Introduction

There is no doubt that economic and social development has become one of the most important agenda items for the global trading system. The importance of development has been well demonstrated by the adoption of the Doha Development Agenda (DDA) in the current round of multilateral trade negotiations in the World Trade Organization (WTO), the "Doha Round." The progress of the round has been interrupted and delayed on several occasions because of the considerable gap between developed- and developing-country members' positions on trade and development issues. A key issue of the debate is whether the current regulatory framework for international trade, as represented by the legal disciplines of the WTO, serves the development and trade interests of less developed economies.

This book attempts to address this issue from the perspective of law and development, that is, by evaluating the impact of law on economic and social development. From this perspective, an assessment of the current regulatory framework for international trade can be made to examine whether relevant rules of international trade and the world trading system as a whole meet the development interest of developing countries. In this book, seventeen leading scholars and professionals from several countries, including the United States, Canada, Australia, Japan, Korea, Israel, China, and United Kingdom, discuss relevant international trade law issues from the law and development perspective.

This book does not attempt to review theoretical aspects of law and development studies or evaluate their applicability to the current discussions of trade and development. Those who are interested in such an exploration may refer to other books, such as the excellent recent volume, *The New Law and Economic Development*, edited by David Trubek and Alvaro Santos (New York: Cambridge University Press, 2006). The orientation of the present book is more practical, in a research-based sense. It attempts, without relying on any particular theoretical stance or applying an ideological preference, to assess whether relevant rules of international trade in some key areas have served the development interest of developing countries and, if not, what reforms can be suggested for improvement.

We have selected four key topics for discussion and set out sixteen chapters in four parts: Part I covers general issues on international trade and developing countries, Part II discusses law and development issues in the World Trade Organization, Part III moves on to law and development issues in regional trade agreements, and Part IV engages with law and development issues concerning other regional initiatives. These four parts encompass much of the international trade and development debates today, and the assigned chapters in each part address specific issues as follows.

Part I of the book begins with the topic of economic development and international trade in general. Chapter 1 by Yong-Shik Lee points out that least developed countries (LDCs) have not benefited significantly from international trade, and proposes a new trade scheme ("microtrade") with the aim of reducing or eliminating extreme poverty prevalent in LDCs. Chapter 2 by Tomer Broude turns to the settlement of international disputes in which development policy issues arise. Chapter 3 by Bryan Mercurio brings out another important issue in international trade – namely, intellectual property rights – and discusses its implication on development. Following that, reflecting on the recent emphasis on security in international trade since 9/11, Chapter 4 by Maureen Irish presents security issues in international trade and discusses their impact on the trade of developing countries.

Part II focuses on law and development issues in the WTO system. Chapter 5 by Yong-Shik Lee reviews the legal framework of the WTO system from the perspective of developing countries and proposes extensive reform. Chapter 6 by Faizel Ismail discusses the role of developing countries in shaping issues in the WTO. Chapter 7 by Gary Horlick and Katherine Fennell explores the treatment of developing countries in the WTO dispute settlement system and examines difficulties that developing countries are facing in the current system. Chapter 8 by Andrew Mitchell and Joanne Wallis analyzes, based on case studies, legal problems of WTO accession process faced by developing countries.

Part III covers the proliferation of regional trade agreements, one of the most significant issues in the international trading system today. Chapter 9 by Moshe Hirsch opens this discussion by addressing the broader development interest in the context of regional integration. Chapter 10 by Mitsuo Matsushita and Yong-Shik Lee provides a more specific account of relevant rules regulating free trade agreements (FTAs) from the development perspective and proposes a global FTA network as a means to coordinate different and often conflicting rules among FTAs and to promote common interests of developing countries. Chapter 11 by Anthony Cassimatis explores the impact that human rights conditionalities of FTAs and Generalized System of Preferences (GSP) have on the trade of developing countries. Chapter 12 by Yong-Shik Lee concludes this part with the fundamental question of whether FTAs and foreign direct investment will be a viable answer for economic development and whether the recent proliferation of FTAs will benefit developing countries.

Part IV discusses the law and development aspects of regional trade initiatives intended to promote economic development. Chapter 13 by Colin Picker explores complexities arising from regional differences within countries with aspects of both developed and developing worlds. Chapter 14 by Caf Dowlah introduces the U.S. GSP program and discusses critical issues with the program. Chapter 15 by Yong-Shik Lee, Young-Ok Kim, and Hye Seong Mun provides a rare account of the development initiatives of North Korea and suggests possible law and policy reforms. Chapter 16 by Xiaojie Lu addresses China's development policy in the context of relevant subsidy regulations.

