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Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy - Agricultural Tariffs and Subsidies

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ARTICLE

POVERTY, ISLAMIST EXTREMISM, AND THE DEBACLE OF DOHA ROUND COUNTER- TERRORISM: PART ONE OF A TRILOGY—AGRICULTURAL TARIFFS AND SUBSIDIES*

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* Parts Two and Three of the Trilogy appear as follows: Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy—Non-Agricultural Market Access and Services Trade*, 44 CASE W. RES. J. INT'L L. 325 (2011) (War Crimes Research Symposium on International Law in Crisis), and Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy—Trade Remedies and Facilitation*, 40 DENV. J. INT'L L. & POL'Y 237 (2012) (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 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 INT'L LAW. 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 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 LOY. U. CHI. INT'L L. REV. 5 (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 TEX. INT'L L.J. 1 (2009), which analyzes the Round from the July 2008 collapse through July 2009.

(5) *Doha Round Betrayals*, 24 EMORY INT'L L. REV. 147 (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 TUL. J. INT'L & COMP. L. 3 (2008).

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I. ARGUMENT OF THE TRILOGY: TRADE AS COUNTER-TERRORISM

International trade law always has been about economic development. International trade law always has been about national security. And, since the advent of Islam in 610 AD with the first revelation from Allâh through the Archangel Gabriel (in Arabic, *Jibreel*) to the Prophet Muhammad (Peace Be Upon Him (PBUH)), Muslims have been engaged, in one way or another, in international trade law.

Thus, it is a fallacy to think that poor or Muslim countries are newcomers to the modern world trading system. The first two paragraphs of the Preamble to the General Agreement on Tariffs and Trade (GATT) state:

The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods¹

From these paragraphs, two points are evident.

First, of the twenty-three original GATT contracting parties, eleven were poor countries (Burma, Ceylon, Chile, China, Cuba, Southern Rhodesia, and South Africa, plus India, Lebanon, Pakistan, and Syria). Second, four of the countries (India, Lebanon, Pakistan, and Syria) were Muslim or had sizeable Muslim communities. In other words, half of the countries founding the modern multilateral trading system in the aftermath of the Second World War were developing or least developed, and nearly 20% of them embodied Islam in a significant way. These figures understate both points because Belgium, France, Netherlands, and United Kingdom all held sway over vast poor and/or Muslim territories when GATT entered into force on 1 January 1948.

Second, the original contracting parties did not view international trade as an end in itself. Rather, it was an instrument for economic growth and enhanced living standards. International trade was a, but not the only,

1. General Agreement on Tariffs and Trade, pmb., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], reprinted in RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 113 (3d ed. Supp. 2008).

means to raise incomes and generate jobs. After all, no nation in history has achieved sustained economic success through autarky.

It also is a fallacy to think international trade law is divorced from national security. Since ancient times, securing trade routes and assuring essential supplies of goods or services that cannot be obtained domestically has been a critical element in the rise and fall of empires. Sustained imperial development has meant some degree of economic integration and interdependence, and a set of rules for commercial intercourse, which in turn has demanded attention to threats to patterns and conduits of imports and exports. The histories of many empires, from the Roman and Carthaginian, through the Arab-Islamic and Ottoman Turkish, to the British and American, all reveal a link between international trade and national security.

This long-standing nexus among international trade law, economic development, and national security, in which Islam is engaged, is all the tighter in the post-9/11 world. Spread around the world, many Muslim communities, marginalized by poverty, have little hope for a brighter future through opportunities from multilateral trade liberalization. Extremism, even accompanied by violence, is a gravely sinful temptation to which some of the marginalized poor are vulnerable. Weapons technology aided by evil genius has multiplied the force threat posed by violent extremist organizations (VEOs) to the global capitalist order, of which the trading system is an essential part.

It was this nexus, in the aftermath of the September 11 terrorist attacks, which drove Members of the World Trade Organization (WTO) to launch the Doha Development Agenda (DDA), commonly called the Doha Round, in November 2001. It is this nexus that the Members have long since betrayed. The thesis of this article is that the Doha Round is a failed counter-insurgency operation. The Round has lost nearly all links to its original purpose. That purpose was trade liberalization to spur development in a post-9/11 context in which extremism is wrongly perceived by some disaffected, impoverished, and thus marginalized Muslims as an alternative to stake-holding in the world trading system.

Why this failure? Because the WTO Members have succumbed utterly to the pursuit of commercial self-interest, so their Doha Round dealings have become a monstrous mishmash of minutiae. The Members have produced draft-negotiating texts that are so devoid of vision and so replete with exceptions that they are not fit for a dog's breakfast. To use a different metaphor, Members have turned the Round into an exercise in Social Darwinism, forgetting the common good—to use multilateral trade liberalization to fight poverty and thereby Islamist extremism.²

2. See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (George Braziller, Inc. rev. ed. 1959) (explaining Social Darwinism).

Not surprisingly, therefore, in anticipation of the December 2011 WTO Ministerial Conference in Geneva, Members in August 2011, after a decade of Doha Round negotiations, sounded three themes. First, to save face for the WTO, it should be made clear to the international trade community that the Organization and Round are not synonymous.³ Failure of the Round should not damage the credibility of the WTO. Second, the single undertaking methodology, by which Members do not officially agree on any item until all of them have agreed on all items (i.e., nothing is agreed until everything is agreed, and all Members must agree to everything, thus horizontal trade-offs across different sectors and topics are required), should be revisited.⁴ Possibly, it should be abandoned in favor of a more flexible approach that would account for the size, diversity, and complexity of the Membership. Third, to move beyond the Round without formally declaring it dead, discussions on “twenty-first century issues” should proceed.⁵ Such issues would include agricultural export restrictions and food security, climate change, electronic commerce (particularly whether to extend the 1998 *Moratorium on Customs Duties on Electronic Transmissions*, i.e., the moratorium on collecting duties on goods transmitted digitally over the internet), foreign direct investment (FDI) and competition policy, foreign exchange rates and trade, intellectual property protection (particularly whether to extend a moratorium on non-violation nullification and impairment cases under the *WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*), trade rules and innovation, and transparency in customs facilitation.

All three themes are problematic. The first one is a lie. If the WTO cannot conclude a multilateral trade bargain, then it has failed at one of its essential purposes—multilateral trade liberalization. To be sure, there are other reasons for its existence, most notably, dispute resolution and monitoring and surveillance. But, it no longer is the single, indispensable forum for grand, global trade bargains. The second theme calls for betrayal of a historic mode of operation, dating from the era of how the Contracting Parties, acting jointly (i.e., the CONTRACTING PARTIES), under GATT worked. It also intimates a betrayal of developing and least developed countries, accusing some of them of playing the role of “spoiler,” seeking the “lowest-common denominator outcomes,” or free-riding on the concessions of others.⁶ In an age when they comprise the vast majority of the Membership,

3. See Daniel Pruzin, *Upcoming WTO 2011 Ministerial Expected to Echo 2009 Gathering as Low-Key Affair*, 28 Int'l Trade Rep. (BNA) No. 32, at 1305 (Aug. 11, 2011).

4. See Len Bracken, *Business Representatives Explore Ways to Liberalize Trade as Doha Round Falts*, 28 Int'l Trade Rep. (BNA) No. 31, at 1274, 1274–76 (Aug. 4, 2011).

5. See Pruzin, *supra* note 3, at 1305; Bracken, *supra* note 4, at 1275.

6. Such were the epithets used in Susan C. Schwab, *After Doha—Why the Negotiations Are Doomed and What We Should Do About It*, FOREIGN AFF., May–June 2011, at 104, 111 (emphasis added). Ms. Schwab served as United States Trade Representative (USTR) from 2006–2009. Yet, Ambassador Schwab goes on to note that “one of the WTO’s most important characteristics is the

their individual and collective voice, through their ability to join or block a consensus, is suppressed. The third theme is misleading. Several of the issues are not time-bounded; that is, they existed in the twentieth century, and Members considered some of them when they debated what to put on the Doha Round agenda.

Regardless of the merits of the three themes, what is telling is that the WTO Members raised them. Their doing so manifests their loss of purpose. No longer are they dedicated to poverty alleviation and the struggle against Islamist extremism. That is, no longer do they seek to use multilateral trade liberalization as a counter-terrorist weapon.

It is said the Doha Round is “intended to improve global market access by cutting massive farm subsidies in rich countries and import tariffs in poorer ones”⁷ That characterization is simplistic: it is true as far as it goes, but it does not go far enough. The Round—intentionally launched in the heart of the Arab Muslim World—was thought to be an important way to fight oppression, and thereby wean people in poor countries, especially ones with significant Islamic populations, away from anti-capitalist thinking and, worse yet, violent action.

Unfortunately, in the Doha Round, the Members, and chiefly among them the United States (U.S.), European Union (E.U.), Brazil, China, and India, have used legal details to advance their narrow agendas. Since ancient times, city-states and countries have negotiated out of self-interest. Yet this time, in this Round, the dominant Members have taken self-interest to such a level that it is proper to query whether they are the extremists. They have lost all sight of the common good, and sacrificed the broad purpose of the DDA, which might be characterized as an effort to prove once and for all that Francis Fukuyama, in *The End of History and the Last Man* (1992), not Samuel Huntington, in *The Clash of Civilizations* (1996), was right. The middle “D” bespeaks the purpose of the Round, development, and intimates the follow-on link between boosting development and fighting Islamist extremism.

Yet, as the Round has ground on, to a halt, over the years, the middle “D” has gone missing, and the link between fighting poverty through trade liberalization, on the one hand, and reducing vulnerability to Islamist extremism, on the other hand, has been lost. Thus, the International Food Policy Research Institute (IFPRI), a prominent non-governmental organization (NGO), released a study on 30 November 2009, the second day of the Seventh WTO Ministerial Conference, concluding that “[t]he Doha agreement . . . has an ambivalent impact on developing countries and does not offer enough to the poorest countries It has to offer more in terms of

inclusion of these developing economies in governance and decision-making from its origins as the General Agreement on Tariffs and Trade in 1948.” *Id.* at 117.

7. Tripti Lahiri, *New Delhi ‘Breakthrough’ Sets Restart of Doha Round Ag, NAMA Talks for Sept. 14*, 26 Int’l Trade Rep. (BNA) No. 36, at 1191 (Sept. 10, 2009).

market access and reduced trade costs.”⁸ Notably, 110 of the 153 Members of the WTO—nearly three-quarters of the Membership—are poor, that is, they are self-identified developing countries or classified by objective economic criteria as least developed countries.⁹ One-fifth, or 20%, of the Membership (roughly thirty-one countries) fits into the “least developed” category.¹⁰ And, critically, the above-quoted conclusion applies to Muslim countries, insofar as nearly all of them are developing or least developed. In sum, another way to state the thesis of this article is as follows: Notwithstanding rhetoric from the WTO about the importance of the Doha Round to poverty alleviation, what the Members have done in the Round is enshrine Social Darwinism as trade policy.¹¹

Even for seasoned experts, the proposed terms and conditions for a Doha Round bargain are devilishly complex. International trade law, like other fields of international business law, is not for the faint-hearted or woolly-headed. Pontification is more persuasive if it is based on catechesis.¹² No reliable meta-inferences can be drawn without first meditating on practical details in real-world negotiating documents. The results make the effort worthwhile. There are grand themes buried in, but extractable from,

8. Laura MacInnis, *World Economy Has Outgrown Doha, WTO Meet Told*, REUTERS, Dec. 1, 2009, available at <http://af.reuters.com/article/commoditiesNews/idAFGEE5B00G320091201?sp=true> (emphasis added) (quoting International Food Policy Research Institute study).

9. See RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 279 (2008) (entry for “least developed country”); Daniel Pruzin & Gary G. Yerkey, *U.S. Sought to Water Down Proposal for ‘Stock-Taking’ Meeting on Doha*, 26 Int’l Trade Rep. (BNA) No. 48, at 1673, 1674–75 (Dec. 3, 2009) (discussing remarks by Mari Pangestu, Minister of Trade, Indonesia). See also the website of the World Trade Organization, www.wto.org, for information and listings on developing and least developed countries.

10. See *Global Trading System Must Deliver More to the Least-Developed—Lamy in Istanbul*, WORLD TRADE ORG. (May 9, 2011), http://www.wto.org/english/news_e/sppl_e/sppl191_e.htm.

11. As one illustration among many of this rhetoric, see, for example, World Trade Organization, Seventh Ministerial Conference, *Chairman’s Summary*, Dec. 2, 2009, available at http://www.wto.org/english/thewto_e/minist_e/min09_e/stat_e/velasco_closing_e.doc. See generally HOFSTADTER, *supra* note 2, (explaining Social Darwinism ideology).

