Development: Domestic Constraints and External Opportunities from Globalization

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I. INTRODUCTION

The letter of invitation to this conference described it as designed to contribute to a “renewed debate in the last several years on how best to promote development in an era of globalization.” It also identified three critical components in this debate: development assistance in support of the so-called Millennium Development Goals (MDG), trade liberalization for improving access to industrial country markets for developing

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countries, and institutional reforms, in particular, development assistance towards building effective and corruption-free government.

Each of these critical components is problematic. First, declarations such as MDG, the Monterrey Declaration on Development Finance, or the Right to Development are rhetorical and hortatory and have only limited operational significance. Second, although greater access to industrial country markets, and a rule-based and transparent global system of trade and finance that guarantees such access to developing countries are important, the real issue is not the recognition of their importance, but the political economy of ensuring the existence of both. Progress in this regard depends largely, though not wholly, on the United States, the European Union, Japan, and other industrial countries. Without their willingness to dismantle their protective barriers and agricultural export subsidies in the Doha Round of trade negotiations, not much progress can be expected. Third, the potency of development assistance as a lever to bring about sustainable reforms (not only economic, but socio-political-institutional) is overrated, not least because such assistance from the West has gone in the past to many odious regimes as a reward for their support in the Cold War. Last, ignoring the tremendous variance across developing countries in their stages of their economic, social, and political development and treating them as an undifferentiated group of “Third World” or “developing” countries in discussing market access or assistance is an invitation to avoid critical thinking.

Many of the needed changes in policy, the political economy of making them, and, above all, the changes in polity, society, and institutions to promote development are domestic. In all countries there are usually vested interests in the status quo that would resist change. It would ill serve the objective of promoting development to focus excessively, if not exclusively, on the external dimension. Given the diversity among the developing countries, advice on their domestic policy must necessarily allow for their particular context. At the same time, in doing so one should not fall into the trap of viewing every country as sui generis, thus assuming that no general principles and prescriptions relevant for many or most countries exist. Indeed, such principles do exist. For example, one of the important domestic institutions of a country that has both an intrinsic value and instrumental role in promoting (or retarding) development is its legal system, both in a de jure or formal set of laws, rules, and case-laws, and in a de facto sense of its functioning, specifically its enforcement and its efficiency, both of which are invariably country-specific. It is indeed appropriate that this conference has focused on legal issues.
In what follows, I first discuss the process of development in Section II. Section III is devoted to the external aspects of development, namely international trade, finance, and intergovernmental organizations. Section IV is concerned with the domestic dimensions and legal reform, drawing on the debate on legal reforms in India. I offer a few concluding remarks in Section V.

II. THE PROCESS OF DEVELOPMENT

In thinking about how best to promote development, it is instructive to recall that until the emergence of in the late nineteenth century of neoclassical economics, the focus of which is static equilibrium, all of economics was development economics, with its focus on “dynamics of growth and development. Adam Smith’s theme was the wealth of nations” and the factors that promoted wealth accumulation. Marx, of course, pursued the grand theme of theory and evolution of capitalism in history. The last quarter of the nineteenth century and the first decade or so of the twentieth century saw the first wave of globalization, the characteristics of which were eloquently described and whose abrupt end as the First World War broke out was bemoaned by no less a person than Keynes.1 The inter-war period was disastrous from the perspective of the global economy, characterized as it was by rising protectionism, collapse of global capital markets, and, of course, the Great Depression. It is no surprise that economists were more concerned about unemployment and idle capacity than about static equilibrium or of grand dynamics of development. It is only in the closing years of the Second World War, at which time arose the problems of reconstruction of war-damaged economies and development of poor countries in anticipation of their becoming independent nations, that the problem of development began to draw attention from economists. In this section, I discuss the emergence of development economics as a distinct discipline and how the pioneers of development economics viewed the goals, content, and process of development. Their diagnosis of the causes of underdevelopment and their experience of the disastrous inter-war period led them to propose development strategies which, in many ways, turned out to be inappropriate to the realities of the world economy of the post-Second World War era. I review the experience with these strategies that emphasized state-directed industrialization based on import substitution in the four decades or so after the end of the Second World War and the main lessons from this experience. These lessons emphasized the efficiency of

the market mechanism, the importance of openness to external trade and investment, and, above all, the creation and strengthening of institutions that are essential for successful development.

A. The Emergence of Development Economics

Scholars of disciplines besides economics, such as anthropology and political science, have enriched the academic analysis of development. Still, as an economist myself, I am most familiar with and comfortable in discussing economists’ perceptions and analyses of development. Development economics as a subdiscipline branched off from mainstream economics during the final years of the Second World War. Until the advent of neoclassical economics in the late nineteenth century, all of economics was development economics. Classical economists such as Adam Smith, David Ricardo, Karl Marx, and their predecessors were concerned with issues of economic development. The pre-Second World War neoclassicists, with the exception of Allyn Young whose classic article was entitled “Increasing Returns and Economic Progress,” paid virtually no attention to problems of growth or of development of poor countries.¹ Neoclassical resurgence in development economics is strictly a post-war phenomenon.

B. Goals and Content of Development

The United Nations Development Programme (UNDP) asserts that:

[e]conomic growth became the main focus after the Second World War and the growth rate of the gross national product became the goal of development in the 1950s and 1960s, the question of promoting individual well-being receded. In time distribution was altogether forgotten. . . . [T]hus income moved from an admittedly partial measure of well-being to center stage as a measure of production and as the sole measure of welfare in per capita form. By the 1960s it was clear from many developing countries that income growth had not tackled the problem of mass poverty. Income distribution and equity came to the forefront as an additional objective of development.³

The most charitable characterization of this assertion is that it is based on a misreading of the history of development thinking and policy. This is not to say, of course, that occasionally development and growth of in-

². UNDP; HUMAN DEVELOPMENT REPORT 1990 104 (1990).
come per head were treated as synonymous. Interestingly, the Nobel Laureate Jan Tinbergen, a sage among economists, in a section entitled “Ultimate Aims Pursued” in his celebrated little book *The Design of Development*, states the general principle that one should maximize the contribution of an investment program to the country’s “well-being.” “Well-being” may be taken to mean national income, present and future, with possible corrections for distribution over social groups or regions.⁴

Buchanan and Ellis, authors of an early textbook on development, distinguished between indicators that in their view portrayed the quality and texture of life as an “end-product” and others that tended to proxy economic performance and therefore to explain or at least correlate with the end-product.⁶ Significantly, they included life expectancy at birth, infant mortality, general health indicators, and food intake in the set of indicators of end-product. They viewed “real income per person” simply as a short-hand expression for all these indicators together. Arthur Lewis, also a pioneer in development and another Nobel Laureate, ended his magisterial *The Theory of Economic Growth* with a chapter entitled, “Is Growth Desirable?” Thus, early development economists and, even more importantly, policy-makers were very aware, long before UNDP discovered it, that development is multidimensional and growth of per capita income had an important *instrumental* role in promoting development rather than being solely a measure of development success or failure.

In India, as early as 1938, the Indian National Congress, the dominant political party then fighting for national independence, appointed a committee under the chairmanship of the future Prime Minister Nehru to plan for the development of independent India. Nehru recalled later:

> Obviously we could not consider any problem, much less plan, without some definite aim and social objective. That aim was declared to be to insure an adequate *standard of living for the masses*; in other words to get rid of the appalling poverty of the people. . . . [T]here was lack of food, of clothing, of housing and every other requirement of human existence. To remove this lack and insure an irreducible minimum standard for everybody, the national income had to be greatly increased, and in addition . . . there had to be a *more equitable distribution of wealth.*⁸

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⁵.  *Id.*
In a widely cited book, the Nobel Laureate Amartya Sen defined development as a “process of expanding the real freedoms that people enjoy,” contrasting with what he called “narrower views of development, such as development with the growth of gross national product, or with the rise in personal incomes or with industrialization or with technological advance, or with social modernization.” He suggests that “viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely means that, inter alia, play a prominent part in process.”

