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## Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy - Trade Remedies and Facilitation

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## Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy - Trade Remedies and Facilitation

### Keywords

Remedies, Terrorism, International Trade, Islamic Law, World Trade Organization

**POVERTY, ISLAMIST EXTREMISM, AND THE  
DEBACLE OF DOHA ROUND COUNTER-TERRORISM:  
PART THREE OF A TRILOGY –  
TRADE REMEDIES AND FACILITATION \***

RAJ BHALA\*\*

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\* Parts One and Two of the Trilogy appear as follows: Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy – Agricultural Tariffs and Subsidies*, 9 UNIVERSITY OF SAINT THOMAS LAW JOURNAL issue 2 (2011, Annual Law Journal Lecture), and Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy – Non-Agricultural Market Access, Services, and Trade Remedies*, 44 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW issues 1 & 2 (2012, War Crimes Research Symposium on International Law in Crisis). Part Three is the present article and also in honor of the 40th Anniversary Symposium in Honor of Professor Ved Nanda.

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I am grateful to my spring 2011 *Advanced International Trade Law* class for many excellent research papers, which provided many insights and sources incorporated into this article, including the papers by Hannah Sandal and Joseph R. Billings, both of the University of Kansas School of Law Class of 2011, and Sarah R. Schmidt, Class of 2013.

This article assumes familiarity with Parts One and Two of the Trilogy, and my five prior publications on the Doha Round, at least with the relevant substantive concepts and events that occurred between the launch of the Round in November 2001 and negotiations as of July 2009:

- 1) *Poverty, Islam, and Doha*, 36 THE INTERNATIONAL LAWYER 159-96 (2002), which covers the launch of the Round in November 2001.
- 2) Chapters 3 and 4 of the *International Trade Law* textbook, referenced above, particularly concepts and terms in the negotiations, and the status of those talks through the July 2007 Draft Modalities Texts issued by Ambassadors Crawford Falconer (New Zealand) and Donald Stephenson (Canada), Chairmen of the Agriculture and Non-Agricultural Market Access negotiations, respectively.
- 3) *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW 5-171 (fall/winter 2008), which covers the Round through the July 2008 collapsed Ministerial meeting.

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4)*Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEXAS INTERNATIONAL LAW JOURNAL 1-125 (2009), which analyzes the Round from the July 2008 collapse through July 2009.

5)*Doha Round Betrayals*, 24 EMORY INTERNATIONAL LAW REVIEW 147-183 (summer 2010), which considers the Round from July 2009 through December 2009.

Portions of this article are drawn from the *Texas* piece. All errors are the responsibility of the author.

For a stimulating account of the Round set in a wide context of political economy, see William A. Lovett, *Beyond Doha: Multipolar Challenges for a Globalized World*, 17 TULANE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 3-37 (Winter 2008).

## I. Synopsis

This article is the third and final part of a trilogy, the argument of which is that the Doha Round is a failed instrument of counter-terrorism. The Round, launched in November, 2001, was supposed to make the world safe for free trade, but not simply to realize net economic welfare gains from reductions in barriers to cross-border flows of goods, services, and intellectual property. Rather, the original intent was to connect those gains to the threat posed by violent extremist organizations (“VEOs”) in the post-9/11 world. The gains were intended to be channeled, in no small part, to poor, marginalized Muslim communities that otherwise might be recruitment grounds for VEOs acting (falsely, to be sure) in the name of “Islam.”

As the Doha Round dragged on through the first and now second decade of the new millennium, the commercial self-interest of World Trade Organization (“WTO”) Members dwarfed their shared political economic interest. They lost sight of the common good in fighting poverty, thereby attacking one factor exploited by VEOs. They invented (*post hoc*, of course) new reasons for the Round, such as fighting the global economic slump (as Part One concludes). Their behavior became a reason in itself as to why implementing the initial vision for the Round proved difficult, such as the negotiating positions of China (as Part Two concludes). Plausible or not, all such reasons spelled a collective failure to follow through on the founding promise of the Round: drawing a clear link between freer trade, poverty alleviation, and threat reduction.<sup>1</sup>

Part One of the trilogy advances this argument in the context of trade liberalization in agricultural products. Part Two does so in the context of trade liberalization in industrial products (“non-agricultural market access,” or “NAMA”), and services trade. Part Three makes the argument in the context of trade remedies, so called “rules” covering antidumping (“AD”), countervailing duties (“CVD”), and fishing subsidies. It also does so in the context of trade facilitation, which refers to customs procedures. As with Parts One and Two, the context of Part Three is technical. The devil, in the sense of straying from the initial purpose of the Doha Round, is in the details, in the sense of lengthy, mind-numbing draft modalities texts. The Texts critically analyzed here are the December 2008 Draft Rules Text,<sup>2</sup> April 2011

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1. See, e.g., *World Trade Talks End in Collapse*, BBC NEWS (July 29, 2008, 22:46 GMT), <http://news.bbc.co.uk/2/hi/business/7531099.stm>.

2. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236 (Dec. 19, 2008) [hereinafter, *New Draft Consolidated Chair Texts*], available at [http://www.wto.org/english/tratop\\_e/rulesneg\\_e/rules\\_chair\\_text\\_nov07\\_e.pdf](http://www.wto.org/english/tratop_e/rulesneg_e/rules_chair_text_nov07_e.pdf).

Rules Document,<sup>3</sup> December 2009 Draft Trade Facilitation Text,<sup>4</sup> and April 2011 Trade Facilitation Document.<sup>5</sup>

This Part completes the trilogy with comments on the missing middle “D” in the Doha Development Agenda (“DDA”). It also charts out, in a preliminary manner, potential special dispensations in international trade law for Islamic countries. Consequently, Part Three concludes where Part One began, and where the Doha Round did, too: with thoughts about how to link trade liberalization to poverty alleviation, and thereby reduce vulnerability to Islamist extremism. These concluding observations, like those of Parts One and Two, support the trilogy’s overall argument that the Round is not about trade liberalization, poverty alleviation, or reducing threats from VEOs.

## II. NO REMEDY FOR REMEDIES

Formally entitled the *Draft Consolidated Chair Texts of the AD and SCM Agreements*, this 94-page document includes a so-called “Road Map for Discussion” to help reach agreement on fishing subsidies, as well as trade remedies against dumping and subsidization.<sup>6</sup> The basic goal of Doha Round rules negotiations is to “clarify and improve” disciplines.<sup>7</sup> After all, since the WTO was born on 1 January 1995 (and as of November 2009), Members have launched over 3,500 AD investigations (with developing countries – particularly Argentina,

3. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, TN/RL/W/254 (Apr. 21, 2011) [hereinafter, *Agreement on Implementation of Article VI*], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair.../adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair.../adp_subsidies_e.doc).

4. See Negotiating Group on Trade Facilitation, *Draft Consolidated Negotiating Text*, TN/TF/W/165 (Dec. 14, 2009) [hereinafter *Draft Consolidated Negotiating Text*], available at <http://docsonline.wto.org/DDFDocuments/t/tn/TF/W165.doc>.

5. See Negotiating Group on Trade Facilitation, *Draft Consolidated Negotiating Text – Revision*, TN/TF/W/165/Rev.8 (Apr. 21, 2011) [hereinafter, *Revised Draft Consolidated Negotiating Text*], available at <http://docsonline.wto.org/DDFDocuments/t/tn/TF/W165R8.doc>.

6. See *New Draft Consolidated Chair Texts*, supra note 2, at 1; see also *Agreement on Implementation of Article VI*, supra note 3, at 1-2; *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (Nov. 30, 2007) [hereinafter, *Draft Consolidated Chair Texts*] available at [www.wto.org/english/tratop\\_e/...e/rules\\_chair\\_text\\_nov07\\_e.doc](http://www.wto.org/english/tratop_e/...e/rules_chair_text_nov07_e.doc) (a previous iteration of the text). This Synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the December 2008 and November 2007 Draft Rules Texts.

7. *Rules*, BRIEFING NOTES, [http://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/rules\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm) (last visited Nov. 5, 2011) (posted in connection with the Seventh Ministerial Conference held in Geneva from 30 November – 2 December 2009). Also within the ambit of the Rules negotiations is the clarification and improvement of disciplines on regional trade agreements (RTAs). There are over 400 RTAs, with more than half of world trade conducted under an RTA. *Id.* The WTO has yet to pass judgment on any of them as to whether they meet the requirements of GATT Article XXIV and GATS Article V. *The Doha Agenda*, UNDERSTANDING THE WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/doha1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm) (last visited Nov. 5, 2011).

China, India, and South Africa – accounting for the majority of such cases) and 202 CVD investigations.<sup>8</sup> Chairman Valles conceded up front there was essentially nothing novel in his “new” Draft. On all three topics – AD, CVD, and fishing subsidies – the disagreement among WTO Members was serious, with no obvious prospect of convergence, and easily sufficient to scupper a successful outcome to the Round.

What was new, however, was the activism in the December 2008 Draft Rules Text. There was far less of it than in its predecessor. Rather than proposing specific compromise language, as he had done in the previous iteration, the Chairman took a bottom-up approach, and offered such language only on points where Members had reached a consensus on a solution. Because they had reached so few consensuses, the new Text was more of an essay with questions and issues than a legal document.<sup>9</sup>

Indeed, as to fishing subsidies, Members essentially forced the Chairman to abandon the proposals he tabled in November 2007 and return to the proverbial “drawing board.” In respect of AD and CVD remedies, the December 2008 and November 2007 Draft Texts were nearly identical, except for the unmistakable emphasis in the new Text on points of disagreement in lieu of proposed language to facilitate accord. The Chair inserted these points in bold, and put them in square brackets, at the relevant spots in the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping, or “AD”, Agreement) and Agreement on Subsidies and Countervailing Measures (“SCM” Agreement).<sup>10</sup> Because these insertions replaced draft AD and CVD provisions, giving the documents the sense of reverse momentum, it was ineluctable that the later Text was less advanced than its predecessor. Moreover, depending on the perspective of the Member, the reversal was especially troubling.<sup>11</sup>

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8. *Rules*, *supra* note 7.

9. *New Draft Consolidated Chair Texts*, *supra* note 2, 1.

10. These *Agreements* are reprinted in a variety of sources, including RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT*, 339-66, 431-78 (3rd ed. 2008).

11. *See, e.g.*, The Bureau of National Affairs, *Direction of WTO Talks “Unacceptable,” U.S. Steelworkers President Gerard Says*, 26 Int’l Trade Rep. (BNA) 12 (Jan. 1, 2009) (reporting that United Steelworkers (USW) President Leo W. Gerard and his union strenuously objected to any re-writing of AD or CVD rules that would weaken America’s trade defenses, such as a prohibition on zeroing, a requirement to separate out causal factors in determining injury, a mandatory termination of orders under Sunset Reviews, a ban on disbursing AD duties or CVDs to aggrieved domestic industries, a lesser duty rule, or a public interest test).

By April 2011, WTO Members registered little progress in reaching consensus on rules about AD, CVD, or fishing subsidies. Accordingly, in his cover note to the April 2011 Rules Document, the Chairman of the Negotiating Group on Rules said he chose to prepare a revised legal text on AD, i.e., a new WTO AD Agreement, but not one on CVDs or fishing subsidies. Regarding the April 2011 Draft AD Agreement, the Chairman stated:

This should not be understood to mean that I perceive significant signs of convergence on the major “political” issues. To the contrary, it is noticeable that *the new text contains the same twelve bracketed issues as the 2008 Chair text*. The 2008 Chair text on anti-dumping does however contain extensive un-bracketed language on a wide range of technical but nevertheless important issues, and our work over the past two plus years has pointed to a few areas where useful changes to that language might be warranted. In short, therefore, arguably a new text on anti-dumping can usefully reflect some limited progress, and in any event it can serve to give a clear idea of where things stand.<sup>12</sup>

As for CVDs, the Chairman elected to prepare a report instead of a revised text:

I have chosen to prepare a report rather than a text for the following reasons. First, *as with anti-dumping, there have been no significant signs of convergence on bracketed issues as reflected in the 2008 Chair text on subsidies and countervailing measures*. Furthermore, unlike in the area of anti-dumping the amount of un-bracketed text in the area of subsidies and countervailing measures is limited, and some of that language (such as that relating to regulated pricing and to the role and interpretation of the Illustrative List of Export Subsidies) is controversial. And while on certain more technical issues un-bracketed language has gained some traction, there are very few useful changes to be proposed at this point. In the area of transposition of possible changes in anti-dumping provisions to their counterpart CVD provisions, insufficient discussion has occurred to date to allow the identification of

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12. *Agreement on Implementation of Article VI*, *supra* note 3, at 201 (emphasis added).



legal language reflecting convergence. Finally, a significant number of substantive new proposals have been submitted during the past few months. Due to time pressure, the Negotiating Group has not yet fully explored the degree to which any elements of convergence can be found in respect of these proposals. Thus, I see no advantage to preparing a new SCM text at this juncture.<sup>13</sup>

Likewise, as for fishing subsidies, the Chairman stated gloomily:

2. After careful consideration of the current state of play . . . I have concluded that I am not now in a position to present a revised legal text on fisheries subsidies. Rather, the only option available to me at this juncture for both capturing such progress as has been made, and more significantly, for identifying the numerous remaining gaps in Members' positions, is to present a detailed narrative report.

3. In reaching this conclusion in these difficult circumstances, I have heard very clearly the main message from Members to Chairs that for now, any Chair-produced documents must be of a bottom-up nature. That is, Members have made plain that they would not welcome compromise proposals from Chairs that would seek artificially to bridge the real gaps in positions that remain. Applying this standard to the fisheries subsidies negotiations, at present there is too little convergence on even the technical issues, and indeed virtually none on the core substantive issues, for there to be anything to put into a bottom-up, convergence legal text, and there are no fisheries subsidies disciplines already in existence to which we could refer or revert. Nor would a text with either a small range of options, or with all positions and proposals presented as "options," be feasible. The former would require me to pick and choose, and thus would not be bottom-up. The latter would probably be impossible to produce as one text that was comprehensible. In any case, such a text would be nothing more than a compilation of

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13. *Id.* (emphasis added); see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *Negotiations on Subsidies and Countervailing Measures: Report by the Chairman*, ¶ 2 TN/RL/W/254 (Apr. 21, 2011) [hereinafter *Negotiations on Subsidies and Countervailing Measures*], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair.../adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair.../adp_subsidies_e.doc) (providing the same summary).

proposals, which I consider could only impede movement toward convergence.

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6. After those discussions ended [in 2009, following issuance of the December 2008 Rules Text], Members began to submit new proposals. While initially there were only a few, by late 2010 and to date in 2011 proposals proliferated . . . . While many of the proposals contain new ideas and some suggest new approaches on certain issues, unfortunately in their totality (and with a few exceptions) these could not be characterized as convergence proposals. Rather, they generally reflect and elaborate on the already well-known positions of their proponents. Nor has there been movement toward convergence over the course of the debate on the proposals. Thus, in spite of many meetings since the beginning of the year [2011] – indeed a nearly-continuous session of the Negotiating Group – and in spite of the wealth of new proposals, little tangible progress on the core issues has been made. In short, notwithstanding intensive work and greater clarity in scoping several issues, the fisheries subsidies negotiations remain in more or less the same impasse as at the end of 2008 . . . with positions if anything hardening since then.<sup>14</sup>

Thus, as of April 2011, the textual landscape for Doha Round rules negotiations was slightly more confusing than it had been in December 2008. On AD, Members had produced a revised AD text, but it looked like the November 2007 and December 2008 Draft Texts. As for CVD and fishing subsidies rules, they still were working with the December 2008 Draft Text, but supplemented it with the April 2011 Rules Document.

#### A. Twelve AD Fights

In respect of AD, the December 2008 Draft Rules Text highlighted 12 key areas of dispute. So, too, did the April 2011 Draft *AD Agreement*. They were as follows:<sup>15</sup>

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14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *Negotiations on Fisheries Subsidies: Report by Chairman*, ¶¶ 2-3, 6 TN/RL/W/254 (Apr. 21, 2011), available at [www.wto.org/english/tratop\\_e/dda\\_e/chair.../adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair.../adp_subsidies_e.doc) (emphasis added); see also *Agreement on Implementation of Article VI*, *supra* note 3, at 1 (providing a similar synopsis).

15. These areas are set out in bold and brackets in the *New Draft Consolidated Chair Texts* after the Article, and replace draft proposals set out in the same places in the *Draft Consolidated Chair Texts*. These areas also are set out in bold and brackets in the

• *Zeroing (Article 2:4:2 of the AD Agreement)*

In December 2008, the Chairman best summarized the impasse: “Delegations remain profoundly divided on this issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.”<sup>16</sup>

Similarly, in April 2011, he observed zeroing:

remains among the *most divisive* in the anti-dumping negotiations, and there have been few signs of convergence. *Positions range from insistence on a total prohibition on zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.* Some delegations however hold more nuanced positions, and there is openness among some delegations to undertake a technical examination of this issue in particular contexts, such as for example the third (“*targeted dumping*”) methodology provided for in Article 2.4.2.<sup>17</sup>

Put succinctly, the rest of the world – and that included Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Taiwan, Thailand, and Turkey that banded together in a group totaling 16 WTO Members called “Friends of Antidumping Negotiations” (“FANs”) – insisted on a ban on zeroing.<sup>18</sup> The assertion was the amount of dumping (positive dumping margins) should be reduced (offset) by non-dumped sales (negative dumping

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*Agreement on Implementation of Article VI.* See generally RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 871-1045, 1111-78 (3rd ed. 2008) (for a treatment of AD law).

16. *New Draft Consolidated Chair Texts*, *supra* note 2, art. 2.4.2, chairman’s note (“Zeroing”).

17. *Agreement on Implementation of Article VI*, *supra* note 3, art. 2.4.2, chairman’s note (“Zeroing”) (emphasis added).

18. Daniel Pruzin, *Dumping: Antidumping Critics Argue Latest Report Highlights Need for Doha Rules Agreement*, 26 Int’l Trade Rep. (BNA) 637 (May 14, 2009); Daniel Pruzin, *Dumping, Countervailing Duties: China Urges Ban on Zeroing in Dumping Investigations as Part of WTO Rules Talks*, 23 Int’l Trade Rep. (BNA) 695 (May 4, 2006); Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int’l Trade Rep. (BNA) 203-04 (Feb. 12, 2009); *Rules*, *supra* note 7. That the U.S. is the only country opposing a ban on zeroing has been widely reported. See, e.g., Daniel Pruzin, *WTO: Senior Officials to Address Talks on Rules; Advocates Call for Progress in Light of Crisis*, 26 Int’l Trade Rep. (BNA) 1605 (Nov. 26, 2009).

margins). Without that ban, the deck would remain stacked against respondent producer-exporters, as dumping margins would be inflated artificially, and the use of the AD remedy would be abusive.

The FANs spoke from experience, as the United States (“U.S.”) frequently used zeroing when calculating dumping margins against their exporters. The FANs were successful in causing a major change in the Draft Text from November 2007. The earlier Text embodied the American position, permitting Simple Zeroing in original investigations, and both Simple and Model Zeroing in Administrative and Sunset Reviews.<sup>19</sup> Nonetheless, the U.S. adamantly stuck to its position there would be no successful conclusion to the Doha Round unless Members agreed to overrule legislatively the string of what it regarded as erroneous Appellate Body precedents against zeroing.<sup>20</sup> Only that solution, said the U.S., would allow it and other Members to impose an AD duty on the full amount of dumping – a right they have under Article 9:3 of the *AD Agreement*. Consequently, the likelihood that the FANs and U.S. might agree on a compromise, such as to ban zeroing in all contexts except targeted dumping, was dim.

• *Causation (Article 3:5 of the AD Agreement)*

Members could not agree on how to handle three practical causation questions that arise in virtually every AD case. First, should it be mandatory to separate and distinguish the allegedly injurious effects of (1) dumped imports and (2) other factors, so as to avoid attribution of those effects to dumped imports when, in fact, other factors might be the cause? Second, to what extent is a quantitative, as distinct from a qualitative, analysis of non-attribution necessary? Third, to what degree should the allegedly injurious effects of dumped imports be weighed against those effects from other factors?

In April 2011, the Chairman summarized the positions among WTO Members:

*Delegations continue to hold widely diverging views on issues relating to causation of injury. Recent discussions*

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19. See Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int'l Trade Rep. (BNA) 203-04 (Feb. 12, 2009). See BHALA, *supra* note 15, at 1023-25 (3rd ed. 2008), for the distinction between Simple and Model Zeroing.

20. Daniel Pruzin, *WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) 1072-73 (July 15, 2010). See RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 530-34 (2008), for a tabular summary of those rulings. See also Appellate Body Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 66 WT/DS344/AB/R (Apr. 30, 2008) (adopted May 20, 2008).

have focused on two issues: *whether it should be mandatory to separate and distinguish the effects of dumped imports and other factors, and the extent to which authorities should be required to conduct a quantitative (as opposed to qualitative) analysis of non-attribution.* Although there seems to be a shared view that authorities should carefully consider the effects of factors other than dumped imports, and ensure they are not attributed to dumped imports, there are substantial gaps regarding the degree of precision that can or should be required.<sup>21</sup>

The importance of resolving causation issues cannot be overstated.

Through a series of trade remedy cases over several years, the Appellate Body had grappled with such issues. As a general principle of law across legal systems, it is unjust to impose liability against a party that is blameless. That the Members could not agree on how to manifest this principle, in light of the WTO jurisprudence that had emerged, was evidence of how little progress they had made.

- *Material retardation (Article 3:8 of the AD Agreement)*

Dumping is not actionable unless it causes or threatens to cause injury, or unless it materially retards the establishment of a domestic industry. How tightly should the term “material retardation” be defined? When is an industry “established”? The Chairman said in the April 2011 Draft *AD Agreement*:

There is a broadly expressed view that the provisions of the Agreement regarding material retardation would benefit from amplification and clarification, and many elements of the 2007 Chair text attract broad support. *There are however widely divergent views on the core issue of when an industry is “in establishment.”* Most notably, *while some delegations consider that an industry might still be in establishment even if there was some domestic production, other delegations consider that once there is any domestic production an industry is no longer “in establishment,”* and in such cases the proper analysis is one of current injury or threat.<sup>22</sup>

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21. *Agreement on Implementation of Article VI, supra* note 3, art. 3.5, chairman’s note (“Causation of Injury”) (emphasis added).

22. *Agreement on Implementation of Article VI, supra* note 3, art. 3, para. 8 (first emphasis added).

In other words, some Members argued an industry might still be in the process of getting established, even if there is a small amount of domestic production. Other Members said any such production means the industry is established, and thus the injury analysis must focus on actual injury or threat thereof.

• *Definition of domestic industry (Article 4:1 of the AD Agreement)*

What criteria should be used to exclude (1) producers that are related to exporters or importers, and (2) producers that also are importers, from the definition of a domestic industry? That definition is essential in delineating the class of petitioners potentially entitled to AD relief, as well as determining at the outset whether the petitioners have standing to bring an AD case. The Chairman explained in April 2011:

There are *widely varying views* about the need for criteria governing this exclusion, and about the nature of any possible criteria. In particular, some delegations consider that the rules should be precise, reflecting numerical criteria, and directive in nature. Other delegations believe that any criteria should not be too prescriptive, as the assessment must be case by case. Yet other delegations do not exclude such producers and believe that no changes to these provisions are necessary.<sup>23</sup>

In essence, four issues were at stake.