12. One example is the argument that (1) the Doha Round is increasingly irrelevant because it focuses on issues of declining importance, such as cutting tariffs (when the average worldwide duty rate is about 10%) and domestic agricultural support (when those subsidies are declining in significance), and (2) therefore the agenda of the Round should be enlarged to cover issues like collusion among oil-producing countries, the regulation of sovereign wealth funds (SWFs), and global financial supervision. See Aaditya Mattoo & Arvind Subramanian, *From Doha to the Next Bretton Woods—A New Multilateral Trade Agenda*, FOREIGN AFF., Jan.–Feb. 2009, at 15–26. The argument rests in part on the technically false premise that the Round proposals contain no meaningful guarantees against WTO Members reversing their trade policies or resorting to high punitive import tariffs. See *id.* at 17. A careful reading of the July and December 2008 Draft Modalities Texts on Agriculture, NAMA, and the November 2007 Draft Trade Remedy Rules Text, evinces such proposals. See also the sources cited *supra*, note 1. The argument also rests on the entirely unrealistic premise that broadening, rather than narrowing, the issues for negotiation would help conclude the Round. Amidst all the rhetoric among trade negotiators in the Round, one of the claims not heard is that they are unable or unwilling to reach a successful outcome on trade unless they strike a deal on oil, SWFs, and global finance.

the details. Those themes are hardly less grand than war and peace, wealth and poverty, Islam and globalization, statesmanship and self-interest, and accessibility and opaqueness of law.

II. TRADE LIBERALIZATION, POVERTY ALLEVIATION, AND ISLAMIST EXTREMISM

A. *Is There Really a Link?*

No less an authority than the Roman Catholic Church has identified poverty as a cause of violence between nations and peoples. As part of the Second Vatican Council (October 1962–December 1965), the Church issued in December 1965 *Gaudium et Spes*. Chapter V of this document is entitled “The Fostering of Peace and the Promotion of a Community of Nations.” It begins with a definition of “peace:”

78. Peace is not merely the absence of war, nor can it be reduced solely to the maintenance of a balance of power between enemies, nor is it brought about by dictatorship. Instead, it is rightly and appropriately called an enterprise of justice. Peace rests from that order structured into human society by its divine Founder, and actualized by men as they thirst after ever greater justice. The common good of humanity finds its ultimate meaning in the eternal law. But since the concrete demands of this common good are constantly changing as time goes on, peace is never attained once and for all, but must be built up ceaselessly. Moreover, since the human will is unsteady and wounded by sin, the achievement of peace requires a constant mastering of passions and the vigilance of lawful authority.

*But this is not enough. This peace on earth cannot be obtained unless personal well-being is safeguarded and men freely and trustingly share with one another the riches of their inner spirits and talents.*¹³

Manifestly, a necessary but not sufficient condition for true peace is justice, which includes vigilant attention to constantly changing economic conditions suffered by others. Such justice is required, above and beyond internal self-control.

Section 1 of Chapter V discusses “The Avoidance of War.” It expressly mentions “terrorism” as a form of “war.”¹⁴ It dubs the “arms race” an “utterly treacherous trap for humanity, and one which ensnares the poor to an intolerable degree.”¹⁵ That is because vast expenditures go to arms, the opportunity cost of which is alleviation of “multiple miseries” around

13. *Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, in THE SIXTEEN DOCUMENTS OF VATICAN II ¶ 78, at 705–06 (1999) (emphasis added).

14. *Id.* ¶ 79.

15. *Id.* ¶ 81, at 709.

the world.¹⁶ Section 2 discusses “Setting up an International Community.” Key paragraphs from these Sections state:

83. *In order to build up peace above all, the causes of discord among men, especially injustice, which foment wars must be rooted out.* Not a few of these causes come from excessive economic inequalities and from putting off the steps needed to remedy them. Other causes of discord, however, have their source in the desire to dominate and in a contempt for persons. And if we look for deeper causes, we find them in human envy, distrust, pride and other *egotistical passions*. Man cannot bear so many ruptures in the harmony of things. Consequently, the world is constantly beset by strife and violence between men even when no war is being waged. Besides, since these same *evils* are present in the relations between various nations as well, in order to overcome or forestall them and to keep violence once unleashed within limits, it is absolutely necessary for countries to *cooperate* more advantageously and more closely together and to organize together *international bodies* and to work tirelessly for the creation of organizations which will *foster peace*.

84. In view of the increasingly close ties of mutual dependence today between all the inhabitants and peoples of the earth, the apt pursuit and efficacious attainment of the universal *common good* now require of the community of nations that it organize itself in a manner suited to its responsibilities, *especially toward the many parts of the world which are still suffering from unbearable want*.

. . . .

85. The present solidarity of mankind also calls for a revival of greater cooperation in the *economic* field. Although nearly all peoples have become autonomous, they are far from being free of every form of undue dependence, and far from escaping all danger of serious difficulties.

The development of a nation depends on human and financial aids. The citizens of each country must be prepared by education and professional training to discharge the various tasks of economic and social life. But this in turn requires the aid of foreign specialists, who when they give aid will not act as overlords, but as helpers and fellow-workers. Developing nations will not be able to procure material assistance unless *radical changes are made in the established procedures of modern commerce*. Other aid should be provided as well by advanced nations in the form of gifts, loans or financial investments. Such help should be accorded with generosity and without greed on the one side and received with complete honesty on the other side.¹⁷

16. *Id.*

17. *Id.* ¶¶ 83–85, at 711–12 (emphasis added).

Simply put, avoidance of war requires more than just a military strategy. Paragraph 83 calls attention to underlying evils that cause conflict, one of which is gross disparities within and across communities, and which, in turn, emanates from egoism. The insight of the Church is as true today as it ever was. The reference in Paragraph 84 to cooperation through international organization almost augurs the birth of the WTO on 1 January 1995 and agreement on the DDA six years thereafter. The discussion in Paragraph 85 is a reminder of the adage that poverty anywhere is a threat to prosperity and security everywhere, almost prescient about threats from terrorist organizations, and daring in the call for “radical” changes in the conduct of international business.

In the post-9/11 environment, the question the Doha Round presents to the world might be put this way: Why be a courier for Osama Bin Laden, as was the Kuwaiti-born Pakistani, Abu Ahmed (*alias* Arshad Khan), his most trusted messenger, if one can own and operate an import-export business that trades lawful goods and services or be gainfully employed in such an enterprise?¹⁸ Admittedly, some Islamist extremists—particularly leaders within a terrorist organization—are from wealthy or middle-class backgrounds. They have their choice of occupations. Admittedly, too, some extremists are motivated by ideology regardless of their socioeconomic station in life. *Salafi Jihâdists* are one example of religious zealots, and their movement originated in wealthy Saudi Arabia.¹⁹ They are determined to overthrow any regime they deem un-Islamic; hence, the Doha Round is quite irrelevant to them. But, to start with wealth or ideology is to beg a key question: Under what conditions is a person more liable to encounter, receive, accept, and execute an Islamist extremist message?

Manifestly, not every poor person is a terrorist or even disposed to extremism. If they were, the world would be far less safe than it is, given the roughly one billion people who live on less than \$1 U.S. per day. Equally evident is that not every Muslim is a terrorist or even inclined to violence. Again, the world would be a lot less safe were that not so, as there are about 1.3 billion Muslims in the world. Moreover, Islam is most definitely not susceptible to terrorism. To think otherwise is prejudicial, and like most prejudices, this one is based on ignorance. The genuine, properly interpreted rules of the *Sharî’a* (Islamic Law) do not support terrorist acts or extremist ideologies.²⁰ Islam and its legal system is, of course, a beauti-

18. M. Ilyas Khan, *Who Was the Courier Who Led U.S. to Osama Bin Laden?*, BBC NEWS (May 5, 2011), <http://www.bbc.co.uk/news/world-south-asia-13300680>. Interestingly, the business in which the courier engaged to cover his work with Osama Bin Laden is unclear. The theories are dealing in smuggled auto parts, foreign exchange, and running a goods transport company. *Id.*; see also Elise Labott & Tim Lister, *Courier Who Led U.S. to Osama Bin Laden’s Hideout Identified*, CNN WORLD (May 3, 2011), http://articles.cnn.com/2011-05-03/world/bin.laden.courier_1_alqaida-members-al-qaeda-leader-tora-bora?_s=PM:WORLD (identifying the courier).

19. See *Coming out of the Arab Woodwork*, ECONOMIST, April 30, 2011, at 49, 49–50.

20. See RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*Sharî’a*) chs. 49–50 (2011).

ful paradigm characterized by considerable diversity within a unity of core precepts. This diversity includes people who hold religiously extreme ideas, but who are non-violent, and also politically active Muslims who are inspired by their faith, but who are not fixated on seizing power by any means in the name of Islam.²¹ The sad reality is a tiny minority in any religion can distort genuine doctrines for evil purposes, and each religion has endured dastardly distortion at one juncture or another in its history.

In other words, blaming a religion for sponsoring terrorism is wrong. Accordingly, it would be equally reasonable, though perhaps euphemistic, to refer not to “Islamist extremism,” but rather “VEOs” and the “Persons of Interest” (POI) who run them, and who are recruited as evil minions to serve in them. What is clear is that “Islamic,” as distinct from “Islamist,” is the incorrect adjective: None of the bloodshed wrought by VEOs or their POIs is authentically Islamic.

In any case, there is not a great deal that international trade law, or the Doha Round, can do to change religious precepts or their abuse by fanatics. Poverty, however, is a different matter. The law as shaped by the Round can make a difference in the lives of poor people. Most obviously, it can create opportunities for new employment and higher income, and thereby help alleviate poverty. The question thus is joined: Does poverty alleviation through trade liberalization matter, in terms of reducing proclivity toward terrorism?

That is, is there a link between poverty alleviation and Islamist extremism? Surely the answer is yes. President Barack H. Obama declares: “Extremely *poor* societies . . . provide *optimal breeding grounds* for disease, *terrorism*, and conflict.”²² His Secretary of State, Hilary Clinton, therefore categorizes economic development as “an *integral* part of America’s *national security* policy.”²³

The link is not adamant. The precise causal connection is not entirely clear. But, the basic connection is obvious enough, both self-evident and clear from observed experience: poverty, in the narrow sense of a lack of income, and a broader sense of capabilities deprivation or an even broader sense of oppression, connotes a lack of status as a stakeholder in the global trading system.²⁴ Put succinctly, marginalization, which is a hall-

21. See *Better than Cure—But Difficult*, ECONOMIST, June 11, 2011, at 61, 61.

22. *Exploding Misconceptions*, ECONOMIST, December 18, 2010, at 146, 146 (quoting President Barack Obama) (emphasis added).

23. *Id.* (quoting Secretary of State Hilary Clinton) (emphasis added).

24. The link is especially apparent to American military personnel who have served in Afghanistan, Indonesia, Iraq, Philippines, Thailand, and other theaters plagued by Islamist extremism. The author has put the question to such personnel (whose names must remain anonymous for security reasons) who serve as Special Operations Forces (SOF) officers. Invariably, the answer is affirmative, typically with an almost quizzical look because the point is so obvious.

On capabilities deprivation, see AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999), and the summary of this book in BHALA, *supra* note 9, at 116–22 (entry for “development as freedom”).

mark of poverty, is a contributory factor in vulnerability to violent religious fanaticism. Conversely, a world trading system in which a person finds opportunity through decently-paying jobs, and thereby hope for the socioeconomic advancement of himself and his family, is one—but by no means the only—way to offer the status of stakeholder. Concomitant with that status is the opportunity for better education and health care, both of which, along with a reduction in income poverty, give a person a rational basis for hope in the system.

This affirmative answer also is based on careful academic research. Consider the analysis offered by Oxford economist Paul Collier in his acclaimed book, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2007). He identifies an unmistakable link between economic underdevelopment and conflict. The gist of his argument is that the economic health of a country is a primary determinant of its susceptibility to conflict.²⁵ The poorer a country, in economic terms, the more prone it is to be mired in civil strife—a “Conflict Trap”—whereas the better its economic performance, the more likely it will not experience, or at least not remain mired in, conflict. While not linking poverty to Islamist extremism in particular, the Collier analysis is applicable: The former is a microcosm of the latter, which is the macrocosm.

To be sure, some Islamist extremists are home-grown in wealthy countries, like the United Kingdom and U.S. Among them, however, some are from poor or marginalized communities within those countries. Many terrorists are from poor countries—Afghanistan, Pakistan, Somalia, and Yemen are proven fertile grounds for recruiting and training *Salafi Jihâdis*, who are active in yet other poor countries, such as Jordan and Libya.²⁶ Pakistan, the population of which is 97% Muslim, rightly has attracted considerable attention.²⁷ That is for reasons more than its notoriety as the place, specifically Abbottabad, hardly two hours from Islamabad, where Osama Bin Laden was killed by American Special Operations Forces in May 2011. That also is because all of its regions bordering Afghanistan, from north to south, are marked by considerable poverty: the Northern Areas (Kashmir), Northwest Frontier Province (NWFP), Federally Administered Tribal Areas (FATA), North and South Waziristan, and the province of Balochistan. As *National Geographic* put it, these regions, “[w]here the mountains meet the lowlands” are where “the fierce fundamentalism of the Afghan frontier confronts the moderate Islam of the Indian subcontinent.”²⁸ Overall in Pakistan, the unemployment rate is 15% (and probably, unofficially, much

25. See PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* 19–20 (2007).

26. See *Coming out of the Arab Woodwork*, *supra* note 19, at 49–50.

27. See Don Belt, *Struggle for the Soul of Pakistan*, NAT’L GEOGRAPHIC, Sept. 2007, at 32, 40.

28. *Id.* at 43.

higher), and 24% of the population ekes out an existence below the poverty line.²⁹

That defeating Islamist extremism in Pakistan (or Afghanistan) is not purely a military matter is indisputable, as America's Commander-in-Chief observed. In his acclaimed June 2009 speech at Cairo University, President Barack H. Obama stated:

We [the U.S.] also know that *military power alone is not going to solve the problems in Afghanistan and Pakistan*. That is why we plan to invest \$1.5 billion each year over the next five years to partner with Pakistanis to build schools and hospitals, roads and businesses, and hundreds of millions to help those who have been displaced. And that is why we are providing more than \$2.8 billion to help Afghans develop their economy and deliver services that people depend upon.