The distinction between ends and means and the related one between intrinsic and instrumental values are well understood. What is less well understood is that, as in logical systems in which “there is a certain freedom of choice as to which statements one wishes to regard as premises, and which ones as derived implications,” there is often some freedom of choice or an element of arbitrariness in what one deems an end as opposed to means. For example, universal primary education could be viewed as an end in itself or as a means to the end of informed participation of all citizens in the socio-economic-political processes of a nation. Besides, in some situations, an end could also be a means for achieving another end. Be that as it may, expansion of substantive freedoms as an end or goal is implicit in the writings some policy makers such as Jawaharlal Nehru. Sen’s characterization of development, and more importantly his identification of major sources of lack of freedom, reinforce one of the main points of this paper that the constraints on development are largely domestic.

Last, there is the concept of a right to development adopted by the United Nations General Assembly in 1986. This is not the occasion to explore whether it has any content and, if it does, whether it or human rights more broadly conceived provide a normative framework for thinking about institutions, including legal systems, for development. Sen devotes Chapter 10 of his book to human rights. He identifies three broad critiques to the human rights approach—a legitimacy critique (a confounding of the consequences of legal systems with pre-legal principles), a coherence critique (rights do not mean much as long as there is no agency that has the duty to provide such rights), and a cultural critique (there are no universal values underpinning the rights)—only to argue against the significance of the critiques. I did not find his argu-

10. Id.
ments, particularly the ones against legitimacy and coherence critiques, persuasive.  

C. Diagnosis of the Causes of Underdevelopment

In their analysis of the reasons why many countries had not developed, most of the early development economists started from a presumption that there was a large surplus of rural labor with low marginal productivity, and industrialization was the key to absorb this surplus in more productive activities. The process of industrialization in their view was constrained on the demand side by lack of domestic demand and on the supply side by shortage of physical capital. Additionally, the process was rife with externalities, indivisibilities, and scale economies. These in turn meant that spontaneous industrialization through private initiatives responding to market signals would not come about. Thus the State had to play a major role in the process, and this role involved regulation of the market economy through controls on prices, production, credit, and domestic and foreign trade. Complementarities between industries on the supply as well as demand sides meant that, in an economy largely closed to foreign trade, "balanced" investment in a number of activities simultaneously had to be planned and, because of indivisibilities, the quantum of investment had to be large.

The prospects for foreign trade were seen to be limited for two reasons. First, traditional exports of primary products could be increased only by increasing cost, because their prices were relative to those of imports. For example, the terms of trade were believed to be declining secularly. Second, demand for nontraditional exports of simple manufactures was restricted by trade barriers erected by industrialized countries, and supply was limited by the lack of industrial capacity and infrastructure in developing countries. Only industrialization based on substituting domestic production would ease the constraints of domestic demand and foreign exchange.

12. For example, in dismissing the legitimacy critique Sen argues that human rights are best seen as a set of ethical claims that must not be identified with legislated legal rights, and that their plausibility should be judged as a basis of ethical reasoning and as the basis of political demands. Clearly, the legitimacy critique is not about human rights as the basis for ethical reasoning (i.e., pre-legal principles), but rather about their status as entitlements sanctioned by law. Sen also dismisses the coherence critique on the ground that human rights are rights shared by all regardless of citizenship, the benefits of which rights everyone should have. It seems odd to claim that everyone should have a benefit, while it is not the duty of anyone to ensure that everyone does indeed enjoy that benefit.

Although there were early reasoned critiques of this paradigm by Gottfried Haberler, Jacob Viner, Theodore Schultz, and Peter Bauer, it nonetheless became the dominant paradigm among not only development economists in the academy but also international organizations such as the United Nations (UN), the World Bank, and the International Monetary Fund (IMF). Tinbergen characterized the State or government of an economy desirous of achieving sustained development as one engaged in "activity of the sort usually considered essential to an orderly state such as the maintenance of order and physical security of persons and property." In addition, there must be a minimum of "instruments of economic policy in the hands of the government, and these must be properly used."^4 Presumably because he conceived of most governments in the image of the Dutch government, he must have assumed that the State would be effective in its interventions in the economy and, above all, that those in control of the apparatus of the State would behave like Platonic guardians rather than as predators and would use it only to further the interest of the governed.

D. Development Experience Since the End of World War II and Its Lessons

1. Failure of the Dominant Paradigm

In contrast to the optimistic expectations of the originators of the dominant paradigm, the actual development experience since the end of the Second World War is decidedly mixed. Only a few countries (leaving aside countries with less than a million in population in 1960) of East and Southeast Asia, other than China, had achieved sustained and rapid growth for more than three decades since the mid-sixties, and only until some of them experienced a severe financial crisis in 1997. Interestingly, although the crisis was in many ways devastating, barring Indonesia (where the crisis was political as well as economic), other crisis-ridden countries have since resumed their growth, albeit at a somewhat slower rate relative to the pre-crisis era because of a global slowdown. In contrast:

African economic performance has been markedly worse than that of other regions. During the 1980s, per capita GDP declined by 1.3 percent p.a., a full 5 percentages points below the average for all low-income developing countries. During 1990–94 the

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decline accelerated to 1.8 percent p.a. and the gap widened to 6.2 percentage points.\textsuperscript{15}

In the final two decades of the twentieth century, China and India, the world's two most populous countries with a combined total population of 2.25 billion in 2000, enjoyed historically unprecedented average annual rates of growth of GDP of around ten percent and six percent, respectively.

From hindsight, it is clear that the dominant paradigm of state-directed development was doomed to fail. The reason is that the "market failure" perspective of the dominant paradigm, the "market friendly" characterization of East Asian government interventions,\textsuperscript{16} and the "market enhancing" view of Aoki\textsuperscript{17} implicitly assume what Dixit calls a "crude but effective caricature,"\textsuperscript{18} namely that policies are to be "made by an omnipotent, omniscient, and benevolent dictator."\textsuperscript{19} Dixit suggests that with the development of "second best" theory, which recognized that the policy maker may be constrained from adopting first-best policies, his or her "omnipotence" was removed.\textsuperscript{20} Once it is recognized that he or she may not have, and may not even be able to acquire, the information needed to design and implement optimal policies, "omniscience" was removed. In spite of this, most normative policy analysis continues to assume that the policy-maker is a benevolent dictator. Indeed, as Dixit argues:

The implicit assumption is that once a policy that maximizes or improves social welfare has been found and recommended, it will be implemented as designed and the desired effects will follow.

In reality, a policy proposal is merely the beginning of a process that is \textit{political} at every stage. . . . The political process of policy making is constantly influenced by the legislature, the executive and its agencies, the courts, various special interest lobbies, the media, and so on. The legislature may fail to enact the economist's desired policies; the administrative process may fail to implement the legislated policies in the intended manner. The

\begin{thebibliography}{99}
\bibitem{17} \textit{See THE ROLE OF GOVERNMENT IN EAST ASIAN DEVELOPMENT} I (Masahiko Aoki & Masahiro Okuno-Fujiwara eds., 1997).
\bibitem{19} \textit{Id.}
\bibitem{20} \textit{Id.} at 8, 9.
\end{thebibliography}
outcomes may fail to correct market failures, and may instead incur new costs of their own.\textsuperscript{21}

Although the leadership of many developing countries was initially committed to development, partly as a consequence of the dominant role of the State in the economy, over time political and administrative corruption emerged and grew. The competition for aligning developing countries to their side by protagonists of the Cold War exacerbated this trend. In the context of civil wars and ethnic conflicts and poor policies, development became a casualty in many parts of the world. Yet there were some successes in development.

2. Lessons: Efficiency of Markets, Importance of Openness and Institutions

Some lessons from these successes in development were obvious and have already induced changes in development policies. Notably, these lessons include the widespread recognition of the efficiency of the market mechanism, the role of external trade and investment as engines of growth and development, and, above all, the intrinsic and instrumental values of participatory democracy. Most developing countries are engaged in domestic reforms to remove state-created \textit{domestic} impediments in the functioning of markets. They are also globalizing, that is, removing barriers to external trade and investments.

As the rise of the anti-globalization movement demonstrates, however, market-oriented reforms and globalization, though remarkably successful in some developing countries (including the two giants of China and India) in accelerating growth, have not succeeded everywhere. I would argue that the successes as well as failures have much to do with the existence and functioning of domestic institutions, both private and public. The effectiveness of domestic institutions depends on their tackling the basic problem identified by Dixit, namely, the possibility of opportunistic behavior. These institutions include, importantly, legal institutions.

