

Reclaiming Development in the World Trading System. By Yong-Shik Lee. New York: Cambridge University Press, 2006. Pp. 208. \$70.00.
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INTRODUCTION

It is a common place of contemporary economic scholarship to try to explain why underdeveloped countries have failed to *modernize* or *develop* themselves. With the help of adequately chosen cross-country correlations, any economist can conveniently craft (and prove) her gift for prophecy. The top-hit list of proposed panaceas for growth range from combating levels of corruption and embracing the rule of law, to reducing the rates of fertility. As William Easterly has put it “like the ancient questors, we economists have tried to find the precious object, the key that would enable the poor tropics to become rich. We thought we had found the elixir many different times. The precious objects we offered ranged from foreign aid to investment in machines, from fostering education to controlling population growth, from giving loans conditional on reforms to giving debt relief conditional on reforms. None of them has delivered as promised.”¹

In understanding why all panaceas failed and, more importantly, what else is there for us to do, we may well have to start with a word of caution. The combination of two dichotomies, *exogenous* versus *endogenous* and *necessary* versus *sufficient*, should serve us to get a first grasp of the fact that not all relevant variables for growth can be controlled by policy makers in the first place. To be sure, this is the obvious case of natural resource endowments, but not only. Jeffrey Sachs and the New Millenium troop have ‘officially’ acknowledged the necessity of palliating the effects of other uncontrollable factors such as being located far from the sea or the incidence of tropical diseases.

Yong-Shik Lee’s *Reclaiming Development in the World Trading System*, on the contrary, moves along the parcels of reality that better allow for strategic manoeuvring. In the premise that not all challenges to growth come from being under an evil star, and that bad policies -as bad luck- can kill growth, Lee focuses on the interaction between the world trading system, as it is today, and the economic development of the underdeveloped. Going from micro to macro and from local to global, the legal framework for international trade becomes relevant to poverty and development from the moment that the specific regulatory requirements of trade disciplines “not only affect the conduct of trade” (p.18), but also interfere with the ability of developing countries to adopt effective development policies (p.10). As to the tone, Lee is explicitly inspired in the historical analysis of economic development conducted by Ha-Joon Chang in *Kicking away the ladder* (2002), and sets his query with the conviction that there are several inconsistencies between the provisions of the current regulatory framework for international trade, “represented by the WTO” (p.14), and the developmental needs of developing countries.

But his, however, is not a mere voice of protest. Always concise and fairly pragmatic, the book moves away from utopian social engineering or mind-numbing technical formulas to identify, first, the economic policies which might lead poor countries on to a path of self-sustaining growth, and to present, then, an arsenal of proposals -varying both in elaboration and implementability- on how the trade disciplines should be redefined to allow developing countries

¹ WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH xii (2001).

adopt effective development policies. His personal intuition on the *necessity* maxim is that “[a]lthough a development-friendly trading system alone may not be sufficient to facilitate economic development, it is nevertheless essential.”²

This Review proceeds as follows. I begin, in Part I by addressing Lee’s diagnosis that some GATT/WTO provisions have put roadblocks on the path of development for many, if not all, developing countries, and signalling some of the criticisms that have been levelled at WTO’s decaffeinated compromise to assist economic development. In Part II, I turn to the medicine. I will go through Lee’s main proposals outlining how trade disciplines should be redefined as to be congruent with a genuine commitment to the development ‘of the rest,’ and ultimately, with the goal to eradicate world poverty. I will also touch briefly on what I think are his two most innovative proposals, the “Development Facilitation Tariff” and the “Development Facilitation Subsidy.” Since the rigors of these suggestions, to be (hopefully) implemented in the heart of the WTO, could still be easily circumvented by more powerful countries through the strategic utilisation of WTO-sanctioned trade measures, Part III serves as a complement to Part II by illustrating the problems posed by the World Trade Court’s current interpretation on anti-dumping actions and safeguard measures, and indicating how the rules on trade sanctions should be amended in order to refrain developed countries from frustrating the goals of these new provisions. In Part IV, I will take this developmental ‘regulatory box’ out of the darkroom and assess the likelihood that it ever gets marketed, that is, the chances that any of Lee’s proposals can ever come into fruition. Part V, closes with a final assessment on why keeping developmentalism at a merely *rhetoric* stage, may not be as good a strategy in the Hobbesian state of nature as it may appear to some in countries in the North.

I. THE BARGAIN FOR TRADE AND THE PROMISE THAT WASN’T

At the core of the axiomatic foundation of the book, lies a proposition so modest in its pretensions that it runs the risk of *feeling* tautological. After acknowledging that the majority of the world population has not been able to share in today’s world unprecedented prosperity, Lee undertakes that the only lasting solution for the human tragedy of persistent poverty is “to create an economy in these countries through economic development that would provide inhabitants with adequate resources and sustain their living standards beyond subsistence” (p.3). It is his definition of ‘economic development,’ though, which helps us decipher the normative element underpinning such simple recipe for success: “[e]conomic development or, simply, development, is the process of a structural transformation of an economy from one based primarily on the production of primary products (i.e., a product consumed in its primary [unprocessed] state) generating low levels of income to another based on modern industries that provides higher levels of income” (p.3, footnote 7).

Learning from the export-driven development of South Korea, Lee signals two – structurally and legally *intertwined*- factors which can be conducive to economic growth: industrialization and trade. Neither of these variables, however, is new in the development

² YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM, 5 (2006). Lee adverts that neither a development-friendly international trading system nor any other international support alone will facilitate development and relieve poverty (p.4); specifically, a “working institutional arrangement between the public and private sectors, a consistent economic policy, social peace, an educated population, access to capital, entrepreneurship, and a cultural environment that fosters working ethics and can accommodate changes associated with development,” are also essentially important for development. *Id.*

literature. “Trade, not aid” was indeed the famous slogan launched in Geneva in 1964 by a largely united group of developing countries, sometimes known as the “Group of 77,” which defended in fact an order of preferences that even Pareto would approve of. The advantages of trade over aid or donations—even in the impossible case that they could indefinitely be provided to solve the problem of poverty—, do not only echo the lessons of the old Chinese proverb “do not give fish,” but the formula also has a place in the dialectic of statehood, national dignity and empowerment, and perhaps in the obliteration of remaining vestiges of colonial dependency. Furthermore, if Easterly is right when asserting that the “urge to steal everything not bolted to the floor is the most obvious growth-killing incentive that government officials face,”³ the trade alternative would also offer the advantage of curtailing the dangers entailed by corruption in the administration of foreign assistance.

Neither David Ricardo, nor W. W. Rostow,⁴ or the “catch-up” theories of the 60s 70s and 80s,⁵ serve however to explain what went wrong *in* and *after* the Uruguay Round. Perhaps regrettably, but certainly ironically (or maybe the other way around) insights on the economic outcomes of the “world trading system,” as it *is* today, do not come from the analysis of the Heckscher-Ohlin model -the so-called workhorse of trade theory-, but from other (social science) disciplines.⁶ The accusation, succinctly, is that politics, more than economic mispredictions, lie behind the elusiveness of economic development. (Should Jeffrey Sachs perhaps start from here?)

Like the many heads of a hydra, all serving to speak for the same imbalances, the richness of the WTO universe permit that discontent on its workings be ‘somatized’ different ways: for instance, in an analysis of the political *inputs* that made up GATT fabrics, but also through the evaluation of any of its *end-products* -TRIPS, agriculture, textiles, safeguards, anti-dumping- and

³ EASTERLY, *supra* note 1, at 241.

⁴ A highly influential economist, political theorist and cold war liberal adviser to President Kennedy, from the perspective of mainstream economics Walt Whitman Rostow’s name is invariably linked to his ‘stages of development’ and particularly to his ‘take-off stage.’ As he wrote in an article of 1956, his hypothesis is: “that the process of economic growth can usefully be regarded as centering on a relatively brief time interval of two or three decades when the economy and the society of which it is a part transform themselves in such ways that economic growth is, subsequently, more or less automatic. This decisive transformation is ... called the take-off.” W.W. ROSTOW, *The Take-Off into Self-Sustained Growth*, 66 *ECON. J.* 25, 25 (1956). As to the influence of his work, Henry Rosovsky affirmed in 1965 that “Rostow is without doubt the most famous economic historian of our age. His works have been translated into many languages; practically all books on economic development and history cite him extensively; he has been lavishly praised by Cambridge economists and the London *Economist*; and finally, the term “take-off” has become a standard part of our mid-century vocabulary. No other living economic historian occupies a similar position. Indeed, one would probably have to go to Karl Marx—with whom Rostow likes to compare himself—to find an equally member of our profession, and Marx achieved his greatest fame posthumously.” HENRY ROVOSKY, *The Take-Off into Sustained Controversy*, 25 *J. ECON. HIST.* 271, 271 (1965).

⁵ Two influential formulations of the catch-up ‘thinking’ are those of Gerschenkron (1962) and Abramovitz (1986). These theories share a common understanding on the latent technological catching-up capacity of latecomers which can take advantage of the technological paths previously forged by more developed countries. See PAUL BURKETT and MARTIN HART-LANDSBERG, *A Critique of “Catch-Up” Theories of Development*, 33 *J. CONTEMP. ASIA* 147 (2003) (reviewing—and criticising—the catch-up constructions of Gerschenkron, Abramovitz and the World Bank’s “Social Capital Synthesis” in the latter half of the nineties).

