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Keywords

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SELECTED ASPECTS OF INTERNATIONAL TRADE AND THE WORLD TRADE ORGANIZATION'S DOHA ROUND: OVERVIEW AND INTRODUCTION

VED P. NANDA*

I.

International trade is credited with alleviating poverty for hundreds of millions in the world, especially in India and China.¹ However, not all have benefited from it. To illustrate, Africa's share in the world trade has declined since the 1990s, and sub-Saharan countries have been marginalized. The United Nations Development Program reported in 2005 that if Africa could have maintained the share of global export that it had in 1980, its export earnings would have been about \$119 billion higher then.² The report noted that "the share of world export of sub-Saharan Africa, with 689 million people, is less than one half that of Belgium, with ten million people."³

Multilateral trade negotiations are always complex and never easy to conclude. The current "Doha Round," formally called the Doha Development Agenda (DDA), was launched with high expectations in November 2001 in Doha, Qatar, after the failed Ministerial Meeting in Seattle in 1999. Conceived as a development round, it was scheduled to be concluded in 2005 and is still awaiting completion. The Director General of the WTO, Pascal Lamy, had earlier suspended the Doha Round Talks in July 2006 following a meeting of the principal negotiating countries—the United States, the European Community, Japan, Austria, Brazil, and India—as no agreement could be reached on agricultural

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Editor's Note: This Symposium edition of the Denver Journal of International Law and Policy includes works by scholarly presenters at the annual University of Denver Sturm College of Law Sutton Colloquium and Myres S. McDougal Lecture, Spring 2007, and the International Law Student Association annual fall conference held at the University of Denver, Fall 2007. Professors Cai, Duong, Kennedy, and Mr. Stencel presented at the Sutton Colloquium. Professor Halvorssen, Mr. Emory, and Mr. Jones presented at the ILSA conference. Professor Nanda graciously presented at both.

1. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION, ch. 5 (Oxford Univ. Press 2004).

2. U.N. Devel. Prog. [UNDP], *Human Development Report 2005: International Cooperation at a Crossroads—Aid, Trade and Security in an Unequal World*, 117, UN Doc. HDR2005 (2005) (Kevin Watkins lead author).

3. *Id.*

issues—both subsidies and tariff and quota protections—which remain the most contentious during this round.

Two years later, Lamy convened a meeting of the world trade minister in Geneva the week of July 21, 2008, “to bridge gaps in your positions,” and in the belief that “the chances are reaching agreement this month are better than 50 percent.”⁴ On July 4, in an open memorandum to the trade ministers, he said:

The coming weeks represent the moment of truth for the Doha Round. If we are to conclude the Doha Round, we must strike a deal this month on trade in agriculture and industrial goods, provide clear signals on opening services markets and clear the decks on the remaining issues.⁵

To the ministers “from our poorest and weakest members,” his message was: “You know this agreement will create new opportunities in the global marketplace and, coupled with an effective Aid for Trade package, could transform entire sections of your economy.”⁶ Subsequently, in opening the meeting of the Trade Negotiations Committee on July 21, 2008, Lamy said that for the action to conclude the Doha Round by the end of 2008 he could think of “no stronger spur... than the threats which are facing the world community across several fronts, including rises in food prices and energy prices and financial market turbulences.” He added, “There is widespread recognition that a balanced outcome of the Doha Round could in these circumstances could provide a strong push to stimulate economic growth, providing better prospects for development and ensuring a stable and more predictable trading system.”⁷

II.

There was a broad consensus in the 1980s that the weakness of the GATT must be corrected for the functioning of a viable multilateral trading system. The Uruguay Round negotiations were launched in September 1986, which were contemplated to last four years, but the Round was eventually signed in April 1994. The outcome was a most comprehensive trade agreement. Its success included the establishment of a framework of rules and commitments. It further reduced tariffs, opened up new markets and expanded the GATT reach by bringing under multilateral trade rules trade related to services, sanitary and phytosanitary measures, investment, and intellectual property, and by extending some multilateral disciplines to textile and clothing and agricultural issues. Its crowning achievement, however, has to be the creation of a new institution, the World Trade Organization, as the successor to GATT, which indeed heralded the transformation of the new international trading system.

In his appraisal of the Uruguay Round, the former Director General of GATT/WTO, Peter Sutherland, observes that developing countries were not

4. Pascal Lamy, *The moment of truth*, INT'L HERALD TRIB., July 4, 2008, at 6 col. 3.

5. *Id.*

6. *Id.*

7. World Trade Organization, *Lamy Says Time for Action is Now Amid Economic Threats*, WTO: 2008 NEWS ITEMS, July 21, 2008, http://www.wto.org/english/news_e/news08_e/meet08_chair_21july08_e.htm.

“really left out of the process,” while conceding that “the demands the Uruguay Round made on some developing countries were considerable and sometimes beyond their means. The need for capacity building and technical assistance was underestimated and only in recent years has that lack of support been corrected.”⁸ He acknowledges “the terrible reality that some of the poorest States are denied access to the trading system because they have neither the necessary human nor physical infrastructure.”⁹ The current Director General Lamy concurs:

[W]hile political decolonization took place more than 50 years ago, we have not yet completed economic decolonization. A fundamental aspect of the current Round of trade negotiations—the DDA—is to correct the remaining imbalances in the trade rules in favor of developing countries and to improve the rules by providing developing countries with authentic market opportunities.¹⁰

Notwithstanding these successes, the major criticism of the Uruguay Round is that overall the developing countries received little benefit from the negotiations. Although they were granted phase-in periods in many instances for assuming new obligations, developing countries faced large adjustment costs and lacked the necessary institutions, physical infrastructure and human resources to take advantage of these concessions. Also, developed countries failed to fulfill their promises to provide enhanced market access for developing countries and make significant reductions in trade-distorting agricultural subsidies.

