?

Fourth, in respect of reforms, India began improving its IP regime. Foreign direct investors (as well as exporters) look carefully at the state of IPRs as a factor in deciding where to place an investment: they expect not only protection at least at internationally-

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*396* *DESH – A Fresh Shot.*

*397* *DESH – A Fresh Shot.*
acceptable levels, but also actual IPR enforcement by legal and judicial authorities. And, they do not want to be forced to transfer patents, trademarks, copyrights, or trade secrets to local firms. As the 1998 WTO Appellate Body Report in the India Patent case (discussed in a separate Chapter) intimates, India emerged from the Uruguay Round (1986-1994) of MTNs with a sub-par record on enactment and enforcement of IP laws.\(^{398}\) So, with the 1991 reforms, India loosened requirements about technology transfer. It extended patent protection to pharmaceuticals, agricultural chemicals, and certain food products.

### IV. Financial Sector Reforms

Financial sector reforms aimed to liberalize commercial and investment banking markets and institutions operating in India. Three market reforms were key: partial freeing of interest rates; promotion of competition among commercial and investment banks; and creation of a new securities exchange for equities trading.\(^{399}\) The reforms also included technological innovations, such as electronic trading and un-certificated (\(i.e.,\) paperless) securities, and greater efficiencies in clearing and settlement.

Of these three reform categories, the “center-piece” and “focal point” of Indian economic reforms was the first.\(^{400}\) That was for good reason. One clear result emerging from economic development research is the direct relationship between the outward orientation and growth: economies that are more open to trade (and FDI) experience faster gains in GDP than those pursuing protectionist policies like import substitution, or worse yet, autarky.

Underlying all categories was a shift in economic ideology from the era of Prime Minister Nehru and his daughter, Prime Minister Indira Gandhi (1917-1984, PM, 1966-1977, 1980-1984): away from central planning, and toward the market. Trade was not to be discouraged, but promoted. Foreign investment was not to be regarded with suspicion, much less hostility, but to be pursued. Finance was not to be a backward and inefficient sector, but rather a dynamic, innovative link between savings and investment. Among many indicators of the paradigmatic shift was the shrinkage in the size of the Indian government. The central government fiscal deficit as a percentage of GDP dropped from 7.7% to 5.5% between 1990-1991 and 1992-1993.\(^{401}\)

The reforms worked quickly. Spurred by a private sector unshackled from government strictures, real annual growth in Indian GDP exceeded 6% in the mid-1990s.\(^{402}\) In 1996, the share of exports in Indian GDP rose to 9.2%, and between 1993 and 1996, Indian merchandise exports and imports (measured in U.S. dollar value terms) grew at an average rate of 20% per annum.\(^{403}\) The share of India in the growth of world exports increased. So:

\(^{399}\) See Krueger & Chinoy, 2.
\(^{400}\) Acharya, 57; Krueger & Chinoy, 3.
\(^{401}\) See Krueger & Chinoy, 2.
\(^{402}\) See Krueger & Chinoy, 2.
\(^{403}\) See Krueger & Chinoy, 3.
Together with deregulation of industry and fiscal stabilization, these external sector reforms yielded exceptionally good results by the mid-1990s. Export growth soared to 20 percent in three successive years, inward remittances quadrupled to $8 billion by 1994-95, foreign investment rose from negligible amounts to over $6 billion by 1996-97, foreign exchange reserves climbed steeply from the precarious levels of 1991 to over $26 billion by the end of 1996-97, and the debt-service ratio was halved over the decade. 404

But, the good news was not to last.

VI. 1990s and Early 2000s: Reforms Sputter

• Backsliding on Tariff Cuts

By the late 1990s, first generation reforms sputtered, with predictable adverse consequences. Consider the external sector. A lurking problem with the impressive reductions in tariffs is they were cuts to applied, not bound, MFN rates. Put in legal terms, the 1990-1991 tariff cuts were not locked in under the tariff binding principle of GATT Article II. Thus, India could post its applied rates back up again, up to its bound levels – and so it did, taking advantage of considerable “water” (i.e., gaps between lower applied and higher bound rates) in its tariff schedules.

After 1996, Indian import-weighted average applied tariffs crept back up from its 1996-1997 low of 24.6% to 30.2% in 1999-2000. 405 For intermediate goods, the import-weighted average jumped nearly 10 percentage points in the same three-year period, from 21.0% to 31.9%. The zenith of the economy-wide simple average tariff rates was 1997-1998, at 34.4%, after falling steadily from 128% in 1990-1991. 406 It rose to 40.2% in 1989-1999, and stayed essentially unchanged at 39.6% the next year.

Not surprisingly, backsliding on tariff cuts meant India compared unfavorably with other countries. Consider 1993, just two years into the “First Generation” of reforms, and the end of Uruguay Round negotiations. A 1996 World Bank study examined 26 developing countries, asking what the post-Uruguay Round bound and applied tariff rates, as of 1993, were for 13 product categories. 407 It drew two key conclusions.

First, India had the highest or second highest applied rates for all product categories. Indeed, its average applied tariff rate for all categories was nearly thrice the average of all other countries: India had an exceptionally high average applied rate of 51.6%, whereas

404 Acharya, 57.
405 See Srinivasan, 20.
407 This World Bank study, G. Pursell & A. Sharma, Indian Trade Policies Since the 1991/92 Reforms, is discussed in Srinivasan, 22.
the average for the other developing countries was 19.2%. Second, the patterns for applied rates existed for bound tariff rates: Indian post-Uruguay Round bound levels were higher than all other countries, across all product groupings, and for some groupings, they were significantly higher.

Further research shows India’s First Generation of tariff cuts were unimpressive relative to other poor or emerging countries. In 1994, among 13 developing countries, India had the highest average tariff level, 55%. Save for Egypt, India had the highest maximum tariff level, 65%. Six years on, India still compared unfavorably: of all large countries (ones with over 20 million people), the average Indian tariff rate was second only to that of Argentina, and well above averages in the rest of Asia and Latin America.

Perhaps most disappointing is the First Generation of external sector reforms failed to enhance the relative status of India across the decade of the 1990s. That decade, of course, was a crucial one for free market-oriented reform across much of the developing and developed world after the November 1989 fall of the Berlin Wall and collapse of Communism. For India, however, though not a lost decade, it was a disappointing one.

Unsurprisingly, India fared poorly in respect of openness as measured by low tariffs when compared with East Asian countries. Table 13-1 shows India against them across approximately 1989 to 2000. To be sure, in terms of percentage cuts to simple mean tariffs, India was in line with the other countries: all of them cut their average applied tariffs by at least 41.9% (Korea) and as much as 72.9% (Philippines). Likewise, on imported-weighted mean tariffs, India was in between the low of 36.2% (Malaysia) and 83% (Philippines), albeit at the low end of this range. But, the key is the final tariff rate: after the cuts, the Indian average (both simple and import-weighted) was still the most protectionist. Moreover, the Indian record on chopping tariff peaks manifestly was execrable: it cut by just 4.1% the share of lines in its Schedule with duty rates above 15%, whereas all other countries made large double-digit cuts. These points are true, even though India showed the most significant decrease in the degree of dispersion in its tariff Schedules, and two other countries (Korea and Malaysia) actually injected additional dispersion into their Schedules.

Surprisingly, the Indian record was undistinguished even against its Sub-Continental neighbors, except for Pakistan. Table 13-2 records tariff cuts on the Sub-Continent, again across the decade of the 1990s. At first glance, India looks to compare well: India cut its simple mean tariff by 58.9%, amidst a range from 8.4% (Pakistan) to 80% (Bangladesh); and, India dropped its average imported weighted tariff by 42.5%, while one country (Nepal) actually raised its average by 11.3%, and another country (Bangladesh) lowered its average by 76.5%. But, as intimated, it is Bangladesh and Sri Lanka that outshine India in respect of aggressive tariff reductions: after the cuts, India’s

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409 Except for the calculations on percentage reductions (columns 4, 6, 8, and 10), data in Tables 13-1 and 13-2 are drawn from the 2002 World Bank World Development Indicators, which is discussed in Srinivasan, Table 1.3 at 23.
simple and imported weighted average tariff levels were the highest, save for Pakistan. Similarly, India yielded the lowest percentage reduction in tariff peaks, though it did relatively well in reducing tariff dispersion.

In sum, the economic evidence is clear: neither the 1991 reforms nor the 1986-1994 Uruguay Round catalyzed dramatic applied or bound tariff reductions in India relative to other countries. India did cut them in the early 1990s. But, India failed to stay the course, and thus failed to liberalize to the extent of its competitors.
### Table 13-1
**Indian versus East Asian Tariffs in 1990s**

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
<th>Simple Average Tariff (%)</th>
<th>Percentage Reduction in Simple Average Tariff</th>
<th>Tariff Dispersion: Standard Deviation of Simple Average Tariff</th>
<th>Percentage Reduction in Tariff Dispersion (Percentage Cut in Standard Deviation of Simple Average Tariff)</th>
<th>Import-Weighted Average Tariff (%)</th>
<th>Percentage Reduction in Imported Weighted Average Tariff</th>
<th>Tariff Peaks: Percentage of Tariff Lines with Tariff Peaks (Tariffs Above 15%)</th>
<th>Percentage Reduction in Tariff Peaks (Percentage Decrease in Number of Tariff Lines with Tariffs Above 15%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>1990</td>
<td>79.0</td>
<td>-58.9%</td>
<td>43.6</td>
<td>-71.8% (increased tariff dispersion)</td>
<td>49.6</td>
<td>-42.5%</td>
<td>97.0</td>
<td>-4.1%</td>
</tr>
<tr>
<td></td>
<td>1999</td>
<td>32.5</td>
<td>-58.9%</td>
<td>12.3</td>
<td>-71.8% (increased tariff dispersion)</td>
<td>28.5</td>
<td>-42.5%</td>
<td>97.0</td>
<td>-4.1%</td>
</tr>
<tr>
<td>China</td>
<td>1992</td>
<td>41.0</td>
<td>-60.2%</td>
<td>30.6</td>
<td>-65.0%</td>
<td>33.2</td>
<td>-55.7%</td>
<td>77.6</td>
<td>-94.6%</td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>16.3</td>
<td>-60.2%</td>
<td>10.7</td>
<td>-65.0%</td>
<td>14.7</td>
<td>-55.7%</td>
<td>4.2</td>
<td>-94.6%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1989</td>
<td>21.9</td>
<td>-61.6%</td>
<td>19.7</td>
<td>-45.2%</td>
<td>13.0</td>
<td>-60.0%</td>
<td>50.3</td>
<td>-77.7%</td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>8.4</td>
<td>-61.6%</td>
<td>10.8</td>
<td>-45.2%</td>
<td>5.2</td>
<td>-60.0%</td>
<td>11.2</td>
<td>-77.7%</td>
</tr>
<tr>
<td>Korea</td>
<td>1988</td>
<td>14.8</td>
<td>-41.9%</td>
<td>5.3</td>
<td>+10.2%</td>
<td>10.5</td>
<td>-43.8%</td>
<td>12.5</td>
<td>-94.4%</td>
</tr>
<tr>
<td></td>
<td>1999</td>
<td>8.6</td>
<td>-41.9%</td>
<td>5.9</td>
<td>+10.2%</td>
<td>5.9</td>
<td>-43.8%</td>
<td>0.7</td>
<td>-94.4%</td>
</tr>
<tr>
<td>Country</td>
<td>Year</td>
<td>Simple Average Tariff (%)</td>
<td>Percentage Reduction in Simple Average Tariff</td>
<td>Percentage Reduction in Tariff Dispersion: Standard Deviation of Simple Average Tariff</td>
<td>Import-Weighted Average Tariff (%)</td>
<td>Percentage Reduction in Import-Weighted Average Tariff</td>
<td>Tariff Peaks: Percentage of Tariff Lines with Tariff Peaks (Tariffs Above 15%)</td>
<td>Percentage Reduction in Tariff Peaks (Percentage Decrease in Number of Tariff Lines with Tariffs Above 15%)</td>
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<td>-----------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Malaysia</td>
<td>1988</td>
<td>17.0</td>
<td>-45.3%</td>
<td>15.1</td>
<td>9.4</td>
<td>46.7</td>
<td>-47.3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>1997</td>
<td>9.3</td>
<td>-45.3%</td>
<td>33.3</td>
<td>+120.5% (increased tariff dispersion)</td>
<td>6.0</td>
<td>-36.2%</td>
<td>24.7</td>
<td></td>
</tr>
<tr>
<td>Philippines</td>
<td>1989</td>
<td>28.0</td>
<td>-72.9%</td>
<td>14.2</td>
<td>22.4</td>
<td>77.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>7.6</td>
<td>-72.9%</td>
<td>7.7</td>
<td>-45.8%</td>
<td>3.8</td>
<td>-83.0%</td>
<td>8.8</td>
<td></td>
</tr>
<tr>
<td>Thailand</td>
<td>1989</td>
<td>38.5</td>
<td>-56.9%</td>
<td>19.6</td>
<td>33.0</td>
<td>72.8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>16.6</td>
<td>-56.9%</td>
<td>14.1</td>
<td>-28.1%</td>
<td>10.1</td>
<td>-69.4%</td>
<td>45.9</td>
<td></td>
</tr>
</tbody>
</table>
### Table 13-2
Indian versus Other Sub-Continental Tariffs in 1990s

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
<th>Simple Average Tariff (%)</th>
<th>Percentage Reduction in Simple Average Tariff</th>
<th>Tariff Dispersion: Standard Deviation of Simple Average Tariff</th>
<th>Percentage Reduction in Tariff Dispersion (Percentage Cut in Standard Deviation of Simple Average Tariff)</th>
<th>Import-Weighted Average Tariff (%)</th>
<th>Percentage Reduction in Imported Weighted Average Tariff</th>
<th>Tariff Peaks: Percentage of Tariff Lines with Tariff Peaks (Tariffs Above 15%)</th>
<th>Percentage Reduction in Tariff Peaks (Percentage Decrease in Number of Tariff Lines with Tariffs Above 15%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>1990</td>
<td>79.0</td>
<td>-58.9%</td>
<td>43.6</td>
<td>-71.8%</td>
<td>49.6</td>
<td>-42.5%</td>
<td>97.0</td>
<td>-4.1%</td>
</tr>
<tr>
<td></td>
<td>1999</td>
<td>32.5</td>
<td>-80.0%</td>
<td>12.3</td>
<td>79.3</td>
<td>13.6</td>
<td>88.4</td>
<td>98.2</td>
<td>51.8</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>1989</td>
<td>106.6</td>
<td>-80.0%</td>
<td>17.8</td>
<td>-82.8%</td>
<td>15.9</td>
<td>21.0</td>
<td>98.2</td>
<td>51.8</td>
</tr>
<tr>
<td>Nepal</td>
<td>1993</td>
<td>21.9</td>
<td>-18.3%</td>
<td>20.9</td>
<td>+17.4% (increased tariff dispersion)</td>
<td>17.7</td>
<td>+11.3% (increased imported weighted average tariff)</td>
<td>58.9</td>
<td>-68.3%</td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>17.9</td>
<td>-18.3%</td>
<td>20.9</td>
<td>17.7</td>
<td>18.7</td>
<td>-68.3%</td>
<td>58.9</td>
<td>-68.3%</td>
</tr>
</tbody>
</table>
Table 13-2 (continued)

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
<th>Simple Average Tariff (%)</th>
<th>Percentage Reduction in Simple Average Tariff</th>
<th>Tariff Dispersion: Standard Deviation of Simple Average Tariff</th>
<th>Percentage Reduction in Tariff Dispersion (Percentage Cut in Standard Deviation of Simple Average Tariff)</th>
<th>Import-Weighted Average Tariff</th>
<th>Percentage Reduction in Import-Weighted Average Tariff</th>
<th>Tariff Peaks: Percentage of Tariff Lines with Tariff Peaks (Tariffs Above 15%)</th>
<th>Percentage Reduction in Tariff Peaks (Percentage Decrease in Number of Tariff Lines with Tariffs Above 15%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pakistan</td>
<td>1995</td>
<td>50.9</td>
<td>-8.4%</td>
<td>21.5</td>
<td>-1.4%</td>
<td>46.4</td>
<td>-10.1%</td>
<td>91.4</td>
<td>-5.6%</td>
</tr>
<tr>
<td></td>
<td>1998</td>
<td>46.6</td>
<td></td>
<td>21.2</td>
<td>41.7</td>
<td>-10.1%</td>
<td>86.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>1990</td>
<td>28.3</td>
<td>-65.0%</td>
<td>24.5</td>
<td>26.9</td>
<td>51.7</td>
<td>-57.4%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2000</td>
<td>9.9</td>
<td>-62.0%</td>
<td>9.3</td>
<td>7.4</td>
<td>22.0</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Note the East Asian Financial Crisis is not a plausible explanation for these Indian failures. That largely unanticipated (but in retrospect, foreseeable) Crisis occurred between 1997-1999. So, it would be chronologically inaccurate to argue Indian external sector reforms intentionally were at a slower pace than those of East Asia, to avoid adverse contagion effects of rapid trade liberalization. If anything, then it is the admixture of a legacy of post-Partition protection and domestic political problems that accounts for deceleration and reversals in the 1990s of First Generation reforms.

- **Persistence of Tariff Escalation**

Concomitantly, India had yet to rid itself of tariff escalation.\(^{410}\) In 1997-1998, its lowest tariff duties, averaging 25%, were on unprocessed items. Semi-processed goods attracted a higher tariff, averaging 35%. The steepest tariff was on processed merchandise, 37%. Manifestly, India still concocted its tariff schedules to promote domestic industry as per its history of import substitution.

No less troubling than the aforementioned points was the unwinding of the depreciation of the *rupee*:

India’s trade reforms of the early 1990s were characterized by a significant nominal depreciation of the exchange rate, which translated into a substantial real devaluation in the early 1990s. … India’s export-weighted multilateral real exchange rate in relation to the country’s five largest export markets (the United States, Japan, Germany, the United Kingdom, and Hong Kong) depreciated by almost 60 percent by 1993 relative to its level in 1990. From that point, however, there seems to have been a persistent – albeit gradual – real appreciation vis-à-vis these currencies – thus eroding some of the early gains. This pattern is also evident in India’s real exchange rate in relation to the labor-abundant Asian countries – which constitute India’s major competition in export markets. India’s real exchange rate vis-à-vis these countries depreciated significantly (relative to its level in 1990) until the mid-1990s. With the onset of the [1997-1999] Asian crisis and the subsequent depreciation of most East Asian currencies, however, the *rupee* began to appreciate significantly in relation to these currencies. Indeed, as of September 2000, India’s real exchange rate had appreciated almost 20 percent vis-à-vis the East Asian countries – relative to its value just before the crisis – thus offsetting much of the real depreciation that India had experienced in the early 1990s.\(^{411}\)

In short, as with tariff reforms, on exchange rate reforms, the benefits of *rupee* depreciation in the early 1990s, which helped fuel high growth rates, were “undone” by *rupee*


\(^{411}\) See Krueger & Chinoy, 5.
appreciation by the end of that decade.\textsuperscript{412} Export growth, in particular, slumped, especially in relation to other Asian emerging countries, like Korea, and even Latin American ones, like Chile. Thus, Indian exchange rate policy failed to provide the stimulus exporters needed to sustain their growth, and concomitantly to ensure a healthy balance between foreign exchange revenues they generate as against foreign exchange expenditures incurred by importers. \textsuperscript{413}

- **Almost Standing Still**

Export growth slowed. Perhaps most tellingly, India – an original contracting party to the 30 October 1947 GATT and founding Member of the 1 January 1995 WTO – stood in the same position in world trade for over half a century. In 1948, the share of Indian exports in world merchandise exports (in value terms) was 2.2%. It fell to 0.5% by 1983. It grew back to just 0.7% in 2000.\textsuperscript{414} Not only had its post-Partition trade policy failed, but also its 1991 reforms had yet to bear full fruit.

Indeed, its status as a founding member of the modern multilateral trading system belied its commitment to open markets. At the 1948 Havana Conference, throughout much of GATT history, and all of the Doha Round of WTO negotiations, India championed S&D treatment for developing countries.\textsuperscript{415} That is, India argued for asymmetric obligations on developed countries, once again fearful that dramatic opening by developing countries would “retard industrialization,” and thereby lead to neo-colonialist exploitation.

- **FDI and Banking Sector Difficulties**

As regards FDI, the twin devils of decrepit physical infrastructure and rampant top-down corruption highlighted the disadvantages of establishing or expanding production facilities in India \textit{vis-à-vis} China. The share of FDI flowing to developing countries for which India accounted reached a highpoint of 2% in the 1990s – a paltry figure for a country the size of India.\textsuperscript{416}

In the financial sector, the Indian government deficit jumped to 10.8%.\textsuperscript{417} Financing government expenditures crowded out bank lending to the private sector, throttling its rapid growth. Indian banks were saddled with NPLs and other poor-quality assets at levels in excess of international standards. Banking and securities regulation proved inadequate, even corrupt, and scandals struck equities trading on the BSE.

**VI. Reasons for Deceleration**

Why did Indian economic reforms decelerate after a promising start? India faced

\textsuperscript{412} See Krueger & Chinoy, 5.
\textsuperscript{413} See Krueger & Chinoy, 5.
\textsuperscript{414} See Srinivasan, 18.
\textsuperscript{415} See The Doha Round Trilogy; Srinivasan, 18.
\textsuperscript{416} See Krueger & Chinoy, 4.
\textsuperscript{417} See Krueger & Chinoy, 2, 6.
(again) domestic political uncertainty and international turmoil. Domestically, enthusiasm for reforms among Indian leaders declined amidst concerns that of rising socioeconomic inequality. Liberating the economy to boost growth was welcome, but that growth should alleviate, not exacerbate, poverty. After all, governments can and do rise and fall when citizens find “reforms” injure their interests. The Congress Party came to power in 2004, defeating the Bharatiya Janata Party, with the support of hundreds of millions of poor, minority, lower-caste, and rural voters who had not benefitted economically as had the upper and middle classes from BJP policies.

Additionally, within India, the reforms had not operated long enough to root out entirely the mindset of post-Partition Socialist-style policies. For instance, some Indian industrialists failed to push for a more depreciated rupee, even though the producer-exporters among them would have benefited from a weaker currency, and non-exporters would have seen opportunities in foreign markets:

A significantly cheaper rupee would at a stroke neutralize all the arguments about India’s lack of competitiveness coming from electricity tariffs, poor infrastructure, and high interest rates, and provide … [a] level playing field….\footnote{See Naushad Forbes, Comment – Indian Exports and Exchange Rate Policy, in Reforming India’s External, Financial, and Fiscal Policies, 90 (Anne O. Krueger & Sajid Chinoyd Eds., Stanford, California: Stanford University Press, 2003). [Hereinafter, Comment – Indian Exports.]} In short, many Bombay Club captains of Indian Industry still thought in terms of a strong rupee to (1) make raw materials and intermediate goods they used to produce finished goods cheaper, and (2) function as a protective tariff against foreign finished goods.\footnote{Comment – Indian Exports.}

Moreover, in the first two decades of the 21\textsuperscript{st} century, the government itself got in the way:

… Without a doubt, India has made impressive recent progress in building the “hardware” of economic success – its physical and digital infrastructure, its ability to provide tangible basic goods to its population, and its strong base of skilled engineers and entrepreneurs. Yet at the same time, the country continues to struggle to fix its “software,” the crucial economic framework under which domestic entrepreneurs and foreign firms must operate. Policies are changed abruptly; rules are altered to favor certain firms. As a result, domestic entrepreneurs and foreign companies have been reluctant to undertake the investments needed to exploit India’s rapidly advancing hardware. Whether India manages to boom again and become a serious alternative to China will depend on whether the country can finally overcome the long-standing defects in its policy software. …

… A comparison with China is instructive. Compared with China’s, India’s population and workforce are young. And whereas China’s
hardware revolution – its huge investments in infrastructure and housing – has largely run its course, India’s is only just beginning. China is also an increasingly authoritarian country and has begun to undermine private-sector entrepreneurship and innovation through sometimes punitive state intervention; India, by contrast, is the world’s largest democracy, with the groundwork in place for an expanding private sector.

For the Indian economy to achieve its potential, however, *the government will need a sweeping new approach to policy – a reboot of the country’s software*. Its industrial policy [discussed below] must be reoriented toward lower trade barriers and greater integration into global supply chains. The national champions strategy [also discussed below] should be abandoned in favor of an approach that treats all firms equally. Above all, *the policymaking process itself needs to be improved, so that the government can establish and maintain a stable economic environment in which manufacturing and exports can flourish.*

In effect, Raisina Hill (the off-hand term for India’s government) was partly to blame for stalling the reignition of growth-generating reforms, hence the solution lay there.

Internationally, there was an undeclared war with Pakistan centered on Kargil, in which India triumphed at great cost, plus (another) military *coup d’état* in Pakistan, this one led by General Pervez Musharraf (1943-, President, 2001-2008) against the elected Prime Minister, Nawaz Sharif (1949-, PM, 1997-1999, 2013-2017). There were pressures associated with the American invasions of Afghanistan and Iraq. Indian Muslims numbered in the range of 200 million, and the possibility of Islamist extremism lurked – and manifested itself in the horrific Bombay bombings of November 2008, which were perpetrated by *Lashkar-e-Taiba*, a militant organization based in Pakistan.

Exogenous threats to Indian stability were not the only reason India lost focus on domestic economic reforms. There was a loss of faith in reforms, which to some Indians seemed like a neo-colonialist trick. Some Indian constituencies were wary about more integration into the global economy. *After all (and as discussed in a separate Chapter), the Grand Bargain of the Uruguay Round (1986-1994) was disappointing. Via this promising trade-off, developing countries like India would gain improved market access for T&A and agricultural products into developed country markets, and developed countries would cut their farm subsidies. In return, developing countries would grant access to their markets for service suppliers from developed countries, and strengthen protection for IP of developed country firms. But, in phasing out the global quota system for T&A that had been in place under*

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420 Arvind Subramanian & Josh Felman, *India’s Stalled Rise – How the State Has Stifled Growth*, 101 FOREIGN AFFAIRS number 1, 139-150, 139, 149 (January/February 2022). (Emphasis added.) [Hereinafter, *India’s Stalled Rise*.]

the 1974 Multi-Fiber Arrangement, the WTO ATC created a near-laissez faire regime. T&A companies from the U.S. and EU consolidated their production facilities in a handful of cheap-labor countries, as they no longer had to spread operations across dozens of countries to stay within quota limits.

Here, then, from an Indian perspective was divide and conquer: pitting India, China, Vietnam, Sri Lanka, Indonesia, and other countries with T&A plants against one another to avoid local shutdowns. As for farm product exports from poor to rich countries, the international competitive playing field hardly had leveled. Tariff spikes and non-tariff barriers remained. Spending by rich countries on domestic agricultural support measures and agricultural export subsidies did not fall dramatically. And, a basic asymmetry in farm plot sizes, and thus economies of scale, remained. Ind](#)
a had (as of February 2019) roughly 263 million farmers, almost 85% of whom own less than two hectares (4.94 acres) of land. As against India’s average farm size (as of 2015-2016) of 1.08 hectares (2.67 acres), America’s average farm size (as of 2017), at 444 acres, is 166 times larger.

Conversely, developed countries – again, from an Indian perspective – seemed to be the primary beneficiaries of the WTO GATS and TRIPs Agreement. Many of their services suppliers, across sectors such as banking, construction, engineering, finance, insurance, and telecommunications, expanded into the markets of emerging countries in what seemed to be a one-way trade flow. Developed countries insisted developing countries do more to protect corporate patents, trade and service marks, copyrights, and semiconductor mask works, and opposed efforts to liberalize TRIPs Article 31 in respect of compulsory licensing in situations when a country lacks capacity to manufacture pharmaceuticals.

VII. Unacceptable Facts

The First Generation reforms and their aftermath have borne some fruit. Perhaps most impressively, India has recorded high growth rates and cut into poverty. In the first term of Prime Minister Singh (2004-2009), Indian GDP grew roughly 8%-9% annually, and hit a historical high of 9% in 2007, then the second fastest growing major economy in the world. In 2010, the Indian economy grew at an even faster clip than that of China. The poverty rate (i.e., the percentage of the total population falling below the absolute

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425 See What a Waste, THE ECONOMIST, 11 May 2013, 12. This comparison presumes the measurements used for each country are consistent. See id. (also reporting that from 2005 to 2007, the Indian economy grew by roughly 9% annually).
poverty line) in 2004-2005 was 27.5%, down from 44.5% in 1983. But, in several serious respects, the First Generation of Indian reforms proved inchoate. Growth has fallen off to half its peak level, at about 4.5% per annum. Unacceptable still is not only the poverty rate, but also the facts that:

1. 43% of Indian children go hungry, which is twice the rate of Sub-Saharan Africa;
2. 50% of all Indians defecate in the open, leading to deaths from diarrhea and encephalitis;
3. India spends just U.S. $39 per person annually on public health, as against $203 in China and $483 in China, or 1.2% of Indian GDP, as against a global average of 6.5%;
4. 400 million Indians, about one-third of the population, have no electricity; and,
5. Roughly 600,000 babies are aborted every year because they are girls.

Manifestly, then, the 1991 reforms left many challenges unaddressed.

VIII. 12 Specific Challenges

With the sputtering of India’s First Generation reforms and deceleration of the Subcontinental juggernaut, 12 specific reforms became plainly necessary.

1. Upgrading and expanding physical infrastructure needed to support economic growth, such as roads, railroads, air- and sea-ports, energy (especially electricity) generation, sanitation facilities, and telecommunication systems.
2. Opening certain sectors to FDI, including retail stores (especially large, multi-brand retailers).

PM Modi intoned to Parliament in February 2021:

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430 In September 2012, the government of Prime Minister Manmohan Singh pushed through long-stalled reforms on FDI in the retailing sector, allowing foreign companies to own up to 51% of local supermarkets. See Avantika Chilkoti & Barney Jopson, Wal-Mart’s India Chief in Sudden Departure,
“There is a new FDI that the country has to be saved from – that is foreign destructive ideology.”

Reinforcing that rhetoric, India bedevilled foreign retailers with two requirements: foreigners could not own more than 51% of the equity in any supermarket chain; and they can open grocery stores only in a city of less than one million people. These limitations tilted the competitive playing field in favor of “Bollygarchs” like Mukesh Ambani, Asia’s richest man. Mr. Ambani’s conglomerate, Reliance Industries Ltd., used cut-throat (and arguably predatory) pricing to drive out local competitors, thus becoming “India’s biggest brick-and-mortar retailer,” and sought to hobble the entry of Amazon and Wal-Mart into India’s retail and e-commerce markets.

FINANCIAL TIMES, 27 June 2013, 13. Their doing so posed a threat to the millions of mom-and-pop stores in India’s “vast but fragmented retail market.” Id. But, foreign retailers could do so only if they fulfilled local infrastructure investment requirements, so by June 2013, no foreign retailer had taken a controlling stake. See id. By then Wal-Mart had opened only 20 wholesale stores through a 50-50 JV with Bharti Enterprises (controlled by Indian billionaire Sunil Mittal). In June 2013, the head since 2007 of Wal-Mart India, Raj Jain, abruptly resigned. Wal-Mart India had complained about the investment restrictions against its expansion.


Entry into the Indian market was not the only travail Amazon faced. It also had problems with India’s competition authority concerning an acquisition of a failing local retailer:

What should be an ordinary commercial dispute between Amazon.com Inc. and the founders of a near-bankrupt retailer is shining a harsh light on the quality of legal and regulatory protection investors actually receive in India. The long-drawn-out saga has thrown up two questions for prospective investors, or those who already have business interests in India. First, what does a go-ahead from the country’s antitrust authority even mean if an entire chain of investment based on that approval has to be unwound or reversed after two years? Second, can one rely on international arbitration to enforce Indian contracts, or will local courts get involved and throw a spanner into alternative dispute-resolution mechanisms?