⁶ The Heckscher-Ohlin model is a “variable-proportions account of trade” developed by Eli Heckscher and Bertil Ohlin at the Stockholm School of Economics. It builds on the Ricardian postulates on comparative advantage, but places its emphasis in factor endowments as the basis for comparative advantage and therefore as the fundamental determinant of trade patterns. Their hypothesis is expressed in summary form in the Heckscher-Ohlin Theorem: “A country exports those commodities produced with relatively large quantities of the country’s relatively abundant factor.” R. W. JONES, *Factor Proportions and the Heckscher-Ohlin Theorem*, 24 *REV. ECON. STUD.* 1,1 (1957).

their consequences on the development of the underdeveloped. It has been said (of the big Faustian bargain) that developing countries, which constitute two-thirds of WTO membership, did not participate in relevant negotiations that later ‘regulated’ their marginalization. Not only had they to make strong concessions when acceding to the WTO by promising, illustratively, to protect an intellectual property that is never theirs, with no working requirement or real technological transfer in exchange, but they also had to confront the fact that trade –as administered by the WTO- is only amorphously ‘free’ –if not *disrespectful* to relative advantages in agricultural products, textiles and clothing-.⁷ But if trade is not totally ‘free,’ the “Singapore issues” made it also clear that it is surely intended to be ‘fair.’ In the Western lexicon, ‘fairness’ means that we are also concerned with the legality of child labour, overall labour conditions and environmental standards.

In an ethos of relative dispassion, however, Lee’s primary focus lies in the curtailment of the infant industry promotion policy forwarded by Friedrich List (1789-1846). Ever since the industrial revolution that brought rapid growth to the developed world, many countries’ policies have been geared to promote the process of industrialization, very often at the expense of other sectors as agriculture. As an empirical backdrop, Lee contends that “history has shown that virtually all of today’s developed countries have adopted state industrial promotion policies and achieved economic development” (p.159). *Promises* that the growth of the manufacturing sector pulls the economy with it, fuelled by the accumulation of physical and human capital, and *fears* of declining relative prices of primary products, as the controversial Prebisch-Singer hypothesis suggests,⁸ have seduced many developing countries to embark in the industrialization path, no matter the price. That is, until they become members of the WTO.

Lee claims that the current WTO provisions, mandated by the set of neoliberal policies so-called “Washington Consensus” which have impregnated the regulatory makeup of the

⁷ While standard trade theory predicts that trade liberalization benefits all countries involved, it is apparent that hardly any country is willing to adopt free trade policies for ‘free;’ rather, the proliferation of antidumping measures under the WTO framework, shows that ‘players’ maintain notable resistance to open their markets to international competition even when reciprocal concessions have been agreed internationally. As to why countries deviate from the free trade regime, the explanation is quite intuitive: the efficiency gains from trade liberalisation always result in *aggregate* net benefits, but industries and pressure groups are necessarily *sub-state*. Enhanced trade openness in a certain sector entails adjustment problems and bears implications in resource reallocation and distribution. In the case of agriculture, historical and sentimental reasons also play an important role in the protectionism of the United States and Europe. See, e.g., J. A. RAGOSTA, *Trade and Agriculture, and Lumber: Why Agriculture and Lumber Matter*, 14 KAN. J.L. & PUB. POL’Y 413 (2005). From a development perspective, as Lee mildly claims, “it is unfortunate that the two major categories of export products from developing countries did not benefit from the market liberalization effort of the GATT and were subject to systematic import restrictions for over five decades.” LEE, *supra* note 2, at 110.

⁸ See JUERGEN VON HAGEN, *Relative Commodity Prices and Cointegration*, 7 J. BUS. & ECON. STAT. 497, 497 (1989) (noting that “[f]ew paradigms in economics have had as much of an impact on economics as the Prebisch-Singer hypothesis of a secular decline in the relative price of primary commodities [which constituted indeed] the leading theme of generations of development economists in Latin America from the 1950s to the 1970s. Basically, the hypothesis says that in the process of industrialization and economic growth the average price of manufactured goods increases relative to the price of primary commodities. The reasoning behind this rests primarily on such assumptions as that the productivity of the manufacturing sector grows faster than the productivity of the primary sector and that the income elasticity of the demand for agricultural products is less than unity ... Many development economists drew the conclusion that [developing countries] had to be redirected away from participating in the traditional world-trade flows and toward import substitution of manufactured goods as to avoid the apparently impending long-run impoverishment.”) The empirical evidence about the validity of this hypothesis remains, however, highly controversial.

WTO,⁹ unduly encumber the use of the two key measures of infant industry promotion that were used in the past by nearly every major developed country: tariff protection and subsidies.¹⁰ His claim, briefly put and unambiguously worded, is that “governments of developing countries would not be able to adopt some of the trade-related development policies of the NICs, because the current regulatory framework for international trade, represented by the World Trade Organization (WTO), does not allow them so” (p.10).

As a matter of formal accuracy, however, one ought to concede that the WTO has not remained completely impervious to the reality faced by two-thirds of its members; at least officially. The problem is that, in a still very mercantilist organization, rules are made by the one-third with the biggest economies; and, in this context, that existing *compensatory inequality* formulas –as Remiro Brotóns calls them-¹¹ have either been articulated as ‘perishable’ benefits, or termed as ‘good intention’ clauses that could only have little appeal in the zero-sum game of international trade.

As Lee observes, while provisions according special and differential (S&D) treatment to developing countries *do* exist in WTO disciplines, they have either proved too stringent,¹² too

⁹ The concept of “Washington Consensus” was originally coined by John Williamson in the late eighties to describe the list of policy desiderata, which in Williamson’s words “offers a description of what is agreed about the set of measures that are typically called for in the first stage of policy reform.” Cited in DANI RODRIK, *Understanding Economic Policy Reform*, 34 J. ECON. LITERATURE 9, 18 (1996). As summarised by Dani Rodrik, the elements of the Washington Consensus are: (1) Fiscal discipline; (2) Redirection of public expenditure priorities toward health, education and infrastructure; (3) Tax reform, including the broadening of the tax base and cutting marginal tax rates; (4) Unified and competitive exchange rates; (5) Secure property rights; (6) Deregulation; (7) Trade liberalization; (8) Privatization; (9) Elimination of barriers to direct foreign investment (FDI); and (10) Financial liberalization. *Id.* at 17. These ten elements were deemed to constitute the “standard reform package,” promoted by Washington-based institutions such as the International Monetary Fund, World Bank and U.S. Treasury Department to countries facing economic crises.

¹⁰ Since the 1950s the world has mainly witnessed two ‘modelled’ routes to industrialisation, the so-called *import substitution industrialization* (ISI) and the *export-oriented industrialisation* (EOI). Through the 1950s and much of the 1960s, industrialization strategies based on import substitution, generally pursued in the framework of comprehensive planning and extensive government participation in industrial activity, were in vogue. In face of the unsatisfactory results of these inward-looking policies and the increasing prominence of the newly-industrialized countries (NICs) of East Asia, in the 1970s the intellectual climate on industrialization strategies changed to export or outward-oriented industrialization. The different ‘attitude’ of ISI and EOI towards trade can be, perhaps, better understood by means of an example. At one extreme of the spectrum, Easterly recalls a case in prereform Ghana which illustrates to what great lengths many poor countries went in order to go it alone. He tells us that “the Ghanaians were so eager to have domestic automobile production that they imported kits with a complete set of auto parts from Yugoslavia. They then assembled the cars and sold them. But the international price at which they bought the kits was greater than the international price of the fully assembled vehicle!” EASTERLY, *supra* note 1, at 229. On the successful extreme of the spectrum we find South Korea which, as from 1963, switched from a predominantly import substitution strategy to a *primarily* export-oriented one. The government’s interventions played a central role in shaping and promoting South Korea’s industrial development by providing strong incentives and support for exports while pursuing import substitution in a range of new, increasingly complex, industries. Here we have the other face of the automaking coin: “Close attention to Northern consumer tastes help to explain why in world markets Korean cars have far outsold their Brazilian, Russian and Indian rivals, all of which were designed with domestic consumes in mind. The parallel experience of Japan served as a blueprint for the Koreans, which further laid the foundation for the Malaysian movement, ‘Look East’.” HENRY Y. WAN, JR and JASON WEISMAN, HONG KONG, *The Fragile Economy of Middlemen*, in ECONOMIC GROWTH AND INTERNATIONAL TRADE 52, 55 (E. Kwan Choi and Bjarne S. Jensen eds., 1999).

¹¹ ANTONIO REMIRO BROTONS *et al.*, DERECHO INTERNACIONAL 94 (1997).