In the concluding chapter, Gary Horlick offers insight into the key political issues concerning trade and development, as well as some of the WTO attempts to address development issues.

We hope that this book will benefit all those who are interested in the enigmatic interaction between the areas of trade, law, and economic development and will, at least to a modest extent, contribute to finding legal solution for the significant disagreements surrounding trade and development issues. Ultimately, we subscribe to the saying that all things are uncertain the moment society departs from law, but in these areas, the law still remains to be explored, established, and elaborated.

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PART I

Developing Countries and International Trade

1

Law and Development for Least Developed Countries

Theoretical Basis and Regulatory Framework for Microtrade

Yong-Shik Lee

I. INTRODUCTION: POVERTY, TRADE, AND REGULATORY ISSUES

The world has witnessed unprecedented technological and economic advances in recent times, yet much of the world's population does not share this prosperity. Poverty remains one of the most serious global problems. Despite considerable efforts by international organizations, governments, and nongovernmental organizations (NGOs), the situation has not improved significantly, and nearly half of the world population lives below the poverty line.[1] This calls for new approaches that could lead to solutions for poverty problems around the world. This chapter proposes a theoretical and regulatory framework for a new type of international trade to improve the economic status of populations in least developed countries (LDCs).[2] This new

[1] For poverty lines, the World Bank uses references set at consumption levels of USD 1.25 per day (the mean of the national poverty lines for the fifteen poorest countries of the world) and USD 2 per day (the median poverty line for the developing world) at 2005 prices. It has been estimated that in 2005, 1.4 billion people had consumption levels below USD 1.25 a day and 2.6 billion (48% of the world population) under USD 2 per day. The "poverty line" refers to the latter in this chapter. See World Bank, *Poverty: At a Glance*, available at: http://web.worldbank.org. See also Y. S. Lee, *Reclaiming Development in the World Trading System* (New York: Cambridge University Press, 2009), chap. 1.

[2] LDCs are the poorest countries in the world. Although poverty is found among the populations in both developed and developing countries, it is most prevalent in LDCs. The United Nations currently designates forty-eight countries as LDCs. The list is reviewed every three years by the Economic and Social Council. The following three criteria are used to identify LDCs in its latest 2009 triennial review:

1. A low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita (under $905 for inclusion, above $1,086 for graduation)
2. A human capital status criterion, involving a composite Human Assets Index based on indicators of (a) nutrition – percentage of population undernourished; (b) health – mortality rate for children

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type of trade is called "microtrade." In this chapter, I use the term microtrade to describe international trade on a small scale, based primarily on manually produced products using small amounts of capital and low levels of technology available at a local level in LDCs.[3] Microtrade is conceived as a means to raise income to reduce or eliminate poverty when no other conventional means of economic development[4] is either available or sufficient to accomplish this.

Poverty is most serious in LDCs but exists in other, more advanced developing countries and even in developed countries. The poverty issue in developed countries is a problem of income distribution; it is not within the purview of this chapter, which focuses on poverty issues in LDCs and addresses ways in which poverty can be reduced or eliminated by improving the income of populations in LDCs through microtrade. The mechanism of microtrade and its legal framework are discussed in the next two sections.

The solution to the prevalent poverty problems in LDCs should come from economic development that will provide the majority of LDC populations with the economic capacities to meet the material requirements of daily life above the poverty level. Although aid and donations from other countries, international bodies, NGOs, and private individuals are important sources of temporary relief for impoverished populations in LDCs,[5] they are not a lasting solution to poverty in countries without viable economies. The countries that have escaped from poverty in the past fifty years (e.g., some East Asian economies, including South Korea, Taiwan, Hong Kong, Singapore, and, more recently, China) did so through successful economic development and not through aid and donations.

In all of the successful development cases, world trade has been a crucial element in success, as a number of leading scholars, such as Rodrik, Amsden, and Wade, have studied extensively.[6] LDCs do not typically have sufficient domestic markets

aged five years or under; (c) education – the gross secondary school enrolment ratio; and (d) adult literacy rate

3. An economic vulnerability criterion, involving a composite Economic Vulnerability Index based on indicators of: (a) population size; (b) remoteness; (c) merchandise export concentration; (d) share of agriculture, forestry and fisheries in gross domestic product; (e) homelessness owing to natural disasters; (f) instability of agricultural production; and (g) instability of exports of goods and services.