III.

In contrast to the Uruguay Round, the Doha Round has emphasized the developing countries’ needs. The developing countries were actively engaged through the participation process in producing the Doha Development Agenda, which indeed was the beginning of a new era, for in all the prior eight WTO rounds, a small number of the developed countries were involved in the so-called Green Room negotiations, where they made the major decisions for all members. The reach of the Agenda, however, was seen by several developing countries as too extensive and ambitious, as they were concerned about their limited resources to effectively address the so-called “Singapore issues”—investment, competition policy, government procurement, and trade facilitation—as well as the inclusion of electronic commerce; the European Communities had insisted on the inclusion of these issues. But for the trade facilitation issue, the others were eventually dropped.

8. Peter D. Sutherland, *Leadership and Vision: Some Lessons From the Uruguay Round*, in WORLD TRADE ORGANIZATION, *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 49, 50 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008) [hereinafter *The WTO*].

9. *Id.* at 59.

10. Pascal Lamy, *The WTO Doha Development Agenda: Working For a Fairer Global Trading System*, in *The WTO*, *supra* note 8, at 5, 9.

The Doha Ministerial Declaration of November 14, 2001,¹¹ contains several elements related to development and alleviation of poverty. Among other benefits, developing countries would gain from technical assistance and capacity-building programs and from enhanced market access. The least developed countries (LDCs),¹² left behind and marginalized in the multilateral trading system, would be assisted so as to become effective participants.

The Doha Declaration calls for negotiation on outstanding implementation issues of special concern to developing countries and adopts the Decision on Implementation-Related Issues and Concerns,¹³ under which members expressed their determination "to take concrete action" to address implementation concerns of developing countries, including obstacles to implementation such as resource constraints. It includes, along with general implementation concerns, those related to specific agreements, such as the Agreement on Agriculture, the Agreement on Textiles and Clothing, the Agreement on Subsidies and Countervailing Measures, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Rules of Origin, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. The members also committed to negotiations on agricultural issues aimed at improving market access and reducing all forms of subsidies, reducing trade-distorting domestic support, and to negotiations aimed at reducing or eliminating tariff and non-tariff barriers to non-agricultural products, and negotiation on services.

The Doha Declaration especially addresses three issues of special importance to developing countries—trade-related aspects of intellectual property rights (TRIPs), technical cooperation and capacity-building, and special and differential treatment. It also makes special provisions for LDCs.

The Declaration calls upon the Council for TRIPs to study the relationship between the UN Convention on Biological Diversity and TRIPs, paying special attention to development.¹⁴ It emphasizes that TRIPs should be interpreted and implemented "in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines."¹⁵ On technical cooperation and capacity building, growth and integration, the Declaration endorses the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration, and calls upon the Secretariat to support efforts to bring trade into national development and poverty reduction plans.¹⁶ It also calls for the WTO to devise a plan for long-term funding of WTO technical assistance.¹⁷

11. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

12. LDCs are the world's 50 poorest nations as identified by international organizations.

13. Decision on Implementation-Related Issues and Concerns, WT/MIN(01)/17, in Doha Declaration, *supra* note 11, at para. 12.

14. *Id.* para. 19.

15. *Id.* para. 17.

16. *Id.* para. 38.

17. *See generally id.* paras. 39-41.

The Declaration notes the developing country-proposed 2001 Framework Agreement on Special and Differential Treatment,¹⁸ which had contended that the Uruguay Round had resulted in a “dramatic erosion” of Special and Differential Treatment (S&DT).¹⁹ The Declaration agrees to review all S&DT provisions “with a view to strengthening them and making them more precise, effective and operational,” and endorses the work program set out in the Decision on Implementation-Related Issues and Concerns.²⁰ Responding to the concern that few of the several S&DT provisions in the Uruguay Round Agreements are legally enforceable, it calls on the Committee on Trade and Development to consider how to identify mandatory S&DT provisions and how to incorporate them into the WTO rules.²¹

As to the LDCs, while the Doha Declaration expresses commitment to the goal of duty-free, quota-free market access for LDC exports, it acknowledges the commitments made by some WTO members to make their markets more accessible to LDC exports, including such initiatives as the European Union’s “Everything but Arms,”²² the “African Growth and Opportunity Act” of the United States,²³ and the “LDC Market Access” initiative of Canada. The Declaration also calls for continued work on LDC accessions to the WTO.²⁴

LDCs may not be able to take full advantage of the preference schemes mentioned above, in part because of restrictive “rules of origin” and non-tariff barriers such as stringent sanitary and phytosanitary requirements. These initiatives are often criticized because there are conditions attached.²⁵ In reality, market access for LDCs often remains illusory, for they lack the infrastructure as well as the resources for meaningful participation.

Over the years, the developed countries have failed to match the promising commitments they made in the Doha Declaration. For example, developed countries’ tariff escalation for many agricultural exports of developing countries

18. World Trade Organization, *Preparations for the Fourth Session of the Ministerial Conference: Proposal for a Framework Agreement on Special and Differential Treatment*, WT/GC/W/442 (2001).