The role of institutions in development is best seen by viewing development in the transactions perspective of Dixit\textsuperscript{22} and Williamson.\textsuperscript{23} At early stages of development, most households are largely self-sufficient, and the few transactions they engage in consist of sporadic exchanges through barter of a few goods and services. As development proceeds,
exchanges (using money as a medium of exchange) of an enormous number of goods and services take place, regularly and repeatedly, through markets in which the original producers (sellers) and the ultimate users (buyers) may not, and often will not, be known to each other, and with the quid and quo of exchanges being separated widely in time and space.

With the separation of production and use, an important role for intermediation arises so that a class of traders and financial intermediaries emerges who buy goods and services only to sell them at a different time or place, rather than use them. Once intermediaries, whose sole interest is in the return from price arbitrage (profits from buying low and selling high) emerge, speculative activities also arise. It is not the existence of markets per se — after all, markets have existed since antiquity — but it is their scope, size, and sophistication that characterizes successful development. While common in developed economies, efficient financial and capital markets (that is, markets in which intertemporal transactions involving saving, investing, borrowing, and lending take place, and insurance markets for transactions across uncertain states of nature) function poorly or are nonexistent in developing countries. Also, the relationship between markets and development runs both ways—as Adam Smith noted long ago, increased specialization through division of labor, a dominant characteristic of development, is limited by the size of the market.

Exchanges in which the quid and the quo are widely separated in time or space will not take place unless property rights are well defined and contracts are enforced. Availability of reliable and inexpensively acquired information, in particular about future conditions, facilitates such exchanges. It is a cliché to say that the three branches of the State (executive, judiciary, and legislative) are crucial for determining what property rights (and, more broadly, which laws) get enacted and what contracts are admissible, how well laws and contracts are enforced, and how efficiently disputes are settled, and so on. As Hilary Josephs notes, however, in her review of a book on China’s administrative law system:

> [t]he fundamental flaw of the Chinese legal system by modern international law standards is due to the absence of representative government. The laws cannot be considered the expression of the popular will when the executive and legislative branches of government are not accountable at the ballot box.24

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Josephs is absolutely right that merely focusing on the failures of the legal processes, such as the vagueness of laws and bureaucratic whims in their enforcement, tends to obscure the basic problem of absence of representative democracy. Her point is well taken that, in examining any legal system, be it Chinese, Indian, or that of the United States, an attitude "that laws will be self-executing with no element of judgment or discretion in their implementation" and that there could be no "divergence between theory and practice of law" is primitive and unsophisticated by standards of contemporary legal scholarship.25

III. EXTERNAL DIMENSION IN DEVELOPMENT

A. Trade Policy and Development: Analytical and Empirical Evidence

Krueger points out that:

[i]deas with regard to trade policy and economic development are among those that have changed radically. Then and now, it was recognized that trade policy was central to the overall design of policies for economic development. But in the early days, there was a broad consensus that trade policy should be based on import substitution. . . . It was thought [that] import substitution in manufactures would be synonymous with industrialization, which in turn was seen as the key to development.26

She also noted how radically the different current thinking is by contrast. It is now widely accepted that:

growth prospects for developing countries are greatly enhanced through an out-oriented trade regime and fairly uniform incentives (primarily through the exchange rate) for production across exporting and import substituting goods . . . It is generally believed that import substitution at a minimum outlived its usefulness and liberalization of trade is crucial for both industrialization and economic development. While other policy changes also are necessary, changing trade policy is among the essential ingredients if there is to be hope for improved economic performance.27

25. Id. at 191–92.
27. Id. at 1.
There are some notable dissenters to this view, however, who claim that "[t]he import substitution (IS) policies followed in much of the developing world until the 1980s were quite successful in some regards and their costs have been vastly exaggerated," and that "IS worked rather well for about two decades, [bringing] unprecedented economic growth to scores of countries in Latin America, the Middle East, and North Africa, and even to some in Sub-Saharan Africa." Even acknowledging these dissenters, most development economists would share Krueger's view.

The analytical arguments supporting the contribution of outward orientation or globalization to economic growth and development are well known. There are essentially three sources of economic growth: growth in inputs of production; improvements in the efficiency of allocation of inputs across economic activities; and innovation that creates new products, new uses for existing products, or brings about more efficient use of inputs. Being open to trade and investment contributes to each of the three sources of growth. Domestic resources are allocated more efficiently when the economy can specialize in those activities in which it has comparative advantage. By being open to capital, labor, and other resource flows, an economy is able to augment relatively scarce domestic resources and to use part of its abundant resources elsewhere where they earn a higher return. Clearly, efficiency of resource use in each nation and across the world is enhanced by the freedom of movement of resources. Finally, the fruits of innovation anywhere in the world become available everywhere in such an open world. Empirically demonstrating these beneficial outcomes, however, is neither simple nor free of controversy. Krueger based her conclusions on the number of comparative country studies done in the 1970s and 1980s.

In recent years several cross-country regression studies have appeared purporting to assess the roles of trade openness, commitment to rule of law, quality of institutions, human capital, income-inequality, and so on, in explaining growth. One of the deft practitioners of this "all but the kitchen sink" approach to the inclusion of explanatory variables in a regression, Sala-i-Martin, even titled two of his articles, "I Just Ran

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29. Id. at 99.
Two Million Regressions” and “I Just Ran Four Million Regressions”!

Jagdish Bhagwati and I have argued that one has to be skeptical for many reasons of the findings of most of these regressions. There is no theoretical reason to presume that data from many countries and over several time periods all have been generated by the same stochastic process specified by the common regression. Economic theory (and political and institutional theories even more so) rarely specifies the functional forms for the relations among variables, let alone the probability distribution of the stochastic error terms of the regression. Besides, the variables included in the regressions are almost always empirical proxies (subject to conceptual differences, measurement biases, and errors) of their counterparts in the theoretical model from which the estimating equation is sometimes derived.

We concluded that nuanced, in-depth analyses of country experiences in a comparative framework, taking into account numerous country-specific factors such as those sponsored by the National Bureau of Economic Research, OECD, and the World Bank in the 1960s and 1970s, were far more informative on openness to foreign trade than the recent cross-country regressions. These studies broadly confirmed that the strategy of inward-oriented import-substituting industrialization pursued by many developing countries to varying degrees in that era was costly in terms of foregone growth and welfare.

Fortunately, as pointed out in Section II, the virtues of outward orientation have been recognized by policy makers; this fact is reflected in that many developing countries are integrating their economies to a greater extent than before with the world economy. The results from globalization across countries vary significantly. In the two large developing countries of China and India, it is widely recognized that their globalization contributed to the acceleration in their growth and a reduc-


34. See, e.g., William Brock et al., *Policy Evaluation in Uncertain Economic Environments*, 1 BROOKINGS PAPERS ON ECON. ACTIVITY 235 (2003). Brock and others formalize this issue in the context of policy evaluation as “model” uncertainty, arguing that the common practice of conditioning on a particular model is inappropriate. They suggest a procedure of model averaging to account for model uncertainty. Since they suggest using standard Bayesian methods to account for model uncertainty, the choice of the space of models and prior probabilities over this space is crucial for the application of these methods. This choice is fraught with conceptual problems.
Others see poverty and inequalities increasing, however, because of globalization; for example, Stiglitz asserts that:

> [g]lobalization today is not working for many of the world’s poor. It is not working for much of the environment. It is not working for the stability of the global economy. The transition from communism to a market economy has been so badly managed that, with the exception of China, Vietnam, and a few Eastern European countries, poverty has soared as incomes have plummeted. . . . [Because of globalization, millions of people] have actually been made worse off, as they have seen their jobs destroyed and their lives become more insecure. They have felt increasingly powerless against forces beyond their control. They have seen their democracies undermined, their cultures eroded. 36

The divergent outcomes across countries of the response to globalization are best understood once it is recognized that globalization is just an enabling policy. It removes or reduces barriers to transactions across national borders, and thus opens up opportunities that may not have existed before. Whether these opportunities are availed of so that benefits flow depends on, inter alia, whether resources move at low costs to the activities that have become profitable and away from those that have become less profitable after the opening. The poor functioning of domestic institutions and other constraints could prevent or increase the cost of resource movements (see Section IV) and even make globalization welfare worsening. This is not an argument against globalization, but rather only an argument for reform of domestic institutions.

