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International Trade and Developing Countries (Introduction)

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INTRODUCTION

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INTRODUCTION

An opportunity for international trade is important for all countries, and yet is especially vital for low-income countries facing the steepest development challenges. Cross-border trade among mutually-consenting private economic actors is sure to occur spontaneously as it has done for thousands of years. Yet in modern economies, international trade is regularly restricted by governments on both the import and export sides of a transaction. Over the past several decades, industrial countries have erected numerous barriers to exports from developing countries and have therefore been at least partly responsible for undercutting human development opportunities in those countries. To be sure, counterproductive governmental policies in many developing countries are also important factors in explaining why persistent poverty is often so hard to eradicate.

The post-World War II international trading system has always recognized that trade policy has a significant development dimension. The original General Agreement on Tariffs and Trade ("GATT") of 1947[1] contained an Article XVIII addressing economic development, and that Article was amended in 1948 and again in 1955.[2] Article XVIII begins by noting that the attainment of the objectives of the GATT will be facilitated by a "progressive development" of economies, particularly those economies that can only support low standards of living and are in the early stages of development.[3] Operationally, Article XVIII

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

2. *See* World Trade Organization [WTO], 1 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 512 (6th ed., 1995) [hereinafter ANALYTICAL INDEX].

3. *See* General Agreement on Tariffs and Trade art. XVIII(1), Apr. 15, 1994, *reprinted in* WTO, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILAT-

gives flexibility to utilize protective measures affecting imports and to grant governmental assistance required to promote the establishment of particular industries.[4] In addition, the GATT negotiating principles make clear that less-developed countries are assumed to have needs for more flexible use of tariff protection.[5] These early GATT provisions were supplemented in 1965, when the GATT was amended to add Part IV (Trade and Development), which encourages economically developed GATT contracting parties to "accord high priority to the reduction and elimination of barriers to products currently or potentially of export interest to less-developed contracting parties."[6] In 1979, the GATT parties enacted the Enabling Clause to permit unilateral discriminatory trade preferences in favor of developing countries.[7]

Despite these treaty-based provisions, many high-income countries, including the United States, have continued to restrain exports from developing countries, especially in import sensitive sectors such as agriculture, textiles, and clothing. When the World Trade Organization ("WTO") launched its first round of multilateral trade negotiations at Doha, Qatar in 2001, the Ministerial Declaration stated a commitment to place the needs and interests of developing countries at the heart of the newly-adopted work program in order to "make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development."[8] These Doha Round negotiations are now in their fourth year, and the prospects for a successful conclusion are

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ERAL TRADE NEGOTIATIONS 447 (1999), *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

4. *See id.* art. XVIII(2)-(3).

5. *See id.* art. XXVIII *bis*(3)(b).

6. Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, Feb. 8, 1965, 17 U.S.T. 1977, 572 U.N.T.S. 320.

7. *See* WTO, Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, ¶ 1, L/4903, GATT B.I.S.D. (26th Supp.) at 203 (1978-1979) ("Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.") (citation omitted); *see also* 2 ANALYTICAL INDEX, *supra* note 2, at 1048-49.

8. WTO, Ministerial Declaration of 14 November, 2001, ¶ 2, WT/MIN(01)/DEC/1, 41 I.L.M 746 (2002).

uncertain as of this writing, a fortnight before the crucial Hong Kong WTO Ministerial to be held in mid-December 2005.

This Book quite appropriately addresses the challenge of trade and developing countries. The most powerful countries have sound financial, political, environmental, and social reasons to promote sustainable economic growth throughout the world, and yet too often the policies used to do so have failed or have, in some instances, been designed in such a hypocritical way that they could not possibly succeed in their ostensible purposes. In recent years, however, international organizations, civic society, academics, the business community, religious leaders, entertainment celebrities, and the media have focused public attention on the myriad failings of current development policies. This Book makes a very useful contribution to the current debate about what works and does not work in promoting development.

The Book contains three Articles on important issues: Professor Raj Bhala's Article provides a critical examination of the U.S. African Growth and Opportunity Act ("AGOA") which grants trade preferences to certain countries in Sub-Saharan Africa.[9] Professor J.M. Migai Akech's Article discusses the syndrome of bilateral political and economic pressure being imposed on developing countries in ways that erode their policy autonomy.[10] The third Article, written by Professor Marisa Pagnattaro, evaluates the labor provisions in the new Dominican Republic—Central America—United States Free Trade Agreement (using the popular acronym "CAFTA") and concludes that these provisions are inadequate for the United States and for the long-term needs of the CAFTA countries too.[11]

Raj Bhala is a well known authority on international trade law. In his Article, he unmasks the numerous deficiencies in AGOA that make it far less beneficial to needy African countries than the U.S. politicians who championed AGOA claim it to be. Professor Bhala's Article is titled "The Limits of American Generosity," and he frames his text around the question of whether AGOA is truly generous, or whether the details of AGOA "reveal

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9. Raj Bhala, *The Limits of American Generosity*, 29 FORDHAM INT'L L.J. 299 (2005).