First, should producers that are related to exporters or importers, or that are themselves importers, be excluded from the “domestic industry” that would benefit from an AD remedy? Assuming the answer is “yes,” then, second, what degree of affiliation should trigger the exclusion? That is, how close can a producer be to an exporter or importer before that producer is cast out of the universe of petitioners? Closely connected to the second issue, third, is how the proximity should be measured? Would precise, numerical criteria, or a loose, case-by-case analysis be better? Following logically from the third issue, fourth, how should the measurement criteria be selected? In particular, which criteria would both protect the sovereignty of Members, and be less expensive and time-consuming to administer?<sup>24</sup>

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23. *Id.* art. 4, para. 1 (emphasis added).

24. See Rossella Brevetti, *Dumping, Countervailing Duties: New Revised Draft Doha Texts Released on Dumping, Subsidies for Further Talks*, 26 Int'l Trade Rep. (BNA) 27 (Jan. 1, 2009).

• *Definition of subject product (Article 5:6 of the AD Agreement)*

Should a provision be added concerning the product under consideration – i.e., the good subject to an AD investigation or subject merchandise – to clarify how that product is defined? The Chairman stated in the April 2011 Draft *AD Agreement*:

While many delegations consider that a provision on this issue would be useful, concerns have been expressed that such a provision could have “vertical” as well as “horizontal” implications (e.g., with respect to the inclusion of parts), as well as implications in respect of subsequent proceedings. These concerns have caused some delegations to *link this issue to the outcome of discussions on anti-circumvention*, while other delegations reject any such linkage. There are also differences of view regarding, *inter alia*, how broadly the product under consideration should be defined, the *role of physical and market characteristics* in determining the product under consideration, and *when and how* [the] product under consideration should be determined.<sup>25</sup>

Some Members argued a new provision defining “subject merchandise” would focus the scope of an investigation, hence the above reference to linking the issue to anti-circumvention. The U.S. had first-hand experience with problems of circumvention created by Chinese producer-exporters subject to AD orders. But, other Members feared a definition, if too broad, might implicate related products in a vertical and horizontal sense and thereby bring (for example) parts of a product into an investigation. That outcome would be unfair to the implicated producer-exporters. Redolent of the controversies of defining a “like product” under Article III of the General Agreement on Tariffs and Trade (“GATT”), Members also failed to agree on the extent to which criteria such as physical and market characteristics should be used to “subject merchandise.”<sup>26</sup>

• *Information requests to an affiliated party (Article 6:8 of the AD Agreement)*

Members could not agree on how to treat an interested party in an AD investigation that has been asked for information.<sup>27</sup> Some Members

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25. *Agreement on Implementation of Article VI, supra* note 3, art. 5, para. 6 (emphasis added).

26. *See id.*

27. *See Agreement on Implementation of Article VI, supra* note 3, art. 6, para. 8.

thought such a party should not be deemed non-cooperative if it fails to provide data about an affiliate that it does not control. Other Members thought a deemed exemption would encourage non-cooperation based on an excessively narrow view of "control."<sup>28</sup>

• *Public Interest Test (Article 9:1 of the AD Agreement)*

The November 2007 Text included a public interest requiring each WTO Member to have a procedure whereby no AD remedy could be imposed without taking due account of the views of interested domestic parties. They include industrial and retail users of the subject merchandise and domestic-like product, and suppliers of inputs to the domestic industry. The European Union (EU) backed this proposal. The U.S. stood in opposition, on the ground these changes would infringe on the sovereignty of a Member to impose and collect AD duties in the manner it deems suitable.<sup>29</sup>

In the December 2008 Text, the Chairman summarized aptly the wide gap in positions over these topics:

Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty. Some consider that such a procedure would impinge on Members' sovereignty and would be costly and time-consuming, while others support inclusion of such a procedure. Issues related to any such procedure include the extent to which any such procedures should apply in the context of Article 11 [administrative and sunset] reviews, whether the ADA's [AD Agreement] requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply.<sup>30</sup>

In April 2011, the Chairman repeated the first two sentences (above), but modified the third sentence, as follows:

Issues related to any such procedure include *the elements that can or should be taken into account in any*

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28. *Id.*

29. See Daniel Pruzin, *WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) 1072 (July 15, 2010); Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int'l Trade Rep. (BNA) 203 (Feb. 12, 2009).

30. *New Draft Consolidated Chair Texts, supra* note 2, art. 9, para 1.



*public interest proceeding*, the extent to which any such procedures should apply in the context of Article 11 reviews, whether the ADA's requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply.<sup>31</sup>

This modification indicates the disagreement among Members had widened further. Not only did it include procedures, judicial review, and dispute settlement, as it had before, but also included the elements to consider in a public interest hearing. In other words, the Members could not agree on what "public interest" meant.<sup>32</sup>

These disagreements pitted the U.S. against the EU and many other Members. But, they also divided constituencies within many Members. Predictably, consumer groups championed a public interest test, and producer groups steadfastly opposed it.

• *Lesser Duty Rule (Article 9:1 of the AD Agreement)*

Also included in the November 2007 Text was a lesser duty rule. Such a rule states a WTO Member need only impose an AD duty up to the level necessary to rectify dumping, which may be less than the full amount of the dumping margin. The EU backed this rule, as its AD law contains one. The U.S. stood in opposition, for the same reason it opposed a public interest test: infringement on the sovereignty of a Member to impose and collect AD duties in the manner it deems suitable.<sup>33</sup>

In the December 2008 Text, the Chairman summarized aptly the large gap in positions over the issue:

On lesser duty, *many delegations strongly support inclusion of a mandatory lesser duty rule*. Other delegations oppose the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views about

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31. *Agreement on Implementation of Article VI*, *supra* note 3, art. 9, para. 1 (emphasis added).

32. *Id.*

33. See Daniel Pruzin, *WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) 1072 (July 15, 2010); Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int'l Trade Rep. (BNA) 203 (Feb. 12, 2009).

the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty.<sup>34</sup>

The situation scarcely had changed by April 2011, with the Chairman providing a similar summary at that time:

*Many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose with equal conviction the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views about the appropriate degree of specificity for any new rules and the extent to which those rules should prescribe or prioritize particular approaches to determining the appropriate level of duty. Some delegations have indicated that at a minimum language in the current Agreement regarding the desirability of applying a lesser duty should be maintained.*<sup>35</sup>

Here again, the issue pitted not only the U.S. against the EU and many other Members, but also divided constituencies within many Members. Predictably, consumer groups championed a lesser duty rule, and producer groups steadfastly opposed it.

• *Anti-circumvention (Article 9:5:3 of the AD Agreement)*

Should an express set of rules to deal with circumvention of an existing AD order be added? Circumvention occurs when a foreign producer-exporter that is the target of an AD order seeks to evade the order by shipping (1) subject merchandise in parts or unfinished forms, (2) a slightly modified version of the merchandise, or (3) components to a third country, assembling them in the third country, and then sending them to the importing country that maintains the order.<sup>36</sup> If so, then what numerical thresholds should be used to find dumping, injury, and causation? Should anti-circumvention measures apply to all imports of the product in question from a country, or target only imports from a

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34. *December 2008 Draft Rules Text*, *supra* note 2, art. 9, para. 1 (emphasis added).

35. *Agreement on Implementation of Article VI*, *supra* note 3, art. 9, para. 1 (emphasis added).

36. Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int'l Trade Rep. (BNA) 203 (Feb. 12, 2009).

specific producer-exporter, i.e., should the measures be country — or company — specific?

Members disagreed on all these questions.<sup>37</sup> As the Chairman summarized in the April 2011 Draft *AD Agreement*:

Delegations disagree as to *whether* there should be specific rules on anti-circumvention. *Some delegations consider that the only appropriate reaction to perceived circumvention is to seek initiation of a new investigation, while other delegations consider that anti-circumvention is a reality, and that rules on anti-circumvention are necessary to achieve some degree of harmonization among the procedures used by different Members.* To the extent that rules are included, delegations disagree, *inter alia*, *what types of circumvention* should be addressed (with particular concern expressed regarding the use of anti-circumvention measures in respect of exports originating in a third country), *whether numerical thresholds* are desirable, *whether findings of dumping, injury and causation should be required* and *whether anti-circumvention measures should be company-specific or country-wide.*<sup>38</sup>

Thus, one group, including the U.S. and EU, argued special multilateral rules are needed, especially to harmonize the existing array of national-level rules. They were dismayed at the deletion from the November 2007 Text of a specific provision that would have allowed a WTO Member to extend the scope of an AD order if that Member discovered an exporter covered by the order sought to circumvent it. Another group, including China, felt victimized by American and European anti-circumvention measures, and opposed any inclusion in the Draft Text of anti-circumvention rules. This group said the only appropriate response to alleged circumvention is to launch a new AD investigation.<sup>39</sup>

• *Sunset reviews (Article 11:3 of the AD Agreement)*

The Members disputed the appropriate criteria for initiating and conducting a sunset review (that is, a review of an AD order five years

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37. *See id.*

38. *Agreement on Implementation of Article VI, supra* note 3, art. 9, para. 5.3 (emphasis added).

39. *See* Negotiating Group on Rules, *Proposed Provision of Anti-Circumventing*, TN/RL/W/216 (Feb. 12, 2008).

after its imposition). Members also disagreed sharply on what ought to happen after a sunset review. In the April 2011 Draft *AD Agreement*, the Chairman explained:

Delegations have widely differing views regarding various aspects of the sunset issue. *There is sharp disagreement as to whether there should be any automatic termination of measures after a given period of time and, if so, after how long. On the two extremes of this issue are those delegations that favour automatic termination after five years without any possibility of extension and those that reject the principle of automatic termination altogether.* Other issues dividing delegations include *whether there is a need for additional standards and criteria governing sunset determinations and, if so, what standards and criteria would be most appropriate; what rules should apply to the initiation of sunset reviews*, including whether there should be limitations on *ex officio* initiation, and proposed standing and evidentiary thresholds for initiation; and the *timeframes for completion of investigations*.<sup>40</sup>

In brief, some Members argued an AD remedy must terminate automatically after five years, with no possibility of extension. Others – such as the U.S. – rejected automatic termination, and were pleased by the deletion of a proposal in the November 2007 Text that would have capped the duration of any AD remedy at 10 years.<sup>41</sup>

- *Third country dumping (Article 14:4 of the AD Agreement)*

Should the rules allowing for investigation and prosecution of a dumping claim on behalf of a third country (i.e., that dumping in an importing country is causing injury to a domestic industry not in that country, but in a third country) be scrapped, or should they be revised to make them operational (i.e., more user-friendly, and thereby more practical than as set out in the *AD Agreement*)? Alternatively, should the possibility of a third country dumping action be eliminated entirely from the *Agreement*? The Chairman stated in the April 2011 Draft *AD Agreement*:

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40. *Agreement on Implementation of Article VI, supra* note 3 (emphasis added).

41. See generally Daniel Pruzin, *WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) 1072, 1072 (July 14, 2010); Daniel Pruzin, *Dumping: WTO Members React to Revised Rules Text; U.S. Insists on Including Zeroing Provisions*, 26 Int'l Trade Rep. (BNA) 203 (Feb. 12, 2009).

*Some delegations* support new rules that would eliminate the requirement for Council for Trade in Goods approval to take anti-dumping action on behalf of a third country, as in their view the current rules are unworkable. *Other delegations* do not rule out such new rules, but consider that many other issues about how such actions would be taken would need to be resolved before they could reach a judgment on the desirability of operationalizing anti-dumping action on behalf of a third country. *Yet other delegations* question whether it is desirable to operationalize this provision at all, with certain delegations preferring that the provision be deleted entirely.<sup>42</sup>

The three-way split among Members again illustrated the lack of progress since December 2008. Third-country dumping, while not insignificant, ought not to have been a vexatious issue. Surely hard work, coupled with flexibility, could have produced a compromise for such an action, subject to strict, technical disciplines.

• *Special and Differential (S & D) treatment (Article 15 of the AD Agreement)*

On a topic of manifest interest to poor countries in the Islamic world, there was no consensus among WTO Members as to whether developing and least developed countries ought to get any preferential treatment beyond the modest special regard they are supposed to be accorded under the *AD Agreement*. In the April 2011 Draft *AD Agreement*, the Chairman explained:

The Group has continued to examine issues relating to special and differential treatment for developing Members, both as exporters and as users of anti-dumping. While *some delegations advocate flexibilities for the investigating authorities of developing Members*, for example in respect of initiation of investigations, *other delegations are cautious about such flexibilities*, particularly in light of the fact that many developing Members are now active users of anti-dumping. Regarding technical assistance, *some delegations propose creation of a trade remedies facility* that would assist smaller and resource restricted developing Members to develop the capacity to use such remedies. While *some delegations oppose any facility* that would assist Members

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42. *Agreement on Implementation of Article VI, supra* note 3, art. 14, para. 4 (emphasis added).

to use trade remedies, others consider that all Members have an equal right to use trade remedies in a WTO-consistent manner.<sup>43</sup>

So, after a decade of multilateral negotiations ostensibly dedicated to development, Members could agree neither on whether poor countries ought to have S & D treatment in respect of AD actions, nor on whether they should get legal training to handle them.

To close observers of the Doha Round, none of these 12 controversies was a surprise. That is because their origins lay in the birth of the Round. The U.S. consistently maintained that modifying AD (or other trade remedy) rules to improve transparency and due process were acceptable.<sup>44</sup> But, the U.S. cautioned, substantive modifications to rules were not, as that would exceed the Doha Round negotiating mandate. The fact the December 2008 Rules Text and April 2011 Draft *AD Agreement* could highlight controversies, but not suggest language to resolve them, underscored their severity.

This fact also underscored how the Round drifted from its original purpose growing out of the September 11 terrorist attacks. AD (and other trade remedies) can sharply circumscribe the market access of producer-exporters from developing and least developed countries to developed country markets. Ensuring an AD investigation is not abused for protectionist purposes that serve narrow domestic industry interests in the U.S. or other developed country, but undermine long-term national security interests in both the petitioner and respondent countries, is a matter WTO Members ought to have considered. Neither side gains if jobs and incomes are lost in a poor country because the merchandise of a producer-exporter in that country is knocked out of an important export market by an AD duty. The Members also ought to have considered ways to bolster the technical legal capacity of developing and least developed countries to bring and defend AD cases. Neither side gains if those jobs and incomes are lost either because the poor country was unable to combat *bona fide* dumping in its own market, or fight a case effectively when the behaviour of one of its producer-exporters is challenged abroad.

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43. *Agreement on Implementation of Article VI, supra* note 3, art. 15 (emphasis added).

44. See Daniel Pruzin, *WTO: WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) 1072 (July 15, 2010).

## B. Five CVD Fights

As for CVDs, the December 2008 Draft Rules Text and April 2011 Rules Document emphasized five critical areas of unresolved controversy:<sup>45</sup>

- *Calculation of the Amount of a Subsidy (Article 14(c) of the SCM Agreement)*

Should a new provision be added covering government financing of loss-making institutions?<sup>46</sup> The provision would deal with official loan or loan guarantees provided to institutions that incur long-term operating losses and also with funding to state-owned enterprises (“SOEs”) that are not credit- or equity-worthy. As the Chairman explained in the April 2011 Rules Document:

This issue originated in a proposal by the European Union to create a new category of prohibited subsidies covering the provision by virtue of government action of financing to a wide range of industries on terms and conditions inadequate to cover the long-term operating costs and losses of such financing, where this benefited exported goods.<sup>47</sup>

Some Members argued the addition was needed to discipline trade-distorting financing schemes, which had proliferated in the fall 2008 with the onset of a global economic recession. Other Members fiercely opposed any change, because it would discriminate against SOEs. Still other Members, mindful of the global financial crisis triggered in September 2008, did not want to constrain their policy space to deal with prudential measures during a financial crisis.<sup>48</sup>

- *Export Competitiveness (Article 27:5-6 of the SCM Agreement)*

Article 27:5 of the *SCM Agreement* accelerates the period during which a developing country must phase out its export subsidies from eight years (calculated from the date of the entry into force of the *WTO Agreement*, i.e., 1 January 1995) to just two years, if the country has

45. See *Agreement on Implementation of Article VI*, *supra* note 3; see RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 847-51 (2008) (explaining general treatment of CVD law).

46. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Negotiation on Subsidies and Countervailing Measures: Reports by the Chairman*, ¶¶ 5-8, TN/RL/W/254 (Apr. 21, 2011), available at [www.wto.org/english/tratop\\_e/dda\\_e/chair.../adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair.../adp_subsidies_e.doc).

47. *Negotiations on Subsidies and Countervailing Measures*, *supra* note 13, para. 5.

48. *Id.* ¶ 8.

reached export competitiveness in the subsidized product.<sup>49</sup> Article 27:6 defines "export competitiveness" as a share in world trade of that product of at least 3.25 percent calculated for two consecutive calendar years. Egypt, India, Kenya, and Pakistan found two problems with these rules.<sup>50</sup>

First, they said they sought to lengthen the period during which the export competitiveness of a product is determined.<sup>51</sup> They called for a change to a five-year moving average. By using a moving average over five-years, aberrational determinations of export competitiveness due to temporary market fluctuations would be avoided. Second, they advocated the flexibility to allow for the re-introduction of an export subsidy to a product that loses its export competitiveness.<sup>52</sup> The *SCM Agreement* is silent as to whether a subsidy can be reintroduced under this circumstance.

But, many Members resisted these proposals.<sup>53</sup> Some Members thought a five-year base period is too long, and queried how to operationalize the flexibility to reintroduce an export subsidy.<sup>54</sup> Other Members opposed any change to the measurement period, and were skeptical of reintroducing an export subsidy, as it would upset the balance between minimizing trade-distortive effects of such subsidies on the one hand, and the need for subsidies in poor countries on the other hand.<sup>55</sup>

• *S & D Treatment (Article 27:6 of the SCM Agreement)*

The *SCM Agreement* entitled developing countries to phase out export subsidies over a longer period of time than developed countries. It also allowed them to keep these subsidies in respect of a particular product until they had reached export competitiveness in that product market (defined as 3.25 percent of world trade in 2 consecutive years). Members argued over two questions.

First, should the definition of a product that could receive an export subsidy be refined? Second, should a developing country be free to restore a subsidy if it loses export competitiveness in a product market, after having reached competitiveness, and if so, under what criteria and for how long? In failing to resolve their differences, they again missed

49. Agreement on Subsidies and Countervailing Measures, art. 27.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14.

50. *Id.* ¶ 27.6; *Negotiations on Subsidies and Countervailing Measures*, *supra* note 13, ¶ 9.

51. *Negotiations on Subsidies and Countervailing Measures*, *supra* note 13, ¶ 9.

52. *Id.*

53. *Id.* ¶¶ 9-11.

54. *Id.* ¶ 11.

55. *Id.*



an opportunity to fashion rules that could be of help to Islamic countries.

• *Export credits and market benchmarks (Annex I, Illustrative List of Export Subsidies items (j)-(k), of the SCM Agreement)*

Should export credits continue to be measured in terms of the cost incurred by the subsidizing government to provide these credits? Or, should they be gauged by the benefit they confer on a recipient? Some Members, especially developing countries, said the existing cost-to-government methodology was both inconsistent with the general definition of a “subsidy” in Article I of the *SCM Agreement*, and disadvantageous to developing countries.<sup>56</sup> As the Chairman explained in the April 2011 Rules Document:

This issue was first raised in a proposal by Brazil to amend item (j) and the first paragraph of item (k) of the Illustrative List of Export Subsidies (Annex I) to reflect a benefit to recipient basis for identifying prohibited export subsidies in the forms of export credits and guarantees, in place of the existing cost to government-based language. One concern underlying the proposal is that the generally higher government costs of funds in developing compared with developed countries means that a cost-to-government standard for export credits and guarantees will put developing country exports of capital goods at a structural disadvantage. If the developing Member provides export credits at rates covering its cost of funds, the rates will be systematically higher than those offered by developed countries using their own cost of funds as the benchmark. If the developing country were to match the terms offered by the developed country, it would have to provide credits at below its own cost of funds, and thus would run afoul of the prohibition in the first paragraph of item (k). A further concern behind the proposal is that the cost to government language of the provision is inconsistent with the Agreement’s general definition of “subsidy.”<sup>57</sup>

In other words, a developing country was at special risk of running afoul of the rules on prohibited export subsidies and being subject to an especially high CVD rate, because of the relatively higher cost of funds in developing versus developed countries. The idea championed by

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56. *Negotiation on Subsidies and Countervailing Measures*, *supra* note 13, ¶ 12.

57. *Id.*

Brazil was to account for this reality by measuring export credits and guarantees based on the benefit to recipients, not the cost to the government. Yet, other Members opposed this development-friendly idea as development-unfriendly.<sup>58</sup>

Opponents argued using the benefit-to-recipient approach would boost costs for developing country borrowers, because it would reduce predictability (i.e., increase uncertainty) for government agencies that grant export credits, and thereby reduce the overall amount of financing available.<sup>59</sup> In turn, the cost of financing would rise, and purchasers of financed goods would pay more for those goods. Those purchasers often are other developing countries, which tend to import rather than export capital goods, and are helped by such goods financed with inexpensive export credits. Finally, opponents contended, the cost-to-government is the internationally accepted standard methodology.

• *Export credits and successor undertakings (Annex I, Illustrative List of Export Subsidies item (k), of the SCM Agreement)*

Should changes the Organization for Economic Cooperation and Development (OECD) might make in its Export Credit Arrangement automatically have effect in the *SCM Agreement*? The Chairman set out the problem in the April 2011 Rules Document:

15. This issue originated in the same proposal by Brazil on export credits [discussed above], which in respect of the second paragraph of item (k) [of the of the Illustrative List of Export Subsidies (Annex I) to the *SCM Agreement*] proposed that any changes made to the “undertaking” referred to therein following the conclusion of the Uruguay Round would need to be adopted by consensus of WTO Members. *For Brazil this is an issue of systemic concern, as the “undertaking” in question is the Arrangement on Officially Supported Export Credits, to which only a small number of WTO Members are parties, and changes to which are negotiated and approved at the OECD.* Via the second paragraph of item (k), however, *that undertaking establishes a safe harbour from the SCM Agreement’s prohibition for certain export credit practices, and panels have interpreted the provision’s reference to “successor undertaking” to mean the most recent version of the Arrangement adopted by its parties. Brazil thus is concerned that this interpretation means that a small*

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58. *Id.* ¶¶ 12, 14.

59. *Id.* ¶ 14.

*group of countries operating outside the WTO can change WTO rules applicable to all Members.* A number of delegations, including some parties to the Arrangement, objected to this proposal, which in their view would be fatal to the Arrangement. They consider that the Arrangement works well to discipline export credits, and that the frequent updating that it requires to remain current with market developments could easily be blocked at WTO by a Member for political reasons unrelated to the Arrangement itself.

. . . .