**B. Doha Round of Multilateral Trade Negotiations and Reform of the WTO**

The importance, even the necessity, of domestic reforms for reaping the benefits of globalization does not in any way dilute the need for efforts to increase the access of developing countries to industrial country markets and the effectiveness of their participation in the decision- and rule-making processes of the World Trade Organization (WTO). Indeed, the urgency of concluding the Doha Round of multilateral trade negotiations and, in particular, removing the distortions in global agricultural markets created by industry country policies of export subsidy and domestic support cannot be underestimated.

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I have argued elsewhere that the WTO's scope and mandate has to be strictly confined to trade in goods and services.\(^{37}\) The impeccable logic of Jan Tinbergen, that one needs as many policy instruments as policy objectives and that using a single instrument to achieve more than one objective is a prescription for achieving none of them efficiently, applies to institutional design as well.\(^{38}\) Using a single organization as an instrument for designing and enforcing rules governing trade in goods and services, intellectual property protection, environmental protection, observance of human rights including labor standards, investment, and competition is utterly inappropriate.\(^{39}\) By the same token, the WTO is ill-suited to serve as an instrument for promoting economic development of less-developed countries, a task far more complex than trade, even though its liberal trading system is very important for development. For this reason, calling the Doha Round a development round creates unrealistic expectations.

There are already other institutions such as the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), and the United Nations Environment Programme (UNEP), to mention only a few, that could be utilized with appropriate strengthening of their enforcement capability to achieve several of the above objectives. Fortunately, thus far the trade ministers who are the ultimate decision makers in the WTO have recognized the ILO as the appropriate organization for labor standards and have firmly resisted the demands from industrialized countries to bring labor standards into the WTO. Once they resume the Doha Round of negotiations, the ministers should decide not to consider labor standards ever again in the WTO. Although Trade Related Aspects of International Property Rights (TRIPS) is already in the WTO, and there is a committee on Trade and Environment in the WTO as well, there is no reason why the ministers could not decide to take TRIPS out of the WTO permanently and leave intellectual property issues for the WIPO.\(^{40}\) Arguing against taking TRIPS out of the WTO based on WIPO's enforcement mechanism being weak in comparison to the WTO's is a non-argument: the members of WIPO, specifically the industrialized countries so keen on protecting their IPR, could simply strengthen WIPO's dispute settlement mechanism. Likewise, they should terminate the committee on Trade and Environment


\(^{38}\) See JAN TINBERGEN, ECONOMIC POLICY: PRINCIPLES AND DESIGN 53–58 (1956).

\(^{39}\) There is ample evidence that the International Monetary Fund and the World Bank have become less effective as they drifted from their original mandates into other areas in which they had no competence.

\(^{40}\) I discuss TRIPS in the next section of this article.
and leave environmental issues to UNEP. Last, the issues of investment and competition (two of the so-called “Singapore issues”) relate largely to domestic regulatory policies; the case for developing international disciplines through multilateral agreements binding on all members of the WTO is simply not strong. The two should be taken out of multilateral negotiating agenda while the possibility of plurilateral agreements among a subset of members should be left open.

1. Intellectual Property and the WTO

Turning to intellectual property, implicit in the term “intellectual property rights” (IPR) is the notion that there is a property value to intellectual contributions and a party to whom the rights to that property value accrue. The literature on IPR distinguishes three different perspectives on this issue. At one extreme is the communitarian perspective on intellectual property: although the inventor might claim novelty for her contribution, she draws upon the contributions of millions of others in making her own. There is thus no genuinely novel, individually attributable, creative activity and so there is no such thing as intellectual property that could be given protection. At the other extreme is the natural rights view: whatever an inventor creates is her own property, she is the sole judge of how that property is to be used, and the State in particular does not have any right to interfere with her exercise of the right she has on her property.

Most IPR regimes do not take either of these extreme views but rather opt for a third choice, a utilitarian perspective. Protection for intellectual property is to be provided because inventive activity has broader public utility that goes beyond the benefits that accrue to the private inventor. The U.S. Constitution recognizes this in allowing that “[t]he Congress shall have Power . . . [t]o Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” For this reason, although there are costs to protecting intellectual property through patent rights, these costs do not outweigh the benefits to the society. In the absence of protection, according to the utilitarian perspective, some innovation that is beneficial to society would not take place.

41. Of course, the decisions of each of the various institutions have to be coordinated with those of the others so that they reinforce, rather than detract, from achieving the objectives of all.
The grant of a patent gives a monopoly right to the patentee for a specified period of time over the fruits of the innovation. The patentee could, however, exercise the monopoly right to charge a price of the product over and above its marginal cost, thereby imposing a loss on the users of the product. Unless the profits from a successful innovation are large enough to compensate for the cost incurred on research, however, including both productive research and that research which does not lead to a product that can be successfully marketed, incentives for innovation would be blunted. The utilitarian perspective balances the loss to users arising from the grant of monopoly rights to the patentee against the benefit to society from encouraging innovation. In U.S. legal practice, as well as in the definition of the patent legislation, there is a clear understanding that the possible monopoly loss from giving a patent could be significant. For instance the patentee is prevented by legislation from extending his patent rights forward to other markets where there is no patent protection per se. For example, Kodak had arguably a monopoly on its copier parts. It allegedly tried to extend its monopoly to the copier service industry by refusing to sell parts of its copier to anyone who was not a Kodak authorized service provider. In the ensuing trial in the District Court of the case brought against Kodak by a service provider, the jury unanimously held that Kodak had a parts monopoly and it levered its parts monopoly to monopolize service. Such levering violated antitrust laws. Kodak was held liable for damages, and the court issued a 10-year injunction requiring Kodak to sell parts to the service provider at non-discriminatory prices. Kodak appealed against this to the Ninth Circuit and lost.44

There is very limited empirical evidence on the utilitarian perspective's fundamental assumption that granting patents encourages innovation. Sakakibara and Branstetter have suggested that patenting and patent protection through granting monopoly rights do not seem to be associated with significant increases in innovative activity, except possibly in pharmaceuticals.45 Even if strong protection of IPR promotes innovation, however, there is absolutely no evidence suggesting that a

uniform patent life of twenty years for all innovations, regardless of whether they relate to a new mousetrap or a lifesaving drug, is socially optimal. In spite of this dearth of evidence, this uniform patent life is what the agreement TRIPS in the WTO requires.

Prior to the Uruguay Round (UR) of multilateral trade negotiations, intellectual property was not part of the GATT. IPR was under the jurisdiction of the WIPO. Pressure from the American pharmaceutical companies resulted in TRIPS being introduced into the negotiating agenda of the UR in the first place. India opposed it and conceded only at the last minute. TRIPS was included in the negotiating agenda, even though there were other means of protecting IP, primarily because American companies thought that, by putting it in the WTO so as to have access the WTO’s strengthened dispute settlement mechanism, they would have a much heavier stick with which to beat alleged violators of patent rights. The whole IPR issue within the WTO thus centers on the dispute settlement mechanism (DSM).

Under GATT Articles XXII and XXIII, the DSM was a political process that in effect encouraged both the defendant and plaintiff eventually to compromise. The system worked reasonably well. The WTO’s DSM, in contrast, is an adversarial legal process in which poor

46. See Frederick M. Abbott, The TRIPS—Legality of Measures Taken to Address Public Health Crises: Responding to USTR-State-Industry Positions That Undermine the WTO, and T. N. Srinivasan, The TRIPS Agreement, in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec 311, 316 (Daniel L. M. Kennedy & James D. Southwich eds., 2002). Before the conclusion of the UR, the United States frequently threatened to use “Special 301” provisions of the U.S. Trade Act of 1988 against countries whose intellectual property regimes it judged weak. Brazil and India were two countries that were put on the “watch list” for possible sanctions under these provisions. Developing countries acquiesced to TRIPS in large part to forestall such unilateral actions by the United States. See Frederick M. Abbott, The TRIPS—Legality of Measures Taken to Address Public Health Crises: Responding to USTR-State-Industry Positions That Undermine the WTO, in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec 316. Dam, in a private communication to the author, points out that TRIPS was also heavily supported by the software, motion picture, and recording industries. Email from Kenneth Dam (May 22, 2004) (on file with the author). For a history of TRIPS, in particular the roles of CEOs of Pfizer (Pratt) and IBM (Opel), who happened to have been roommates in college, in formulating the TRIPS approach to IPR, see KENNETH DAM, THE RULES OF THE GLOBAL GAME: A NEW LOOK AT U.S. INTERNATIONAL ECONOMIC POLICY-MAKING 260–61 (2001). Dam believes that controversies surrounding TRIPS are largely due to pricing issues relating to AIDS and other lifesaving drugs and the desire of some countries to protect their generic industries. Even if Dam is right, the issue still remains of the social cost effectiveness of the grant of monopoly rights through patents of uniform life, regardless of the nature of innovation in providing incentives for innovation.