10. J.M. Migai Akech, *Developing Countries at Crossroads: Aid, Public Participation, and the Regulation of Trade in Genetically Modified Foods*, 29 FORDHAM INT'L L.J. 265 (2005).

11. Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT'L L.J. 386 (2005).

an uncharitable, begrudging approach."[12] Based on a careful examination of the country eligibility and product-specific provisions in the current AGOA law, Professor Bhala documents numerous ways in which U.S. law is insufficiently charitable. His Article is especially impressive and valuable in explaining the intricacies of the convoluted "rule of origin" provisions in AGOA for apparel trade, which he says lead to harmful economic distortions and promote dependency in recipient nations. Another excellent feature of Professor Bhala's Article is his analysis of the statutory country eligibility provisions for AGOA. He sharply criticizes what he calls "spiraling conditionality,"[13] following an analysis that shows how these provisions encourage economic dependency, permit political bullying, and fail to achieve social justice. He is especially critical of the requirement on worker rights, observing that this "requirement, noble as it sounds, arguably does little more than placate American labor interests."[14] Professor Bhala asks the reader to envision a paradigm of trade law that would "go beyond protecting the self-interest of domestic producers in developed countries."[15] He concludes that today, "American willingness to give duty-free treatment extends only to the line of a potential threat to domestic producers."[16]

Migai Akech, of the University of Nairobi, is an authority on the law of biosafety. In his Article, "Developing Countries at Crossroads: Aid, Public Participation, and the Regulation of Trade in Genetically Modified Foods," Professor Akech turns his attention to the dilemmas of genetically-modified ("GM") food trade from the perspective of developing countries.[17] The problem he describes is that the United States and the European Community ("EC") have adopted diametrically opposite approaches to the regulation of GM agriculture, with the EC's approach being more precautionary. Because the United States and the EC consider the stakes to be high, each side has placed economic and political pressure on developing countries to follow its own approach to GM regulation. For example, he points to the use of food aid by the United States as a lever to get devel-

12. Bhala, *supra* note 9, at 300.
13. *Id.* at 330.
14. *Id.* at 335.
15. *Id.* at 300.
16. *Id.* at 384.
17. *See generally* Akech, *supra* note 10.

oping countries to accept the introduction of GM products, giving the example of Zimbabwe's food crisis of 2001-2002.[18] Such practices put developing countries in a vulnerable position, because they need to be able to export to and gain assistance from both the United States and the EC. Both Bhala's and Akech's Articles converge in criticizing rich countries for seeking to impose their own policy choices on developing countries.

One solution Akech advocates is for developing countries to enhance space for public participation in the regulation of biotechnology through the use of techniques of deliberative democracy. He explains that "the regulation of trade in GM food products is a political process that needs to be democratized if there is to be a sufficient consideration of their potential impacts on human health and the environment."[19]

Marisa Pagnattaro is a U.S.-based scholar of international business and employment law. Her thoughtful analysis of the labor provisions in the CAFTA, titled "Leveling the Playing Field: Labor Provisions in CAFTA," is quite timely, as the treaty itself was approved by the U.S. Congress just a few months ago.[20] Professor Pagnattaro begins by noting the provisions in U.S. law, passed in 2002, mandating the President to seek labor provisions in new free trade agreements, and considers these provisions in light of relevant international law, namely, twenty-three conventions enacted by the International Labour Organization (ILO). Following a short analysis of the conventions, she employs recent studies, mainly official U.S. government reports, to document the persistence of serious derogations from internationally recognized labor rights in the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. In her view, the labor provisions in CAFTA are inadequate to address these problems, because "CAFTA does not require any revision of labor laws to increase standards consistent with international core labor rights."[21] She also argues that the labor provisions in CAFTA "do not comply with the plain language or spirit of the [U.S.

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18. *Id.* at 289-90.

19. *Id.* at 290-91.

20. *See generally* Dominican Republic—Central America—United States Free Trade Agreement Implementation Act, Pub. L. No. 109-053 (2005) (to be codified at 19 U.S.C. § 4001); *America's Congress Finally Passes CAFTA*, ECONOMIST, July 30, 2005.

21. Pagnattaro, *supra* note 11, at 433.

legislation granting Trade Promotion Authority ("TPA")]."[22]

Pagnattaro's Article concludes with a specific proposal for more effective labor provisions in future U.S. free trade agreements. For example, she calls for trade agreements to require parties to "agree to strengthen domestic law to be consistent with core labor standards."[23] It is interesting to note that the two contributions by professors Bhala and Pagnattaro offer vividly diverging perspectives on the appropriateness of labor conditionality in a trade context.

The publication of this Book once again shows the regularity with which the *Fordham International Law Journal* is able to present lively and important Articles on international trade law.[24] The Editors of this volume are to be commended for continuing this scholarly service to the global community.

22. *Id.* at 438.

23. *Id.* at 443.

24. For example, see the twenty-six Essays and Articles in monumental symposium, *The World Trade Organization, Globalization, and the Future of International Trade*, 24 FORDHAM INT'L L.J. 1 (2000).