¹² LEE, *supra* note 2, at 40 (commenting the tight ceilings imposed by article 9.1 of the Agreement on Safeguards).

pricey,¹³ largely declaratory,¹⁴ or simply temporal in nature. During the Uruguay Round, developed nations were reluctant to agree on S&D treatment to developing countries on a permanent basis, reflecting “the prevalent attitude that a same set of rules should eventually be applied to all nations, both developed and developing countries, and that the S&D treatment should be limited and not be renewed or expanded” (p.41). As Judith H. Bello, former General Counsel to the U.S. Trade Representative, has indeed explained, “such bifurcation of standards proved politically unacceptable to the United States in many circumstances. Regarding the use of export subsidies, for example, the U.S. policy was to decline to apply the Subsidies Code to any developing country absent the latter’s bilateral agreement with the United States to limit, if not eliminate, its use of export subsidies.”¹⁵

In the converse understanding that “the one rule for all nations” (p.41) is not consistent with the development needs of developing countries, and that “the provisions of Article XVIII, which are still standing today, clarify that GATT/WTO disciplines authorize and support industry promotion policy” (p.62), Lee feels empowered to ignite a pyrotechnic of regulatory proposals which impregnates his book, in a constant ebb and flow between considerations *de lege lata* and considerations *de lege ferenda*. In the next section, I will outline briefly what I believe are his most notable contributions.

II. ‘THE GLOBAL GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED’

In the intention to create “policy space” for developing countries, Lee reviews the rules on tariffs, subsidies, antidumping, safeguards, TRIMs, TRIPS, GATS, as well as rules on agricultural and textile trades, to propose modifications that provide better assistance with economic development. The reader must be advised, though, that not everything of what he says is new and that the book, in a few twists of circularity, seems at moments to be preaching to the converted. Yet, we should forgive Lee for both his quick predictability and the orthodoxy of his critiques, for the contribution of the book lies in fact in who is making the claims, and the sobriety with which the author undertakes his exposition. Currently an associate editor of the *Journal of World Trade*, this academician, lawyer and former government counsel of South Korea, advances arguments that somehow resemble those of Chakravarthi Raghavan or Dani

¹³ *Id.* at 28 (noting that Article XVIII of the GATT, “Government Assistance to Economic Development,” requires developing countries to conduct negotiations and to offer reciprocal concessions as a precondition to modify the Schedule of Concessions for developmental purposes).

¹⁴ *Id.* at 36-37 (observing that Part IV of the GATT -Articles XXXIII-XXXVIII- entitled “Trade and Development,” is “not really obligatory in the sense that a violation of these provisions does not entail effective sanction,” while noting that it is doubtful whether the GATT Decision on November 28, 1979, referred to as the “enabling clause,” which permanently approved the General System of Preferences (GSP) and the exchange of preferences among developing countries, “has actually made any real difference in the policy decisions of developing countries regarding their trade relations with developing countries.”) See also T. ADEMOLA OYEJIDE, *Multilateral Trade Negotiations, in DOHA AND BEYOND – THE FUTURE OF THE MULTILATERAL TRADING SYSTEM* 68, 85 (Mike Moore ed., 2004) (noting that “the GSPs are non-contractual and therefore subject to unilateral modification or withdrawal at the pleasure of preference-granting countries.”)

¹⁵ JUDITH H. BELLO, *Some Practical Observations about WTO Settlement of Intellectual Property Disputes*, 7 VA. J. INT’L L. 357, 363-364 (1997). The author further observes that with “the launch of the Uruguay Round multilateral trade negotiations in 1986 [a] key objective of the United States was to eliminate any *substantive* special and differential (S&D) treatment for developing countries, and replace it with *procedural* S&D treatment. Less-developed countries (LDCs) would be held accountable to the same standards as developed countries, but they would be allowed a longer periods in which to come into conformity with such standards” (emphasis added). *Id.* at 364.

Rodrik,¹⁶ or initiatives which have been forwarded under the auspices of the UNCTAD. The book is then a ring in a chain of intellectual efforts that hopefully shall bring the developmental dimension of the WTO from more activist, vindictive, forums, to a milder but perhaps further-reaching academic status.

I should advise still, that not all of Lee's proposals are fully developed either. In many instances, Lee's suggestions are those of who signals the path to follow, but leaves the actual crafting of the amendments for later stages. There are, however, a few notable, welcomed, exceptions. Besides this clear, congruent –yet still, ethereal- *diktat* that shall permeate, horizontally, the revision of all the pieces of the world trading system, we see perhaps more 'corporeality' in his proposals to build a separate Council for Trade and Development, and to create a separate and enforceable regulatory structure, provisionally entitled "Agreement on Development Facilitation" (ADF).

As to the organizational apparatus, while a Committee on Trade and Development (CTD) is currently organized in the WTO under the General Council with the mandate "to address issues concerning developing countries that include implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased participation of developing countries in the trading system, and the position of LDCs" (pp. 43-44), the scope of its assistance –or of that of the Subcommittee on Least Developed Countries also established under the CTD, or of the International Trade Centre, for that matter- is "rather limited." As Lee observes "[o]ther essential development issues, such as technology transfer, financial mechanism, and debt relief have not been covered by these activities because the CTD does not have a mandate to address these issues within the WTO." Explicitly inspired in the TRIPS Council, Lee believes in the benefits of elevating the level of the institutional body on trade and development to the council level even when he acknowledges that two working groups have been established under the Doha Development Agenda –one on Trade, Debt and Finance and the other on Trade and Technology Transfer-, in response to the demand of developing countries to fill this lacunae. As he claims, "[t]his elevation will not only make a symbolic statement recognizing the essential importance of development issues but also meet practical needs," by assuring a continuous and permanent attention to development issues, and guaranteeing a parallel increase in the staff and resources available to assist with developing countries (p. 46).

As to the feasibility and desirability of a separate set of rules facilitating development, Lee proposes to create a separate agreement in WTO disciplines: the ADF.¹⁷ Inspired again in the

¹⁶ See DANI RODRIK, *The Global Governance of Trade As if Development Really Mattered*, UNDP, 2001 (claiming that "a development-friendly international trading regime is one that does much more than enhance poor countries' access to markets in the advanced industrial countries. It is one that enables poor countries to experiment with institutional arrangements and leaves room for them to devise their own, possibly divergent solutions to the developmental bottlenecks that they face," and that a world trade regime that puts development first "has to accept institutional diversity, rather than seek to eliminate it." More significantly, though, Dani Rodrik advocates "providing unrestricted access to least developed countries' exports and enabling developing countries greater autonomy in the use of subsidies, 'trade-related' investment measures, patent regulations and other measures," while proposing to recast the current Agreement on Safeguards into an Agreement on Developmental and Social Safeguards which would permit the application of opt-outs, *inter alia*, as part of a broadly supported development strategy aimed at stimulating technological capabilities.") Lee recognises the influence of Dani Rodrik's work – specifically of his "excellent paper on industrial policy"- in his *Acknowledgements*. LEE, *supra* note 2, at xvi. See also DANI RODRIK, *Industrial Policy for the Twenty-First Century*, UNIDO, 2004.

¹⁷ Lee adverts that "the ADF may require a separate status within Annex 1 of the WTO Agreement as it would affect the operation of GATS and the TRIPS Agreement, as well as the Multilateral Agreements on Trade in Goods." LEE, *supra* note 2, at 48.

TRIPS Agreement, Lee moves the analogy to the legal space when claiming that “[a]t any rate, the ADF would make a statement that development issues are considered to be as essential as other issues promoted by developed countries such as TRIPS, which has attained a separate regulatory treatment, and no longer only a subject of elaborate rhetoric, by providing a coherent and permanent regulatory structure on trade and development, which has been missing from the [Uruguay Round]” (p. 48). The ADF is intended to reunite and *reinvigorate* if necessary the scattered S&D treatments –since Lee contends that some of these provisions, such as the subsidy rules for developing countries, should be converted into permanent-, to elaborate on GATT Article XVIII and Part IV –in the pursuit of more specific, *enforceable* and *monitorable* obligations-, and to incorporate new substantive provisions to facilitate economic development, of which he does not suggest but a few (p.48). Unsurprisingly, the two more elaborated suggestions, the “Development-Facilitation Tariff” (DFT) and the “Development-Facilitation Subsidy” (DFS), target the protection of infant industries.

As regards the first, Lee is driven by the premise that the principle of rigid binding tariff rates makes it burdensome for developing countries to raise tariffs to protect infant industries. Despite the apparent authorisation embedded in GATT Article XVIII, the multilateral control placed in paragraph 7 requires protracted negotiations and onerous compensations that, compounded with the ‘medieval magnetism’ of North Atlantic behavioural norms,¹⁸ may impede developing countries from adjusting their tariff bindings when they need it. Advocating for a more flexible treatment of binding concessions in favour of development, Lee proposes that the imposition of an additional tariff in excess of what is established in each WTO schedule of commitments, the DFT, be permissible to those developing countries which intend to promote a domestic industry. Some procedural safeguards should serve to prevent the abuse of this possibility, such as the publication of an infant industry development plan, public hearings and prior notification and consultation with interested Members. Moreover, and as a way of accounting for the exceptionalism of this deferential treatment, developing countries should be treated differently in accordance with their development stages -as gauged by their income levels-, by having to face different “caps” (maximum DFT rates).