17. . . . On the one hand, *some delegations consider that any rules that will be binding on WTO Members must be adopted by consensus decision of those Members.* In this regard, the clarification was made that only changes to the “interest rates provisions” of the Arrangement would need to be submitted to the WTO for approval, as only these provisions are relevant to the safe harbor in the second paragraph of item (k). *Others, however, remain concerned over the potential for WTO Members to veto evolutions of the Arrangement.* They note that only a small number of non-OECD countries actually provide medium- and long-term export credits, and that these countries often are invited to participate in negotiations of revisions to the Arrangement. They consider that the OECD has expertise in the area, and note its recent outreach initiatives to expand participation in the Arrangement. *In their view, WTO Members with no interest in export credits should not have the opportunity to block necessary changes to the Arrangement, and one institution should not be able to block the coming into force of agreements reached in another institution. . . .*<sup>60</sup>

In brief, some Members thought changes in the OECD Arrangement should take effect through the *SCM Agreement*, essentially for the sake of efficiency, and because the OECD has expertise in the field. Others demanded the right to veto, in the WTO context, any changes made by the OECD, so that the subset of Members participating in that Arrangement could not change the rules on export credits for the entire Membership.

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60. *Id.* ¶¶ 15, 17 (emphasis added).

In October 2010, China started a sixth battle over the *SCM Agreement*.<sup>61</sup> It proposed that the *Agreement* be amended to include an Annex with disciplines on the use of “facts available” in CVD investigations, akin to the Annex in the *AD Agreement*.

The proposal served China’s self-interest: China was stung by the large number of CVD investigations launched against Chinese exports, particularly since 2007, when the DOC altered its long-standing policy against imposing the CVD remedy on imports from non-market economies (“NMEs”), of which China is one. “Facts available” may come from a petitioner in a CVD investigation, or sources of information other than the respondent foreign producer-exporter. An investigating authority may rely on such facts if the respondent either does not produce information it requests, or fails to provide useable information.<sup>62</sup> Many CVD cases brought in the U.S. against Chinese merchandise have resulted in the imposition of CVDs on the basis of facts available.<sup>63</sup>

So, proposed China, a new Annex to the *SCM Agreement* ought to create a safe harbour: an investigating authority must consider the “reasonable ability of the interested Member [i.e., the exporting country from which subject merchandise is shipped] or the interested party [i.e., the respondent] to supply a response” to a request for information.<sup>64</sup> Critically, the authority, said the proposal, “shall not maintain a request for the information . . . if presenting the information as requested would result in an *unreasonable extra burden* on the interested Member or the interested party.”<sup>65</sup> On its face, the proposal was problematic. How could an investigating authority in an importing country judge the “reasonable ability” of the target foreign country or respondent, especially given that they have an incentive to claim disability? Would the standard of “unreasonable extra burden” engender rounds of litigation at the WTO as to what it means? In brief, if the Chinese proposal was aimed at combating what it called biased and abusive CVD investigations, then surely the proposal erred too far in the other direction, and would impede fact-finding – that is, obstruct justice – via frivolous claims of disability and burden.

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61. See *Negotiation on Subsidies and Countervailing Measures*, *supra* note 13, ¶¶ 29-30; Daniel Pruzin, *China Seeks in Doha Talks to Narrow Use of “Facts Available” in CVD Investigations*, 27 Int’l Trade Rep. (BNA) 1586 (Oct. 21, 2010).

62. Pruzin, *supra* note 61.

63. *Id.*

64. *Id.*

65. *Id.*

### C. No Remedy for Small-Scale Muslim Fisherman, Either

As if the aforementioned battles on AD and CVD were not enough in number or intensity, fishing subsidies were the topic of yet fiercer conflict. On these subsidies, the December 2008 Draft Rules Text and April 2011 Rules Document were more disheartening than on AD and CVD. WTO Members had leapt backwards from where they appeared to have been in November 2007.

Fishing subsidies are not extraneous to negotiations about trade remedies. Rather, they concern governmental support in a particular sector, and thus are squarely within the kind of measure subject to a classic trade remedy, namely, a CVD. Moreover, their link to poverty is obvious. "Over two billion people depend on fish as a major source of protein and income."<sup>66</sup> Bangladesh, Malaysia, Indonesia, Somalia, and Yemen are among the examples.<sup>67</sup> That also is true of non-Muslim countries with large Muslim coastal communities, including India, the Philippines, and Thailand.<sup>68</sup> Such countries are not necessarily the most blameworthy in terms of causing or exacerbating the over-fishing crisis.

Rather, it is developed countries that have considerable resources to subsidize large-scale commercial fishing fleets. The long-distance fishing fleets of the EU and China are not commercially viable, and survive only because of government subsidies for fuel, other operational expenses, and vessel construction and maintenance.<sup>69</sup> For example, this support allows foreign fleets to obtain more, bigger, and faster boats than they otherwise would have.

Even when developed countries seek to cut such subsidies and provide alternative support to their fisherman to use environmentally sustainable catch methods, the fishermen do not always behave. In May 2011, for example, an undercover operation by the EU Fisheries Commission to crack down on illegal fishing discovered Italian fishermen use drift nets (which span several kilometres in length) to catch swordfish and Atlantic bluefin tuna.<sup>70</sup> The tuna, which migrate

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66. See Amy Tsui, *Members of Congress Ask USTR to Ensure WTO Talks Include End to Fishery Subsidies*, 28 Int'l Trade Rep. (BNA) 1167 (July, 14 2011) (quoting a letter dated 6 July 2011 to U.S. Trade Representative Ambassador Ron Kirk from 12 Senators and 30 Members of the House of Representatives).

67. See Andrew W. Speedy, *Animal Source Foods to Improve Micronutrient Nutrition in Developing Countries: Global Production and Consumption of Animal Source Foods*, 133 J. NUTRITION 4048S, 4050S-52S (2003).

68. *Id.*

69. See Tsui, *supra* note 66.

70. Guy Dinmore & Eleonora de Sabata, *Covert Mission Finds Sicily Skippers Still Use Drift Nets*, FIN. TIMES May 2011, at 21-22 (stating that as a result, the European Court of Justice (ECJ) is likely to impose significant monetary penalties against Italy). See generally Seth Korman, Note, *International Management of a High Seas Fishery:*

to the Mediterranean Sea, along with dolphins, sharks, turtles, and whales, and some birds, are endangered species, all of which are ensnared in drift nets.<sup>71</sup> Thus, the EU banned drift nets in 2002, and subsidized its fishermen to desist from their use. The Italian fishermen pocketed the subsidy, flouted the ban – and Italian authorities, including the Coast Guard, did nothing.<sup>72</sup> Consider, then, the impact on the countries of the Southern and Eastern Mediterranean – all of which, save for Israel, are Muslim. Their smaller-scale fishermen suffer from stock depletion caused by their European counterparts.

Nonetheless, from the American perspective, the link between disciplines on fish subsidies to promote sustainable development, on the one hand, and alleviating poverty and susceptibility to Islamist extremism on the other hand, was lost. In the words of four former U.S. Trade Representatives (USTRs), William Brock, Carla Hills, Susan Schwab, and Clayton Yeutter, in an April 2011 letter to President Barack H. Obama, America viewed the matter as an opportunity to “set a historic precedent by showing that trade can directly benefit the environment *while promoting jobs, exports, and open markets.*”<sup>73</sup> That is, at stake for the U.S. was an environmental measure that would not interfere with market access for American fish exports.

America focused on its commercial and recreational fisheries interests, which account for over two million jobs in the U.S.<sup>74</sup> For U.S. policy in the Doha Round, the possibility subsidies by foreign governments might be at cross-purposes with America’s counter-terrorism efforts was of marginal (if any) importance. Rather, they mattered because they undermined opportunities for American exporters in third countries, by putting American fisherman at a disadvantage. For example, by cutting operating costs of foreign producers and exporters, they injured American coastal communities. Even environmental groups, such as Mission Blue, Oceana, and the World Wildlife Fund (WWF) emphasized fishing subsidies “undermine[] U.S. trade opportunities in potential export markets” by “creating an uneven playing field and reducing the stocks on which U.S. fishers depend.”<sup>75</sup> In truth, both rationales matter, or should.

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*Political and Property-Rights Solutions and the Atlantic Bluefin*, 51 VA. J. INT'L L. 697-748 (2011), for a discussion of some of the pertinent issues relating to fishing subsidies.

71. Dinmore & de Sabata, *supra* note 70.

72. *Id.*

73. Rossella Brevetti, *Allgeier Says Success of Fisheries Pact at WTO Would Help Sell Doha Package*, 28 Int'l Trade Rep. (BNA) 768 (May 12, 2011) (emphasis added).

74. See Tsui, *supra* note 66.

75. Rossella Brevetti, *Environmental Groups Ask Obama for Strong Fisheries Subsidy Pact in WTO*, 28 Int'l Trade Rep. (BNA) 848 (May 26, 2011) (paraphrasing a letter dated 11 May 2011 from these three environmental groups to President Barack H. Obama).

Unsurprisingly, by April 2011, the only points on which WTO Members agreed were incontrovertible facts:

- A global crisis of overcapacity and overfishing exists, with over 85 percent of the world's fisheries being overexploited, fully exploited, depleted, or in need of recovery, and with 63 percent of fish stocks around the world requiring rebuilding.<sup>76</sup> In April 2011, the Chairman intoned:

The longstanding blockage in these negotiations exists in spite of the strong consensus among delegations of all sizes and levels of development that the state of global fisheries resources is alarming and getting worse. Indeed all delegations, when referring to data, rely on the same statistics – those published by the FAO [United Nations Food and Agriculture Organization] – the latest of which show that 85 per cent of world fish stocks are either fully- or over-exploited. All recognize that this is a crisis of exceptionally serious implications for all humankind, and particularly for the poor in many countries who are heavily dependent on fisheries as a source of nutrition and employment. Nor is there disagreement that developing as well as developed countries are major participants in global capture fishing, and that all countries face a common problem and share responsibility to contribute to finding solutions, although not necessarily on a uniform basis.<sup>77</sup>

- The crisis is due in part to the \$30-34 billion annually (as of 2006) governments grant as fishing subsidies, including \$20 billion (equivalent to 20-25 percent of revenues) to increase the capacity of fleets to fish for longer periods, more intensively, and at further distances. As the Chairman put it: “most [Members] agree that subsidies play a major role in contributing to these problems [of overcapacity and overfishing], and that this is what is behind the

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76. See World Trade Organization, *Briefing Notes – Rules*, available at [www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/rules\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm); Amy Tsui, *Members of Congress Ask USTR to Ensure WTO Talks Include End to Fishery Subsidies*, 28 Int'l Trade Rep. (BNA) 1167 (July 14, 2011) (quoting a letter dated 6 July 2011 to USTR Ambassador Ron Kirk from 12 Senators and 30 Members of the House of Representatives); Jonathan Lynn, *Activists Say Fish Deal Hostage to WTO Deadlock*, REUTERS (Oct. 29, 2009, 12:50 PM), [www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029](http://www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029).

77. *Negotiations on Fisheries Subsidies*, supra note 14, ¶ 12.

negotiating mandate to strengthen disciplines on fisheries subsidies, including through a prohibition.”<sup>78</sup>

- Overall, annual fishing subsidies (as of 2010) equal about 20 percent of the value of the world catch of fish.<sup>79</sup>

- Seven industrialized countries account for 90 percent of the subsidies – Canada, the EU, Japan, Korea, Russia, Taiwan, and the U.S.<sup>80</sup>

- Fishing subsidies provided by the EU and Japan have helped contribute to a worldwide fishing fleet that is about 250 percent larger than needed to fish at sustainable levels.<sup>81</sup> Ominously, Brazil and China are increasing their subsidies nearly to the level of the industrialized countries.<sup>82</sup> Over 50 percent of the large vessels that engage in unsustainable fishing are Chinese, and the Communist Party supports them with fuel subsidies.<sup>83</sup>

- The crisis has adverse economic and environmental effects.<sup>84</sup> It also has impacts on nutrition and health, because over one billion people rely on fish as the key source of their protein.<sup>85</sup>

Despite widespread appreciation of these facts, the Members could not agree on a common strategy to deal with the crisis. Their disagreement persisted, as the April 2011 Rules Document indicated essentially no progress had been made from December 2008 through mid-2011.<sup>86</sup>

78. *Id.*

79. See Rossella Brevetti, *Environmental Groups Ask Obama for Strong Fisheries Subsidy Pact in WTO*, 28 Int'l Trade Rep. (BNA) 848 (May 26, 2011).

80. Daniel Pruzin, *WTO Rules Chair Admits Little Progress on Sticking Points, Issues Fisheries Warning*, 26 Int'l Trade Rep. (BNA) 1641 (Dec. 3, 2009).

81. Amy Tsui, *USTR Hopes to Use Doha WTO Talks, TPP to Eliminate Fishing Subsidies, Support Oceans*, 27 Int'l Trade Rep. (BNA) 1103 (July 22, 2010).

82. *Id.*

83. See Rossella Brevetti, *Allgeier Says Success of Fisheries Pact at WTO Would Help Sell Doha Package*, 28 Int'l Trade Rep. (BNA) 768 (May 12, 2011).

84. See December 2008 Draft Rules Text, *supra* note 2, Annex VIII, ¶ 2; Jonathan Lynn, *Activists Say Fish Deal Hostage to WTO Deadlock*, REUTERS (Oct. 29, 2009, 12:50 PM), [www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029](http://www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029).

85. See Jonathan Lynn, *Activists Say Fish Deal Hostage to WTO Deadlock*, REUTERS (Oct. 29, 2009), [www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029](http://www.reuters.com/article/2009/10/29/us-trade-wto-fish-idUSTRE59S3X920091029).

86. See Daniel Pruzin, *U.S. Criticizes WTO Chief Lamy's Assessment of Doha Impasse, Says NAMA Not Only Issue*, 28 Int'l Trade Rep. (BNA) 724 (May 5, 2011).



The Members were split three ways:

- 1) First, Japan, Korea, and Taiwan were skeptical of a link between subsidies and over-fishing.
- 2) Second, the so-called “Friends of Fish” on the other side – consisting of Argentina, Australia, Chile, Colombia, New Zealand, Norway, Iceland, Pakistan, Peru, and the U.S. – sought stringent disciplines on fisheries subsidies.<sup>87</sup>
- 3) Third, Brazil, China, India, Indonesia, and Mexico demanded exceptions, i.e., S & D treatment that would allow flexibility to deviate from any such disciplines for poor countries.<sup>88</sup>

The desire of the second group for stringent disciplines clashed head-on with the skepticism of the first group. The demands of the third group caused consternation among the second group, which feared exceptions for developing countries would undermine any new disciplines.

Accordingly, the Members disputed eight key areas:

- *Benchmarks?*

What metrics should be used to gauge the existence of overcapacity or overfishing objectively and precisely?

- *Judge?*

Should individual Members be permitted to self-judge overcapacity and overfishing?<sup>89</sup> Or, should some other party, group, or institution make those judgments?

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87. See World Trade Organization, *Briefing Notes – Rules*, available at [www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/rules\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm). See also Amy Tsui, *USTR Hopes to Use Doha WTO Talks, TPP to Eliminate Fishing Subsidies, Support Oceans*, 27 Int'l Trade Rep. (BNA) 1103 (July 22, 2010) (quoting Senator Ron Wyden (Democrat – Oregon), Chairman, Senate Finance Committee Subcommittee on International Trade, Customs, and Global Competitiveness, telling Mark Linscott, Assistant USTR for Environment and Natural Resources: “Let me just give you something to take back to Geneva – no fish subsidies agreement, you will have my opposition. Congress in my view is not going to accept it and all you have to do is look at this Committee to get an idea of how powerful this issue is.”).

88. See Daniel Pruzin, *Officials at WTO Cite Mixed Results from Doha “Brainstorming” Sessions*, 27 Int'l Trade Rep. (BNA) 1543 (Oct. 14, 2010).

89. See *New Draft Consolidated Chair Texts*, *supra* note 2, Annex VIII, ¶ 6.

- *Fisheries Management?*

Should the core of a deal on fisheries subsidies be obligations about fisheries management, or a prohibition on subsidies? As the Chairman explained in April 2011:

91. From the outset of the negotiations, the issue of fisheries management has figured prominently in the debates. *Some delegations argue that if proper management is in place, subsidies cannot cause either overcapacity or over-fishing. Others, however, consider that while fisheries management is important, it cannot on its own combat the pressure for overcapacity and overfishing brought to bear by subsidization.* In their view, the global crisis in fish stocks is ample evidence that fisheries management by itself is inadequate to control overcapacity and overfishing. In this regard, the example of the North Atlantic cod industry has been cited.

92. *These differences of view in turn are reflected in very different proposals as to the role that fisheries management should play in the disciplines. Delegations holding the former view consider that fisheries management should form the core of the new rules, and that the subsidy disciplines should play the auxiliary role of creating incentives for Members to adopt strong management systems.* Their proposals thus are to shorten the list of subsidies to be prohibited, and to make these prohibitions subject to certain management-related conditions (such as subsidizing the replacement of retired vessels with vessels of smaller capacity), and/or to put greater emphasis on adverse effects provisions, in which the existence and operation of the fisheries management system would play a pivotal role in determining whether subsidization had caused overcapacity and overfishing in a particular situation.

93. *Other delegations, however, maintain that the core of the disciplines must be a prohibition of certain subsidies, and that fisheries management should be a conditionality for making use of exceptions from the prohibition (whether general exceptions or exceptions under special and differential treatment).* They further consider that while having fisheries management in place can be a relevant factor in assessing whether non-prohibited subsidies have

caused adverse effects to fish stocks, this by itself should not be sufficient for a successful rebuttal of a claim.<sup>90</sup>

In brief, Members could not agree on the basic paradigm for an agreement – whether it was about resource management or subsidy prohibition. This disagreement, of course, begged an important question: what are the key features of “fisheries management” to which all Members should adhere?<sup>91</sup>

• *Prohibition?*

How should the scope of the fishing subsidy prohibition be delineated?<sup>92</sup> Should the subsidies ban apply to a comprehensive list, i.e., a broad and strict prohibition, with coverage including a ban on support for:

- 1) construction of new fishing vessels;
- 2) repair and modification of existing vessels;
- 3) operating costs of vessels and in- or near-port processing activities;
- 4) fuel;
- 5) port and other infrastructure facilities;
- 6) incomes of fishermen;
- 7) prices of fish products;
- 8) destructive fishing practices;
- 9) overfished fisheries;
- 10) transfer of fishing or service vessels (from one to another country);
- 11) illegal, unreported, and unregulated (“IUU”) vessels;
- 12) transfer of access rights (whereby one country that pays for fishing access rights in the waters of another country sells those rights to a third country)?<sup>93</sup>

Or, should a conditional approach to prohibition be used, allowing for certain fishing subsidies, such as artisanal (i.e., small scale) fisheries, natural disaster relief, *de minimis* support, and barring only subsidies most harmful to global fishing stocks?<sup>94</sup>

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90. *Negotiations on Fisheries Subsidies*, *supra* note 14, ¶¶ 91-93 (emphasis added).

91. *See id.* ¶¶ 94-95.

92. *See id.* ¶¶ 17-18.

93. *See id.* ¶¶ 25-45.

94. *See id.* ¶¶ 20-24; *New Draft Consolidated Chair Texts*, *supra* note 2, ¶ 5; *see Pruzin, supra* note 88.

Related to these questions was how to draft a prohibition. Should a positive list of subsidies, akin to Article 1:1 of the *SCM Agreement*, be created, with the scope of prohibited subsidies on the list “modulated by general exceptions”?<sup>95</sup> Or, would a negative list, identifying only particular types of subsidies as unlawful, be appropriate?

• *Exemptions and S & D Treatment?*

For the benefit of poor countries, what specific types of fishing subsidy programs might be exempt from a prohibition on fishing subsidies, above and beyond the general exceptions to which any country could have recourse?<sup>96</sup> Accordingly, Members had failed to agree on the possible exemptions for developing and least developed countries from any ban on fishing subsidies, as well as on technical assistance for such countries.<sup>97</sup> As the Chairman stated in April 2011:

. . . virtually all of the proposals for special and differential treatment are based on permanent exceptions from various prohibitions, in various circumstances and subject to various conditions . . . . That said, there are fundamentally different visions as to how S&DT [special and differential treatment] should be structured, what particular exceptions should be provided in which particular circumstances, and what conditions should apply to the different exceptions.<sup>98</sup>

Among the possible exemptions were subsidy programs:

- 1) that contribute only minimally to overcapacity or overfishing;
- 2) whose effects could be controlled adequately by a fisheries management scheme;
- 3) that focus on small operations, i.e., a “bottom tier” of activities that relate to artisanal (small-scale) or subsistence fishing, which would not contribute to overcapacity or overfishing;<sup>99</sup> or
- 4) that are important to the economic development of a poor country.<sup>100</sup>

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95. *Negotiations on Fisheries Subsidies*, *supra* note 14, ¶ 10.

96. *See generally id.* ¶¶ 46-83 (describing proposed subsidy exceptions for developing countries, including a tiered proposal structure).

97. *See id.* ¶ 82 (concerning technical assistance).

98. *Id.* ¶ 46.

99. *See id.* ¶¶ 58-67.

100. *See New Draft Consolidated Chair Texts*, *supra* note 2, ¶ 5.

Members contested the parameters for exemptions, as well as the exemptions themselves. For example, how should “subsistence” fishing to be measured? How does it differ from “artisanal” activities? Would income and price support, funding for port infrastructure, and subsidies for the construction of small-decked and undecked vessels qualify for an exemption, because they matter to economic development?<sup>101</sup> In this respect, fuel subsidies, and support for other operating costs, were a “very divisive” topic.<sup>102</sup>

Should flexibilities for poor countries to derogate from any ban on fishing subsidies extend to support for activities on the high seas, that is, beyond the Exclusive Economic Zone (“EEZ”) of those countries?<sup>103</sup> This question also provoked heated debate.

Developing countries argues that equity suggested, “yes.” Poor countries “are latecomers to high seas fisheries, and should be able to use whatever means they deem necessary in order to catch up to the developed world.”<sup>104</sup> International law also suggested, “yes,” because, “all countries have the right to a share of fisheries in international waters, but . . . the cost advantages of developed Members’ fishing fleets are too great for [developing countries] to overcome without subsidies.”<sup>105</sup> Fairness, too, suggested, “yes.” “Developed countries are responsible for the overfishing of high seas stocks,” but now seek to “impose a standstill on high seas fishing.”<sup>106</sup> That standstill would hurt the vulnerable resources, i.e., spawning and juvenile stocks, within the EEZs of developing countries. Nature, also, counseled for an affirmative answer: the distinction between EEZs and the high seas is artificial, because many stocks are highly migratory.<sup>107</sup>

Developed countries offered strong rebuttals. First, the high seas are “the most biologically and politically vulnerable” fishing areas, as there is no national jurisdiction and thus no mechanism to ensure the “internationally-shared fisheries resources” are managed sustainably.<sup>108</sup> Second, any fishing activity outside of an EEZ is by definition “highly industrialized,” not subsistence or artisanal, even if a poor country engages in such activity.<sup>109</sup> So, all countries should be

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101. See *Negotiations on Fisheries Subsidies*, *supra* note 14, paras. 68-69.

102. *Id.* para. 73.

103. See *id.* paras. 75-81.

104. *Id.* para. 76.