Last month [December 2021], Amazon was fined 2.02 billion rupees ($26.7 million) by the Indian competition watchdog. Worse, its $192 million capital infusion in Future Coupons Pvt. – a 2019 transaction – was put “in abeyance” for being economical with disclosures. The Commission said it was denied an opportunity “to assess the effects of the actual combination,” which gave Amazon strategic rights over publicly traded Future Retail Ltd. Never mind that those “effects,” even if the trustbuster did get a chance to study them, are unlikely to have included concentration of power in the retail industry, for the simple reason that Amazon is not a retailer in India. It’s an electronic marketplace for buyers and sellers.

…

Amazon’s travails in India, however, have little to do with dominance. The foreign firm is legally barred by India’s overseas investment rules from acting as a retailer that owns or discounts inventory. The foreign firm is legally barred by India’s overseas
Likewise, with respect to insurance, not until March 2021 did the government propose lifting the cap on foreign equity ownership from 49% to 74%.\(^{434}\) (Through 2015, the limit had been 26%.) In pushing the 2021 **Insurance (Amendment) Bill** through the **Rajya Sabha** (i.e., the Council of States, or Upper House of India’s bicameral legislature, the **Lok Sabha** being the House of the People, or Lower House) that would allow foreign insurers to hold a majority stakes, the government confessed local insurers faced liquidity pressures and insolvency risks, and that FDI would help bolster their resources and generate employment. Yet, whether the higher cap would attract investment was unclear: average FDI in Indian private insurance (excluding reinsurance) companies was just 31%, far below the 49% ceiling.\(^{435}\)

investment rules from acting as a retailer that owns or discounts inventory. That explains why Amazon sought to control Future Retail indirectly, via its investment in Future Coupons, a related firm. To keep on the right side of Indian law, the global e-commerce giant has similarly kept its voting rights in another of its acquisitions – the local grocery chain More – below 26%.

In doing those deals, however, the U.S firm hasn’t started wielding outs size influence on India’s $800 billion-a-year consumer commerce. Mom-and-pop stores control 80% of the grocery market.

…

The freezing of the antitrust approval has put a question mark around the very contract that Amazon is trying to enforce. When Future tried to use that loophole to get further hearings in Singapore quashed, a Delhi High Court Judge remarked that for arbitration to speedily settle disputes, interference by courts must be kept to a minimum. “If the parties are encouraged to approach the court at every stage of the arbitration proceedings, the whole purpose of the arbitration would stand frustrated,” the Judge said. And yet, just a day later, a two-judge bench of the same court set aside the arbitration to speedily settle disputes, interference by courts must be kept to a minimum. “If the parties are encouraged to approach the court at every stage of the arbitration proceedings, the whole purpose of the arbitration would stand frustrated,” the Judge said. And yet, just a day later, a two-judge bench of the same court set aside the arbitration proceedings, the whole purpose of the arbitration would stand frustrated,”

… Amazon is challenging the latest Delhi High Court order in India’s Supreme Court and has appealed against the antitrust agency’s vol te face before a company-law tribunal. And that’s the final point investors need to bear in mind: They must be ready for expensive and time-consuming litigation to protect the value of their transactions. …


Amazon was not alone in running afoul of India’s competition authorities. Google did, too. Following an investigation by the Competition Commission of India (CCI) launched in 2019, the CCI found Google of abuse of its market position – “using its Android platform to dominate the market” – and issued a 13 bn rupees ($161 m; £144m) fine, and cease-and-desist order against Google. See *Google: India Fines Tech Giant $161 m for Unfair Practices*, BBC News, 21 October 2022, [www.bbc.com/news/world-asia-india-63336328](http://www.bbc.com/news/world-asia-india-63336328).


\(^{435}\) See *Rajya Sabha Passes.*
Continuing privatization of SOEs, which (as of October 2007) still accounted for 38% of total output in the formal non-farm sector, are one-third less productive than private firms, and grow less rapidly than firms benefiting from privatization (e.g., in the IT sector).

Eliminating investment (equity) caps on foreign ownership of local financial service providers, especially in banking and insurance, and in other key sectors, such as agriculture, civil aviation, and telecommunications.

In this respect, the July 2013 announcement that India would scrap its 74% cap on foreign holdings in mobile phone operations was welcome. That development came with another one on which a key local player, Reliance, capitalized:

India’s government tweaked rules in 2013 to create a “unified license” that allowed operators with a broadband wireless permit to offer voice calls by paying a one-time fee. Only one operator had such a permit nationwide at that time – Reliance Jio. The new rules helped it move swiftly.

After receiving a unified license and rolling out Reliance Jio’s telecom services in September 2016, [Mukesh] Ambani [(1957-) its Chairman, Managing Director, and largest shareholder of Reliance Industries, and Asia’s richest man] sold voice and data plans at rock bottom prices. That made digital services more affordable for millions of Indians. Although rivals won similar licenses, some went bankrupt amid the ensuing price war, including his younger brother Anil’s Reliance Communications Ltd. Non-state operators in telecommunications eventually dropped to three from at least a dozen.

Also welcome was the Indian pledge to foreign investors in defense production: if they had state-of-the-art technology, then they could exceed the 26% equity cap limit, subject to the approval of a Cabinet Committee on National Security. But, reforms with respect to other sectors, including commodity exchanges, oil refining, and single-brand retailing, was less impressive: the foreign equity caps would stay, though a larger percentage would be permissible without requiring government approval (i.e., via the so-called “automatic route”). Likewise, a commitment to ease restrictions on outside investment in other sectors, such as insurance and tea plantations, seemed vague, as well as disappointing absent lifting equity cap limits.

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438 *Asia’s Richest Man.*
(5) Cutting tariffs further, which (as of October 2007) averaged about 20%, among the highest figures in the world, continuing to compress tariffs so as to reduce tariff dispersion, and reduce tariff peaks.

(6) Continue the movement to a fully and freely convertible rupee for current and capital account purposes, local foreign exchange markets, and even internationalization of the rupee (i.e., its hardening as an internationally tradable and acceptable means of payment), even if such developments entail greater volatility in exchange rates for the rupee.439

(7) Drastically reducing government subsidies, which (as measured as a percentage of GDP) are the second highest in the world among countries surveyed by the OECD.

(8) Transforming traditional agriculture. “Nobody doubts that for India to have a shot at exiting its lower-middle-income trap, farming must come out of its sub-3% growth rut.”440 That means the “[p]roductivity of labor, land, fertilizer and water have to improve,” and “[m]assive private investments need to take place in storage and processing for the country’s 2% share of global agricultural exports to increase.”441 It also means India needs to cut its farm tariffs, which at an average of 36.5% (as of March 2021), are some of the highest in the world, and reform its non-transparent price support system. On both counts, India has repeatedly been criticized at the WTO by Canada, the EU, and U.S. as protectionist in the extreme.442

The government of PM Modi tried (unsuccessfully) to implement some of the requisite reforms. So, too, had each of his predecessors across the previous 20 years.

(9) Reforming the labor market, specifically to make it more flexible by eliminating (1) restrictive employment protection laws against collective dismissals, and (2) the requirement manufacturing firms obtain government permission to lay off workers at any factory with more than 100 employees.

(10) Modernizing and strengthening copyright and patent laws. Nothing in the 1991 reforms prepared India for the emerging IP issues of the early 21st century, with which FTAs such as CPTPP dealt. The stasis in Indian IP law thus positioned India poorly relative to other Asia-Pacific countries, which modernized their IP rules and, in turn, could negotiate modern trade agreements having made essential domestic law updates.

439 See Acharya, 57-58.
441 Modi Needs One.
442 Kartik Ashta, Revisiting India’s Agricultural Trade Policies, GATEWAY HOUSE (Mumbai), 27 January 2021, www.gatewayhouse.in/india-agricultural-trade-policies/ [hereinafter, Revisiting India’s Agricultural].
(11) **Enforcing IP laws**, especially with respect to pharmaceuticals (India is a leading center for counterfeit medicines), software (74% of which in India is pirated), and entertainment (notably, movies and music, the pirating of which damages Bollywood).

(12) **Reducing social stigmas based on gender, caste, religion, and ethnicity**, which aside from being against both secular and natural law, inhibit the full realization of India’s tremendous human capital potential.

The complementarity of these 12 reforms to changes in international trade rules cannot be over-emphasized.

Nor can the need for urgency be over-emphasized. Foreign (and domestic) portfolio and direct investors have lost considerable confidence in India, and shown their displeasure at the stymied reforms by pushing down the value of the *rupee* relative to the dollar. In August 2013, it hit a record low of roughly 65 *rupees* to the dollar, a decline of about 12% theretofore in 2013. The crash of the *rupee* raised the prospect of import-driven inflation (reinforced by ambitious Indian government plans to provide subsidized rice, wheat and other essential to 67%, roughly 800 million Indians), which if manifest would disproportionately injury the poor.

The full fruits of external sector changes cannot be realized simply because they are made. Those changes operate in tandem – or not – with other reforms. So, sclerosis caused by an unresponsive and overweening state, stifling labor laws, strictures on SMEs, a backward financial sector, a crumbling infrastructure, disrespect for IP rights, and segregating women or minorities away from education and jobs must be tackled. Until they are, external sector reforms – however good – will operate sub-optimally.

It is worth commenting that the difficulties India faces with its reform project contrast in some respects with the experience of China. For instance, in respect of economics, because Indian labor laws make hiring and firing so difficult, 87% (as of October 2007) of employment in the manufacturing sector is with firms that employ less than 10 workers. In China, only 5% of industrial jobs are at firms with fewer than 10 workers. Consequently, Chinese firms can develop and maximize economies of scale, absorb new technology, and enjoy higher labor productivity, than Indian companies.

**IX. Importance of REER**

Also, of importance to sustaining an outward-oriented international trade regime is continued reform of the exchange rate, with particular attention to the Real Effective

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444 *See Andy Mukherjee, Breaking News – India Grain Subsidy May Only Outsource Hunger, Reuters, 10 July 2013, www.reuters.com.*
Exchange Rate.\textsuperscript{445} The REER is:

The weighted average of a country's currency relative to an index or basket of other major currencies adjusted for the effects of inflation. The weights are determined by comparing the relative trade balances, in terms of one country's currency, with each other country within the index.\textsuperscript{446}

Simply put, the REER is the value of the currency of one country (e.g., the Indian rupee) against the value of other major (i.e., hard) currencies in an index (namely, the U.S. dollar, Japanese yen, EU euro, and a few others), with adjustments for the effects of inflation.

Gauging the currency against others makes the REER “effective” (as distinct from a value against just one other currency, i.e., a bilateral rate), while correcting for inflation makes the REER “real” (as distinct from nominal). Using a basket is more realistic in a globalized world in which any one country, (e.g., India) trades with many countries, with payment often made in a major currency.\textsuperscript{447} Correcting for inflation obviously makes the REER unadulterated by price level changes in any one country.

Economists teach that the REER ought to be judged by a two-pronged test: (1) Does the REER keep foreign exchange earnings and expenditures roughly in balance over the intermediate term?; and (2) Does the REER give exporters a sufficient incentive such that exports grow at a satisfactory pace?\textsuperscript{448}

As a country seeks to grow through export-orientation, and does so by dismantling tariff and non-tariff barriers, passing the test is particularly important: the level and path of the REER must not undermine the salubrious effects of eliminating trade barriers.\textsuperscript{449} The exchange rate must not operate orthogonally to trade law reform. So, the exchange rate must be devalued in real terms to an appropriate degree.\textsuperscript{450} That way, domestic factors of production (land, labor, physical capital, human capital, and technology) will respond by shifting into export-oriented production. Those devaluations, by making imports more expensive, also will offset (at least in part) increased competition from imports to domestic producers that comes with lower trade barriers.

\section*{X. Three Economic Options}

\textsuperscript{445} See Krueger & Chinoy, 4.

\textsuperscript{446} Definition of “Real Effective Exchange Rate – REER,” INVESTOPEDIA, www.investopedia.com/terms/r/reer.asp.

\textsuperscript{447} Note that the basket of currencies selected may be weighted according to trade between the other countries (U.S., Japan, EU, etc.), on the one hand, and the country of the currency being valued, on the other hand (India). That weighting may be based on exports, imports, or exports plus imports (total trade). If so, then the full and proper term is “trade weighted effective exchange rate.” See Trade-Weighted Effective Exchange Rate, WIKIPEDIA, http://en.wikipedia.org/wiki/Trade-weighted_effective_exchange_rate_index. A trade-weighted rate, such as for the rupee, gives a more accurate picture of the prices Indian exporters receive for their exports, and the prices Indian importers pay for their imports.

\textsuperscript{448} See Krueger & Chinoy, 4.

\textsuperscript{449} See Krueger & Chinoy, 4.

\textsuperscript{450} See Krueger & Chinoy, 4.
Going forward, in theory India had three economic options. These are ably discussed by Amartya Sen (1933-), winner of the 1998 Nobel Prize in Economics, and his co-author, Jean Drèze (1959-), in their 2013 book, An Uncertain Glory: India and its Contradictions. The first option was to go back to post-Partition policies: turn again to the Indian government to re-occupy the commanding heights of the economy, this time with the benefit of experience from the 1947 to 1991. The idea here is India committed a fatal blunder departing from its leftist policies, as only “[h]igh rates of taxation, expropriation of large holdings [including land, which is essential for industrialization], and nationalization of large companies” can “redistribute wealth to the backward regions and poorer parts of the population.”451 This option, the darling of unreconstructed Marxists, is seductive: it seems to be a panacea for the excesses concomitant with First Generation reforms, and the persistence of mass poverty.

The second option was to accelerate the pace of free-market reforms: drive India as quickly as possible to a deregulated, laissez-faire economy. The idea here was India did not go far enough down the free market path, and its problem is not too much capitalism, but too little. Stop regulating the conditions under which businesses fire and fire, and the wage rates they pay, and continue to dispose of state-owned land so that private businesses can use those plots to industrialize. Indeed, “[i]f labor laws were liberalized, and companies allowed to buy land directly from peasants at the prevailing market rate, then … more jobs and more wealth would be created.”452 This option, the darling of Neo-Classical fundamentalists, is seductive: ostensibly, the failure to follow through after 1991 on reforms, and to tolerate backsliding, are the source of India’s woes.

But, as Sen and Drèze astutely argue, both options are extreme. Neither jogging back to the past nor sprinting ahead is satisfactory, or even realistic. What is needed is a third way, a course that continues privatization, bolsters entrepreneurship, rewards innovation, and welcomes openness to globalization – but also reduces absolute poverty rates and boosts human development indicators, including access to and enhancement of education and health care, and the empowerment of women.

Yes, growth rates matter. But so, too, do real wage rates (which have been stagnant), levels of malnutrition (which are high), gender ratios (which are unequal), sanitation (which is monstrous), and social stigmas (like caste and region, which persist). The private sector should take the lead in activism, but the union (central) government must be activistic, at least in a supervisory role, and the latter must not be corrupt or subject to politicization, per the salubrious examples of Canada and Sweden.

Ironically, that is what Prime Minister Nehru sought – a third way between American Capitalism and Soviet Communism that would yield sustainable GDP per capita growth rates with distributional equity and social justice. Renowned Indian economist Jagdish Bhagwati (1934-) remarked India is cursed by the affliction of having brilliant economists.453 They have debated endlessly about trade and other economic policies, yet

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451 See The Delhi Dilemma.
452 See The Delhi Dilemma.
453 See ThAROOR, 244.
few appreciate the legal dimensions of their various proposals, and none has yet devised a third way that is theoretically robust and practically appealing. That may take a grand lawyer-cum-politician, as Nehru was, updated to the new millennium.

A simple example adduces the point. Tariff collections account for nearly 30% of all central government tax revenues.\textsuperscript{454} Free trade-oriented economists clamor for a reduction in applied duties.

But, that cannot happen without structural change in the composition of government funding. In turn, that cannot occur without fundamental tax reform, especially in respect of income tax rules and enforcement. All such changes are far beyond the narrow ken of economists. Good lawyers and skillful politicians, guided by sound economic thinking, are indispensable.

\textbf{XI. Getting Politics and Law Straight}

At bottom, however, India’s challenges are not economic. They are legal and political. Why did the first-generation reforms peter out? Why has growth slowed? Why is the export sector and underachiever? Why do hundreds of millions of Indians remain poor?

A typical answer is population, but the one-word answer is: “government,” or “governance.” It is the government, by its obstructionist action, maddening paralysis, and rampant corruption, that has held, and continues to hold, India back from achieving the successes enjoyed by other developing countries, particularly in East Asia. It is not the lack of rule of law on statute books or in cases, but in implementation in villages, towns, and cities, that holds India back from these successes.

As regards political and legal reform, Communist or other extremist parties in India have blocked or impeded change or implementation, partly out of understandable concerns the changes benefit the rich and widen income disparities. Yet, reform-minded governments, such as the Congress Party-led coalition headed by Prime Minister Singh, sometimes rely on the Communist parties for support.

Conversely, with a monopoly on political power, the Communist Party of China can push through necessary reforms – albeit after internal consultations, negotiations, and debate. Yet, as has been widely reported for several years, large and growing socioeconomic disparities in China, plus many cases of cadres and their families benefitting corruptly from their Party positions, are frequent sources of protest (sometimes violent) against Party rule and policies.

As modern India is a young country atop an ancient civilization, as is modern China, debates about their relative systems and performance are only just beginning. Born in 1947 and 1949 respectively, their economic records are short as against a timeline many Americans can hardly understand.

\textsuperscript{454} See Acharya, 57-58.
But, in the end, it is hard not to be sanguine about India, its economic future, and its status in the global trading system. Over 40% of Indians were not born in 1991, when the first generation of reforms transpired. As any traveller to India knows, the young are full of optimism and hope. Besides, Indians are survivors – and joyful ones at that.

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455 See What a Waste, THE ECONOMIST, 11 May 2013, 12.
Chapter 14

INDIA AND FTAs\(^\text{456}\)

I. New Era with Prime Minister Modi?

In May 2014, Indian voters handed the opposition BJP the most lop-sided victory in the history of the world’s largest free market democracy since 1984. Then, the spoils went to the Congress Party in a wave of sympathy following the assassination of Prime Minister Indira Gandhi. Three decades later, after being in office since 1991, the electorate had enough of the Congress Party: with corruption rampant, the national infrastructure decrepit, and the economy performing sub-optimally, the BJP seemed to be the answer. The voter turnout was nearly 67% of the eligible 815 million voters – the largest election in human history.

The BJP leader, Narendra Damodardas Modi (1950-), promised to write large across the country what he had done as Chief Minister of Gujarat from 2001-2014, the same western coastal home state of Mahatma Gandhi (1869-1948):

1. Pro-growth, pro-business, pro-manufacturing, pro-FDI economic reforms;
2. Better governance, especially less corruption;
3. Less government, with streamlined procedures and decisive outcomes;
4. More emphasis on renewable energy; and
5. Linking clearly India’s Foreign Service and pragmatic commercial diplomacy, and encouraging states to forge trade and commercial relations abroad (e.g., in Africa, where there is a large Indian diaspora).

With the first clear majority in the Lok Sabha since 1984, the BJP was on course to put through Parliament the necessary legislation.

With 282 of 543 seats, boosted to 336 by allied parties in its National Democratic

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\(^{456}\) This Chapter is drawn from Raj Bhala, *Indian Trade Policy Trilogy*, first published in the *Manchester Journal of International Economic Law*:


Special thanks are owed to that *Journal* and its Editor in Chief, Professor Dr. Asif H. Qureshi.
Alliance (NDA), the BJP easily cleared the key figure of half plus one, or 272 seats.\textsuperscript{457} Congress and its United Progressive Alliance (UPA) scored just 44 and 58 seats, respectively – their words drubbing in Indian history. So, the BJP was liberated from the “divisive and regressive coalition politics” that plagued Congress Party-led governments in the 1990s and early 2000s.\textsuperscript{458} It also was emboldened by the electorate’s rejection of Congress Party populist entitlement programs.

But, the new government had to proceed mindful of suspicions among Indian minorities that it was chauvinistically Hindu, partly because during Spring 2014 campaign the Mr. Modi failed to allay concerns that as Gujarat Chief Minister he was implicated in February 2002 riots in which 900-2,000 mainly Muslims were massacred – though in May 2010 a Special Investigation Team of the Supreme Court found no substantial incriminating evidence that Modi willfully allowed the communal violence.\textsuperscript{459}

\textsuperscript{458} Madhur Singh, \textit{India’s Opposition Party Given Historic Mandate; Business Eager for Change}, 31 International Trade Reporter (BNA) 950 (22 May 2014).
\textsuperscript{459} See Narendra Modi, \textsc{Wikipedia}, \url{en.wikipedia.org/wiki/Narendra_Mod}. Thereafter, the instances of expressions – macro- and micro-aggressions – of Hindutva (Hindu nationalism) proliferated. For example:

Sitting in an office lined with books overlooking a giant prayer hall, Mohammed Ashfaq Kazi, the main preacher at the largest mosque in Mumbai, checked a decibel meter attached to the loudspeakers before he gave the call to worship.

“The volume of our azaan (call to prayer) [\textit{i.e.}, \textit{adhaan}] has become a political issue, but I don’t want it to take a communal turn,” said Kazi, one of the most influential Islamic scholars in the sprawling metropolis on India’s western coast.

As he spoke, he pointed to loudspeakers attached to the minarets of the ornate, sand-colored \textit{Juma Masjid} in Mumbai’s old trading quarters.

Kazi and three other senior clerics from Maharashtra, where Mumbai is located, said more than 900 mosques in the west of the state had agreed to turn the volume down on calls to prayer following complaints from a local Hindu politician.

Raj Thackeray, leader of a regional Hindu party, demanded in April that mosques, and other places of worship, kept within allowed noise limits. If they did not, he said his followers would chant Hindu prayers outside mosques in protest.

... “If religion is a private matter, then why are Muslims allowed to use loudspeakers all 365 days (of the year)?” Thackeray told reporters in Mumbai, India’s financial hub and capital of Maharashtra.

“My dear Hindu brothers, sisters and mothers come together; be one in bringing down these loudspeakers,” he said.

Leaders of India’s 200 million Muslims see the move, which coincided with the holy festival of \textit{Eid}, as another attempt by hardline Hindus to undermine their rights to free worship and religious expression, with the tacit agreement of the ruling Hindu nationalist ... BJP. ...
Bloody clashes have erupted sporadically across India since independence, most recently in 2020 when dozens of people, mostly Muslims, were killed in Delhi following protests against a citizenship law that Muslims said discriminated against them.

While hardline Hindu leaders were seeking to undermine Islam, Kazi said, “we (Muslims) have to maintain calm and serenity.”

The state took Thackeray’s initiative seriously.

Senior police officials met religious leaders including Kazi … to ensure microphones were turned down, as they feared clashes in Maharashtra, home to more than 10 million Muslims and 70 million Hindus.


Indian authorities raided the BBC’s Delhi and Mumbai offices after the BBC aired a documentary concerning the Gujarat incident critical of PM Modi – a broadcast India said was “hostile propaganda.” *BBC India: Director General Tells Staff to Report Without Fear*, BBC NEWS, 23 February 2023, www.bbc.com/news/world/asia-india-64747641 (also reporting: “Tax officials spent three days carrying out what they called a ‘survey’ at the BBC offices. India’s Central Board of Direct Taxes said it had found ‘discrepancies and inconsistencies,’ as well as evidence indicating ‘that tax has not been paid on certain remittances which have not been disclosed as income in India by the foreign entities of the group.’ … [O]position [Labor Party] MPs in the U.K. described the raids as ‘intimidation’ and deeply worrying.”). The raid seemed to be both retaliatory and admonitory, and exacerbated fears the *BJP* encroached on India’s long-stand press freedoms to serve its political interests, but (fortunately) the BBC was not cowed. *See id.* (reporting: BBC Director General Tim Davie emailed BBC India staff, stating: “Nothing is more important than our ability to report without fear or favor. … We won’t be put off from that task. … [T]he BBC does not have an agenda – we are driven by purpose. And our first public purpose is to provide impartial news and information to help people understand and engage with the world around them.”). The *BJP* piled on the pressure, opening another investigation against the BBC, alleging violations of India’s *Foreign Exchange Management Act, 1999*, a civil law. *See Aftab Ahmed, India Opens New Investigation into BBC in Widening Crackdown, REUTERS, 13 April 2023, www.reuters.com/world/asia/india-india-opens-investigation-into-alleged-violation-foreign-exchange-rules-by-bbc-2023-04-13/ (noting the Enforcement Directorate, which is tasked with fighting financial crimes, conducted the investigation).

On the one hand, for those (including your *E-Textbook* author) who have witnessed first-hand the unmistakable discrimination in certain Gulf Arab countries against Christianity (including the lack of publicly demonstrable crosses or audible Church bells, while simultaneously being subjected to loud, dare it be said, annoying, *adhaan* loudspeakers aimed directly at Catholic Churches that are allowed to exist), the Hindu position was understandable. On the other hand, India is supposed to be better – that is, more tolerant than Gulf Arabia.

For a synopsis of developments during the Modi Administration that critics charged undermined India’s long-standing reputation as the world’s largest secular, free-market democracy, and its tolerance as the world’s most religiously pluralistic nation, see Mujib Mashal, Suhasini Raj & Karan Deep Singh, *Modi’s Power to Sideline Challengers is Only Growing*, THE NEW YORK TIMES, 29 March 2023, www.nytimes.com/2023/03/29/world/asia/modi-india-gandhi-judiciary.html?smid=nytcore-ios-share&referringSource=articleShare (observing: “Mr. Modi has not gone as far as [former PM] Ms. [Indira] Gandhi – Mr. [Rahul] Gandhi’s grandmother – did in the 1970s, when the government suspended elections and civil liberties for nearly two years as it declared a national emergency because of what it called threats to internal stability. [In March 2023, Mr. Gandhi, leader of the opposition Congress Party, was sentenced by a local Court in Gujarat, the home state of Mr. Modi, “to the maximum of two years in prison for criminal defamation – the exact length of time needed to trigger his ouster from Parliament and potentially prevent him from contesting elections for years to come.”] But Mr. Modi’s methods, if less blunt, have been in some ways more effective…. Ms. Gandhi’s move to rule by decree and throw opponents in prison, known as the Emergency, bred large resistance movements, and eventually led to a huge election loss in 1977. Mr. Modi,
One point was clear: what William Dalrymple (1965-), the astute British historian of India, called a “sexually transmitted democracy,” i.e., dominance by the Nehru-Gandhi family of the Congress Party and Indian government, was over.⁴⁶⁰ “Modi Ji” came from a family of grocers and was a chai wallah (tea seller) helping his father sell tea at the Varnagar Railway Station, the humblest of origins of any Indian Prime Minister to date.

The new Prime Minister wasted no time boosting trade and investment relations with America. He visited the U.S. in September, saw President Barack H. Obama (1961, President, 2009-2017) at an APEC forum in November, and hosted President Obama in India in January 2015 – the first time a sitting American President visited India twice, and the first time an American President was named Chief Guest at the Indian Republic Day celebrations (which commemorate the 26 January 1950 entry into force of the Indian Constitution). The sides also revived their bilateral “Trade Policy Forum,” with a view to resolving market access and IP disputes.

However, the new Prime Minister was not above taking protectionist steps if he thought there were good economic or political reasons to do so. Indeed, in 2018, his budget included across-the-board tariff hikes – the first such move since the 1990s:

[R]eversing a 20-year trend, Union Budget 2018-19 substantially raises tariffs across a range of sectors: Thus, on imported mobile phones, the applicable rate jumps from 15% to 20%, in addition to a 15% tariff on certain components of mobile phones and television sets.⁴⁶¹

Aside from revenue generation, the justification was classic economic nationalism: the Prime Minister sponsored a “Make In India” initiative to promote manufacturing and thereby industrialization in India. The tariff hikes were criticized:

the policy choice reflects an erroneously mercantilist mindset, that one can cut back on imports while boosting exports, not realizing that a reduction in imports, induced by an increase in tariffs, is generally expected to lead to a decrease in exports of a corresponding value – a proposition known in jargon as the Lerner’s Symmetry Theorem [discussed in a separate Chapter].

As an illustration, note that more expensive imported inputs, due to higher tariffs, make for more expensive domestic production and thus less, not by leaving India’s democratic institutions intact but bending them to his will, has found cover both at home and with Western allies – already willing to look away because of other more powerful incentives [such as India’s support in the Sino-American Trade War, as well as seeking to wean India off of its neutral position on Russia’s invasion of Ukraine] – as a veneer of judicial independence remains in place.⁴⁶⁰

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more, competitive exports. One cannot have one’s cake and eat it too!\footnote{India’s Protectionist Folly.}

Still, that same year, Mr. Modi agreed to “a populist and counter-productive set of restrictions on the sale of cardiac stents and knee implants in India.”\footnote{See Mihir Sharma, Who Doesn’t Love a Trade War?, BLOOMBERG QUINT (India), 21 June 2018, www.bloombergquint.com/opinion/2018/06/22/who-doesn-t-love-a-trade-war?utm_campaign=website&utm_source=sendgrid&utm_medium=newsletter. Yet, the statutory exclusions from product eligibility (discussed below) disqualify leather goods, such as wallets and purses.}

Though a small sector, medical equipment is an “influential” one.\footnote{Who Doesn’t.}

And, in April 2021, in light of the monstrously poor response of the Modi Administration to the COVID-19 pandemic (discussed in a separate Chapter), none other than the celebrated Bangalore-based author, Ramachandra Guha, penned a biting critique of the PM:

… On February 24 this year, the Narendra Modi Cricket Stadium was inaugurated in the city of Ahmedabad, just before a Test match between India and England. …

By having a sports stadium named after himself within his lifetime, Modi put himself in the worst possible company, including Kim Il Sung and Saddam Hussein. Yet what truly made it in bad taste was that India had just come through a dire 12 months. Although the Covid-19 pandemic had not yet caused as much loss of life as in Europe and North America, the economy lay in ruins. Gross domestic product contracted by 23.9 per cent between April and June 2020. By some estimates, more than 100m people had lost their jobs.

Admittedly, the Covid curve had flattened in the final months of 2020, with cases and deaths coming down quite substantially. Still, with all that India needed to do to rebuild its economy and restore its ever-fragile social fabric, was this the time for its prime minister to so extravagantly allow a public massaging of his ego?

… [M]y country has become the new epicentre of the virus. Anxious messages pour in from friends overseas as they read of how every day India sets a world record for the most cases recorded in the previous 24 hours.

These are “official” figures, issued by a government notoriously economical with the truth. One CNN report cited an expert who suggested deaths are under-reported by a factor of between two and five, meaning we may have already had 1m[illion] Covid-related deaths instead of the roughly 200,000 reported so far. …
As stories of oxygen shortages and photos of burning funeral pyres are carried across the world, the culpability of the Modi government becomes ever clearer. From the time the first reports of the virus emerged, our prime minister has consistently ignored the danger signs while focusing on building his own personal brand and image.

Like other populists, Modi has been sceptical of experts’ advice, saying he much prefers “hard work” to “Harvard”. Where previous Indian prime ministers actively consulted scientists and economists in the making of public policy, Modi has preferred to trust his own instincts. The professional civil service, and even the diplomatic corps, have become more and more politicised, with growing emphasis on loyalty to the leader and his ideology. The pandemic has in many ways brought into sharp focus a more existential crisis for India – the creeping erosion of its democratic traditions and values.

Let me take you back to February 2020, exactly a year before the inauguration of the Narendra Modi Stadium, when the prime minister visited Ahmedabad in the company of the then US president, Donald Trump. The virus was making its presence known, but the leaders of the world’s richest and largest democracies were unconcerned.