19. Doha Declaration, *supra* note 11, para. 7.

20. *Id.* para. 44, available at www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm.

21. Doha Declaration, *supra* note 11, para. 12.

22. Under the “Everything but Arms” agreement, the EU gives LDCs complete duty- and quota-free access to the EU markets. Generalised System of Preferences Council Regulation (EC) No 2501/2001.

23. Under the African Growth and Opportunity Act the U.S. allows duty-free imports from sub-Saharan Africa when African nations meet certain criteria.

24. Doha Declaration, *supra* note 11, para. 42. See also Doha Declaration (endorsement of the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries), para. 43.

25. See, e.g., Belinda Calaguas, *et al.*, *Comment & Debate: No deal on Doha*, THE GUARDIAN, July 18, 2008, at 37. The July meeting in Geneva “will see the EU and the US once again attempt to pressure developing countries into opening their markets and natural resources to multinational companies in return for minimal reform of their damaging agricultural policies. Despite the fact that European politicians and Pascal Lamy are still calling these talks the ‘Doha development agenda’, real development dropped off the agenda a long time ago.” *Id.* The writers represent the civil society groups Action Aid, Friends of the Earth, War on Want, and the World Development Movement.

remains an acute problem. Also, the developed countries did not provide market access to the developing countries' products, especially textiles and agricultural products. Border protection measures in developed countries remained high, with even higher tariffs for processed products, creating the so-called "tariff escalation problem." As stated in a 2003 World Bank study, a processed final cocoa product faced as high as 186 percent tariffs in the United States and 63 percent in the European Union, while the average tariff on the import of the unprocessed product is no higher than 0.5 percent in the United States and European Union.²⁶ Director General Lamy states that "[i]n Japan, tariffs on coffee escalate from 0% on the raw product to 24% on the final product. Bound tariffs of the European Union for unprocessed coffee, tea, mate, and cocoa stand mostly at 0%, while some tariffs are above 50% for prepared or preserved products."²⁷ Trade distorting agricultural subsidies in both the US and the EC are also of great concern to the developing countries.

The trade negotiations stalled at the following ministerial meeting in Cancun in 2003.²⁸ Amid recriminations the meeting ended as a dismal failure without reaching any agreement. A coalition of the developing countries led by Brazil, China, and India found the US-EU joint proposal on agriculture inadequate and hence unacceptable because it lacked the needed reform on agricultural subsidies and tariff escalation. They responded to it with their own agricultural proposal, and were unwilling to give concession on other issues, including market access on industrial products and services.²⁹

The talks were resurrected with the July 2004 Framework Agreement reached at a meeting of the General Council in Geneva.³⁰ The Framework Agreement gave the LDCs exemption from liberalization commitments in agriculture. It also allowed developing countries to specify certain products as special, to which they could apply a special safeguard clause to be negotiated in order to combat import surges. The WTO members also accepted the principle that deeper cuts should be made to higher tariffs than lower tariffs.

The next ministerial meeting, held in Hong Kong, was a modest success as it ratified the decisions made at the Geneva meeting without, however, accomplishing much more.³¹ The members emphasized "the central importance of

26. See WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004 -- REALIZING THE DEVELOPMENT PROCESS OF THE DOHA AGENDA 2004, at 104 (2003).

27. Lamy, *supra* note 10, at 9.

28. For the concluding Ministerial Declaration, see World Trade Organization, Doc. WT/MIN(03)/20, available at http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_20_e.doc.

29. See generally Ernesto Zedillo, *The World Trade Organization's Biggest Problem at Ten: Surviving the Doha Round*, in *The WTO*, *supra* note 8, at 63, 67.

30. See Doha Work Programme, *Decision Adopted by the General Counsel on 1 August 2004*, WTO Doc. WT/L/579.

31. For the concluding Ministerial Declaration, see Doha Work Programme, Ministerial Declaration of 18 December 2005, WT/MIN(05)/Dec, available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm [hereinafter Hong Kong Ministerial Declaration].

the development dimension in every aspect of the Doha Work Programme and recommit[ted themselves] to making it a meaningful reality, in terms both of the results of the negotiations on market access and rule-making and of the specific development-related issues” they set out in the declaration.³² Of special note is the agreement to eliminate all forms of export subsidies, reduce trade-distorting domestic support, and restructure tariff cuts in agriculture negotiations.³³ Developed countries reaffirmed their commitment to eliminate all forms of export subsidies on cotton in 2006 and to give duty- and quota-free access for cotton exports from LDCs “from the commencement of the implementation period.”³⁴

Among LDC Agreement-Specific Proposals related to S&DT, developed countries are mandated and developing countries are encouraged to provide duty-free and quota-free market access for all LDC products by 2008 or no later than the start of the implementation period. Members who faced difficulties in doing so are to provide such market access for at least 97 percent of LDC products by that time period.³⁵ Members agreed that

the implementation by LDCs of their obligations or commitments will require further technical and financial support directly related to the nature and scope of such obligations or commitments, and direct[ed] the WTO to coordinate its efforts with donors and relevant agencies to significantly increase aid for trade-related technical assistance and capacity building.³⁶

The Hong Kong Ministerial Declaration also had a special emphasis on aid for trade. This initiative includes technical assistance so as to help countries to develop their strategies on trade, to negotiate more effectively, and implement outcomes of negotiating rounds. It also includes infrastructure, that is, building the roads, ports, and telecommunications linking domestic and global markets; productive capacity, which means that countries invest in industries and sectors so that they can diversify exports; and adjustment assistance to help developing countries with the costs associated with tariff reductions or declining terms of trade.³⁷ The Declaration calls aid for trade a “valuable complement” to the Doha Development Agenda,” which “should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO’s Agreements and more broadly to expand their trade.”³⁸

Members invited the Director General to create a task force to provide recommendations on how to operationalize aid for trade so that it could contribute most effectively to the development dimension of the DDA. They also invited the

32. *Id.* para. 2.