countries are at a disadvantage because they cannot afford to hire expensive legal consultants. Additionally, the Appellate Body (AB) of the WTO’s DSM is very powerful: its decisions can be reversed only by the unanimous vote of WTO members. There is already some disturbing evidence of judicial overreach by the AB and its usurping of the exclusive rule-making powers of the members of the WTO. In the Shrimp-Turtle case brought by India, Malaysia, Pakistan, and Thailand against the United States regarding the U.S. prohibition of imports of shrimp harvested with technology that may adversely affect certain sea turtles, the WTO panel had held that the import embargo was inconsistent with GATT Article XI (which limits the use of import prohibitions or restrictions) and could not be justified under Article XX. The Appellate Body overruled the Panel and found that the embargo did qualify under Article XX (9) (which deals with general exceptions to the rules, including for certain environmental reasons) but failed to meet the requirements of the chapeau (introductory paragraph) of the Article; i.e., the United States violated the non-discriminatory application (of the embargo measure) requirement of the chapeau. The Appellate Body, in overruling the panel, may have interpreted Article XX (9) more broadly than the text would warrant and what the signatories had intended it to mean.

In the domestic arena, if a decision of a country’s highest court is not socially acceptable, there is a legislative means of amendment of laws to remove the disability identified by the court. In contrast to the domestic arena, there is no such legislature in the WTO, and although the Appellate Body’s decision theoretically can be reversed, in practice it is not possible to mobilize a consensus of WTO members to do so. Ordinarily a rule-based legal system of settling disputes such as the DSM is in the interest of its weak developing country members if the strong industrial country members comply with the rulings of the system, as they have been doing thus far. Still, it is too soon to tell whether replacing the GATT political process, which favored the powerful, with a costly legal process of the WTO, which the weak can ill afford, is necessarily an improvement.

GATT Article XXIV relating to preferential trade agreements such as customs unions and free trade areas has been an utter failure. Since
such agreements are proliferating and are not necessarily in the best interests of developing countries, it is essential to replace article XXIV by the simple requirement that any proposed Preferential Trade Agreement (PTA) be notified to the WTO, and any trade preferences that its members grant to each other be extended to all other members of the WTO on a most favored nation basis within a specified period (say, five years) of the coming into force of the PTA. This way, members of the WTO would be free to enter into a PTA and reap its non-trade benefits, if any, while limiting the potential damage to non-members of the PTA from the trade preferences that the members of the PTA grant to themselves. Last, antidumping measures, which have no economic rationale but rather are the equivalent of weapons of mass destruction in the armory of trade policy instruments, should be eliminated from the list of allowable policy instruments in the WTO.

2. Reform of the World Bank and the International Monetary Fund

Besides reform of the WTO, the reform of the World Bank and the IMF, the two other international institutions that interact with developing countries, for good or for ill, is important. The World Bank is overextended and ineffective. For example, there is no rationale for its lending to, and having field offices in, countries which have easy access to world capital markets already (e.g., China and Brazil) or would have such access were they to enact the needed domestic reforms, particularly in the financial sector (e.g., India and Argentina). A far smaller bank that provides technical advice and resources to countries with a leadership credibly committed to development but with a limited domestic capability for economic management would serve the needs of development better.

The IMF has strayed far beyond its original mandate and has been mired in structural adjustment lending and in poverty alleviation, besides becoming a debt collection agency for imprudent private lenders. It should return to its original mandate and provide macroeconomic policy

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50. The IMF, the World Bank, and the WTO are intergovernmental organizations. Concerns have been expressed about their "unrepresentativeness" and their "democracy deficits," whatever those terms mean. Demands that civil society ought to have a say in their decision making have already been met in various ways. For example, although disputes that are brought to the DSM of the WTO are, by definition, between states, the AB has begun to accept amicus briefs from parties which are not states. Whether the legitimate concerns about the accountability of intergovernmental organizations and the transparency of their decision-making processes are best addressed by ad hoc involvement of civil society representatives is an open question, especially since it is often unclear whose interests the civil society representatives represent. See, e.g., Joseph Nye Jr., Globalization's Democratic Deficit: How to Make International Institutions More Accountable, FOREIGN AFFAIRS 2–6 (Jul./Aug. 2001).
advice through its Article 4 surveillance mechanism and concern itself mainly with ensuring the stability of the global monetary system. Whether for doing so it has to become a lender of last resort with more resources at its command is arguable.

3. Development Assistance

It is evident that the volume of private capital flows far exceed development assistance. It is true that private flows are confined to a few emerging market countries, but others could join their ranks once their domestic reforms are complete. Still, for a number of developing countries (particularly in Sub-Saharan Africa) development assistance will continue to be important. The evidence from HIPC (Highly Indebted Poor Countries) initiatives, however, suggest that conditionalities associated with debt relief and development assistance do not always work. After all, funds are fungible, and restricting the use of a part of the total resources available to a government cannot ensure that its overall spending is development oriented.

4. Worrying Actions by the United States and European Union

Last, and most importantly, the United States and the European Union by their recent actions have not helped the process of globalization and the adoption of the rule of law in developing countries. One example is the plethora of thoughtless legislative actions at the federal and state levels prohibiting “outsourcing” without any serious analysis of its overall impact on the U.S. economy. A second example is what is widely perceived as a climb down by the United States in order to appease the European Union in the negotiations for liberalizing agricultural trade, an issue of great concern to developing countries. In July, 2002, the United States had offered a far-reaching set of proposals for substantially reducing, and eventually eliminating by an agreed future date, all domestic support measures, immediately eliminating export subsidies altogether, and considerably reducing import tariffs. Had the proposals been adopted, the complex classification system of domestic support so susceptible to abuse would have been abolished. This system, adopted as

51. The success of the surveillance mechanism, just as that of the DSM of the WTO, depends crucially on the willingness of the strong as well as the weak to consider the advice of the IMF seriously and act on it. For example, the United States has not paid much attention to IMF's views on its macroeconomic policy.

52. At least 35 states have introduced more than 100 bills to curb or ban offshore outsourcing, and legislation on the issue has also proliferated at the federal level. See Shannon Klinger & M. Lynn Sykes, Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation (2004), available at http://www.nfap.net.
part of the Uruguay Round Agreement on Agriculture,\textsuperscript{53} classified domestic support measures into green and blue boxes, the expenditure on which there were no limitations, and an amber box on which there were limitations on expenditure that varied across countries with no necessary relation to the importance of agriculture in their economies.

While these proposals received support from developing countries and agricultural exporters, the European Union vehemently attacked them for going too far and for being hypocritical in light of the May, 2002 passage of a U.S. farm bill authorizing additional spending of over $120 billion in various domestic support measures. Although the United States claimed that even after the implementation of the bill U.S. expenditures on domestic support will not exceed the ceiling set up in the agreement on agriculture in the Uruguay Round, this claim was unconvincing. In any case, in August, 2003, a month before the ministerial meeting of the WTO in Cancún, the United States and European Union came up with a joint set of proposals which amounted to far less liberalization of agricultural trade than the proposals of July, 2002 intended. In particular, the proposals did not abolish the complex boxes system, and although the proposals included reduction of trade-distorting support measures by unspecified percentages, they did not set a date for the elimination of those measures, nor did they propose immediate elimination of export subsidies.\textsuperscript{54} This set of proposals drew strong opposition from developing countries and contributed to the collapse of the Cancún Ministerial meeting.