A parallel reasoning is followed with current WTO provisions that prohibit export and import-substitution subsidies and those authorizing countervailing measures against actionable subsidies. Between July 2002 and June 2003, seven out of thirteen countervailing duty investigations were initiated against imports from developing countries (p.76). Here again, Lee proposes that the rigors of Article 3.1 of the Agreement on Subsidies and Countervailing Measures be lifted in favour of developing countries. Incorporating once more the sliding scale approach and alluding to the same safeguards, Lee undertakes that governments in developing countries should be allowed to grant different levels of subsidies (the DFS) according to their development status. Countervailing actions could however be taken beyond the authorised caps.

In terms of regulatory efficacy, the most obvious Achilles heel of this symmetrically attractive framework is that it will only do its magic *ceteris paribus*, that is, all things being equal and developed countries refraining from the temptation to negativate its potential benefits

¹⁸ See ALICE H. AMSDEN and TAKASHI HIKINO, *The Bark is Worse than the Bite: New WTO Law and Late Industrialization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 104-105, 110 (2000) (claiming in fact that “the problems bedeviling latecomers today are not formal *legal* constraints but *informal political* pressures exerted by North Atlantic economies in favor of radical market opening,” and observing that “what has changed since the world’s axis tilted more towards liberalism is not in the realm of law but in the realm of politics;” specifically, “coercion takes the form of political pressure by the North Atlantic on emerging economies.”)

through all imaginable formulas within or without the WTO. If developed countries, for example, engage in forum-shopping and use bilateral and multilateral free-trade agreements to contract around these rules, these proposals will hardly make a difference.¹⁹ It is precisely to prevent this circumvention, that Lee proposes that “the current WTO rules must prohibit Members from compromising the rights of developing countries protected under the WTO provisions by regional agreements or any other means” (p.152). An alternative way in which developed countries could frustrate the objectives of this deferential treatment is through the *parallel* application of administered protection measures. Because subsidies and countervailing duties are already addressed under the DFS framework, Lee devotes an entire segment of his book (Chapter IV) to analyse how anti-dumping actions and safeguards measures should be redefined to prevent spurious interferences with development efforts. Given the relevance of this side of the ‘development box,’ and because the activity of WTO Panels and the Appellate Body in this realm has proved to be particularly objectionable from a development perspective, I will follow suit and address them separately in the next section.

III. MAKING SURE THAT THE BACK DOOR IS CLOSED – THE AMENDMENT OF TRADE SANCTIONS

Despite its incongruity with WTO’s freer-trade policy,²⁰ and a dubious justification from the point of view of mainstream economics -the so-called “Washington consensus”- the WTO system authorizes the application of certain trade measures to protect temporarily a vulnerable domestic industry from competition. The sanctioned solution for WTO’s three trade remedies – countervailing duties, antidumping actions, and safeguard measures- is to superimpose tariffs or duties on a particular product above and beyond the amount listed in the yearly schedule of tariffs.

But here is where the analogy ends. Beyond this same end-result, safeguards and antidumping measures constitute different creatures, with dissimilar spirit, behaviour, and responsibilities on the part of their adopters. To begin with, the rationale for anti-dumping or countervailing actions is rather different from that for safeguard measures (p.83). While the former revolve on the notion of “fair trade” and represent a defensive reaction against imported products purportedly being sold at a price below production costs -either with an strategic purpose or as a result of subsidization by a foreign government-, safeguard measures are applied

¹⁹ The use of FTAs or of vertical pressure tactics to impose ‘U.S.- preferred outcomes to WTO negotiations’ is not a mere hypothetical concern. See, e.g., FREDERICK M. ABBOTT, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT’L L. 317, 349-354 (2005) (observing that since the adoption of the Doha Declaration in November 2001, the U.S. has negotiated various FTAs which restrict the use of the flexibilities under the TRIPS Agreement and that, by providing that marketing approval of medicine may not be given effect during the term of a patent without the consent or acquiescence of the patent holder, may effectively bar the use of compulsory licensing under the Doha Decision of August 30, 2003); CARLOS M. CORREA, *Bilateralism in Intellectual Property: Defeating the WTO System for Access to Medicines*, 36 CASE W. RES. J. INT’L L. 79, 81-82 (2004) (noting that FTAs “reflect a reaction to the growing resistance that United States initiatives encounter in the WTO,” and that “whatever the commercial gains of FTAs in the short and long term for [the counterparties] may be, the dramatic increase in the level of protection of IPRs is likely to have a direct and significant impact on the capacity to design and implement development policies, particularly in the area of public health.”)

²⁰ See JUDITH H. BELLO, *supra* note 15, at 367 (claiming that the *free and fair* policy “could be characterised as an oxymoron.”); JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM* 14 (1991) (claiming that “[f]air trade is a two-faced creature: One face is friendly to free trade; the other frowns on it, indeed, seeks to devour it, for fair trade mechanisms can be misused to allege unfair trade unfairly and thus undermine free trade.”)

in a non-discriminatory manner, and only when an increase in imports causes or threatens to cause *serious injury* to a domestic industry.²¹

Their concomitant impact on the exports of developing countries is not the same either. The concept of “fair trade,” which provides the underlying justification for apparently neutral defence measures such as anti-dumping or countervailing actions, poses particular challenges to the quest for development. Precisely because the infant industries of developing countries may not be *naturally* poised to compete in the quality-price ratio with more efficient counterparts from developed economies (this is the definition of development after all!), some measures of protection and promotion may be necessary to enable these infant industries to enter key markets which, perhaps, of necessity, are overseas (p.85). In some ways, then, the use of the argument in favour of the ‘level playing field,’ especially when examining each sectoral initiative in a vacuum (and doing so, in fact, under an unacceptable North-South veil of ignorance), enables a tree hide the forest of ‘equal opportunities’ as understood in its most valiant and comprehensive sense, and runs counter any realistic intent to promote development.

Since the inception of the WTO in 1995, the number of antidumping measures has mushroomed not only in rich countries, where anti-dumping is “alive and well,”²² but increasingly, in the bigger developing countries such as India, Brazil or China.²³ Such exuberant proliferation of actions is explained by the many ‘convenient’ attributes of the protectionist ‘weapon of choice.’ antidumping measures are both cheap and easy to adopt,²⁴ and particularly painless to defend when challenged.

Sharing the intuitions of what Brink Lindsey has already ‘documented,’²⁵ Lee claims that

²¹ See Report of Appellate Body on *US — Lamb* (WT/DS177/AB/R; WT/DS178/AB/R) (para. 124) (observing that “[t]he standard of “serious injury” set forth in Article 4.1(a) is, on its face, very high. Indeed, in United States - Wheat Gluten Safeguard, we referred to this standard as “exacting”. Further, in this respect, we note that the word “injury” is qualified by the adjective “serious”, which, in our view, underscores the extent and degree of “significant overall impairment” that the domestic industry must be suffering, or must be about to suffer, for the standard to be met. We are fortified in our view that the standard of “serious injury” in the Agreement on Safeguards is a very high one when we contrast this standard with the standard of “material injury” envisaged under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”) and the GATT 1994. We believe that the word “serious” connotes a much higher standard of injury than the word “material”.”)

²² SYLVIA OSTRY, *External Transparency: the policy process at the national level of the two-level game, in DOHA AND BEYOND – THE FUTURE OF THE MULTILATERAL TRADING SYSTEM* 94, 98 (Mike Moore ed., 2004).

²³ As to the statistics of antidumping, according to the data compiled from the semi-annual reports of WTO Members to the Committee on Anti-Dumping Practices, there has been a total of 2938 Initiations in the period 1 January 1995 - 30 June 2006. As to the geography of the petitioners, see, e.g., India (448); Argentina (209); South Africa (199); China (126); Brazil (125); Turkey (106); Mexico (89); United States (366); European Community (345) Australia (188); Canada (138).

²⁴ Since antidumping measures are taken to counteract ‘unfair trade,’ there is no obligation to compensate the injured parties. Such obligation exists, however, as regards safeguards measures, which have the additional ‘disadvantage’ of having to be exercised on a most-favoured-nation basis.

²⁵ See, e.g., BRINK LINDSEY, *The U.S. Antidumping Law: Rhetoric versus Reality* (Cato Trade Policy Analysis no. 7, August 16, 1999) at 6 (observing that “[i]n the typical antidumping investigation, the Commerce Department compares home market and U.S. prices of physically different goods, in different kinds of packaging, sold at different times, in different and fluctuating currencies, to different customers at different levels of trade, in different quantities, with different freight and other movement costs, different credit terms, and other differences in directly associated selling expenses (e.g., commissions, warranties, royalties, and advertising). Is it any wonder that the prices aren’t identical? Admittedly, the Commerce Department’s dumping calculation methodologies try to adjust for some of the differences, but the adjustments are necessarily imprecise.”) See also BRINK LINDSEY and DANIEL J. IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* (2003); BRINK LINDSEY and DANIEL J. IKENSON, *Reforming the Antidumping Agreement: A Road Map for WTO Negotiations* (Cato Trade Policy

the inherent complexity and arbitrariness in the determination of the normal value “has been a breeding ground for the abuse of anti-dumping actions” (p.93). Indeed, except for egregious techniques such as that of zeroing, which has been repeatedly held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement,²⁶ Article 2 still leaves plenty of leeway to national authorities to cherry-pick the methodology and calculation of costs, average prices and “reasonable profit,” that will yield the most favourable result for domestic interests. This again, redounds to the detriment of developing countries whose competitiveness usually rests on the low prices of their products. As Lee concludes, “although a lower price alone is not sufficient for the application of [antidumping] measures, the current provisions permitting the ‘construction’ of costs and reference prices make it relatively easy for the national authorities to find dumping and apply [antidumping] measures against exports from developing countries” (p.95).