Modi wanted praise from Trump, and Trump wanted Modi to get Indian-Americans to vote for him in the 2020 presidential election. In Ahmedabad the two populist demagogues made a show of respect towards Mahatma Gandhi, visiting his ashram on the banks of the Sabarmati river. Then Modi took Trump to New Delhi, where, while they chatted and feasted, riots broke out in India’s capital, in which Muslims suffered disproportionately.

Throughout February 2020, Modi’s attentions were devoted to planning the visit of his friend from America. Throughout much of March, Modi and his Bharatiya Janata Party were focused on bringing down a government ruled by the Congress party in the state of Madhya Pradesh, offering inducements to legislators to defect.

On March 11 the World Health Organization declared Covid-19 a pandemic. …

When speaking at public rallies, while canvassing votes for himself or his party, Modi works in the polemical mode, loudly mocking his rivals in an ever-increasing cascade of insults. When speaking on television, as prime minister, Modi adopts a gentler, paternal tone. He speaks softly, offering homilies to his fellow citizens. The sting is generally at the end. And so it was on the evening of March 24, 2020, when he began by talking of the crisis that Covid-19 posed, before suddenly announcing that all of India, in just four hours’ time, would be locked down for three whole weeks.
With their jobs taken away from them at one fell swoop, and no buses or trains running any more, tens of thousands of workers began to walk back to their villages. Photographs of poor Indians walking with their belongings on their head, and of their being stopped and brutalised by the police, went viral. Several commentators remarked on the chilling similarities between these images and those of refugees during the Partition of India.

... Despite his failures on the economic front, despite his mishandling of the pandemic, Modi remains enormously popular among voters. An opinion poll conducted in late January showed “NaMo” as having approval ratings of above 70 per cent. Events of recent weeks may have caused a slide, but this is likely to be modest, rather than precipitous. How does one explain this disjunction between performance and popularity?

... One reason for Modi’s appeal is that his ideology of Hindu majoritarianism is widely shared by voters, particularly in the populous states of northern India. The BJP has been especially successful in getting lower-caste Hindus into their fold, by offering them cultural superiority over Muslims. India once stood out in South Asia for affirming that faith and state were distinct in public matters. Now, under Modi, India is increasingly becoming a Hindu version of Pakistan. ...

Modi’s political success has also been enabled by a weak and fragmented opposition. Particularly culpable here is the Indian National Congress, once the great party of the freedom movement, now the property of a single family. In the general elections of 2014 and 2019, the BJP won easily because Modi was pitted against Rahul Gandhi, an entitled fifth-generation dynast with no administrative experience; he is also an indifferent orator. ...

Finally, Modi has been able to do what he wants because of the capitulation of the democratic institutions meant to keep authoritarianism in check. The principal culprit here is the Supreme Court, whose conduct in recent years has been nothing less than supine. Successive chief justices have refused to protect individual liberties and minority rights, been insensitive to the savage suppression of dissent by the state, and facilitated a secretive electoral bonds scheme whereby the ruling party can collect money from businesses in return for favors.

... Modi may (or may not) win a third term as Prime Minister. But from what he has done so far, it seems pretty clear that the republic has been ill-served by his rule. Incompetence, sectarianism and the cult of personality – these are the three defining traits of his regime.465

That infamous February 2020 tête-à-tête between two controversial populist leaders is

465 Ramachandra Guha, The Unmaking of India, FINANCIAL TIMES, 30 April 2021, www.ft.com/content/80c18d5b-443e-48e4-9f28-3cc491df4260?shareType=nongift.
discussed below.

II. Paradigm Shifting February 2020 “Namaste Trump”

● Paradigm Shifts

“We’re not treated very well by India, but I happen to like Prime Minister Modi a lot.” Therein lies a clue to what happened. If ever there was an example of the shift in paradigms from Smith-Ricardo free trade to mercantilist-oriented managed trade, and then to business contracts, the February 2020 Trump-Modi trade agreement, forged during the President’s visit to India, was it. Their deal was not an FTA, nor even an MTA. It was nothing more than a contract (or set of contracts) signed by two CEOs with no grand global economic vision beyond the cheering crowds they could see, nor any international relations strategy beyond their personal hugs. But for their political positions atop the strongest and largest democracies in human history, the terms of their contract would not be newsworthy.

What was newsworthy is what their contract said about paradigmatic shifts in international trade law and policy. No longer was the purpose of trade agreements to create free trade as theorized by Adam Smith and David Ricardo. No longer was the purpose to manage trade as practiced by (for example) President Barak Obama in his TPP negotiations and Prime Minister Manmohan Singh in his approach to RCEP. The process and results of the 24-25 February 2020 “Namaste Trump” spectacles in Ahmedabad, Agra, and Delhi, following the September 2019 “Howdy, Modi” rodeo in Houston, make clear that ambitious FTAs are inconceivable and modest managed trade agreements are improbable. Trade talks yield nothing more than narrow business contracts.

Simply put, what happened was two proud men shoved a promising big-chested economic relationship into a tapered, slim-fit shirt that even their trim predecessors would find too tight.

● What Would an Indo-American FTA Look Like?

An authentic “FTA” provides duty-free, quota-free (DFQF) treatment to all 10,000 product lines in their Schedules of Tariff Concessions under the Harmonized Tariff System (HTS) immediately upon entry into force (EIF) of the agreement. There are no or few staging categories (SCs) through which to phase out tariffs. Any allowed SCs, for exceptionally sensitive products, are short in time (e.g., 5 years), and front-end loaded (e.g., over half of a tariff is eliminated in the first half of that period). The FTA maximizes mutual recognition agreements (MRAs) on sanitary and Phytosanitary (SPS) measures and technical barriers, so as to minimize the abusive use of these measures as NTBs.

An authentic FTA also covers all 12 service sectors and 161 sub-sectors classified in their Schedules of Services Concessions organized via the July 1991 U.N. Central Product Classification (W-120) List. Across most sectors and sub-sectors, for all four modes of supply, these Schedules list “None.” “None” means there are no, or precious few, restrictions on supplying services cross-border, consuming them abroad, or foreign direct
investment (Modes I, II, and III, respectively), or on national treatment. The FTA narrowly limits professional immigration (Mode IV), maximizes MRAs on service quality standards, and minimizes declared non-conforming measures (NCMs). Likewise, the deal maximally opens government procurement markets, subject to national security exceptions, and electronic commerce and data flows, with reasonable personal privacy exceptions.

The last time America approximated free trade advocacy was during the Administration of George W. Bush (1946-, President, 2001-2009), who famously declared on 14 September 2004 at the United Nations General Assembly:

[T]he surest path to greater wealth is greater trade. By expanding trade, we spread hope and opportunity to the corners of the world, and we strike a blow against the terrorists. Our agenda for freer trade is part of our agenda for a freer world.”

Thus, he proposed in 2003 a Middle East Free Trade Agreement (MEFTA) as a counter-terrorism strategy: build wealth through free trade, and thereby fight the bad guys, whose pool of boys to recruit will shrink as the kids study how to build fortunes across free markets with businesses that employ, source from, and sell to people regardless of creed or caste. The would-be entrepreneurs will cherish democratic institutions, the rule of law, and human rights, if for no other reason than they’re good for business in inter-connected, multicultural bazaars.

III. An Indo-American FTA?

- Why No Indo-American FTA?

The importance of each country to the other ought to have suggested a grand Indo-American FTA. America is once again India’s largest trading partner (as of 2018-2020, with China second). Conversely, with respect to goods, India (as of 2019) is America’s ninth largest trading partner. Bilateral trade in goods and services was $142.6 billion – a record (set in 2018). An ambitious FTA would surely lead to more such records. Yet, the

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468 “[I]n 2018-19, India-U.S. bilateral trade stood at $ 87.95 billion as compared to India-China bilateral trade worth $87.07 billion,” and “[i]n April-December 2019-20, bilateral trade between the U.S. and India stood at $68 billion, as compared to $64.96 billion with China.” See Ahead of Trump’s. See also Archana Chaudhary, Lighthizer to Talk Trade Deal With India Before Trump Visit, BLOOMBERG, 28 January 2020, www.bloombergquint.com/global-economics/lighthizer-to-discuss-trade-deal-with-india-before-trump-s-visit?utm_campaign=website&utm_source=sendgrid&utm_medium=newsletter (discussing trade flow data). [Hereinafter, Lighthizer to Talk.]
Trump Administration was allergic to large bilateral trade imbalances (witness its concerns with NAFTA 1.0 and China, discussed in separate Chapters), feared broad, deep trade deals would exacerbate them, and thus targeted India’s $23.2 billion surplus in goods trade for reduction through managed trade.\footnote{469} Never mind this imbalance was a tiny fraction of that with China.

Indeed, aside from their mutually-attractive bigness, the third big player – China – ought to have been a reason America and China ought to have reached an impressive bilateral FTA. India was concerned about import surges from China. Thus, when India raised via its 2020 Union budget applied MFN duties on a wide range of merchandise (\textit{e.g.}, electronics, toys, medical devices, and walnuts), effective 1 February 2020, it insisted the real target was China.\footnote{470}

Per a standard Neo-Classical economic analysis (discussed in a separate Chapter), an Indo-American FTA would create trade between the two countries, and divert it from China. Yet, India was unwilling to test the competitiveness of its businesses in free trade with the U.S. And, the U.S. stereotyped India as a strategic counterweight to China, Chinese influence in Pakistan, and the Belt and Road Initiative (BRI). As India’s Ambassador Neelam Deo observed:

\begin{quote}
… [T]he way trade is discussed between the two countries is acrimonious. …
\end{quote}

\begin{quote}
[But,] there has been an uptick in defence relations. The Trump Administration, perhaps because of its views and perspective on China, has been much more forthcoming on bilateral defence [than on trade] relations. It has promoted the sale of defence systems to India, which we would like to have because they are highly sophisticated, and our armed forces express the need for them. This has also given more profile and substance to the concept of the Indo-Pacific.\footnote{471}
\end{quote}

Simply put, America had yet to expand its view to see in India another Japan or Korea – a military and economic ally in Asia.

Why not? Neither “Make America Great Again” nor \textit{Hindutva} made space for Bush-like (dare it be said) “vision.”\footnote{472} Likewise, neither ideology made space for

\footnotetext[469]{The U.S. goods plus services trade deficit with India (in 2018) was $25.8 billion, thus goods account for most of the imbalance. \textit{See }Lighthizer to Talk.}

\footnotetext[470]{\textit{See }India Offers U.S.}


educational excellence in the sense of honest discussions about history. For example:

When Indian children began the school year … [in April 2023], students in thousands of classrooms were issued new textbooks on history and politics that either watered down or purged key details from India’s past that Prime Minister Narendra Modi’s ruling party finds inconvenient to its Hindu nationalist vision for the country.

The changes took aim at references to the links between Hindu extremism and the assassination of Mohandas K. Gandhi; the secular foundation of post-colonial India; and the 2002 riots in Gujarat, where hundreds of Muslims were killed in days of indiscriminate retaliatory violence at a time when Mr. Modi was the state’s top leader. Chapters on Mughal history, covering hundreds of years of Muslim rule, were either slashed or removed.

Among the deleted passages from 12th-grade history and politics texts:

-- Gandhi’s “steadfast pursuit of Hindu-Muslim unity provoked Hindu extremists so much that they made several attempts to assassinate” him.

-- Gandhi “was particularly disliked by those who wanted India to become a country for the Hindus, just as Pakistan was for Muslims.”

-- “Instances, like in Gujarat, alert us to the dangers involved in using religious sentiments for political purposes. This poses a threat to democratic politics.”

The alterations, which had been under discussion since last year before being formalized in the newly printed curriculum, follow other efforts by Mr. Modi’s Bharatiya Janata Party, or B.J.P., to erase prominent Muslim marks on India’s history and politics, including the frequent changing of street and city names from Muslim to Hindu.

The governing party’s leaders have also tried to minimize the founding fathers’ arguments for why India’s diversity could survive only under a secular umbrella, co-opting the legacy of many secular leaders as they push to remake India into a Hindu-first nation.

With that divisive campaign, anti-Muslim hate speech has proliferated, holy sites have been aggressively contested and Hindu lynch mobs have killed Muslims on suspicion of slaughtering or even just transporting cows, which are considered holy by Hindus.

…

Dinesh Prasad Saklani, Director of the National Council of Educational Research and Training, an autonomous organization under the Ministry of Education that oversees textbook content, said the changes had been made to reduce the load on children after the pandemic. Chapters were removed to avoid repetition, and important information was condensed, Mr. Saklani said, “which will in no way affect a child’s knowledge.”

Even the removal of single words, he said, like one that identified Nathuram Godse, Gandhi’s assassin, as an upper-caste Hindu, was undertaken solely as part of that exercise.

“You tell me, when content load is being reduced during times of such trauma, if the experts felt such-and-such thing should be removed, so it was. How is it such a big thing? I mean, are all Brahmans assassins?” Mr. Saklani said, referring to Mr. Godse. Brahmans sit atop the caste hierarchy and are a large voting bloc for Mr. Modi’s party.

Mr. Saklani said that the education organization had nothing to do with either the B.J.P. or the R.S.S., a powerful right-wing group that is the ideological fountainhead of Mr. Modi’s political party. (A reference to a ban on the R.S.S. after Gandhi’s assassination was among the deletions.)

So, in the Trump-Modi era, counter-terrorism was decoupled from trade and reattached to nationalism, a tool of which was shaping (dare it be said, policing through propaganda) thought.

Thus, Messrs. Trump and Modi never thought to apply the teachings of Professors Smith and Ricardo. The President himself declared any bilateral deal was in the “early stages of discussion for an incredible trade agreement to reduce barriers of investment between the United States and India.” He did not say such a deal would eliminate those barriers, and thus an authentic FTA was not even in the “early” negotiating stages. He did say he was in “no rush” toward what would be a “reduction” of barriers.

● What Would an Indo-American Managed Trade Deal Look Like?

There is no standard definition of an “MTA.” It’s a sliding scale away from DFQF EIF treatment for goods, service schedules with zero NCMs, a robust “positive list” of government ministries open to foreign bidders, and unrestricted cross-border data flows.

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474 This phenomenon was a topic at the March 2020 Annual University of Saint Thomas Law Journal Symposium. See https://ir.stthomas.edu/ustlj/symposia.html.


476 Quoted in Trump Says U.S.-India.
The greater the departure, the greater the “management” of trade. With sufficient deviation from the free trade pole, but before hitting the autarkic pole of no trade whatsoever, merchandise and services imports and exports, procurement, and IP are sufficiently regulated that trade seems better characterized as “managed” than “free.”

During his 36 hours on the Subcontinent, if President Trump had been in more of a rush to reduce trade barriers, then he and the PM might have said Namaste! to an MTA that answered these questions:

(1) On dairy, faced with declining domestic demand and stiff Canadian barriers despite the USMCA, the U.S. sought access to India’s dairy market.

India, however, is “the world’s largest milk-producing nation,” and thus “traditionally restrict[s] dairy imports to protect the livelihoods of 80 million rural households involved in the industry.”

Would the U.S. accept India’s offer to grant access to American dairy products, but subject to (1) a 5% tariff, (2) quotas, and (3) certification that those products are not derived from livestock reared with feed containing blood meal, internal organs, or ruminant tissues (i.e., Indian testing for U.S. dry distilled grain soluble (DDGS) poultry feed to assure this feed has no live GM components)?)

(2) On poultry, faced with Chinese counter-retaliation in the Sino-American Trade War, the U.S. looked to third country replacements like India.

Alas, Indian poultry farmers could not easily compete with industrial-scale slaughter facilities in (for example) Arkansas. Would the U.S. accept India’s offer to cut the Indian duty on chicken legs from 100% to 25%, or would it insist on a reduction to 10%? Would the U.S. agree to comparable market access offers by India on turkey meat (as well as fresh produce, such as blueberries and cherries, plus assorted items like alfalfa hay, dried distillers grains, pecans, pizza cheese, and whey protein)?

(3) On motorcycles, having denied itself promising markets like Vietnam by withdrawing in January 2017 from TPP, the U.S. wanted to boost sales of in India.

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477 See India Offers U.S.
479 See India Offers U.S.
480 See Shawn Donnan & Jordan Fabian, Trump Raises Doubts Over India Trade Deal Ahead of Visit, BLOOMBERG (18 February 2020), https://nz.news.yahoo.com/trump-raises-doubts-over-india-232004067.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlImlvbS8&guce_referrer_sig=AQAAAkNz1v6ZVE-XgkaoxGG6FrPE0dEzcOKG1H2598dWd6si3Dt88rTguGk07kJkUuXk07jIAzuD7UpIzbnNsXvzbq4nEkGSqC2V9Rmlgo [hereinafter, Trump Raises Doubts]; India, U.S. Unlikely.
The President, whose long-standing affection for Harley-Davidson was no secret, opposed India’s 50% tariff on large motorcycles.481 Would the U.S. accept India’s offer of a partial reduction in duties on large-engine bikes?

(4) On medical devices, again losing out on the benefits of a special TPP Annex on this topic, the U.S. looked to India.

What it found objectionable was India’s 2019 decision to cap prices of medical devices (e.g., cardiac stents and knee implants). Free market prices ensured inventors could earn a fair return for sunk R&D costs. Might the U.S. come to see that few Indians could afford the prices the U.S. producer-exporters of those devices would prefer to charge, and accommodate some limits?

(5) On services, absent legislative authority from Congress, the President could not talk about Mode IV.

But, he could talk about Mode I. The U.S. looked askance at India’s data localization requirements, which added costs for U.S. financial and health service providers, as they had to set up “data fiduciaries” – that is, establish entities under Indian law to store and process data in India (in effect, servers) – and police the cross-border flows of data.482 America’s Big Tech companies knew well that “India is … the largest open data market in the universe,” i.e., per capita, more data is consumed in India than anywhere else in the world.483 Yet, India’s Lok Sabha (Lower House of Parliament) was studying a draft privacy law (the Personal Data Protection Bill, 2019) that America’s GAFA companies opposed: the legislation might not only impede those flows, but also mandate they handover user data to India’s Data Protection Authority, and report (under Clause 25) to the DPA any data breaches.484

The U.S. also disagreed with India’s e-commerce restrictions that barred platforms like Amazon and Wal Mart from selling merchandise produced by businesses in which they had a non-de minimis equity interest. Yet, vertically integrated, foreign-financed production and distribution was a market structure in which Indian mom-and-pop stores would die. Might the two sides examine these topics, the way the U.S. and the EU and Japan were doing?

Alas, the U.S. and India failed to engage each other on the aforementioned questions. Hence, they failed to strike an MTA.

● Why No Indo-American MTA?

481 See India Offers U.S.
482 See India Offers U.S.
483 What Will Trump’s?
Manifestly, the turn away from FTA toward a possible MTA was not for lack of market access interest on the American side. Nor should it have been for a desultory effort on the Indian side to leverage its interests. For India, President Trump’s June 2019 withdrawal of GSP preferences (discussed in a separate Chapter), which India had enjoyed since the 1970s, was objectionable. So, too, was America’s February 2020 rejection of India’s self-proclaimed status as a “developing” country for GATT-WTO purposes. India seemed not to push these points.

Also objectionable to India were various U.S. SPS and TBT standards that impeded the access of Indian farm commodities and manufactured goods. The President’s January 2020 decision to extend the 25% and 10% Section 232 tariffs on steel and aluminum, respectively, to derivative products, prejudiced India’s exports of those derivatives to the U.S. And, India’s long-standing gripe about U.S. immigration restrictions (e.g., H-1B visas) was unresolved. Here, too, were more leverage points for India.

Thus, the two sides remained stuck in a rhetorically blustery dialectic of substantively silly retaliation: India’s medical device price caps contributed to America’s de-list India from GSP preferences; that removal contributed to India’s increase of its applied tariff rates, which encouraged America to deny India “developing” country S&D treatment. Messrs. Trump and Modi did little else than contemplate middling market access concessions in exchange for GSP restoration. As Mumbai-based Gateway House (India’s Council on Global Relations), explained, doing so was consistent with their economic nationalism, which pleased their respective political bases:

President Trump and Prime Minister Narendra Modi have certain traits in common. Both are fundamentally anti-elitist in their outlook, and both are nationalists. Trump is a real estate developer from Queens, New York whose career has been outside the so-called East Coast establishment of politicians, academicians, and media – sectors that have been so unable to accept his presidency. “America First” is the nationalist slogan of Trump, who is a breaker of icons, trying to drain the metaphorical swamp of entrenched elites.

Prime Minister Modi has leveraged his image as a former chai wallah or tea-seller to maximize his appeal. Modi is trying to reshape India as a nationalist Asian leviathan. Like Trump, he is trying to eliminate a culture of entitlement, a perception that the Congress Party projected through the so-called Nehru dynasty. “Make in India” is Modi’s slogan, aimed at increasing employment in the manufacturing sector.

Both political leaders are exceptionally skilled at cultivating their personas. Trump is the unorthodox, brash, and pugnacious street fighter, while Modi wishes to be the meticulous keeper of the Indian brand and traditional values. Both are dependent upon Twitter to disseminate their messages: Trump has an estimated 64 million followers, while Modi has 50 million.
And both are larger than life.\textsuperscript{485}

Alas, the President’s comment – that “Well, we can have a trade deal with India, but I’m really saving the big deal for later on”\textsuperscript{486} – adduced the end of both free and managed trade, at least for the foreseeable future.

\begin{itemize}
  \item **Business Contract**
  \end{itemize}

With no MTA, much less an FTA, Indo-American trade became contractual. The U.S. also wanted to ship more military goods to India. Would an Indian Cabinet decision to buy 24 multi-role MH-60R Seahawk naval helicopters, worth $2.6 billion, from Lockheed Martin suffice?\textsuperscript{487} Yes.

Perhaps India might also buy $1.8 billion worth of air defense radar, missiles, and other arms (including six AH-64E attack Apache helicopters) from U.S. contractors, as well as six nuclear reactors from Westinghouse?\textsuperscript{488} Yes again.

America accepted India’s offer to buy U.S. ordnance, plus the reactors.\textsuperscript{489} The $3 billion price was adequate consideration to support their bargain. Moreover, in October 2020, the two sides inked a Basic Exchange and Cooperation Agreement, building on their 2005 Framework for the U.S.-India Defense Relationship, which they renewed in 2015. BECA “symbolize[d] the strengthened defence and security partnership between the two countries and the growing interoperability capabilities between the two militaries.”\textsuperscript{490} Indeed:

bilateral defence engagement has been thriving, characterized by high-level dialogues, joint exercises, defence trade and technology cooperation. American support has also ensured India’s entry in global technology export control regimes – Australia Group, the Wassenaar Arrangement and the Missile Technology Control Regime [both discussed in separate Chapters.]

\textsuperscript{486} *Quoted in Trump Raises Doubts.*
\textsuperscript{489} *See Trump Says U.S.-India.*
Membership of these regimes has enabled India’s access to high technology in the civilian space and defence sectors. U.S. military equipment has added considerable value to India’s power projection capability.\textsuperscript{491}

To be sure, this thriving relationship, linking the world’s largest and most religiously pluralistic democracy with the world’s oldest and most powerful democracy, made strategic sense amidst a common concern: China.

But, burgeoning defense ties should not entail an opportunity cost suffered by the poor. Regrettably, scant consideration seemed paid to whether that money could be better spent on poverty alleviation. In a shameful irony for the supposed champion of the poor, India erected a 1,640 long, four-to-six-foot high wall (which local officials supposedly approved in December 2019) so Mr. Trump would not have to look at the Saraniya Vas slum (the residents of which get 90 minutes daily of communal tap water and earn $104.36 monthly as hotel knife sharpeners) along his 13.7 mile motorcade route (from the airport to the new 110,000-seat Sardar Patel cricket stadium in Motera) during his three-hour long, $12 million visit to Ahmedabad, the largest city in Mr. Modi’s home state of Gujarat.\textsuperscript{492} Would that Texan, George W., say “howdy” to this wall or walling off free trade?

Not surprisingly, six months after President Trump’s visit, and not withstanding reports in the Indian press in July 2020 that an agreement was at hand,\textsuperscript{493} the two countries had not agreed to even a mini-trade deal. The sticking points were predictable, too. India wanted back its GSP status. America demanded India purchase $6 billion worth of U.S. farm goods (including almonds, apples, chicken, and dairy products), because that was roughly the amount of Indian trade that would receive GSP DFQF treatment.\textsuperscript{494}

But, that demand undercut the purpose of GSP, indeed, of GATT Article XXXVI:8 and the 1979 Tokyo Round \textit{Enabling Clause}, on which GSP schemes are premised: non-reciprocity, \textit{i.e.}, the grant of preference by a developed to a developing with no contingency in exchange. And, that demand was incongruous with India’s domestic needs: it was willing and able to purchase U.S. energy goods to fuel its industrializing economy, but the U.S. demanded that the product mix be slanted toward agriculture (perhaps partly because of the loss of China as an export outlet for American farmers thank to the Sino-American Trade War (discussed in a separate Chapter)). More sensibly, the U.S. called for India to remove several of its infamous NTBs that impeded access for American agricultural goods:

\textsuperscript{491} Deepening India-U.S.
The problem is, unsurprisingly, electoral politics on the Indian side: Given that Indian election campaigns can revolve around “cow protection,” the Indians want the U.S. to agree that no dairy imports will come from cows fed on animal protein. Everyone knows what the compromise will have to be: some form of labelling. If, after that, Indians still don’t consume U.S. dairy products, that’s just how the market works.\footnote{Mihir Sharma, \textit{Now’s the Time for India to Make a Deal With U.S.}, \textit{BLOOMBERG QUINT} (Mumbai), 31 August 2020, \url{www.bloombergquint.com/global-economics/india-should-strike-trade-deal-with-us-before-election}. [Hereinafter, \textit{Now’s the Time}.]}

And, the U.S. also chafed at India’s proposed step-by-step reduction of tariffs on high value added goods and technology products: after years of trying to tear down high bound and applied duty rates in the failed Doha Round, it wanted them to come down dramatically, rapidly, and permanently.

\begin{itemize}
\item \textbf{Four Takeaway Questions from Trump India Trip}
\end{itemize}

First, is there such a thing as “free” trade? It exists in theory. Arguably, this first-best economic outcome is no more in reality. Free traders will be fortunate to find a second-best solution, namely, a managed trade deal. They shall have to comfort themselves with the \textit{USMCA, CPTPP, KORUS,} and perhaps \textit{RCEP.}

Second, what are the impediments to “managed” trade agreements? That is, what precludes countries from achieving carefully calibrated, merchandise-specific, and sector-specific deals? Arguably, there must be an alignment of reciprocally complementary import-export interests. For instance, a sector deemed sensitive by one MTA Party cannot be the one in which the other Party has a keen export interest, at least not unless there are creative cross-sectoral trade-offs.

Third, with FTAs inconceivable and MTAs unattainable, have all trade deals become business contracts, a third-best solution? Arguably, such contracts are disaggregated, low-brow reflections of free versus managed trade and national security versus nationalism. They pervert grand statesman-like trade deals into strongmen’s business contracts. The American President and Indian PM gave participants a case study of sacrificing Smith and Ricardo at the altars of America First and \textit{Hindutva.}

No less an authority on international political economy than billionaire investor George Soros thus pointed out in February 2023 that “India’s Prime Minister Narendra Modi saying India was a democracy but Modi was not a democrat.”\footnote{India FM Jaishankar Says Soros Dangerous, Debate Needed on Democracy, \textit{REUTERS}, 18 February 2023, \url{www.reuters.com/world/india/india-fm-jaishankar-says-soros-dangerous-debate-needed-democracy-2023-02-18/}. [Hereinafter, \textit{India FM Jaishankar Says}.]} His remark triggered a sharp rebuke from the PM’s Foreign Minister, Subrahmanyan Jaishankar, who said Mr. Soros was “‘old, rich, opinionated, and dangerous,’” plus his comments “didn’t recognize its difficult path from colonization” and reflected a “Euro-Atlantic view.”\footnote{India FM Jaishankar Says.}
Setting aside the undiplomatic ad hominem nature of the Foreign Minister’s reply, it missed the mark. Mr. Soros knew well the horrors of the Second World War, and a fortiori, of colonialization, and India’s founding fathers – largely western educated – did not limit democratic values to one part of the world.

Finally, was India simply inadapte at understanding how domestic American politics drive trade agreements. Consider the assessment of Indian economist Mihir Sharma:

The U.S.-India trade relationship in the Trump era has been dismal – partly because Indian trade officials have been slower than their counterparts in Europe or even China to figure out how to use America’s electoral divisions to their advantage. India’s Commerce Minister [Piyush Goyal] insists that we are “almost there” on a “quick trade deal”; ... however, U.S. Trade Representative Robert Lighthizer complains that India is “at times, a troublesome trading partner for the United States.”

India had every incentive to up its game: it was locked in an ever-more tense standoff with China in Kashmir, at the LAC in Aksai Chin; it touted itself as an FDI destination for companies seeking to decamp from China amidst the Sino-American Trade War; America courted India as an ally in what appeared to be a new Cold War with China; and a January 2023 Indian intelligence by police in Ladakh predicted there would be more deadly clashes with China along their contested Himalayan frontier.

IV. **RCEP** Withdrawal and Aftermath

- **November 2019 Withdrawal Decision**

  In November 2019, the PM cast doubt on whether his May 2014 election and May 2019 re-election ushered in a new era of Indian trade policy, one characterized by resolute openness to freer trade. That month, India announced its withdrawal from negotiations to forge a 16-Party Regional Comprehensive Economic Partnership.

  … India’s decision is a disappointing window into how much has changed in New Delhi since it became one of the initial movers of the RCEP process seven years ago under then-Prime Minister Manmohan Singh. Even Singh’s Indian National Congress party now opposes RCEP. With his departure from the political stage, there are few official voices left in favor of openness.

  India now lacks both ambition and imagination; it fears the world rather than embracing it. In retrospect, it’s the two decades of optimism after the

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498 *Now’s the Time.*

1991 reforms that seem exceptional. Talking points released to media by the ruling Bharatiya Janata Party stressed the “pro-Indian industry” steps that the government of Prime Minister Narendra Modi had taken since 2014 – a long list, in fact, of tariff and non-tariff barriers.

Almost comically, the press release described India’s long history of trade scepticism as “the days when Indian negotiators caved into pressures from the global powers on trade issues.” Trade negotiators around the world will be hard-pressed to recognize this description.

Indian officials who till a few weeks ago were warning that staying out of RCEP would only “isolate” India are today arguing that the agreement is against India’s national interest. What they actually mean is that Indian sectoral interests have successfully captured its government. Prime Minister Modi, speaking at the summit, insisted that his decision on RCEP would have to meet the test that Mahatma Gandhi [Gandhi Ji] specified for policy: *It must improve the lives of the poorest. The reality is that, for a country like India, freer trade, cheaper goods and more reliable prices do indeed improve the lives of the poorest. Those hurt are the industrial blocs that seek protection from competition.*

Of course, India neither did nor could stop the other 15 RCEP Participating Countries (called “RPCs,” i.e., Parties to the deal) countries from forging ahead, signing a deal on 4 November that India might one day re-join. Table 14-1 lists the countries in RCEP and other Asia-Pacific trade agreements.

*RCEP is a 15-Party FTA among the 10-country ASEAN (which, founded in August 1967, is dedicated to inter-governmental cooperation and regional integration on cultural, economic, educational, political, and security matters, and the Secretariat of which is in Jakarta) plus Australia, China, Japan, Korea, and New Zealand – and, until its withdrawal,*

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501 In February 2022, Hong Kong applied to join RCEP, which it could do as an “other customs territory” of the PRC. *See Hong Kong Applies to Join RCEP Trade Agreement*, NIKKEI ASIA, 23 February 2022, https://asia.nikkei.com/Economy/Trade/Hong-Kong-applies-to-join-RCEP-trade-agreement. RCEP Parties accounted for 70% of Hong Kong’s exports and imports (in 2021), thus membership would secure DFQF status and thus render them yet more competitive among those Parties.
This “supersized trade pact” – the “world’s largest trade bloc” entered into force on 1 January 2022, following China’s ratification of the deal in March 2021, approval by both the upper and lower houses of Japan’s parliament and the governments of other Parties.