A third example is the reluctance to deal in a substantive way with tariff escalation (import tariffs rising with the degree of processing, such that unprocessed raw products attract the lowest tariff) and tariff peaks (tariffs on specific products that far exceed average tariffs) that significantly discriminate against exports from developing countries. The longstanding ambivalence of the United States with respect to international judicial institutions does not help the cause of rule of law. Most recently, for example, the United States declined to sign on to the jurisdiction of the newly established International Criminal Court. Earlier, the United States had withdrawn from the compulsory jurisdiction of the International Court of Justice after the Court’s ruling against the United States in the case brought by Nicaragua in 1986. Even in the case of WTO’s DSM, the then-Senator Robert Dole had proposed establishing a

\begin{footnotesize}

\textsuperscript{54} Fortunately, in mid-2004 both the United States and European Union have proposed to eliminate them. See WTO, \textit{The July 2004 Package}, available at http://www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm.
\end{footnotesize}
WTO Dispute Settlement Review Commission made up of federal judges that would review final WTO decisions adverse to the United States. The proposed commission would review whether the panel or Appellate Body of the WTO’s DSM had acted improperly. If the commission made three affirmative decisions in any five-year period, any member of the U.S. Congress could initiate an expedited legislative procedure leading to the withdrawal of the United States from the WTO.\(^5\) Although the Dole proposal was fortunately not adopted by Congress, the still-present threat of a possible U.S. withdrawal cannot but influence the decisions of WTO’s dispute settlement bodies.

IV. DOMESTIC CONSTRAINTS

A. Some General Considerations

Sen examines:

[s]ocietal arrangements, involving many institutions (the state, the market, the legal system, political parties, the media, public interest groups, and public discussion forums, among others) are investigated in terms of their contribution to enhancing and guaranteeing the substantive freedoms of individuals, seen as active agents of change, rather than as passive recipients of dispensed benefits.\(^6\)

Almost all of the institutions mentioned by Sen are domestic, and, as such, any policy for improving their functioning towards enhancing freedoms has to be domestic. By the same token, domestic pressure for adoption of particular domestic policies in response to external pressures such as aid conditionality is unlikely to be sustained unless there is a broad domestic political support for those domestic policies. These domestic policies are essential for growth, as domestic institutions can offset the contributions of liberalization to growth by limiting labor mar-

\(^5\) The European Union filed a complaint in 1996 against the U.S. Helms-Burton Act, under which non-U.S. companies could be sued by private parties in U.S. courts for “trafficking” in those assets confiscated by the Cuban government from those private parties, for the Act’s extraterritorial reach. Before a panel was appointed to consider the dispute, the European Union asked for its postponement by a week in order to reach a compromise with the United States on settling it. This effort failed, and a panel was appointed. Just hours after the appointment of the panel, the United States announced that “it would refuse to take part in the legal proceedings. It declared that the newly-created body [WTO], which was intended to be the arbiter of World Trade Rules, ‘has no competence to proceed in an issue of American national security.’” N.Y. TIMES, Mar. 21, 1997, at A1.

\(^6\) Sen, supra note 9, at xii–xiii.
ket flexibility, segmenting internal markets, and failing to provide the necessary economic and social infrastructure.

The traditional argument about static factor price effects and gains from trade, for example, assumes that resources move smoothly and costlessly from import-competing to exporting activities. Obviously, if resources cannot or do not move, exporting industries will not expand, while import-competing industries will surely contract because of increased competition from imports after trade liberalization, resulting in unemployment. This somewhat extreme but elementary argument has been raised by Stiglitz against trade liberalization when he says that "[i]t is easy to destroy jobs, and this is often the immediate impact of trade liberalization, as the inefficient industries [those created under the protectionist walls] close down under pressure from international competition." Because he assumes that no new, more efficient jobs would be created, Stiglitz concludes that "moving resources from low-productivity uses [in inefficient industries] to zero productivity [unemployment] does not enrich a country . . . ." While true, keeping factors in less-productive uses forever does not enrich a country, either.

This is not to say that there is no rationale for phasing in trade liberalization over a period of time, but only that it does not mean postponing it forever. In fact, committing credibly to a phased program while at the same time removing domestic impediments would be the appropriate policy. If the phasing-in period is too long, however, the commitment to liberalize will not be credible; to decide the length of the phase-in period, the possible loss of credibility must be balanced against the benefits of easing the costs of adjustment to liberalization.

Globalization's effect on short-term growth also depends upon the exact forms of globalization and pre-existing market distortions. Removing barriers and controls on financial capital flows, for example, may improve resource allocation and give more people access to better-functioning credit markets in the long run. In the short term, on the other hand, it can lead to crisis and lower growth in countries with fragile domestic financial sectors. Those regions (and individuals) which are better placed initially to take advantage of the opportunities opened up by reforms (or, for that matter, by any other factor, such as, e.g., the information-technology revolution) are naturally likely to grow faster (and richer). For example, India's phenomenal success in software is still

57. STIGLITZ, supra note 36, at 59.
58. P. C. Mahanalobis also proposed the creation of a Labour Reserve, into which laid off or retrenched workers would be placed; the Reserve would pay them a modest allowance and train them for reemployment elsewhere in the economy. P.C. Mahanalobis, The Asian Drama: An Indian View, SANKHYA, THE J. OF STAT., Series B., Vol. 31, Parts 3 & 4 (Dec. 1969).
confined to a few cities in the south and west. The real issue is not one of increasing regional disparities but of whether the socio-economic system would enable the initially disadvantaged regions and individuals to catch up. If it does not, the social and political consequences could be serious and could lead to secessionist threats.59

Needless to say, in the developing world, market distortions are ubiquitous, and their impact on the extent and depth of poverty are often serious. Whether an individual (or a household) has adequate resources to purchase enough of the relevant goods and services so as not to be deemed poor (the "poverty bundle") at the relevant prices at a point in time depends, of course, on what she (or her household) can earn from her assets (land, financial capital, and physical capital) and, most importantly, from her labor (allowing for skills and educational attainments). The functioning of asset and labor markets, as well as product markets for goods and services bought or sold, obviously influences the earnings from assets and their purchasing power.60 The chief asset of the poor is their labor; thus, raising productivity to create a sustained increase in real returns to labor in wage and self-employment would contribute significantly to poverty alleviation. Domestic public policy has a large role to play in reducing poverty: increasing the human capital endowments of the poor, perhaps by providing incentives for investment in human capital or through public expenditure on (and improved access of the poor to) public education and health care programs, raises the productivity of their labor.

Globalization also contributes to this goal in several ways. First, the growth associated with globalization will generally create an outward shift in the demand for wage labor and for goods and services produced by the self-employed. Second, returns to the abundant factor, which in most poor countries is unskilled labor, would rise with trade liberalization.61 While multinational companies naturally take advantage of the less-developed country's abundance of unskilled workers to pay less than they would pay similar workers in their home countries, these wages are often higher than the wages paid by domestic companies in the host

59. The defeat of the ruling National Democratic Alliance in the general elections of April–May, 2004 in India has been attributed by some to be impatience of the large rural population to wait for benefits of reforms and globalization to reach them.

60. Clearly if there are no distortions in all these markets and all individuals and households face the same prices, the extent of poverty would be determined by the distribution of assets and labor in the economy.

61. There are, empirically, important exceptions to this general theoretical expectation. See, e.g., Ann E. Harrison & Gordon Hanson, Who Gains from Trade Reform? Some Remaining Puzzles, 48 J. Dev. Econ. 419, 419–47 (1999) (presenting evidence that trade openness in several Latin American and Asian countries has been associated with an increased return to skilled labor relative to unskilled labor).
countries. Third, more-integrated labor markets are important to ensure that workers receive the best return for their work. This last aspect of globalization has not yet been realized; in fact, national integration is still limited by poor infrastructure, explicit restriction on movement (as in China), and linguistic differences across regions. Unlike commodities, the cost of whose movement within and between countries is primarily determined by costs of transportation and insurance, the cost of mobility of labor involves social and legal barriers as well as economic ones.

B. Legal Reforms in India

Legal reforms is currently a hot topic in India. The Federation of Indian Chambers of Commerce and Industry (FICCI) and India held a national conference on April 10, 2004, in New Delhi on “Reinventing Indian Legal System for Achieving Double Digit Economic Growth.” In the campaign for the parliamentary elections recently concluded in May, 2004, the election manifestos of major political parties all included legal reforms. The Indian National Congress (INC), which won the largest number of seats and is forming the government, promised that:

[i]mmediate measures will be taken to drastically cut delays in courts, particularly in the High Courts and in lower levels of the judiciary. Legal aid services will be aided. Alternative dispute settlement mechanisms will be strengthened. A new system of nyaya panchavats will be instituted.