More surprisingly, and as a second (awkward) peculiarity of this dark corner of the WTO, a deferential standard of review has been explicitly articulated and incorporated to the text of the Antidumping Agreement.²⁷ As conceptually framed by the Appellate Body in *EC — Hormones*, the standard of review is aimed to reflect the balance between “the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves.”²⁸ As regards antidumping, then, one might say that the United States

Analysis no. 21, December 11, 2002); BRINK LINDSEY and DANIEL J. IKENSON, *Antidumping 101: The Devilish Details of “Unfair Trade” Law* (Cato Trade Policy Analysis no. 20, November 26, 2002).

²⁶ The Panel Report on *United States - Anti-Dumping Measure on Shrimp from Ecuador* (WT/DS335/R), 30 January 2007, is the latest in a series of unfavourable WTO rulings against US practices of employing 'zeroing' when calculating dumping margins. Following the reasoning of the Appellate Body in *US - Zeroing (EC)*, the Panel further notes, in para. 7.40, that “in our view, there is now a consistent line of Appellate Body Reports, from *EC - Bed Linen* to *US - Zeroing (EC)* that holds that “zeroing” in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2.” This succession of successful complaints against US’ ‘zeroing’ practices, have finally ‘seduced’ the United States to fulfil his international obligations under the Antidumping Agreement. On December 27, 2006, a few months before the expiration of the time to implement the DSB recommendations and rulings on *US- Zeroing (EC)* (9 April 2007), the Department of Commerce published a modification concerning the calculation of the weighted-average dumping margin in antidumping duty investigations (71 FR 77722). On January 16, 2007, the Department delayed the effective date of the modification until January 23, 2007 (72 FR 1704), and subsequently until February 22, 2007 (72 FR 3783), where the Assistant Secretary for Import Administration informs in fact that “[t]he methodology set forth in the Federal Register notice published at 71 FR 77722 on December 27, 2006, will be used in implementing the findings of the WTO panel in *US- Zeroing (EC)* pursuant to section 129 of the URAA concerning the specific antidumping investigations challenged by the EC in that dispute. The Department also will apply the final modification in all current and future antidumping investigations as of the effective date.”

²⁷ See Report of the Appellate Body on *EC — Hormones* (WT/DS26/AB/R, WT/DS48/AB/R) (para. 114) (noting that the “SPS Agreement itself is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. Nor are there provisions in the DSU or any of the covered agreements (other than the Anti Dumping Agreement) prescribing a particular standard of review.”) As to the deference accorded to national authorities, see, e.g., Panel Report on *Egypt - Steel Rebar* (WT/DS211/R) (para. 7.8) (claiming that “[c]oncerning Egypt’s assertion that Turkey is seeking a de novo review by the Panel of the evidence submitted to the IA, it is clear that in any dispute under the AD Agreement, a panel must adhere to the standard of review set forth in Article 17.6(i) of that agreement, which precludes a de novo review by a panel.”); Appellate Body Report on *Thailand - H-Beams* (WT/DS122/AB/R) (para. 117) (asserting that “[t]he aim of Article 17.6(i) is to prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of procedure and due process. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the Anti-Dumping Agreement.”)

²⁸ *EC-Hormones* (WT/DS26/AB/R, WT/DS48/AB/R) (para. 115).

lobbied hard to retain as much ‘jurisdictional competence’ as politically feasible. Aiming to restrict the discretion of WTO panels when reviewing administrative decisions, the USTR was able to persuade Director-General Sutherland and the negotiating parties that an unambiguous deferential standard should be added for antidumping.²⁹

A bit of ‘luck’ did the rest. While the final version of Article 17.6 did not incorporate the United States’ proposal to further restrict the review of the Panels to the (cherry-picked) factual record developed by the administering authorities during their investigation,³⁰ the WTO Panels have autonomously adopted this interpretation,³¹ normally alluding to Article 17.5(ii).³² The review of antidumping measures, thus, has stayed bizarrely thin.

Adding to the incomprehensibility, panels have placed the burden of proof on the complaining party, even when most scholars consider that Articles VI and XVI run counter the concepts of both tariff bindings and most-favoured-nation, and that they should therefore be treated as “exceptions” for burden of proof purposes.³³ As Gary N. Horlick and Peggy A. Clarke

²⁹ See GARY N. HORLICK and ELEANOR C. SHEA, *The World Trade Organization Antidumping Agreement, in WTO JURISPRUDENCE AND POLICY: PRACTITIONERS’ PERSPECTIVES* 393, 394, 426 (Marco C.E.J. Bronckers and Gary N. Horlick eds., 2004) (explaining that “at that time, the United States was at the high point of using its antidumping law, both as a tool of “back-door” industrial policy, as well as an escape-valve for protectionist pressures arising from the sharp run-up of the U.S. dollar in the early 1980s and the consequent problems for U.S. import-competing and exporting industries. In effect, the U.S. Administration argued that higher duties against “unfair” imports were necessary in order to preserve free trade. There was also the possibility that some officials in the Administration actually believed the rather misinformed statements made on their behalf in connection with antidumping laws.”) See also, JUDITH H. BELLO, *supra* note 15, at 362 (observing that “throughout the Uruguay Round antidumping negotiations, some U.S. beneficiaries of antidumping orders advocated a tightly circumscribed standard of review in any dispute under the Antidumping Agreement. To best protect the discretion of the U.S. administrators of the antidumping law ... U.S. private sector proponents of an activist antidumping policy argued for a heavy burden of proof on any member challenging an antidumping order. These advocates succeeded in generating strong bipartisan political support in Congress, and the Bush administration adopted this position in the negotiations of the antidumping Agreement. However, the Bush administration felt it had substantially different interests in other areas under negotiation [in particular under TRIPS].”)

³⁰ See GARY N. HORLICK and PEGGY A. CLARKE, *Standards for Panels Reviewing Antidumping Determinations under the GATT and WTO, in WTO JURISPRUDENCE AND POLICY: PRACTITIONERS’ PERSPECTIVES* 115, 118-119 (Marco C.E.J. Bronckers and Gary N. Horlick eds., 2004).

³¹ See, e.g., Panel Report on *Guatemala - Cement II* (WT/DS156/R) (para. 8.19) (defining the standard of review applicable by virtue of Article 17.6(i) as follows: “We consider that it is not our role to perform a de novo review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective. In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities’ evaluation of the facts, we will first need to examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation.”) See also Panel Reports on *Egypt - Steel Rebar*, (WT/DS211/R) (para. 7.20); *United States - Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282/R) (para. 7.3); *Argentina - Ceramic Tiles* (WT/DS189/R) (para. 6.27); *US - Stainless Steel* (WT/DS179/R) (para. 6.3); *EC - Bed Linen* (WT/DS141/R) (para. 6.45); *Thailand - H-Beams* (WT/DS122/R) (para. 7.51); *US - Steel Plate* (WT/DS206/R) (para. 7.6).

³² Article 17.5(ii) provides that “[The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon] the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.”

³³ See GARY N. HORLICK and PEGGY A. CLARKE, *supra* note 30, at 125-126. See also Panel Report on *United States - Anti-Dumping Measure on Shrimp from Ecuador* (WT/DS335/R) (para. 7.9-7.10) (claiming, notwithstanding the

have observed in relation to two panel reports adopted within the framework of GATT 1947,³⁴ panels “have placed a burden of proof on the complaining party that cannot be met. In [both cases, the complaining party] has been required to demonstrate that [the defendant’s] actions, respectively, have resulted in the imposition of duties in excess of the level of dumping. In both cases, it was not [the complaining parties] that had access to the facts, but rather the [the defendants] that had the facts to demonstrate that they did not impose excessive duties.”³⁵

This accretion of demerits regarding antidumping measures leads Lee to suggest that “there is indeed little rationale to preserve this archaic system of [antidumping] practices” (p.94). Since his bigger concern lies, however, in the subjacent protectionism of the North, Lee proposes to exempt the imports from developing countries from antidumping measures as a sufficiently drastic antidote. In the understanding that developed countries may not be willing (or find it politically feasible) to put their own domestic industries in peril for the purpose of “trade accommodation,” Lee concedes that the use of *safeguards* might serve as the necessary shield that shall enable developed countries to sufficiently protect local interests.