I know that for many, the face of globalization is contradictory. The Internet and television can bring knowledge and information, but also offensive sexuality and mindless violence. *Trade can bring new wealth and opportunities, but also huge disruptions and changing communities*. In all nations—including my own—this change can bring fear. Fear that because of modernity we will lose control over our economic choices, our politics, and most importantly our identities—those things we most cherish about our communities, our families, our traditions, and our faith.

But I also know that human progress cannot be denied. *There need not be contradiction between development and tradition*. Countries like Japan and South Korea grew their economies while maintaining distinct cultures. The same is true for the astonishing progress within Muslim-majority countries from Kuala Lumpur to Dubai. In ancient times and in our times, Muslim communities have been at the forefront of innovation and education.³⁰

But, solving the problem is not purely a trade matter, either. That is, the question is not whether a development-friendly set of rules agreed upon by WTO Members in the Doha Round would rid Pakistan of its many Islamist extremist groups.

After all, Pakistan—specifically, endemic corruption, poor governance, military interference in politics, and dysfunctional public education—is sometimes its own worst enemy. Small wonder why the *Taliban* or its sympathizers reputedly provide social services—they fill a gap a properly

29. *The World Factbook, Pakistan*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html> (last visited Jan. 16, 2012). Yemen is even worse off, with over 45% of its population below the poverty line. *The World Factbook, Yemen*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ym.html> (last visited Jan. 16, 2012).

30. Barack H. Obama, *Remarks by the President on a New Beginning*, Speech at Cairo University (June 4, 2009) (emphasis added).

functioning state should cover, and they expand their ideological base in doing so. (The scenario is replayed in Lebanon by Hezbollah.) Consider, then, the observation of Javed Ibrahim Paracha:

a bearded, heavysset former member of [Pakistan's] parliament who has been dubbed "*Al Qaeda's* lawyer" for successfully representing several hundred *jihādists* captured in Pakistan after 9/11. He explains what emboldens these young women [*i.e.*, about 200 female religious students wearing black veils, who in 2007 took over a public children's library in Islamabad to protest the destruction by the government of mosques run by extremist clerics, which the government said were built without permits] to risk their lives for Islam: "This government [of General Pervez Musharraf] has lost all credibility," he says. "People look at Musharraf and they see a U.S. puppet who's willing to declare war on fellow Muslims to satisfy America. They also see his generals getting rich, *while they're getting poorer every day. People are losing hope.* Pakistan and its government are becoming two different things. This will have to change, and soon."³¹

In other words, poverty is one among several structural problems to which Mr. Paracha refers that are causal factors as to why a minority of Muslims turn to extremism.³² The Doha Round cannot cure all such problems.

But, as President Obama suggests, there are some opportunities worth pursuing, beyond the obvious ones concerning trade rules governing agricultural and industrial products. Consider trade in services, which includes as a major sector educational services. There are over 10,000 Islamic schools (*madrasas*) in Pakistan. Many of them cater to poor students and are run by moderate Islamic clerics. But, about 60 percent of the *madrasas* are affiliated with the extremist *Deobandi* sect of *Sunni* Islam.³³ They teach a severe brand of the *Sharī'a*, calling for a return to its fundamentals, namely, the Holy Qur'ân and *Sunnah* (traditions) of the Prophet Muhammad (PBUH) that were set in the seventh century AD.

Pakistani parents tend not to want to send their children to such schools, where their kids memorize the Holy Qur'ân but receive no practical life skills. Typically, they do so for financial reasons. The schools are well-funded, providing free meals, uniforms, and a copy of the Holy

31. Belt, *supra* note 27, at 42 (emphasis added). The government later backed down and allowed not only the mosques to be rebuilt, but also the removal from the library of any book deemed to be un-Islamic.

32. Similarly, in Somalia, the Minister of Finance, Mohamed Abdullahi Omaar, dubbed international efforts to fight piracy as fatally flawed because they focused on containment of symptoms rather than the root causes of piracy—state fragmentation, incapacity, and a lack of investment to "improv[e] the stability and prosperity of Somalia." Michael Peel, *Somali Minister Hits at Anti-Piracy Policy*, FIN. TIMES, April 19, 2011, at 2. In other words, piracy, like terrorism, is symptomatic of deeper causal factors, a key one of which—but not the only one—is poverty.

33. See Belt, *supra* note 27, at 44.

Qur'ân. Parents who lose their jobs or suffer income declines—perhaps (if they are cotton farmers) because of competition from subsidized American cotton or high barriers in the EU to textiles and apparel (T&A) merchandise (if they work in a mill or garment factory)—have little choice. Suppose the Doha Round yields, not only trade liberalization in primary and secondary educational services, but also assistance to Islamic countries to import first-rate teachers and pedagogies of essential modern skills, like reading, writing, arithmetic, and critical thinking. Might these imports put pressure on extremist *madrasas* by giving them competition? That is, might an increase in the supply of foreign educational services give parents a viable choice?

More generally, the question is whether development-friendly trade rules, if implemented alongside fundamental reforms, would support reforms that Pakistan ought to take. Might they boost employment and incomes for a large swathe of Pakistan's population at the lower tiers, and thereby help engineer a transformation in Pakistan's dreadfully skewed socioeconomic order? In turn, would the empowerment of millions dispose them against a radical agenda to convert Pakistan into a strict Islamic state, far distant from the vision of its founder, Mohammed Ali Jinnah, that it be a secular democracy in which Islam imparted its cultural, but not political, influence?³⁴

There are other examples. Nigeria, a WTO Member, the population of which is about 50% Muslim, is one. Nigerian Muslims live in the north, where per capita income is 50% less than in the predominantly Christian south, and declining, and where literacy rates are two-thirds lower than in the commercial capital, Lagos, which is a port city in the south.³⁵ In the principal northern city of Kano, two of the nine million residents are beggars, and the industrial zones that once were home to garment manufacturers are abandoned.³⁶ Thus, *The Economist* reported in May 2011, “[m]ilitancy is on the rise,” “[i]t is no surprise that extremists thrive in this climate,” and “Boko Haram, a local terror group, is roaming ever wider and fine-tuning its methods; a link up with al-Qaeda may be next.”³⁷ Two months later, these fears were confirmed: In August, this VEO blew up the United Nations Headquarters in Abuja, killing twenty-three people and wounding more than eighty, and the individual who planted the bomb was linked to *Al Qaeda*.³⁸ Poor governance, meaning corruption and communal divisions, is the cause. Once again, the relevant question is not whether a successful Doha Round can eliminate the threat of Islamist extremism in

34. See *id.* at 40.

35. *A Man and a Morass*, *ECONOMIST*, May 28, 2011, at 27, 27.

36. *Id.*

37. *Id.*

38. See *Nigeria U.N. Bomb: 'Al-Qaeda Linked' Man Named as Suspect*, *BBC NEWS* (Aug. 31, 2011), <http://www.bbc.co.uk/news/world-africa-14734738>. Loosely translated from Hausa, “Boko Haram” means “Western education is forbidden,” and this VEO seeks imposition in Nigeria of what it calls the “*Shari'a*.” *Id.*

Nigeria. It cannot do so. Rather, the question is whether the Round, along with appropriate governmental reforms, can reduce poverty in Nigeria and thereby the appeal of extremism that some alienated Muslims might feel.

B. *Nevermind the Regressions*

Certain statistical and multivariable regression analyses suggest the link between poverty and extremism is tenuous.³⁹ They argue terrorism results from political oppression and other non-economic factors. But, these studies miss the mark, and in any event do not gainsay a link between poverty and extremism.

First, that suggestion defies common sense, as well as historical and field experience. Simply put, a person who has nothing to live for has nothing to lose. Resorting to violence in the grossly distorted name of a religion is perceived to hold few offsetting disadvantages. The lack of a decent education, because of poverty, means the inability to think critically, and thereby realize that name is being perverted, is under-developed.

Second, these analyses focus on terrorists who commit violent acts, making much of the fact that some terrorists (as on 9/11) are from wealthy backgrounds. The studies often measure wealth by education, and thus point out some terrorists have high school diplomas. *Al Qaeda*, *Hammas*, *Hezbollah*, the *Taliban*, and other VEOs acting in the name of Islam are well aware that while they can and do obtain some recruits from educated but disaffected youths, their large, fertile recruiting pool is stocked with the marginalized poor. Moreover, those diplomas mean little.⁴⁰ Bluntly put, a diploma from a typical school in many parts of the Arab world does not measure up to one from Western Europe, Japan, or the U.S. All that can be said is that to carry out a spectacularly evil terrorist attack with sophisticated devices or weaponry, special training is required to master those instruments.⁴¹ (Flying a plane into a building illustrates the point.)

Third, many poor people are facilitators of terrorism but not picked up in the datasets of economists. For example, some Bedouins in the Sinai Peninsula and tribal peoples in Waziristan trade arms and narcotics because

39. For a summary of these studies, see *Exploding Misconceptions*, *supra* note 22, at 146 (discussing a 2008 survey of studies by Alan Krueger of Princeton University, as well as other individual studies). The discussion above is not intended to be a comprehensive review and critique of these studies.

One oft-cited study is Alan B. Krueger & Jitka Maleckova, *Education, Poverty and Terrorism: Is There a Causal Connection?*, 17 J. ECON. PERSP. 119, 119 (2003).

40. Here again, the author has put the question to U.S. SOF officers (whose names must remain anonymous for security reasons), who invariably confirm the point.

41. See *Exploding Misconceptions*, *supra* note 22, at 146 (discussing a study by Claude Berrebi of the RAND Corporation and Efraim Benmelech of Harvard University concluding, as *The Economist* put it, that “more educated suicide-bombers are assigned to attack more important targets”). Note, however, this study is limited to Palestinian suicide bombers between 2000 and 2005.

they have no other lucrative means of support.⁴² To whom do they sell arms, for example, except terrorists? For such traders, a development-friendly Doha Round, which brought them into the formal trading system, could do wonders, with the knock-on benefit of cutting off from terrorists at least some of their intermediaries for weapons. Likewise, trafficking in counterfeit goods—i.e., products that violate a lawful copyright, trademark, or patent—may be tempting to impecunious people seeking to eke out a living. Some of the proceeds of such sales may find their way into the hands of terrorists.

Finally, empirical analyses may suffer from one or the other of various shortcomings common in econometric research. For instance, one study focuses only on data from the Middle East, but neglects hotbeds of terrorist activity elsewhere, including Afghanistan, Pakistan, Yemen, and both North and Sub-Saharan Africa.⁴³ As another instance, one study argues the typical terrorist is not “unusually poor or badly schooled.”⁴⁴ But, delineating poor or badly educated from “unusually” poor or badly educated people may be difficult in practice—and perhaps not that relevant in terms of policies to promote development and counter-terrorism. As another example, one study considers only male Palestinian suicide bombers recruited by *Hamas* and Islamic *Jihâd* from the West Bank and Gaza, while another focuses on militants recruited by *Hezbollah* from the *Shî'ite* majority region of Southern Lebanon.⁴⁵ These studies urge that the average suicide bomber or militant, respectively, tends to be better educated and less poor than others in the respective statistical reference group. Yet, terrorists come from far more places than the Levant, come from far more nationalities than Palestinian, and may be women and children.

Still another problem concerns definitions. One study contends there is no hard link between the per capita Gross Domestic Product (GDP) of a country and the propensity of that country to spawn terrorists.⁴⁶ But, it defines “poverty” in terms of low literacy rates or residence in a country with a stagnant economy.⁴⁷ In truth, broader concepts like capability deprivation or marginalization may be more appropriate measures to explore the link between poverty and generating terrorists. Likewise, a result in that study (that suicide attackers are less likely to come from the poorest than from

42. On the general problem that many poor countries with large Muslim populations cannot effectively police their international boundaries, thus creating a vacuum in which Islamist extremists can operate, see Susan E. Rice, *The Threat of Global Poverty*, NAT'L INT, Spring 2006, at 76, 76–82.

43. See Krueger & Maleckova, *supra* note 39.

44. See *Exploding Misconceptions*, *supra* note 22, at 146 (discussing a study by Alan Krueger of Princeton University).

45. See *id.* (discussing a study by Claude Berrebi of the RAND Corporation and one by Alan Krueger of Princeton University).

46. See *id.* (discussing a study by Claude Berrebi of the RAND Corporation and one by Alan Krueger of Princeton University).

47. *Id.*

relatively better-off countries) may be skewed by restricting the definition of a terrorist event to suicide bombing.⁴⁸

To be sure, quantitative research on the causes and causal mechanisms of terrorism must not be categorically dismissed. One worthwhile insight may be provided by a study that indicates an inverse relationship between the skill level of the average terrorist, on the one hand, and economic conditions, on the other hand.⁴⁹ As those conditions improve, educated people have enhanced job opportunities that earn higher incomes.⁵⁰ VEOs thus have a smaller pool of good talent from which to recruit evildoers.⁵¹ Conversely, the skill level of the average terrorist rises when job and income prospects are grim. However, this study is limited to Palestinian suicide bombers between 2000 and 2006.⁵² In brief, the point is simply to appreciate the limitations of statistical and econometric methodologies.