Impressively, RCEP covers $25 trillion in economic output, … roughly 30% of global gross domestic product, population, and trade – more than CPTPP. In other words, the 15-Party bloc (following India’s withdrawal, discussed below) was the largest FTA in the world: it encompassed nearly one-third of world economic output, trade, and population. Upon its EIF, the RCEP Parties either scrap(ed) or lower(ed) tariffs on a wide range of items from where they were in 2014, when negotiations began [in earnest],” and overall the FTA “will eventually eliminate tariffs on 91% of all industrial goods within the framework,” and eventually abolished “levies on more than 90% of goods traded within the bloc.”

Also impressive is the fact RCEP “stands to benefit a larger number of countries and more of the world’s population [than CPTPP] when it comes to trade in goods,” and “is the first trade deal to bring together the economies of China, Japan, and South Korea.”


504 See Wendy Wu, Japan Approves World's Biggest Free-trade Deal After China’s Call to Boost Asian Economy, SOUTH CHINA MORNING POST, 29 April 2021, https://bilaterals.org/?japanapproves-worldsbiggest. [Hereinafter, Japan Approves World’s Biggest.] 503 See Japan Approves World’s Biggest (reporting: “Thailand and Singapore have also ratified the agreement. The deal will go into force 60 days after six of the ASEAN members and three non-ASEAN member states [China, Japan, and Korea] ratify it.”). Technically, on 1 January 2022, RCEP entered into force among the 10 Parties “that completed ratification earlier: China, Japan, Australia, New Zealand, Brunei, Cambodia, Laos, Singapore, Thailand, and Vietnam.” Subsequently, Korea completed ratification and the deal entered into force for it on 1 February 2022. The remaining four signatories were Indonesia, Malaysia, Myanmar, and the Philippines.

505 As of February 2023, only Burma and Philippines among the ASEAN countries had not ratified RCEP, but Philippines pledged it would do so “soon.” Cliff Venzon, Marcos Says Philippines to Ratify RCEP Free Trade Deal “Soon,” NIKKEI ASIA, 10 February 2023, https://asia.nikkei.com/Economy/Trade/Marcos-says-Philippines-to-ratify-RCEP-free-trade-deal-soon.


507 See Japan Approves World’s Biggest.

World’s Biggest Trade Deal.

509 RCEP Kicks In.

510 Why the Japan and Korea agreed to participate in RCEP is partly due to economic self-interest, namely, the general and sector-specific benefits they anticipated from the deal:

Japan’s government estimates that RCEP will lift Japanese GDP by about 2.7% through higher exports. For Japan, RCEP means 86% of exports to China and 92% of exports to South Korea will become tariff-free, a dramatic increase from the current 8% and 19%.
However, as was true for CPTPP through the use of Staging Categories, “[b]ecause many tariffs will be phased out gradually under RCEP, it will take time for the pact to have a full impact on regional trade.” Moreover (as discussed below), as evidence CPTPP is the broader and more ambitious of the two blockbuster deals, CPTPP eliminate[d] 99.9% of tariffs.511

Following up on ASEAN’s efforts to harmonize trade and trade-related agreements, Japan originated the idea for RCEP to lower tariffs and NTBs on goods. The first negotiating round for RCEP was held in May 2013 in Brunei. The second round was held in Australia in September 2013, and by November 2019, over 12 rounds had occurred. RCEP negotiators had hoped to conclude RCEP by year-end 2015, but that deadline slipped, and they recalibrated their goal for the 35th ASEAN Summit in Bangkok.

As for India, in his first term as PM, Mr. Modi energetically involved India in RCEP talks. But, as domestic political pressures mounted, the enthusiasm for India to join a mega-regional deal waned:

It [RCEP] was viewed as an opportunity to plug into the evolving global value chains. The competence of Indian industry was rising and there was economic optimism with the new Narendra Modi government in power. For the others, RCEP was a device to access India’s large market.

That was also the time when two other mega-regional trade agreements were under negotiation – … TPP, led by the U.S., and … TTIP, between the European Union and the U.S. – from which both India and China were excluded. Therefore, there was genuine eagerness in India to join with the RCEP.

But by the time the 3rd RCEP Summit in Bangkok rolled around in November 2019, there was not a single, visible, constituency in India supporting the agreement – not the farmer nor the manufacturer. The Swadeshi Jagran Manch, an economic affiliate of the social organisation, Rashtriya Swayamsevak Sangh (RSS), and the sitting BJP government, an ardent activist which favors self-reliance and is against economic imperialism, announced a 10-day nationwide protest. The farmers’ unions, such as the All India Kisan Sangharsh Coordination Committee (AIKSCC), led several protests across the country. Even India’s biggest industry chamber, the Confederation of Indian Industry (CII), opposed signing the

The new deal is expected to benefit Japan’s growing electric vehicle sector in particular. Some EV motors for the Chinese market faced a tariff of up to 12% as of the date of negotiations, but this will be scrapped in stages over 16 or 21 years. The 6% tariff on certain lithium-ion batteries will also be scrapped over the course of 16 years.

Id. 511 World’s Biggest Trade Deal.
FTA.\textsuperscript{512}

At their November 2019 meeting in Bangkok, 15 RPCs – but not India – finished text-based negotiations on all 20 Chapters of their FTA, plus all the market access schedules, thus leaving them with the task of “legal scrubbing” of the text with a view to signing the deal in 2020.\textsuperscript{513} (Table 14-2 outlines these 20 Chapters.) Those Chapters covered not only trade in goods and services, but also electronic commerce, FDI, IP, competition policy, dispute settlement, and economic and technical cooperation.

- **RCEP Size, China, and Japan**

Setting aside *TPP*, which until America’s infamous January 2017 withdrawal (via an Executive Order from President Donald J. Trump (1946-, President, 2017-), accounted for 40% of world GDP among its 12 Parties and thus would have been the largest FTA in human history, *RCEP* became the largest trade bloc, accounting for 40% of world trade,\textsuperscript{514} and 45% of the world’s population.\textsuperscript{515} The 11-Party *CPTPP* account for roughly 14% of world GDP. (They signed *CPTPP* in March 2018, and as of November 2019, it had entered into force among the seven Parties that ratified it.) India boasted the third largest economy in *RCEP*, following China and Japan, but even with India’s departure from *RCEP* discussions, *RCEP* outsizes *CPTPP* and ranks as the world’s largest FTA.\textsuperscript{516} That is, “[e]ven without India, the countries in the *RCEP* bloc account for nearly a third of global gross domestic product,” though India’s “departure means they have less than a third of the world’s population instead of around half.”\textsuperscript{517}

**Table 14-1**

**Participants in Asia-Pacific Trade Deals**

<table>
<thead>
<tr>
<th>Agreement</th>
<th>ASEAN</th>
<th>RCEP</th>
<th>TPP</th>
<th>CPTPP (TPP 11)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>X</td>
<td></td>
<td>X</td>
<td>X</td>
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<tr>
<td>Brunei Darussalam</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Burma (Myanmar)</td>
<td>X</td>
<td>X</td>
<td></td>
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<tr>
<td>Cambodia</td>
<td>X</td>
<td>X</td>
<td></td>
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</tbody>
</table>


\textsuperscript{514} See Demetri Sevastopulo, Shawn Donnan & Ben Bland, *China Presses for Trade Deal to Rival TPP*, FINANCIAL TIMES, 16 October 2013, 3.


\textsuperscript{516} See *India Rejects.*

\textsuperscript{517} *India Rejects.*
<table>
<thead>
<tr>
<th>Country</th>
<th>Participation</th>
<th>Withdrawn Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Chile</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>China</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>India</td>
<td>X</td>
<td>(withdrawn, November 2019)</td>
</tr>
<tr>
<td>Indonesia</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Japan</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Korea</td>
<td>X</td>
<td></td>
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<td>Laos</td>
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<td>Malaysia</td>
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<td>Philippines</td>
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<tr>
<td>Thailand</td>
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<tr>
<td>United States</td>
<td></td>
<td>X</td>
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<tr>
<td>Vietnam</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

**Total Number**

- 10 (16 until India’s withdrawal)
- 15 (12 until America’s withdrawal)
- 11
Table 14-2
Synopsis of RCEP Chapters

<table>
<thead>
<tr>
<th>Chapter Number</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Initial Provisions and General Definitions</td>
</tr>
<tr>
<td>2</td>
<td>Trade in Goods</td>
</tr>
<tr>
<td>3</td>
<td>Rules of Origin, Including Annex on Product Specific Rules</td>
</tr>
<tr>
<td>4</td>
<td>Customs Procedures and Trade Facilitation</td>
</tr>
<tr>
<td>5</td>
<td>Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>6</td>
<td>Standards, Technical Regulations, and Conformity Assessment Procedures</td>
</tr>
<tr>
<td>7</td>
<td>Trade Remedies</td>
</tr>
<tr>
<td>8</td>
<td>Trade in Services, Including Annexes on Financial Services, Telecommunication Services, and Professional Services</td>
</tr>
<tr>
<td>9</td>
<td>Movement of Natural Persons</td>
</tr>
<tr>
<td>10</td>
<td>Investment</td>
</tr>
<tr>
<td>11</td>
<td>Intellectual Property</td>
</tr>
<tr>
<td>12</td>
<td>Electronic Commerce</td>
</tr>
<tr>
<td>13</td>
<td>Competition</td>
</tr>
<tr>
<td>14</td>
<td>Small and Medium Sized Enterprises</td>
</tr>
<tr>
<td>15</td>
<td>Economic and Technical Cooperation</td>
</tr>
<tr>
<td>16</td>
<td>Government Procurement</td>
</tr>
<tr>
<td>17</td>
<td>General Provisions and Exceptions</td>
</tr>
<tr>
<td>18</td>
<td>Institutional Provisions</td>
</tr>
<tr>
<td>19</td>
<td>Dispute Settlement</td>
</tr>
<tr>
<td>20</td>
<td>Final Provisions</td>
</tr>
</tbody>
</table>

Nevertheless, RCEP is unambitious in comparison with CPTPP. The U.S. as dubbed RCEP a “very low-grade treaty.” That is because it does not require Parties to liberalize their economies. “Unlike CPTPP, RCEP does not set rules on state-owned enterprise reform…” RCEP also leaves unaddressed the advancement of labor and environmental rights. And, the coverage of IP topics by RCEP is spotty. On the one hand, RCEP “set[s] bloc-wide standards for about 20 different fields including intellectual property,” and “require[s] members to allow free data flows across borders, and ban them from forcing companies to set up local servers [i.e., bans data localization].” On the other

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519 What’s the RCEP (quoting U.S. Secretary of Commerce Wilbur Ross).

520 World’s Biggest Trade Deal.

521 World’s Biggest Trade Deal.
hand, CPTPP covers (including data exclusivity for biologic medicines) several 21st century IP issues in sophisticated ways.

China always had been the *de facto* leader of RCEP talks, and viewed the FTA as a counterweight to CPTPP, and certainly to a TPP that America might one day re-join. After all, China essentially had been excluded from TPP talks, and thus positioned RCEP as a rival geopolitical trade block. China also saw RCEP as a means to advance its BRI: strengthening regional economic integration through free trade would complement the massive infrastructure projects the CCP financed, via loans to beneficiary countries. Simply put, Chinese merchandise could flow freely across RCEP borders through transportation networks built by China.

Japan, which (as Table 14-1 indicates) is both an RPC and CPTPP Party, takes the same view, but from the opposite side: concerned about China’s increasing profile in Asia, and unhappy at China’s dominance of RCEP, it sees CPTPP as a vital counterbalance. Not surprisingly, when India withdrew, Japan expressed its hope it would rejoin – to Japan, India helped offset China within RCEP.

As former Japanese Minister of Defense, Takeshi Iwaya, put it: “It’s not desirable to have an agreement that suits China’s purposes,” and “[e]ven if it takes a long time, it’s important to build an agreement that’s desirable for all the member countries.” Indeed, “[a]n advantage for the other countries [i.e., other than China] of having relative heavyweight India in the trade pact would have been less domination by China, particularly at a time they see the United States as a less reliable trade and security partner.” Notably, RPCs never excluded America; rather, for the U.S. to be eligible to apply to join RCEP, it would need first to conclude an FTA with ASEAN.

- **India’s Objections**

At the sixth RCEP round in December 2014 in New Delhi, the 16 Asian countries involved failed to finalize a basic framework for an FTA. They diverged over the coverage and pace at which industrial tariffs should be reduced, and the emphasis on services trade liberalization. India felt other countries were asking for too high a percentage

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523 See *India Exits the RCEP*.


527 India Rejects.

528 See *What’s the RCEP*.

529 See Amrit Dhillon, *India Objects to Proposed Tariff-Reduction List in Regional Free Trade Agreement Talks*, 31 International Trade Reporter (BNA) 2173 (18 December 2014).
of goods to be included: they wanted tariffs to be cut on 80% of goods, while India preferred 40% coverage. But, in contrast to a slower pace on goods trade liberalization, India wanted a faster pace, and wider coverage, on services.

The difference arose because even absent an FTA with China, the Indian market was flooded with inexpensive Chinese goods, whereas India was eager to open up foreign countries for its professional services providers (e.g., engineers, health care workers, and teachers), and ensure they would get temporary migration permits in those countries. India’s economic policy emphasized manufacturing- and services-led growth, domestically and for export. In key industrial sectors, India was not internationally competitive, hence its preference for managed RCEP trade in manufacturing. India had highly competitive cross-border services sectors, so – in contrast to the years before and during the 1986-1994 Uruguay Round – it no longer saw itself as forever a services importer.

These concerns climaxed with India’s pull out from further RCEP negotiations. India won some important concessions. For example, there were two exceptions to India’s agreement to eliminate tariffs on about 90% of merchandise from most RPCs, specifically, the ASEAN countries, plus Japan and Korea.530

First, India was not obliged to make those cuts on Chinese products; rather, on items from China, and from Australia and New Zealand, India was expected to eliminate tariffs on over 74% of merchandise. Second, India’s tariff phase-out periods were protracted, namely, 10-, 15-, and 20-years. Still, “[t]he Chinese claimed that India had raised new demands at the last minute; the Indians insisted that they were simply holding out for the same concessions they always had.”531

Those sought-after concessions that India failed to win, along with a sagging economy and the highest unemployment level in 40 years, constituted its logic for withdrawal:

(1) **RCEP** market access opportunities for trade in goods were asymmetric, with unfairly high tariffs and NTBs in certain RPCs that would burden Indian exports, coupled with a ratchet obligation (whereby once India set a tariff rate, it could not revise that rate upward). They would conspire to leave unresolved the problem of trade imbalances, particularly bilateral trade deficits vis-à-vis China. India’s experience from its FTAs with ASEAN, Japan, and Korea – specifically, product exclusions of products in which India had a keen export interest – exacerbated this concern:

[S]ome products that led to an increase in trade deficit, such as imports of palm oil, tea and coffee, are excluded from the FTAs.

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531 India Turns.
This made stakeholders in India, from industry, farmers and government, sceptical of the benefits of yet another FTA \( [i.e., RCEP] \).\(^{532}\)

The asymmetries also threatened Indian workers – particularly the 93% of India’s workforce in the informal sector – with displacement caused by import competition.\(^{533}\) Their plight would be worsened by the reality that, unlike developed country RPCs, such as Australia, New Zealand, and Japan, India has no comprehensive social safety net on which they could fall back.\(^{534}\)

\( (2) \) RCEP would not alter the pattern of Sino-Indian trade. “India’s exports to China primarily consist of raw materials such as iron ore, metals, and cotton, while China’s exports to India are dominated by finished manufactured products such as mobile phones and electrical machinery.”\(^{535}\) RCEP market access rules would not alter the fundamental dependent position of India relative to China.

\( (3) \) RCEP failed to revise the base duty rates from which tariff cuts would be made, that is, to update them from 2014 to 2019.\(^{536}\) Apparently, as India had raised certain duties during that period, it sought to make cuts from the higher levels.

\( (4) \) RCEP PSROs were insufficiently stringent to prevent merchandise from China flooding the Indian market that was not genuinely made in China or the RCEP zone.\(^{537}\) Conversely, based on India’s past experience with ROOs in its FTAs, whereby Indian producer-exporters rarely took advantage of DFQF treatment under those FTAs, and bilateral trade imbalances worsened, India worried that RCEP ROOs would be unhelpful to its producer-exporters:

India’s experience with earlier FTAs with Japan, South Korea, and ASEAN countries has been far from satisfactory. These FTAs have not resulted in a more balanced and mutually beneficial trade. Post-FTA, bilateral trade volumes have increased, but imports from partner countries have increased at a faster pace than India’s exports with partners. Due to its relatively higher tariff regime, India had to reduce tariffs much more than partner countries. With the result, India’s trade deficit with existing FTA partners in the region increased consistently after the implementation of FTAs.

Apart from the lack of competitiveness, Indian exporters have not been able to achieve greater benefits from existing FTAs due to low

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\(^{532}\) Goodbye, RCEP.

\(^{533}\) See India Exits the RCEP.

\(^{534}\) See India Exits the RCEP.

\(^{535}\) India Exits the RCEP.


\(^{537}\) Could Join RCEP.
awareness and cumbersome rules of origin. According to the estimates of the Asian Development Bank, the utilization rate of India’s FTAs varies between 5 and 25 percent [that is, the total benefits created by an FTA that producer-exporters actually use for their exporters\textsuperscript{538}] – one of the lowest in the region.\textsuperscript{539}

(5) \textit{RCEP} did not protect Indian farmers, who constitute “the most important electoral constituency in the world’s largest democracy,”\textsuperscript{540} particularly from agricultural imports from Australia and New Zealand, such as dairy products.\textsuperscript{541}

(6) \textit{RCEP} also did not protect India’s service workers. In particular, the FTA did not provide market access for Indian services suppliers. “[T]here was little interest among other RPCs to lower barriers to trade in services as India was keen to push for greater liberalization of trade in IT and IT-enabled services (especially in Mode 4) due to its globally competitive IT sector.”\textsuperscript{542} Moreover:

As far as the services sector is concerned, India could not secure greater market access in its trade agreement with ASEAN. In the case of bilateral trade agreements with South Korea, Japan, Malaysia, and Singapore, where India successfully negotiated the … MRAs – aimed at facilitating the movement of IT and other service professionals – anticipated gains have not yet materialized because of weak enforcement of MRAs.\textsuperscript{543}

(7) \textit{RCEP} failed to provide Indian businesses with adequate FDI opportunities, and was displeased with two aspects of the FDI Chapter: ISDS, and substantive standards.

The negotiations on the investment chapter were dragged on far longer than anticipated. Right from the beginning, Japan and Korea were seeking higher standards for investment protection besides the incorporation of the … ISDS mechanism that would allow investors from the RPCs to bypass domestic courts of host states and sue a host state through international arbitration proceedings. Japan also sought a complete ban on caps on royalty payments and a ban on technology transfer on a negative list basis.

On the other hand, India sought a more cautious approach based on public policy protection and limited coverage as the country is facing more than 12 arbitration suits under previously signed bilateral investment treaties.

\textsuperscript{538} Goodbye, \textit{RCEP}.
\textsuperscript{539} India Exits the \textit{RCEP}.
\textsuperscript{540} Modi’s Treating.
\textsuperscript{541} India Rejects.
\textsuperscript{542} India Exits the \textit{RCEP}.
\textsuperscript{543} India Exits the \textit{RCEP}.
Leaked documents reveal that a compromise was reached at the final round of negotiations (September 2019) for not including the ISDS in the present agreement because the negotiators wanted to conclude RCEP negotiations by November 2019. However, under the work program, RPCs agreed to enter into discussions on ISDS provision within two years after the entry of force of the RCEP agreement and conclude them within three years from the start of discussions.

Apart from the ISDS mechanism, India was also not keen to include controversial clauses (such as asset-based definition of investment, fair and equitable treatment, and most favored nation) under the investment chapter of RCEP as these clauses are inconsistent with the new model BIT text (2015) that defines India’s overall policy towards investment agreements. By accepting such provisions under the proposed RCEP, India would have effectively replaced its model text with a new template that gives extensive rights and protection to foreign investors, while constricting the national policy space.544

(8) RCEP created disciplines on IPRs and electronic commerce that India was unwilling to accept.545

(9) Regarding trade remedies, RCEP did not include a special safeguard for autos, whereby India could impose remedial duties on fairly-traded imports that surged from a particular RPC.546

Despite these rationales, the ineluctable fact India faced was this: it never could emerge from its lower-middle income status unless it developed a world-class exporting industries, balanced among farm and industrial goods, and services, but it could not do so containing itself to its own domestic market.

India’s auto sector was a case in point:

This month Indian Commerce Minister Piyush Goyal cited the scale of this trade deficit as he sought to explain why the Indian government had chosen not to join a new regional trade deal [RCEP]. The deal would require Delhi to dismantle existing tariff protections, a move it fears would precipitate an even heavier onslaught of Chinese goods.

Many Indians believe that China is dumping dead inventory on India,

544 India Exits the RCEP. With respect to MFN treatment, India objected to extending it to countries with which it did not have an FTA. See Goodbye, RCEP. As for ISDS, India objected to “extending … [this] sophisticated … dispute settlement mechanism to local governments like panchayats and municipal bodies, where India is institutionally weak…” Id.

545 India Exits the RCEP.

546 See Could Join RCEP.
selling counterfeit goods and evading customs.

In addition to Chinese exporter’s success, India’s trade deficit is also driven by its own companies’ failure to develop exporting opportunities. Delhi has never enjoyed the economies of scale that its giant neighbour benefits from. Policies on land and labor and its dysfunctional infrastructure are also among the reasons why it has been unable to take advantage of the tensions between the U.S. and China to attract multinationals seeking to shift production away from the Mainland.

India has a combined trade deficit with its neighbours in South-East Asia of almost $22 bn [as of November 2019].

“A weak manufacturing sector is making India more protectionist in terms of global trade,” said Shumita Deveshwar, a Delhi-based analyst with research boutique TS Lombard.

The lack of export competitiveness is one reason why the country’s growth is languishing.

And local consumers are not coming to the rescue. Private consumption growth is slowing.

This is partly because Indian companies’ poor cost control has consequences for the domestic market too. Take the automotive industry, which contributes 7.5 per cent of the country’s gross domestic product and employs more than 30 m[illion] people directly and indirectly. Given India’s high duties on car imports, “the only way to sell cars in India is to make them here,” said Rajeev Gupta, founder of Arpwood, a merchant bank based in Mumbai. “Every part of the value chain is Indian. But India is among the highest cost producers in the world; it isn’t cost competitive.”

Maintaining high import tariffs and backing away from trade deals all fuel India’s dependence on protectionism. But this is not the right formula for global competitiveness at a time of slowing growth.

India’s latest move to insulate its market from foreign rivals [i.e., withdrawing from RCEP] makes it hard to see how the country’s industrialists will ever have an incentive to improve.

In turn, that disincentive hurt India’s youth who aspire for quality jobs: “How do its [India’s] politicians intend to provide jobs to its hundreds of millions of deprived young people unless they produce goods for the world, and not just each other?”

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547 Henny Sender, Why Indian Groups are Struggling to Compete with China, Financial Times, 26 November 2019, www.ft.com/content/04e24940-0ee5-11ea-a225-db2f231cfeae?shareType=nongift.

548 India Turns.
India needed access to foreign markets, and it needed the stimulus of foreign competition in those and its home markets. That kind of access necessarily would come at a price, namely, reciprocal concessions, which are inherent in any trade negotiation:

For India, the RCEP would have been its biggest FTA, and the country would have to offer far deeper commitments than already made under its existing FTAs with ASEAN, Malaysia, Singapore, South Korea, and Japan.⁵⁴⁹

In other words, even more than bilateral FTAs, a blockbuster FTA like RCEP was a path to long-awaited reformist outcomes. India’s withdrawal, coupled with no show of interest in CPTPP, suggested it was taking an inward, even isolationist, past.

Ironically, by one important metric, India is not a protectionist country: the ratio of India’s trade to GDP is 43%, which is higher than that of China (38%) and the U.S. (27%).⁵⁵⁰ Indeed, “India is often criticised for being a protectionist nation, but in fact, the reverse is true.”⁵⁵¹ Yet, in another irony, the longer India abstained from pan-Asian FTAs, the worse the position for its producer-exporters. Staying out of them Indian hurt companies that the Modi Administration supposedly wanted to help (in addition to farmers) by its RCEP withdrawal and CPTPP avoidance:

Some of India’s top 10 exports such as engineering goods, chemicals, pharmaceuticals, and electronics face erosion in market share on account of lower tariffs that members of the 15-nation Regional Comprehensive Economic Partnership enjoy for trading among themselves, according to economists. To put things in perspective, engineering products alone account for a quarter of the nation’s merchandise exports.

“In sectors where India is somewhat contributing to the global supply chain, RCEP would prove to be disadvantageous,” Amitendu Palit, a Senior Research Fellow at the National University of Singapore…

“Under RCEP, cost of trade will come down which is a big advantage.” As the trade pact kicks in, tariff will be eliminated on at least 92% of traded goods among participating countries. This is much more broad-based than what India has committed under its existing FTAs with Japan, South Korea or ASEAN.

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he common rules of origin make the bloc an attractive destination for supply chains by making it easier for RCEP members to source inputs from within the bloc, said Priyanka Kishore, head of economics for South Asia and South-East Asia at Oxford Economics, said…

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⁵⁴⁹ India Exits the RCEP.
⁵⁵⁰ Goodbye, RCEP.
⁵⁵¹ Goodbye, RCEP.
This has exporters worried about expansion plans which may take a hit due to lack of competitive access to a huge market. “Many sectors would want to shift to nations in the bloc to get access to the market and common rules of origin is a big advantage,” said Sharad Kumar Saraf, president of the Federation of Indian Export Organisation, India’s largest exporters’ group.\(^\text{552}\)

Simply put, Indian producer-exporters would suffer a competitive disadvantage *vis-à-vis* RCEP and CPTPP Parties that was easily quantifiable: the margin of preference, measured by the difference between the (1) MFN duty applied by those Parties to Indian merchandise and (2) the RCEP or CPTPP tariff. That difference was positive, as (2) was zero, or headed to zero, as the FTA Parties phased out duties on merchandise originating in their zone.

Thus, India needed to move beyond the common refrain that “[b]efore expanding global footprint through FTAs, India must put its own house in order by strengthening the domestic productive capacities, enhancing R&D, and mobilizing resources to improve the physical and social infrastructure so that domestic producers can compete in the international markets,” *i.e.*, that “[t]here are a host of domestic issues that needs to be addressed to make the Indian industry globally competitive.”\(^\text{553}\)

That refrain was based on a false premise. Indian domestic infrastructural reforms were not a pre-condition to global integration, nor were the two processes a zero-sum game. To the contrary, those reforms could not happen quickly or efficiently without integration, namely, imported capital goods and other merchandise, FDI, and services necessary to resurrect India’s decrepit infrastructure. The two processes, properly viewed, were a complementary, positive-sum game: “A key priority for India now is accelerating domestic reform *in sync with* an evolving global trading system.”\(^\text{554}\)

That certainly was a key takeaway from the September 2019, 253-page *Report on Trade* by India’s official High-Level Advisory Group.\(^\text{555}\)

Many times, in the Report, the group discusses this “mind set,” which has led to excessive regulation or absence of one where required or the ridiculous extent to which it has been taken at other times or simply forced India to be aloof in the global market place.

If India has to arrest the southward journey of its external trade sector, the second phase of globalisation must begin with some critical reforms to make

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\(^{553}\) *India Exits the RCEP*.

\(^{554}\) Goodbye, RCEP. (Emphasis added.)


goods and services more competitive to be able to find global markets. The report also contextualises its work in India’s aspiration of becoming a $5 trillion economy by 2025. The target just cannot be achieved without a significant contribution of exports to the GDP. And exports can only be promoted by gaining competitiveness, diversifying markets and products, strengthening infrastructure and logistics and expanding scales of production to bring down costs.

The recommendations can be broadly grouped as:

- Institutional – covering both external and internal;
- Sectoral – including goods and services addressing both policy and regulatory issues;
- Facilitation – such as export credit and insurance and investment promotion
- Contemporary Developments – such as the U.S.-China trade conflict and new regional trade agreements; and
- Reforms – in the core sectors such as labor, land, agriculture, cost of capital, and taxation.

It is imperative for India to join regional trade agreements to retain its position as a major trading nation, to pursue value chain-based manufacturing for the world, promote technology-led investments, secure mobility for its skilled workforce, and above all to become more competitive and not be excluded from the mainstream of international trade.

The Report includes champion sectors such as textiles and clothing, pharmaceuticals, biotechnology, electronics, medical devices and agriculture for special recommendations. The focus of recommendations includes simpler and less regulation, higher skill development, removal of barriers – regulatory, legal, and technical – within Indian states and the central government and beyond India’s borders, adopt global best practices, collaborate for technology, innovation, research, and promote investment.

India’s exports are seriously impacted by both the high cost of capital for production and export credit as such, including the low coverage of insurance. Hence the report recommends enhanced Exim capitalisation, greater leveraging of borrowing and newer instruments to promote buyers’ credit.

A significant part of the discussion on sectors in the report includes important service sectors such as financial services, education, healthcare
particularly medical value tourism, and tourism. The report draws from
global best practices, analyses Indian hurdles to growth and identifies
policy, regulatory and promotional actions which will take India to a higher
trajectory of growth. A quote from the Report on financial services
summarises the approach of the group to this subject, “the baggage of
round-tripping cannot be used to stifle a major sector any more than using
the risk of a traffic accident to stop construction of a key highway.”

All recommendations revolve around simplifying regulation making them
less burdensome and above all remove the underlying principle of
‘suspicion’ in every transaction. The report recommends a new blueprint
for foreign investment funds and foreign institutional and individual
investors. Recognizing the need for huge investments in the infrastructure
sector, it recommends long-term bonds, allowing a mechanism for
mainstreaming a one-time disclosure of undisclosed income. The report
addresses issues of taxation and fund management at length from two
perspectives, firstly as facilitation to fresh investment and secondly to
encourage competitive production.

[The Report] strongly recommends a review of the agri-export basket to
discourage water-guzzling crops and include fruits and vegetables.

Labor-related recommendations have been made for sectors such as textiles
and clothing where archaic laws have come in the way of modernisation
and expansion.

In early 2000, India consciously adopted a tariff reduction plan which
somehow was lost in the protectionist noise and appears to have been more
or less given up since 2017, in order to pursue a “Make in India” program.
The group recommends a five-year plan to rationalise and reduce tariffs but
still protect tariffs on new technology products for a limited time to develop
capacities.556

556 Rajeev Kheer, Export Advisory Group: Trade Policy for Globalization 2.0, BLOOMBERG QUINT
(Mumbai), 5 November 2019, www.bloombergquint.com/opinion/india-exports-trade-policy-for-
globalisation-2.0-by-rajeev-
kher?utm_medium=newsletter&utm_campaign=website&utm_source=sendgrid. (Emphasis original.)