When looked through the prism of development, then, the role of safeguards is favourable since “the existence of this safety net enables developed countries to increase market access to imports from developing countries” (p.86),³⁶ while helping to “dissolve significant political pressure to protect domestic industries during the times of rapid import increases” (p.97). Furthermore, safeguards have the paradoxical advantage of affecting all imports regardless of their origin and the alleged behaviour of exporters and, consequently, such measures will necessarily come under the scrutiny of many more countries – both developed and less developed - minimising the possibilities of vertical abuses.

fact that the United States was not seeking to refute Ecuador's claims, that “[i]n our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a prima facie case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a prima facie case. In EC - Hormones, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a prima facie case and shifted the burden of proof to the responding party ... More recently, in US - Gambling, the Appellate Body indicated that “[a] panel errs when it rules on a claim for which the complaining party has failed to make a prima facie case”, and noted that: A prima facie case must be based on “evidence and legal argument” put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.”) Indeed, the fact that Ecuador’s eventually ‘won’ the case, should not blind us with optimism. As indicated *supra*, in note 26; this case is the last in a row of “zeroing” cases, where the Appellate Body has ruled – in dispute after dispute – that the zeroing of negative dumping margins is inconsistent with the Antidumping Agreement. Other disputes are still pending: *US— Continued Existence and Application of Zeroing Methodology* (WT/DS350); *US— Measures Relating to Shrimp from Thailand* (WT/ DS343); *US— Final Anti-dumping Measures on Stainless Steel from Mexico* (WT/ DS344); *US— Provisional Anti-Dumping Measures on Shrimp from Thailand* (WT/DS324); *US— Anti-Dumping Duties on Silicon Metal from Brazil* (WT/DS239).

³⁴ *United States — Anti-dumping duties on imports of fresh and chilled Atlantic salmon*, GATT doc. ADP/87 (adopted, 27 April 1994); *EC- Anti-dumping duties on Audio Tapes in Cassettes Originating in Japan*, GATT doc. ADP/136 (unadopted, 28 April 1995).

³⁵ See GARY N. HORLICK and PEGGY A. CLARKE, *supra* note 30, at 124.

³⁶ See *US - Line Pipe* (WT/DS202/AB/R) (para. 82) (claiming that “part of the raison d'être of Article XIX of the GATT 1994 and the Agreement on Safeguards is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgement of that Member, makes it necessary to protect a domestic industry temporarily.”)

But here is the irony. As Lee argues in another book,³⁷ besides the inherent exceptionalism of the conditions that permit the adoption of safeguards,³⁸ a streak of successful challenges against disputed investigations and applications of this measure has generalised the perception that it is difficult to apply safeguard measures consistently with the rules set forth in the Safeguard Agreement. Not only is the standard of review non-deferential,³⁹ but the decisions of Panels and Appellate Body indicate that the threshold for a *prima facie* case is somehow ‘generous.’⁴⁰ If the (burlesque) tone employed by a Panel reflects something of its attitude concerning a particular subject matter, the following fragment of the Panel Report in *US— Steel Safeguards*, in which the Panel summarises the tenor of its task, could perhaps help us anticipate a few things, for example, the fact that all of the disputed safeguard measures to date have been found to be inconsistent with the current WTO framework:⁴¹

10.17 The Panel recalls that the Agreement on Safeguards is concerned with the ultimate determination made and reflected in the Member's report of investigation. There is no provision on how or when the investigation is to be initiated or whether, in a specific Member, the initiation of the investigation should be undertaken by the King, the President or the industry. Nor does the Agreement on Safeguards dictate the manner in which determinations are to be arrived at. What matters is that, ultimately, there is a reported determination of the right to take a safeguards measure (pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994) and that, if, and when, challenged

³⁷ YONG-SHIK LEE, *SAFEGUARD MEASURES IN WORLD TRADE – THE LEGAL ANALYSIS* (2005).

³⁸ See *supra* note 21.

³⁹ See Panel Report on *US- Steel Safeguards* (WT/DS248/R; WT/DS249/R; WT/DS251/R; WT/DS252/R; WT/DS253/R; WT/DS254/R; WT/DS258/R; WT/DS259/R/R) (paras. 10.25-10.27) (arguing that “the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second enquiry that the Panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994;” referring, respectively, to the analysis of whether the safeguard measure conforms to Articles 2, 3, and 4 and Article XIX of GATT, on one hand, and Articles 5, 7 and 9, on the other, and signalling a higher level of scrutiny for this second enquiry, that is, “when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures.”)

⁴⁰ See LEE, *supra* note 37, at 126 (noting that “the threshold for a *prima facie* case is met if the evidence presented is sufficient to demonstrate the complainant's claim generally, and the rebuttal of the specific information, which may not support the claim of a *prima facie* case, is not necessary.”) Lee is referring to the conclusion of the Appellate Body in *US - Line Pipe* (WT/DS202/AB/R) (para. 187) (claiming that “[c]ontrary to what the Panel stated, we do not consider that it was necessary for Korea to address the information set out in the USITC Report, or in particular, in footnote 168 in order to establish a *prima facie* case of violation of parallelism. Moreover, to require Korea to rebut the information in the USITC Report, and in particular, in footnote 168, would impose an impossible burden on Korea because, as the exporting country, Korea would not have had any of the relevant data to conduct its own analysis of the imports.”) See also, Panel Report on *US- Steel Safeguards* (para. 10.29) (noting that “in the context of the Panel's first enquiry, it is for the complainants to convince the Panel that, in its Report, the United States failed to provide a reasoned and adequate explanation that the WTO pre-requisites for the imposition of safeguard measures were satisfied. In practice, before the WTO panel, the United States will defend USITC's demonstrations and determinations, and the complainants will challenge their WTO-compatibility. In the context of the Panel's second enquiry - when assessing whether the safeguard measures were imposed only to the extent necessary - the Appellate Body has ruled that when the panel concludes, at the end of its first enquiry, that the safeguard measures were imposed in violation of Article 4.2(b), a reversal of the burden of proof occurs so that there is a presumption that the safeguard measures were applied in a manner inconsistent with Article 5.1.”)

⁴¹ *Id.*

prima facie before a WTO panel, the choice of safeguard measure (Articles 5, 7 and 9) can be justified. The Appellate Body made that clear in *US - Line Pipe*:

"We note also that we are not concerned with how the competent authorities of WTO Members reach their determinations in applying safeguard measures. The Agreement on Safeguards does not prescribe the internal decision-making process for making such a determination. That is entirely up to WTO Members in the exercise of their sovereignty. We are concerned only with the determination itself, which is a singular act for which a WTO Member may be accountable in WTO dispute settlement. It is of no matter to us whether that singular act results from a decision by one, one hundred, or-as here-six individual decision-makers under the municipal law of that WTO Member. What matters to us is whether the determination, however it is decided domestically, meets the requirements of the Agreement on Safeguards."

In reality, though, WTO panels and the Appellate Body have scrutinized disputed safeguard measures not only under (a rather strict literal exegesis of) the Safeguards Agreement,⁴² but also of Article XIX provisions,⁴³ with its ambiguous "unforeseen developments" clause which leaves little room for shoehorning. In fact, perhaps, because Panels truly believe that "[w]hat was "unforeseen" when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today, [where] after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels," as the Panel of *US- Steel Safeguards* adverted in para. 10.42, Panels have been prone to approach this relic of the GATT with much less benevolence than their predecessors.

In a very early dispute under the GATT 1947, the so called *US - Fur Felt Hats decision*, the Contracting Parties were called upon to examine the consistency of a U.S safeguard measure against imports of hats from Czechoslovakia.⁴⁴ While the U.S. had been able to reach an agreement with all other affected Contracting Parties, Czechoslovakia lodged a protest, *inter alia*, in the understanding that neither the fact that hat styles had changed, nor the fact that the US had a comparatively lower level of productivity in hat bodies with special finishes, constituted an "unforeseen development" within the meaning of Article XIX (paras. 10-11). The Contracting Parties, however, opted to make a somewhat benign reading on the existence of unforeseen developments:

8 The United States representative stated that about the time the duties were reduced there was a style change greatly favouring hats with nap or pile finishes, a development which was not and could not have been foreseen at the time the concession was granted. As a result of that style change hat bodies with special finishes were imported in increased quantities and represented more than 95 per cent of the imports of women's fur felt hats and hat bodies in 1949 and in the first six months of 1950. The increased popularity of special finishes, which, as

⁴² See, e.g., *US — Lamb* (WT/DS177/AB/R; WT/DS178/AB/R) (paras. 124-127) (embarking on a meticulous literal interpretation of the Safeguard Agreement).

⁴³ See Panel Report on *US- Steel Safeguards* (para. 10.37) (claiming that "it is now clear that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of fact, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied.")

⁴⁴ *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, 27 March 1951 - CP/106.

compared with the plain felt hats require much larger amounts of hand labour, which is more expensive in the United States than in the exporting countries, created a special problem for the United States producers who were not in a position to adapt themselves to the change in demand in view of a severe competition from imports. He stated that the United States negotiators at Geneva, while realizing the shifting fashions in the hat trade and expecting some increase in imports, had not been aware of the extent that this particular change in taste had then reached in Europe and had not foreseen the degree of the future shift to special finishes or the effect which it, together with the concession, would have on imports. He considered this statement was sufficient to show unforeseen developments

...

12. The members of the Working Party, with the exception of the Czechoslovak representative, accordingly considered that the effects of the circumstances indicated above, and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947, and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concession can therefore be considered to have been fulfilled.