Source: http://www.unohrlls.org/en/ldc/related/59.

[3] A prominent futurist, Alvin Toffler, used the term "micro-trade" in his interview with *USA Today* and discussed briefly some of the microtrade elements explained in this chapter. "Can We End World Poverty?" *USA Today*, January 28, 2000, available at: http://www.usatoday.com/news/opinion/columnists/toffler/toff04.htm.

[4] These means include economic opportunities, such as employment or business opportunities arising from domestic sale of goods and services, as well as from conventional international trade of mass-produced manufactured products or primary products utilizing economies of scale.

[5] Official Development Assistance (ODA) to LDCs totaled more than USD 23.4 billion in 2008. OECD, *ODA by Recipients*, available at: http://stats.oecd.org.

[6] See infra notes 19, 20, 21, and 22.

for goods and services to support economic development because of the local population's low purchasing power. World trade opens up affluent foreign markets for the goods and services produced in developing countries, and economic development has been achieved by taking advantage of those foreign markets through export. This development strategy, called "export-oriented development policy," has been employed successfully by formerly developing economies in East Asia, such as South Korea, Taiwan, Singapore, and Hong Kong, from the 1960s through the 1990s, with remarkable success.[7]

This success has not been replicated in most LDCs.[8] Various political, social, and economic problems deter LDCs from undertaking the large-scale development initiatives that have been successfully completed in the East Asian countries. Microtrade is proposed as an alternative to overcome the typical supply constraints of LDCs, such as insufficient capital and low levels of production technology. This allows residents in LDCs to export local products to affluent foreign markets – albeit on a much smaller scale than that achieved by newly industrializing countries[9] – with the objective of generating income that will be beyond the poverty level. In facilitating exports from LDCs, some of the regulatory issues in international trade law also need to be addressed. Part IV of the General Agreement on Tariffs and Trade (GATT), which has long been considered to be a set of rules that are declaratory but not effective with binding force, along with some other reform proposals in international trade law, can be used as a regulatory basis to facilitate microtrade.

This chapter introduces the concept of microtrade and offers preliminary discussions on its mechanism and regulatory framework. Section II discusses the concept of microtrade and its mechanisms. Section III addresses relevant regulatory issues. The legal framework for international trade, as represented by the disciplines of the World Trade Organization (WTO), is relevant because it regulates the measures of government in international trade and can also be applied to microtrade. Consideration is given to possible reforms of the regulatory framework to facilitate

7 These four economies have undergone rapid industrialization since the 1960s and have been called "newly industrializing countries" (NICs). All of them have passed the threshold for high-income country status as classified by the World Bank (GNI per capita of USD 11,906 or more based on 2008 data). Four decades ago, these countries were poor, with economies dependent on the production of cheap primary products. Between 1961 and 1996, South Korea increased its GDP by an average of 9.80% per annum, Hong Kong by 9.58%, Taiwan by 10.21%, and Singapore by 9.95%. Alan Heston, Robert Summers, and Bettina Aten, *Penn World Table Version 6.2* (Philadelphia: Center for International Comparisons of Production, Income and Prices, September 2006). In the same period, the export growth rate of these four economies ranged from around 15% to nearly 30%. Export was an "engine" for the high economic growth in all of these countries.

8 From 1980 to 1990, the average annual economic growth rate for LDCs was –0.4%. From 1990 to 2000, it was a mere 1.3%. In the same period, the average growth rate for other developing countries was 1.8% and 3.4%, respectively. United Nations Commission on Trade and Development (UNCTAD), *The Least Developed Countries Report 2008*, p. 139, Statistical Index: Data on Least Developed Countries, Table 1, GDP per capita and population: levels and growth.

9 Supra note 7.

microtrade. Section IV draws conclusions and offers suggestions to promote microtrade.