105. *Id.*

106. *Id.*

107. *Id.* para. 77.

108. *Id.* para 79; see also *id.* para. 81 (describing the problems of enforcing sustainable conditions for a S & D treatment exception that allows for a subsidy for fishing activities on the high seas).

109. *Id.* para. 80.

subject to the same subsidy disciplines on high seas fishing. Third, a poor country can protect its spawning and juvenile stocks with a sound "national fisheries management" program.<sup>110</sup>

At the heart of the disagreement lay the fact poor countries demanded S & D treatment in connection with a problem for which they are partly to blame. The Chairman indicated as much in April 2011:

47. Among the considerations cited frequently in this context is the important role of developing countries in world marine capture production. According to FAO statistics, *six of the top ten fishing nations, and 11 of the top 15, are developing countries, and developing countries collectively account for about 70 per cent of global capture production. For many Members, given these facts S&DT cannot simply be a blanket carve-out from the disciplines for all developing Members, as in their view this would render the overall discipline ineffective.* A number of developing Members, while stressing that they do not seek a simple blanket carve-out, nevertheless consider the absolute figures to be *misleading* in that they mask the comparative efficiency and magnitude of countries' fishing activities, and thus their relative impacts on global fisheries resources. They argue instead that the use of catch *per capita*, or catch per fisher, as alternative measures, show that developing countries make less impact on global resources than do developed countries.

48. Some of the differences in the approaches advanced by different Members appear to relate to the *different rationales advanced for S&DT in the particular context of fisheries subsidies disciplines.* In this regard, objectives of S&DT that have been referred to in the discussions and proposals include: (1) *poverty alleviation, i.e.,* assistance for vulnerable, disadvantaged populations; (2) *development of the fisheries sector as a source of jobs, income and trade,* both to lift people out of poverty and to create new opportunities for economic development and linkages; (3) *building up domestic capacity* to exploit the fisheries resources within the national jurisdiction; (4) *enhanced policy flexibility* for Members with a small share of global fish catch, on the grounds that they have at most a negligible impact on global overcapacity and overfishing; (5) *extending domestic fishing activities beyond coastal*

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110. *Id.*

*areas*, both into the EEZ [Exclusive Economic Zone] and (in some cases) into the high seas, to relieve pressure on coastal fisheries resources, including spawning and juvenile populations; (6) “*catching up*” to the developed world in terms of vessels, technology, scale, and areas of operation; and (7) *exercising rights under international law* to exploit commercially valuable fish stocks in international waters, the products of which are traded internationally. All proposals and discussions emphasize the need for the subsidies to be deployed and the subsidized activities to be conducted in a sustainable manner, although like the different approaches to the S&DT exceptions, the proposed approaches to the accompanying sustainability conditionalities vary greatly.<sup>111</sup>

In other words, there was considerable debate over the guilt of poor countries, and the theory underlying any S & D differential treatment they might get. Unsurprisingly, the Members could not agree on the practical matter of how to calibrate the nature, scale, and geographic scope of their activities that should be exempt from any disciplines.<sup>112</sup>

Also unresolved, then, were the precise fisheries management obligations a poor country would have to implement before having access to an S & D treatment exception that permitted it to subsidize its fisheries in some manner. Presumably, these obligations would require the country to implement “internationally-recognized best practices, including regular science-based stock assessments.”<sup>113</sup> And, what transition rules would apply to developing and least developed countries, so that they might have more time to phase in their obligations?<sup>114</sup>

Finally, whether S & D treatment should be tailored for different categories of poor countries was in dispute. Members generally agreed least developed countries ought to get the best of S & D treatment.<sup>115</sup> But, they worried that some developing, and even some developed, countries might behave unscrupulously and try to take advantage of the exemptions designed for least developed countries. And, they could not agree on whether distinctions should be made among developing countries. Obviously, doing so along the lines of the draft agriculture and NAMA proposals (e.g., with differentiations for net food importing developing countries (“NFIDCs”), certain recently acceded members

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111. *Id.* ¶¶ 47-48.

112. *See id.* ¶ 10.

113. *Id.*

114. *See id.* ¶ 11.

115. *See id.* ¶ 49.

("RAMs"), and small, vulnerable economies ("SVEs")), or along new lines (e.g., distinguishing developing countries with a small share of global wild fish capture) would risk making the fishing subsidy rules vastly more complex.<sup>116</sup>

• *Notification?*

What scheme should be used for Members to notify one another of their fisheries subsidies, particularly if they sought to invoke a general or S & D treatment exception?<sup>117</sup> How much advance notice must a Member provide?<sup>118</sup> To what forum should notice be given – the FAO, WTO, or some other entity?<sup>119</sup> What information would be sufficient to demonstrate that a Member qualified for an exception?<sup>120</sup>

Related to problems of notification were questions of what to do with information in a notification? Should there be a review of the practices of the notifying country, and if so, what kind of review should it be?<sup>121</sup> For example, if notification is to the FAO, then should it be empowered to render a judgment as to the soundness of the fisheries management system in a poor country, and the entitlement of that country to invoke an exception? Would this judgment be binding? Could it be used in a WTO adjudicatory proceeding? Should a non-notified subsidy be presumed rebuttably to be prohibited?<sup>122</sup>

• *Remedy?*

To be meaningful, any discipline on fishing subsidies would have to have associated with it a remedy for breach.<sup>123</sup> Likewise, an unlawful subsidy would have to be attributed to the subsidizing government, not the flag of the vessel carrying subsidized fish (otherwise, it would be easy to circumvent the disciplines).<sup>124</sup> And, the rule of origin for fisheries product, used for customs and labeling purposes, would not affect this attribution. But, what should the legal criteria for the remedy be?

Should the "traffic light" scheme of the *SCM Agreement* be used, whereby certain subsidies are forbidden ("red light") as long as they are specific, and are presumed irrefutably to cause adverse effects, while

116. *See id.*

117. *See id.* ¶¶ 11, 97.

118. *See id.* ¶¶ 99-100.

119. *See* April 2011 Rules Document, *Negotiations on Fisheries Subsidies – Report by the Chairman*, TN/RL/W/254, Part III.E ¶¶ 101-02 (Apr. 21, 2011), available at [www.wto.org/english/tratop\\_e/dda\\_e/chair.../adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair.../adp_subsidies_e.doc).

120. *Id.* ¶¶ 11, 104.

121. *See id.* ¶¶ 11, 101-03.

122. *Id.* ¶¶ 11, 97.

123. *See id.* ¶¶ 11, 84.

124. *Id.* ¶¶ 11, 84, 90.



other subsidies are actionable (“yellow light”) if they are both specific and cause adverse effects?<sup>125</sup> What sort of “adverse effects” should be actionable – only those in relation to fish stocks, such as over-capacity and over-fishing, or any effect on trade?<sup>126</sup> What test should be used to establish a causal link between adverse effects and subsidization?<sup>127</sup> Is the mere absence of strong resource management enough to deem such a link exists, or must more be shown?

As to the remedy, should it be limited to a CVD, as per Article 7:9 of the *SCM Agreement*?<sup>128</sup> Or, should a WTO panel or the Appellate Body be empowered to fashion a different sort of remedy? Should the remedy be the same for all types of fish, or should a distinction be made for highly migratory stocks?<sup>129</sup> Should the remedy cover only fish from the “same stock,” or also a “directly competitive product”?<sup>130</sup>

- *Enforcement?*

What methods should be used to monitor and survey any exempt fishing subsidy programs, to ensure the integrity of the prohibition is not undermined and thus to help prevent overcapacity and overfishing?<sup>131</sup> For instance, should inspectors from the FAO review whether a poor country is implementing its fisheries management obligations?<sup>132</sup>

Thus, Chairman Valles simply put to the Members in his “Road Map” a long list of questions concerning fundamental issues to address.<sup>133</sup> They were back to square one.

These issues were under the negotiating mandate Members undertook three years before the Draft Text, in the December 2005 Hong Kong Ministerial Conference. And, following the Seventh Ministerial Conference in Geneva in November-December 2009, the Chairman readily admitted no progress had been made in the year

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125. See *id.* para. 5.

126. *Id.* para. 87.

127. *Id.* para. 89.

128. See *id.*

129. *Id.* para. 88.

130. *Id.*

131. See *New Draft Consolidated Chair Texts*, *supra* note 2, ¶ 7.

132. See *Negotiations on Fisheries Subsidies*, *supra* note 14, ¶ 10.

133. See *New Draft Consolidated Chair Texts*, *supra* note 2, ¶¶ 10-11 (concerning the prohibition of fishing subsidies), ¶¶ 12-13 (concerning general exemptions from the prohibition), ¶¶ 14-15 (concerning S & D treatment), ¶ 16 (concerning general disciplines on, and actionability of, fishing subsidies), ¶¶ 17-20 (concerning fisheries management), 21-22 (concerning transparency), ¶ 23 (concerning dispute settlement), ¶¶ 24-25 (concerning implementation), ¶¶ 26-27 (concerning transition rules).

since he issued his Text (*i.e.*, since December 2008).<sup>134</sup> Chairman Valles elaborated on that depressing conclusion in April 2010. Deciding to retire from his post as Chairman after six years, and return to Uruguay, he said the bottom-up approach embodied in the December 2008 Text had been fruitless, and – worse yet – Members had made no significant progress after eight years of negotiations on bridging differences on AD or CVD rules.<sup>135</sup> His successor, Ambassador Dennis Francis of Trinidad and Tobago, wrote in April 2011:

13. . . . [W]hat then is the problem? Why have these negotiations been underway for 10 years with little tangible progress in finding a solution? In my view, it seems that most (although not all) delegations, *rather than seeking to build convergence by indicating acceptance of the appropriate level of disciplines* (and of the policy changes that this would imply), to effectively address what is undeniably a common and rapidly worsening problem, appear to be focusing principally on *maintaining their own status quo by placing on "others" the main responsibility to implement solutions, while minimizing the impact of disciplines on their own activities*. Thus in spite of the nearly universal calls for disciplining subsidies in an effective way, many delegations in practice seem to *elevate the exceptions above the disciplines*. For some *developed* Members, a main reason given is that subsidies are necessary to *protect traditional ways of life, vulnerable coastal communities, and jobs in the fisheries sector*. For many *developing* Members, a main reason often cited is the need for policy space to subsidize in order to *harness fisheries as a basis for development, economic growth, and employment*. In the face of the sharp and continuing declines in the fisheries resources, however, *it is hard to see how such strategies can either protect communities and jobs or be a source of food security and stable growth over the long-term*.

14. . . . [A] unified, long-term strategic approach to cooperating to rationalize economic signals – including by giving priority to collectively reducing the level of capacity- and effort-enhancing subsidies – can actively promote and contribute to profitability of global fisheries, with the

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134. See Daniel Pruzin, *WTO Rules Chair Admits Little Progress on Sticking Points, Issues Fisheries Warning*, 26 Int'l Trade Rep. (BNA) 1641 (Dec. 3, 2009).

135. See Daniel Pruzin, *WTO Chair Cites Absence of Progress in Doha Antidumping, Subsidies Talks*, 27 Int'l Trade Rep. (BNA) 659 (May 6, 2010).

hugely advantageous additional benefits of economic and environmental sustainability. . . . [F]isheries are often compared to the *prisoner's dilemma*: non-cooperative pursuit of individual payoffs leads to overfishing, which in turn imposes economic loss (not to mention negative environmental effects) on all parties involved. In fact, it is widely-accepted that the economic benefits lost due to overfishing are significant – a World Bank Report gives an estimate of U.S. \$50 billion annually, without counting the out-of-pocket additional costs of subsidies (estimated to be at least U.S. \$16 billion annually). To put these figures in context, the value of the total global marine fish catch is around U.S. \$90 billion. Like the prisoner's dilemma, however, fisheries are not a zero-sum game. Successful subsidy negotiations can help bring about a situation where profitability and economic and environmental stability are mutually reinforcing, contributing to sustainable wealth creation.

15. In order for the negotiations to make significant progress, I am of the view that negotiators will have to focus more on these incontrovertible realities no matter how inconvenient, and less on protecting their short-term defensive interests. Unless this happens, I do not hold great prospects for the fisheries subsidies negotiations.<sup>136</sup>

A more honest assessment is hard to come by.

### III. NOT FACILITATING TRADE

#### A. Progress through April 2009

By April 2009, it appeared a Doha Round agreement on trade facilitation (*i.e.*, simplifying customs procedures, which can be a non-tariff barrier to trade, so as to reduce the transactions costs of trade and thereby increase trade flows by speeding up procedures for the clearance and release of merchandise) might be within reach. A June 2010 study by the Peterson Institute for International Economics states that reducing the costs of moving goods across international borders could boost global Gross Domestic Product (“GDP”) by over \$100

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136. *Agreement on Implementation of Article VI*, *supra* note 3, ¶¶ 13-15 (emphasis added).

billion.<sup>137</sup> Additionally, the WTO Director-General, Pascal Lamy, rightly explained in June 2011:

. . . implementation of the Trade Facilitation measures discussed in Geneva [i.e., in the Doha Round] could reduce total trade costs by almost 10 percent . . . .

. . . For OECD countries it currently takes on average about four separate documents and clearing the goods in an average of ten days at an average cost of about \$1,100 per container. By contrast, in Sub-Saharan Africa almost double the number of documents are required and goods take from 32 days (for exports) to 38 days (for imports) to clear at an average cost per container of between \$2,000 (for exports) and \$2,500 (for imports). The overall world champion at trade facilitation is Singapore, where four documents are required and goods are cleared in, at most, five days at an average cost of around \$456 per container. At the other end of the scale are many of the low-income developing countries, in particular the landlocked developing countries, whose trade-processing costs can mushroom as a result of the effort required to move goods in transit by road or rail through their neighbours to their nearest international port. According to recent research, every extra day required to ready goods for import or export decreases trade by around 4 percent.

Handicapping the world's least competitive producers and poorest consumers with additional transaction costs of \$1,000 or more for each container of goods that they manage to export or import is clearly absurd.<sup>138</sup>

Indeed, even a one percent improvement in cutting red tape and streamlining customs procedures, as measured by an index of indicators for transparency and predictability, can increase trade in industrial goods by 0.7 percent.<sup>139</sup>

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137. Susan C. Schwab, *After Doha, Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFF. 104, 115 (2011). Ms. Schwab served as USTR from 2006-2009, *id.* at 104.

138. *WTO Trade Facilitation Deal to Reduce Trade Costs and Boost Trade*, Lamy, WORLD TRADE ORG. (June 24, 2011), [http://www.wto.org/English/news\\_e/sppl\\_e/sppl197\\_e.htm](http://www.wto.org/English/news_e/sppl_e/sppl197_e.htm) (speech of WTO Director-General Pascal Lamy to the World Customs Organization, Brussels, Belgium, 24 June 2011).

139. *Red Tape at Port Costlier than Shipping between Ports: Economists Mull Doha's Value*, 2010 NEWS ITEMS, WORLD TRADE ORG (Nov. 2, 2010), [http://www.wto.org/english/news\\_e/news10\\_e/dda\\_02nov10\\_e.htm](http://www.wto.org/english/news_e/news10_e/dda_02nov10_e.htm).

Under the April 2009 Doha Round proposed agreement, developing countries would be able to implement immediately between 30 and 50 percent of the obligations, with no technical assistance required to do so. Implementation of the deal, however, would be part of a single undertaking, meaning the deal was contingent on resolving the agriculture, NAMA, services, and rules issues.<sup>140</sup> The agreement would deal with three articles of GATT that cover transit, fees and formalities (i.e., paperwork and documentation), and transparency of regulations – Articles V, VIII, and X, respectively. Most if not all WTO Members appreciated their shared interest in trade facilitation, though developing countries were keen to avoid having heavy obligations imposed on them, and insisted on technical and financial assistance from developed countries to meet the burdens of implementing any trade facilitation obligations.<sup>141</sup>

#### B. Heavily Bracketed April 2011 Draft Trade Facilitation Text

On 14 December 2009, the Negotiating Group on Trade Facilitation published a “Draft Consolidated Negotiating Text.”<sup>142</sup> Containing 16 Articles, it was the first draft accord in the Doha Round on the topic, but it was replete with bracketed text. On 21 April 2011, the Negotiating Group published a new version of the Text. Organized into two Sections, with Section I containing Articles 1-15, and Section II containing 10 paragraphs on S & D treatment, the April 2011 Draft Trade Facilitation Text looked very much like the December 2009 predecessor. It, too, was replete with bracketed text.<sup>143</sup>

The key highlights of the 37-page April 2011 Draft Text are as follows:

##### • *Provisions Relating to GATT Article X on Transparency of Trade Measures*

These provisions covered publication and availability of information in Article 1, prior publication and consultation in Article 2, advance rulings in Article 3, appeal (i.e., review) procedures in Article 4, and other measures to enhance impartiality, non-discrimination, and transparency in Article 5.<sup>144</sup>

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140. See Amy Tsui, *Trade Facilitation Agreement Bright Spot in Doha, May be Finished in Few Months*, 26 Int'l Trade Rep. (BNA) 507 (Apr. 16, 2009).

141. See Daniel Pruzin, *Hopes Fading for WTO “Deliverables” Deal as Delegations Take Hard Line on LDC-Plus*, 28 Int'l Trade Rep. (BNA) 1164 (July 14, 2011); *DOHA Development Agenda, Briefing Notes, Trade Facilitation*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dda\\_e/status\\_e/tradfa\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/status_e/tradfa_e.htm) (last visited Nov. 8, 2011).

142. See *Draft Consolidated Negotiating Text*, *supra* note 4.

143. See *Revised Draft Consolidated Negotiating Text*, *supra* note 5.

144. *Id.* arts. 1-5.

Article 1, Paragraph 1, called for publication of trade measures. Article 1, Paragraph 1:1 explained such publication should be prompt, in a non-discriminatory and easily accessible manner that enables all governments, traders, and interested parties to become acquainted with the relevant trade measures. The measures at issue concern (*inter alia*) import, export, and transit procedures, applied duty rates, fees and charges, rules on customs classification and valuation, rules of origin, penalties, appeal procedures, and tariff-rate quotas. Article 1, Paragraphs 2 and 3 required establishment of an official website and inquiry points. Publication need only be in the vernacular of the country at issue, but if practicable, should be in at least one WTO language (English, French, or Spanish).<sup>145</sup>

Article 2 required an interval between publication and entry into force and opportunities for interested parties to comment on trade measures. That interval must be “reasonable,” as must be the comment period, but the precise amount of time is undefined. Also unspecified is what constitutes an “opportunity” to comment. Indeed, whether the chance to comment would be mandatory, or provided by a Member “to the extent practicable,” was unresolved.<sup>146</sup>

Article 3 mandated issuance by governmental authorities of advance rulings, possibly in a maximum period of 150 days (a drop from 180 days in the December 2009 Text), with clear procedures as to how an applicant may obtain one.<sup>147</sup> An applicant could seek an advance ruling on matters of tariff classification (and, therefore, the applied duty rate to be imposed), customs valuation, duty drawback, tariff rate quotas, rules of origin, and fees and charges.<sup>148</sup> Any such ruling must be valid for a “reasonable” (albeit unspecified) period of time.<sup>149</sup> However, no advance ruling would be required if an adjudicatory decision on the issue were rendered, or the matter was pending before an adjudicatory or administrative body.<sup>150</sup> Advance rulings would not be precedential, but binding only on the applicant who sought the ruling and the relevant customs agency.<sup>151</sup>

Article 4 obligated each WTO Member to ensure it allows for administrative and judicial appeals of customs decisions.<sup>152</sup> Appeal procedures would have to be non-discriminatory, and decisions set out supporting reasoning.<sup>153</sup> But, to what body could an appeal be lodged,

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145. *See id.* art. 1, paras. 1.2, 2.2.

146. *Id.* art. 2, para. 2.1.

147. *Id.* art. 3, paras. 1.1, 4.6.

148. *See id.* art. 3, para. 1.7.

149. *See* April 2011 Draft Trade Facilitation Text, art. 3, para. 13.

150. *See id.* art. 3, para. 1.:2.

151. *Id.* art. 3, para. 1.3 ter.

152. *Id.* art. 4, para. 1.1.

153. *Id.* art. 4, paras. 1.3-1.5.

and would that body have to be independent of the customs official or agency rendering the controversial decision? These crucial questions were unresolved.<sup>154</sup>

Article 5 prescribed disciplines on the issuance of import alerts (or rapid alerts) concerning food safety, possible risks to animal or plant health, and the monitoring of the quality of imported foods. Such alerts would have to be based on positive evidence that food failed to meet uniform, objective standards, possibly based on international references. With multiple alternatives in bracketed text, there was no consensus among Members as to the precise criteria to trigger issuance of an alert.<sup>155</sup> Article 5 also discussed detention and test procedures with respect to problematic imported goods.<sup>156</sup>

• *Provisions Relating to GATT Article VIII on Fees and Formalities Connected with Importation and Exportation*

These provisions concerned disciplines on fees and charges imposed on imports and exports in Article 6, and requirements for the release and clearance of goods, in Article 7. Article 6 required fees and charges be imposed only for services rendered in connection with importation or exportation, be limited to the amount of the services rendered, and not be calculated on an *ad valorem* basis.<sup>157</sup> Article 6 also required a WTO Member to publish its fee schedule and not enforce it until an adequate time period after publication.<sup>158</sup> And, it set out limitations on the imposition of penalties, including that they be proportionate to the infraction, there be no conflicts of interests associated with their assessment and collection, that a written decision accompany any imposition of a penalty, and that the possibility of waiver of the penalty exist if the infraction is disclosed voluntarily by the breaching party.<sup>159</sup>

Article 7 obligated Members to maintain procedures on pre-arrival processing, i.e., administrative procedures of a customs authority to examine import documentation submitted by traders prior to the arrival of goods so as to expedite the clearance and release of goods upon their arrival, and allow for immediate release. But, Members could not agree on whether such processing would be an entitlement for all traders or a privilege only for traders with good compliance records.<sup>160</sup> Article 7 also authorized Members to separate release from final determination and payment of customs duties and fees, i.e., to allow an importer to obtain

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154. *See id.* art. 4, para. 1.1.

155. *See id.* art. 5, paras. 1.1-1.5.

156. *Id.* art. 5, paras. 2.1-3.4.

157. *Id.* art. 6, paras. 1.1-1.3.

158. *Id.* art. 6, paras. 1.4-1.5.

159. *Id.* art. 6, paras. 2.2-2.5.