C. *Did They Know of the Link?*

The link between trade liberalization and poverty alleviation, and the follow-on link from poverty alleviation to reduced vulnerability to Islamist extremism, was on the minds of world leaders and their trade ministers when they launched the Doha Round in November 2001 in the Qatari capital. To think otherwise is to deny history.⁵³ The Round “was originally championed as a means of demonstrating *international solidarity and cooperation in the immediate aftermath of the 9/11 terrorist attacks.*”⁵⁴ Indeed,

48. See *id.* (discussing a study by Alan Krueger of Princeton University).

49. See *id.* (discussing a study by Esteban Klor of Hebrew University in Jerusalem, Efraim Benmelech of Harvard University, and Claude Berrebi of the RAND Corporation).

50. See *id.*

51. See *id.*

52. *Id.*

53. Countless news stories discuss the launch of the Doha Round “in 2001 in the capital of Qatar with the goal of helping poor countries prosper through greater access to markets in rich countries.” Doug Palmer, *Analysis: WTO Faces Tough Choices After Latest Doha Setback*, REUTERS, Apr. 21, 2011, available at <http://www.reuters.com/article/2011/04/21/us-trade-wto-doha-idUSTRE73K8I220110421>. Such descriptions draw both an explicit link to poverty alleviation, and an implicit link (by mentioning the launch date and venue) to fighting terrorism. Some accounts are a bit more direct as to the latter link, stating (for example) that “the long-stalled round . . . was launched after the Sept. 11, 2001 [attacks] . . .” Tom Barkley, *U.S. Says Too Early to Declare Doha Round Dead*, MARKETWATCH (Apr. 21, 2011), <http://www.marketwatch.com/story/us-says-too-early-to-declare-doha-round-dead-2011-04-21>. But, it is unsurprising that explicit mention of Islamist extremism is not always made. Aside from concerns by some observers or commentators about offending Muslim constituencies by linking “Islam” with “extremism,” not every WTO Member stressed this link with equal vigor, either when the Round was launched, or during the subsequent history of the Round.

54. Daniel Pruzin, *WTO Members Give Up on Deliverables Pact, To Push for Work Program to Advance Doha*, 28 Int’l Trade Rep. (BNA) No. 30, at 1228, 1230 (July 28, 2011) (emphasis added).

Likewise, in March 2002, world leaders gathered in Monterrey, Mexico, for the United Nations International Conference on Financing for Development. That Conference articulated a goal of increasing economic assistance to poor countries as a way to help prevent future terrorists acts. See United Nations International Conference on Financing for Development, Mar. 18–22, 2002,

in the Declaration launching the Round, Ministers made explicit the first step in the link—between trade liberalization and poverty alleviation:

1. The *multilateral* trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to *maintain the process of reform and liberalization of trade policies*, thus ensuring that the system plays its full part in promoting recovery, growth and development. We therefore strongly reaffirm the principles and objectives set out in the Marrakesh Agreement Establishing the World Trade Organization, and *pledge to reject the use of protectionism*.

2. *International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.* Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

. . . .

10. Recognizing the challenges posed by an expanding WTO membership, *we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members.* While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. *We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.*⁵⁵

Report of the International Conference on Financing for Development, U.N. Doc. A/CONF.198/11 (2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/392/67/PDF/N0239267.pdf?OpenElement>.

55. World Trade Organization, *Ministerial Declaration on the Doha Development Agenda (DDA) for Multilateral Trade Negotiations*, ¶¶ 1, 2, 10, WT/MIN (01)/DEC/1 (Nov. 20, 2001) (adopted Nov. 14, 2001) (emphasis added), available at http://www.wto.org/english/thewto_e/min01_e/minded_e.htm.

Why not also make explicit in the Declaration the second, final step in the link, namely, from poverty alleviation to vulnerability to Islamist extremism? The answer is a matter for speculation. One possibility is to save face for Islamic countries, i.e., not to single them or the religion of Islam out as uniquely plagued with the problem of extremism, and thereby not foster Islamophobia. No matter, though, as this next step was obvious enough, and regrettably, the hysteria spread and still exists.

To deny the existence of the link at the launch of the Doha Round also is to ignore a strong, optimistic, and long-standing vision for international trade, summarized by the phrase “peace through trade.”⁵⁶ The vision, championed by America’s longest-serving Secretary of State (from 1933 to 1944, under President Franklin Roosevelt), Cordell Hull (1871–1955), is that trade generates economic prosperity, and sooner or later, directly or indirectly, political democracy. In turn, people who are well off, or who have hope for a better future, are unlikely to want to overturn the status quo violently or support war with people in other well-off democracies. The vision is not uniquely American. Tanzania’s former President, Benjamin Mkapa, aptly summarized that “it is futile, if not foolhardy to think there is no link between poverty and terrorism. . . .”⁵⁷ In turn, the former U.S. Assistant Secretary of State for African Affairs, Susan Rice, observed that Africa is the “world’s soft underbelly for global terrorism,” and VEOs seek to recruit from among its “poor, disillusioned populations”⁵⁸

America has not lost faith in the vision of peace through trade. To the present, it is part of the rhetoric of U.S. trade policy. It was a hallmark of that policy when the DDA was launched. That is, America viewed trade policy and multilateral trade liberalization as an important component of its national security strategy. Multilateral trade liberalization was one tool in the kit to be used in the Global War on Terror that had been thrust upon America.

There is no better evidence of this linkage—trade as an element of counter-terrorism—than the official U.S. government report of the 9/11 Commission. It summarizes the relationship of underdevelopment and sense of hopelessness that goes with it to trade liberalization and counter-terrorism:

Economic openness is essential. Terrorism is not caused by poverty. Indeed, many terrorists come from relatively well-off

56. Kishore Mahbubani, *Trade in the New Asian Hemisphere*, in *PEACE AND PROSPERITY THROUGH WORLD TRADE 6* (Fabrice Lehmann & Jean-Pierre Lehmann eds., 2010) (discussing the peace-through-trade theory); see generally DANIEL GRISWOLD, *MAD ABOUT TRADE: WHY MAIN STREET AMERICA SHOULD EMBRACE GLOBALIZATION* (2009).

57. Adam Lusekelo, *Africa’s War on Terror Targets Poverty*, BBC NEWS (Feb. 27, 2003), <http://news.bbc.co.uk/2/hi/business/2797405.stm>.

58. *Africa and the War on Global Terrorism: Hearing Before the Subcommittee on Africa of the Committee on International Relations*, 107th Cong., 18 (2001) (testimony of Susan Rice, Assistant Sec’y of State and Consultant on African Affairs).

families. Yet when people lose hope, when societies break down, when countries fragment, the breeding grounds for terrorism are created. Backward economic policies and repressive political regimes slip into societies that are without hope, where ambition and passions have no constructive outlet.

The policies that support economic development and reform also have political implications. Economic and political liberties tend to be linked. Commerce, especially international commerce, requires ongoing cooperation and compromise, the exchange of ideas across cultures, and the peaceful resolution of differences through negotiation or the rule of law. *Economic growth expands the middle class, a constituency for further reform.* Successful economies rely on vibrant private sectors, which have an interest in curbing indiscriminate government power. Those who develop the practice of controlling their own economic destiny soon desire a voice in their communities and political societies.

The U.S. government has announced [in May 2003] the goal of working toward a Middle East Free Trade Area, or MEFTA, by 2013. The United States has been seeking comprehensive free trade agreements (FTAs) with the Middle Eastern nations most firmly on the path to reform. . . . *Muslim countries can become full participants in the rules-based global trading system, as the United States considers lowering its trade barriers with the poorest Arab nations.*

Recommendation: A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future.⁵⁹

To be clear, underdevelopment, of which poverty is a ubiquitous feature, is a condition in which extremist ideas simmer. Neither it generally, nor income deprivation specifically, leads inexorably to terrorism. There are intervening variables, as well as other causal variables. Deprivations of political and social rights, and religious freedoms, operate in either or both senses.

In other words, neither underdevelopment nor poverty is a necessary or sufficient condition for Islamist extremism. But, neither can they be ignored. They are repeatedly observed phenomena connected with this extremism. VEOs like *Al Qaeda* know it and exploit it to their advantage. As Professor Kevin J. Fandl rightly states:

59. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT—FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 378–79 (authorized ed., July 22, 2004) (bold emphasis in original, italics emphasis added).

Poverty is rampant in rank and file Muslim terrorists; however, it is not found in the leadership of these groups. So while the large majority of members of terrorist groups hail from impoverished areas in the Middle East and Southern Asia that do not afford sufficient opportunities for members' self sufficiency, the wealthy leadership continue to belong "to an old tradition in which self-serving elites seize upon and manipulate the grievances of the poor." By manipulating ideas and subsequently the minds of individuals, these power-hungry leaders are able to seize upon the lack of opportunity of these often impoverished and otherwise peaceful citizens, convincing them to rise up and take the lives of others and/or themselves in the name of the leadership's cause—not Islam, but vengeance. . . .

. . . .
 . . . This conventional method of warfare [military means], while effective in pinpointing targets in complete darkness, will be useless in eliminating the ideology that fuels terrorism. Terrorists are non-conventional actors using non-conventional means through amorphous concepts that cannot be identified, contained, or labeled. These are actors whose most potent weapon is the communication of ideas *among masses of people awaiting an opportunity for a better life*.⁶⁰

American trade negotiators involved in the launch of the Round, and the early years of that Round, knew it, too—that to attack poverty through appropriate new trade rules is to attack terrorism. If they did not, then why in May 2003 would the U.S. have launched its *Middle East Free Trade Initiative* (MEFTA), the stated goal of which is to stitch together countries in that region into a network of free trade and democracy?⁶¹

Accordingly, successive iterations of the U.S. *National Strategy Report*, an explanation and analysis of American national security strategy submitted by the President to Congress annually pursuant to Section 108 of the *National Security Act of 1947*, have linked poverty alleviation and broader economic development to reducing the threat from Islamist extremism.⁶² President George W. Bush wrote in the 2002 *National Strategy Report*:

[T]he United States will use this moment of opportunity to extend the benefits of freedom across the globe. We will actively work to bring the hope of democracy, development, free markets, and free trade to every corner of the world. The events of September 11,

60. Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terrorism Without the War*, 19 AM. U. INT'L L. REV. 587, 594, 599 (2004) (quoting Ken Booth & Tim Dunne, *Worlds in Collision*, in *WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER* 9 (Ken Booth & Tim Dunne eds., 2002)) (emphasis added).

61. For a discussion of MEFTA, see RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 694–95 (3d ed. 2008).

62. See 50 U.S.C. § 404a (2006).

2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states. Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.

The United States will stand beside any nation determined to build a better future by seeking the rewards of liberty for its people. Free trade and free markets have proven their ability to lift whole societies out of poverty—so the United States will work with individual nations, entire regions, and the entire global trading community to build a world that trades in freedom and therefore grows in prosperity. . . .

. . . .

We are also guided by the conviction that no nation can build a safer, better world alone. Alliances and multilateral institutions can multiply the strength of freedom-loving nations. The United States is committed to lasting institutions like the United Nations, the World Trade Organization, the Organization of American States, and NATO [the North Atlantic Treaty Organization], as well as other long-standing alliances.⁶³

Entitled “Ignite a New Era of Global Economic Growth through Free Markets and Free Trade,” Section VI of the 2002 *National Strategy Report* amplifies the theme of peace-through-trade:

A strong world economy enhances our national security by advancing prosperity and freedom in the rest of the world. Economic growth supported by free trade and free markets creates new jobs and higher incomes. It allows people to lift their lives out of poverty, spurs economic and legal reform, and the fight against corruption, and it reinforces the habits of liberty.

. . . .

The concept of “free trade” arose as a *moral principle* even before it became a pillar of economics. If you can make something that others value, you should be able to sell it to them. If others make something that you value, you should be able to buy it. This is real freedom, the freedom for a person—or a nation—to make a living. To promote free trade, the United States has developed a comprehensive strategy:

- *Seize the global initiative. The new global trade rounds we helped launch at Doha in November 2001 will have an ambitious agenda, especially in agriculture, manufacturing, and services, targeted for completion in 2005.* The United States has led the way in completing the accession of China and a

63. PRESIDENT GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA v-vi (2002), available at <http://merln.ndu.edu/whitepapers/USnss2002.pdf> (emphasis added).

democratic Taiwan to the World Trade Organization. We will assist Russia's preparations to join the WTO.⁶⁴

Manifestly, the Doha Round was not completed by the Hong Kong Ministerial Conference in December 2005, and while China and Taiwan acceded to the WTO in 2001 and 2002, respectively, negotiations for Russia to join have yet to be finished. (As for the remaining eight of the nine bullet-point elements in the comprehensive strategy, the U.S. made progress on some of them, but not in any enduring or conclusive manner, in the Bush and Obama Administrations.⁶⁵) In the intervening years, as the Round has dragged on, trade negotiators—both American and foreign—have lost sight of the theme, not to mention the fervor, of believing trade liberalization to be a “moral principle.”