II. MICROTRADE: A NEW TYPE OF INTERNATIONAL TRADE

A. *Microtrade – Linking the World Market with Local Production*

According to United Nations' statistics, more developing countries were poorer by the beginning of the millennium than they were fifty years earlier, and few countries have escaped poverty.[10] This clearly shows that economic development has not been successfully facilitated in most developing countries, particularly in LDCs. The economic and human welfare situation in LDCs is, in fact, dire. Average GNP per capita of the LDCs was a mere USD 454 in 2006,[11] and the average proportion of the population living on under USD 1 a day among 22 LDCs was 43.6%.[12] Life expectancy was 51.6 years[13] compared with 79.3 years in developed countries.[14] The infant mortality rate was 9%[15] compared with 0.51% in developed countries.[16] Diseases kill millions of people in LDCs every year. As of 2005, 11.7 million people in LDCs – nearly 3% of the population – were estimated to have been infected by the HIV virus.[17] Armed conflicts have added to the suffering in LDCs, and millions of people have been killed or become refugees. Attaining political stability and economic development will be necessary to stop such human tragedy.

Promoting economic development in LDCs presents a number of difficulties. The following factors have been cited as reasons for sluggish economic progress and prevalent poverty in LDCs: poor social and industrial infrastructure, insufficient capital and low levels of technology, low literacy and education levels, lack of entrepreneurship and management expertise, insufficient political leadership for economic development coupled with political instability, corruption and weak government institutions with absence of effective administrative support, and even some

[10] According to the UN Human Development Report 2003, fifty-four countries had become poorer by the beginning of the new millennium than they were in 1990, as measured by GDP per capita. United Nations Development Program, *U.N. Human Development Report 2003* (New York: Oxford University Press, 2003).

[11] Supra note 8.

[12] The covered period is 1990–2003. UN Office of the High Representative for the Least Developed Countries, *Selected Economic and Social Indicators for LDCs (2005)*, available at: http://www.un.org/special-rep/ohrlls/ldc/2005%20socio-econ%20indicators.pdf.

[13] UNCTAD (2008), supra note 8, p. 146, Statistical Index: Data on Least Developed Countries, Table 8, Indicators on Demography.

[14] OECD, *Health Data 2009* (the cited statistics are for 2006), available at: http://www.oecd.org.

[15] UNCTAD (2008), supra note 8, p. 146, Statistical Index: Data on Least Developed Countries, Table 8, Indicators on Demography.

[16] OECD (2009), supra note 14.

[17] UNCTAD (2008), supra note 8, p. 147, Statistical Index: Data on Least Developed Countries, Table 9, Indicators on Health.

cultural issues that are deterrents to economic development.[18] Most of these problems will be difficult to solve in the short term. Large-scale development initiatives and the subsequent economic development in East Asia were possible because these countries, despite initial capital and supply constraints, did not suffer from some of the cited problems and were strong in certain key elements for development, such as a high literacy rate, strong political leadership, and effective administrative support from government.[19]

The East Asian countries moved beyond poverty by successfully undertaking a series of export-oriented economic development initiatives, which included promoting large-scale export industries.[20] The contribution of international trade to economic development and the role of government in successful cases have been widely studied and well documented.[21] Leading scholars such as Amsden and Wade have studied the industrial policies adopted by the East Asian countries and concluded that their governments had directed investments to certain key industries and intervened in international trade in various ways (i.e., by using subsidies and limiting foreign imports) while engaging in trade and promoting exports.[22] Although

[18] See A. F. Petrone (ed.), *Causes and Alleviation of Poverty* (Hauppauge, NY: Nova Science Publications, 2002). For the effect of culture on development, see Amartya Sen, *Culture and Development*, World Bank Paper (December 13, 2000), available at: http://info.worldbank.org/etools/docs/voddocs/354/688/sen_tokyo.pdf.

[19] Kwang-Suk Kim and Joon-Kyung Park, *Sources of Economic Growth in Korea: 1963–1981* (Seoul: Korea Development Institute, 1985), p. 6. Factors such as political and social stabilities, effective technocratic bureaucracies and organized government support, strong political leadership, educated workforce, strict work ethics, and higher ratio of savings are cited as important factors for the successful economic development of South Korea and the other NICs. Dani Rodrik has also suggested that an ideal institutional arrangement between the public and private sectors should be in place to facilitate development. Dani Rodrik, *Industrial Policy for the Twenty-First Century*, paper prepared for UNIDO (September 2004). According to Rodrik, the working institutional arrangement is dependent on the existence of effective cooperation and communications between the public and private sectors. Nonetheless, Rodrik also stresses that some measures of transparency and accountability should be imposed to prevent the moral hazards associated with government support. Ibid., pp. 20–21.