33. *Id.* paras. 4-10.

34. *Id.* para. 11.

35. *Id.* Annex F.

36. *Id.*

37. See generally World Trade Organization, Development: Aid for Trade -- Aid for Trade fact sheet, available at http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm.

38. Hong Kong Ministerial Declaration, *supra* note 31, para. 57.

Director General to consult with members as well as with relevant international organizations, the regional development banks, the IMF and the World Bank, with a view to reporting to the General Council on appropriate mechanisms to secure additional financial resources for aid for trade, where appropriate through grants and concessional loans.

The Director General accepted these recommendations. He engaged in a series of consultations with the pertinent institutions on securing additional financial resources for aid for trade. He also established a task force as suggested to advise on how best to deliver this additional funding. The task force's recommendations³⁹ included a call for strengthening the "demand side" and the "donor response," and for closing the gap between "demand" and "response" at the country, regional, and global level. Another recommendation was for the WTO to monitor and evaluate aid for trade.

Director General Lamy is a strong proponent of aid for trade in the WTO agenda. The following two statements clearly indicate the importance he attaches to this initiative. In his words, aid for trade

has an important political role to play as a complement to the trade negotiations. Additional development assistance can help [the developing] countries address trade bottlenecks and unlock their full trade and growth potential. Aid for Trade is about translating theoretical trade opportunities for developing countries into realities. Results on aid for trade are not contingent on the conclusion of the [Doha] Round, but its value and importance will be greatly increased if it is implemented in conjunction with substantial new market access opportunities and new rules on trade facilitation.⁴⁰

In opening a conference in September 2007 in Lima, Peru, entitled "Mobilizing Aid for Trade: Focus Latin America and the Caribbean," Lamy highlighted the role of aid for trade in meeting developing countries' needs. He said:

Today's global economy—which could be widened and strengthened by the conclusion of the Doha Round—is fundamentally changing the development dynamic, creating huge potential for developing countries to harness trade as an engine of growth. But to seize this opportunity, they also need access to the basic infrastructure that drives globalization—21st century transport corridors and telecommunications networks that can connect exporters to world markets; modern customs facilities that can move products rapidly and efficiently across borders; testing labs to ensure that exports meet international standards; financial "safety nets" to ease concerns about economic adjustment and shocks;

39. World Trade Organization, Task Force on Aid for Trade, Recommendations of the Task Force on Aid for Trade, WTO Doc. WT/AFT/1, 27 July 2006.

40. Lamy, *supra* note 10, at 11.

and the sophisticated expertise and institutions needed to navigate a highly complex world trading system.⁴¹

Three regional reviews on Aid for Trade were organized with the help of the WTO in 2007 in Lima, Peru; Manila, the Philippines; and Dar-es-Salaam, Tanzania. Subsequently, the first global Aid for Trade review was held in Geneva in 2007, which featured the participation of a number of trade and development ministers and heads of regional development banks and the World Bank, IMF, and the OECD.⁴²

In February 2008, the WTO Director General proposed an Aid-for-Trade Roadmap, which featured national and sub-regional reviews in Africa, Latin America and the Caribbean, and Asia and the Pacific. These reviews would be

focused, technical, and results-oriented, with the aim of assisting in advancing—and then monitoring—the implementation of concrete national and sub-regional strategies. The broad objective would be to showcase how Aid-for-Trade strategies can progress—and are progressing—and to create incentives for others to follow suit.⁴³

The next global review of aid for trade by the WTO General Council is scheduled to be held in Geneva in spring/summer 2009, to “provide political guidance, momentum and the ‘big picture’ on implementation and evaluation.”⁴⁴

The European Union provides a promising example of a region operationalizing aid for trade. On October 15, 2007, it adopted an Aid-for-Trade Strategy.⁴⁵ The strategy is designed to support all developing countries, especially LDCs, so that they could better integrate into the world trading system and to use trade more effectively toward the objective of eradicating poverty in the context of sustainable development.

In April 2008, an EU Commission staff working paper provided a report as the first monitoring exercise after the adoption of this strategy.⁴⁶ According to the report, 20 of the 27 EU member states “had on-going co-operation activities in the field of Aid for Trade,” and “good progress is being made” toward meeting the specific EU pledge to provide €2 billion annually to Trade Related Assistance by 2010.⁴⁷ The report states:

41. World Trade Organization, *Aid-for-Trade Initiative “Critical” for Latin America and the Caribbean* Lamy, 13 September 2007, WTO NEWS: SPEECHES, www.wto.org/english/news_e/sppl_e/sppl68_e.htm.

42. See World Trade Organization, *Aid For Trade -- From Making Trade Possible to Making Trade Happen*, www.WTO.org/english/tratop_e/dda_e/meet08_brief10_e.doc.

43. World Trade Organization, *2008 Aid-for-Trade Roadmap, Annotated Update*, 4 June 2008, www.wto.org/english/tratop_e/devel_e/a4t_e/a4t/ext/roadmap08_e.doc.