160. *Id.* art. 7, para. 1.1.

its goods before final decisions about the tariff liability have been made and before importer has paid the tariff.<sup>161</sup>

Article 7 discussed risk assessment and analysis in respect of the potential for non-compliance with customs laws and the need to use risk management techniques in a way that reduced the number of physical inspections of goods.<sup>162</sup> Article 7 also discussed post-clearance audits (“PCA”), the establishment and publication of average release and clearance times, and criteria for obtaining the status of an authorized trader.<sup>163</sup> Finally, Article 7 covered expedited shipments, requiring (or, possibly, simply encouraging) Members to allow for the expedited release of goods, at least for merchandise entered through air cargo facilities.<sup>164</sup> Members could not agree on what “expedited” means – release within 3, 6, 24, or 48 hours, or a “reasonable period of time”?<sup>165</sup>

Ominously, the Article 7 obligations concerning risk management potentially conflict with post 9/11 U.S. customs reforms. Article 7 proposed that risk management, in the form of border controls, should concentrate on high-risk shipments. But, U.S. law requires that by 2012, 100 percent of all maritime containers bound for America be scanned overseas.<sup>166</sup>

• *Additional Provisions Relating to GATT Article VIII*

Articles 8-10 also dealt with formalities relating to importation and exportation. Article 8 forbids a WTO Member from requiring a consular transaction, i.e., requiring from a consul of the importing Member in the territory of the exporting Member a consular invoice or consular visas for a commercial invoice, certificate of origin, or other shopping document in connection with importation of a good.<sup>167</sup>

Article 9 called for border agency cooperation, that is, coordination of activities and requirements among customs authorities.<sup>168</sup> Article 9, paragraph 9.1 *bis*, which Members set in brackets, required Members to allow goods in transit (i.e., transshipped goods) to be declared as such.

Article 10 called for periodic review of formalities, and obligates Members to minimize them and the attendant documentation requirements so they are not “an unnecessary obstacle to trade.”<sup>169</sup>

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161. *Id.* art. 7, para. 2.1.

162. *Id.* art. 7, paras. 3.1-3.6.

163. *Id.* art. 7, paras. 4.1-6.6.

164. *Id.* art. 7, para. 7.1.

165. *Id.* art. 7, para. 7.2(c).

166. Daniel Pruzin, *As Doha Talks Falter, Efforts Get Under Way on Alternative Approaches to Salvage Gains*, 28 INT'L TRADE REP. (BNA) 644, 644 (Apr. 21, 2011).

167. *Draft Consolidated Negotiating Text*, *supra* note 4, art. 8, para. 1.1.

168. *Id.* art. 9, paras. 1-3.

169. *Id.* art. 10, paras. 1.1-2.4.



Article 10 also called on Members to accept commercially available information and copies, but whether they must or ought to do so was not agreed.<sup>170</sup> Likewise, Members could not agree on whether they must consider whether there are “reasonably available” alternative requirements that fulfill their “legitimate objectives” that are “significantly less trade restrictive” than their existing rules.<sup>171</sup> They also could not agree on whether Members would have to rely on, or merely ought to rely on, best practices and international standards (e.g., as set by the World Customs Organization (“WCO”)).<sup>172</sup> Article 10 also calls on Members to establish a single window for the one-time submission of customs documentation.<sup>173</sup> Article 10 forbids Members, to the extent possible, from mandating the use of pre-shipment inspection (PSI) and from requiring the use of a customs broker.<sup>174</sup>

Logically, Article 10 required Members in a customs union (CU) to use the same border procedures throughout their CU.<sup>175</sup> Finally, Article 10 obligated Members to allow for temporary admission of goods, inward processing (i.e., importing merchandise temporarily into a customs territory without payment of duty, for manufacturing, processing, or repair, and then subsequent exportation of finished merchandise under a different customs regime), and outward processing (i.e., exporting merchandise temporarily from a customs territory for manufacturing, processing, or repair abroad and then re-importing finished merchandise with a full or partial exemption from duties).<sup>176</sup>

• *Provisions Relating to GATT Article V on Freedom of Transit*

Article 11 provisions covered freedom of transit. This Article provided a definition of “traffic in transit,” sets out a basic freedom of transit rule.<sup>177</sup> It obligated WTO Members to provide non-discriminatory treatment (that is, both national and MFN treatment) to traffic in transit and ensured they do not apply restrictions on freedom of transit that would be “a disguised restriction on trade.”<sup>178</sup>

Article 11 also clarified that GATT Article V does not obligate a Member to build infrastructure to facilitate the transit of goods, or to

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170. *Id.* art. 10, para. 2.4.

171. *Id.* art. 10, para. 2.1.

172. *Id.* art. 10, para. 3.1.

173. *Id.* art. 10, para. 4.1.

174. *Id.* art. 10, paras. 5.1, 6.1.

175. *Id.* art. 10, para. 7.1.

176. *Id.* art. 10, para. 10.

177. *Id.* art. 11.

178. *Id.* art. 11, para. 4.

provide access to such infrastructure that it does have unless it opens those facilities for general use by third parties.<sup>179</sup>

Pursuant to GATT Article V, any regulations, formalities, or charges affecting traffic in transit must not be "more restrictive . . . than necessary," with the possible additional caveat that they must "fulfill a legitimate objective."<sup>180</sup> Further, consideration must be given to "less restrictive" alternative measures, and existing measures must not be "a disguised restriction on transit traffic."<sup>181</sup> Article 11 also imposed disciplines on fees, formalities, and documentation requirements imposed in respect of traffic in transit, including exemptions from customs duties imposed on imported merchandise as well as exemptions from compliance with technical standards.<sup>182</sup> Advance filing and processing of transit documentation, prior to arrival and trans-shipment, would be mandatory.<sup>183</sup>

Finally, Article 11 also ensured that once transited goods have undergone the relevant procedures, they must be allowed to exit the relevant customs territory without delay.<sup>184</sup> There was a bar on the use of customs convoys except for high-risk goods.<sup>185</sup> There were disciplines on bonded transport regimes and guarantees, to avoid inland diversion of goods in transit.<sup>186</sup>

- *Final Provisions*

Article 12 concerned customs cooperation among WTO Members.<sup>187</sup> It called for, *inter alia*, the exchange of information and assistance on imported and exported merchandise, on traffic in transit, and on verification of declarations made by traders. But, Members did not reach consensus on the extent to which some of the proposed rules would be mandatory versus exhortative.<sup>188</sup>

Article 13 discussed institutional arrangements, including the establishment of a WTO Committee on Trade Facilitation.<sup>189</sup> Article 14 required Members to establish a national Committee on Trade

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179. *Id.* art. 11, para. 1 bis.

180. *Id.* art. 11, paras. 3, 9.

181. *Id.* art. 11, paras. 3(b)-(c).

182. *Id.* art. 11, paras. 7, 10.

183. *Id.* art. 11, para. 11.

184. *Id.* art. 11, paras. 12-15.

185. *Id.* art. 11, para. 17.

186. *Id.* art. 11, paras. 15-16.

187. *Id.* art. 12, para. 1.

188. *See id.* art. 12, paras. 1, 4.

189. *See id.* art. 13, para. 1.1.

Facilitation. Its goal is to “facilitate the process of domestic coordination of trade facilitation matters.”<sup>190</sup>

Article 15 contained special provisions for small, vulnerable economies (“SVEs”) that are members of a CU or FTA. They may adopt regional approaches to implementing their trade facilitation obligations.<sup>191</sup> Also, all of the obligations in the Draft Text would be subject to the exceptions in GATT Articles XX and XXI.<sup>192</sup>

- *S & D Treatment*

Part II of the Draft Text contained transitional provisions for developing and least developed countries. Paragraph 1 explicitly acknowledged the differences among these countries, and it stated that S & D treatment “should extend beyond the granting of traditional transition periods for implementing commitments” and relate the “extent and the timing of entering commitments” to “the implementation capacities of developing and least developed country Members.”<sup>193</sup> None of them would be compelled to make infrastructure investments beyond their means, and least developed countries would have only to undertake commitments commensurate with their specific development, financial, and trade needs, “or their administrative and institutional capabilities.”<sup>194</sup> Conversely, developed countries “shall ensure to provide support and assistance” to poor countries so they could implement their obligations.<sup>195</sup> Absent such funding, or absent the requisite capacity, poor countries would not have to fulfill their duties.<sup>196</sup> But, commitment of support and assistance from rich countries would be “not open ended.”<sup>197</sup>

Overall, Paragraph 1 contained bracketed language that is politically correct, designed not to offend any Member. On the one hand, it set out general principles that favor poor countries. On the other hand, it did not guarantee them any specific funding from rich countries. This equivocation was troubling, because trade facilitation is rightly touted as a way to help poor countries, whether Islamic or not: they can participate more effectively in the global trading system through more efficient customs clearance processes. Market access gains from tariff and subsidy cuts are not realizable if trade cannot flow because of cumbersome or corrupt procedures for classification,

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190. *See id.* art. 14, para. 1.1.

191. *Id.* art. 15, para. 1.1.

192. *Id.* art. 15, para. 1.3.

193. *Id.* § II, para. 1.2.

194. *Id.* § II, paras. 1.2-1.3.

195. *Id.* § II, para. 1.4.

196. *Id.* § II, para. 1.4.

197. *Id.* § II, para. 1.5.

valuation, and inspection. They also are unrealizable if port and related infrastructure is parlous. Yet, on providing financial assistance to poor countries to help them implement trade facilitation commitments, the Members (in the words of a trade diplomat) had “very significant and fundamental” differences.<sup>198</sup>

Equally troubling was another fact: having stated implementation periods are not the only type of S & D treatment for poor countries, the Members, in the rest of Section II, focus on only this type. This hypocrisy was evident in Paragraphs 2 through 8 of the Draft Text. They group commitments for developing and least developed countries on trade facilitation into three categories – A, B, and C – with different implementation periods for the duties in each category:<sup>199</sup>

- 1) Category A commitments would be legally binding upon the entry into force of the Trade Facilitation Agreement.<sup>200</sup>
- 2) Category B commitments would allow for a transitional period, but that period is undefined, which do not require any technical assistance or capacity building.<sup>201</sup>
- 3) Category C commitments would require technical assistance or capacity building, and, therefore, additional time for implementation, though again the period is undefined.<sup>202</sup>

Developing and least developed countries would have the right to notify to the WTO the commitments they are putting in each Category, i.e., categorization is self-determined.<sup>203</sup> Similarly, under Categories B and C, developing and least developed countries could define for themselves the implementation period for each self-imposed obligation, or accept a default time of one year.<sup>204</sup> To be sure, Members did not agree on that default time or on how much time after entry into force of a Trade Facilitation Agreement a poor country would have to notify the WTO of its obligations.<sup>205</sup>

Flexibilities existed for a developing or least developed country that faced difficulties implementing obligations in a timely fashion. Upon

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198. Quoted in Daniel Pruzin, *WTO Chief Warns Members Not to Get Stuck on 'Deliverables' Package, Says LDCs Priority*, 28 Int'l Trade Rep. (BNA) 886 (June 2, 2011).

199. See *Draft Consolidated Negotiating Text*, supra note 4, § II, paras. 2.1-2.3.

200. *Id.* § II, para. 2.1.

201. *Id.* § II, para. 2.2.

202. *Id.* § II, paras. 2.3, 5.3.

203. *Id.* § II, para. 2.4.

204. *Id.* § II, para. 4.2(a) (explaining that commitments would take effect at the end of the expiry of the time period for notifying the WTO about the commitment and its implementation); see *id.* art. 8.

205. See *id.* § II, paras. 3.1, 3.2, 4.1, 5.1, 5.2, 5.1 bis.

notification to the WTO of such difficulties (a so-called “Early Warning Mechanism”), developed country Members would cooperate to help the country overcome the difficulties, including via an extension of the deadline.<sup>206</sup> Possibly, an extension of up to a year would be provided automatically upon notice.<sup>207</sup> Developing and least developed countries also would have the option to shift an obligation from one Category to another, most likely from B to C.<sup>208</sup>

Further, there were three “Peace Clauses.” The first one ensured WTO Members do not bring legal claims under GATT Article XXIII or WTO dispute settlement procedures against developing or least developed countries for a grace period of two years following the entry into force of a Trade Facilitation Agreement.<sup>209</sup> The second one immunized developing and least developing countries from suit in respect of a Category B or C commitment for two years following implementation of that commitment.<sup>210</sup> However, Members did not agree on the two year period (after all, it was in bracketed text), nor had they decided whether a different period should apply in the second Peace Clause to least developed countries.<sup>211</sup> The third clause, for the benefit of least developed but not developing countries, barred suit against such countries for an unspecified number of years as regards their Category A commitments.<sup>212</sup> In all instances, developed countries would be obligated to “exercise due restraint” in bringing up a matter for consultations, or adjudication, with a developing or least developed country.<sup>213</sup>

Finally, and to be fair to the Draft Text, there was a new dimension to S & D treatment, one going beyond deferral of implementation periods. Article 9 said:

[9.1 The provision of technical assistance and capacity building by developed country Members and relevant international organizations and other agencies of cooperation, including the IMF [International Monetary Fund], OECD, UNCTAD [United Nations Commission on Trade and Development], WCO and the World Bank, is a *precondition* for the acquisition of implementation capacity

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206. *Id.* § II, paras. 4.2(c), 6.1-6.4, 6.1 bis-6.3 bis.

207. *Id.* § II, para. 6.2.

208. *Id.* § II, paras. 4.3, 6.1 bis-6.3 bis.

209. *Id.* § II, para. 7.1.

210. *Id.* § II, para. 7.2.

211. *See id.* § II, paras. 7.1-7.2, 7.7.

212. *Id.* § II, para. 7.6.

213. *Id.* § II, para. 7.8.

by developing country and least-developed country Members in respect of provisions requiring assistance.]

[9.2 In cases where technical assistance and capacity building *is not provided or lacks the requisite effectiveness*, developing country and least-developed country Members *are not bound* to implement the provisions notified under Category C.]<sup>214</sup>

In other words, unlike any other provision in the GATT–WTO regime, legal obligations of poor countries are explicitly contingent on rich countries helping them with the means to fulfill those obligations. Why flog a poor country for failure to meet its duties when it could not possibly do so without assistance? Additionally, Article 10 of the Draft Text obligates developed countries to report to the WTO on the technical and financial assistance, and capacity building measures, they provide to poor countries.<sup>215</sup>

Unfortunately, the relevant text (quoted above) is bracketed. Moreover, how exactly a legal claim might be brought under Article 9.19.-2 is unclear. Suppose a developed country accuses a developing or least developed country of failure to implement a Category C commitment. The developing or least developed country respondent counters that the developed country complainant failed to provide the requisite technical assistance for capacity building, or did not do so effectively. What evidence must the respondent adduce for this defense to be successful? An abject failure to provide any help might be sufficient. But, could the developed country rebut that evidence by arguing no assistance was needed to implement the particular obligation at issue, or by contending it provided help but it was wasted owing to corruption in the government of the respondent? Perhaps the developed country could argue there is no “hard law” obligation for it to provide assistance, citing Article 9.3, which states:

9.3 [Developed country Members and developing country Members in a position to do so] [Members] *agree to facilitate* the provision of technical assistance[, financial assistance] and capacity building to developing country and least-developed country Members, *on mutually agreed terms and either bilaterally or through the appropriate international organizations*. The objective of such assistance is to assist developing country and least-

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214. *Id.* § II, paras. 9.1-9.2 (emphasis added) (footnote omitted).

215. *Id.* § II, para. 10.1.

developed country Members to comply with the Agreement's commitments.<sup>216</sup>

To “agree to facilitate” is not the same as a mandate to commit funds and expertise, and in any event, such agreement is contingent on the “mutual agreement” of the developing or least developed country. Moreover, perhaps providing normal budgetary contributions to the appropriate international organization, such as the World Bank, fulfills Article 9.3. Certainly, Article 9.4 lays out principles for providing technical assistance and capacity building, exhorting developed countries to take account, *inter alia*, of the development framework of the recipient, regional integration, and private sector activities.<sup>217</sup> But, the listed principles are generic, and might easily expand rather than narrow the grounds for dispute between rich and poor countries.

### C. What Should Have Happened

Without doubt, the April 2011 Draft Text on Trade Facilitation provided considerable detail on the basic GATT Article V, VII, and X obligations and helps resolve contemporary customs problems. But, WTO Members failed to reach agreement on a vast array of critical issues. The Text contained 850 brackets. That is, there were 850 trade facilitation areas in which the Members, after a decade of negotiations, had not reached consensus.<sup>218</sup> Complicating matters further was the fact many brackets were set within other brackets, i.e., the document had bracketed text within bracketed text.

To some degree, the range and depth of disagreement was puzzling. Trade facilitation ought to be an area in which free traders and development champions can reach agreement. Both groups seek increased trade, and cutting red tape achieves that result. Thus, assuming agreement could be reached on the bracketed language, the Draft Text promised to have a significant, positive effect on trade facilitation. The problem was an agreement was not at hand.

At the same time, helpful as streamlining customs clearance procedures could be to generating trade, boosting economic growth, and alleviating poverty in poor countries, and in turn, to rendering poor people in those countries less susceptible to Islamist or other extremist ideologies, a caveat should be noted. The poor should not be blamed for their poverty, if for no other reason than to do so is uncharitable (and very much un-Christian). That is, some developed country officials

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216. *Id.* § II, para. 9.3 (emphasis added).

217. *See id.* § II, para. 9.4(a)-(c).

218. *See* Pruzin, *U.S. Criticizes WTO Chief Lamy's Assessment of Doha Impasse, Says NAMA Not Only Issue*, *supra* note 86.

have the view that if a trade facilitation deal is agreed, then most of the development-oriented work of the Doha Round is complete, and the focus of the rest of the Round can be on market access. Rich countries should not so easily absolve themselves of their responsibilities to poor countries. Charity aside, they would do well to bear in mind they share a long-term national security interest in addressing poverty and the sense of marginalization or oppression felt among some Muslim communities.

#### IV. THE MISSING MIDDLE “D” IN THE DDA

##### A. Why Not . . . ?

If the Doha Round is not about true free trade, or aggressive trade liberalization, then is it about the middle “D” in the acronym DDA? That is, is the Round about development, specifically about fighting poverty in the Third World? The question became all the more acute during the Round. As trade negotiators fiddled with and quibbled over mind-numbing details, the number of chronically hungry people in the world rose from 848 million in 2003-2005 to nearly one billion (specifically, 963 million) in 2008.<sup>219</sup> The United Nations Millennium Development Goal (MDG) of halving world hunger between 1990 and 2015 was further off than ever before.<sup>220</sup>

“No” is the response to the above question. Why not, as the U.S. urges in the first and second trade agenda report of the Obama Administration (the *2009 Trade Policy Agenda and 2008 Annual Report*, and *2010 Trade Policy Agenda and 2009 Annual Report*),<sup>221</sup> and at every other opportunity, demand a correction of the “imbalance” in the Doha Round negotiations between:

- 1) a known, calculable value of America’s concessions (including cuts to farm subsidies); and
- 2) a value of new market access opportunities from other countries for America’s farmers, ranchers, manufacturers, and service providers, which is unclear because of special flexibilities, not the least of which is the special safeguard mechanism (“SSM”) for agricultural products?<sup>222</sup>

219. Javier Blas, *Almost 1bn People Now Going Hungry*, FIN. TIMES, Dec. 10, 2008.

220. See DICTIONARY OF INTERNATIONAL TRADE LAW, *supra* note 20, 296-97 (presenting an overview of the MDGs).

221. OFF. OF U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, THE 2009 TRADE POL'Y AGENDA AND 2008 ANN. REP. OF THE PRESIDENT OF THE U. S. ON THE TRADE AGREEMENTS PROGRAM pt. 1, at 3, pt. 2, at 3 (2009); OFF. OF U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, THE 2010 TRADE POL'Y AGENDA AND 2009 ANN. REP. OF THE PRESIDENT OF THE U. S. ON THE TRADE AGREEMENTS PROGRAM pt. 1, at 4 (2010).

222. See also Daniel Pruzin, *WTO Members Endorse Work Plan to Secure Doha Agreement in 2011*, 27 Int'l Trade Rep. (BNA) 1832 (Dec. 2, 2010) (quoting U.S.



Why not, as the USTR professes, focus on winning for the American people market-opening concessions from foreign governments, make it clear that “no deal is better than a bad deal,” and declaim that America

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Ambassador to the WTO Michael Punke saying, “What is not realistic is the notion that a few of the world’s most powerful trading nations [e.g., Brazil, China, and India] can play by a set of rules that gives them largely unfettered access to global markets – without giving appropriate reciprocity in return”); Daniel Pruzin, *Deputy USTR Punke Cites Commitment to Successful Conclusion of Doha Round*, 27 Int’l Trade Rep. (BNA) 658 (May 6, 2010) (reporting “[t]he United States has been pinned with the blame for holding up the Doha talks by some delegations, who say Washington is insisting on additional market access conditions from some WTO Members – in particular . . . Brazil, China and India – without making it clear what it wants and without offering tradeoffs to secure the concessions,” and “U.S. officials for their part insist that the special provisions for developing countries written into draft negotiating texts on agriculture and industrial tariffs mean the major emerging markets could secure additional access to the U.S. market while offering little or any additional market access on their end,” thus “the Doha agreement as spelled out in the draft text[s] stand little chance of securing support either from the U.S. Congress or the U.S. business community.”); Rossella Brevetti, *Administration’s 2010 Trade Agenda Warns Against Weak Doha Round Pact*, 27 Int’l Trade Rep. (BNA) 290 (Mar. 4, 2010) (laying out the policy of the Obama Administration on the Doha Round); Gary G. Yerkey, *U.S. Expected to Come Under Pressure at WTO Ministerial Over Doha Trade Talks*, 26 Int’l Trade Rep. (BNA) 1604 (Nov. 26, 2009) (reporting on the confirmation hearing before the Senate Finance Committee of Michael Punke to be the U.S. Ambassador to the WTO, at which he said “the concessions made by the U.S. were ‘very clear,’ but ‘what’s unclear is what we’re going to receive in return.”); Doug Palmer, *U.S. Warns “Imbalance” in Doha Talks Needs Fixing*, REUTERS, Mar. 2, 2009, available at <http://www.reuters.com/article/2009/03/02/us-obama-trade-idUSTRE5215RU20090302>. (quoting from the *2009 Trade Policy Agenda*); Joe Kirwin, *Kirk Rejects Complaints About U.S. Position by EU on Doha Talks, DOD’s Tanker Bidding*, 27 Int’l Trade Rep. (BNA) 462 (Apr. 1, 2010) (quoting USTR Ambassador Ron Kirk, in advance of a meeting with new European Trade Commissioner Karel De Gucht, that in light of the massive American trade deficit, claims that the U.S. was protectionist are “laughable,” and restating the American position that Brazil, China, and India must open their markets to U.S. agricultural, manufacturing, and financial services products); Daniel Pruzin, *Officials Downbeat After U.S., India, Brazil Talks in Paris on Doha Round*, 26 Int’l Trade Rep. (BNA) 1381 (Oct. 15, 2009) (reporting Brazil and India insisted the U.S. “start showing its cards,” while the U.S. demanded “greater clarity in regards to the developing country flexibilities,” and quoting an unnamed trade diplomat as saying “I don’t think they’re [the Doha Round talks among the three countries] going anywhere”); Daniel Pruzin, *G-20 Trade Diplomats See Positive Outcome from Summit, but Business Groups Skeptical*, 26 Int’l Trade Rep. (BNA) 1311 (Oct. 1, 2009) (paraphrasing Acting U.S. Ambassador to the WTO, David Shark, that “the United States knows what concessions it will have to make on agriculture and industrial tariffs under the draft texts now on the table,” and quoting him as saying it is “still not sufficiently clear what the others will be doing”); Tripti Lahiri, *New Delhi ‘Breakthrough’ Sets Restart of Doha Round Ag, NAMA Talks for Sept. 14*, 26 Int’l Trade Rep. (BNA) 1191 (Sept. 10, 2009); Gary G. Yerkey, *U.S. Says No WTO Deal Possible Until Other Countries Improve Their Offers*, 26 Int’l Trade Rep. (BNA) 304 (Mar. 5, 2009). The U.S. is not alone in pushing for greater concessions by poor countries on market access for goods and services. BusinessEurope urged the EU to adopt the same stance as the U.S. Daniel Pruzin, *Business Group Pushes EU to Press for Access Gains in Emerging Markets*, 27 Int’l Trade Rep. (BNA) 1068 (July 15, 2010).

will not be “shamed” into accepting a Doha Round package that generates insufficient export opportunities?<sup>223</sup>

After all, 95 percent of the world’s consumers reside outside the U.S., so it is keenly in America’s economic interest to have free-trade access to them. Yet, endless flexibilities for developing countries in the draft Doha Round texts would allow those countries to wall off their consumers from American products. Looking at the December 2008 Draft NAMA Text, the former USTR, Ambassador Susan Schwab, complained:

What are the relative roles and responsibilities of advanced (or developed), emerging, and developing countries?