Fifty years later, and with the shift from diplomacy to legalism, not only Member States seem to be less sympathetic to the economic elucubrations of their counterparts,⁴⁵ but Panels (though firstly, the Appellate Body) have also undertaken a more demanding and strict approach to the demonstration of ‘unforeseen developments.’ While alluding to the *US - Fur Felt Hats decision* in para. 10.43, the Panel of *US- Steel Safeguards* found that the measures imposed by the U.S. in the form of an increase in duties on a diversity of steel products were inconsistent with the requirements of Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards, since the “USITC's unforeseen development findings did not provide a reasoned and adequate explanation of how the confluence of the Asian and Russian Crises, together with the strong United States' economy and US dollar, actually resulted in specific increased imports into the United States causing serious injury to the relevant domestic producers” (para. 10.150).

Quite contrary in fact to the antidumping ‘paradox,’ where Panels have tended to restrict their inquiry to the very information evaluated by the domestic administrative authorities in determining the existence of dumping, the safeguard panels could be said to have placed on member states a double burden of ‘information exhaustiveness.’ First, in the determination of the

⁴⁵ See Panel Report on *US- Steel Safeguards* (para. 10.40) (indicating that “an unforeseen development, pursuant to Article XIX:1(a) GATT 1994, is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers. In the current dispute, the United States argues that the USITC identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United States' market and persistent appreciation of the US dollar, and the confluence of all of these events as unforeseen developments. The European Communities, China, Switzerland and Norway contend that none of these events constituted unforeseen developments, nor did any combination of them. The same four complainants as well as New Zealand argue that the developments mentioned by the United States were not unforeseen because they were not unexpected.”)

existence of a “serious injury or threat thereof,”⁴⁶ under Article 4, but also, in establishing that the upsurge of imports was due the “result of unforeseen developments,” as provided in Article XIX:1(a). As threatened by the Panel of *US- Steel Safeguards*:

10.39 In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities “considered all the relevant facts and had adequately explained how the facts supported the determinations that were made.” Appellate Body Report, *Argentina - Footwear (EC)*, para. 121; Appellate Body Report, *US - Lamb*, para. 102.

...

10.43 In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could (reasonably) have had in mind.

Since safeguards measures are, however, “politically necessary in order to undertake liberalisation in the first place and to find the necessary majorities to do so at home,”⁴⁷ and, thus, determine to a great length the *implementability* of any proposal to offer a more deferential treatment to developing countries, Lee suggests that the relevant provision of the Agreement “be modified to clarify that the provisions of the Safeguard Agreement constitute the sole authority on the application of safeguard measures” (p.106). In an act of unsurprising coherence with the conclusions in his book on safeguards, Lee also reminds the reader that this “onerous analytical requirement” (p.106) of demonstrating unforeseen developments was “set by the Appellate Body,” when it is clear from certain provisions in the Safeguards Agreement that only those provisions set forth in the Agreement, and not those of Article XIX, are meant to govern the application of safeguards (p.105).

Lee’s proposal to make safeguards reasonably (and veritably) ‘available,’ together with the exemption of exports from developing countries from antidumping measures, would put the ribbon on the substantive proposals explained in the previous section. The question now is, where do we go with this regulatory box?

IV. READY, SET, GO?

⁴⁶ See, e.g., *id.* at paras. 10.22-10.23 (claiming that “[i]n *Argentina - Footwear (EC)*, the Appellate Body stated that, pursuant to Article 4, a Panel cannot conduct a *de novo* review of the evidence or substitute its analysis and judgment for that of the importing Member, but “[t]o determine whether the safeguard investigation and the resulting safeguard measure applied by [a Member] were consistent with Article 4 of the Agreement on Safeguards, the Panel was obliged, by the very terms of Article 4, to assess whether the [Member's] authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.” ... In *US - Lamb*, the Appellate Body added that “a panel can assess whether the competent authorities’ explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities’ explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities’ explanation does not seem adequate in the light of that alternative explanation.”)

⁴⁷ THOMAS COTTIER and MATTHIAS OESCH, *INTERNATIONAL TRADE REGULATION – LAW AND POLICY IN THE WTO; THE EUROPEAN UNION AND SWITZERLAND – CASES, MATERIALS AND COMMENTS* 486 (2005).

In determining how the principles of the law of nature applied to the conduct and affairs of nations and sovereigns, Emeric De Vattel reasoned in 1753 that “[s]ince men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature — Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.”⁴⁸

Three centuries later we cannot but conclude that sovereign equality is at best a target, and probably, only on paper. The fact that Article 1.2 of the United Nations Charter proclaims that “[t]he Organization is based on the principle of the sovereign equality of all its Members” serves, perhaps, as a bitter compensation for a structure which is in fact far from democratic.⁴⁹ Many years before its enactment, and specifically, a year before the Concert of Europe that emerged from the Congress of Vienna in 1815, which also proclaimed the equality of States, the then big potencies of Europe (Austria, France, United Kingdom, Prussia and Russia) had been negotiating, in secret, the fate of the continent. History proves that *equality* is as illusory as sticking the head of a woman to a fish tail in order to get a mermaid. This was indeed the image used in the 19th century by the Scottish John Lorimer to explain why “Russia and Rumania have the same right to be recognised as States, but they do not have it to be recognised as *equal* States.”⁵⁰ Yet all this, somehow carries important implications for what Yong-Shik Lee is trying to do in his book.

After reading about WTO-deficits and WTO-patching for 160 pages –that is, the whole volume- one feels enticed to engage in dialogue with the author about Raul Prebisch and the maligned experience of import substitution in Argentina, the possible path to the further elaboration or sophistication of his proposals, or about the dangers that the tax and subsidy schemes he proposes might entail. In my case, I would also have to express an intellectual consonance with most of what Lee suggests. While it is true that both the DFT and DFS may be abused for protectionist ends (to the resulting detriment of domestic consumers), the improbable *feasibility* of a better solution in face of what constitutes *compelling* development needs (which affect in fact entire communities), should make us question the ever-convenient excuse that plans seeking to introduce some equilibration in the world wealth terms require a level of caution and risk freeness that, quite probably, could only be satisfied with a magic formula. If developing countries cannot compete in agriculture, but they are also too far behind to compete ‘naturally’ in manufactured goods, formal insistence on the ‘asepticism,’ or North-South ‘neutrality’ of WTO norms, is neither *morally* admissible. But if we said before that protectionism is usually fed by ‘sub-state’ coalitions,⁵¹ it seems that *morality* loses its normative value the bigger the group.

Specifically, it takes not our technical eye but a good cup of coffee and -perhaps- our daily journal to realize, indeed, that we might well be wasting our time back in the drawing board. Out of the technical bubble, the deadlocked nature of the Doha Round of multilateral trade negotiations and the disruption of the Seattle ministerial meeting in 1999 and the Cancun

⁴⁸ EMERIC DE VATTEL, THE LAW OF NATIONS, 1753; § 18 *Equality of nations*.

⁴⁹ See, e.g., article 23.1, establishing that “The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council.”

⁵⁰ ANTONIO REMIRO BROTONS, *supra* note 11, at 95 (personal translation).

⁵¹ See *supra* note 7.

Ministerial Meeting in 2003, serve both as a warning and as a premonition of the chimerical nature of the prospects to change (so fundamentally) the *status quo*. Throughout the book Lee has –probably intentionally- chosen to neglect greatly the part of ‘getting to agree’ to his proposals. And certainly, promises that these suggestions will “maintain the stability of the international trading system” (p.62), that the Development-Facilitation Subsidy will not dismantle the current structure of the SCM Agreement (p.42), or that his “proposals advocate limited modifications of the open trading system to better facilitate the development of developing countries and do not suggest a change of this system otherwise” (p.143), do not anyhow lessen the weight of the ‘otherwise’ part of the formula.

But Lee also seems to forget that, in many ways, rules governing trade, and whatever else is achieved through the linkage bargaining that has characterized the WTO,⁵² is as exogenous to poor countries as being located far from the sea or being near from the Equator: they take them as *given*. Trade negotiation has indeed been described as “a game for high stakes, between unequally matched teams, where much of the game is played with few rules and no referee.”⁵³

To learn about the symptoms of this other illness of the WTO –the representational imbalance- we may have to refer to other doctors. Gilbert R. Winham has argued how the pyramidal bargaining during the Tokyo Round, whereby negotiations were initiated by the major nations only after important decisions had been made and compromises had been struck, “caused resentment, particularly among the developing countries which were most frequently excluded from the process.”⁵⁴ Fatoumata Jawara and Aileen Kwa, have also exposed how pyramidal bargaining or vertical multilateralism makes it possible for a few rich countries –the United States, the European Union, Canada, and Japan, jointly referred to as the “QUAD”-, to dominate the trade agenda at the expense of all countries.⁵⁵ The authors explain how developing countries “find themselves locked in a vicious cycle of political impotence, unfair trading rules and weakening trade performance” (p.182) and conclude that, in order to reap any substantial benefits from the multilateral trading system, developing countries must either show greater unity in the trade-negotiation process (*id*), or hold to the hope that they will prevail by virtue of the “strength of arguments” (p.150). Using also an infamous acronym, the “IPC” –standing for Intellectual Property Committee-, Susan K. Sell takes one step back in the chain of authorship and crafting, to get to the hand that (both allegedly and effectively) shapes trade policies: that of multinationals.⁵⁶ As she notes, the Uruguay Round was unusual in so far as the agenda of the new issues was driven almost entirely by the private sector. As she sentences, “[s]tate-centric accounts of the Uruguay Round are at best incomplete, and at worst misleading, as they obscure the driving forces behind the TRIPS Agreement;” specifically, “TRIPS is a ‘can do’ story about twelve men (the members of the IPC) who made IP rules that now bind most of the globe.”⁵⁷

In an attempt, though, of achieving some neutrality, one might even find it *intellectually*

⁵² JOSE E. ALVAREZ, *The WTO as Linkage Machine*, 96 AM. J. INT’L L., 146, 147 (2002).