The Congress will tackle the root causes of corruption and the generation of black money. To a large extent, deregulation, removal of laws that have outlived their utility or have not fulfilled

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62. Wage labor market policies are obviously not a solution for all of poverty. Only a small part of the labor force in many developing countries (less than 20% in India and South Asia, for example) is in formal wage and salary employment. An overwhelming majority of the labor force is in self-employment (often in subsistence farming, in handicraft activities, and in household-based production for local markets). For them it is not so much the functioning of labor markets but that of product and credit markets that is more relevant. See generally MINISTRY OF LABOUR AND EMPLOYMENT OF THE GOVERNMENT OF INDIA, REPORT OF THE NATIONAL COMMISSION OF LABOUR (2002).

63. Concern with legal reforms is not new. Since the third decade of the 19th century, law commissions were constituted by the government from time to time and were empowered to recommend legislative reforms. The first such commission was established in 1834, and the second, the third, and the fourth law commissions were constituted in 1853, 1861 and 1879, respectively. In 1925, a Civil Justice Committee appointed by the government submitted its report. In the post-independence period, seventeen Law Commissions have been constituted, with the seventeenth having been constituted with effect from September 1, 2003. It has a three-year term. Its terms of reference include various aspects of legal reforms. The seventeen law commissions have thus far issued 191 reports in all, available at www.lawcommissionofindia.nic.in.
their social purpose, transparency in party financing, and state funding of elections will help. Even so, the Congress is conscious of the havoc that corruption at all levels adds to the harassment of the common man and is determined to rid the country of this scourge.64

The Communist Party of India (Marxist), which is supporting the INC government, included the following in its judicial reform proposals:

- Reforms in judicial system to provide speedy relief at affordable cost to the common people;
- Constituting a National Judicial Commission comprising of representatives from judiciary, executive, legislature and bar for appointment, transfer of judges and to ensure judicial accountability;
- There should be a proper balance in the relations between the legislature, judiciary and the executive and the exercise of powers in their respective spheres without encroaching into the legitimate domain of other organs.65

The defeated coalition, The National Democratic Alliance, at the center proposed the following:

- A Rs. 1,000 crore (roughly $2 billion) Fund for Modernization of Courts will be set up to improve the physical and operational infrastructure of courts. This will receive partial contribution from the legal community. Judicial officers will be empowered to involve the community in improving the facilities in a transparent manner.
- The number of courts and the number of judges will be doubled in five years for quicker judicial process.
- A separate class of courts will be set up for cases involving specified commercial laws such as the Contract Act, Negotiable Instruments Act, and other business laws. These would deliver quicker justice to aggrieved businesses, and would be partly funded by charging both litigants a “Fast Track” fee.
- Reform of the criminal justice system to make dispensation of justice simpler, quicker, and more effective.


• Courts all over the country will be computerized and networked for improving their efficiency.

• Extension of Fast-Track Courts to all layers of the judiciary.

• Expansion of alternative dispute redressal mechanisms through Lok Adalats and Tribunals.

• Setting up a National Judicial Commission for appointment of judges and ensuring judicial ethics.

• A Judicial Procedural Reforms Committee will suggest, within six months, how to halve the time taken to conduct every trial, civil or criminal. The aim would be to ensure that three-fourths of all court cases are completed in twelve months.

• The number of cases in which the Government is a litigant will be halved in the next three years.66

The president of FICCI in his welcome address to the conference described the problems and their outcomes as follows:

We all know that Companies today have to maintain a huge department and incur major expenses to ensure compliance of innumerable laws. As you know, because of the complicated system, this compliance is not easy and often these laws push companies into avoidable litigations, sometimes over trivia. It is not unreasonable to assume that at any given point of time some of our companies are embroiled in a number of legal cases, which carry on not only for years but for decades.

The net result is:

• The huge unnecessary legal cost adds to cost of operations just when companies are struggling to reduce costs to meet the threat of global competition.

• New projects and expansion plans particularly in green field areas are delayed because of numerous laws and compliance requirements. This slows down the process of investment, which indeed should be the key objective if we want to achieve a 10% growth rate.

The confidence of foreign investors in India's business environment suffers because of the delay in delivering justice despite of the fact that India has one of the fairest judicial systems in the world.

He made the following five reform proposals:

First—There should be a Sunset Clause in all Legislations, Rules and Laws—The Government must review the relevance of such legislations after the expiry of time period in the Sunset Clause.

Second—There should be a mandatory provision in the law to provide that no frivolous appeal from Government would be filed. A method to ascertain must be developed and the Ministry of Law and Justice could play a pivotal role.

Third—The existing Court procedures and systems must be rationalized and simplified to facilitate speedy disposal of cases.

Fourth—The concept of plea-bargaining, as prevalent in the United States should be introduced.

Fifth—To reduce the burden on Courts, more and more cases should be referred to Institutional Arbitration.

The interest in judicial reforms across the political spectrum from the extreme left to the religious right is somewhat surprising. In fact, the election manifestos seem to take it for granted that reforms are needed as they do not spell out why. On the surface, the proposed reforms by all parties and FICCI have several common elements, such as reducing delays, bypassing the regular courts through the creation of special courts and tribunals and other fora for alternative dispute settlement mechanisms, creation of a judicial commission for appointment and transfer of judges, and so on. It is also evident that the wish to accelerate and deepen India's globalization process, which in large part means removal of domestic constraints that add avoidable costs and make Indian products less competitive in world markets, is also behind the push for

67. There is a literature on various ADMs in India. See Robert Moog, Democratization of Justice: The Indian Experiment with Consumer Forums (Stanford University Center for Research on Economic Development and Policy Reform Working Paper No. 141, 2002). Moog's own evaluation of one ADM, namely the Consumer Fora established under the Consumer Protection Act of 1986, is sobering. While rightly emphasizing that data available are too limited to draw firm conclusions, he finds that these fora have not substantially reduced the burden on civil courts. On the quality of justice, as measured by three criteria of community empowerment, party participation and access to justice, only one, namely access, has increased with the creation of the fora. Despite this weakness, Moog concludes nonetheless that this experiment with ADMs is worth continuing. Id.
reforms.68 This is clearly seen from the proposals of FICCI but also in the election manifestos. This being said, the reform proposals seem superficial and are focused on the symptoms rather than deeper causes69 not only of the inefficiency and high cost of system in its delivery of judicial service, but even more importantly of the deleterious distributional and economic development consequences of the judgments rendered. The failure to identify the root causes and also the specific laws that constrain economic growth (e.g., labor and bankruptcy laws) is understandable. No political party would wish to identify and thus offend special interests that would be adversely affected were such laws to be amended or repealed. Legal reform encompasses both law reform (i.e., changes in laws) and judicial reform (i.e., reform of procedural aspects of the legal system). A similar distinction has been made by Jensen and Heller,70 who, according to Moog,71 identify three levels of reform: changes in substantive law; reform of law-related institutions; and government compliance with the law. All reform proposals in India seem to concentrate on procedural aspects, however, and pay little attention to law reform. The latter probably is equally, if not more, urgent than judicial reform.

There are several reasons why law reform is urgent in India.72 First, because of India’s common law tradition, not all laws are statutory,
although some laws have evolved through case law and then been codified. The bulk of commercial law has been codified. There is, however, administrative law consisting of government orders, regulations, and rules. In principle, these have some statutory laws as their foundation. The pursuit of a development strategy since 1950 in which the state played a dominant role and the private sector was controlled by administrative means rather than the fiscal system operating through the market led to the explosion of administrative laws. Yet the report of 1998 by the Commission on Administrative Reform noted that the legislative department of the central government did not have a complete compilation of rules, regulations, and procedures issued by the central ministries, let alone those issued by state governments. Apparently, the last time they were all collated and assembled was in 1963.

The same report pointed out there were 2,500 central statutory laws in force when it reported. There was no estimate of all the state laws in force, although in one state alone there were 1,100, which suggests, given that there are now 28 states, the total number could be around 30,000 state laws! In certain areas in the so-called Concurrent List of the Seventh Schedule of the Indian Constitution, both the center and the states can legislate. These statutes are rarely published; the government has the copyright and monopoly publication right to its works, which include laws, and, apparently, the governments do not feel it essential to publish the laws.