To be sure, in November 2001, not all WTO Members held exactly the same perspectives on the project on which they were about to embark as did the U.S. Some countries were slower to the mark to appreciate how drastically the world had changed after September 11, and thus to think about links between terrorism and trade. But, to one degree or another, the nexus of trade liberalization, poverty alleviation, and fighting Islamist extremism was perceptible. The former United States Trade Representative (USTR), Ambassador Susan Schwab, writes that:

[T]he [Doha Round] talks have sought to promote economic growth and improve living standards across the globe—especially in developing countries. . . .

. . . .

When the Doha Round finally began *in the wake of September 11, 2001*, negotiators continued to disagree over its objectives and how to achieve them.

*The use of trade liberalization and reform to generate economic growth and help alleviate poverty formed the core of the initiative.*⁶⁶

Ujal Singh Bhatia, the former Indian Ambassador to the WTO, notes that “[c]onsensus on launching the Round emerged under the *extraordinary situation created by the 9/11 events.*”⁶⁷ That many if not most trade officials at the November 2001 Ministerial Conference in Doha had those events on

64. *Id.* at 17–18 (emphasis on “Seize the global initiative” in original; other emphasis added).

65. Those other eight elements are: pressing regional initiatives, moving ahead with bilateral free trade agreements, renewing the partnership between the executive branch and Congress on trade, promoting the connection between trade and development, enforcing trade agreements and laws against unfair trade practices, helping domestic industries and workers adjust, protecting the environment and workers, and enhancing energy security. *See id.* at 18–19.

66. Susan C. Schwab, *After Doha—Why the Negotiations Are Doomed and What We Should Do About It*, 90 FOREIGN AFFAIRS 104, 104–06 (2011) (emphasis added).

67. Ujal Singh Bhatia, *WTO Members are Lashed to the Mast of the Doha Round*, FINANCIAL TIMES, May 16, 2011, at 8 (letter to the *Financial Times*) (emphasis added). Mr. Bhatia served as Ambassador from 2004–2010.

their minds, and thought about how they might structure their good work to combat evil, is scarcely disputable.

D. The World Has Not Changed

One of the oft-used arguments by the U.S. in the Doha Round, particularly in the later years of the Round, is that “the world has fundamentally changed since the Doha Round was launched in November 2001, with Brazil, China, India, and others becoming world-leading exporters in some sectors of the global economy over the past decade.”⁶⁸ Thus, American trade officials argue, the key question in the Round is “to what extent should the major emerging economies take on additional responsibilities to liberalize global trade in order to reflect their growing importance in the global economy[?]”⁶⁹ This argument is not untrue, but rather is made in the wrong venue.

It is not untrue because the world has changed in the sense of the importance of major emerging powers. The likes of Brazil, India, and China are vastly more important to the U.S. and other developed countries than they once were. Between 1998 and 2001, less than half of the growth in world GDP came from outside of rich countries.⁷⁰ Between 2011 and 2014, the countries that are not rich, i.e., developing and (to a lesser extent) least developed countries, will account for 75% of the addition to global GDP. That is why:

America sees the Doha talks as its final opportunity to get fast-growing emerging economies like China and India to slash their duties on imports of such [manufactured] goods, which have been reduced in previous [GATT] rounds but remain much higher than those in the rich world. *It wants something approaching parity*, at least in some sectors, because it reckons its own low tariffs leave it with few concessions to offer in future talks. *But emerging markets insist that the Doha Round was never intended to result in such harmonization.*⁷¹

The emerging markets are right, and it is in relation to their point that the world has not changed.

In fact, even with the death of Osama Bin Laden in May 2011, much of the world has not fundamentally changed since November 2001 when the Doha Round was launched. Islamist extremism remains a global threat.⁷²

68. Daniel Pruzin, *WTO Chief Calls for Rethink on Doha Talks, Says Differences on Sectorals 'Unbridgeable,'* 28 Int'l Trade Rep. (BNA) No. 17, at 686, 687 (Apr. 28, 2011).

69. *Id.*

70. See *The Doha Round: Dead Man Talking*, ECONOMIST, Apr. 28, 2011, at 81. This and the projected contribution to world GDP are from the International Monetary Fund.

71. *Id.* (emphasis added).

72. See, e.g., Daniel Dombey, *Al-Qaeda 'Still a Formidable Network,'* FINANCIAL TIMES, May 10, 2011, at 3 (reporting that according to the U.S. State Department, *Al Qaeda* remains as deadly as ever, notwithstanding the demise of Bin Laden).

The conditions of poverty, and a generalized sense of oppression, both of which incubate Islamist extremists, have not changed. Thus, when the U.S. offers up the argument that Brazil, China, India, and other emerging developing countries must offer concessions commensurate with their enhanced global commercial status, the U.S. is not wrong about their new status and what the consequences of it ought fairly to be. Rather, the U.S. is just making a reasonable argument in the wrong venue and betraying the very purpose on which it helped launch the Round: counter-terrorism.

The Doha Round never was intended for a re-balancing of trade concessions, although developing and even least developed countries never were told they would have no obligations whatsoever. That is, while the Round never was designed as a one-sided exercise whereby rich countries take on all market access and subsidy reduction commitments, and poor countries do nothing, it was intended to address the single gravest threat facing all nations: terrorism, specifically, Islamist extremism. To be sure, no WTO Member saw the Round as a magic bullet that would end terrorism. But, many if not most of the Members appreciated the role trade liberalization could play in combating one of the conditions that spawns this extremism: poverty, or put more generally, a sense of oppression.

The fact that India is home to the largest concentration of Muslims in the world and that China has a sizeable Muslim population have not changed. What has changed, for those two countries, since November 2001, is they have been struck by Islamist extremism and have had to devote considerable military and security resources to fighting it. The “new” fact that China and India have had success in exporting does not alter the “old” fact that they are home to roughly 700 and 600 million poor people, respectively, who live in squalid conditions and have little stake in the world trading system, and many of them are Muslim.

Brazil, too, is beset with a large population of poor people, albeit non-Muslim. Yet, even with Brazil, the link with Islamist extremism may exist. Radical Islamist groups, such as *Hezbollah*, traffic pirated intellectual property goods (as well as narcotics and weapons), such as music CDs and movie DVDs. Such pirated goods have been found in South America and surely are attractive to poor people, who cannot afford authentic items. To what ends do the radical groups put their ill-gotten gains from the sale of counterfeit assets? The answer is not just social welfare projects they sponsor in impoverished places like South Lebanon, but also surely includes terrorist activities.

III. TEXTS AND DOCUMENTS

A. *The December 2008 Draft Modalities Texts*

The course of evolution is perhaps less apparent in the world of international trade law than biology. Chronic Doha Round problems on agricul-

ture and non-agricultural market access (NAMA) remained unresolved during the fall of 2008, summing to a list of issues needing convergence before a resurrection of the Round was more than the object of hope. Yet, none of the then-153 WTO Members appeared to have a vision that the extraordinary still was possible. None seemed to believe progress on details would lead to salvific resurrection of the moribund Round.

China, for example, did little else than call for realism and dampen expectations with Sun Zhenyu, its Ambassador to the WTO, stating in November 2008:

One important thing for all Members is that they should be realistic, and also try to have a balanced outcome. . . . These [i.e., the Special Safeguard Mechanism (discussed below) and sensitive products in agriculture, and sectoral negotiations and preference erosion in NAMA (also discussed below)] are all very delicate issues, and eventually there must be a kind of balance. . . . Now everybody is in crisis . . . in order to get what we did not get in July [2008], we have to be more realistic on those issues. . . . If you raise the stake[s] at this stage, try to ask for more on the basis of July, that will probably not fly. . . .⁷³

Fortunately, two unsung heroes of the Round kept the faith that a resurrection could happen, and, that if it did, the world might be a little better place: the Chair of the Agricultural Negotiations, Ambassador Crawford Falconer of New Zealand, and the Chair of the Market Access Negotiations, Ambassador Luzius Wasescha of Switzerland.

These Chairmen issued new Draft Modalities Texts on 6 December 2008 in their respective areas.⁷⁴ If there is a resurrection of the Doha

73. *Chinese Ambassador Calls for Realism in WTO Trade Talks*, CHINA VIEW (Nov. 28, 2008), http://news.xinhuanet.com/english/2008-11/28/content_10423758.htm; see also *China, U.S. Have "Robust" talks on Turmoil*, REUTERS, Dec. 4, 2008, available at <http://uk.reuters.com/article/2008/12/05/china-usa-idUKBJB00052620081205> (reporting on the 5th Strategic Economic Dialogue (SED) talks between the U.S. and China, in which the two sides issued a bland reiteration of the importance of completing the Doha Round, with meaningful progress by the end of 2008).

74. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.4 (Dec. 6, 2008) [hereinafter *December 2008 Draft Agriculture Modalities Text*]; World Trade Organization, Negotiating Group on Market Access, *Fourth Revision of Draft Modalities for Non-Agricultural Market Access*, TN/MA/W/103/Rev.3 (Dec. 6, 2008) [hereinafter *December 2008 Draft NAMA Modalities Text*].

Chairman Falconer also issued three documents covering issues on which major disputes remained, offering possible compromise solutions:

- (1) On Sensitive Products—
World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Designation*, TN/AG/W/5 (Dec. 6, 2008).
- (2) Also on Sensitive Products—
World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Tariff Quota Creation*, TN/AG/W/6 (Dec. 6, 2008).
- (3) On SSMs—

Round, then the terms and conditions in those Texts will be the setting for it.⁷⁵ That is not to say Members will complete the Round based on each and every proposal in the Texts. To the contrary, the Texts almost surely will undergo revisions that vary from the insubstantial to the immense, depend-

World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Special Safeguard Mechanism*, TN/AG/W/7 (Dec. 6, 2008).

75. See World Trade Organization, *WTO to Move Quickly on Wider Front in 2009 – Lamy* (Dec. 17, 2008), http://www.wto.org/english/news_e/news08_e/tnc_dg_stat_17dec08_e.htm.

Notably, using the December 2008 Texts as a basis for negotiations was India's official position following the return to power of the Congress Party in the May 2009 general elections and appointment of a new Minister for Commerce and Industry—the Anand Sharma, replacing Kamal Nath. India was able to take that position with greater ease, and profess a renewed commitment to the Doha Round, because the election results permitted the Congress Party to shed its most left-wing, protectionist partners in the governing coalition. See Daniel Pruzin, *WTO Members Set December 15–17 as Date for 2011 Ministerial Gathering*, 27 Int'l Trade Rep. (BNA) No. 42, at 1628, (Oct. 28, 2010); Tripti Lahiri, *New Delhi 'Breakthrough' Sets Restart of Doha Round Ag, NAMA Talks for Sept. 14*, 26 Int'l Trade Rep. (BNA) No. 36, at 1191 (Sept. 10, 2009); Serena Tarling & George Parker, *New Delhi Ready to Resume Doha Round of World Trade Talks*, FINANCIAL TIMES, June 23, 2009, at 6.

Likewise, the Group of 20 developing countries insisted ever since the Agriculture Text was issued that it is the “basis for resuming negotiations and represents the end-game in terms of the landing zones,” and has rejected a “selective reopening” of the Text. See Daniel Pruzin, *New WTO Ag Negotiations Chair Walker Outlines Work Plans for Immediate Term*, 26 Int'l Trade Rep. (BNA) No. 25, at 840, 841 (June 25, 2009). Indeed, that insistence applies to both draft modalities agreements, covering agriculture and NAMA, and (as observed above) is held to by (*inter alia*) Brazil, China, and India, as they did not want to see back-sliding, or a return to square one, in Doha Round negotiations—an outcome they feared, perhaps wrongly, that the Administration of President Barack H. Obama sought. See Daniel Pruzin, *WTO Members Vow to Press Forward with Intensified Talks on Doha Round*, 28 Int'l Trade Rep. (BNA) No. 6, at 215 (Feb. 10, 2011) (quoting Brazil's Ambassador to the WTO, Roberto Azevedo, saying that any attempt to push far beyond the December 2008 texts might “backfire, risking to unravel the delicate network of trade-offs we so carefully wove over the last nine years”); Daniel Pruzin & Gary G. Yerkey, *U.S. Sought to Water Down Proposal for 'Stock-Taking' Meeting on Doha*, 26 Int'l Trade Rep. (BNA) No. 48, at 1673 (Dec. 3, 2009); Lahiri, *supra* at 1191. See also Daniel Pruzin, *Lamy Sees Low-Profile 'Stock-Taking' Meeting as Frustration Over Doha Grows*, 27 Int'l Trade Rep. (BNA) No. 8, at 248, 249 (Feb. 25, 2010) (reporting that while the U.S. was the most critical of the December 2008 Draft Texts on Agriculture and NAMA, most WTO Members agreed a final deal should not stray too far from them); Jonathan Lynn, *Intensified Doha Talks to Resume this Month*, REUTERS, Sept. 4, 2009, available at <http://www.reuters.com/article/2009/09/04/us-trade-doha-idUSTRE58310Q20090904> (noting that key trade ministers—albeit representing just 39 of the then 153 Members—agreed at a September 2009 meeting in New Delhi, in advance of the G-20 summit in Pittsburgh, to resume Doha Round talks on the basis of the December 2008 Texts, and quoting USTR Ron Kirk as saying “[i]t has never been our argument that we should start all over again or reopen them, but we have to have some idea of what those gaps and blanks are”); Gary G. Yerkey, *India Plans to Host G-20 Trade Ministerial this September to Help Advance WTO Talks*, 26 Int'l Trade Rep. (BNA) No. 26, at 841 (June 25, 2009) (quoting Minister Sharma as saying USTR Ron Kirk agreed to build on the existing texts); Daniel Pruzin, *New WTO Ag Chair Vows Fast Action to Revive Doha Round Farm Trade Talks*, 26 Int'l Trade Rep. (BNA) No. 18, at 568, 568–69 (Apr. 30, 2009); Daniel Pruzin, *Ministers Pledge to Refrain from Imposing New Trade Barriers, Will Push for Doha Deal*, 26 Int'l Trade Rep. (BNA) No. 6, at 180, 180–81 (Feb. 5, 2009) (reporting the trade ministers of Brazil and Switzerland regard the December 2008 Texts as the basis for any deal).

ing on the topic.⁷⁶ Indeed, following the November 2010 G-20 Summit in Seoul, Members pledged to redouble their efforts to agree to revised agriculture and NAMA texts, which they (not the Chairmen) promised to prepare, by April, or at least the middle of, 2011, with a view to signing the deal at the eighth WTO Ministerial Conference in Geneva in December 2011.⁷⁷ Members feared the window of opportunity—one of many during the interminable Round—to finish the Round would close in 2012 because of presidential elections in France, India, and the U.S.