⁵³ FATOUMATA JAWARA and AILEEN KWA, BEHIND THE SCENES AT THE WTO: THE REAL WORLD OF TRADE NEGOTIATIONS – THE LESSONS OF CANCUN 50 (2004). For an illuminating review of the book, see JAMES THUO GATHII, *The High Stakes of WTO Reform*, 104 MICH. L. REV. 1361 (2006).

⁵⁴ GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 354 (1986).

⁵⁵ FATOUMATA JAWARA and AILEEN KWA, *supra* note 53.

⁵⁶ In 1986, the members of the ad hoc US-based Intellectual Property Committee (IPC) were Bristol-Myers, CBS, Du Pont, General Electric, General Motors, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto and Pfizer.

⁵⁷ SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW – THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 2, 28 (2003).

stimulating to try to jump to the ‘other shore’ and imagine to be, for instance, Mike Moore writing for the FINANCIAL TIMES, June 19, 2000, “*The WTO Is a Friend of the Poor.*” What would we (have to) say if we had to address these critics? Representational unfairness in the trade-negotiation process is, of course, negated through the official venues. In “A handbook on the GATS Agreement,” a WTO Secretariat publication,⁵⁸ we get a hint of possible official replies. In Part 8 “Misconceptions about the GATS” (pp.48-50), the pamphlet addresses “sources of criticisms” on the public policy implications of the GATS. After adverting that “some of the claims may be dismissed as scaremongering, driven for example by income interests of sector incumbents” (p.48.), the “handbook” lectures the readers on the fact that “[c]onsensus is the basic decision-making principle in the WTO. Like the GATT or the TRIPS Agreement, the GATS thus poses no risk to national sovereignty. It is simply not possible in negotiations within the purview of WTO to outvote a Member and/or subject it to disciplines that it is not prepared to accept. Moreover, it is worth bearing in mind that, as a last resort, nothing would prevent a frustrated government from quitting the Organization altogether. However, this has not happened to date. On the contrary, GATT/WTO membership has continued to prove highly attractive. Since the conclusion of the Tokyo Round in 1979, it has increased by about a half to close to 150 Members at present, and many governments have applied for accession.”⁵⁹

Because of its constructive nature –maybe- the book was not the proper forum to touch upon these not always edifying blame games on WTO’s democratic deficit or the secretive and non-inclusive nature of the negotiations and decision-making at the WTO.⁶⁰ But certainly, (comprehensive) pragmatism should require some more inquiry into the motivation of developed countries to ameliorate the marginalization of low-income countries or to redress, for that matter, the marked differences in the distributions of the benefits of multilateral trade negotiations. Lee’s affirmation that he writes in “the premise that the economic development of developing countries should be considered a priority for moral, economic, human rights, and security reasons” (p.156), sounds laudable but somehow naïve. None of these factors are new, and their limited political appeal is proven precisely by the outcomes of the rounds that he is now trying to amend, or by the mere proliferation of FTAs that he mildly criticises (on other grounds) in pages 141-155 of the book. And perhaps, this is the weakest part of Lee’s construction: the mistake of indulging in the illusion that he needn’t address the scarce political feasibility of his proposals.

V. CONCLUSION

Half a century ago, the Haberler Report (GATT, 1958) identified several factors which could explain why many low-income countries were not deriving much benefit from the previous GATT Rounds. First, some of the domestic policies of the richer countries contributed significantly to the decline in exports of low-income countries. Principal among these were the high tariffs that faced exports of low-income countries on a wide range of products in which they

⁵⁸ A HANDBOOK ON THE GATS AGREEMENT, A WTO Secretariat Publication, Prepared by the WTO Trade in Services Division, 2005.

⁵⁹ *Id.* at 49.

⁶⁰ See SYLVIA OSTRY, *supra* note 22, at 94. See also, ALEXANDER COCKBURN and JEFFREY ST. CLAIR, FIVE DAYS THAT SHOOK THE WORLD – SEATTLE AND BEYOND (2000). The authors, acting –perhaps- as spokesmen of the “New Movement” (p.1) or “Anti-WTO Movement” (p.118), claim that “[t]he function of the WTO is to express in trade rules the present balance of economic power on the world held by the big corporations, which see the present WTO round as an opportunity to lock in their gains, to enlist its formal backing in their ceaseless quest for cheap labor and places to dump their poisons.” *Id.* at 117.

had comparative advantage. Second, less developed countries faced particular challenges in the context of multilateral trade negotiations: very few of them had actually participated in the rounds and they were not “principal suppliers” of many products that formed the focus of these negotiations. They also had nothing or little to offer in return for requesting developed countries to lower tariffs on products of particular export interest to them. Finally, as countries with relatively small economies and markets with exports concentrated on a limited number of primary commodities, they could exercise only limited leverage in the framework of multilateral negotiations.

It is somehow sobering that, lexicon tendencies apart, the report could well have been written today. Fifty years of multilateral rounds have shown us that, having little to offer, the poor can hope, at best, to be a nuisance. Being the majority of WTO members, low-income countries may of course use the consensus voting practice to block not only any actions on the so-called “new issues” but also liberalization efforts in traditional negotiating areas unless substantive provisions are included that aim at rectifying the perceived imbalances in trading benefits and costs. Many observers have indeed expressed their doubts on the sustainability of a dualistic framework constituted by a very stringent WTO dispute settlement mechanism, which requires consensus to undo rulings from panels and from the Appellate Body, and the very cumbersome WTO negotiation process which requires consensus to do almost everything. But neither the so-called ‘operability’ crisis nor the much commented ‘legitimacy’ crisis of the WTO, seem to have made much difference on the developed world’s attitude.⁶¹ While promising some candies on the multilateral front,⁶² the most powerful international players have discretionally crawled towards bilateralism and regionalism as a solution against deadlocked multilateralism.

But ironically enough, the fact of not facilitating the development of ‘the rest’ in a more orthodox way, has ‘annoying’ side-effects for developed countries. While convergence is not near, it certainly fights its way; the question is which way we prefer such equilibration (or arbitrage) to take place. When goods and services are not allowed to flow freely, factors of production do;⁶³ either because misery in these countries is correlated to low labour costs and poor environmental standards -and some ‘developed’ capital flees to get advantage of these *attractive* opportunities-, or because workers look for a ‘fair bargain’ themselves and physically climb the fences which protect the frontiers to the North.⁶⁴ And here is where, in a boomerang

⁶¹ See ROBERT E. BALDWIN, *Key Challenges Facing the WTO*, in DOHA AND BEYOND – THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 46, 50 (Mike Moore ed., 2004) (noting that the Doha Declaration itself and the Doha decision on implementation-related issues and concerns, constitute excellent sources that indicate the various concerns of the developing countries over the WTO system).

⁶² Notably, in launching the Agenda, the Doha Ministerial Declaration deliberately used a substantial amount of “development-friendly” language and suggests that the centerpiece of the Agenda is a “development Round.” But one should regard institutional promises with some caution. See, e.g., T. ADEMOLA OYEJIDE, *supra* note 14, at 90 (noting that, while it remains uncertain that the Agenda will solve the outstanding problems associated with Uruguay Round’s ‘special and differential treatment’ provisions, it has certainly proposed “to ‘add insult to injury’ by negotiating new trade rules agreements on investment, competition policy, government procurement and trade facilitation as part of ‘single undertaking’ – meaning that the new agreements will apply to all members without exception.”)

⁶³ Once circumvented by politics, economists might again have a say. See, e.g., ROBERT A. MUNDELL, *International Trade and Factor Mobility*, 47 AM. ECON. REV. 321(1957); J. H. G. OLIVERA, *Is Free Trade a Perfect Substitute for Factor Mobility?*, 77 ECON. J. 165 (1967).

⁶⁴ See, e.g., *The President of Mexico declares before Bush that emigration is stopped with development – “It is more efficient to build one kilometre of a highway than ten of a wall in the frontier”, says Calderon*, EL PAÍS, Wednesday 14 March 2007, Año XXXII, N. 10.869, p.6.

effect from Smoot-Hawley to Senator Byron Dorgan, the other kind of protectionism kicks in.⁶⁵

In a less than virtuous world, half irrational, half short-sighted, perhaps only when these side-effects prove too burdensome for the developed world's electorate, we shall be ready to look again to Yong-Shik Lee's proposals and rescue them from the academic crystal box.

⁶⁵ See, e.g., BYRON DORGAN and SHERROD BROWN, *How Free Trade Hurts*, *The Washington Post*, Saturday, December 23, 2006, Page A21; BYRON DORGAN, TAKE THIS JOB AND SHIP IT: HOW CORPORATE GREED AND BRAIN-DEAD POLITICS ARE SELLING OUT AMERICA (2006).