One problem the Report appeared to miss was that of policy coordination in the agricultural sector.
On the one hand, rules concerning farm exports are governed by the Foreign Trade (Development and
Regulation) Act, 1992. On the other hand, the possibility of placing export bans or imposing other trade
restrictions affecting the farm sector (as occurred, for example, starting in June 2020 on onions, as discussed
in a separate Chapter) are governed by three farm bills promulgated in 2020. The risk created was a mismatch
whereby the 1992 Act encouraged integration of Indian farming into the global trading system, whereas
protectionist measures, or other anti-free market tools (such as minimum export prices or minimum support
prices), were taken under the 2020 legislation. Also at stake in insuring policy convergence was food security.
See Shweta Saini, Separating The Wheat From The Chaff In India’s Farm Policy, BLOOMBERG QUINT
indias-farm-policy.
Fortunately for India, the 15 RPCs left open the possibility of re-engagement. India could move rapidly to implement the recommendations of the Report. Its doing so would be mutually beneficial, as:

most RPCs would like India to join the RCEP as it offers them preferential access to the potentially large Indian market. For Australia, additional market access for agricultural exports would be substantial if India joins the RCEP because it already has an FTA with all RPCs except India.557

Thus, their 4 November 2019 Joint Statement following their Bangkok Summit created a window for India, from that date until the expected final signing date in 2020, i.e., during the legal scrubbing process:

“India has significant outstanding issues, which remain unresolved. All RCEP Participating Countries will work together to resolve these outstanding issues in a mutually satisfactory way. India’s final decision will depend on satisfactory resolution of these issues.”558

Would the Modi Administration meet this challenge?

The answer was unclear. On the one hand, Japan gave the Administration a boost when it announced (on 29 November 2019) that it would not sign RCEP unless India rejoined the deal.559 Japan had good reasons for this position:

[M]oving forward with RCEP would give Japan greater opportunities to bolster exports to India, and more importantly, to increase investments into the subcontinent – a win-win for both sides. This is no small matter, given that India-Japan trade has been relatively modest. Still, for Japan, the bigger win of having India be part of the RCEP framework would be political. … [Japanese Prime Minister Shinzo] Abe was the first to propose the “Indo-Pacific” approach to greater regional integration in 2007 – speaking before the Indian parliament, no less – by encouraging Japan and India, Asia’s two most prominent democracies, to work more closely together on regional security and economic development.

For Japan, RCEP is not simply a trade agreement – and especially given that its tariff reduction proposals are far less ambitious than those of CPTPP or other trade deals recently signed by Tokyo. Rather, RCEP represents a way for Japan to play a bigger role as a regional rule-maker more broadly, and

557 India Exits the RCEP.
558 Joint Statement (final paragraph).
especially in the absence of the United States. For Tokyo to be effective, keeping in mind China’s indisputable outsize influence, it needs backing from Delhi as well. In order for Tokyo to have an impactful voice when it comes to pushing back against Beijing’s rules, it needs not only India’s presence – but also the expectation that New Delhi will help Tokyo push back. With India not in RCEP, New Delhi’s presence is undercut, and Tokyo will have a tougher time counterbalancing China’s increasingly powerful voice.

In essence, in the broader framework of counterbalancing China’s position, India’s presence in RCEP is critical for Japan politically.\footnote{Michael Kugelman & Shihoko Goto, \textit{India’s Geopolitical Blunder Will Lead to Economic Woes}, \textit{National Interest}, 22 December 2019, \url{https://bilaterals.org/?india-s-geopolitical-blunder-will}. [Hereinafter, \textit{India’s Geopolitical Blunder}.]}

India’s Foreign Minister, Subrahmanyam Jaishankar (1955-), said at the January 2020 Raisina Dialogue Conference (an annual multilateral gathering hosted in Delhi by India’s Ministry of External Affairs):

We haven’t closed the door on [RCEP]. The ball is in the court of the countries concerned and whether they make it worth our while….

…

It isn’t as much about getting along, because we don’t have a choice, we have to get along. But it’s about the terms, the basis and how it actually works out. That is where it’s a work is in progress….

[He also intoned that India would] no longer be a prisoner of its past image, [and that] India’s way is not to be disruptive, but to be the decider and the influencer rather than the abstainer. In fact, India owes it to itself and the world to be a just power.”\footnote{Quoted in India’s “Door Still Open” to RCEP Free-Trade Deal: Foreign Minister Subrahmanyam Jaishankar, \textit{South China Morning Post}, 15 January 2020, \url{www.scmp.com/week-asia/politics/article/3046231/indias-door-still-open-rcep-free-trade-deal-foreign-minister}.}

Yet, the Foreign Minister’s statement suggested Japan and India viewed RCEP through different paradigms:

For Tokyo, RCEP is a major political tool that would advance broader regional integration and act as a roadmap for good governance. For New Delhi, though, RCEP is first and foremost an economic deal that could hurt its more vulnerable industries and lead to near-term pain – even though it could lead to much-needed domestic structural reform in the longer term.\footnote{India’s Geopolitical Blunder.}

And, that pain was why, on the other hand, India seemed inclined not to re-join a potentially ambitious RCEP, but rather seek bilateral FTAs with Japan, as well as Australia, Korea,
and New Zealand, which would be unambitious.\textsuperscript{563}

India even spoke of its openness to bilateral FTAs with the EU, U.K., and U.S. In fact, in May 2021, India announced it would resume FTA negotiations with the EU, which had been dormant since 2013.\textsuperscript{564} On a parallel track, the EU and India said they would “start talks on a separate investment protection deal and an accord on geographical

\textsuperscript{563} Like Japan, New Zealand searched for ways to keep India engaged in RCEP, arguing India would “have a key role as the Covid-19 pandemic disrupts global trade.” See Tracy Withers, Asia Trade Bloc Seeks Ways to Include India, Says New Zealand Official, BLOOMBERG QUINT (Mumbai), 4 June 2020, www.bloombergquint.com/global-economics/n-z-official-says-asia-trade-bloc-seeks-ways-to-include-india. New Zealand had good reason to make this argument: RCEP accounts not only for 30\% of world trade, but also 58\% of New Zealand’s exports. Id.

In July 2022, it appeared India and Australia were close to finalizing an FTA, and others were in the offing:

[Indian Minister of Commerce and Industry] Piyush Goyal … [said] he expected the countries would conclude the trade deal “within the next few months” and that 11 of the proposed pact’s 26 Chapters were already “dusted and ready.”

Both India’s Prime Minister Narendra Modi and his U.K. counterpart Boris Johnson have pushed trade diplomacy as part of their economic agendas. India is pursuing trade agreements with the EU and Canada after inking deals with the United Arab Emirates and Australia, while Downing Street sees an agreement with New Delhi as a centrepiece of its post-Brexit economic strategy.

The mooted deal is expected to improve market access for goods such as British whisky and Indian textiles. But it also touches on politically sensitive areas, including potentially opening up the UK to more students and skilled workers from India.

Benjamin Parkin & John Reed, India and U.K. to Seal Trade Deal in “Next Few Months,” Minister Says, FINANCIAL TIMES, 6 July 2022, www.ft.com/content/ba1c2233-8e1d-4c35-bbe3-0a703fcbdc1d?shareType=nongift. However, as details of the specific provisions in each of the Chapters were sketchy, it was impossible to assess whether India had sought – and made – ambitious (as in broad, deep) commitments.

\textsuperscript{564} See EU and India Agree to Resume Free-Trade Negotiations, NIKKEI ASIA, 9 May 2021, https://asia.nikkei.com/Politics/International-relations/EU-and-India-agree-to-resume-free-trade-negotiations [hereinafter, EU and India Agree to Resume]; Sam Fleming, Jim Brunsden, Michael Peel & Amy Kazin, EU and India Set to Revive Talks on Trade Deal, FINANCIAL TIMES, 3 May 2021, www.ft.com/content/3339f3a1-69e8-4c46-bd33-c777a4c5c922?shareType=nongift (reporting: “The EU and India plan to revive long-stalled talks on a comprehensive trade deal as they seek to deepen economic ties and respond to China’s rise. The two sides could announce as soon as Saturday the relaunch of negotiations that were suspended in 2013 amid disagreements over tariff rules for car parts and free-movement rights for professionals. The resumption of talks between two of the largest economies in the world has risen as a priority for both sides in recent months as they grapple with the challenges posed by the rise of China and its model of state-backed capitalism, and the economic damage wrought by the coronavirus pandemic. … Previous attempts by the EU and India to reach a pact foundered despite intensive work between 2007 and 2013. Problematic issues included India’s reluctance to ease access for EU lawyers and to further open up its market to European car parts. New Delhi was frustrated by the EU’s unwillingness to offer more generous rights for its professional service providers to work in Europe. Officials believe the prospects for a deal are now more propitious than 10 years ago, as India seeks ways of responding to the increasing economic power of China in the region. New Delhi last year decided against joining 15 other countries, including China and Japan, in a regional economic partnership.”). [Hereinafter, EU and India Set.]
indications – famous brand names often linked to the places they are made, from France’s champagne to India’s Darjeeling tea.”\textsuperscript{565} In practice, the Indo-European FTA talks did not start in earnest until June 2022, with a focus on digital trade, technology, and sustainable development, and enhanced collaboration between the two sides amidst the Ukraine war that Russia launched in February 2022.\textsuperscript{566}

Likewise, the following month, India and the U.K. made similar moves toward a trade agreement that would be a precursor to an FTA:

India and the U.K. are intensifying talks to remove non-tariff barriers and foster greater market access as they work to stitch together the South Asian nation’s first major free trade pact in a decade.

The two countries have zeroed in on a list of achievable items that would help the U.K. showcase the benefits of leaving the European Union while also allowing India to forge new bilateral ties after Prime Minister Narendra Modi’s government pulled out of a multilateral Asia trade pact \textit{[RCEP]} in [November] 2019….

They expect to finalize an interim agreement by the end of the year [2021] that would give British medical devices and agricultural products such as apples, quinces and pears access to Indian markets, while widening the scope of employment in the U.K. for Indian seafarers and nurses, the people said, asking not to be identified as the matter is still under discussion.

…

The proposed agreement … is expected to resolve long-pending demands including allowing British legal firms access to the Indian market and a social security pact to ensure India’s skilled professionals don’t have to pay certain taxes in the U.K. if they’re being paid domestically….

Still, contentious issues remain, including high Indian tariffs on alcohol and automobiles. The U.K. wants the removal of tariffs including a 150% levy on whiskey and 125% duty on imported cars, while India is seeking “data secure nation” status. Areas including e-commerce, public procurement, financial and banking services have yet to be discussed, the people said.\textsuperscript{567}

Any such FTA would be a step in India’s stalled FTA program (if its policy even could be called a program). India completed an FTA with Mauritius in February 2021, but that was commercially insignificant. India’s last significant FTA came in 2011, yet that was with a middle-income country, Malaysia.

\textsuperscript{565} \textit{EU and India Agree to Resume.}
\textsuperscript{566} See Alex Hancock, \textit{EU to Restart Trade Talks with India After Almost 10 Years}, \textit{FINANCIAL TIMES}, 17 June 2022, \url{www.ft.com/content/8c4ebccc-b46d-4bd1-8b6e-38a24a8195f8?shareType=nongift}.
By March 2023, India and the U.K. had made considerable progress, yet has some distance to close a deal:

So far, 13 of 26 policy areas that cover topics such as goods, services, investments, and intellectual property rights have been closed. …

Kevin McCole, Managing Director of the U.K. India Business Council, says a free trade agreement would bring “real growth” in digital trade because of respective strengths in the sector and the geographical distance between the countries.

“Data and digital trade only has [sic] to navigate regulatory barriers,” he said. “So if regulatory alignment is agreed, then there is scope for substantial growth in U.K.-India trade via digital services and digitally enabled services.”

Services account for 44% of U.K. exports to India and the same percentage of imports from India.

But in India, a debate over domestic data legislation may be hindering the discussions.

Tech associations favor the liberalization of digital trade but with certain caveats such as “if I want to share certain data with you, you should also assure me that this data would not be pilfered or used for other purposes,” said Pankaj Jha, a Professor at O.P. Jindal Global University in India’s northern Haryana state.

Natasha Schou, Head of Asia Pacific at TheCityUK, an industry body representing financial and professional services, points to the U.K.-Japan free trade deal as “a really useful benchmark to follow for other FTAs,” as well as the Digital Economy Agreement with Singapore. [Both are discussed in a separate Chapter.] The deal with Japan commits both sides to not adopt unjustified data localization measures, not to impose customs duties on electronic transmissions, and works towards recognizing e-signatures among other measures.

… Britain’s asks for duty concessions around Scotch whisky and automobiles are “a bone of contention,” [King’s College London Professor Harsh V.] Pant said.

Corporations are also hoping the negotiators make progress in regard to visas and migration. In addition, an investor protection element is being
sought. Several years ago, India unilaterally terminated an investor protection agreement with the U.K.\(^{568}\)

In addition to digital trade, market access for selected product, and FDI matters, a key sticking point was likely to be human rights – including labor rights, and the rights of women and LGBTQ+ persons – in India. The U.K. was mindful of the efforts of the EU to advance these rights in its trade agreements. The U.K. could ill afford to look like it used its post-Brexit trade negotiating sovereignty to condone the degradation of rights in other countries by not mentioning them in its new trade deals. As for India, its \(BJP\)-led government might have difficulty conceding to robust, resilient provisions on rights in an Indo-U.K. FTA. That was because of its nationalistic domestic base.

V. Industrial Policy and \textit{Atmanirbhar Bharat}

Such FTA deals made commercial sense. For example, India was the EU’s 10\(^{th}\) largest trading partner, and the EU was the second-largest destination for Indian exports.\(^{569}\) But, economics were not the prime driver of possible trade, investment, and GI deals. Rather, an Indo-European FTA, and allied arrangements, were motivated in part by geopolitical shifts: India was concerned about a rising, aggressive China. A deal with the EU would – though representing a departure from India’s traditional, post-Partition non-aligned stance – position India rather squarely in a trade alliance to counter China and \textit{RCEP} (from which, as discussed below, India withdrew – a game-changing move, from the EU perspective\(^{570}\)).

However, in negotiating such deals, India would “remain committed to fair trade but on the basis of reciprocity,” and declared “[t]here are no red lines.”\(^{571}\) These negotiations were cast in two broad contexts: first, Modi Administration industrial policy, which was “motivated by its well-founded desire to lure international manufacturing away from an increasingly uncompetitive China;” but second, a three-pronged strategy, called \textit{Atmanirbhar Bharat} (Self-Reliant India),” which consisted of (1) “targeted subsidies,” (2) “a return to protectionism,” and (3) “non-participation in regional trade agreements.”\(^{572}\)

Prong (1) of \textit{Atmanirbhar Bharat} suggested a replacement of the old “License Raj” with a new “Subsidy Raj,” with the new regime carrying the same risks as the old one: enforcement difficulties, arbitrary decision-making, establishment of a system of


\(^{569}\) \textit{EU and India Set.} (data as of May 2020).

\(^{570}\) \textit{See EU and India Set.}

\(^{571}\) \textit{Atmanirbhar Bhar Aat Push: India Eyes Free Trade Agreements with EU, U.K., U.S., TIMES NOW NEWS}, 11 July 2020, \url{https://bilateralts.org/?atmanirbhar-bhar-aat-push-india} (quoting Minister of Commerce and Industry Piyush Goyal, and also reporting “Goyal highlighted that India can take the lead in supplying high quality and competitive textiles, handicrafts, leather, and furniture, while it would need access to high-grade technology in several sectors and spirits.”).

\(^{572}\) Arvind Subramanian & Josh Feldman, \textit{India’s Stalled Rise — How The State Has Stifled Growth}, 101 \textit{FOREIGN AFFAIRS} issue 1, 144 (January-February 2022), \url{www.foreignaffairs.com/articles/india/2021-12-14/indias-stalled-rise} [Hereinafter, \textit{India’s Stalled Rise}].
entitlements that become entrenched and thus difficult to remove, and promotion of domestic champions, that is, large business conglomerates (especially the Adani Group and Reliance Industries, headed by two of the world’s richest men, Gautam Adani and Mukesh Ambani). The result threatened to reify a sclerotic oligopolistic economy that create barriers to entry of foreign goods, services, and investment. Worse yet, those risks threatened to “intensify India’s historic problem of ‘stigmatized Capitalism,’” that is, the “deep[[] ambivalence” among “[m]any Indians .. about the private sector – and Capitalism generally.”

Given Prongs (2)-(3), in truth, India showed no interest in eliminating tariffs on 80%-90% of agricultural commodities (including potentially sensitive farm products such as dairy and wheat) and industrial goods, even in a phased manner, nor to agree to what it regarded as lax ROOs – all of which would be mandated by RCEP. The victims of that disinterest were Indian firms needing inexpensive, high-quality import inputs for finished goods they hoped to export: high tariffs on those inputs drove up their costs, and staying out of RTAs circumscribed their market access opportunities.

VI. Long-Term Data Localization Issue

Unsurprisingly, signs of a compromise on India’s part in the RCEP negotiations were not good. Indeed, on IP, specifically, data localization, there appeared to be considerable divergence, which was an ominous portent not only for India joining RCEP, but also its trade relations with the U.S.

The Cabinet of the government of Prime Minister Narendra Modi approved (in December 2019) the Personal Data Protection Bill, a data privacy law that would regulate “how firms including global tech giants Amazon, Facebook, Alphabet’s Google and others process, store and transfer Indian consumers’ data.” Under the Bill, “social media firms

See India’s Stalled Rise, 146.

India’s Stalled Rise, 147.

Moreover, it appeared Amazon may not have been entirely forthcoming with the Indian government and, indeed, circumvented Indian FDI laws. See Aditya Kalra, Indian Agency Seeks Information, Documents from Amazon Amid Probe: Source, REUTERS, 12 March 2012, www.reuters.com/article/us-amazon-india-operations/indian-agency-seeks-information-documents-from-amazon-amid-probe-source-idUSKBN2B41F6. Had Amazon favored a small group of large sellers on its platform (e.g., by giving them discounted fees and assisting them obtain special deals with major high-tech companies such as Apple, Inc.), thus discriminating against SMEs? Had Amazon exercised control over inventory of sellers on its platform, rather than having all sellers operate independently)? Internal Amazon documents, dated between 2012-2019 and obtained by Reuters, suggested Amazon played a “cat and mouse game” with the government, “adjusting its corporate structures each time the government imposed new restrictions aimed at protecting small traders.” Id. For a gripping, in-depth account, see Aditya Kalra, Amazon Documents Reveal Company’s Secret Strategy To Dodge India’s Regulators, REUTERS, 17 February 2021, www.reuters.com/investigates/special-report/amazon-india-operation/. See also Akira Hayakawa & Takeshi Shiraishi, Amazon Deflects India Headwinds with Local Production Pledge, NIKKEI ASIA, 23 February 2021, https://asia.nikkei.com/Business/Retail/Amazon-deflects-India-headwinds-with-local-production-pledge (reporting: “Later this year [2021], Amazon will begin producing Fire TV Sticks with the help of Foxconn, the Taiwanese iPhone assembler formally known as Hon Hai Precision Industry. This will be Amazon’s first manufacturing foray into India, which follows Apple’s move to assemble iPhones in the country. … [Amazon’s] announcement of the production line aligns with Prime Minister Narendra Modi’s ‘Make in
[would be expected] to develop a voluntary method for users to verify themselves.”

Crucially:

The Bill mandates that personal data categorized as sensitive will be stored or processed only in India, the source said, declining to be named as details about the Bill in its current form are not public.

It also says that data deemed sensitive will have to be stored in India but can be processed outside of the country.

India’s banking regulator last year [2018] directed foreign firms such as Mastercard and Visa to store their payments data locally for “unfettered supervisory access.”

It later clarified that transactions made in India could be processed outside of the country but the related data should be brought back for local storage within 24 hours.

In its above-referenced April 2018 Storage of Payment System Notification, the RBI stated:

2. It is observed that not all system providers [i.e., payment systems and commercial banks] store the payments data in India. In order to ensure better monitoring, it is important to have unfettered supervisory access to data stored with these system providers as also with their service providers/intermediaries/third party vendors and India’s plan to build up the nation’s manufacturing base. But it seems to reflect Amazon’s desire to soften hard-line policies against foreign participants in the e-commerce market more than it does a move for economic benefits.”

Tellingly, in August 2021, Amazon cut its relationship with Cloudtail. See Amazon to End Relationship with Indian Seller Cloudtail, NIKKEI ASIA, 10 August 2021, https://asia.nikkei.com/Business/Technology/Amazon-to-end-relationship-with-Indian-seller-Cloudtail (reporting: “Amazon.com and one of its biggest sellers in India, Cloudtail, have decided to end their relationship, … following years of allegations from brick-and-mortar retailers that the seller received preferential treatment. A joint venture between Amazon and India’s Catamaran that controlled Cloudtail was coming up for renewal on May 19, 2022, and the two sides said in a joint statement they had mutually decided not to extend it beyond that date. The decision comes after a Reuters investigation in February [2021] based on Amazon documents showed the U.S. company had given preferential treatment for years to a small group of sellers, including Cloudtail, and used them to bypass Indian laws.”); Aditya Kalra, Amazon, Top Indian Seller Cloudtail End Relationship Amid Regulatory Heat, REUTERS, 9 August 2021, www.reuters.com/business/amazon-end-relationship-with-indian-seller-cloudtail-2021-08-09/ (reporting: “Arvind Singhal, Chairman of retail consultancy Technopak Advisors, … [said] that Amazon and Catamaran’s decision appeared aimed at defending against any possible future scrutiny of their business models.”). It is difficult to escape the inference from Amazon’s decision to sever its ties with Cloudtail that the allegations uncovered in the February 2021 Reuters investigation were not unfounded, and that Amazon sought to cut its losses, i.e., avoid a severe penalty from the Indian government.


577 India’s Cabinet Clears.

other entities in the payment ecosystem. It has, therefore, been decided that:

(i) All system providers shall ensure that the entire data relating to payment systems operated by them are stored in a system only in India. This data should include the full end-to-end transaction details / information collected / carried / processed as part of the message / payment instruction. For the foreign leg of the transaction, if any, the data can also be stored in the foreign country, if required.\(^{578}\)

Applying this Notification, in July 2021, the RBI banned MasterCard from issuing new credit, debit, or payment cards, saying the company “had not complied with rules requiring foreign card networks to store data on Indian payments exclusively in India.”\(^{579}\)

That move followed similar RBI actions earlier in the year against American Express and Visa. (The dispute persisted, as the USTR – on behalf of the American credit card behemoths, faulted India for favoring India’s RuPay (as in “Rupees payment”) payment system, while banning MasterCard and impeding Visa, thus violating India’s GATS market access and national treatment obligations.\(^{580}\) Thus, both the Notification and Bill raised the matter of how India’s emerging data privacy standards would mesh with those in RCEP or, for that matter, any major FTA, such as TPP.

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\(^{578}\) Reserve Bank of India, Notifications, RBI/2017-18/153, DPSS.CO.OD No. 2785/06.08.005/2017-2018, Storage of Payment System Data (6 April 2018), www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244.


\(^{580}\) See Aditya Kalra, Exclusive: Visa Complains to U.S. Govt about India Backing for Local Rival RuPay, REUTERS, 28 November 2021, www.reuters.com/business/finance/exclusive-visa-complains-us-govt-about-india-backing-local-rival-rupay-2021-11-28/ (reporting: “Visa Inc … has complained to the U.S. government that India’s ‘informal and formal’ promotion of domestic payments rival RuPay hurts the U.S. giant in a key market, memos … show. … RuPay … has been supported by public lobbying from Prime Minister Narendra Modi that has included likening the use of local cards to national service. U.S. government memos show Visa raised concerns about a ‘level playing field’ in India … between … USTR Katherine Tai and company executives…. Mastercard Inc. … has raised similar concerns privately with the USTR. Reuters reported in 2018 that the company had lodged a protest with the USTR that Modi was using nationalism to promote the local network. … Modi has promoted homegrown RuPay for years, posing a challenge to Visa and Mastercard … in the fast-growing payments market. RuPay accounted for 63% of India’s 952 million debit and credit cards as of November 2020, … up from just 15% in 2017. … Modi, in a 2018 speech, portrayed the use of RuPay as patriotic, saying that since ‘everyone cannot go to the border to protect the country, we can use RuPay card to serve the nation.’ Finance Minister Nirmala Sitharaman said last year [2020] that ‘RuPay is the only card’ banks should promote. The government has also promoted a RuPay-based card for public transportation payments. While RuPay dominates the number of cards in India, most transactions still go through Visa and Mastercard as most RuPay cards were simply issued by banks under Modi’s financial inclusion program…. Visa told the U.S. government it was concerned India’s ‘push to use transit cards linked to RuPay’ and ‘the not so subtle pressure on banks to issue’ RuPay cards…. Mastercard and Visa count India as a key growth market, but have been jolted by a 2018 central bank directive for them to store payments data ‘only in India’ for ‘unfettered supervisory access.’ Mastercard faces an indefinite ban on issuing new cards in India after the Central Bank said it was not complying with the 2018 rules.”).
These measures also raised the question of whether the conflict between major multinational payments systems and India could be avoided by an Indo-American Digital Trade Agreement:

Mastercard Inc. has been told not to issue new cards in India. It’s a move that underscores the urgent need of a U.S.-led digital trade pact to set global standards for what sovereign states can and cannot do to firms that obtain and process data internationally.

The Indian central bank pulled the plug on the U.S. payments network for alleged noncompliance with its controversial local data storage rules introduced three years ago. In April, the monetary authority imposed similar restrictions on American Express Co. and Discover Financial Services’ Diners Club cards. Existing customers are going to be fine in all three cases, but the harsh penalties will still reduce competition in the market.

Could this dislocation have been avoided? Globally, e-commerce, content and payment firms are in the crosshairs of regulatory action. While governments advance many reasons for insisting on local storage – from checking money laundering to ensuring national security – the burden of compliance falls disproportionately on international firms. Rivals that serve only one market have no trouble in meeting the requirements. That makes it a trade access issue. To plug this and several other gaps in cross-border exchange of data, President Joe Biden’s team is working on proposals for a digital trade deal with economies in the Asia-Pacific [as discussed in a separate Chapter]….

Decades of globalization have lowered tariffs and harmonized customs procedures in trade of goods. And although selling services like banking and insurance across borders is still messy, regional free-trade deals are at least trying to reduce the friction. When it comes to data capitalism, however, populous nation-states are increasingly aware of the value of the raw material at their disposal – and loathe to share it with others.

Localization requirements represent some of the most egregious curbs. From Russia and China to India and Indonesia, many governments are insisting on domestic data storage. Some are going further. China used a 2017 cybersecurity law to crack down on Didi Global Inc. just days after the popular ride-hailing app sold shares in the U.S. From September, things will get tighter still. Under a new data security law, Chinese firms will need the government’s permission to share any information about their mainland operations with law enforcement officials overseas.

India offers a more hospitable environment for now, but it, too, is considering legislation for safeguarding of personal data and processing of non-personal information. The compliance costs for businesses will be
determined by the guidelines formulated under these new laws. As Amazon.com Inc. and Walmart Inc. are discovering, staying on the right side of idiosyncratic Indian rules can be a costly affair.

…

The Reserve Bank of India wants data on Indian card payments to reside only on servers locally – with no copies retained elsewhere. As more countries impose such data sovereignty requirements, the economic efficiencies from centralized storage and processing will go out the window. The data center market has a heavy concentration in five markets: Northern Virginia, Singapore, London, Sydney, and Silicon Valley. Decisions on where to set up shop are taken on the basis of reliable 24x7 power, legal certainty, fiber connectivity and cloud availability from the three main providers – Amazon, Microsoft Corp. and Alphabet Inc.’s Google. But localization requirements are coming in the way. Mastercard even announced a $350 million investment in a data processing center in Pune, Maharashtra its first outside the U.S. – to comply with the Indian regulation. Yet, the RBI was clearly not impressed.

Data is unlike any other commodity. Everything else, from oil to computer software, gets its value from well-defined property rights protected by legal systems. … Now, if states rush into the legal vacuum, and unilaterally assert rights over individual data, it’ll lead to more chaos. What consumers everywhere want is for their governments to bat for privacy and fair dealing by tech firms.⁵⁸¹

At issue, then, was whether the joint Indo-U.S. interest in consumer-friendly data protection laws could be realized against the singular Indian rush toward strict data localization.

VII.  **RCEP Moves Forward Without India**

* November 2020 RCEP Signed

After eight years of negotiations dating to November 2012, at the 37th ASEAN Summit on 15 November 2020, a virtual event hosted by Vietnam, the 15 RCEP Parties signed their deal.⁵⁸² India was not among them. This FTA, the rules of which spanned over

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500 pages, followed by thousands more pages of country-specific scheduled goods and services commitments, and NCMs, was an economic, historic, and national security watershed. Notably, the RCEP Parties left in the text a clause by which India could join within 18 months after the agreement took effect. That is, no other country except for India could join RCEP without waiting for a protracted designated period after RCEP entered into force.

**RCEP Economics**

Economically, China, Japan, Korea, the 10 ASEAN members (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam), plus Australia and New Zealand, created not only Asia’s, but also the world’s, largest FTA, accounting for 30% of the world’s population (2.2 billion people) and 30% of world GDP ($26.2 trillion). These facts make RCEP bigger than either USMCA (and FTA) or the EU (a CU). Similarly, RCEP Parties are a major FDI destination: they account for 16% of global FDI stock and over 24% of flows.

Certain RCEP provisions linked directly to China’s ambitious development plans, even to its Made in China 2025 industrial policy (discussed in a separate Chapter) to “nurture[e] strategic industries.” For example, consider the tariff phase out rules on EV technologies:

Under the new massive trade deal signed on Sunday, China is set to scrap tariffs immediately on a large portion of items that are currently subject to a roughly 2% to 6% tariff, mostly in areas where China already is a competitive player.

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584 See RCEP Kicks In; RCEP Nations to Sign.

585 See Eyes on Biden’s TPP Move; Asia Pacific Nations Sign Biggest; RCEP Nations to Sign.


But it secured a longer grace period on many items that are protected under steep tariffs, or that are expected to face intense global competition in coming years.

By mixing immediate tariff repeals with long phase-out periods, Beijing managed to create an industry road map that will shield growth sectors, such as eco-friendly vehicles, from foreign competitors for the long term.

... Meanwhile, China will immediately scrap tariffs on high-performance steel such as alloy steel, an area where Japanese producers already have an edge. But tariffs will be eliminated at different times for various hot-rolled steel products.

In other words, China was adept at securing long-phase out periods for merchandise it sought to protect from RCEP competitors, and short periods for inputs it needed from them for finished goods in which it sought a dominant position.

For example, China will not scrap its tariffs on certain electrodes and materials for electric car batteries until the 16th year of the agreement. China considers electric vehicles a priority area, and has quickly bolstered output of battery components. A Chinese company is now the world’s top producer of insulators.589

Likewise, Japan advanced through RCEP the interests of one of its priority sectors, passenger vehicles: Cambodia and Laos agreed to eliminate tariffs on them, prompting METI to proclaim, “It’s one of our achievements.”590

Was RCEP as ambitious as other blockbuster trade deals? Manifestly not. To be sure, both addressed NTBs and transparency, and both covered IP, e-commerce (including paperless trading), data privacy (including online consumer and personal information protection), education, engineering, finance (including back-office processing), and professional services (e.g., graphic design), and telecommunications.591 RCEP also established a Secretariat to oversee and manage changes to the deal.592 And RCEP Parties committed to fully opening at least 65% of their services sectors by raising foreign equity holding limits (e.g., on FDI).593 However, several such pledges largely consolidated existing ones under bilateral FTAs the RCEP Parties already had in place. FDI entry and best practices commitments were a case in point.