. . . .

For manufactured goods, these proposals would, by the end of the Doha Round implementation period, allow the tariffs of most emerging economies, other than China and South Africa, to remain largely unchanged from those in place when the Doha Round began. Based on 2008 calculations, this would result in the *developed economies’ delivering over three-quarters of the Doha Round’s market-opening results, well beyond their current 53 percent (and shrinking) share of global GDP.*<sup>224</sup>

Likewise, said Deputy USTR and Ambassador to the WTO, Michael Punke, in June 2010:

It [the flexibility for developing countries to exclude tariff lines from agreed-upon formulaic cuts, along with extended implementation periods, for them] means that China could shelter its entire automobile sector from any market opening. It means China could shield broad parts of its chemical sector from market opening. It means Brazil could leave in place over a thousand tariff peaks.

It means India . . . could avoid making cuts in applied tariffs on 97 percent of its industrial tariffs. . . . When you

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223. Daniel Pruzin, *Kirk Says U.S. Will Not be ‘Shamed’ into Accepting Inadequate Doha Deal*, 26 Int’l Trade Rep. (BNA) 1684 (Dec. 10, 2009) (quoting USTR Ambassador Ron Kirk); Gary G. Yerkey, *U.S. Still Needs More Time to Decide Next Steps in WTO Trade Talks, Punke Says*, 26 Int’l Trade Rep. (BNA) 1529 (Nov. 12, 2009) (reporting on the confirmation hearings before the Senate Finance Committee of Michael Punke to be U.S. Ambassador to the WTO).

224. Schwab, *supra* note 137, at 104, 109-10 (emphasis added).

think about examples like that, I think it's not surprising that we don't believe what's currently on the table is sufficiently ambitious or balanced, particularly when you contrast that with what's being asked of the U.S. We're being asked to make cuts to 100 percent of our applied tariffs. If what's on the table were implemented, the average U.S. tariff rate would be cut from 3.9 percent to 1.9 percent. If you look at the trade-weighted tariff, the U.S. would end up with an average tariff of 0.7 percent.<sup>225</sup>

Never mind the fact a 3.9 percent duty rate is a nuisance tariff, so a cut to 1.9 percent makes little economic difference in terms of protective effect. Never mind also the fact that America accounts for 12 percent of global trade, down from over one-quarter in the 1980s.<sup>226</sup> It is not that America has become weaker or failed to export more. Rather, from the perspective of the USTR, it is that the proverbial global economic "pie" is getting bigger, and – amidst new power relationships in an arguably multi-polar world economic system – America wants a larger slice.

As Ambassador Punke put it in November 2010:

The central question that remains is whether or not the emerging economies are ready to *step up to a level of responsibility that's commensurate with their role* in the global economy.<sup>227</sup>

This refrain was repeated nearly *verbatim*, and *ad nauseum*, evincing just how hardened positions had become. In January 2011, Ambassador Punke stated:

The central question of the [Doha] Round . . . remains the question of whether emerging economies are prepared to accept the responsibility that comes along with their position in the global economy. If they're prepared to accept that responsibility, we'll have a successful outcome.<sup>228</sup>

225. Daniel Pruzin, *Punke Says U.S. Frustrated by Talks with Brazil, China, India on Doha Tariffs*, 27 Int'l Trade Rep. (BNA) 973 (July 1, 2010).

226. Len Bracken, *WTO Official Describes Doha Round Negotiations as Test for U.S. Leadership*, 27 Int'l Trade Rep. (BNA) 776 (May 27, 2010).

227. Daniel Pruzin, *WTO Ambassador Punke Cites Importance of Upcoming Talks to Advance Doha Round*, 27 Int'l Trade Rep. (BNA) 1914 (Dec. 16, 2010) (emphasis added).

228. Daniel Pruzin, *Punke Cites Disappointment with Initial U.S. – China Talks on Advancing Doha Round*, 28 Int'l Trade Rep. (BNA) 76 (Jan. 20, 2011).

In July 2011, he intoned:

[F]rankly, if [the] Doha [Round] could be completed by virtue of throwing a pile of concessions on the table, we would have had a deal many years ago. [The goal of the Obama Administration is] not just any deal – but a good deal [indicative of new global economic realities]. . . . Wishing this complexity away with empty exhortations – or calls for unilateral concessions – will not result in success.<sup>229</sup>

The position clearly was one of maximizing America's slice in a pie that was growing because of Brazil, China, India, and other enlarging markets, not one of ensuring that poor countries with marginalized Muslim youths got a bigger or fairer slice.

Consistent with this position, Ambassador Punke characterized his December 2010 meeting with Chinese Commerce Minister Chen Deming as “somewhat disappointing,” as China failed to spell out detailed tariff cuts it was willing to make, and stuck to its position that participation in NAMA sectoral negotiations must be voluntary.<sup>230</sup> Likewise, the American Ambassador lambasted the new Brazilian government for raising import duties, indeed, the Common External Tariff (“CET”) of *MERCOSUR*, from 20 to 35 percent on toys to protect Brazilian, Argentine, Paraguayan, and Uruguayan toy companies from Chinese producer-exporters. It was a “stick in the eye to Brazil's trading partners, and it creates a more difficult environment for the Doha negotiations,” said the Ambassador.<sup>231</sup> The new government picked up where its predecessor left off, as Brazil had raised tariffs in 2009 and 2010 on autos, auto parts, chemicals, electronics, plastics, and textile and apparel (“T & A”) items. The U.S. castigated Brazil for the large gap between its bound and applied average duty rates – the “water” in its tariff schedule: 31.4 versus 11.6 percent.<sup>232</sup>

Following, or better yet composing the same refrain, issuance of the April 2011 Documents, eight major American business groups – the

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229. Rossella Brevetti, *World Bank President Zoellick Blasts U.S. 'Defensive' Position in Doha Round*, 28 Int'l Trade Rep. (BNA) 1203 (July 21, 2011).

230. Pruzin, *Punke Cites Disappointment with Initial U.S. – China Talks on Advancing Doha Round*, *supra* note 228.

231. *Id.*

232. Timothy C. Brightbill, *NTE Identifies Trade Barriers in More than 60 Countries, as Well as Some Hard Truths About the WTO's Doha Round*, 28 Int'l Trade Rep. (BNA) 834 (May 19, 2011) (recounting statistics presented in the twenty-sixth annual *National Trade Estimate on Foreign Trade Barriers*, published by the USTR on Mar. 30, 2011).

American Farm Bureau Federation, Business Roundtable, Coalition of Services Industries, Emergency Committee for Foreign Trade, National Association of Manufactures (“NAM”), National Foreign Trade Council, U.S. Chamber of Commerce, and U.S. Council for International Business – intoned in a joint statement that:

A trade round is about opening markets and setting the rules for world trade for decades so it must address the reality that all major developed and advanced developing WTO members that have benefitted from past rounds enormously have a responsibility to the world trading system to undertake significant market opening measures . . . It is clear that this is not happening.<sup>233</sup>

In July 2011, the NAM Vice President for International Economic Affairs, Frank Vargo, intoned that:

[a]bout 70 percent of all the duties on American manufacturers’ exports are assessed by a relatively small handful of the advanced developing countries. . . And about 70 percent of the duties that the least developed countries pay are paid to the same countries.<sup>234</sup>

The first point relied on a distinction favored among American protectionists, between better- and worse-off developing countries. The distinction is dubious because the ostensibly better-off ones, like Brazil and India, are home to hideously high numbers of desperately poor people.<sup>235</sup> The second point correctly recounted a long-standing concern about barriers to trade among poor countries (South – South trade).<sup>236</sup> But, it presumed that least developed countries have much in the way of industrial products to export, and ignored the infant industry concerns of many poor country manufacturers.

Manifestly from such comments, the Doha Round was far adrift from the vision on which it was founded: development, through trade liberalization, as a counter-terrorism strategy. A decade on, the Round

233. Len Bracken, *Eight Industry Groups React to Deadlock on Doha, Back Administration on Problems*, 28 Int’l Trade Rep. (BNA) 728 (May 5, 2011).

234. Len Bracken, *Business Representatives Explore Ways to Liberalize Trade as Doha Round Falts*, 28 Int’l Trade Rep. (BNA) 1274 (Aug. 4, 2011).

235. See CIA, THE WORLD FACT BOOK: POPULATION BELOW POVERTY LINE, <https://www.cia.gov/library/publications/the-world-factbook/fields/2046.html> (last visited Nov. 9, 2011).

236. Bracken, *supra* note 234.

was about re-balancing rights and obligations in the world trading system, namely, fewer rights and more obligations for big developing countries. American policy no longer linked gains from free trade with defeating *Al Qaeda* and the Taliban. Rather, the policy was to compel Brazil, China, and India to realize they could not have it both ways: (1) being classified as developing countries and continuing their anti-American trade policies, and (2) demanding the respect and status of major powers without shouldering the attendant obligations and burdens.<sup>237</sup> “Grow up” was the American response.

To be fair, from a commercial perspective, the American response was justifiable. It was backed by a bevy of data on agriculture. For example, India has among the highest average bound tariff rates on agricultural goods in the world (as of December 2009) – 114 percent.<sup>238</sup> Some of India’s bound farm tariffs are at 300 percent.<sup>239</sup> Since 1991, when India introduced economic liberalization reforms, it dropped its average applied agricultural tariffs notably, from 113 percent in that year to 34 percent in 2007.<sup>240</sup> But, 34 percent still is among the highest average applied rates on farm goods in the world, and India slapped especially high tariffs on apples, chocolate, cookies, coffee, grapes, potatoes, and poultry.<sup>241</sup> Small wonder that (as of 2008) American agricultural exports amount to just six percent of the Indian import market, and overall, farm imports supply only three percent of Indian demand. Small wonder, then, why former USTR, Ambassador Susan Schwab criticized the December 2008 Draft Agriculture text: it “would allow India to shield close to 90 percent of its current agricultural trade from tariff cuts . . .”<sup>242</sup>

Likewise, data on industrial product trade exist to support the American perspective. For instance, the U.S. grants duty-free treatment on agricultural and construction machinery, whereas China does not. Since 2000 (and up through 2009), Chinese exports of this equipment grew by 45 percent.<sup>243</sup> The U.S. also grants duty-free treatment to

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237. See Bradley S. Klapper, *With a ‘short window,’ one more try for deal on world trade talks*, *Business- International Herald Tribune*, N.Y. TIMES (Oct. 14, 2006), <http://www.nytimes.com/2006/11/14/business/worldbusiness/14iht-wto.3535749.html>.

238. Amy Tsui, *Baucus, Grassley Call for Access to Indian Agricultural Market as ITC Report Released*, 26 Int’l Trade Rep. (BNA) 1774 (Dec. 24, 2009).

239. Brightbill, *supra* note 232.

240. U.S. INT’L TRADE COMM’N, USITC PUBL’N NO. 4107, INDIA: EFFECTS OF TARIFFS AND NONTARIFF MEASURES ON U.S. AGRICULTURAL PRODUCTS 5-4 (2009), available at [www.usitc.gov/publications/332/pub4107.pdf](http://www.usitc.gov/publications/332/pub4107.pdf).

241. Brightbill, *supra* note 232.

242. Schwab, *supra* note 137, at 104, 110 (criticizing the draft because it would also “permit China to exclude from the cuts commodities of keen interest to both developing and developed countries, including corn, cotton, sugar, rice, and wheat.”).

243. Daniel Pruzin, *U.S. Envoy Hears Positive Tone on Doha, But Actual Negotiations Are Still Missing*, 27 Int’l Trade Rep. (BNA) 1757 (Nov. 18, 2010).

medical equipment imports, but China does not. Since 2005 (up through 2009), Chinese exports of these products doubled.<sup>244</sup> Plainly, the U.S. said, China was internationally competitive in these markets. Hence, it should drop its tariff barriers to zero on them. As for India, since the Doha Round negotiations began in November 2001, it had reduced its peak industrial tariffs from 35 to 10 percent.<sup>245</sup> Yet, 10 percent was higher than necessary to protect increasingly world-class Indian exports, and it still maintained high tariffs on autos, motorcycles, and textiles.<sup>246</sup> America saw a lot of “water” in India’s tariff schedule: an average bound rate of 48.6 percent contrasted with an average applied rate of 12.9 percent.<sup>247</sup>

Further rhetorical questions were the American response to the question about the middle “D” in “DDA.” Why not, as some in Congress demand, amend American law to require the USTR to stick strictly to reciprocity, forbidding it to agree to a tariff concession unless it secured the elimination of foreign tariff and non-tariff barriers?<sup>248</sup> Why not, as the American business lobby insists, demand a balance among agriculture, NAMA, and services opportunities, and greater ambition in all three areas, plus strong trade remedy rules, rather than allow other WTO Members to focus on the farm sector?<sup>249</sup> Why not, as American agricultural interests intone, obtain commercially meaningful market access for U.S. farm products, especially in light of the severe concessions the U.S. is being asked to make in respect of domestic support and export competition?<sup>250</sup> Why not, then, reject any attempt to reap an “early harvest” of separate agreements on particular issues, rather than await a comprehensive single undertaking?<sup>251</sup>

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244. *Id.*

245. Nayanima Basu, *Officials Lose Hope of Wrapping Up Doha Round by 2010*, BUS. STANDARD (India), Feb. 14 2010, <http://www.business-standard.com/india/news/officials-lose-hopewrappingdoha-round-by-2010/385623/>.

246. Brightbill, *supra* note 232.

247. *Id.*

248. See Amy Tsui, *Brown-Slaughter Bill Would Require USTR to Eliminate Barriers before Cutting Tariffs*, 26 Int’l Trade Rep. (BNA) 1386 (Oct. 15, 2009) (reporting that a legislative proposal – the *Reciprocal Market Access Act* – was introduced to Congress in October 2009 that would establish authority to enforce a reciprocal bargain by raising American tariffs if a foreign government reneged on its promise to cut its tariff or non-tariff barriers).

249. See Gary G. Yerkey, *U.S. Business, Farm Groups Urge Obama to Reassess Approach to WTO Trade Talks*, 26 Int’l Trade Rep. (BNA) 308 (Mar. 5, 2009); Amy Tsui, *NAM Issues Economic Recovery Agenda to Congress Calling for Open Markets*, 26 Int’l Trade Rep. (BNA) 314 (Mar. 5, 2009).

250. See Yerkey, *U.S. Still Needs More Time*, *supra* note 223.

251. See Gary G. Yerkey, *USTR Nominee Rejects ‘Early Harvest’ of Agreements in WTO Trade Negotiations*, 26 Int’l Trade Rep. (BNA) 372 (Mar. 19, 2009).

## B. Because . . .

Indubitably, each of these questions is reasonable on the assumption the paradigm for the Doha Round is reciprocity, not generosity. From the American perspective, reciprocity is, and should be, the paradigm. In his first State of the Union Address, in January 2010, President Barack H. Obama made that clear:

*[W]e need to export more of our goods. (Applause.) Because the more products we make and sell to other countries, the more jobs we support right here in America. (Applause.) So tonight, we set a new goal: We will double our exports over the next five years, an increase that will support two million jobs in America. (Applause.) To help meet this goal, we're launching a National Export Initiative that will help farmers and small businesses increase their exports, and reform export controls consistent with national security. (Applause.)*

*We have to seek new markets aggressively, just as our competitors are. If America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores. (Applause.) But realizing those benefits also means enforcing those agreements so our trading partners play by the rules. (Applause.) And that's why we'll continue to shape a Doha trade agreement that opens global markets.<sup>252</sup>*

Critically, the National Export Initiative ("NEI") calls for doubling American exports within 5 years.<sup>253</sup> There is no reference in the President's address to poverty alleviation and its follow-on link to combating the breeding grounds for Islamist extremism. The Doha Round was about, or had turned into an exercise about, American exports and jobs, period. Moreover, the U.S. assertion that it is willing to offer additional concessions if only developing countries will improve their market access offers in agricultural, industrial, and services trade – an assertion made by President Obama at the November 2010 Seoul G-20 Summit – is dubious.<sup>254</sup> Could the NEI goal of doubling exports be achieved if America was not mercantilist in its position?

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252. President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>) (emphasis added).

253. *Id.*

254. Daniel Pruzin, *G-20 Leaders Say Time to Conclude Doha; Obama Prepared to Take Risks for Approval*, 27 Int'l Trade Rep (BNA) 1755 (Nov. 18, 2010).



The American argument boils down to an assertion that difficulties in the Doha Round are due to a standoff.<sup>255</sup> On the one side is the U.S., which rightly demands greater market access in developing countries for its agricultural and industrial products, and its financial services, and seeks legitimization of its trade remedy methodologies, particularly zeroing. To some degree, the U.S. is backed by other developed countries, namely, Australia, which champions better market access for agricultural and industrial products, and services. Notably, the U.S. is not joined by the EU, which declared around 2009, and reiterated in May 2010, that they had reached the limit of what they can offer and will make no new concessions.<sup>256</sup> In that respect, the EU has succeeded in painting the U.S. as the “bad guy” in the Round, with nearly insatiable demands – at least in the minds of some participants and observers.

On the other side are big emerging countries, particularly Brazil, China, and India. They wrongly resist these demands, says the U.S., and thereby fail to shoulder greater responsibilities in the world trading system, despite their professed desire to be major players in this system. Thus, when in November 2009 former Deputy USTR Peter Allgeier suggested a three-pronged compromise to break the impasse:

- 1) Brazil, China, and India forgo any exceptions to agreed upon NAMA tariff cuts and any right to make no cuts on Special Products;
- 2) the U.S. abandon its zeroing methodology in calculating dumping margins; and
- 3) the EU drop its proposal to extend the higher degree of protection afforded in *TRIPs* Article 23 to wine and spirits to a broad range of other geographically indicated items.<sup>257</sup>

The idea was reasonable. But, it was firmly rooted in a paradigm of reciprocity between rich and poor countries, not generosity of the rich toward the poor. Unsurprisingly, it went largely unnoticed. The likes of Brazil, China, and India stuck to the position that the U.S. must back down from its manifestly excessive demands as well as its failure to indicate what it would offer if they actually did cough up a few more concessions.

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255. Yerkey, *U.S. Expected to Come Under Pressure at WTO Ministerial Over Doha Trade Talks*, *supra* note 222.

256. Daniel Pruzin, *U.S. Told to Tone Down Demands If Doha Round Deal to be Concluded*, 27 *Int'l Trade Rep.* (BNA) 775 (May 27, 2010).

257. Yerkey, *U.S. Expected to Come Under Pressure at WTO Ministerial Over Doha Trade Talks*, *supra* note 222.

### C. Trade Deficits and China

China's position hardened because of Federal Reserve monetary policy.<sup>258</sup> The U.S. was flooding the world with dollars, as evidenced by the November 2010 Federal Reserve decision to commence a second round of quantitative easing by buying \$600 billion of Treasury securities. In foreign exchange markets, dollar depreciation was the consequence of such easing, which in turn meant countries with trade surpluses were at risk of becoming countries with trade deficits.

For example, the dollar depreciated against the Brazilian *real*, and Brazil experienced a \$50 billion reversal in its merchandise trade balance between 2007 and 2010.<sup>259</sup> Predictably, Brazil announced in December 2010 it was unlikely it could make further substantive Doha Round trade concessions in view of its worsening trade balance.<sup>260</sup> The 15-percentage point increase in the *MERCOSUR* CET on toy tariffs (mentioned above) was "due to their [American] own policy of devaluing [*sic*] the dollar . . . [and besides,] U.S. products benefit more from the declining dollar than Brazilian products benefit from the increase in tariffs," argued Brazil's Ambassador to the WTO, Roberto Azevedo.<sup>261</sup>

Exacerbating the problem, from the perspective of Brazil, was that China was the largest source of cheap imports into Brazil – in part because of the appreciation of the *real* relative to the Chinese *yuan*.<sup>262</sup> In July 2011, Brazil (specifically, its Minister of Finance, Guido Mantega) not only spoke of "struggles between countries" over foreign exchange valuations, but also said the global currency was "absolutely not over."<sup>263</sup> True enough, low interest rates in developed countries

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258. Daniel Pruzin, *Brazilian Official Says U.S. Payment Expected for Further Concessions in Doha*, 27 Int'l Trade Rep. (BNA) 1912 (Dec. 16, 2010); see, e.g., Joe Leahy, *Brazil's Soaring Currency Aggravates Problems for Rousseff Administration*, FIN. TIMES (London), July 2-3, 2011, at 1.

259. Pruzin, *Brazilian Official Says U.S. Payment Expected for Further Concessions in Doha*, *supra* note 258.

260. *Id.* See also Daniel Pruzin, *Trade Ministers Vow to Overcome Differences, Achieve Doha Breakthrough*, 28 Int'l Trade Rep. (BNA) 178 (Feb. 3, 2011) (reporting the new Brazilian Foreign Minister, Antonio Patriota, stated Brazil had limited room to make concessions because of the appreciation of the real relative to the dollar).

261. Pruzin, *Punkte Cites Disappointment with Initial U.S. – China Talks on Advancing Doha Round*, *supra* note 228.

262. Joe Leahy, *Brazil and China Face Increase in Trade Tensions*, FIN. TIMES (London), Jan. 31, 2011, at 1; Joe Leahy, *Brazilian Factories Tested by Chinese Imports*, FIN. TIMES (London), Jan. 31, 2011, at 6.

263. Chris Giles & John Paul Rathbone, *Currency Wars "Not Over,"* FIN. TIMES (London), July 6, 2011, at 1 (reporting that Brazilian interest rates were high because of tight monetary policy, which it needed to prevent the Brazilian economy from unsustainably high growth levels and to combat inflation). See also *Brazil's Currency War Wounds*, FIN. TIMES (London), July 8, 2011, at 8 (reporting on the effect of currency appreciation on the Brazilian economy).

were partly to blame. With Brazil's main policy rate at 12.25 percent that month, small wonder why financial investors sought to purchase the *real* and thereby acquire Brazilian interest-bearing assets.<sup>264</sup>

Yet, as a general matter, much reluctance by Brazil, India, and other emerging markets and developing countries to reducing their trade barriers through the Doha Round stemmed not from fear of competition from the U.S., but from China.<sup>265</sup> Former USTR, Ambassador Susan Schwab, explained that "fear of increased imports from China may be the most unacknowledged reason behind Doha's continued failures."<sup>266</sup>

The Vice-President of the Council of the Americas/Americas Society put it well in a speech in March 2011:

It's not just production in Brazil that might be impinged on by Chinese low-cost production sales, but also Brazilian markets in Africa.