While Brazil, China, and India argue these Texts ought not to be altered in any material way, the U.S. insists on significant changes.⁷⁸ Some WTO Members, such as South Africa, have rejected them. Overall, as the Minister of Trade for New Zealand and former Chair of the Agriculture Negotiations, Tim Groser, remarked in June 2009:

We've got agreement, not necessarily comfortable agreement, that you can't [walk] away from seven years of text that's been developed [for the Doha Round negotiations]. There have been people wanting essentially to go back to square one. That was a recipe for disaster. [Not building on the December 2008 Agriculture Text, and presumably the NAMA Text as well, would be] either naiveté of the highest order or cynicism of the lowest order.⁷⁹

The point is the December 2008 Draft Texts on Agriculture and NAMA embody a final judgment Members must make—do they accept, with modifications as need be, the proposals for freeing up world trade in farm and manufactured products, or not? Only a “yes” answer leads to a resurrection. A “no” answer means final death of the Doha Round, at least in the sense of completion via a single undertaking, which is the approach of all previous multilateral trade rounds.⁸⁰

76. See Gary G. Yerkey, *U.S. Cautions Lamy Against Pushing for Early Restart of WTO Trade Talks*, 26 Int'l Trade Rep. (BNA) No. 13, at 404 (Mar. 26, 2009).

77. See Daniel Pruzin, *Officials Meet to Begin Preparations in Geneva for Accelerated Doha Talks*, 27 Int'l Trade Rep. (BNA) No. 48, at 1874 (Dec. 9, 2010); Daniel Pruzin, *WTO Members Endorse Work Plan to Secure Doha Agreement in 2011*, 27 Int'l Trade Rep. (BNA) No. 47, at 1832 (Dec. 2, 2010); see also World Trade Organization, *Farm Talks To Aim for 'Modalities' in First Quarter of 2011* (Dec. 6 and 10, 2010), http://www.wto.org/english/news_e/news10_e/agng_06dec10_e.htm.

78. See Daniel Pruzin, *WTO Ministerial Ends with a Whimper; Members to Review Doha Talks in Early 2010*, 26 Int'l Trade Rep. (BNA) No. 48, at 1638, 1639 (Dec. 3, 2009).

79. Murray Griffin, *Cairns Ministers Seek Rapid Re-Engagement on Doha; USTR Urges Openness to New Ideas*, 26 Int'l Trade Rep. (BNA) No. 24, at 772 (June 11, 2009).

80. As of the end of the Seventh Ministerial Conference in Geneva, held from 30 November through 2 December 2009, there were increasingly numerous and desperate calls, from rich and poor countries alike, to abandon the single undertaking and aim for separate, less ambitious deals on individual topics such as—

- Disciplines on fishing subsidies.
- Duty-free access for merchandise from the least developed countries.
- Ending cotton subsidies.
- Settlement of the *Bananas* dispute.

The faith of Chairmen Falconer and Wasescha was tempered by realism, of course. The WTO Director-General Lamy decided not to call a meeting of trade ministers before year-end 2008, admitting there was no political will among key Members—including, without naming them, China, India, the U.S., and EU—to make the compromises necessary to complete the Doha Round.⁸¹ The Chairmen were under tremendous pressure to issue the December Texts. The Director-General hoped they might come up with the magic formulae needed to reconcile theretofore intractable differences. He also hoped that in 2009 he would secure re-appointment as Director-General (which he did), and to some degree his success was bound to that of the Round.⁸²

Yet, in a Member-driven organization such as the WTO, Chairmen Falconer and Wasescha hardly could impose solutions. Chairmen are neither scribes nor dictators. They occupy an uneasy position, being more than facilitators (though that is their technical description) but having no management authority. Their position can and does change, depending on

- Trade liberalization for environmental goods and services.

The U.S. continued to favor the single undertaking approach, as it was keen to see what it would “get” in return for what it “gave.” See Laura MacInnis, *Calls Grow To Smash WTO Deal into Digestible Pieces*, REUTERS, Dec. 3, 2009, available at <http://www.reuters.com/article/2009/12/03/us-trade-wto-deals-idUSTRE5B229G20091203>. Each of these topics, including the U.S. position calling for reciprocity, is explored more fully below.

81. See World Trade Organization, *Lamy Recommends No Ministerial Meeting By End of This Year* (Dec. 12, 2008), http://www.wto.org/english/news_e/news08_e/tnc_dg_12dec08_e.htm; Daniel Pruzin, *Lamy Says Spring G-20 Meeting Should Include Commitment to End Doha*, 26 Int'l Trade Rep. (BNA) No. 5, at 144, 144–45 (Jan. 29, 2009); Daniel Pruzin & Gary G. Yerkey, *WTO's Lamy Calls Off Doha Ministerial; Deal Up to Obama Team, U.S. Official Says*, 25 Int'l Trade Rep. (BNA) No. 50, at 1766, 1766–77 (Dec. 18, 2008); Roberta Rampton, “Many Gaps” Nix World Trade Deal Breakthrough: USTR, REUTERS, Dec. 12, 2008, available at <http://www.reuters.com/article/2008/12/12/us-trade-wto-schwab-idUSTRE4BB5BP20081212>.

For a comparative journalistic account of the political economy of China and India in light of global economic recession, see *China and India: Suddenly Vulnerable*, ECONOMIST, Dec. 13, 2008, at 15. For a briefing on Chinese economic reforms ushered in by Deng Xiaoping in 1978, see *China's Reforms: The Second Long March*, ECONOMIST, Dec. 13, 2008, at 30–33. For a discussion of obstacles to Indian economic development, including labyrinthine politics, a creaky infrastructure, terrorist threats, and gross inequities, see *A Special Report on India: An Elephant, Not a Tiger*, ECONOMIST, Dec. 13, 2008, at 62.

82. The unanimous, four-year re-appointment, effective 1 September 2009, occurred in April 2009 after the WTO Members required Pascal Lamy to make a presentation on his vision for the future of the WTO, and engage in a question-and-answer session. See THE WORLD TRADE ORGANIZATION, <http://www.wto.org>.

With no others announcing their candidacy by the 31 December 2008 deadline, Lamy became the first uncontested selection in WTO history. See Daniel Pruzin, *Lamy Secures Second Term at WTO Helm After No Challengers to Leadership Emerge*, 26 Int'l Trade Rep. (BNA) No. 2, at 38 (Jan. 8, 2009); UPDATE 1—*Lamy Only Candidate for Next Head of WTO*, REUTERS, Jan. 5, 2009, available at <http://uk.reuters.com/article/2009/01/05/uk-trade-wto-lamy-idUKTRE5041VE20090105>. Aside from an endorsement of his performance in the post, that fact may reflect the lack of other viable candidates, a reluctance among Members to engage in a contentious changing of the guard (especially amidst a difficult global economic environment), and a perception among Members that the position is a thankless one (at least in the present climate).

the circumstances, in the large area between these extremes. Deals must come from the Members.

Thus, the Chairmen did their best to strike the right balance between capturing points of convergence among Members and suggesting possible solutions to reach consensus on outstanding disputes. If trade ministers did not reconvene for another go at a final deal, then at least the reason would not be the lack of revised negotiating documents, however modest, even trivial, the revisions might be. Both Chairmen prefaced their December 2008 Draft Modalities Texts with the same caution: “[E]verything is conditional in the deepest sense.”⁸³ About three months later, Chairman Falconer added a post-script to his Text. In March 2009, he announced his departure from his posts as Chairman and as New Zealand’s Ambassador to the WTO, to return to Wellington to serve as Deputy Secretary at the Ministry of Foreign Affairs and Trade.⁸⁴

While he was replaced by another New Zealander, Ambassador David Walker,⁸⁵ that post-script was an ominous portent: Having served as the Chairman since July 2005, few, if any, officials knew more about trade and agriculture, and had labored with greater tenacity and good cheer in the Doha Round, than Chairman Falconer. Another bad omen came in September 2009, when the New Zealand Ministry of Foreign Affairs announced Ambassador Walker was being reassigned to a different post effective early 2010, a date later put off to April 2011.⁸⁶ Despite his heroic efforts, the two-year tenure of Chairman Walker was marked by little else than a stalemate over entrenched differences on major substantive issues and grinding, mind-numbing work on technical issues of templates WTO Members could use to list their final agricultural concessions and attendant data.

Following issuance of the Draft Modalities Texts in December 2008, negotiations proceeded, in fits and starts, as chronicled below. By early 2011, there was pressure from the WTO Director-General, Pascal Lamy, and certain Members, like the EU, on the Chairman of the respective nego-

83. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, pmb., at ¶ 2; *December 2008 Draft NAMA Modalities Text*, *supra* note 74, revision, ¶ 1.

84. See Daniel Pruzin, *Chair of WTO Farm Trade Talks to Leave in April, Will Return to New Zealand*, 26 Int’l Trade Rep. (BNA) No. 13, at 408 (Mar. 26, 2009).

85. See Daniel Pruzin, *Deal Reached on New Doha Agriculture Chair; New Zealander Walker to Succeed Falconer*, 26 Int’l Trade Rep. (BNA) No. 16, at 507 (Apr. 16, 2009); Daniel Pruzin, *New Zealander Walker Set to Secure Ag Chair in Doha Talks*, 26 Int’l Trade Rep. (BNA) No. 15, at 477 (Apr. 9, 2009). Interestingly, the Group of 33 developing countries, which includes India, opposed the appointment of Ambassador Guillermo Valles Galmés of Uruguay, because he had been critical in July 2008 of the position taken by many developing countries in favor of a special agricultural safeguard mechanism (which is discussed below). See *id.*

86. See Daniel Pruzin, *Lamy Postpones Meeting Amid Continued Bickering Over ‘Deliverables’ Package*, 28 Int’l Trade Rep. (BNA) No. 24, at 974 (June 16, 2011); Daniel Pruzin, *WTO Members to Begin Search for New Agriculture Negotiations Chair*, 27 Int’l Trade Rep. (BNA) No. 35, at 1336 (Sept. 9, 2010).

tiating groups to issue revised texts by Easter (24 April 2011).⁸⁷ That way, the remainder of the year could be used to fill in schedules of commitments, and the Doha Round could be finished by the end of the year. Every meeting held among the Members, in various configurations, toward that end in January through early April 2011 failed. That is, no breakthrough agreement emerged. And, with heads of governments captivated by revolutions in the Arab World, and war in Libya, they paid little attention to the Round. The U.S., along with India and other Members, took the position that no new texts should be issued and that doing so would risk the appearance, if not reality, that the Chairs were imposing modalities agreements on the Members, contrary to the Member-driven way in which the WTO conventionally operates. Such texts would have no traction with domestic legislatures.

Following the work of his colleagues on the Draft Modalities Texts in Agriculture and NAMA, Ambassador Guillermo Valles Galmés of Uruguay, Chairman of the Negotiating Group on Rules, issued a revised Draft Consolidated Text on trade remedies, specifically, antidumping (AD), countervailing duties (CVDs), and fishing subsidies.⁸⁸ He did so about one week after issuance of the Agriculture and Modalities Texts. Vast tracts of the December 2008 Rules Text were identical to the previous iteration, which the Chairman had issued in November 2007. The new Rules Text had only one advantage over its predecessor: It identified clearly the points of disagreement among WTO Members and the range and depth of their disagreement. The disadvantage was unmistakable: The new Text deleted proposed drafting language on those points because that language had attracted neither consensus nor convergence toward consensus.

Confessedly, the December 2008 Draft Rules Text was dispiriting. It embodied no strong faith in the possibility of a Doha Round resurrection.

87. See Daniel Pruzin, *WTO Chairs to Issue Doha 'Documents' April 21*, *Lamy to Brief on NAMA Progress*, 28 Int'l Trade Rep. (BNA) No. 15, at 609 (Apr. 14, 2011).