Still, the expected stimulative effect of RCEP was hardly huge: “[t]he Peterson Institute for International Economics estimate[d] the deal could increase global national

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589 China’s RCEP Tariff Concessions.
590 China’s RCEP Tariff Concessions.
591 See RCEP: Asia-Pacific Countries; Asia Pacific Nations Sign Biggest.
592 RCEP Agreement Will Transform.
593 See Asia Pacific Nations Sign Biggest.
income by $186 bn annually by 2030 and add 0.2% to the economy of its member states,” and much of the gains may be had in China, Japan, and Korea – less so in smaller Southeast Asian nations.\footnote{RCEP: Asia-Pacific Countries. The forecast is Peter A. Petri & Michael G. Plummer, \textit{East Asia Decouples from the United States: Trade War, COVID-19, and East Asia’s New Trade Blocs}, Peterson Institute for International Affairs, Working Paper 20-9 (June 2020), \url{www.piie.com/system/files/documents/wp20-9.pdf}.} For even these modest gains to accrue, \textit{RCEP} had to enter into force. That meant the legislatures of at least six \textit{ASEAN} plus three non-\textit{ASEAN} Parties, of the total 15 \textit{RCEP} Parties, had to approve it, yet in them, anti-trade and anti-China sentiments lurked.\footnote{See \textit{RCEP: Asia-Pacific Countries}.}

The 20 Chapters of \textit{RCEP} (which covered \textit{(inter alia)} goods, ROOs, customs procedures and trade facilitation, SPS measures, trade remedies, services, FDI, temporary migration of natural persons, IP, competition policy, SMEs, government procurement, and institutional structures and dispute settlement) were neither as broad nor deep as the 30 Chapters of \textit{CPTPP} (which cover the same topics, plus more). Whereas \textit{RCEP} phased out 91% of all existing tariffs among its Parties, \textit{CPTPP} phased out existing 99.9% of existing tariffs among its Parties, \textit{RCEP} did so on 91%.\footnote{Eyes on Biden’s TPP Move.} \textit{CPTPP} phased out immediately tariffs on 86.6% of industrial goods, and eventually does so for 99.9% of them, but \textit{RCEP} eliminates duties on only 86.6% of industrial goods, and then over time – not immediately.\footnote{China’s \textit{RCEP} Tariff Concessions.} That said, whereas the longest \textit{RCEP} phase out period is 20 years,\footnote{See \textit{RCEP: Asia-Pacific Countries}.} \textit{CPTPP} has “staging categories” in excess of 20 years.\footnote{See \textit{RCEP: Asia-Pacific Countries}.}

Moreover, whereas \textit{CPTPP} covered agriculture and services trade liberalization fairly thoroughly, \textit{RCEP} did so in a spotty fashion:

\textit{RCEP} will cut tariffs and establish rules in about 20 areas, including cross-border data flows. The agreement will do less to remove tariffs on farm and fishery products than the \textit{Trans-Pacific Partnership} or the \textit{Japan-European Union} economic partnership agreement, out of consideration for the many food exporters in the \textit{RCEP} bloc.

\textit{RCEP} will remove duties on 61% of such imports from \textit{Association of Southeast Asian Nations} members, Australia and New Zealand, along with 56% from China and 49% from South Korea.

As for Japanese exports, the deal is expected to eliminate Chinese tariffs on some scallops in the 11\textsuperscript{th} year after taking effect, a South Korean duty on candy in year 10 and Indonesian levies on some beef immediately after taking effect. Duties on Japanese sake and spirits are to be phased out as well.

Japan will maintain import duties on five politically sensitive product categories: rice, wheat, beef and pork, dairy and sugar. Tokyo scrapped import tariffs on 82% of farm and fishery products under the TPP and its deal with the EU.  

Furthermore, whereas CPTPP dealt with product standards and TBTs, and contained provisions on labor and environmental matters, RCEP did not.

So, for instance, RCEP did not deal with “product standards for new and innovative technologies such as 3D printing or Artificial Intelligence.” Likewise, in their e-commerce Chapter, RCEP Parties were “unable to agree on any rules on cross-border data flows or a customs moratorium on data transmission,” and the public policy exceptions in that Chapter appeared large enough to undermine those rules. As for dispute settlement, several RCEP Chapters were outside its jurisdiction until at least two years after RCEP entered into force, and then only with a review by RCEP Parties.

Thus, not surprisingly, Columbia University economist Jeffrey Sachs (1954-) urged “as the next step, the RCEP should strengthen cooperation on restoring [following the COVID-19 pandemic] tourism and trade, investing in renewable energy, and achieving sustainable development.” On the one hand, perhaps strengthening RCEP in these ways were the first of several steps. On the other hand, perhaps the differences between RCEP and CPTPP served the interests of the RCEP Parties, especially China. In particular, RCEP afforded China most of the tariff reduction benefits that CPTPP would have allowed, had China been a TPP Party.

But, RCEP did not force China to make major policy changes. CPTPP would require China to make significant reforms, unless the extant Parties waived or lessened the rules for Chinese entry. Japan said it would not do so, and accession of a new Party required unanimous consent of the existing ones. Examples of the relatively greater ambition of CPTPP over RCEP that would necessitate shifts include services market access, IP protection (including forbidding forced disclosure of software source code), SOE disciplines (for example, on fair competition, which are “partly a response to the global glut of steel and other products caused by aggressive capital investments by China’s state-

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600 RCEP Nations to Sign.
601 RCEP Agreement Will Transform.
602 Robin Harding & John Reed, Asia-Pacific Countries Sign One of the Largest Free Trade Deals in History, FINANCIAL TIMES, 15 November 2020, www.ft.com/content/2dff91bd-ceeb-4567-9f9f-c50b7876adce?shareType=nongift. [Hereinafter, Asia-Pacific Countries Sign One.]
603 Quoted in Maoling Xiong & Hua Xia, RCEP to Bring Significant Benefits to Members, Say Experts, XINHUA (XINHUA.NET), 17 November 2020, www.xinhuanet.com/english/2020-11/17/c_139522402.htm. [Hereinafter, XINHUA (XINHUA.NET).]
owned manufacturers”), and labor or environmental protection – all of which appeared unacceptable to the CCP led by President Xi Jinping (1953-, President, 2013).605

- **RCEP Historical Significance**

  Historically, the significance of *RCEP* – however shallow economically in comparison to other mega deals – could not be gainsaid. China, Japan, and Korea – adversaries during through the 20th century colonial period, Second World War, and Cold War – joined together in their first FTA, eliminating levies amongst them:

  Non-tariff items from Japan to China will jump to 86% from the current 8%. Likewise, non-tariff items to South Korea will be 92%, as opposed to 19% today.

  In automobile parts, 87% will be tradable tariff-free. Steel products, which are currently levied at 3% to 6%, and agricultural tractors, which are subject to 6% tariffs, will become tariff-free when the trade pact takes effect.606

  To be sure, China already had separate FTAs with ASEAN and Australia.607 Nonetheless, *RCEP* was a big step in China’s efforts to persuade its neighbors that its rise was peaceful by stitching those bilateral deals into the fabric of an Asia-Pacific regional deal. In brief, *RCEP* was China’s first non-bilateral mega deal following a century of upheaval.

- **RCEP Strategic Dimensions**

  Strategically, *RCEP* also mattered. China had driven the deal,608 presenting both America and India with a competitive challenge.609 During the 2020 Presidential debates, candidate Joe Biden intoned, “either China’s going to write the rules of the road for the 21st century on trade, or we are.”610 With *RCEP*, China was doing just that. As President-Elect, he intoned:

  “We make up 25% of the world’s trading capacity, of the economy of the world. We need to be aligned with the other democracies, another 25% or more, so that we can set the rules of the road,” Biden noted when answering a question on whether the U.S. should consider joining the *Regional

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606 *Eyes on Biden’s TPP Move.*

607 *See Eyes on Biden’s TPP Move.*

608 *But see Asia-Pacific Countries Sign One* (quoting Deborah Elms, Executive Director, Asian Trade Centre consultancy, Singapore: “*RCEP* has never been China-led or China-driven. This was *ASEAN’s agreement…. But once the agreement takes effect it will be hard for *ASEAN* to stay in the driver’s seat.”).

609 Mindful of this fact, an unnamed senior official at Japan’s METI said: “We don’t want Japan to be seen as entering a framework being led by China.” *Quoted in RCEP Summit on Nov. 15.*

610 *Quoted in Eyes on Biden’s TPP Move.*
Comprehensive Economic Partnership, “instead of having China and others dictate outcomes because they are the only game in town.”

As President, the pressure on Mr. Biden (1942-, President, 2021-) to re-engage America in the Asia-Pacific region, possibly via re-joining TPP, bilateral agreements with Taiwan, or both, was considerable.

Plausibly, China’s engagement with the region through RCEP potentially lessened its dependence on the U.S. as an export market – and, in turn, to continued impediments in that market caused by the Sino-American Trade War (discussed in a separate Chapter):

China, which had for years been unwilling to open up its markets, recently shifted course in its trade strategy. The new emphasis on opening doors to the outside world is a by-product of trade tensions with the U.S. Calculating that American pressure is not likely to ease under the Biden Administration, Beijing seeks to strengthen bonds with Asian neighbors to avoid being isolated internationally.

Through the Trade War, the U.S. had encouraged companies to re-orient their supply chains out of China. RCEP gave them precisely the opposite incentive. That was because of the common ROOs and simplified customs procedures under RCEP in comparison with the patchwork of ROOs and formalities under bilateral FTAs:

It’s possible the new “rules of origin” – which officially define where a product comes from – will have the biggest impact.

Already many [RCEP] member states have … FTA[s] with each other, but there are limitations.

“The existing FTAs can be very complicated to use compared to RCEP,” said [Executive Director] Deborah Elms from the Asian Trade Centre [in Singapore].

Businesses with global supply chains might face tariffs even within an FTA because their products contain components that are made elsewhere.

A product made in Indonesia that contains Australian parts, for example, might face tariffs elsewhere in the ASEAN free trade zone [AFTA].

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612 Eyes on Biden’s TPP Move.
Under RCEP, parts from any member nation would be treated equally, which might give companies in RCEP countries an incentive to look within the trade region for suppliers.\(^6\)

By way of example:

… [I]magine a company trying to create a toaster to be exported from Japan. Without RCEP, the Japanese company would not have received any possible tariff benefits from sending the toaster to China or South Korea as there was no trade agreement between them. If the company tried to sell the product into ASEAN, it would have needed to ensure sufficient Japanese and ASEAN parts and components were included in the final toaster, unless it was being sent to Singapore or Vietnam, where the Japanese company could use the rules of origin found in … CPTPP. If the Japanese company decided to ship the item to Australia, it would need to include enough content to meet either the existing bilateral trade rules or switch to using the CPTPP. New Zealand-bound toasters could be sent under CPTPP as there is no existing bilateral in place with Japan.

… But RCEP now makes it possible to design a toaster in Japan to meet RCEP rules and ship it straight to 14 other markets in Asia without redesign or remanufacturing. As an added bonus, the company only has to use one certificate of origin, rather than grapple with dozens of different forms.\(^6\)

Simply put, insofar as RCEP Parties strengthened their regional supply chains, including those linking them to China, a pan-Asian FTA was a means for China turn the Trade War into a sideshow.\(^6\)

\(^6\) RCEP: Asia-Pacific Countries. (Emphasis added.)

\(^6\) RCEP Agreement Will Transform.

\(^6\) See, e.g., Asia-Pacific Countries Sign One (observing “[a]ll of ASEAN’s trade agreements have different rules of origin so, for example, if a company in Indonesia makes a bicycle it might be eligible under a free trade deal with Japan but would need different components to be eligible under a deal with South Korea,” but “RCEP will sweep all of that away,” i.e., “[w]hen you manufacture a product for RCEP it works for all 15 countries,” “[a]nd there’s only one piece of paper that you need,’ said Deborah Elms” [also quoted above], who added that “the greatest consequence may be taking the first step towards Asia’s emergence as a coherent trading zone, like Europe or North America, because ‘Asia is integrated but it’s for the purpose of delivering goods to other markets,” said Ms Elms,’ [but] ‘RCEP changes that.’”

RCEP Agreement Will Transform (arguing “while Asia is already lined with trade deals, the net result has been a confusing ‘noodle bowl’ of mismatched commitments,” so “[c]ompanies have had to work hard to figure out what benefits might be on offer between any two markets in the region,” as “[t]he rules and procedures between agreements often differ, making them challenging to use” but with RCEP, “one rule of origin that applies to all of Asia,” so that “products that are manufactured to meet RCEP originating criteria can now be shipped to all 15 markets without the need for any adjustments in suppliers, raw materials, parts or components.”); Khanh Vu & Phuong Nguyen, Asia Forms World’s Biggest Trade Bloc, a China-backed Group Excluding U.S., REUTERS, 14 November 2020, www.reuters.com/article/asean-summit-rcep-signing/asia-forms-worlds-biggest-trade-bloc-a-china-backed-group-excluding-u-s-idUSKBN27V03K (reporting “RCEP could help Beijing cut its dependence on overseas markets and technology, a shift accelerated by a deepening rift with Washington”). Even America’s loyal ally and bilateral FTA partner, Australia, hoped for relations with China through RCEP, manifest tangibly in increased access to the Chinese market for Australian farm goods.
VIII. Does India Need Aggressive Regionalism?

Nearly three-quarters of a century after Britain partitioned India effective 15 August 1947, modern Indian politicians faced a challenge the country’s Founding Fathers could not have foreseen: rewriting India’s trade laws and policies. Jawaharlal Nehru, Mohandas K. Gandhi, and B.R. Ambedkar (1891-1956) thought laterally across multiple disciplines. Contemporary leaders included shrewd technocrats with Hindu nationalist biases presiding over unconnected fiefdoms. What they must do is ditch India’s long-standing commitment to multilateralism, and rewrite India’s trade history by shifting from Passive to Aggressive Regionalism. To do so, they must think like the Founders, that is, synthetically, integrating free trade doctrine with national security and public health imperatives, and act in unison.

● Flawed Assumptions of Passive Regionalism

Passive Regionalism rested on two key assumptions. Thanks to global economic, geopolitical, and public health developments, neither holds true anymore.

(1) Multilateralism facilitates India’s economic development

Partition cut 12 weeks before the birth of the multilateral trading system, with the 30 October 1947 signing – including by India and Pakistan, two of the 23 original contracting parties – of the General Agreement on Tariffs and Trade. Through eight successive rounds of GATT negotiations, culminating in the 1986-1994 Uruguay Round, India secured market access for its exports on most-favored nation and national treatment terms, with bound tariff schedules, to an ever increasing number of contracting parties, and ultimately 123 Members of the new WTO, born on 1 January 1995. India maintained the import substitution policies its Founders favored, benefitted from non-reciprocal preferences through special and differential treatment provisions in GATT-WTO treaties, and litigated trade disputes through the efficient, fair Dispute Settlement Understanding.

Multilateralism is moribund, maybe dead. The WTO as a negotiating forum died in July 2008 when a major Ministerial meeting failed to produce a consensus in favor of ambitious, cross-cutting texts on liberalizing goods and services schedules, cutting farm subsidies, and disciplining remedies. As for multilateral S&D treatment, the Trump Administration canned it in July 2019, when it declared it no longer would respect self-judgments of entitlement claims to “developing” country status. The Obama and Trump Administrations killed the Appellate Body, citing judicial activism and adherence to precedent.

None of today’s 166 WTO Members, calculating rationally, should rely principally on multilateralism to advance its economic development goals. Japan doesn’t. It joined

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GATT in 1955, but since 2002 has inked no less than 17 FTAs (including with India in 2011). Likewise, though its Communist Party joined the WTO in January 2007, Vietnam now boasts roughly 12 FTAs. Both are founding Parties to CPTPP. They are converts to aggressive regionalism, and India should follow them into CPTPP.

(2) Good neighbors

At Partition, China was in the last two years of its Civil War. The Communist Party took power on 1 October 1949. Within one year, Chairman Mao invaded Tibet and thereafter occupied Aksai Chin, the location of the deadly 15 June 2020 battle at the Line of Actual Control. Through war in 1962, China consolidated its grip on the region.

Nevertheless, India’s post-Partition leaders clutched the shibboleth that as a fellow poor, non-aligned nation, China could be engaged constructively. Thus, China became India’s largest source of imports (as per Table 44-3). In 2019, India bought $70 billion worth of electronic goods, industrial machinery, organic chemicals, and pharmaceutical ingredients. Along with chemicals, pharmaceuticals, the sectors most dependent on sourcing from China are automobiles, consumer durables, renewable energy (especially solar) items, and telecom equipment. Thus, unsurprisingly, India’s largest bilateral trade

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618 See Mahima Kapoor, Sectors, Stocks Most Exposed To India-China Trade Links, According To Motilal Oswal, BLOOMBERG QUINT (Mumbai), 25 June 2020, www.bloombergquint.com/business/sectors-stocks-most-exposed-to-india-china-trade-links-according-to-motilal-oswal. [Hereinafter, Sectors, Stocks Most Exposed.] Thus, in specific:

Automobiles
-- Over a quarter of total import content is from China with the country being a key supplier of sub-components used in engines, electrical/electronics, alloy wheels, tyres, etc.
-- It would be difficult to replace Chinese suppliers in certain segments like electrical and semi-conductors as the required scale and skill isn’t available at present.

Consumer Durables
-- Chinese brands in goods such as televisions and mobiles have strong presence in Indian markets while they’re looking to increase their presence in air-conditioner, refrigerator and washing machine segments.
-- Supply chain dependence on China for Indian brands is also high. It would be difficult to replace Chinese suppliers in critical components like compressors, LED chips, motors, mobile displays, etc.

Telecom
-- Telecom companies are dependent on network equipment providers like Huawei and ZTE for network access, which includes front-end telecom sites as well as backhaul network.
-- China services three-quarters of handset demand in India and is deeply entrenched in the global smartphone supply chain. Any disruption in Chinese products may have a major impact on 4G adoption in India.
deficit is with China, shipping just $18 billion worth of merchandise to its large(r) neighbor. That is a change: “From barely any deficit in 1999-2000, India ran a trade deficit of 1.7% of its GDP with China in FY20.”

This asymmetry poses a constraint on two drivers of India’s economic growth. India’s generic pharmaceutical companies are beholden, and its manufacturing sector exposed, to China (as the first four and bottom three rows, respectively, of Table 14-3 evince.) Ironically, applying Dependency Theory, India risks substituting its colonial periphery-core relationship with Britain to a post-Partition one with China.

Table 14-3
India’s China Dependence

<table>
<thead>
<tr>
<th>What India Need from China…</th>
<th>Means Dependence on China</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active Pharmaceutical Ingredients and Bulk Drugs Overall</td>
<td>70%</td>
</tr>
<tr>
<td>Raw Materials for Pharmaceuticals Overall</td>
<td>67%</td>
</tr>
<tr>
<td>Raw Materials for Antibiotics and Penicillin</td>
<td>90%</td>
</tr>
<tr>
<td>Starting Materials and Chemicals for APIs Made in India</td>
<td>85%</td>
</tr>
<tr>
<td>Air Conditioner and Refrigerator Parts</td>
<td>44%</td>
</tr>
<tr>
<td>Consumer Electronics</td>
<td>45%</td>
</tr>
<tr>
<td>Electronic Components</td>
<td>37%</td>
</tr>
</tbody>
</table>

And yet, starting in November 2012, India participated in the RCEP, the China-driven proposed FTA including the 10-country ASEAN, plus Australia, Japan, Korea, and New Zealand. Seven years later, when India withdrew from RCEP negotiations, it did so for the wrong reasons. India feared a flood of Chinese imports owing to Indian tariff and NTB

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**Pharmaceuticals**

-- Dependency on China for key starting materials is at 60-70%. A ban on imports from China could lead to supply chain disruption in the Indian pharma industry.

-- Due to economy of scale, raw materials procured from China are estimated at 20-30% cheaper than those manufactured domestically.

**Chemicals**

-- Raw material imports from China for Indian agrochemical industry ranges between 10-50% depending on the product portfolio.

-- Over the past three to four years, Indian agrochemical players are trying to diversify their sourcing requirement—identifying other countries to source from.

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**Utilities**

-- India is highly dependent on Chinese solar modules for construction of solar capacities.

-- 80% of module requirement is met from China. Any decision to curb imports for existing projects under construction is likely to result in tariff revisions (pass-through on costs).

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Id. 619 Sectors, Stocks Most Exposed.

reductions. Yet, import surges can be dealt with through safeguards, which India could have insisted for RCEP. Indian officials simply did not want to confront domestic constituencies benefitting from those barriers.

India’s record with its westerly neighbor is worse: wars with Pakistan in 1947-1948, 1965, 1971, and 1999, and no Kashmir settlement. Yet, India hopes for closer ties with Pakistan through the unambitious, exception-riddled 2006 South Asia Free Trade Agreement.

China and Pakistan are not good neighbors. They are dangerous ones. And, they are increasingly allied. With Pakistan unstable and potentially failing, China has a pliant vassal bound to it through the Belt and Road Initiative. It’s a Bollywood nightmare, except it might be real: India forced into a three-front confrontation, with China in the Western and Eastern Himalayan sectors, plus with Pakistan across Jammu & Kashmir, Punjab, Rajasthan and Gujarat.

Why Aggressive Regionalism and CPTPP Work for India

The COVID-19 pandemic spotlighted why good neighbors matter. Without broad, deep trade linkages to good neighbors further afield, such as Japan and Vietnam, India’s supply chains for medical equipment and pharmaceutical supply chains were insecure. That was a point PM Modi himself recognized, when in August 2020 he “proposed reshaping global supply chains based on trust and stability, and not just cost benefits, as the country eyes new logistics networks that are less dependent on China.” In addition to India’s geographical merits (e.g., proximity to Asian markets), the PM observed “companies are now also looking for reliability and policy stability,” and asserted “India is the location which has all of these qualities.”

Enter Aggressive Regionalism. Aggressive Regionalism finds no salvation in multilateralism, diversifies away from nasty neighbors, and energetically links India to like-minded, trustworthy winners across the Indo-Pacific.

Active Regionalism puts greatest emphasis to secure India’s export, import, foreign direct investment, and IP interests on blockbuster FTAs with multiple countries, at least some of which are large, dynamic markets, and most, if not all, of which share India’s secular democratic values. CPTPP satisfies these parameters.

The 11 CPTPP Parties account for 14% of world GDP. All are in North and Southeast Asia, the Antipodes, and Latin America, thus stretching India beyond its troubled

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622 Kiran Sharma & Takako Gakuto, Modi Calls for “Trustworthy” Supply Chains, in Alternative to China, NIKKEI ASIAN REVIEW, 4 September 2020, https://asia.nikkei.com/Economy/Modi-calls-for-trustworthy-supply-chains-in-alternative-to-China (also reporting that while Mr. Modi “did not mention Beijing by name, … the speech [on the theme of “Navigating New Challenges”] fits a recent trend of decoupling from China, as the two major countries face off on the Himalayan border”).
Himalayan and western borders. Save for Brunei and Vietnam, all are multi-party democracies (evidenced impressively in last month’s Singapore election). Even those two might be horrified by the excessively broad vagaries and extraterritorial reach of the CCP’s National Security Law for Hong Kong and its heavy-enhanced enforcement (discussed in a separate Chapter). Three CPTPP Parties (Brunei, Malaysia, and Vietnam) join the Philippines, Taiwan, and Thailand to dispute China’s Nine Dash Line claims across the South China Sea, while a fourth (Japan) disputes China’s claims in the East China Sea.

Integrating India’s economy with the TPP 11, decoupling it from China, and ending the time waste of SAFTA will serve India’s national security and public health interests. That’s because of specific Chapters in CPTPP that make this FTA more than about just economics. Consider these examples:

Chapter 3 sets out rules of origin that incentivize the Parties to integrate their supply chains amongst themselves so as to obtain duty-free, quota-free treatment, and ensure non-Parties, such as China, do not qualify for this treatment via minor operations or transshipment. Chapter 10, 11, 11, 13 provide for non-discrimination and market access for cross-border services trade (e.g., telemedicine), increased access for financial services along with sovereign regulatory policy space, and pro-competitive rules for telecommunication services, respectively, which can help meet the laudable ambitions of India’s potential global name brands, such as Reliance in its efforts to compete with Amazon, Walmart, and Zoom everywhere, but also account for Indian consumer interests.

Chapter 17 creates meaningful disciplines on State Owned Enterprises to ensure they operate on commercial considerations or, better yet, are privatized. CCP-subsidized Chinese SOEs account for part of the competitive disadvantage Indian businesses face. Chapter 14 on e-commerce, protects software source code, while Chapter 18 protects source code, while allowing for data flows with privacy protections. India’s IP sector should find such rules reasonable. Plus, there’s Chapter 21 on capacity building – surely

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627 See [www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/13.-Telecommunications-Chapter.pdf](http://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/13.-Telecommunications-Chapter.pdf).


as a developing country, India will find something in it to like.

In brief, joining CPTPP would mean that three quarters of a century after Partition, India would be in a trade deal not forced on it, like Britain’s imperial preference scheme, but chosen by it with a coalition of partners. Until then, the price would keep escalating, i.e., the longer India sat out of CPTPP, the higher the price it ultimately would pay for entry. As new Parties join, possibly India’s new ally, the U.S., and/or India’s former colonial master, the U.K., they will push India for deeper cuts to applied tariffs, broader services market access, greater transparency, and stronger IP protections (notably, the suspended Article 18:51 “5+3” rule, which might give India’s generic producers a headache). India needed those reforms, but its ability to set the pace of their implementation eroded every passing day it was passively, not aggressively, regionalist.

Hints of Change?

Notably, in October 2020, Union Commerce and Industry Minister Piyush Goyal signalled India’s aspiration for an FTA with the EU. That would be far more commercially significant than the trade and investment deal, which included a “Green Strategic Partnership” to collaborate on addressing climate change challenges, incentivize environmentally-friendly growth, and implement the December 2015 Paris Agreement goals, it inked the previous month with Denmark. The EU was the second largest destination for Indian exports, and the two were trusted partners, as evidenced by their cooperation on PPE and generic medicines during the COVID-19 pandemic.

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Chapter 15

MODI ADMINISTRATION TRADE POLICY PROMISE AND REALITY

I. Stop Tinkering

Indian officials fondly proclaim India’s relationship with any other country is not subject to a third country, *i.e.*, each relationship is independent of all others based on India’s rational self-interests. Poppycock.

All international relations are contingent. These officials deluded themselves with *ad nauseum* reminders that India has 1.4 billion population and the only ocean named after a country. But, were these post-Partition legatees somewhere between too scared and too complacent to take on inefficient domestic producers that, mollycoddled by protectionism, lack the economies of scale to compete in the Indo-Pacific region?

The result, Passive Regionalism, was doomng India in global trade in a geopolitical environment dominated by an ever-more assertive China and still-untamed pandemic.

Indian leaders have proclaimed their interest in a “strategic partnership,” specifically with the U.S. – the world’s largest and oldest democracies, respectively – regardless of which political party is in office. Yet, Indian trade officials, unable to connect the dots to national or health security, tinkered episodically with half-hearted measures like impeding Chinese industrial consignments at Indian sea and airports and debating a Border Tax Adjustment (BTA) under Section 3 of the *Customs Act, 1975*. Both were self-destructive red herrings.

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635 This Chapter is drawn from Raj Bhala, *Indian Trade Policy Trilogy*, first published in the *Manchester Journal of International Economic Law*:


(2) A Trilogy on India’s Contemporary International Trade Policy: Part Two – FTAs?, 20 *MANCHESTER JOURNAL OF INTERNATIONAL ECONOMIC LAW* issue 3, 337-376 (December 2023) (lead article), [www.electronicpublications.org/catalogue/267](http://www.electronicpublications.org/catalogue/267);


Special thanks are owed to that *Journal* and its Editor in Chief, Professor Dr. Asif H. Qureshi.

636 See Wajahat Khan, *U.S. and India Seek Strategic Partnership Regardless of Trump, Biden, Nikkei Asia*, 27 October 2020, [https://asia.nikkei.com/Politics/International-relations/US-China-tensions/US-and-India-see-strategic-partnership-regardless-of-Trump-Biden](https://asia.nikkei.com/Politics/International-relations/US-China-tensions/US-and-India-see-strategic-partnership-regardless-of-Trump-Biden) (quoting Rear Admiral (Retired) Sudarshan Shrikhande, former head of Indian Naval Intelligence: “Since we are two democracies, the strategic relationship has to be beyond whichever dispensation would be in power in either nation. The nuances and contours may change, but the foundation has to be deeper to hold the superstructure.”).

Non-transparent hold-ups hurt supply chains of American businesses operating in India that need those inputs, hindering India’s aspirations to be an FDI hub. The BTA would trigger counter-retaliation against Indian exports, and run afoul of the GATT Article III:2 national treatment rule. Worse, the July decision of the Delhi Hotel and Restaurant Owners Association to bar Chinese travellers from its 3,000 lodging facilities, and urge its budget hotels not to use Chinese-origin furniture or kitchen equipment, smacked of racism.

Indian officials also tinkered with outright protectionism. For instance:

India plans to impose stringent quality control measures and higher tariffs on imports from China, people with the knowledge of the matter said, as a military standoff between the neighbors threaten economic ties.

The state-run Bureau of Indian Standards is finalizing tougher norms for at least 370 products to ensure items that can be locally produced aren’t imported…. The products include chemicals, steel, electronics, heavy machinery, furniture, paper, industrial machinery, rubber articles, glass, metal articles, pharma, fertilizer and plastic toys.

Discussions are also on to raise import duty on products including furniture, compressors for air conditioners and auto components, they said. The proposal is being evaluated by the Finance Ministry amid the government’s push for local manufacturing.

The Trade Ministry is separately evaluating non-tariff measures to check Chinese imports in a manner that conforms to the World Trade Organization rules. Such measures would include more inspections, product testing and enhanced quality certification requirement[s]….


Government procurement is yet another area in which Indian officials took action against China in the aftermath of the 15 June 2020 lethal battle at the LAC, but which was underwhelming:

India restricted vendors based in bordering countries from supplying goods and services to government departments citing “national security” in another retaliatory move against the Chinese firms amid a border standoff.

Suppliers from nations sharing border with India will now have to register with the “competent authority” – comprising officers from commerce, home and foreign ministries – to be eligible to bid for procurement of goods and services by public departments, said a statement. This wasn’t necessary earlier.
Even if such tariff and NTB measures passed muster under WTO rules, they not only would impose short-term adjustment costs on Indian consumers, both wholesale and retail. Air conditioners are a case in point:

Indian makers of air-conditioners will be among the consumer durable companies that will see costs rise as the nation plans to increase duties on imports of components from China amid a border standoff. The Bureau of Indian Standards is considering tougher import norms for at least 370 items that can be locally produced. … Discussions are also on to raise import duty on furniture, compressors for air-conditioners and auto components. …

…

Level of localization is 50% for air-conditioners, and 15% or less for items like LED televisions, smartphones, and laptops. Electrical machinery and telecom equipment has the highest share in imports from China at 29.3%…. India’s overall trade dependence on China, according to the Ministry of Commerce, has doubled in the last decade [2010-2019] to $48.6 billion.

Higher duties will be a negative for air-conditioner manufacturers as compressors form 25-30% of the costs and are largely imported from China….641

It also is difficult to imagine that India’s trading partners, including China, would not counter-retaliate, thus hurting Indian producer-exporters. Most importantly, protectionism would neither rouse India from its sluggish inward-looking perspective nor push it to expand outward beyond its Sub-Continental neighborhood.

And, Indian officials tinkered with FDI policy, effectively barring Chinese companies from acquiring Indian ones without prior approval. That, too, triggered well-

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The fresh provisions will apply to all new tenders, and unregistered bidders won’t be eligible. Existing tenders that have crossed the first stage, including evaluation of eligible bidders, will be cancelled if shortlisted unregistered bidders are from neighboring countries.

It’s the latest in a series of measures aimed against firms from China, one of India’s largest trading partners, after a border scuffle left 20 Indian and an unknown number of Chinese soldiers dead.