44. *Id.*

45. Aid for Trade: EU Council agrees on Strategy, 15 October 2007, http://www.europa-eu-un.org/articles/en/article_7395_en.htm.

46. Commission of the European Communities, Commission Staff working paper, Com (2008) 177 final SEC (2008) 431-435 (April 9, 2008).

47. *Id.* at 2.

The EU AfT [Aid for Trade] Strategy is comprehensive: it embraces "classical" Trade Related Assistance (TRA: Trade Policy and Regulation; and Trade Development), as well the other areas stressed by the WTO Aid for Trade Task Force: Productive Capacity Building; Trade Related Infrastructure; and Trade Related Adjustment. The double focus on more resources and better impact on development objectives is complementary. The strategy is closely linked to a growing international momentum....⁴⁸

This initiative could indeed provide the assistance needed by developing countries so that they could become active participants in the international trade arena. The obvious prerequisite for its success, however, is that the existing trade rules be changed to show sensitivity to what the developing countries need most—substantial market access to their products in rich countries and a change in the rules on trade facilitation.

IV.

The week of July 21, 2008, was a period of intense negotiations in Geneva. The revised draft texts of the July 10, 2008, proposals for agricultural market access⁴⁹ and for non-agricultural market access⁵⁰ provided the bases for these negotiations. Ultimately, on July 29, the talks collapsed. The seven representative negotiating partners—Australia, Brazil, China, India, Japan, the European Union, and the US—finally gave up when access to developing countries' markets for agricultural products from developing countries could not be resolved and Director General Pascal Lamy's efforts to broker a compromise failed. The demand of India and China that their farmers be given special protection was a major point of division, revealing those countries' new and growing impact in the international trade arena.⁵¹ Most observers felt that the Doha Round is not finished, however, because the compromises already in place could form the basis for further talks.

48. *Id.*

49. Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.3 (July 10, 2008) available at www.wto.org/english/tratop_e/agric_e/agchairtxt_july08_e.pdf. The aim of negotiations is to reform agricultural trade primarily in three areas: market access (tariffs, tariff quotas, and safeguards), domestic support for farmers and for agriculture, and export subsidies. The modalities are the way or method of doing something, which in the Doha negotiations means the plans for the final deal, for example, how to cut tariffs and reduce agricultural subsidies and support, along with flexibilities to address various sensitivities.

50. Negotiating Group on Market Access, *Draft Modalities for Non-Agricultural Market Access Third Revision*, TN/NA/W/103/Rev.2 (July 10, 2008) available at www.wto.org/english/tratop_e/markacc_e/namachairtxt_july08_e.pdf. The aim of the negotiation is elimination or reduction of tariffs and non-tariff barriers on industrial products, especially products for export from developing countries. The crucial elements for negotiation include flexibilities for developing countries to shelter some sensitive sectors from the full impact of tariff reductions and special treatment for LDCs.

51. *See So Near and Yet So Far; World trade*, ECONOMIST (London), August 2, 2008; *The Next Step for World Trade*, N.Y. TIMES, August 2, 2008.

V.

This Symposium edition addresses several pertinent issues related to international trade, including the Doha Round. Professor Kevin C. Kennedy and John Stencel, past president of Rocky Mountain Farmers Union, present their distinct perspectives on an issue of critical importance to developing countries—agricultural subsidies and US protection of farmers and agriculture. Professor Phoenix Cai studies the vast potential of aid for trade and recommends the means necessary to make this initiative a success. Other issues related to international trade are those of global warming, discussed by Professor Anita Halvorssen, and enforcement issues, discussed by W. Davis Jones and Richard W. Emory, Jr., of the US Environmental Protection Agency. Finally, Professor Wendy Duong studies the impact of artificial intelligence on the future trends of foreign direct investment (FDI) in developing countries, especially LDCs.

In his contribution, *The Doha Round Negotiations on Agricultural Subsidies*, Professor Kennedy discusses at length the special situation of the west and central Africa countries of Benin, Burkina Faso, Chad, Mali, and Togo, whose exports are dominated by cotton. Agricultural exports represent over 60 percent of their earnings and nearly 30 percent of their total export earnings.

After discussing the level of subsidies to their cotton producers by several countries, including the United States, Kennedy reviews the efforts made in the WTO negotiations to treat cotton subsidies as a stand-alone issue and outside the agricultural negotiations, but without any success. He also considers the impact of the 2004 Brazilian proceedings against the United States through the WTO dispute settlement mechanism. The Appellate Body ruled in 2005 that US domestic subsidies to cotton producers had caused serious prejudice to Brazil in world cotton markets because they had a price-suppressing effect on world prices. He refers to various studies that demonstrate that US subsidies also affect world cotton prices.

Professor Kennedy provides a detailed analysis of the efforts made thus far to reform cotton subsidies and explores the future prospects of similar efforts. As to domestic subsidies, he considers the best near-term solution to be for subsidizing nations to fully decouple support—that is, support not tied to production in any respect—rather than provide price support. And he discusses specific features of such support—that it has to be the only form of farm support; that the existing condition for such support that land stay in agriculture should be eliminated; and that all export subsidies and domestic subsidies in the form of decoupled support should be progressively phased out. He also recommends internal reforms that sub-Saharan countries should undertake and suggests that they form a regional trading bloc.