[20] For an evolution of industrial policies of the NICs, see Mari Pangestu, "Industrial Policy and Developing Countries," in Bernard Hoekman, Aaditya Mattoo, and Philip English (eds.), *Development, Trade, and the WTO: A Handbook* (Washington, DC: World Bank, 2002), p. 153, Table 17.1.

[21] See A. O. Krueger, "Trade Policies in Developing Countries," in R. W. Jones and P. B. Kenen (eds.), *Handbook of International Economics*, Vol. 1 (New York: North-Holland, 1984), pp. 519–69; R. Findlay, "Growth and Development in Trade Models," in R. W. Jones and P. B. Kenen (eds.), *Handbook of International Economics*, Vol. 1 (New York: North-Holland, 1984), pp. 185–236; T. N. Srinivasan, "Trade, Development, and Growth," *Princeton Essays in International Economics*, No. 225 (December 2001); G. K. Helleiner (ed.), *Trade Policy, Industrialization, and Development* (Oxford: Oxford University Press, 1992); World Bank, *The East Asian Miracle* (New York: Oxford University Press, 1993).

[22] See Alice H. Amsden, *Escape from Empire: The Developing World's Journey through Heaven and Hell* (Cambridge, MA: MIT Press, 2007); Alice H. Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (New York: Oxford University Press, 1989); Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton, NJ: Princeton University Press, 2003).

the question is whether such government interventions have always been successful in promoting economic development, there is little doubt that the development initiatives made by governments and followed by the private sector have led to the economic growth that drove the East Asian countries out of poverty.[23] Given the constraints and the problems discussed earlier, however, it will not be feasible for many LDCs to undertake large-scale development initiatives, by either the private sector or the government. The working institutional arrangement between the private and public sectors as described by Dani Rodrik[24] is not found in many LDCs, and it is not likely to occur in theforeseeable future.[25]

Microtrade will be an alternative approach to reduce or eliminate poverty when an LDC economy is not supported by a well-functioning government and effective administrative assistance, and when the private sector as a whole does not function to make economic progress. Microtrade will essentially be a local initiative that uses the mechanism of international trade but will not require the large-scale industrial initiatives promoted by East Asian countries during their rapid development periods. The essence of this new approach is to enable LDC residents to export locally produced products (LPPs) to the more affluent markets of developed countries to generate income that is beyond the poverty level. The distinction between microtrade and conventional trade lies in the use of the price difference, as described subsequently, rather than the economies of scale, which require mass production capacities that many LDCs lack and cannot obtain in the near future. Examples of possible LPPs for microtrade include portable items of everyday use, for ease of shipping and distribution, that can be produced without high-level technology or costly production facilities; such items include cups and dishes, utensils, small furniture, musical instruments, art objects, ornaments, and toys.[26]

The price difference between LDCs and developed countries, coupled with the higher purchasing power of consumers in developed countries,[27] can generate higher levels of income for LPP producers in LDCs engaged in microtrade, compared with what can be generated from local transactions. A monthly income of USD 75 per

[23] Supra notes 7, 22.

[24] Supra note 19.

[25] Peter Leeson and Claudia Williamson have taken this idea one step further, arguing that the absence of a government, rather than the presence of a repressive LDC government, has offered a better condition for economic development. Peter Leeson and Claudia Williamson, "Anarchy and Development: An Application of the Theory of Second Best" (2009) 2(1) *The Law and Development Review* 77–96.

[26] For ease of transportation, storage, and distribution, manufactured products, rather than agricultural products, which tend to be less value-added per unit than manufactured products and thus attract lower profits, will be more likely candidates for microtrade. The stringent Sanitary and Phytosanitary (SPS) requirements of developed countries may also create difficulties in the importation of agricultural products from LDCs, which is another reason to choose manufactured products for microtrade.

[27] The average price level of consumption for forty-seven LDCs was measured at 39.2 in 2007 (USA = 100.6), compared with 118.3 for OECD countries in the same year, showing a difference of nearly three times between LDCs and developed countries. Data compiled from "Price Level of Consumption" (Purchasing Power Parity over GDP/Exchange Rate in Current Prices), Alan Heston, Robert Summers, and Bettina Aten, *Penn World Table Version 6.3* (Philadelphia: Center for International Comparisons of Production, Income and Prices at the University of Pennsylvania, August 2009).