And, one more measure India took against China, which mimicked U.S. policy in the Section 301 Sino-American Trade War (discussed in a separate Chapter), was to restrict visas for Chinese to India, and to scrutinize links between Chinese and Indian universities. See Sudhi Ranjan Sen, India Slaps New Curbs on Visas, Schools to Stem China Influence, BLOOMBERG QUINT (Mumbai), 21 August 2020, https://www.bloombergquint.com/business/india-slaps-new-curbs-on-visas-schools-to-stem-china-influence.


founded criticism:

Prior to 1991, India suffered the consequences of conservative FDI laws as compared to other Asian economies that welcomed foreign investment. Governments since then have recognised the importance of foreign direct investment as a key source of capital for the country’s growth and consistently liberalized the rules governing FDI to facilitate foreign investment. Data also reflects a positive correlation between FDI and GDP. …

In April [2020]…, India joined the ranks of several countries seeking to protect domestic companies from foreign takeovers in light of dwindling valuations caused by the rapidly unfolding pandemic. Through the issue of a press note followed by an amendment to the rules governing FDI, the central government mandated government approval for foreign investment from countries which share a land border with India, as well as foreign investment having ‘beneficial ownership’ from such countries. Amid global suspicions about Chinese investment strategy and its underlying security concerns, the government made this move to protect against opportunistic Chinese investments long before the unprovoked killing of our soldiers on the border sharpened anti-Chinese sentiment.

However, the amendment has scuttled non-Chinese investment without possibly intending to do so.

…

In its simplicity, the amendment has multiple ambiguities which have kept investors, investees and advisors guessing. The most conspicuous is the absence of guidance on what constitutes “beneficial ownership.”

Existing Indian laws dealing with beneficial ownership in India set out a threshold, ranging from 10% to 25%, above which it is considered relevant to look beyond a corporate entity to its ultimate beneficial individual owner.

Without a defined threshold, minority, financial or passive Chinese holdings in global pools of capital, holdings that have no control or bearing on investments by such capital pools in India, subject investments from key jurisdictions for capital like the U.S., U.K., Canada, Europe and Middle East to the bureaucracy, delay and intrusion of government approval.

A key class of capital most affected by this ambiguity is private equity/venture capital controlled by managers in countries mentioned above, who may have minority Chinese investors, but are far removed from control or espionage concerns.642

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In essence, a poorly drafted Indian measure was, thanks to its poor drafting, bore the unintended consequence of being over-inclusive, to the detriment of India itself.

Even the correct decision by the Ministry of Electronics and Information Technology to ban TikTok, WeChat, and 57 other Chinese apps – invoking Section 69A the Information Technology Act (Procedure and Safeguards for Blocking of Access of Information by Public) Rules 2009643 – were uncoordinated with the Ministry of Commerce and Industry. That decision was premised on data compilation, mining, and profiling that constituted privacy breaches644 “prejudicial to sovereignty and integrity of India, defence of India, security of state and public order”645 (The decision, and India’s follow-up actions in August 2020 to ban another 118 Chinese-linked apps,646 and in November to block a further 43 such apps,647 are discussed in the context of the Sino-American Trade War in a separate Chapter.) Also uncoordinated were the India-U.S.-Japan-Australia joint naval exercises in the Indian Ocean and Philippine Sea under the 2007 Quadrilateral Security Dialogue,648 and the Ministry of Finance restrictions on public procurement “to strengthen the defense of India and national security.”649

To be sure, all such moves were well-intentioned and resolute. But, none was part of a bold, inter-Ministerial strategy. Would not Nehru, Gandhi, and Ambedkar have pushed for synthetic thinking across economics, defense, and health?

II. September 2020 Failed Agricultural Reforms

Like each of his predecessors in South Block in the 20 years before he became PM, Modi Ji tried to implement at least some of the many key reforms needed to transform India’s traditional agricultural sector.650 This sector was in dire need of “new opportunities and better prices for farmers,” cutting waste (“often as high as four to five times that of most large economies”), and “new technology and investment” (including not only in traditional agriculture, but also in food processing and post-harvest infrastructure) – hence

644 See www.ft.com/content/08e15c26-48e0-4540-a040-1a8782e84f2e?shareType=nongift.
650 Revisiting India’s Agricultural.
the PM’s effort at reformist agricultural legislation.\textsuperscript{651} Alas, in November-December 2020, mass demonstrations erupted around Delhi, with supporting protests in London at the Indian High Commission on Aldwych, by farmers (and agricultural middlemen) from Haryana and Punjab who objected to the Modi Administration’s effort to reform (\textit{inter alia}) farm subsidies.\textsuperscript{652}

What triggered the protests were three laws the government the \textit{Lok Sabha} passed in September 2020 “meant to overhaul antiquated procurement procedures and give growers more options to sell their produce.”\textsuperscript{653} That is, the overall goal of the legislation was to reform India’s agricultural sector, stimulate farm exports, and boost farmer incomes.\textsuperscript{654} Over half of India’s 1.3 billion people toil in India’s agricultural sector.\textsuperscript{655} But to what end?

Agriculture accounts for “barely a sixth of the country’s GDP,”\textsuperscript{656} specifically, about 15% of India’s $2.9 trillion economy (as of March 2021).\textsuperscript{657} India captured only 2.17% of $1.5 trillion in global agricultural trade (as of 2018).\textsuperscript{658} India was (as of March 2022) “the world’s second largest producer of fruits and vegetables,” yet ranked 23\textsuperscript{rd} among the top fruit exporters, and was among only the top 15 exporters of vegetables.\textsuperscript{659} As for the farmers themselves, they were a diverse lot, with Punjab playing a central role in both the successes and problems of Indian agriculture:

For decades, the dominant stereotype of the Indian farmer has been one of a semi-literate, struggling man, who tirelessly ploughs the land. The reality is that India’s 150-odd million farmers are of different kinds – the big and

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\textsuperscript{651} Mayank Bhardwaj & Rajendra Jadhav, \textit{India’s Modi Backs Down on Farm Reforms in Surprise Victory for Protesters}, \textsc{REUTERS}, 19 November 2021, \url{www.reuters.com/world/india/indias-modi-repeal-controversial-farm-laws-2021-11-19/}. [Hereinafter, \textit{India’s Modi Backs Down}.]

\textsuperscript{652} See Revisiting India’s Agricultural, Thousands Protest in London Against India’s Farming Reforms, \textsc{REUTERS}, 6 December 2020, \url{www.reuters.com/article/us-india-farms-protests-britain/thousands-protest-in-london-against-indias-farming-reforms-idUSKBN28G000} [hereinafter, \textit{Thousands Protest in London}].

\textsuperscript{653} See Revisiting India’s Agricultural.

\textsuperscript{654} See Revisiting India’s Agricultural.

\textsuperscript{655} See \textit{Farm Laws: Are India’s New Reforms a “Death Warrant” for Farmers?}, \textsc{BBC NEWS}, 16 February 2021, \url{www.bbc.com/news/world-asia-india-54233080}. [Hereinafter, \textit{Farm Laws: Are India’s}].

\textsuperscript{656} \textit{Farm Laws: Are India’s}.

\textsuperscript{657} See Mayank Bhardwaj, \textit{India’s Farmers To Scale Up Protests As Rihanna Weighs In}, \textsc{REUTERS}, 3 February 2021, \url{www.reuters.com/article/us-india-farms-protests-with-social-media-solidarity-protesting-indian-farmers-win-global-attention-idUSKBN2A30QI}.

\textsuperscript{658} Revisiting India’s Agricultural.

\textsuperscript{659} Revisiting India’s Agricultural.
small; the landed and the landless. So, when it was reported that the protesters were having pizzas, there was some unkind social media chatter about whether these people really worked on the farms. It laid bare, again, how little urban Indians know about their rural brethren.

What Mr. Modi’s government and many people have possibly failed to understand is that many of the protesting farmers have deep linkages with urbanity.

Many of them have children in the army and police, speak English, use social media and have both travelled and have relatives abroad. The protest sites are well organised with clinics, ambulances, kitchens, facilities, libraries, and even its own newspaper. … “This farmer movement speaks the language of middle-class India. They are saying they are patriotic, and fighting for the rights they hold dear,” says historian Mahesh Rangarajan.

This is also not a conventional protest against farm distress or drought, which most governments have been successful at managing. This agitation is ironically a consequence of Punjab’s success in farming – the state is the biggest beneficiary of government-guaranteed prices of wheat and rice, and elaborate state-supported marketing structures.

These have now become a millstone around Punjab’s neck – a glut of two crops has led to overflowing stocks, stagnating incomes and depleting groundwater. “The challenge is that Punjab has been unable to transition from a largely well-to-do farming society to one where there is environmentally sustainable agriculture and industrialization,” says … [Askoka University Political Science Professor Pratap Bhanu] Mehta.

More than 85% of India’s farmers are small and marginal, and they work on some 47% of the total farming land.660

As for the Food Corporation of India held “twice the recommended levels of public stockholding of grain,” but could not “find a domestic or global buyer” for its stockpiles.661

Following 18 rounds of talks between the government and over 30 farmers’ unions, the Modi Administration offered to postpone implementation for 18 months the legislation.662 The farmers balked at the offer, and the government repeal all three laws “and make binding commitments to public procurement of grain at fixed prices.”663 Their movement had “gained international attention and support, including from celebrities such

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661 Revisiting India’s Agricultural.
662 India’s Farmers Set.
663 India’s Farmers Set.
as climate activist Greta Thunberg and U.S. singer Rihanna,\footnote{Anushree Fadnavis \\& Zeba Siddiqui, \textit{Indian Farmers Block Highway Outside Delhi To Mark 100th Day of Protest}, \textit{REUTERS} 6 March 2021, \url{www.reuters.com/article/us-india-farms-protests/indian-farmers-block-highway-outside-delhi-to-mark-100th-day-of-protest-idUSKBN2AY07A}. [Hereinafter, \textit{Indian Farmers Block Highway}.]} as well as Meena Harris, niece of Vice President Kamala Harris (1964, Vice President, 2021) – all of which triggered an accusation from the Indian government that “foreign individuals” were guilty of “sensationalism.”\footnote{Farmers’ Protest: Rihanna Tweet Angers Indian Government, \textit{BBC NEWS}, 3 February 2021, \url{www.bbc.com/news/world-asia-india-55914858}. [Hereinafter, Farmers’ Protest: Rihanna Tweet.]} On 6 January 2021, the Supreme Court of India stayed implementation of the legislation, and ordered a special committee to review the competing arguments of the government and farmers. And, on 6 March, the farmers marked their 100\textsuperscript{th} day of protests: “Tens of thousands of farmers from several north Indian states have been camped out on the outskirts of the capital in bitter cold since December [2020] demanding that the laws be repealed.”\footnote{Indian Farmers Block Highway.} Over 500 protestors had been injured, and at least one killed, in tractor rallies that ended in violent clashes at Delhi’s historic Red Fort.\footnote{See Farm Laws: Are India’s; Farmers’ Protest: Rihanna Tweet; India Protest: Farmers Breach Delhi’s Red Fort in Huge Tractor Rally, \textit{BBC NEWS}, 26 January 2021, \url{www.bbc.com/news/uk-55793731}.} 

Taken together, the three legislative enactments were designed to “loosen rules around sale, pricing and storage of farm produce – rules that have protected India’s farmers from the free market for decades.”\footnote{Farm Laws: Are India’s.} The government had good reason to mount the effort:

Where is it cheaper to buy rice? At a village market in India, a country where 377 million people live below the poverty line? Or on the trading screens of the Chicago Mercantile Exchange?

Shockingly, it’s often the latter. Rough rice futures on the CME averaged $12.63 per hundredweight since the start of September and traded as low as $11.85, equivalent to about $233 a metric ton. Meanwhile, the minimum support price at which India’s government buys un-milled rice from farmers has been fixed at 1,868 rupees per quintal in the same marketing year, or $254 a ton at average exchange rates.

The gap is even wider for wheat, whose minimum support price has averaged a 25\% premium to soft winter wheat futures in Chicago in the current marketing year…

That disparity stems from distortions. Jawaharlal Nehru, the first Prime Minister of Post-Colonial India, repurposed Soviet state planning for a democratic setup, and from 1956 invested heavily in sectors that made machines to produce industrial goods. By the mid-1960s, though, it became apparent to Nehru’s successors that a shortage of basic consumption items...
mostly farm output – was getting in the way of hiring and paying India’s abundant labor. That’s when minimum support prices came into being, … to coax farmers to feed a rapidly growing population.

But in a poor country, high prices assured to growers can’t be passed on to consumers. When both are subsidized, the cost can be as high as 4.2 trillion rupees ($58 billion) in a pandemic year – and even half of that otherwise. Also, nine out of 10 farmers who own less than five acres have been largely left behind by post-1990s reforms that have widened the productivity gap of non-farm labor over agricultural workers to 5.5 times, among the highest in the world.

More than three-fifths of the 1.3 billion population is stuck on the farm, and kept there with a $11 billion fertilizer subsidy; $9.5 billion in unmetered electric power; about $4 billion annual expenditure on periodic loan waivers; and of late an $80-a-year income supplement, which adds up to $9 billion. For the landless, there’s a rural job guarantee, which cost $15 billion after migrant workers lost their urban jobs to the Covid-19 lockdown and returned to their village homes.669

So, the core of the reforms concerned India’s unique mandi system.

“Mandi” is the Hindi term for “market,” which may be public or private, wholesale or retail. The reforms proposed to lessen the role of public, wholesale mandis characterized by MSPs and increase the prominence of private, retail mandis:

For long, farmers have sold their crops in 7,000-odd government-regulated wholesale markets or “mandis” across the country. They are run by committees made up of farmers, often large land-owners, and traders or “commission agents” who act as middlemen for brokering sales, organizing storage and transport, and even financing deals. The new reforms allow farmers to rely less on these markets and promise to improve their income [by, as explained below, selling directly to private mandis].670

To be sure, the mandi system was beset with complex regulations and bedevilled by personal relationships. Moreover, other rules designed to help farmers were poorly targeted and created inefficiencies – and resentment – across commodity markets that, at bottom, faced long-term structural problems.

The government provides them [farmers] generous subsidies, exemption from income tax and crop insurance. They are guaranteed prices for 23

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crops and debts are often waived when they are unable to pay off loans.

But farmers have been on the boil for some years now.

India’s farmers are mostly small or marginal: 68% of them own less than one hectare of land. Only 6% of them actually receive guaranteed price support for their crops, and more than 90% of the farmers sell their produce in the market. More than half of the farmers, in the words of an economist, “don’t even have enough to sell.”

From low productivity to fragmented landholdings, lack of storage infrastructure and high indebtedness, there are several reasons for persistent agrarian distress in India.

Declining productivity and lack of modernization have long hobbled progress.

Plot sizes are shrinking, as are incomes from farming. Prices can be wildly erratic and middlemen form cartels gobble up much of the profits. Of course, farmers were “mainly concerned” these reforms:

eventually lead to the end of wholesale markets and assured prices, leaving them with no back-up option. That is, if they are not satisfied with the price offered by a private buyer, they cannot return to the mandi or use it as a bargaining chip during negotiations.

“First, farmers will feel attracted towards these private players, who will offer a better price for the produce. The government mandis will pack up meanwhile and after a few years, these players will start exploiting the farmers. That’s what we fear,” Multan Singh Rana, a farmer in … Punjab, said.

The government has said the mandi system will continue, and they will not withdraw the Minimum Support Price (MSP) they currently offer. But farmers are suspicious.

“This is a death warrant for small and marginalized farmers. This is aimed at destroying them by handing over agriculture and market to the big corporates. They want to snatch away our land. But we will not let them do this,” Sukhdev Singh Kokri, a farmer, told BBC Punjabi.

“Giving the freedom to the farmer to sell outside the mandi system, to whoever, is a welcome step, in unshackling the farmer,” says economist Ajit Ranade.

Farm Laws: Are India’s.

International Trade Law E-Textbook (Bhala, 6th Edition, 2025)  University of Kansas (KU)
Volume Eight  Wheat Law Library
“But you need the mandi system to coexist with private trading system. Perhaps the government needs to come out with a written law that they will not withdraw the MSP or the mandi system.”

Other analysts also say that much greater reforms – in land use for instance – are needed to give private players any real clout.

India still has stringent laws around the sale and use of agricultural land, and high subsidies that protect farmers from market forces.672

Table 15-1 summarizes the controversial legislation.

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672 Farm Laws: Are India’s.
### Table 15-1

**Synopsis of 2020 Indian Agricultural Legislation Reforms[^673]**

<table>
<thead>
<tr>
<th>Name of Law</th>
<th>Goal</th>
<th>Advantages (For the Government)</th>
<th>Disadvantages (For Farmers)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Essential Commodities (Amendment) Act, 2020</td>
<td>Define the instances in which the <em>Essential Commodities Act</em> can be invoked with respect to foodstuffs.</td>
<td>Provides greater stability and certainty to companies.</td>
<td>Does not resolve the problem of hoarding by traders. Private buyers would be able to hoard essential commodities (e.g., pulses, rice, and wheat) with a view to selling them in the future (whereas only government-authorized agents had been allowed to do so).</td>
</tr>
<tr>
<td>The Farmers Produce Trade and Commerce (Promotion and Facilitation) Act, 2020</td>
<td>Allow privatization of agricultural marketing by permitting a private agricultural market (<em>mandi</em>) to operate in parallel with an Agricultural Produce Marketing Committee (APMC, in effect, a middleman between farmers and retail consumers, and which run the government-regulated wholesale <em>mandis</em>, but which have been complex and infused with regulations and personal</td>
<td>A private <em>mandi</em> can be established close to where food is grown, and a farmer can sell in an area outside the APMC for a higher price. A farmer can sell directly to a private buyer, such as agricultural business, supermarket chain, or online grocer, at a market price (whereas most farmers had been selling the majority of their output to a government-controlled wholesale market, or <em>mandi</em>, with an</td>
<td>Marketing and trade will shift from an APMC, which have been the point of first sale for farm goods, and provided an MSP, to a private <em>mandi</em> where an MSP will not apply (i.e., there is no guaranteed price for produce), thus farmers will lose the protection of an MSP (i.e., of a guaranteed price for their produce). The APMCs, the marketing boards established by state governments to ensure (1) large</td>
</tr>
</tbody>
</table>

[^673]: This Table draws on *Revisiting India’s Agricultural; Farm Laws: Are India’s; What Has Brought.*
| The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020 | Regulate contract farming. | Contract farming (whereby a farmer tailors production to the demands of a specific buyer) will be normalized under a regulatory framework that provides a farmer with security, and also will allow small landholders to band together to form Farmer Producer Organizations. | Farmers still lack sufficient legal protection and will have to fight corporate entities, against which they will have little bargaining power or redress, thus their landholdings will be at risk. |

Four reforms were especially needed, and included in the legislation:

1. Incentives for wheat and rice farmers, especially in Punjab and Haryana, to “switch to more lucrative cash crops,”

2. Replacement of current subsidies with “a robust income support program,” in other words, a shift from government assistance via guaranteed price supports (whereby farmers are paid a government set-price) to deficiency payments (whereby they receive the difference, if any, between a higher target and lower market price),

3. Encouragement of “strong farmers’ collectives,”

4. Installation of “safety nets like crop insurance” and “a trusted/fair contract

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farming dispute resolution mechanism." 675

However, farmers feared the legislation ultimately would “dismantle India’s regulated markets and stop the government from buying wheat and rice at guaranteed prices, leaving them at the mercy of private buyers.” 676

That was because farmers had become dependent on the current support system, hence wanted to scrap legislation reforming it:

A small section of India’s agriculture – most notably in Punjab – relies excessively on selling rice and wheat to the government at so-called minimum support prices. The purchase takes place in markets, known as “mandis.” One of Modi’s bills gave farmers the freedom to sell their produce outside the designated yards – and without having to pay taxes and fees to one of India’s 29 state governments. For grain cultivators, the worry that cropped up was, “If the mandi falls into disuse, will the government stop buying from us at guaranteed prices?”

The fear isn’t entirely irrational. The Food Corporation of India’s granaries are overflowing. The excess stock costs the taxpayer $25 billion, money that could have other uses in the post-Covid economy. Farmers know this. One of their demands is for legal backing for minimum support prices, something that could have ugly consequences for public finances. Authorities currently announce prices for 23 commodities, but these are largely meaningless except for wheat, rice and cotton in a few states.

Punjab is the dominant beneficiary. Each of its 1 million farming households gets $1,600 a year in subsidized fertilizer and free electricity to pump groundwater…. They get these privileges, plus the minimum assured price, in exchange for fulfilling a half-century-old promise of not letting the country starve.

Changing this social contract is necessary. A water-guzzling rice crop isn’t suitable for Punjab. Overuse of groundwater is depleting aquifers, and the burning of paddy stubble is causing hazardous pollution in northern India. But farmers need downside protection before they can be made to believe that markets will bring them prosperity. One way may be to introduce an additional law guaranteeing a basic farm income, benchmarked to every state’s agricultural value added.

The other tweaks [i.e., changes to the three agricultural laws] will involve correcting design flaws. Denying farmers the right to take disputes with

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676 *Thousands Protest in London.*
private buyers to civil courts is problematic. Modi’s contract farming law won’t take off if small landholders fear they’ll be exploited. Relaxing strict rules on hoarding, the final part of the reform package, may benefit farmers’ organizations with sufficient warehousing capacity. But the big winners will be trading companies.

Market supremacy won’t reform India’s agriculture, but a combination of markets and institutions might.\(^{677}\)

The protests posed a dilemma for Indian PM Modi, who promised to transform agriculture, but could not tolerate indefinite chaos in the country’s food markets. And (as intimated above), underlying the conflict over agricultural reform legislation was a difference of philosophy concerning reliance on markets versus institutions:

The dispute is over which strategy to pursue. Markets or organizations? That’s an old dilemma, made famous by economist Ronald Coase in 1937. Modi is leaning toward markets, promising to turn the entire country into a free trade area benefiting 119 million farmers and 144 million farmhands, plus their families. A large and growing number view this move as an end to institutional state support, which they fear will allow profiteering corporations to rush into the resulting vacuum.\(^{678}\)

But leaning toward markets was, to farmers, leaning toward big players against the proverbial small farmer:

Modi has touted the rules – which remove a bar on private companies buying directly from growers – as giving farmers more freedom to transact, enhancing their earning potential.

But many view the deregulation as a step towards ending state procurement of food grains at guaranteed prices. Farmers believe this will leave them at the mercy of powerful corporations such as Mukesh Ambani’s Reliance Industries and Gautam Adani’s eponymous company, claims both companies deny.

“They want us to become contract farmers – bonded laborers on our own farmland,” said Jaypal Singh, 72, who has camped out on National Highway 9 since late November [2020]. “Modi wants to hand our ancestral [land] to Ambani and Adani.”\(^{679}\)

The fiasco set back India’s efforts to modernize its agricultural sector.

On the one hand, the government failed to communicate clearly and behave

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\(^{677}\) Modi Needs One.

\(^{678}\) Modi Needs One.

\(^{679}\) India’s Farmers Set.
transparently with farmers. On the other hand, farmers suspected the worst from well-intended legislation. The result, as Pratap Bhanu Mehta, Professor of Political Science at Ashoka University, said was the conflict was:

“about a lack of trust in the government and an assertive articulation of federalism.”

…

Both the government and farmers agree that farming needs reform. But they cannot agree on specifics. “There are solutions. But the farmers don’t trust the government,” says Prof Mehta. And therein lies the real problem.

It all seemed avoidable. In fact, from a WTO perspective, the game was not zero sum:

India can work around its international obligations to reduce price support, by providing income support to its farmers, a lumpsum cash payment as is already being done by states like the Haryana, West Bengal, and Odisha…. This will incentivise crop diversification, with the adjoining benefit of protecting the already-depleted water tables. Companies like United Phosphorous, Mahindra, and Godrej Agrovet are already involved in this, providing solutions to farmers to produce high value crops and move away from the wheat-paddy cycle. It will reduce India’s subsidy bill at the WTO since cash transfers are not calculated as part of trade distorting subsidies. It is also through these mechanisms that countries like the U.S. can give their farmers large subsidies at the WTO and not face penalties.

Simply put, India could transform traditional agriculture by putting its trade-distorting subsidies into its Green Box, and thus both providing farmers with income security and reducing India’s vulnerability to criticism from the U.S. and other developed countries for sponsoring trade-distorting Amber Box subsidies. India suffered from a lack of strategic, synchronized policy making. As long as India kept segregated its domestic reform legislation from its WTO commitments, and likewise as long as it eschewed ambitious

680 See How Narendra Modi Misread (explaining how and why PM Modi and the BJP failed to anticipate the farmers concerns, noting Mr. Modi had not faced mass protests, either as PM or in his previous post as Gujarat Chief Minister, and observing: “In colonial India, peasant revolts against exploitative rulers often turned violent. Since Independence in 1947, farmers have staged demonstrations against falling crop prices, indebtedness and farm distress. But none have seen the staggering levels of cohesion and mobilisation – involving some 40 farmers’ unions, more than half a million protesters, and large swathes of civil society – as the ongoing agitation.”).

The fired up again in September 2021. See India Farmers’ Protests: Tens of Thousands Join Rally in Uttar Pradesh, BBC NEWS, 5 September 2021, www.bbc.com/news/world-asia-58455866 (reporting: “Tens of thousands of farmers have gathered in the Indian state of Uttar Pradesh to protest against new agriculture laws. … The farmers want state authorities to repeal controversial farm legislation. Organizers described the rally as the biggest protest since their movement began last November [2020]. … The Indian government says the laws, which loosen rules around how farmers can sell their produce, will give farmers more freedom. But opponents say the reforms leave small farmers vulnerable to big corporations.”).

681 Quoted in How Narendra Modi Misread.

682 Revisiting India’s Agricultural.
FTA commitments, it would continue to underperform in world agricultural trade.

Alas, there were “no easy answers:”

Reforming farming in India is a fiendishly complex challenge.

On the one hand, a large portion of the population – big and small farmers, and the landless who work on farms – need to be ensured a decent income.

On the other hand, there are well-founded questions about food security and the impact of farming on the environment.

Farmers in Punjab, Haryana and Maharashtra states, for example, need to be weaned away from producing an excess of subsidised, water-guzzling crops such as wheat, paddy and sugarcane that deplete groundwater. A glut of these crops has led to overflowing stocks and paltry gains to farmers.

Then there’s the challenge of moving people out of un-remunerative farming to factory jobs. But where are the jobs, ask some experts, who say such sweeping change cannot stem from isolated reforms, especially in a country that is still so dependent on agriculture.

…

“For freedom is about actual, viable choices. Choices that you can realize. The point is to expand opportunities and you need to do that by investment in agriculture and the creation of livelihoods off the field,” says Mekhala Krishnamurthy, an Associate Professor of Sociology and Anthropology at Ashoka University.

In other words, on the one hand, farmers could not expect to be protected in perpetuity from market forces of supply and demand with respect to pricing and sales, and output and storage, of commodities. On the other hand, “experts agree[d] that in a country where agriculture employs so many millions, leaving farmers’ fates to the vagaries of the market cannot be the only answer.” Neoclassical liberal economic freedom neither can be avoided nor is a panacea.

Perhaps predictably, in November 2021, the Modi Administration capitulated to one year’s worth of protests by India’s farmers. In its most dramatic policy reversal since becoming PM in May 2014, it repealed all three agricultural reform laws. Mr. Modi said

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683 Farm Laws: Are India’s.
684 What Has Brought.
685 Farm Laws: Are India’s.
686 See Nigam Prusty, India’s Parliament Passes Bill to Repeal Controversial Farm Laws, REUTERS, 29 November 2021, www.reuters.com/markets/commodities/indias-parliament-passes-bill-repeal-controversial-farm-laws-2021-11-29/ (reporting: “India’s Parliament … passed a bill to repeal three laws aiming at deregulating agricultural markets, bowing to pressure from farmers who have protested for over a year to demand that the laws be rolled back. Prime Minister Narendra Modi’s Administration introduced the farm bills last year through an executive order, traditionally reserved for emergency legislation, triggering
that “despite several attempts to explain the benefits to the farmers, we have failed.” He was right – the government never could persuade farmers to change their preference for the longstanding APMC mandi system and guaranteed MSPs:

The reforms, at least on paper, gave farmers the option of selling outside of this so-called "mandi system". But the protesters said the laws would weaken the farmers and allow private players to dictate prices and control their fate. They said the MSP was keeping many farmers going and without it, many of them will struggle to survive.

They said India’s stringent laws around the sale of agricultural produce and high subsidies had protected farmers from market forces for decades and there was no need to change that.

But the government argued that it was time to make farming profitable for even small farmers and the new laws were going to achieve that.

Why was the government unpersuasive? The answer is an admixture of factors:

The Samyukta Kisan Morcha (SKM), an umbrella group of some 40 farmers’ unions, had refused to back down despite appeals from the government to end their protest.

Farmers continued to block motorways to Delhi through harsh winter and summer months and even through deadly Covid waves. They called for strikes across the country and dozens of them even died due to cold, heat and Covid.

The government initially engaged with them and offered to put the laws in abeyance for two years. But after farmers rejected their overtures, the authorities retreated, preferring to go with the wait-and-watch attitude.

… PM Modi’s Bharatiya Janata Party (BJP) is up against strong regional parties in the upcoming elections in Punjab, Uttar Pradesh and Uttarakhand and the government knows that angry farmers would hurt the BJP’s chances of winning the crucial polls.
In other words, the government was guilty of a combination of “haste, high-handedness and lack of legislative acumen,” and Mr. Modi and his BJP became increasingly wary of alienating the Sikh community:

The laws aimed at deregulating the market had whipped up an unprecedented firestorm of protest in the states of Punjab and Uttar Pradesh and posed a real challenge to Mr Modi. They had mobilised farmers and civil society in Sikh-majority Punjab and spread quickly to parts of Uttar Pradesh, states which will see key elections early next year. Taken aback, Mr Modi’s government had called protesters names and stubbornly stuck to its position.

The BJP, which had not anticipated such a blowback, has been trying hard to placate the Sikhs. Much of its executive meeting earlier this month was devoted to assuaging the community’s sentiments: increasing farm budget and crop prices, re-opening a historic corridor to one of Sikhism’s holiest shrines in Pakistan, a fresh probe to punish the guilty in the 1984 anti-Sikh riots in Delhi [following the 31 October 1984 assassination of PM Indira Gandhi (1917-1984, PM, 1966-1977, 1980-1984) by her Sikh bodyguards, Satwant Singh and Beant Singh, allegedly in revenge for the 1-10 June 1984 Operation Bluestar, in which she ordered the Indian Army to root out Sikh separatist terrorists from the Golden Temple in Amritsar.]

Also, the government was clearly getting jittery about the growing alienation of the Sikh community over the laws.

History holds grim lessons in Punjab, a strategic border state: a violent separatist movement in the 1980s was fuelled by similar estrangement of the community. There were warnings from the Party faithful: The Sikhs “should not be bothered,” Satyapal Malik, a former BJP Vice President and present Governor of Meghalaya state, said in October [2021], adding that the community has risen against the government and even powerful empires in the past.

By repealing the laws, Mr. Modi hopes to regain the confidence of the farmers in general and Sikhs in particular.

As far as the farm laws are concerned, the repeal reveals the BJP’s lack of legislative acumen. Much of Mr. Modi’s supposedly bold reforms that were bulldozed through the parliament are stuck: his government has failed to implement a land acquisition law; the rules of new labour laws and a controversial citizenship laws have been delayed. A large part of this blame must lie with the Party’s failure to engage with the opposition in parliament and rushing legislation.
As for those who had supported the farm reforms, it is again a salutary lesson that good economics often makes for poor politics...691

Once again, India had squandered an opportunity at substantively meaningful reform.

PM Modi’s “capitulation” ended the farmers’ protests.692 But, it left “unresolved a complex system of farm subsidies and price supports that critics say the government cannot afford,” plus “raise[d] questions for investors about how economic reforms risk being undermined by political pressures.”693 Indeed, the repeal of the farm bills was not enough for the farmers; the Modi Administration faced a counter-attack on MSPs:

In addition to their repeal demand, protesting farmers are also asking that Modi’s administration introduce a law to secure government prices for produces beyond just rice and wheat. read more

The government currently buys rice and wheat at state-set … MSPs, but the subsidies only benefit about 6% of India’s millions of farmers.