Professor Kennedy endorses a suggestion made by the United Nations Conference on Trade and Development (UNCTAD) that phasing out of agricultural support should coincide with increased international financial and technical assistance to agriculture in the LDCs aimed at promoting agricultural productivity growth and commercialization. He finds US agricultural policy to be unintentionally working at cross purposes with the African Growth and

Opportunity Act. He surmises that successful Doha Round negotiations could perhaps achieve meaningful reform of agricultural subsidies. If these negotiations were to fail, he fears that "litigation may unfortunately replace negotiation as the default mechanism for forcing reforms."

In *Free Trade Versus Fair Trade*, John Stencel, past president of Rocky Mountain Famers Union, warns that liberalized trade will not cure all of agriculture's ills. He argues instead for "fair trade" as essential to American agriculture. In his words,

markets fluctuate, currency values change, trade balances shift, and supply and demand varies. That is the way markets work. That is why farmers and ranchers need federal farm programs, antitrust protections, and transparent trade agreements. The nature of the markets, coupled with the current free market ideology and undue market influence of international corporations, mean that the present situation in agriculture is not an aberration but a *chronic condition* brought to bear upon farmers by our public policy choices.⁵²

By a fair trade system, he means the one that "protects the economic well-being, health and environmental concerns, working conditions and labor rights" of US producers as well as producers from all other countries.⁵³

Stencel contends that bilateral Free Trade Agreements and regional trade agreements the US has negotiated have damaged the US agricultural economy. He considers the expanding export market for US agricultural products as failed policy for, in his opinion, the export problems our policy-makers identify and the free-trade answers they seek do not address the fundamental problems faced by American agriculture and do not reflect the realities of global trade either. Overproduction, he says, is not a key problem, which he considers to be an oversimplification. Instead, he argues that domestic farm policy and trade agreements, not farmers' overproduction, create the problem. Stencel suggests the establishment of a farmer-owned inventory control mechanism for farmers, as advocated by the Farmers Union. This, he argues, would protect against supply and demand market fluctuations as part of an income support mechanism to bolster farm prices for producers. The free trade mentality, he says, is not the answer.

Stencel supports a community-based strategic biofuels program and a US policy of "managing plenty" of the farm programs with a floor under commodity prices and effective control of crop mix and acreage and price stabilization to producers. Just eliminating trade barriers and eliminating subsidies, he argues, would not result in significantly higher prices for farmers anywhere, as in his view the high subsidy levels both in the US and Europe are not the cause but the result of low prices. He believes that in agriculture, and especially in the global marketplace, giant multinational corporations have the capability to dominate conditions of trade at the expense of smaller businesses and individuals. Thus,

52. See Stencel, *infra* p. 366 (emphasis in original).

53. *Id.* at 349.

eliminating trade barriers and globalizing markets would encourage these dominant players to grow even bigger.

Stencel is critical of trade agreements because they could eliminate the farmers' few protections, such as domestic safety net programs and marketing agencies, and could result in lowering labor standards and environmental protections. He recommends new trade rules to combat world hunger and malnutrition. These new rules should ensure the establishment of an international food reserve to assure supply when production is hampered by natural disasters. He also would like to have established a national or international energy reserve of commodities that could be processed into energy. He concludes: "Agricultural producers are in a global market that whipsaws food producers into the fruitless quest to be the lowest cost producers. We need a global market that rewards farmers for participating in the world's greatest occupation—growing food."⁵⁴

In *Aid for Trade: A Roadmap for Success*, Professor Phoenix Cai critically examines in an historical context this new initiative as a complement to the Doha Round. She first describes the evolution of trade-related aid from the middle of the 20th Century, which was initially characterized by the recipients' having little say in the decision-making process, as aid was usually driven by political or commercial considerations of the donors. Thus, recipients had no sense of ownership or meaningful participation in the trade negotiations. She relates one success story—that of the Ozone Convention and its Protocols—where the developing countries assumed ownership and actively participated in the process; they were provided the needed financial and technological assistance to do so through the Convention's Multilateral Fund. This she offers as a promising model framework for a successful aid for trade system.

After sketching the current state of aid for trade, Professor Cai provides a compelling case for the WTO to use this initiative as a promising opportunity for the organization to shed its image as a non-transparent organization and instead enhance its transparency and increase its democratic participation. Aid for trade, she argues, plays a significant part in facilitating the developing countries' participation in the multilateral trading system. However, she evidences how developing nations have been marginalized because of their lack of adequate and effective market access for their goods and services, coupled with technical implementation challenges related to agreements on textiles and clothing, anti-dumping, and TRIPs. She suggests that only at the level of ministerial negotiations can these issues be addressed and obstacles overcome.

Professor Cai's discussion of the tension between aid and trade is thorough and insightful. She discusses among other issues the challenge of donor control and the pivotal role of the recipient government in taking ownership to ensure development success. She is a strong proponent of developing countries' active participation in trade negotiations.

54. *Id.* at 367.

In her "roadmap for success," Professor Cai provides concrete recommendations for the main actors—the WTO, developing countries, the trade legal community—academics, practitioners, and experts —, and donors. These include bringing Doha to a successful conclusion, providing demand-driven technical assistance, assisting developing countries in bolstering their participation, and enhancing transparency and democracy in the multilateral trading system.

Professor Cai recommends that the developing nations should consider aid for trade as an opportunity to gather the necessary empirical evidence to convince developed countries that they need to change their policies so that they provide meaningful benefits to the developing countries. This would require the developing countries to provide "frank and detailed" assessments to the Task Force on Aid for Trade, to ensure better coordination among themselves, and to skillfully use the pertinent information in multilateral trade negotiations.