88. See World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236 (Dec. 19, 2008) [hereinafter *December 2008 Draft Rules Text*].

The term of Mr. Galmés as Ambassador expired in May 2010, thus he had to step down as Chairman of the Rules Negotiations, a post he held since October 2004. In the first few months of 2010, no one expressed any interest in replacing him in this post, and several candidates rejected the possibility. See Daniel Pruzin, *WTO Members Endorse Chair Lineup; Search on for New Doha Rules Talks Chair*, 27 Int'l Trade Rep. (BNA) No. 8, at 255 (Feb. 25, 2010). By June, a taker had been found—Dennis Francis, the WTO Ambassador from Trinidad and Tobago—and WTO Members approved him in July, the fourth Rules Negotiations Chair since the Doha Round was launched in November 2001. Notably, Mario Matus of Chile had been identified as the leading candidate, but he drew objections because of the strong stance of his country in the rules negotiations. Chile favors abolition of zeroing, which the U.S. does not, and Chile favors strict disciplines on fishing subsidies, which Japan, Korea, and Taiwan do not. See Daniel Pruzin, *WTO Members Approve New Rules Chair; U.S. Maintains Hard Line on Antidumping*, 27 Int'l Trade Rep. (BNA) No. 28, at 1072–73 (July 15, 2010); Daniel Pruzin, *WTO Set to Appoint New Chair for Doha Negotiations on Rules*, 27 Int'l Trade Rep. (BNA) No. 24, at 887 (June 17, 2010).

Perhaps that was for good reason. In the preceding thirteen months since the earlier version, WTO Members had given the Chairman precious little to work with, in terms of a consensus on AD, CVD, or fishing subsidies. He had no choice but to drop proposed compromise language and replace it with an insert summarizing the ongoing fights.

B. *The April 2011 Documents*

At the end of March 2011, the U.S. declared the gaps in the Doha Round had become unbridgeable.⁸⁹ The Director-General admitted the talks had reached an impasse. Consequently, the Chairs abandoned the idea of issuing new negotiating texts. They resigned themselves to issuing, on 21 April 2011, “Documents” that reflected progress in the Round since December 2008.

Thus, on 21 April 2011, for the first time in the history of the Round, the Chairs of all nine negotiating groups simultaneously summarized the work that had occurred to date. The groups and associated “Documents” covered:

- (1) Agriculture.⁹⁰
- (2) NAMA.⁹¹
- (3) Services.⁹²
- (4) Rules, which cover, not only the conventional trade remedies of AD and CVDs, but also the matter of fisheries subsidies and regional trade agreements (RTAs), specifically, transparency and systemic RTA issues.⁹³

89. See Pruzin, *supra* note 87, at 609.

90. See World Trade Organization, Committee on Agriculture, Special Session, *Negotiating Group on Agriculture—Report by the Chairman, H.E. Mr. David Walker, to the Trade Negotiations Committee*, ¶ I.A.6, TN/AG/26 (Apr. 21, 2011) [hereinafter *April 2011 Agriculture Document*]. This Document also provides minor typographical corrections to the *December 2008 Draft Agriculture Modalities Text*. See *April 2011 Agriculture Documents*, *supra* ¶ I.D.49.

91. See World Trade Organization, Negotiating Group on Market Access, *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations*, TN/MA/W/103/Rev.3/Add.1 (Apr. 21, 2011) [hereinafter *April 2011 NAMA Document*]; see also World Trade Organization, Trade Negotiation Committee, *Report by the Director-General on His Consultations on NAMA Sectoral Negotiations*, TN/C/14 (Apr. 21, 2011).

92. See World Trade Organization, Council for Trade in Services, Special Session, *Negotiations on Trade in Services—Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee*, TN/S/36 (Apr. 21, 2011) [hereinafter *April 2011 Services Document*].

93. See World Trade Organization, Negotiating Group on Rules, *Communication from the Chairman*, TN/RL/W/254 (Apr. 21, 2011) [hereinafter *April 2011 Rules Document*].

Concerning RTAs, see World Trade Organization, Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements—Report by Ambassador Dennis Francis Chairman, Negotiating Group on Rules*, TN/RL/W/252 (Apr. 21, 2011) [hereinafter *April 2011 RTA Transparency Mechanism Document*], and World Trade Organization, Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Systemic Issues—Report by Ambassador Dennis Francis Chairman, Negotiating Group on Rules*, TN/RL/W/253 (Apr. 21, 2011) [hereinafter *April 2011 RTA Systemic Issues Document*].

- (5) Intellectual Property (IP), in particular, multilateral notification and registration of geographic indications (GIs) for wines and spirits, extension of GI protection to non-alcoholic products, and protection of traditional knowledge and biodiversity.⁹⁴

As regards transparency, since 14 December 2006, the WTO has implemented on a provisional basis a General Council Decision Establishing a Transparency Mechanism for Regional Trade Agreements. See The World Trade Organization, General Council, *The Transparency Mechanism for Regional Trade Agreements*, WT/L/671 (Dec. 14, 2006). Paragraph 23 of that Decision obligated WTO Members to debate, within the context of the Doha Round, whether the Decision should be made permanent. That is, Members had to consider whether the RTA transparency mechanism created by the 2006 Decision should be replaced by a permanent (and possibly modified) mechanism. See *April 2011 RTA Transparency Mechanism Document*, *supra*, at ¶¶ 1, 3. The Annex to the April 2011 Transparency Mechanism Document sets out the 2006 Decision, with possible modifications in bracketed text.

The thrust of the 2006 Decision was to enhance the transparency of RTAs, particularly in view of their proliferation, through early announcements and notifications, subsequent reporting, and technical support. See *April 2011 RTA Transparency Mechanism Document*, *supra*, at ¶¶ 1–2 (on early announcement), 3–4 (on notification), 14–17 (on reporting), and 19 (on technical support for developing countries). The Annex to the Decision requires RTA parties to submit specific data about tariff concessions, MFN duty rates, preferential product-specific rules of origin, and import statistics, as well as information on services trade. The end result, at least in theory, should be improved compliance with disciplines on RTAs in GATT Article XXIV and GATT Article V. Other than the requirement that the WTO Secretariat provide technical support to developing and least developed countries to implement the Decision, particularly with respect to preparing and submitting data, there were no provisions tailored to poor countries. Likewise, there were no provisions to encourage formation of RTAs among poor or Muslim countries or to improve integration among such RTAs as do exist.

As for systemic issues posed by RTAs, the April 2011 RTA Systemic Issues Document merely recounted that discussions among WTO Members had focused on the “substantially all the trade” discipline in GATT Article XXIV:8(a)(i) (for customs unions) and XXIV:8(b) (for free trade agreements), and special and differential treatment for poor countries. See *April 2011 RTA Systemic Issues Document*, *supra*, at ¶¶ 1–5. On the first issue, one-third of the proposals advocated a minimum benchmark to qualify as “substantially all the trade,” which would be based on bilateral trade (between proposed RTA partners), tariff lines covered (by the proposed RTA), or both, or would be based on a combined average of bilateral trade and tariff lines covered. Such proposals called for measuring the benchmark at the time a proposed RTA entered into force, and at the end of a transition period prescribed by the RTA. See *April 2011 RTA Systemic Issues Document*, *supra*, at ¶ 4. On special and differential treatment, Members debated whether any flexibilities they agreed to should be placed in GATT Article XXIV, the 1994 *Uruguay Round Understanding on the Interpretation of Article XXIV*, the 1979 *Tokyo Round Enabling Clause*, or both. That is, Members had reached consensus neither on the substance of flexibilities nor on their placement. Thus, the Chairman reported:

8. To conclude, it is clear that notwithstanding the mandate in Doha and the Ministerial Declaration in Hong Kong, China:
 - i. in essence, the objectives of various Members in these negotiations *remain conceptually different*; and
 - ii. *gaps persist* in Members’ positions on all elements proposed.
9. I reaffirm my advice to Members that *unless they adopt a pragmatic, flexible and less doctrinaire approach* to these negotiations it is unlikely that this impasse will be overcome.

Id. at ¶¶ 8–9 (emphasis added). In light of their failure to reach agreement on these two issues, it was surprising that the Members contemplated a post-Doha Round work program on systemic issues—unless, of course, they sought to defer hard bargaining until after the Round. See *id.* at ¶ 6.

94. The WTO issued three documents on 21 April 2011 dealing with IP and GI matters. See:

(6) Environment.⁹⁵

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- (1) World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session, *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits—Report by the Chairman, Ambassador Darlington Mwape (Zambia) to the Trade Negotiations Committee*, TN/IP/21 (Apr. 21, 2011) [hereinafter *April 2011 Geographical Indications Document*].
 - (2) World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session, Attachment, *Multilateral System—Notification and Registration of Geographical Indications for Wines and Spirits—Draft Composite Text, Revision*, JOB/IP/#/Rev.1 (Apr. 20, 2011) [hereinafter *April 2011 Geographical Indications Draft Composite Text*].
 - (3) World Trade Organization, General Council, Trade Negotiations Committee, *Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPs Agreement to Products Other than Wines and Spirits and those Related to the Relationship between the TRIPs Agreement and the Convention on Biological Diversity—Report by the Director-General*, WT/GC/W/633, TN/C/W/61 (Apr. 21, 2011) [hereinafter *April 2011 TRIPs Article 2—CBD Document*].

See also World Trade Organization, *Intellectual Property: Geographical Indications Negotiations—Formal Meeting, Geographical Indications Draft Completed Swiftly But with 208 Differences* (Mar. 3, 2011), http://www.wto.org/english/news_e/news11_e/trip_ss_03mar11_e.htm (reporting on the status of the negotiations and production of the nine-page draft composite text).

The topic of geographical indications, while set in the context of intellectual property, also relates to agriculture. Though this topic is not addressed in the December 2008 Draft Agriculture Modalities Agreement, many geographically-indicated products are primary or processed farm products. See *December 2008 Draft Agriculture Modalities Agreement*, *supra* note 74, at § V.B.

Negotiations on a proposed multilateral register for GIs pre-date the Doha Round, having commenced in 1997 under the auspices of Article 23.4 of the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*, which states:

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Quoted in RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE—DOCUMENTS SUPPLEMENT 533* (3d ed. 2008).

The fact these talks pre-date the Round (as do certain issues relating to the *General Agreement on Trade in Services*, discussed below), is shameful. It highlights how little progress WTO Members had made in well over a decade of negotiations on a reasonably focused issue.

Mention of the on-going GI negotiations was included in Paragraph 18 of the Ministerial Declaration launching the Doha Round, thereby folding them into the Round:

18. With a view to completing the work started in the Council for Trade-Related Aspects of Intellectual Property Rights (Council for TRIPS) on the implementation of Article 23.4, we agree to negotiate the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference. We note that issues related to the extension of the protection of geographical indications provided for in Article 23 to products other than wines and spirits will be addressed in the Council for TRIPS pursuant to paragraph 12 of this Declaration.

Quoted in RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE—DOCUMENTS SUPPLEMENT 637* (3d ed. 2008).

The GI topic is mentioned again in Paragraph 39 of the December 2005 Hong Kong Ministerial Declaration. For further discussion of the GI negotiations, see RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* (3d ed. 2008) (entry for “Geographical Indication[s]”).

95. See World Trade Organization, Committee on Trade and Environment, Special Session, *Committee on Trade and Environment in Special Session—Report by the Chairman, Ambassador Manuel A. J. Teehankee, to the Trade Negotiations Committee*, TN/TE/20 (Apr. 21, 2011) [hereinafter *April 2011 Trade and Environment Document*].

- (7) Development.⁹⁶
- (8) Trade Facilitation.⁹⁷
- (9) Dispute Settlement.⁹⁸

As always had been true in the Round, the first four negotiating groups were the most important. Without a deal in them, a comprehensive Round, agreed to by all WTO Members as a single undertaking, was impossible.

Collectively, the April 2011 Documents gave a clear picture of what had been agreed to and, more importantly, what areas of disagreement remained. This picture was “vertical,” in the sense that the devilish details of proposals within each negotiating group could be seen. This picture also was “horizontal,” in the sense that the broad package, across all nine areas, could be appreciated.

The WTO Director-General, Pascal Lamy, characterized the Documents as both “impressive and realistic.”⁹⁹ Those adjectives were euphemisms. If they were “impressive,” then it was as much because of their cleverness in obfuscating simple trade liberalization issues with hideously complex rules, as it was for whatever economic gains they might happen to yield. As for the Documents being “realistic,” the more accurate assessment would be “depressing.” After a decade of negotiations, the Documents were long, convoluted regurgitations showing that nothing much had happened since the issuance of the December 2008 negotiating texts.¹⁰⁰ Indeed, following twelve single-spaced pages of discussion, the April 2011 Agriculture Document simply attached the December 2008 Draft Agriculture

96. See World Trade Organization, Committee on Trade and Development, Special Session, *Special Session of the Committee on Trade and Development—Report by the Chairman, Ambassador Shahid Bashir (Pakistan), to the Trade Negotiations Committee*, TN/CTD/26 (Apr. 21, 2011) [hereinafter *April 2011 Trade and Development Document*].

97. See World Trade Organization, Negotiating Group on Trade Facilitation, *Draft Consolidated Negotiating Text—Revision*, TN/TF/W/165/Rev.8 (Apr. 21, 2011) [hereinafter *April 2011 Draft Trade Facilitation Text*].