As in England, in India there is no desuetude so that once enacted a law remains on the statute books forever. Dysfunctional statutes would remain on the books unless repealed and could be capriciously invoked at any time. In the context of economic reforms and globalization, the most debilitating laws are labor and bankruptcy laws. Labor is on the Concurrent List with some forty-five central labor laws, ranging from the Factories Act going back to the 19th century to laws relating to Contract Labor, Trade Unions, and the Industrial Dispute. The late Professor Prasanta Chandra Mahanalobis, the architect of India's Planning for Development and by no means a conservative, long ago characterized Indian labor laws as follows:

Certain welfare measures tend to be implemented in India ahead of economic growth, for example, in labor laws which are probably the most highly protective of labor interests in the narrowest sense, in the whole world. There is practically no link

in his private communication to me, correctly points out that law reforms could run into the same problems surrounding enforcement as court decisions.
Development between output and remuneration; hiring and firing are highly restricted. It is extremely difficult to maintain an economic level of productivity or improve productivity .... In India with a per capita income of only about $70, the present form of protection of organized labor, which constitutes, including their families, about five or six percent of the whole population, would operate as an obstacle to growth and would also increase inequalities.  

The situation has hardly changed in the four decades since he wrote. Labor laws have created a labor aristocracy consisting of unionized employees of government, public sector units, state enterprises, and large-scale private enterprises. The majority of the Indian labor force who are self-employed are not protected by these laws.

It is worth mentioning that under the Trade Unions Act, any seven persons can form and register a trade union, and they need not even be workers. There are no limits on outsiders' holding office in unions, nor is any test laid down for union representatives through secret ballots or otherwise. This gave rise to multiplicity of unions. The multiplicity is debilitating because, by law, an agreement with one union is not necessarily binding on others. Even more debilitating is the Industrial Disputes Act, which requires firms employing 100 workers or more to get the permission of the government before layoffs, retrenchment, and closure. The case law relating to retrenchment is bizarre. The courts have deemed as retrenchment the discharge of a probationary employee at the end of her probation; the automatic termination of a temporary employee appointed for nine days at the end of nine days; the termination of an employee who failed to pass a test required for confirmation; and the termination of a worker who is repeatedly absent without permission.

Among its various features are its detailed stipulations in the Factories Act. An amusing example relates to the type, number, and location of spittoons in a factory and the prominent display at suitable places of a notice detailing the fines on those who spit in the factory but not in the spittoons. The Act enables the government to make rules requiring factories to provide closets for workers’ non-work garments during working hours and a line for drying of wet clothing.

With respect to judicial reforms, the judiciary itself is an obstacle. The single greatest obstacle to reforms, however, is the bar. Moog 74 discusses this issue and so does the Law Commission in its 131st report. Having held that it will have primacy in the appointment of judges, the Indian Supreme Court has failed to recommend appointments to fill vacancies in

73. See Mahalanobis, note 58, at 442.
74. See Moog, supra note 67.
time, so that currently nearly a fourth of the authorized positions of High Court Judge is vacant. Moreover, the judiciary is reluctant to supply even simple data to judge performance. For example, in response to a question in Parliament, the government asked the high courts for information on the number of judgments delayed over a year. One High Court refused on the grounds that supplying such data is an unwarranted infringement on its autonomy! The reluctance to supply such information, the occasional use of "contempt of court" citations to silence critics, and the non-transparency of the procedure of enquiries into alleged misbehavior of judges by other judges have all undoubtedly led to the belief that judicial autonomy has been used to cover up judicial failings.

I do not intend to imply that the entire judicial system in India is corrupt and self-serving, nor do I wish to underplay the vital role that the Indian Supreme Court and the lower courts have played in upholding individual liberty and in executive abuses. Arun Shourie, a former World Bank economist and editor of the widely circulated daily newspaper *Indian Express* and current Minister for Privatization, points out in his book *Courts and Their Judgments*:

Sitting in my own home, and watching my 89-year old father, I get to see how much a single citizen is able to serve society when what he sets out gets the attention of courts. The ending of discrimination between pensioners, making manufacturers and professionals like doctors accountable for the goods and services they provide consumers, getting the thousand-odd blood banks in our country as well as suppliers of intravenous fluids to adhere to minimal standards, getting political parties to maintain accounts, setting up the entire structure of consumer courts

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75. There are many instances where judges retire before delivering the judgment on the cases they heard. Sometimes this action may have political calculations behind it. Arun Shourie recounts the sad saga of a case on bonded labor and the retirement of former Chief Justice P. N. Bhagwati before delivering his judgment on it. *Arun Shourie, Courts and Their Judgments: Premises, Prerequisites, Consequences* 17-18 (2001). See Nelson, *supra* note 68, at 30 (citing Robin Mears as saying, "[c]ourt cases over land disputes frequently drag on for decades.... Probably the bulk of all pending court cases... concern land disputes, both in civil courts and in assault of public order cases."); see also James A. Hanson & Sanjay Kathuria, *India's Financial System, Getting Ready for the Twenty-First Century: An Introduction, in India: A Financial System for the Twenty-First Century* 3 (James A. Hanson & Sanjay Kathuria eds., 1999) ("[T]he log-jam in the courts means that it takes 10-15 years to reach a judgment against a loan defaulter, and even then collateral may not be executed.").

76. The most recent example relates to the acquittal by a lower court in the state of Gujarat of some Hindus who were alleged to have instigated and participated in the killing of Muslims in the gruesome riots of a few years ago. The Supreme Court not only set aside the acquittals and ordered a retrial but also passed strictures against the behavior of local authorities. *See J. Venkatesan, Supreme Court orders re-trial in Best Bakery case, The Hindu, Apr. 13, 2004*, at A1, available at http://www.hindu.com/2004/04/13/stories/2004041306340100.htm.
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across the country, restraining the hands of politicians and the powerful land mafia as they grab land and set up unauthorized colonies in Delhi, drastically altering the procedure for assessing property tax—a procedure that had become an instrument of exactions by assessors, preventing a major strike by the executives of the National Thermal Power Corporation. . . . In each of these instances, by deliberating on the facts and solutions that one solitary citizen had placed before them, the courts affected reform.

There is another feature, one that transcends orders of courts in individual cases. Now that I can see things from within the Executive, I notice in it a healthy fear of the courts. How would the courts react if we do X instead of Y? Has the direction of the court been complied with in full? This overarching concern for the likely reactions and views of the courts ensures that the impact of courts far transcends the individual cases they decide: it is a potent influence for accountability, for rule-abidingness in the Executive.

But equally, the record shows that:

• Several rulings are far from reality, from what lies in the realm of the practicable;

• While the courts often give sweeping directions—ones that get bold headlines, ones that raise hope among citizens—they do not as often follow these up to see whether the Executive has carried them out;

• Outside the State structure there is just about as much fear of the courts as there is of income tax among our non-salaried class.

Without doubt, an important function of the Courts is to proclaim ideals before society, to stretch the Executive so that it puts in the maximum possible effort. But it should be equally evident that if:

• Rulings—or laws—are so far ahead of reality; or if

• Courts, having decreed a remedy, do not follow up to ensure that it is being adhered to;
They run the risk of compounding cynicism—about courts, about laws, about the Rule of Law.77

The far-from-reality rulings to which Shourie refers mostly relate to the economic issues. In large part, they arise from the fact that the training of lawyers in Indian law schools until recently did not include economics. The distinguished U.S. tradition of Law and Economics was virtually absent in Indian legal training. Fortunately, this is changing.

V. CONCLUSIONS

Most of the failures in development, particularly in exploiting the opportunities opened by globalization, can be attributed to domestic constraints in developing countries. Certainly, greater access to industrial country markets and more effective participation of developing countries in the decision-making processes of the WTO are important. The reform of the functioning of the World Bank and the IMF are just as important. Again, benefits from such changes to developing countries would be limited without domestic reform, including reform of the legal system. Repeating the mantra “rule of law” and concluding from crude cross-country regressions that variations in proxy for “rule of law” contributes significantly to variations in growth performance across countries are of dubious value in promoting real reform.

77. SHOURIE, supra note 75, at 14–15. Moog, in an email to the author, points out that the Supreme Court receives as much or more respect and credibility as any other state or political institutions other than the military, and that cynicism over unenforced decisions, though a potential danger, has not thus far tainted the Supreme Court. However, lower courts do suffer a serious credibility problem, and perceptions of corruption, delays, failure to dispense justice, and other factors compound the problem of those courts.