Professor Cai proposes that the trade legal community play a prominent role in making aid for trade a success by actively engaging with their aid counterparts and by providing pro bono legal assistance. As for the donors, she has several suggestions. In addition to contributing aid funds, they must ensure that the recipients assume ownership so that aid is country-driven. They should refrain from attaching damaging conditions to providing aid for trade—they should give it simply as aid and not "in the guise of complex financial arrangements that may result in greater debt for developing countries."⁵⁵ Also, they should decouple aid for trade from results in the Doha Round or future trade negotiations.

In her conclusion, Professor Cai sums up the significant role that aid for trade can play: "The international trading system has much to gain from the effective use of aid for trade as a tool for fulfilling the promise of the Doha Development Agenda, alleviating global poverty and giving developing nations a well-deserved place at the table in the global trade regime."⁵⁶

In her article, *UNFCCC, the Kyoto Protocol, and the WTO—Brewing Conflicts or are They Mutually Supportive?*, Professor Anita Halvorssen suggests that the climate change treaties and the WTO regime share the common goal of promoting human welfare. She examines the relationship between the WTO and the climate regime—the UN Framework Convention on Climate Change and its Kyoto Protocol—and recommends the necessary changes in this relationship which would allow the urgent action needed to address climate change can be taken. Her advice: "Any trade measures inserted into the climate treaties should be carefully written in order to avoid conflicts with the WTO rules and the WTO rules need to become more sensitive to the new scenario of trade measures used to address climate change."⁵⁷

The changes she recommends include a suggestion that the WTO membership negotiate and adopt an agreement on climate change and trade, which would

55. See Cai, *infra* p. 322.

56. *Id.* at 324.

57. See Halvorssen, *infra* p. 377 (citation omitted).

encompass the already-proposed trade in climate friendly technology, not only covering goods and services but also addressing emissions-trading issues. She further calls for the establishment of a Committee on Trade and Climate Change to address areas where trade and climate issues intersect.

In her study of the WTO background, she suggests that the ruling of the *Shrimp-Turtle Case*

has opened the door to the possibility of the WTO deciding future cases in favor of states utilizing measures to address the PPMs, not just the products' attributes. In the context of climate change, WTO member states can perhaps claim Art.XX(g) directly when taking measures against other members' products *produced* using highly GHG emitting energy sources. The argument would be that the PPM measures were used for the protection of an exhaustive natural resource, specifically the climate system which is being endangered by GHG emissions.⁵⁸

Professor Halvorssen offers these proposals after providing a thorough background on anthropogenic sources of GHG emissions and their relationship to trade, and reviewing the UNFCCC and its Kyoto Protocol, especially the pertinent trade-related articles and Kyoto's flexible market mechanisms—emission trading, joint implementation, and the clean development mechanism.

In the first of the two essays on national enforcement, Richard Emory, Jr., senior attorney in the international compliance assurance unit of the US Environmental Protection Agency, offers recommendations for Secretariats and Conferences of the Parties (COPs) to multinational environmental agreements (MEAs) so that they can support and strengthen enforcement by governments to achieve compliance with national laws to implement a Party's MEA obligations. In his essay, *Improving National Enforcement for Better Governance Implementing MEAs*, he describes the essential structural and institutional measures a Party should undertake so that MEAs are better able to support national enforcement.

Emory offers a number of recommendations addressing mostly systems, process, and operations. One is for the Parties to an MEA to form an enforcement committee. Another is for the MEA secretariat to hire more staff with the relevant experience as enforcers. Also, one unit of the United Nations Environment Program should be designated as the coordinating lead agency, perhaps with some new powers and duties, for enforcement issues affecting all or many MEAs.

Focusing on import/export control, Emory offers "simple and effective" measures to combat illegal international trade that undercuts MEAs. Each Party should designate and empower one unit among its MEA Focal Points to be "National Lead for MEA Enforcement Coordination," and should link its customs ministry with its environmental (and other MEA focal point) ministries. Among other recommendations, Parties should move, with the assistance of secretariats, to develop and, by decisions of the COPs, require product-specific codes so that

58. *Id.* at 376.

modern methods including computers can be used. Parties should also adopt systematic approaches to monitor compliance for imports and exports. For this to happen, MEA secretariats should design and propose more standardized licensing schemes and movement documents.

Emory's other "commonsense" approaches for Parties include their developing an intelligence capability to anticipate illegality and to assess threats. He cites the example of the Montreal Protocol, as the Parties to that Protocol failed to anticipate illegality and to assess threats, because they did not foresee that the Protocol's implementation would bring about black markets and smuggling by organized and entrepreneurial criminals. Thus, he recommends that each chemical and its market should be studied for most chemicals covered by the Stockholm Convention and the Rotterdam Convention. Also, criminal penalties must be available to maximize deterrence so that prosecutors and judges are able to punish serious violations.

Emory's final recommendation is that legitimate trade industry, such as trade associations of importers and exporters, should be engaged as partners by MEAs' secretariats and parties. He cites the example of the private sector providing key assistance, including intelligence and sampling equipment, to the US government in its enforcement of the US Clean Air Act which is required for the implementation of the Montreal Protocol. MEA secretariats and concerned parties are asked to exercise more leadership in proposing models and possible standards to all parties, piloting these measures among willing parties. Successful measures should become international standards and MEA treaty obligations as prescriptions by decisions of COPs.