....

Now the United States isn't the only country or the loudest country saying to the Chinese, "you've got to change the value of your currency."

....

I can tell you the Chinese don't care about allegations of human rights abuses. They don't care about labor in the context of unionization.<sup>267</sup>

Likewise, *The Economist* observed: [C]ountries like India and Brazil are now more worried about cheap imports from China than about imports from the rich world. In essence, they might be more willing to open their markets to rich countries *if doing so did not simultaneously let in more Chinese goods*.<sup>268</sup>

264. Giles & Rathbone, *supra* note 263.

265. Schwab, *supra* note 137, at 108. For example, at the April 2011 BRICS meeting in Sanya, China, four of the BRICS countries (Brazil, Russia, India, and South Africa) urged the fifth one (China) to import more products from them, and insisted that their bilateral imbalances (with China) must be reduced. China retorted that its exchange rate policy was not negotiable. Kathleen E. McLaughlin, *Developing Countries' Leaders Push China to Agree to Import More Products*, 28 Int'l Trade Rep. (BNA) 647 (Apr. 21, 2011).

266. Schwab, *supra* note 137, at 108.

267. Amy Tsui, *China's Interests in Brazil, Latin America Prompt Concerns About 'Deindustrialization'*, 28 Int'l Trade Rep. (BNA) 572 (Apr. 7, 2011) (quoting a March 28, 2011 speech by Eric Farnsworth to the National Foreign Trade Council).

268. *Dead Man Talking*, ECONOMIST, Apr. 28, 2011, at 81 (emphasis added), available at <http://www.economist.com/node/18620814/comments>.

Of course, because of the MFN rule in GATT Article I:1 and Article II:1 of the General Agreement on Trade in Services (*GATS*), doing so does mean entry of more Chinese goods. And, the Deputy USTR and Ambassador to the WTO, Michael Punke, summarized perfectly in June 2011:

I've been in many discussions with *many* different Members of the WTO, and in our [U.S.'s] urging those other Members to open their markets in the Doha context, one thing I *frequently* hear is those Members telling me *there's no way we're going to open up on an MFN basis because we're afraid of China . . . .* China is an omnipresence in these negotiations, in whatever room we're in, even if China doesn't happen to be in the room.<sup>269</sup>

In brief, it is not just that some WTO Members fear China. It is that most of them greatly fear China.

Compounding the dilemma for the likes of Brazil and India are three facts: the Chinese (1) are willing to invest in the infrastructure (e.g., ports, roads, and railways) of the countries in which they gain market access to facilitate their interests in those countries (e.g., using them as an export platform); (2) typically import their own laborers, who toil under sub-par labor and environmental standards; and (3) do not operate under stringent anti-corruption standards.<sup>270</sup> Their model of investment, then, is quite different from that of western multinational corporations. That is, argues Farnsworth, the "Chinese model of investment in the Western Hemisphere is for the mercantilist purpose of spurring the Chinese economy and supporting the Chinese communist government."<sup>271</sup> In brief, what help to Brazil or India would a NAMA accord be if it helped Chinese more than their own exporters?<sup>272</sup> The result would be de-industrialization in Brazil and other Latin American countries, if not India, too.

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269. Daniel Pruzin, *Experts Say China Exerts Growing Influence, Generates Rising Tensions in WTO Matters*, 28 Int'l Trade Rep. (BNA) 1135 (July 7, 2011) (emphasis added).

270. Tsui, *supra* note 267.

271. *Id.*

272. See Len Bracken, *Harbinson Sees Three Positive Indicators for Doha Conclusion; Says U.S., China Key*, 28 Int'l Trade Rep. (BNA) 299 (Feb. 24, 2011) (referencing a statement by Bill Reinsch, President of the National Foreign Trade Council ("NFTC"), that China might emerge as a big Doha Round winner on NAMA vis-à-vis Brazil and India).

#### D. Reciprocity and the Two-Track Approach

In May 2009, the above-posed questions prompted the newly appointed USTR, Ambassador Ron Kirk, to advocate in favor of a suggestion originating from Canada: negotiate direct, bilateral tariff concessions on an individual, line-by-line basis first, using the December 2008 Draft Modalities Texts as reference points for minimum commitments, and thereafter conclude negotiations on the language of the Texts themselves.<sup>273</sup> The idea ran counter to how multilateral trade negotiations, including during those of the Uruguay Round, typically are conducted: first secure a deal among all countries on modalities; then enter into bilateral or small-group negotiations on specific tariff cuts to individual tariff lines. Thus, Nestor Stancanelli, Ambassador to the WTO from Argentina, remarked: “[p]ushing for bilaterals without the modalities is crazy [and] [i]t just makes the process more complex and difficult.”<sup>274</sup> The proposed alternative, top-up approach would allow the U.S. to deal directly with major developing countries like Brazil, China, and India to ensure America had a clear indication of what its agricultural and industrial product exporters could expect in terms of new market access opportunities – before giving its final judgment on a Doha Round deal.

That way, America could find out precisely how developing countries intended to use the special rules – the flexibilities – drafted for them, and thus ascertain what it would get in relation to what it gave. In turn, the Congress, deeply skeptical of the effects on the American economy of the Texts, might be more inclined to pass any subsequent Doha Round deal. For instance, the U.S. could find out from India exactly what farm products India intended to designate as “special.” Additionally, the U.S. could discern which countries would participate in sectoral agreements (and the agreements they would join). After all, said the USTR, an agreement on modalities was supposed to be not an end in itself, but rather a means to an end, namely, authentic trade liberalization. Moreover, the skepticism from Congress was set in the wide context of a global economic recession, and the President simply did not have fast-track trade negotiating authority (which had expired on 30 June 2007).

Thus, the USTR had no choice but to propose that during the remainder of 2009, WTO Members would prepare and circulate draft schedules of tariff concessions, and in 2010 commence negotiations on

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273. Daniel Pruzin, *Lamy Cites Need for Two-Track Approach for Concluding WTO's Doha Round Talks*, 26 Int'l Trade Rep. (BNA) 696 (May 28, 2009); Daniel Pruzin, *Kirk Sees Need for New Approach to Doha, Indicates Retreat from Scheduling Proposal*, 26 Int'l Trade Rep. (BNA) 632 (May 14, 2009).

274. Daniel Pruzin, *WTO 'Stocktaking' Meeting Starts on Pessimistic Note; Expectations Lowered*, 27 Int'l Trade Rep. (BNA) 412 (Mar. 25, 2010).

tariff lines of keen interest. Those talks could wrap up in 2010, and a final consensus on the Texts would follow shortly thereafter. For the USTR, the Texts were too vague to accept, hence waiting for post-modalities tariff schedules made no sense. To buttress this proposal, the Obama Administration widened the context and “upped the ante.” What was at stake was nothing short of a new world economic order in which imbalances in the global economy – not merely those in the Doha Round texts – needed correcting. President Barack H. Obama bluntly stated in September 2009, on the eve of the G-20 Summit in Pittsburgh: “We can’t go back to the era where the Chinese or Germans or other countries just are selling everything to us, we’re taking out a bunch of credit card debt or home equity loans, but we’re not selling anything to them.”<sup>275</sup>

The statement itself is economically correct. Serious deficits run by some countries, surpluses by others, and financing from the latter to the former, is neither healthy nor sustainable in the long run. But, the statement is irrelevant to the original aim of the Doha Round – namely, that the Round be a key tool for development to wean countries and peoples away from radicalism, and integrate them into the global economy. The statement forgets this aim and establishes *post hoc* a new goal for the Round, namely, structural adjustment. From an American perspective, U.S. insistence on knowing the full value of concessions developing countries will make, and how they will use their flexibilities, before signing off on Doha Round texts, is sensible, because the new American-established goal is to reduce its chronic trade deficit, and concomitantly reduce the chronic trade surpluses of the likes of China. But, this insistence translates into an unchanged trade policy: the strategy of the Obama Administration for the Doha Round, like that of the preceding Administration, is “no deal without tangible market access gains in advanced developing countries.”<sup>276</sup>

As intimated, the obvious answer to this line of argument – understandable as it may be from an American perspective – is that the Doha Round never was supposed to produce a perfectly balanced outcome. The middle “D” meant there would be a preferential option for the poor. That is why, for instance, India insisted on the right to self-select farm goods as “special” after modalities were agreed, at the time each country prepared its Doha Round tariff schedule.<sup>277</sup> That also is

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275. Alister Bull, *U.S. to Push for New Economic World Order at G20*, REUTERS, Sept. 21, 2009, available at <http://blogs.reuters.com/financial-regulatory-forum/2009/09/21/us-to-push-for-new-economic-world-order-at-g20/>.

276. Daniel Pruzin, *Continued Stalemate Set to Raise Questions About Future of Doha Talks*, 27 Int'l Trade Rep. (BNA) 83 (Jan. 21, 2010).

277. Pruzin, *See Lamy Cites Need for Two-Track Approach for Concluding WTO's Doha Round Talks*, *supra* note 273.

why China insisted that self-designation implies a developing country does not have to publicize the list of goods it plans to shield from agreed-upon cuts until after consensus has been reached on the overall modalities Texts.<sup>278</sup> And, that is why South Africa argued it cannot do more in terms of opening up its market to foreign competition, given that it made concessions during the Uruguay Round that went far beyond commitments made of less developed countries, and why it found the December 2008 Draft Texts on Agriculture and NAMA unacceptable – namely, they failed to address the “developmental imbalance” between rich and poor countries.<sup>279</sup>

Unfortunately, as the Third World began to take the middle “D” seriously, claims came from the First World that it was a mistake to use that middle “D.” Doing so was a teaser, falsely raising expectations among poor countries. “Why give hope to the poor?” was the cold, sarcastic rhetorical question that hardheaded trade realists whispered to each other. Thus, Argentina remarked (in respect of the December 2008 NAMA Text), “[i]t’s a developed country agenda,” because the focus is on market access issues in which rich countries are interested.<sup>280</sup> Argentina also criticized the U.S. of flip-flopping: early on in the Round, the U.S. agreed to modalities with flexibilities for developing countries.

That was not the only answer to the American effort to flip the order of events and put bilateral tariff schedules before the modalities texts. First, Switzerland explained that the August 2004 *Framework Agreement* contemplated bilateral negotiations on specific tariff concessions, but only after modalities agreements were finalized.<sup>281</sup> Second, not all developed countries agreed with the U.S. Notably, the EU opposed the approach suggested by the USTR. Commencing bilateral negotiations before modalities were agreed could mean a re-writing, even unraveling, of the December 2008 Texts, i.e., a loss of years of hard work.<sup>282</sup> Third, and perhaps most importantly, developing countries – including the entire G-20, led by Brazil, China, Egypt (speaking for many African countries), and India – were steadfastly against it. They suspected the U.S. wanted to engage them in bilateral

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278. See Daniel Pruzin, *Trade Ministers Meeting Calls for New Push to Move Doha Round Before September G-20*, 26 Int'l Trade Rep. (BNA) 872 (July 2, 2009).

279. Gary G. Yerkey, *Finishing WTO Talks by End of 2010 Very Unlikely*, South African Minister Says, 26 Int'l Trade Rep. (BNA) 1313 (Oct. 1, 2009) (quoting Rob Davies, South African Trade Minister, on Sept. 29, 2009).

280. Daniel Pruzin, *NAMA Chair Outlines 'Gradual' Approach for Restarting Doha Industrial Tariff Talks*, 26 Int'l Trade Rep. (BNA) 181 (Feb. 5, 2009) (quoting Argentina's WTO ambassador Alfredo Dumont).

281. Pruzin, Kirk Sees Need for New Approach to Doha, Indicates Retreat from Scheduling Proposal, *supra* note 273.

282. See *id.*

talks because the U.S. would have greater leverage dealing with them individually and even could exercise a divide-and-rule strategy.<sup>283</sup>

Thus, the USTR had little choice but to beat a hasty retreat, with one modest consolation. The Director-General, Pascal Lamy, said that perhaps WTO Members could consider a two-track approach. Under it, the Members could continue discussions on modalities, while contemporaneously engaging in bilateral negotiations on cutting farm tariffs and subsidies, reducing trade barriers to industrial products, and clarifying the scope of flexibilities for poor countries. That is, the Members could develop so-called "templates" whereby they would get data from each other with a view to scheduling draft commitments based on modalities formulas, and they could work on those modalities formulas. There was irony in this consolation. Eight years into the Doha Round, there was no clear consensus, much less unanimity, on whether to proceed solely with modalities, commence bilaterals and scheduling, or do both at once. The end-result, which was clear by September 2009, was to do both at the same time.<sup>284</sup>

This two-track approach is exactly the path some WTO Members began to tread with the U.S. To be sure, the compromise language at the July 2009 summit of G-8 leaders (i.e., from Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the U.S.) in L'Aquila, Italy, which also was agreed to by Australia, Brazil, China, India, Indonesia, Korea Mexico, and South Africa, was a fudge: "[W]e regard enhancing the transparency and understanding of the [Doha Round] negotiating results to date as a necessary means to facilitate the conclusion of an agreement."<sup>285</sup>

This language meant the U.S. was entitled to see how poor countries intended to use their flexibilities under Doha Round texts, and whether they would join a sectoral agreement, before agreeing to those texts. Yet, poor countries insisted they would not bargain over the precise products for which they sought special or sensitive designation. Self-designation of those products might allow them to tell the U.S. what they were going to do, as a matter of information, but gave the U.S. no right of consultation, or negotiation, over what the products would be, or whether they would join a sectoral agreement.

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283. *Id.*

284. See *Chair Consults on 'Energizing' Farm Talks for Coming Months*, WTO (Sept. 16, 2009), [http://www.wto.org/English/news\\_e/agng\\_16sep09\\_e.htm](http://www.wto.org/English/news_e/agng_16sep09_e.htm). The progress made by WTO Members on developing templates is recounted in the April 2011 Agriculture Document Part II, and on concomitant data-related activities in Part III. That Document is discussed in Part One of the Trilogy.

285. Daniel Pruzin, *G-8-Plus Declaration Sets Stage for Battle Over Developing Country Flexibilities in Doha*, 26 Int'l Trade Rep. (BNA) 950 (July 16, 2009) (quoting a July 9, 2009 declaration by the G-8 and leaders of other major emerging economies).



Not surprisingly, given the fuzzy compromise language and increasingly entrenched positions, the two-track approach met with mixed results.<sup>286</sup> On the margins of the Seventh WTO Ministerial Conference in November – December 2009 in Geneva, the U.S. declared it had “good” bilateral consultations with India. But, China was unwilling to engage in bilateral talks with the U.S., particularly on lowering its industrial tariffs on chemicals, electronic goods, and machinery. China accused the U.S. of behaving in a protectionist manner and unfairly subsidizing its farmers to the detriment of the market access interests of Chinese farmers. The Chinese Vice Agriculture Minister, Niu Dan, said he had no interest in talking with the U.S. at the Conference, and added rather rudely “I don’t have time.”<sup>287</sup> Brazil revealed the U.S. presented it with a list in early October of 3,000 industrial tariff lines covering (*inter alia*) agricultural and industrial machinery, chemicals, forestry products, medical devices, and pharmaceuticals, for which the U.S. demanded tariff cuts beyond the general NAMA formula reductions.<sup>288</sup>

The U.S. argued Brazil, as well as China and India, is globally competitive in these sectors, and thus ought to be willing to make concessions. Yet, the U.S. neither identified for Brazil precisely how many lines on which it ought to impose extra cuts, nor indicated the priority lines. Brazil balked at the demand, complained that the U.S. failed to state what concessions it would offer in return, and accused the U.S. of making it as a tactic to delay completion of the Doha Round. Brazil also reminded the U.S. that it and other developing countries already had made significant market access concessions, thus the U.S. had no basis for asking for yet more.<sup>289</sup> The U.S. retorted that it should not have to pre-pay for concessions from developing countries, as it already had given up so much to arrive at the December 2008 Draft Agriculture and NAMA texts. This dialectic continued throughout 2010, and into 2011.<sup>290</sup>

Not surprisingly, by late February 2010, there was widespread pessimism the Doha Round could conclude in 2010.<sup>291</sup> Positions had

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286. See Daniel Pruzin & Gary G. Yerkey, *Bilateral Talks on Possible WTO Deal Will Continue for Months, USTR Says*, 26 Int’l Trade Rep. (BNA) 1671 (Dec. 3, 2009).

287. *Id.* (quoting Niu Dan on Nov. 29, 2009, on the eve of the WTO Ministerial Conference).

288. *Id.*; Daniel Pruzin, *U.S. Trades Charges with China, Others Over Responsibility for Doha Impasse*, 27 Int’l Trade Rep. (BNA) 1507 (Oct. 7, 2010).

289. Pruzin & Yerkey, *Bilateral Talks on Possible WTO Deal Will Continue for Months, USTR Says*, *supra* note 286.

290. Pruzin, *U.S. Trades Charges with China, Others Over Responsibility for Doha Impasse*, *supra* note 288.

291. Daniel Pruzin, *Lamy Sees Low-Profile ‘Stock-Taking’ Meeting as Frustration Over Doha Grows*, 27 Int’l Trade Rep. (BNA) 248 (Feb. 25, 2010).

hardened further, and on some topics, they even appeared to have widened. Some WTO Members, and the Director-General, Pascal Lamy, admitted they did not even know how big some of the key gaps were.<sup>292</sup> The best choice seemed to be to press ahead with contemporaneous bilateral and multilateral negotiations, and when appropriate, pluri-lateral ones. After all, the alternatives were to declare the Round dead, which no Member wanted openly to do, or to suspend it indefinitely until the Members had the political will to finish it. The conventional wisdom was that either alternative would deeply injure the long-term credibility and even legitimacy of the WTO. In truth, the world trading community might have appreciated the honesty and integrity behind the alternatives. By the fall of 2010, it was manifest that the Round would not finish by the end of 2010, and probably not by the end of 2011. At the WTO, the U.S. on one side, and Brazil, China, and India on the other, did little else than trade barbs as to which side was to blame for the impasse.<sup>293</sup>

#### E. Embarrassingly Protecting Self-Interest

As for the USTR retreat into accepting a two-track approach, it did not mean the U.S., or developed countries generally, had a newfound appreciation for the middle “D” in the DDA. The fact is that once bargaining began in the Doha Round, especially in earnest after the October 2005 Portman Proposal from the U.S.,<sup>294</sup> the major powers settled into a familiar theme: protecting their interests. They never did shift away from that theme. Put differently, no satisfactory response has emerged to the perspective long-held by Kamal Nath, India’s Minister of Commerce and Industry, namely, for India (and other poor countries), lives are at stake, whereas for America (and other rich countries), the only issue is commerce.<sup>295</sup> Thus, for example, in the

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292. *Lamy Calls for March Stocktaking to “Inject Political Energy and Momentum” in the Negotiations*, WTO (Feb. 22-23, 2010), [http://www.wto.org/english/news\\_e/news10\\_e/tnc\\_chair\\_report\\_22feb10\\_e.htm](http://www.wto.org/english/news_e/news10_e/tnc_chair_report_22feb10_e.htm).

293. Pruzin, *U.S. Trades Charges with China, Others Over Responsibility for Doha Impasse*, *supra* note 288.

294. See INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 15, at 77-141 (analyzing this proposal and other proposals at the time in response to it).

295. Chris Giles, *Acrimony Dashes Doha Hopes*, FIN. TIMES (Feb. 1, 2009), <http://www.ft.com/cms/s/0/0059f106-f084-11dd-972c-0000779fd2ac.html> (paraphrasing Minister Nath). Following the sweeping victory of the Congress Party in India’s general election in May 2009, and the postelection cabinet reshuffle, Mr. Nath was reassigned as Minister of Road Transport and Highways. His replacement as Minister of Commerce and Industry was Anand Sharma. Speculation in the Indian media about the shift was that Mr. Sharma might prove more diplomatic in trade negotiations than Mr. Nath, given that Mr. Sharma had experience at the Ministry of External Affairs. *Kamal Nath’s New Portfolio Takes Industry by Surprise*, INDO ASIAN NEWS SERVICE (May 28, 2009, 11:52

December 2008 Draft Agriculture Text, the U.S. received much of what it had sought all along in the Doha Round, including:

- Base periods, which would apply only to the U.S., to calculate Product-Specific Support in the Amber and Blue Boxes.
- Relatively deeper cuts that would apply to EU and Japanese overall trade-distorting domestic support (“OTDS”), and significant reduction commitments that would apply to Total aggregate measure of support (“AMS”) domestic support in the EU and Japan.
- A broader definition of the “Blue Box” to include counter-cyclical payments.
- Incorporation by reference into Product-Specific Blue Box caps of spending limits in the *2002 Farm Bill*.<sup>296</sup>

To be sure, this Text was more than a mere transcription of the American negotiating position. The Text did not bestow upon the U.S. all it had sought. The U.S. had opposed, for example, any Product-Specific limits in the Blue Box. Nonetheless, poor countries hardly could be pleased.

In light of that middle “D,” provisions written explicitly for the U.S. ought to have proved embarrassing. They were not justified for all rich countries, which somehow might have made them thinly defensible. They were just for the richest one. They raised the question why American farmers ought to get better treatment than their counterparts in Australia, Canada, the EU, or New Zealand, to which the U.S. provided no answer other than it had to get what it wanted or there would be no Doha Round deal.<sup>297</sup>

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PM), <http://www.india-forums.com/news/business/177246-kamal-nath-new-portfolio-takes-industry-by-surprise.htm>. A different conjecture was Mr. Nath was needed to deal with India’s infamous transportation infrastructure problems. G. Seetharaman, *For Infra Firms, Nath’s Just the Man*, DAILY NEWS & ANALYSIS (June 4, 2009, 1:29 IST), [http://www.dnaindia.com/money/report\\_for-infra-firms-naths-just-the-man\\_1261748](http://www.dnaindia.com/money/report_for-infra-firms-naths-just-the-man_1261748).

296. See Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.4 (Dec. 6, 2008), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_dec08\\_a\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf).

297. Following the failure to call a Ministerial meeting at year-end 2008, the *Financial Times* commented:

The reasons for the stalemate in the Doha talks were much the same as they have been for years. The U.S. is demanding more access for its farmers and manufacturers than the big emerging markets are willing to give – and displaying its own lack of will in confronting domestic constituencies by reducing those farmers’ subsidies in return.

Even more embarrassing ought to have been the intransigent American position on cotton. Since at least May 2006, when the World Bank published a study, the effects of cotton subsidies (and their possible removal) on poor countries were well known:<sup>298</sup>

[The] World Bank study noted that nearly half the global cotton production occurred in the United States and China. In 2002, the African and Central Asian countries that relied heavily on cotton exports had an average per capita income of less than 80 U.S. cents per day. Meanwhile, exports from these countries competed with heavily subsidized U.S. exports in the international market.