Protesters are demanding MSPs for all crops - a move that has galvanised growers across the country and taken the protest beyond India’s grain-growing states of Punjab and Haryana.694

The entire saga had adverse consequences for India’s international trade negotiating positions. India could not consider significant farm trade liberalization, whether through FTAs or the GATT-WTO, however much it needed to do so. In pulling the farm legislation, the government handed the SKM a veto the country’s foreign agricultural trade policy.

Ironically, it was not obvious that what the farmers most wanted – MSPs – was in their best interests. Consider this analysis:


See Farm Laws: India Farmers End Protest After Government Accepts Demands, BBC News, 9 December 2021, www.bbc.com/news/world-asia-india-59566157 (reporting: “Indian farmers have said they are ending a year of mass protests a week after the government agreed to abandon controversial agricultural reforms. Thousands of farmers had camped at the borders of the capital, Delhi, with dozens dying from heat, cold and Covid. … The movement had become one of the biggest challenges for Prime Minister Narendra Modi’s government. The farmer groups took the decision after ministers agreed to discuss their other demands, including guaranteed prices for produce and a withdrawal of criminal cases against protesting farmers. … The move was hailed as a victory for farmers and also as a powerful example of how mass protests could still successfully challenge the government. … The government also agreed to provide compensation to the families of the farmers who died during the protest. … The government had promised to form a committee, which will include representatives from the federal and state governments, agriculture scientists and farmer groups.”).

India’s Modi Backs Down.

India’s Parliament Passes Bill.
The big idea behind introducing floor prices is that they provide a measure of financial security for farmers, especially in a country where nearly half of the gross cropped land is dependent upon unpredictable monsoon rains for irrigation.

Price guarantees can also help farmers decide what crops to plant and in what proportion. In other words, the system facilitates production planning at a time when most of India’s farmers still have no access to reliable demand forecasting. All of which may explain the widespread support for a price floor scheme.

In practice, however, price floor schemes do not work, except maybe for commodities like rice and wheat, where the government buys enough of the annual crop so as to influence the market price. Or, in the case of sugar cane, where governments can force processors to buy all the cane supplied to them at prices fixed by federal or state governments. But when it comes to other crops, minimum support prices are not backed by an effective procurement mechanism.

As for when it comes to deciding what crops to plant, again, contrary to popular belief, farmers do not make decisions based on minimum support prices announced before planting season. Planting decisions are actually based on last season’s prices, which actually provide the much-needed price signals for the average Indian farmer. The push by the nation’s farm lobbies for legislated minimum prices for all crops does not make sense.

Not only would the infrastructure necessary to support such legislation cost serious money, but it also would be fiscally ruinous in a country the size of India, as well problems related to wastage and corruption. According to official estimates, 86% of Indian farmers are considered small and marginal, owning less than two hectares of land and who do not produce marketable quantities.

Obviously, an open-ended procurement system funded by taxpayers would end up being monopolized by rich farmers in a few states such as Punjab, Haryana, and Telangana in case of rice, and Punjab, Haryana, Madhya Pradesh, and Uttar Pradesh for wheat. These rich farmers also appropriate most of the subsidies on chemical fertilizers, electricity, and water. But even the richest of them do not pay any income tax.

Moreover, assured procurement and lucrative prices fixed by the government without taking into account changing consumer demand incentivizes the cultivation of water guzzler crops in water-deficient regions.
Thus, the share of rice paddy in Punjab’s total cultivated area has steadily gone up from 5% in 1960 to a whopping 40% in 2020, while the share of pulses in Punjab’s total cultivated area has steadily gone down from 19.1% in 1960/61 to 0.5% over the same period, even though lentils are a popular food item in Punjab. And with the unrestricted pumping of groundwater facilitated by near-free electricity, no wonder the state’s groundwater table has been falling by a meter a year.

Many argue that assured procurement at fixed prices for all crops will remove the bias toward specific crops such as rice or wheat. Maybe, but the same job can be done by a crop-neutral income support program that does not require the creation of a hugely expensive procurement infrastructure. Similarly, a well-developed futures market for agricultural commodities would help minimize price risks for farmers.

Some argue that implementing a countrywide price deficiency payment system will help. Under such a scheme, instead of directly procuring all kinds of farm produce, the government would pay the difference between the minimum support price and the market price. This would involve smaller expenditure commitments on the part of the government as there is no need to create any procurement infrastructure.

While this is an excellent suggestion, with the difference in the two prices borne by taxpayers, most farmers would be encouraged to sell off their entire output immediately after harvest, irrespective of demand conditions, leading to a collapse in market prices – especially for perishables.

That, in turn, will substantially increase the government’s payment liabilities and is the reason why Madhya Pradesh, which introduced its own price deficiency payment system in 2017, could not continue it.

Thus, is the best solution – for the farmers, and for the common good in India – “a well-developed futures market along with a crop-neutral income support program,” so as to “reduce price risk and ensure surety of income for Indian farmers”?

Perhaps. But that is not how the farmers saw it. In February 2024, they again protested angrily in Delhi. They demanded the Modi Administration keep the promise it gave to them two years earlier, namely, (1) introduce MSP legislation to create a guaranteed price that would allow them to sell most of their output at a government-controlled wholesale market (i.e., a mandi), and (2) double farm household incomes, and

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696 *Price Guarantees Will Not Help.*
(3) withdraw court cases filed against them during the earlier protests. The answer they got back was a crackdown, plastic and rubber bullets, and tear gas and water cannons, from police and paramilitary forces. And so the deadlock continued.

III. March 2021 Clumsy Proposed E-Commerce Regulations

On e-commerce, India has struggled to forge a coherent, credible policy. The themes of its reform efforts have been to promote fair competition, maintain a level playing field, reduce market distortions, and avoid digital monopolies. So, the government has drafted proposed rules that (inter alia) would (1) allow the government to collect information from e-commerce platforms, (2) ensure an e-commerce operator does not collect data from a platform and use it gain a market advantage against sellers on its own platform, (3) oblige e-commerce operators to be transparent about discounts they offer, including the extent to which discounts are funded by a platform, and the differences among discounts and funding for products and suppliers, and (4) identify rogue e-commerce entities that sell predominantly pirated goods. But, these efforts have been clumsy and tinged with a socialist attitude that fails to make nuanced distinctions among e-commerce participants.

Thus, India’s third attempt, in March 2021, to “draft [an] e-commerce policy to tighten control over tech behemoths such as Amazon Inc. and Walmart-owned Flipkart in … the world’s second-largest internet market” failed to correct problems associated with the prior proposed frameworks. For instance, the third draft “propose[d] to ensure algorithms created by e-retailers do not discriminate against sellers, and do not adopt algorithms which result in prioritizing a specified seller.” Yet, are those democratizing algorithms sensible, given the tremendous differences in size, scale, and quality of sellers and their merchandise?

With respect to coherence, the government had not pulled together three vital elements to forge a synthetic approach to digital trade: (1) data privacy, (3) FDI promotion, and (3) digital versus physical retail distinctions. On (1), how much data would the government be empowered to collect from e-commerce operators and platforms? Likewise, how much could it collect on consumers? On (2), given the government’s separate moves to reform FDI laws (discussed earlier in this Chapter), to what extent could it encourage

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700 See *India’s New Draft E-Commerce.*

701 *India’s New Draft E-Commerce.* Specifically, the draft policy stated: “E-commerce operators must ensure equal treatment of all sellers/vendors registered on their platforms and not adopt algorithms which result in prioritizing select vendors/sellers.” *India’s Draft E-Commerce Policy.*
investment from overseas without prejudicing domestic e-commerce operators? In other words, how do e-commerce and FDI rules relate to one another? And, on (3), fundamentally, the scope of the draft e-commerce rules was unclear. That is because the government has not defined “e-commerce.” Whether this key term includes the purchase of goods (e.g., food) or services (e.g., travel tickets) is unclear.

To be sure, the rules would “apply to Amazon and Flipkart – two top e-commerce players in India – as well as domestic players like Reliance Industries, which … plan[ned] to expand its JioMart online platform.” (That was not the only area in which Reliance looked for a leg up on foreign competition: laptop computers was another one in which Reliance hoped to be the domestic champion.) But, who else might come within its ambit?

On credibility, the government has not appointed a single e-commerce regulator, but rather called upon a variety of ministries to coordinate e-commerce policy and enforcement. How, then, can the government ensure equal treatment of sellers? How can it prevent one operator from gathering information on a platform and using it for anti-competitive purposes (e.g., to gain a market advantage over another operator)?

IV. Privatization, Strategic Sectors, and Poverty

702 India’s New Draft E-Commerce.  
703 India’s Draft E-Commerce Policy.  
704 See Munisif Vengattil, Exclusive: India’s Reliance Jio to Launch 4G Enabled Low-Cost Laptop at $184, REUTERS, 3 October 2022, www.reuters.com/technology/exclusive-indias-reliance-jio-launch-4g-enabled-low-cost-laptop-184-sources-2022-10-02/ (reporting: “Reliance Jio will soon launch a laptop priced at just 15,000 rupees ($184) – one of the cheapest on offer in India, aiming to replicate the success of its low-cost phone…. Indian billionaire Mukesh Ambani’s Reliance is known for disrupting businesses with cutthroat price offerings. Jio, its telecoms unit, has been credited with upending the world’s no. 2 mobile market with cheap 4G data plans and free voice services in 2016. Last year [2021], it followed that up with its 4G JioPhone that costs $81. The laptop, to be called JioBook, will be embeded with a 4G sim card. … The JioBook will be produced locally by contract manufacturer Flex with Jio aiming to sell ‘hundreds of thousands’ of units by March….”).  
705 In June 2021, India proposed tightening its e-commerce rules yet further to ban so-called “flash sales.” See Aditya Kalra, India Plans Tighter E-commerce Rules Amid Complaints Over Amazon, Flipkart, REUTERS, 21 June 2021, www.reuters.com/world/india/india-plans-tighter-e-commerce-rules-amid-complaints-over-amazon-flipkart-2021-06-21/. In August, India threatened Flipkart with a U.S. 1.35 billion penalty for violating foreign investment laws. See Aitya Kalra, Aftab Ahmed & Sanjeev Miglani, India Enforcement Agency Warns Flipkart, Founders They Could Face $1.35 bn Fine, REUTERS, 5 August 2021, www.reuters.com/world/india/exclusive-india-enforcement-agency-threatens-flipkart-founders-with-135-bln-fine-2021-08-04/. That month, the Supreme Court of India ruled “Amazon and Walmart’s Flipkart should face investigations into alleged anti-competitive behavior,” a decision the Minister of Commerce welcomed with a reference to India’s independence movement. Aditya Kalra & Nupur Anand, Invoking “Quit India,” Minister Welcomes Amazon, Flipkart Ruling, REUTERS, 10 August 2021, www.reuters.com/world/india/invoking-quit-india-minister-welcomes-amazon-flipkart-ruling-2021-08-10/ (reporting: Piyush Goyal welcomed the Court’s decision while speaking in the Indian parliament, where he invoked the ‘Quit India’ campaign – a movement launched in 1942 by India’s iconic freedom fighter Mahatma Gandhi demanding an end to British rule,” saying: ‘These companies used legal tactics to stall the investigation … I am happy to tell you that yesterday, on the day of the Quit India Movement, all the efforts of these companies failed,’ Goyal told Indian lawmakers.”).
Prime Minister Narendra Modi called for bold action, namely, the privatization of 100 PSUs worth Rs. 2.5 lakh crore. In February 2021, he intoned:

… [T]he government will push ahead with plans to “monetize” and “modernize” the assets of the country. The Prime Minister said that public sector enterprises which do not occupy a position of strategic importance should not be kept functional. The only responsibility of the government, he said, is to support the country’s enterprises and businesses.

“I can understand the need of any public sector enterprise if it is fulfilling the needs of any sector and of any strategic importance. It is the responsibility of the government to supply support country’s enterprise and business but there is no need for the government to be in business,” said PM Modi.

Reiterating his government’s stance on privatization, the Prime Minister said, “We have made it clear in the new public sector enterprise policy that government will have limited role in only four strategic sectors and all other public sector units can be privatized.”

… The Prime Minister insisted that the push behind privatization would lead to less governmental interference in people’s lives, reinforcing his previous vision of “minimum government, maximum governance.”

The PM appreciated the historical rationale during India’s immediate post-Independence years for establishing the PSUs, but said that logic no longer applied:

“We cannot continue with public entities just because they have been operational for so long. The government’s focus should be on the welfare of society and policies related to people. It sounds like misusing the talent of our officers to keep them in the business operation of public entities.”

In other words, selling and/or closing SOEs would alleviate poverty, because of the crowding out effect they had on what had become a trade-off between supporting them or helping the poor:

Several of these PSUs … were, in fact, a burden on the exchequer as their losses have to be funded. Though Modi didn’t mention names, Air India ran

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708 Quoted in Government Has “No Business To Be In Business.”
up losses of Rs 27,255 crore in FY16-20. Funding these losses have meant, Modi said, that many less schools, less roads, less hospitals, etc; so while the country’s poor have the first right on government resources, funding PSU losses was cutting into their rights.

And though the prime minister didn’t actually use the term “asset recycling,” by using the proceeds of privatisation – and asset monetization by selling assets of PSUs – to build new roads etc he was pointing out that, far from selling the family silver, he was helping the country’s poor.\textsuperscript{709}

An additional rationale for aggressive privatization, was to stimulate competition. The predominance of SOEs in so many economic sectors throttled the entry of agile private sector agents.\textsuperscript{710}

Of course, debate raged about what four sectors would be deemed “strategic” and thus remain in public hands.

Seven Indian Ministries submitted arguments to the PM that the industries they regulate should be deemed “strategic.”\textsuperscript{711} Telecommunications seemed a sure bet, as were defense and shipping.\textsuperscript{712} The Shipping Ministry pointed out the peculiar nature of shipping, and the absence of FDI in the sector despite the lack of restrictions on such investment:

The Ministry argued that shipping has been “neglected” even though 80-90% of India’s trade by volume is handled by it, across the country’s 7,500 km-long coastline. It said the global economic crisis of 2008 aggravated troubles in the shipping sector which is “very capital intensive, involving long gestation periods” with low profit margins. Indian shipping companies haven’t been able to grow due to the “perceived higher risk profile”, impacting their ability to borrow funds….

\textsuperscript{709} Sunil Jain, \textit{Narendra Modi’s Talk of Privatization Implies Big Reforms}, \textsc{Financial Express} (Noida, Uttar Pradesh) 26 February 2021, \url{www.financialexpress.com/opinion/narendra-modi-talk-of-privatisation-implies-means-big-reforms/2202084/} [Hereinafter, \textit{Narendra Modi’s Talk}].

\textsuperscript{710} Conversely, for remaining SOEs that would compete on commercial terms with private enterprises, India needed Constitutional amendments:

\begin{quote}
Right now, PSUs are considered an “instrumentality of state;” that is, they have to behave exactly like the government would do. That is why, for instance, they need to take out tenders for most things they procure. While that may help ensure public money is not lost to corruption, how can PSUs hope to compete when their private sector counterparts don’t have to call for tenders for everything? So, in areas where PSUs are competing with the private sector, the Constitutional amendment can say, they will no longer be considered … “instrumentalities of state.”
\end{quote}


\textsuperscript{712} \textit{New Privatization Policy: Why The Shipping}.
To press the government to keep shipping units under its control, the ministry also cited limited private interest. There has been no foreign direct investment in the sector over the past two decades, it said, adding that 100% FDI was allowed in the sector in 2001. “100% FDI in ports and shipping is allowed under both government and automatic route for over last two decades. However, not a single global shipping company has used the option to invest and start a shipping company in the country. Foreign shipowners don’t need to come to India to carry Indian cargo when they can access the same cargo based in Singapore and Dubai,” the Shipping Ministry said.

Higher risk, lower returns and “unfavourable tax structure and operating conditions” have kept foreign investors away, the Ministry said.

The ministry cited the importance of SCI for energy and national security — two of the five factors which the government listed for delineating strategic sectors — while opposing its privatization.

The Ministry said it’s important that a certain amount of Indian tonnage of merchant ships is owned by the government, which is the model followed by most maritime nations. It used China as an example, saying that the neighboring nation has three state-owned shipping firms which have 11% share of the global tonnage compared to India’s share of only about 1%.

Ironically, the Shipping Ministry partly undermined its argument in admitting tax and operational concerns impeded FDI. That admission suggested the sector was not intrinsically strategic, and that the government could take policy measures to boost FDI.

Overall, how far should the exemption from privatization go? Should it, for example, be comprehensive in all other sectors, and be forbidden in the strategic ones? In theory, the government insisted it “want[ed] to keep a ‘bare minimum presence,’ while in other sectors all units may be considered for privatization.”

But, would that work in practice? India’s Ministry of Defense did not want any defense-related PSUs privatized, arguing:

private industry has not “evolved enough to match the requirements of the Armed forces” and “ceding control” of the state-owned units to private players will “seriously jeopardise country’s security.”

“... Privatization of PSUs will create a private sector monopoly which may be detrimental to the national security” the Ministry argued.

It said the argument for privatization, which is that it will help achieve

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713 New Privatization Policy: Why The Shipping.
714 New Privatization Policy: Why The Shipping.
economies-of scale and improve productivity, may not be valid in the case of state-owned defence companies as “their area of operation involves manufacturing of technologically-advanced and customized product range especially in case of shipyards where the product has a long gestation period with limited market.”

…

The arguments made by the Ministry suggest “they just want to keep control over these firms,” Former Army chief General (retired) V.P. Malik, who headed the Army during the Kargil War of 1999, said.

One of the other concerns raised by the Defence Ministry was that the ecosystem around PSUs in the sector, which includes small businesses, will be hurt by privatisation. To this, Malik said that MSMEs selling their products to defence PSUs, will continue to do so even if the company is in private hands. “This is also how major manufacturers like Tata, Mahindra or Ashok Leyland get their products,” Malik said.

Malik said the lack of competition in the defence sector, which the ministry cites as an argument against privatization, has resulted in no improvement in quality and technology, leading to higher costs. “If the private sector is already manufacturing major weapon systems, such as multi-barrel rocket launch systems, how can you say they have not evolved themselves?” Malik said.715

Moreover, given that private firms can play complementary roles with PSUs (e.g., through private-public partnerships), and that PSUs were capacity constrained (i.e., they could not necessarily meet all needs of the Indian Armed Forces in a timely manner, particularly in the event of a crisis with China or Pakistan), was the effort by the Defense Ministry to keep the entire sector under government control more about political power than economic reality?

V. Toward a New FTA Policy?

● 2022 CEPA with UAE

Facing a bevy of criticism, from overseas and at home, about its foolish cling to multilateralism to achieve India’s international trade interests, when the WTO was moribund, and its failure to advance those interests by fearfully withdrawing from RCEP failing to apply to CPTPP, and thus falling behind further China (an RCEP Party and CPTPP applicant), the Modi Administration signalled a change in its FTA policy. In February 2022, India signed an FTA with the UAE, its first bilateral trade agreement in the

Gulf region.\textsuperscript{716}

Indo-Emirati FTA negotiations started on 22-23 September 2021 and prioritized by both sides. After 88 days of negotiations, the two Parties signed the deal on 18 February 2022, and it entered into force approximately 60 days thereafter (i.e., the first week of May).\textsuperscript{717} The hallmarks of that 881-page deal,\textsuperscript{718} formally entitled the India-UAE Comprehensive Economic Partnership Agreement (CEPA), included the following:\textsuperscript{719}

(1) **CEPA** reduced tariffs on at least 80\% of goods traded between the Parties, and provided duty-free access to 90\% of India’s exports to the UAE.

So, for example, “[e]xports from India that could benefit from the **CEPA** include textiles, gems & jewellery, petroleum products, engineering and machinery products and chemicals,”\textsuperscript{720} as well as “leather, footwear, sports goods, engineering goods, and pharmaceuticals,”\textsuperscript{721} and “plastic, medical devices, and automobiles.”\textsuperscript{722} All of them were labor-intensive sectors, hence market access gains for Indian exports to the UAE could translate into job creation and security for Indians working in these sectors.

(2) In addition to goods and ROOs and customs procedures for them, **CEPA** covered services (including MRAs for several professions), FDI government procurement, IPRs, digital trade and e-commerce, SMEs, and sustainability.

(3) Impressively, on IPRs, “in a first, agreed to facilitate market access and regulatory approval within 90 days for Indian pharmaceutical products and medical products that have been approved in developed jurisdictions such as the U.S., the U.K., the EU, Canada, and Australia.”\textsuperscript{723}

However, a free trade deal with the UAE was low-hanging fruit for India. That is, query whether **CEPA** was an ambitious FTA.

First and most obviously, coverage of just 80\% of Indo-Emirati trade meant, by definition, India had been reluctant to schedule tariff concessions on upwards of 20\% of imports from the UAE. On the one hand, the 80\% target likely satisfied the GATT Article


\textsuperscript{718} See *India Inks Free Trade Deal with UAE*. 


\textsuperscript{720} See *India-UAE FTA Text Likely.*

\textsuperscript{721} India, UAE Sign FTA.

\textsuperscript{722} *India Inks Free Trade Deal with UAE.*

\textsuperscript{723} India, UAE Sign FTA.
XXIV “substantially all trade” requirement (discussed in a separate Chapter). And, “further tariff concessions were expected on both sides over 5 years that would lead to lower tariffs for 98 per cent of exports and 90 per cent of imports from the UAE.”

On the other hand, the 80% threshold was far lower than what USMCA and other major FTAs boasted. The Parties deferred any further tariff cuts, holding out that prospect buy not mandating it. They also deferred agreed-upon tariff cuts, i.e., not all merchandise that CEPA covered received DFQF EIF. For example, examples of “Indian exports [that were] set to get zero duty access within a further 5 to 10 years [after EIF], include[ed] electronic goods, chemicals and petrochemicals cement, [and] ceramics and machinery [, which] account[ed] for about 9 per cent of the value of current exports to the UAE.” So, not surprisingly, the expected annual bilateral trade boost across the first 5 years of its implementation was $100 billion, up from $60 billion on the eve of the deal. That was impressive, but not hugely so, especially given non-CEPA causes (such as a gradual recovery in world trade hit by the COVID-19 pandemic) were at play. Likewise, the projected gains for the UAE were not overwhelming: an additional “1.7%, or $8.9 billion, to its national GDP by 2030.”

Second, aside from certain steel, metals, and minerals, the UAE exports little else other than energy and energy-related (including petrochemical) merchandise and services. Hungry to fuel its industrialization in competition with China, India needs them at the cheapest cost possible:

The UAE was India’s third largest trading partner in 2020-21 with the country exporting goods worth $16.7 billion and importing items valued at $26.6 billion. India’s major imports from the UAE include petroleum and petroleum products, precious metals, gems and jewellery, minerals, chemicals, and wood products.

…

The proposed CEPA is also important because of its strategic interest to India since UAE is a top supplier of petroleum to the country and could play a major part in strengthening relations with the entire Gulf region.

Thus:

[Indian PM Narendra] Modi and the Abu Dhabi Crown Prince also issued a “joint vision statement” which establishes a roadmap for a future-oriented partnership between the two sides, with the shared objective to promote new trade, investment, and innovation in diverse sectors, including economy, energy, climate action, emerging technologies, food security, health care

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724 India, UAE Sign FTA.
725 India, UAE Sign FTA.
726 India Inks Free Trade Deal with UAE (also reporting that before CEPA EIF, already the Emirates was “India’s third-largest trade partner, accounting for about 40% of the South Asian nation’s trade with the Arab world.”).
727 India-UAE FTA Text Likely.
and defense.

“The UAE is one of India’s key energy providers and remains committed to meeting India’s growing energy demand,” the vision statement said. “Further work will be undertaken to identify new collaboration opportunities to support India’s energy requirements, including new energies, and ensure the provision of affordable and secure energy supplies to India’s growing economy.”

Securing energy supplies from the UAE also helped India navigate, and adhere to, U.S. secondary sanctions on Iran (discussed in a separate Chapter), which barred India from accessing Iranian oil and natural gas.

Accordingly, in entering CEPA, Indian farmers and manufacturers had no worries about significant import competition from like products from the Emirates. As India’s Commerce Minister, Piyush Goyal, said: India and the UAE were “natural partners” that “complement each other, with hardly any element of competition.” In other words, in terms (discussed in a separate Chapter) of Adam Smith’s Law of Absolute Advantage, and David Ricardo’s Comparative Advantage, CEPA was all about Absolute Advantage – and that is the easiest instance in which to dismantle trade barriers.

Indeed, under CEPA, India seemed able to protect its sensitive sectors, while at the same time obtaining inputs it needed from the UAE. Other than energy, gold from the Emirates used by Indian jewelers was an example. Said Indian Commerce Minister Piyush Goyal, “We’ve given tariff concessions to UAE on gold, and they have eliminated tariffs on jewellery.”

Even that concession was circumscribed: “India had agreed to concessional import duties on gold imports up to 200 tons per year.” (In FY2021, “India imported about 70 tons of gold from the UAE,” hence at EIF, the cap was passive, but improved market conditions could render it active.) And, if India (or the UAE) faced an import surge in a product, CEPA contained a safeguard to protect its businesses.

Not surprisingly, then, India’s key concern in making tariff concessions – other than protecting sensitive domestic sectors – was to minimize third-country trade transhipment. ROOs were the prevention device to do so:

Since India’s import duties, on both industrial and agricultural goods, are much higher, especially for sensitive sectors, it has greater responsibility of protecting its industry against import surges. “New Delhi’s key concern is
that the UAE should not be used by third countries to ship their products to India at concessional import duties negotiated under the CEPA. While the Indian industry can face competition from the UAE, the situation can get serious if items from other countries also start getting in. It is, therefore, important to fix strong rules of origin,” … an [unnamed] source said.734

So, CEPA contained “robust rules of origin to protect both economies from misuse of the agreement by third countries, including a requirement of ‘melt and pour’ for steel exports to qualify as domestically produced products from either country.”735

Even this example was exaggerated, because the melt and pour ROO was standard for steel and used, for instance, in the U.S. Section 232 steel case (discussed in a separate Chapter). Ironically, the Commerce Minister “noted that the deepening of the relationship with the UAE would also help Indian exporters gain access to other West Asian countries, Africa, and some parts of Europe.”736 True, insofar as Indian exporters shipped goods through Dubai’s world-class port facility. False, in that they could not obtain DFQF treatment under CEPA into any third-country market. Rather, if they expected such entry, they would have to qualify their merchandise as originating in the Emirates under an applicable UAE FTA with a third country, which surely would mean they would have to engage in productive, substantially transformative, activity in the UAE.

Third, stood to benefit from continued UAE-financed FDI. Emirati investments in India between 2000-2021 totalled $11 billion, placing the UAE among the top 10 investors in India.737 CEPA might increase and accelerate these flows, especially into infrastructure, as India (for obvious geopolitical and national security reasons) neither could nor would accept Chinese BRI financing. Likewise, it was mainly Indians – not Emiratis – who fuelled services (e.g., accountancy, construction, engineering, hotel, IT, law, restaurant, travel, and tourism) in the UAE. Liberalization of service sector trade was win-win.

Fourth, from the Emirati perspective, markets stocked with low-cost Indian merchandise the UAE either does or cannot produce, entering duty-free, is welcome. Indeed, that is why the import duties the UAE imposed on most goods was 5% (including $26 billion worth of Indian exports as of the signing of the deal),738 and thus why the gains for Indian exporters were likely to be minimal.

Indian farmers would realize no benefits, because Emirati tariffs on most agriculture products, including fruits, meats, tea, and vegetables, were zero.739 Indian exporters of alcoholic, carbonated, and sweetened beverages products faced a 50% duty, and a 100% tariff on e-smoking devices and tobacco products. Whether booze imports into an officially Islamic country, or sugary drink and cigarette imports into a country that fared

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734 India-UAE FTA Text Likely.
735 India, UAE Sign FTA.
736 India, UAE Sign FTA.
737 See India-UAE FTA Text Likely.
738 See India, UAE Sign FTA.
739 See India-UAE FTA Text Likely.
rather poorly on physical fitness metrics (e.g., obesity), would surge from India was dubious – notwithstanding any tariff decline.

Fifth, CEPA contained no robust provisions to safeguard labor rights, prevent workplace discrimination against women and LGBTQ+ persons, or promote the environment. In these respects, put mildly, neither India nor the UAE had a grand record. CEPA could have been an opportunity for the Parties to show the world they cared not only about maximizing Smith-Ricardo Absolute and Comparative Advantages, but also about advancing social justice. Instead, India’s Commerce Minister focused solely on the former, forecasting CEPA “will open a million job opportunities for the youth of the country.”

Likewise, CEPA appeared to contain no path-breaking dispute settlement mechanisms to help advance the rule of law in both countries on subjects the FTA did cover.

- 2024 FTA with EFTA

In March 2024, India announced its second potentially commercially consequential FTA with a western democratic country – four of them, EFTA (which consists of Lichtenstein, Iceland, Norway, Switzerland). The deal (with effect from 2025), took a ridiculous 16 years to negotiate and set an equally ridiculous 15-year phase in period. It obliged India to “lift most import tariffs on industrial products from four European countries in return for investment of $100 billion over 15 years;”

It envisages that the European Free Trade Association, will invest $100 billion over 15 years in India’s fast-growing market of 1.4 billion people, [India’s] Trade Minister Piyush Goyal said.

In turn, India will lift, or partially remove, very high customs duties on 95.3% of industrial imports from Switzerland, excluding gold, either immediately or over time…. 

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740 India Inks Free Trade Deal with UAE.
741 In 2022, India and Australia inked an FTA – the Australia-India Economic Cooperation and Trade Agreement:

The deal with India removes tariffs on more than 85% of Australian goods exports to India, … rising to almost 91% over 10 years.

Tariffs will be scrapped on sheep meat, wool, copper, coal, alumina, fresh Australian rock lobster, and some critical minerals and non-ferrous metals to India.

Australia, India Sign Trade Deal in Virtual Ceremony, REUTERS, 2 April 2022, www.reuters.com/world/asia-pacific/australia-india-trade-deal-open-biggest-economic-door-morrison-2022-04-02/. With details sketchy at the announcement, full appraisal of this agreement – whether it heralded a major change in India’s FTA policy toward ambitious FTAs – was difficult. Perhaps there continued to be a longstanding problem of transparency?

742 Manoj Kumar, India Says Europe Trade Group Commits to $100-billion 15-Year Deal, REUTERS, 10 March 2024, www.reuters.com/world/india-says-europe-trade-group-commits-100-bln-15-year-deal-2024-03-10/. [Hereinafter, India Says Europe Trade.]
“Norwegian companies exporting to India today meet high import taxes of up to 40% on certain goods,” [Swiss] Industry Minister Jan Christian Vestre said ….

“With the new deal, we have secured nil import taxes on nearly every Norwegian good.”

The pact covers some new elements such as intellectual rights and gender equity, Goyal added, telling a press conference, “It is a modern trade agreement, fair, equitable and win-win for all five countries.”

So, the Indo-EFTA agreement seemed not to be “ambitious” in the best sense of the term.

First, the FTA scripted a dilated implementation period. Second, it omitted, in a de facto sense, at least one key sector, gold (i.e., what Switzerland exports and what India uses in its jewelry industry: “India … committed to cut its ‘bound tariff rate’ on gold to 39% from 40%, but … [did] not anticipate much impact on imports of the metal from Switzerland.…” But, to be fair, the longest NAFTA 1.0 tariff phase out period was 15 years. And, the acceptance by India of gender equity provisions was impressive – assuming India fully implemented them in practice.

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743 India Says Europe Trade.
744 India Says Europe Trade (also reporting: “India is the EFTA grouping’s fifth-largest trading partner after the European Union, the United States, Britain, and China, with total two-way trade of $25 billion in 2023…. ‘The agreement contains a comprehensive and legally binding chapter on trade and sustainable development,’ the Swiss government said. ‘This will enable the EFTA states, in particular, to address trade-related sustainability considerations.’”).