In his essay, *The Relationship Between Trade and Effective Enforcement*, W. Davis Jones, International Enforcement Training Coordinator in the US EPA, discusses the role of the EPA and other government agencies, such as the Department of State and the Agency for International Development, in helping to build long-term capacity with trading partners; this capacity is aimed at achieving effective environmental compliance and enforcement programs. He explains that because the US is entering into so many bilateral and regional preferential trade agreements, which include environmental provisions to promote public participation, there is a need to build the partners' capacity. These agreements also include measures to enhance environmental performance and to provide appropriate remedies for violation of environmental laws. He notes that there are significant enforcement concerns with the various environmental provisions of these agreements.

Jones gives the example of the provision on public submission process embodied in the agreement between five countries in Central America, the Dominican Republic, and the United States (CAFTA/DR), and another provision outlining an enforcement procedure to follow if the prior clause is violated. Under this process, the Humane Society International filed such a submission in May 2007 alleging that

by failing to complete a comprehensive inventory of products made from sea turtles as required by domestic law, the Dominican Republic is

failing to effectively enforce sea turtle protection laws prohibiting the sale of products manufactured from endangered sea turtles that were captured and killed in the country after July 31, 2001.⁵⁹

The Dominican Republic has been formally requested to submit a response to the points raised in the submission.

Jones suggests that many US partners in these agreements have gaps in their compliance programs, and that an effective compliance program must include compliance incentives and compliance assistance, along with compliance monitoring. It also must have provisions for sanctions and legal remedies for violation of the Party's obligations under the law.

Although "effective enforcement" is not clearly defined in such bilateral and regional agreements, these agreements do include provisions for judicial, quasi-judicial, or administrative proceedings to be in place to sanction and remedy violations. Jones details the full range of activities to be undertaken in an enforcement cycle. These include setting environmental goals, creating awareness and understanding of the problem, and planning and implementation of a program to address the problem's causes. Evaluation of the effectiveness and results, and recommendations for changes to improve the various components of the cycle, are essential as well.

Jones warns that the ideal response does not lie with the transplants of US laws in these countries, for the situations there could be different and most of the US laws may not work effectively in other contexts and would need to be adapted for particular situations. He also recommends that the programs must set priorities and the regulators must develop strategies to effectively monitor compliance, which could be done in many ways, such as through government inspections, industrial self-monitoring, or citizen monitoring and reporting.

Finally, Jones suggests that punitive responses to violations, which are consistently, fairly, and appropriately applied, are essential. Also, there should be internal and external program evaluation and Environmental Compliance and Enforcement Indicators could be helpful to assess whether resources have been utilized appropriately and to assess the kind of benefits resulting to the environment. He concludes:

It took USEPA over thirty years to evolve into the existing Compliance and Enforcement program. Through cooperation with trading partners, the U.S. government can use its experience in environmental control to share successes and failures and accelerate the program development in countries worldwide to ensure that everyone effectively enforces their environmental laws, achieving high levels of environmental protection.⁶⁰

In *Effect of Artificial Intelligence on the Pattern of Foreign Direct Investment in the Third World: A Possible Reversal of Trend*, Professor Wendy Duong

59. See Jones, *infra* p. 391.

60. *Id.* at 394.

expresses her concern that large-scale industrial application of optimum Artificial Intelligence (AI) in the 21st Century may halt the flow of foreign direct investment from the developed countries to the developing countries by changing investor behavior and eliminating the developing countries' comparative advantages. Consequently, AI could bring about the return of 19th Century colonialism.

Professor Duong provides a simple definition of AI as the simulation of the human brain by a computer. She explains:

In AI research, scientific efforts are made to identify those superior functions of the brain that can be *simulated* – for example, what an engineer will do to come up with the system design for factory production. Then, mathematical models, *especially algorithm*, are used to express, memorialize, and document these human brain functions. The models are then fed into a computer, such that when a standardized instruction or an inquiry is given, the computer will generate the result exactly like the work product of the engineer. This enables the computer software to replace the engineer.⁶¹

She supports her thesis with several studies by UNCTAD, the Organization for Economic Cooperation and Development (OECD), and the World Bank. She suggests that multinationals from the developed world may substitute AI for many employees in developing countries, for AI

can literally eliminate the “middle level” of native labor where training and technology transfer once typically occurred – those mid-level supervisors who used to handle machineries and make the system run by exercising and implementing human decisions. Now, AI will be doing their job. The foreign investor (i.e., the multinational) can now limit knowledge of the AI system design to the “privileged few” in the native population who can receive the knowledge-base crucial to AI — only those “privileged few” can afford and are given the opportunity to join the information-based global society. Thus, AI can tremendously increase the gap between these few ruling elites and the massive bottom-level workforce, bringing the scenario back to the 19th century model of production, despite the high-tech sophistication of the “digital factory” work environment.⁶²

She asks, “So, in such a vision, what good does it do for a Third World country to join the WTO? Free trade will only enable such Third World country to keep on exporting raw materials and agricultural products to feed the world, a world ruled by the high-tech producers.”⁶³ And she warns that AI can perpetuate this imbalance.

Professor Duong calls for systematic and coordinated transnational regulation in all relevant areas of the law, ranging from global labor laws and policies to global anti-trust, intellectual property, technology export control, immigration,

61. See Duong, *infra* p. 327

62. *Id.* at 329.

63. *Id.*

communication, and technology licensing laws and policies. She suggests that “the only real solution that can effectively protect the global workforce must lie in a revolutionary framework that can somehow transcend, or even abolish, the existing sovereign structure in order to achieve universal, transnational democracy.”⁶⁴

64. *Id.* at 334.