The study found that if cotton subsidies and import tariffs are eliminated, global prices would rise by an average 12.9 percent. In addition, production would decrease by one quarter in the U.S. and by one half in the EU. As a result, the global share of exports from developing countries would increase from 52 percent to 72 percent. As to farmers' incomes, removal of cotton market distortions would lead to a one sixth decline in US farmers' income and by more than one half in the EU. For sub-Saharan African farmers, incomes would increase by 30 percent.<sup>299</sup>

For the U.S. to link its position to moves by China, knowing full well China's own limited room to maneuver given its concerns about the Uyghurs in Xinjiang, could lead to only one result: selling short the needs of the neediest in Sub-Saharan Africa.

Alongside cotton, the SSM was possibly the most critical Doha Round issue, at least in the agricultural negotiations, for poor countries. Fights over this issue were the proximate cause of the collapse of the July 2008 Ministerial meeting. The first five days of talks (Monday, 21 July through Friday, 25 July) during that meeting – a meeting

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Editorial, *The Broken Promise of Doha*, FIN. TIMES (Dec. 16, 2008), <http://www.ft.com/intl/cms/s/0/14be4348-cba6-11dd-ba02000077b07658.html#axzz1hfylAE50>.

298. See generally Kym Anderson & Ernesto Valenzuela, *The World Trade Organization's Doha Cotton Initiative: A Tale of Two Issues* (World Bank Dev. Research Grp., Working Paper WPS3918, 2006), available at [www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/05/05/000016406\\_20060505160536/Rendered/PDF/wps3918.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/05/05/000016406_20060505160536/Rendered/PDF/wps3918.pdf) (discussing cotton production, trade and economics in developing countries).

299. Robert W. Njoroge, ABA Sec. Int'l L., *Global Fiscal Crisis: A Moment for the Doha Round?*, III INT'L TRADE COMM. NEWSLETTER no. 1, at 8-10 (2008).

originally planned to end on the sixth day (Saturday, 26 July) – summed to nothing. The U.S. and EU singled India out for blame for insisting rich countries make real cuts to their farm subsidies, yet tolerate protection by poor countries of their infant industries. One trade official said of then-Indian Minister of Commerce and Industry, Kamal Nath: “He just sat there and said ‘No’ for 12 straight hours” [ending at 3:30 a.m. on Thursday, 24 July].<sup>300</sup>

From the perspective of Minister Nath, there was good reason to say “No.”

Since 1980, the 62-year old celebrity Indian politician had represented, almost without interruption, in the *Lok Sabha* (India’s Lower House of Parliament), Chhindwara.<sup>301</sup> That is a poor, rural district of 1.8 million in the state of Madhya Pradesh, with 60 million people. The farmers in his district are lucky to have a plot of one-half a hectare, hence commercial farming on a developed country scale is not easy to imagine. Soybean planters in Chhindwara are directly harmed by subsidized American soybeans.<sup>302</sup> Like it or not, Minister Nath knew subsistence farming in a way few developed country trade negotiators can appreciate.

In this context, however understandable the American concern was that poor countries would abuse an SSM if its volume triggers were too low and thwart access to their markets of American farm products through higher-than-pre-Doha Round tariffs, the concern of poor countries was still more important. What the Americans see as a trade issue the likes of China and India see as a food security issue. No less an authority than the United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, argues that WTO agricultural accords wrongly treat food like any other commodity, instead of respecting the human right to food. International trade has failed to feed the hungry, and to help poor countries feed themselves.<sup>303</sup>

Of the nearly one billion people who are hungry in the world, half of them are small-scale farmers in these countries.<sup>304</sup> Of this half – nearly 500 million people – 80 percent are directly engaged in food production. The other 20 percent are landless laborers or fishermen. The SSM remedy is essential, argues the Special Rapporteur, “to

300. John W. Miller, *Indian Minister Frustrates West at Trade Talks*, WALL ST. J. (July 25, 2008), <http://online.wsj.com/article/SB121691447068181327.html> (quoting an unnamed trade official).

301. Alan Beattie, *India’s Local Hero Evokes Mixed Emotions on World Trade Circuit*, FIN. TIMES (Dec. 3, 2008), <http://www.ft.com/intl/cms/s/0/da83adde-c0db-11dd-b0a8-000077b07658.html#axzz1d4v3jlaj>.

302. *Id.*

303. Jonathan Lynn, *U.N. Expert Says Trade Will Not Feed Hungry*, REUTERS (Dec. 17, 2008), <http://www.reuters.com/assets/print?aid=USLH737725>.

304. *Id.*

insulate fragile domestic farm markets [in poor countries] from volatile global prices and import surges.”<sup>305</sup> To be sure, food that is traded internationally accounts for an average of just 15 percent of total world food output. That statistic might suggest developing and least developed countries need more trade, not less, in food. But, from their perspective of food security, they need enhanced capacity to produce food, and not suffer the vicissitudes of the global marketplace – namely, price volatility, import surges, and susceptibility to food that is subsidized and dumped by rich nations.

The long and bloody history of revolutions, both in Asia and the western world, provides the capstone argument for China, India, and other developing countries. Rural poverty has catalyzed social and political upheaval, even whole revolutions. Cases in point are China in the 19th and early 20th centuries, and France in the late 18th century.<sup>306</sup> Compounding fears of history repeating itself are dislocations in the export-oriented manufacturing sectors of China and India. Even before the onset of severe recessionary conditions in late 2008, China alone had 87,000 public order disturbances – in 2005, when its GDP grew at an annual rate of over 10 percent.<sup>307</sup> In brief, the position held by most poor countries on the SSM is more than a devilish technical detail. Fitting squarely within the middle “D” of the DDA, the SSM implicates a truly grand theme.

As a final point about the middle “D,” it is important for developing countries – especially major ones – to assume responsibility for fostering a coherent world trade regime in which the poverty-alleviating effects of trade may be felt. The U.S. points out, rightly, that South–South trade must increase, i.e., poor countries must lift themselves out of poverty in part by trading more with each other than they do.<sup>308</sup> Likewise, the *Financial Times* declares that successful conclusion of the Doha Round requires: development activists giving up the founding myth of Doha – that western farm subsidies and tariffs, outrageous as they are, the main obstacle to poor nations’ integrating with the global economy.<sup>309</sup>

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305. *Id.*

306. See CHRONIC POVERTY RESEARCH CENTER, *Understanding Poverty in China*, in CHRONIC POVERTY REPORT 87-88 (2005), available at [http://www.chronicpoverty.org/uploads/publication\\_files/CPR1\\_chap10.pdf](http://www.chronicpoverty.org/uploads/publication_files/CPR1_chap10.pdf); *The French Revolution*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/French\\_Revolution](http://www.newworldencyclopedia.org/entry/French_Revolution) (last visited Nov. 11, 2011).

307. Geoff Dyer, *Unmade in China*, FIN. TIMES (Dec. 17, 2008), <http://www.ft.com/cms/39a06e68-cbdb-11dd-ba02-000077b07658.html>.

308. See Amy Tsui, *USTR Seeks Coherent World Trade Regime in WTO, Trade Among Developing Nations*, 26 Int'l Trade Rep. (BNA) 73 (Jan. 15, 2009).

309. Editorial, *Life After Doha*, FIN. TIMES (Apr. 18, 2011), <http://www.ft.com/cms/s/0/f759d08a-69ee-11e0-89db-00144feab49a.html>.

To be sure, calling that proposition “the founding myth” may be an overstatement. Moreover, the U.S. has its own interests at stake: many American businesses operate in multiple developing countries, and would benefit from reduced tariff and non-tariff barriers that inhibit these businesses from supplying goods (either for captive consumption or the merchant market) developing country boundaries. That said, developing countries like Brazil, China, and India shoulder a responsibility that goes beyond the matter of access of American exports to their markets. As long as they inhibit real trade flows amongst themselves and other developing countries, they block the evolution of a coherent trade regime in which countries at the same and different levels of development participate.<sup>310</sup>

#### F. The Mexican Plan Spurned

To its credit, on 29 January 2011, Mexico floated a proposal to heal the schisms in the Doha Round and re-focus efforts on the middle “D.” It was a horizontal plan, as it cut across four sectors:<sup>311</sup>

##### (1) *Agriculture*

Developed countries would be obligated to make further reductions in farm subsidies, bringing their cuts closer to what they currently spend, and would be prohibited from shielding their most profitable farm products from major tariff cuts. That is, they would have to reduce OTDS to a level between what the December 2008 draft modalities text required, on the one hand, and their current actual spending, on the other hand. Moreover, developed countries would be required to bind an applied agricultural tariff rate if that rate was below the level that would result from the tiered-reduction formula cut required by the draft text. Finally, developed countries could not designate more than 6 percent of their farm tariff lines as “Sensitive” (a ceiling Canada and Japan had long-since rejected).<sup>312</sup>

##### (2) *NAMA*

All developing countries would be obliged to participate in at least two of the fourteen sectoral initiatives. A developed country would have

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310. Similarly, the large amount of tariff revenues collected by one developing country on imports from another developing country bespeaks the reliance of these countries on customs duties for government revenue. Thus, openness to South – South trade is linked to reform of domestic tax regimes in poor countries, with a view to enhancing income and sales tax collection systems. Such reform, in turn, often depends on a serious anti-corruption campaign, as well as enhanced administrative systems for recording and keeping track of assets.

311. Daniel Pruzin, *U.S. Rejects Mexican Initiative to Advance Doha Talks, Insists on Bilateral Approach*, 28 Int'l Trade Rep. (BNA) 214 (Feb. 10, 2011).

312. *Id.*

to participate in any sectoral initiative that it sponsored. Both developing and developed countries could take advantage of a basket approach, whereby they could make different tariff commitments in different product sectors. In the first basket, on a certain percentage of tariff lines (which the Mexican proposal did not spell out), they would cut tariffs to zero. In the second basket, they would cut tariffs by a percentage (again, not spelled out) beyond what the Swiss Formula required. In this basket, developed countries would have to cut tariffs to a greater extent than developing ones. The third basket would be available only to developing countries. In it, these countries could put tariff lines and thereby exempt them from any cuts beyond what the Swiss Formula required. Every WTO Member could choose what tariff lines it put in what basket. Developed countries would have 5 years to make the cuts to tariff rates in each basket, and developing countries would have 10 years. For both groups of countries, the cuts would be in equal annual amounts.<sup>313</sup>

### (3) *Services*

Both developing and developed countries would be obligated to convert existing services market liberalization into bound *GATS* commitments. They could exempt a set number of services sectors from this requirement, but they could do so only if they had participated in the July 2008 signaling conference. Developing countries would be able to exempt a larger number of sectors than developed ones.<sup>314</sup>

### (4) *Environmental Goods*

Both developed and developing countries would have to reduce tariffs on environmental groups substantially, that is, to a greater degree than required under the Swiss Formula. Developed countries would have to cut those tariffs to zero. Developing countries would have to slash them to a level below what the Swiss Formula would mandate. The Doha Round negotiating group on trade and environment would establish a list of "environmental goods," and developed and developing countries would select goods from that list. But, developed countries would have to pick more environmental goods on which to cut tariffs than developing ones.

Within days, on 4 February, the U.S. rejected the plan.<sup>315</sup> It returned to its refrain that the major emerging markets of Brazil, China, and India must open themselves further to agricultural and manufactured goods, and services, beyond what they set out in the December 2008 texts. The Mexican proposal failed to obligate Brazil,

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313. *Id.*

314. *Id.*

315. *Id.*



China, or India to participate in the key chemicals and industrial machinery initiatives. Moreover, said the U.S., the plan was incomplete. It failed to address the agriculture SSM, industrial non-tariff barriers (“NTBs”), and AD-CVD disciplines. Bluntly, intoned the U.S., the American business community and Congress would not approve the Mexican proposal.<sup>316</sup>

## V. SPECIAL TRADE DISPENSATIONS TO WIN MUSLIM HEARTS AND MINDS

### A. Developing Stakeholders

Poverty anywhere is a threat to prosperity everywhere. That common sense point is even truer when the poverty is in Muslim countries (e.g., Saudi Arabia), or among Muslim communities in non-Muslim countries (e.g., India). The fact is that in the post-9/11 era, many extremist ideologies are in the name of Islam, although in truth they are anything but “Islamic”; rather, they are un-Islamic.<sup>317</sup> In brief, the connection between economic growth, poverty alleviation, and reduced vulnerability to Islamist extremism is or should be readily apparent. That is not to say trade, in spurring growth and reducing poverty, is a panacea for terrorism. Rather, to be a successful counter-terrorist strategy, trade requires complimentary and salubrious structures and policies at the domestic level. Reducing corruption and sound fiscal and monetary policies are examples.

Still, the link between trade and national security is clear enough: developed countries can help themselves in the long run by helping Islamic countries and communities integrate broadly and deeply into the world trading system. Doing so helps provide Muslims with a well-grounded sense of stake holding in this system. Yet, one of the most extraordinary features of the December 2008 Draft Modalities Texts is they say nothing explicitly about the Islamic world.<sup>318</sup> For all the categories these texts create among WTO Members, one cohort they do not treat as such is the one made up of Muslim countries. Indeed, that is true of all the major Doha Round documents.

Consider cotton. From the Uyghur people to many residents of the Cotton Four countries, the farmers are Muslim. The adjustment costs to the U.S. and other non-Muslim developed countries of cotton market access and subsidy concessions might be more than offset by the economic, political, and national security gains from healthier, wealthier cotton farmers in western China and Sub-Saharan Africa.<sup>319</sup>

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316. *Id.*

317. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHAR'IA*) 1359-81 (2011).

318. See *Revised Draft Modalities for Agriculture*, *supra* note 296.

319. See Njoroge, *supra* note 299, at 10.

Similar arguments can be made in other agricultural and industrial sectors. The Doha Round was launched in the aftermath of the terrorist attacks of 11 September 2001. A key reason for meeting in Doha, and pushing through the DDA, was to show that evil extremists not only are un-Islamic, but also are hideously lousy economists. The world – aside from the extremists – has a shared interest in cross-border commercial intercourse and therefore in the concomitant necessary conditions of peace and security. War impedes trade, and as trade declines, so does job and income growth. These points hold as true for Muslims as for Catholics, Protestants, Jews, Buddhists, Sikhs, and so on.

To be sure, aside from particular issues arising under the *Shari'a* (Islamic Law), such as forbidden products (alcohol, pork, and pornography), forbidden banking transactions (those that involve *riba*, which loosely translated is interest), and forbidden insurance policies (those that involve *gharar*, which means uncertainty), there is no such thing as “Muslim trade law.” That is similarly true of other faiths – there is no Catholic trade law, for instance, though Catholic countries may have distinct concerns about certain trade policies and their implications.

#### B. Grim Statistics

Nevertheless, Muslim countries are in need of better integration into the GATT–WTO order. Consider a few stark realities about just the Arab Muslim world:<sup>320</sup>

- The GDP of Arab countries combined is (as of 1999) \$531.2, which is less than that of Spain.
- The total value of non-oil exports from Arab countries is less than that of Finland. There are 300 million people in the Arab world and five million people in Finland.
- During the 1990s, the growth rate of exports from Arab countries was 1.5 percent per year. The average global growth rate was six percent.
- The export base of Arab countries is not diversified. Oil and oil-related products account for 70 percent of their exports.
- Regarding intellectual development, Arab countries lag behind the rest of the world. The number of books translated each year into Arabic in the entire Arab Muslim world is just 20 percent of the number translated into Greek in Greece. The number of books published per million people in the Arab Muslim world (whether written

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320. Bernard Lewis, *Free at Last? The Arab World in the Twenty-First Century*, 88 FOREIGN AFF. 77, 81-83 (2009).

in Arabic, or translated into Arabic) is lower than every other region of the world, except Sub-Saharan Africa.

- On intellectual property (IP) generation, the Arab countries also lag behind the rest of the world. Between 1980 and 2000, Israel registered 7,652 patents in the U.S. Korea registered 16,328 patents in the U.S. In that same 20-year period, Saudi Arabia led the Arab Muslim world in registering patents in the U.S. – with a pathetic 171. Egypt had 77, Kuwait 52, the United Arab Emirates 32, Syria 20, and Jordan 15. Further, Arab countries have one of the lowest numbers of research scientists who publish frequently cited articles.
- Concerning education, the Arab countries again lag behind the rest of the world. In 2003, China began publishing a list of the 500 best universities in the world. None of the over 200 Arab universities were on that list, nor do any of them appear in the subsequent annual rankings. Even when the in list is narrowed to the Asia–Pacific region (covering the Middle East), no Arab university is listed.
- In political development, the countries of the Middle East and North Africa are consistently ranked by Freedom House as having the lowest freedom rating.
- On women’s rights, nowhere in the world is the situation more dreadful than in Arab countries. Women account for slightly more than half of the Arab population, but they are largely absent from economic and political life, and (as is widely known) from the driver’s seat in cars in Saudi Arabia.
- On overall average standard of living, only Sub-Saharan Africa has a lower figure than Arab countries.

Depending on the outcome of the Arab Spring, many of these statistics might improve. In the meantime, contrary to assertions by Islamic extremists, neither supposedly wicked foreign powers, nor the legacy of the Crusades or colonialism, are to blame. Arabs are responsible for themselves and their children.

To be sure, all or some of these statistics may improve after the Arab Spring, assuming countries newly liberated from their monstrously corrupt and economically unhelpful autocrats adopt prudent economic policies. Yet, for now, candidly, these realities are scary. Left unchanged, they play into the evil hands of extremists. That is because Arab masses – the street, as it were – are at risk of developing a sense of exclusion. All faith that domestic politicians and the global economic regime can help change reality for the better is lost. The poison of extremism may appear an antidote.

### C. New Ideas Faithful to the Original Purpose

The obvious inference from the above-listed points is the Doha Round should have focused in part on boosting trade with and among Muslim countries. Because it has failed to do so, the perception among Arab countries, and throughout the Islamic world, that the Round has failed to address the above-listed challenges is not irrational.

If susceptibility to fanatical ideologies and recruitment by VEOs, on the one hand, and oppressive economic circumstances (or the perception thereof), on the other hand, are linked (and they are, as Part One of the Trilogry argues), then the Doha Round was a strategic opportunity to forge trade-generating, poverty-alleviating rules. Perhaps it is not too late to resurrect the Round, restoring it to its original, counter-terrorist purpose via a package of proposals faithful to that purpose. They might include the following:

- An accelerated accession of Algeria, Iran, Iraq, Lebanon, and Syria into the WTO;
- Duty-free treatment for all non-oil exports, without exceptions for T & A and footwear, and for otherwise sensitive farm products, from all Muslim countries;
- A list of farm and industrial products of potential future keen export interest to Muslim countries, and demand free trade on those products;
- A "Muslim Sectoral Agreement," to be followed by all WTO Members, without exception; or
- Support for fisherman in Muslim countries to enhance their livelihoods in an environmentally sustainable way;
- A "Muslim Technical Facility," to boost as rapidly as possible the legal capacity in trade ministries from Morocco to Malaysia, particularly on trade facilitation issues.

Indubitably, there are other terms of a package oriented to reform in the Muslim world.

To be sure, elements of a Doha Round deal faithful to the original purpose of the Round would not change all the grim realities in Islamic World in the short term. They would not deliver an immediate, crushing blow against VEOs. But, they would be practically insignificant, yet symbolically important, steps.

### D. The "Islamic" Delineation

To take such steps, important considerations about inclusion would need to be resolved. Should such a package cover all Islamic countries, namely, all 57 countries in the Organization of the Islamic Conference ("OIC")? Should it cover only OIC countries that are WTO Members?

Should it exclude OIC countries with high *per capita* incomes, like the Gulf Cooperation Council (“GCC”) states? Should emphasis be on the Arab Muslim countries? How should Muslim communities in non-OIC countries, like India or Singapore, be treated? In resolving these matters, every effort should be toward inclusiveness. After all, the goal ought to be to win minds and hearts of Muslims – the entire community (*ummah*) – regardless of international boundaries. To put the point more pragmatically, VEOs recruit from that *ummah* in disregard of those boundaries, hence a positive, pro-active trade reform agenda should contest on those same recruitment grounds.

However these questions are resolved, one matter should be obvious. There is nothing wrong with singling out OIC countries, or a subset of them. As this Trilogy shows, to a nearly ludicrous extent the Doha Round draft modalities texts create hair-splitting delineations among WTO Members, both as sub-groups and individuals. Examples include net food importing developing countries (“NFIDCs”), RAMs, SVEs, countries in the Southern African Customs Union (“SACU”), and Bolivia, as well as – shamefully – rich countries like Canada, Japan, Norway, and the U.S. To establish these delineations for flexibilities or S & D treatment but eschew an “Islamic” category is unjustifiable. Worse yet, it is irresponsible in the post-9/11 climate, given the persistence (even exacerbation) of global poverty, and continued threats posed by VEOs acting in the name of “Islam.”

There are three possible explanations for the willingness of Members to countenance the metastasizing of S & D treatment rules to all such sub-groups and individuals – except Muslim countries. One is cynical: the Members never intended to help those countries in the first place. Doing so was just part of the rhetoric surrounding the launch of the Round, rhetoric necessary to agree on the DDA in the first place. This explanation is difficult to prove, and smacks of being a “cop out.”

The second explanation is atmospheric: WTO Members are too politically correct to agree on a distinction based on religion, and fear offending Islamic countries by intimating a link between a particular religion and terrorism. Why not, then, help Members in all the other categories (e.g., NFIDCs, RAMs, and SVEs), which then will help Muslim countries? After all, those countries are scattered among the non-religiously based categories. This explanation, if true, suggests the Members are willing to entertain a remarkably roundabout, inefficient way of helping the *ummah*. Surely the better approach is to target the problem, as it were, directly.

The third explanation is realistic: sincere as they were in their original purpose for the Doha Round, the Members are politically and economically unable to resist their domestic business constituencies, which put short-term selfish interest above the long-term common good. This explanation best fits the facts. Commercial self-interest is

empirically verifiable lurking throughout the rules championed by various Members in the negotiating texts.

Unfortunately, led by a French Director-General, Pascal Lamy, for much of the Doha Round, one who works in a secular international organization in a Europe that sometimes prides itself as post-religious, questions about identifying poor, Islamic countries in need of special trade rules to fight poverty and thereby extremism never were asked. Mr. Lamy himself has grasped at any reason to justify the Round, except the most obvious one confronted every day, in dozens of countries, by brave men and women who serve, for example, in charitable, non-governmental organizations or in Special Operations Forces ("SOF") of the military. Preach the virtues of free trade, yes, but preach the link between free trade, religion, and a better future; Mr. Lamy would have none of it.

Rather, anointing major developing countries – Brazil, China, and India – into the elite group of WTO Members that could make or break a deal in the confines of the Green Room of the WTO Secretariat is as much of a revolution as the Director-General and Secretariat could orchestrate, tolerate, or imagine. Islam calls roughly 1.3 billion people, second only to Christianity, with about 2.2 billion followers. Who in that Green Room represents the Muslim world? Those three newcomers? The U.S. and EU, which hold fast to their traditional Green Room places and remain the final arbiters of any Doha Round deal?

The anointing of Brazil, China, and India also is part of the unwinding of the relatively straightforward, Uruguay Round era distinction among developed, developing, and least developed countries. It is redolent of the metastasizing of categories among WTO Members. Yet, if there is to be a new category, then surely that of "Islam" is as, or more compelling and as, or more consistent with the DDA, than any other category.