98. See World Trade Organization, Dispute Settlement Body, Special Session, *Special Session of the Dispute Settlement Body—Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee*, TN/DS/25 (Apr. 21, 2011) [hereinafter *April 2011 DSU Report*].

Appendix A to the *April 2011 DSU Report* contained another Report by the Chairman, and Annex 1 to Appendix A contained the July 2008 “Consolidated Draft Legal Text (proposed as a basis for further work).” *Id.* app. A, annex 1. (Both the Appendix A Report and the Draft *DSU* Text bore the TN/DS/25 document coding number of the Report to which they were appended.) Also in April 2011, the Chairman issued Annex 2 to Appendix A, entitled “Thematic Overview,” which discussed various *DSU* reform issues (and which also bore the TN/DS/25 coding number). *Id.* app. A, annex 2.

Finally, at the same time, the Chairman published “Appendix B: Informal DSB Special Session Meetings (May 2010 to April 2010)—Chairman’s Summaries of Recent Work.” Appendix B (which bore the TN/DS/25 coding number) essentially contained minutes of meetings of the DSB on *DSU* reform.

99. World Trade Organization, Trade Negotiations Committee, *Cover Note by TNC Chair*, TN/C/13 (Apr. 21, 2011).

100. See Daniel Pruzin, *WTO Chief Calls for Rethink on Doha Talks, Says Differences on Sectorals ‘Unbridgeable,’* 28 Int’l Trade Rep. (BNA) No. 17, at 686 (Apr. 28, 2011).

Modalities Text. Likewise, following twenty-two single-spaced pages of discussion, the April 2011 NAMA Document simply attached the December 2008 Draft NAMA Modalities Text.

What also was “depressing” was the lack of agreement on the cause of stagnation. Lamy said the entire Doha Round was blocked by a “classic mercantilist issue: tariffs on industrial products, the bread and butter of WTO negotiations since their inception.”¹⁰¹ True, sectoral negotiations within NAMA were a major obstacle. True also, some of the major trading powers behaved like mercantilists in these negotiations. But, as the Deputy USTR and Ambassador to the WTO, Michael Punke, indicated, by no means would the rest of the pieces of the Round fall into place if a NAMA deal were reached.¹⁰² Large, sometimes extraordinarily large, gaps remained on agriculture, services, and essentially all of the topics covered in the Round.

Thus, the roughly 600 pages of Documents highlighted the difference between “work” and “progress,” and between “motion” and “productivity,” that so often mars international organizations. The Director-General blatantly over-stated the strengths of the Documents in saying they represented “greater opportunities for the poorest [and] for the first time plac[ed] development at the heart of the global trading system.”¹⁰³ In truth, the April 2011 Documents marked the fact the Round had “entered the most serious crisis since a failed ministerial meeting in July 2008, when trade ministers from key WTO member[s] came close to clinching a deal.”¹⁰⁴ Moreover, the Documents could be faulted for their scandalous evasion of the purpose on which the Round was founded: fighting poverty, enhancing development, and thereby countering terrorism.

Perhaps one of the most glaring examples came from the Committee on Trade and Development. Pursuant to the DDA, this Committee was charged with considering how best to monitor and evaluate special and differential (S & D) treatment provisions in multilateral trade agreements. Such provisions, by definition, are supposed to offer more favorable treatment to developing countries, and still more favorable treatment to least developed countries, than to developed countries. After a decade of talks, the Committee had done little, as evident from the April 2011 Trade and Development Document. Its author, the Chairman of the Trade and Development negotiations, could not have been a stranger to the links between trade, poverty, and Islamist extremism: He was Ambassador Shahid Bashir of Pakistan.

101. Daniel Pruzin, *U.S. Criticizes WTO Chief Lamy's Assessment of Doha Impasse, Says NAMA Not Only Issue*, 28 Int'l Trade Rep. (BNA) No. 18, at 724 (May 5, 2011).

102. *See id.*

103. World Trade Organization, Trade Negotiations Committee, *Cover Note by TNC Chair*, TN/C/13 (Apr. 21, 2011).

104. Pruzin, *supra* note 100, at 686.

Had the WTO Members reached a consensus on a “Monitoring Mechanism” by which to check the extent to which developed countries were implementing S & D treatment rules? No. They agreed the Mechanism should include, not only all GATT-WTO texts and any Doha Round agreements, but also Ministerial and General Council Decisions.¹⁰⁵ They also agreed the Mechanism should convene biannually.¹⁰⁶ But, they could not agree on what they would do. That is, there was no clear consensus on what “Monitoring” means, i.e., whether it is “meant to be an exercise in ‘transparency,’ overseeing the implementation of S & D provisions, or a permanent negotiating forum on S & D provisions, even after conclusion of the DDA.”¹⁰⁷ In a proposed compromise, they waffled: “Monitoring” would not be a negotiating body, but it could make recommendations or proposals for other WTO bodies, and it will complement, not replace, other relevant WTO mechanisms.¹⁰⁸ The Members also failed to make headway on S & D treatment proposals for specific GATT-WTO texts. In brief, the decade-long work of the Round negotiating group most obviously entrusted with managing the link between trade liberalization and poverty alleviation, by ensuring the existence and operation of development-friendly rules, was singularly unimpressive.

Scrambling to preserve some measure of credibility, in May 2011 Director-General Lamy said negotiations on expanding the WTO *Agreement on Government Procurement (GPA)* might be part of a package of deliverable items at the December 2011 Ministerial Conference.¹⁰⁹ Never before had *GPA* negotiations been linked to or part of the Doha Round. He was stretching outside the Round for some victory to tout. Yet, with three major hurdles to cross, *GPA* negotiations were far from complete.

First, the U.S. and EU awaited a credible offer, with significant central and sub-central government coverage, from China, so that China would be a party to the plurilateral accord. As part of its 11 December 2001 terms of accession to the WTO, China promised to join the *GPA*.¹¹⁰ But, it has been slow in working toward keeping its promise. China submitted its initial offer—the government entities that it scheduled under the *GPA* positive-list approach—in December 2007. That offer was grossly inadequate, in terms of entities covered, and China revised it in July 2010.

105. See World Trade Organization, Special Session of the Committee on Trade and Development, *Report by the Chairman, Ambassador Shahid Bashir (Pakistan), to the Trade Negotiations Committee*, ¶ (a), Annex 1, ¶ 2, TN/CTD/26 (Apr. 21, 2011) [hereinafter *Monitoring Mechanism*].

106. *Id.* at ¶¶ (c), (d), Annex 1, ¶¶ 9, 12. According to ¶ (d), and ¶¶ 9 and 12 of the Annex, WTO Members would reappraise the Mechanism three years after its operation, and thereafter as necessary.

107. *Id.* at ¶ (b).

108. *Id.* at ¶ (b), Annex 1, ¶¶ 3-8.

109. Daniel Pruzin, *WTO's Lamy Says Public Procurement Deal Could be in December Deliverables Package*, 28 Int'l Trade Rep. (BNA) No. 21, at 846 (May 26, 2011).

110. *Id.*

To the chagrin of the U.S. and EU, the revised offer was insufficient. They called on China to expand the central government entities covered.¹¹¹ They also asked China to include procurement by all subcentral governments in all of China's twenty-two provinces and five autonomous regions, and in the four municipalities (Beijing, Chongqing, Shanghai, and Tianjin) under central government authority. The United States and EU also said China needed to include the twenty-three municipalities at the prefecture level. In respect of all these requests, the U.S. and EU noted that China should include subordinate agencies operating under the relevant entities.

Second, the EU demanded more ambitious offers of coverage from Canada, Japan, and Korea. With Japan, for example, the EU insisted it lower its thresholds for government construction contracts that would be subject to *GPA* disciplines.¹¹² The EU also demanded Japan allow foreign suppliers to bid on procurement contracts issued by private Japanese railway operators.

Third, and most importantly, the U.S. had to open further its government procurement market. The U.S., said the EU, needed to schedule more central government entities and subject more state governments to *GPA* disciplines. (Thirteen states had not scheduled any of their official entities in the *GPA*: Alabama, Alaska, Georgia, Indiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, Virginia, and West Virginia.) The U.S. also needed to reduce the competitive distortions created by its set-aside programs. That is, the EU wanted the U.S. to eliminate the exemption the U.S. inserted in the *GPA* from *GPA* disciplines for procurement schemes that require certain federal procurement contracts be awarded to small and medium-sized enterprises (SMEs).¹¹³ Ironically given its much-ballyhooed interest in the environment, the EU also sought an end to U.S. procurement rules that prefer "green" firms that endeavor to protect the environment.

Until the U.S. and other countries enhanced their offers, the EU would adhere to strict reciprocity vis-à-vis such countries when fashioning its offers and awarding government procurement contracts. Thus, it would open up the EU procurement market to Iceland, Lichtenstein, Norway, and Switzerland, but not to Canada, Japan, Korea, or the U.S.¹¹⁴ In sum, these three hurdles meant the likelihood of completing an accord to expand the *GPA* was low, at least in the short or medium-term.¹¹⁵ In turn, the difficulties

111. *Id.*

112. Daniel Pruzin, *Deal on Revised WTO Procurement Accord Will Depend on U.S., EU, Japan Trade-Offs*, 28 Int'l Trade Rep. (BNA) No. 22, at 892 (June 2, 2011).

113. *Id.*

114. *Id.*

115. The EU and U.S. could not even agree on what form a *GPA* deal, if reached, should take. The Europeans favored an entirely new accord, because of EU rules under the Treaty of Lisbon. The U.S. insisted on a revision to the existing *GPA*, because with its lack of fast-track trade negotiating authority, Congress might not pass a new accord. *See id.*

manifest in the April 2011 Documents, on matters that properly were in the Round, could not be offset or covered up easily by a *GPA* deal.

C. *Technical Details as a Foundation for Thematic Appraisal*

What follows in this Trilogy of law review articles is an analysis of the December 2008 Draft Modalities Texts, along with the April 2011 Documents (where relevant). This analysis is at two levels, technical details and thematic appraisal:

- Progress—
How, if at all, do the December 2008 Texts and April 2011 Documents differ from their immediate predecessors of July 2008? This question asks what progress the WTO Members had made in the critical final six months of 2008, and what key areas of disagreement remained.
- The Deal on the Table—
What is the possible consensus reflected in the December 2008 Texts and April 2011 Documents? This question asks what deal is on the bargaining table for the Members to accept or reject, and thereby conclude the Round, one way or the other.

The complexity of the terms and conditions compel a lengthy analysis—hence, the Trilogy. After all, ruminations and pontifications about the Round are bluster without strong grounding in legal fact.

IV. CUTTING DOMESTIC FARM SUBSIDIES

A. *Overview*

In virtually all material respects, the December 2008 Draft Agriculture Modalities Agreement proved to be the same as its predecessor of July 2008.¹¹⁶ The new Text covered the familiar topics—the three dimensions of the *WTO Agreement on Agriculture* from the Uruguay Round (1986–1994), all of which needed reform, namely, domestic support, market access, and export subsidies.¹¹⁷ The December Text also identified the choices facing the WTO Members. Large swathes of it, aside from episodic formatting or

116. This discussion is based on a paragraph-by-paragraph, line-by-line comparison of the December 2008 and July 2008 Draft Agriculture Modalities Texts, and the December 2008 Revised Draft Modalities for Sensitive Product Designation and Agriculture Special Safeguard Mechanisms [SSMs]. These texts are available at http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm. It also is based on the unofficial explanation of these texts prepared by the Information and Media Relations Division of the WTO Secretariat. See WTO Secretariat, *Unofficial Guide to the Revised Draft Modalities—Agriculture* (Dec. 6, 2008, *corr'd* Dec. 9, 2008), http://www.wto.org/english/tratop_e/agric_e/ag_modals_july08_e.htm [hereinafter *Unofficial Guide to Revised Draft Modalities*].

117. The *Agreement on Agriculture* is reprinted in a variety of sources, including BHALA, INTERNATIONAL TRADE LAW, *supra* note 1, at 247–73. For an analysis of the *Agreement*, see Raj Bhala, *World Agricultural Trade in Purgatory*, 79 N.D. L. REV. 691 (2003).

stylistic improvements, were a *verbatim* repetition of the former document.¹¹⁸

By April 2011, nothing much had changed. Thus, in his April 2011 Document, Chairman Walker concluded:

Members have not been in a position to substantively [sic] resolve matters, nor is there any discernible progress on these [ten categories of agricultural] issues [(1) Blue Box subsidies, (2) cotton subsidies, (3) Sensitive Products, (4) tariff caps, (5) tariff quotas, (6) tariff simplification, (7) Special Products, (8) Special Safeguard Mechanism, (9) Tropical Products, and (10) Preference Erosion] that can be captured in [a new negotiating] text.¹¹⁹

If WTO Members agreed to the proposals, then they would implement them textually, as necessary, in part through corresponding changes made to the *WTO Agreement on Agriculture*.¹²⁰ Conversely, if no Doha Round agreement were reached by the fall of 2012, then the Uruguay Round commitments for the United States would remain the guideposts for it in fashioning agricultural policy, particularly in respect of subsidies.¹²¹ (That is because American farm spending is set in roughly five-year cycles by agricultural legislation known as “Farm Bills,” with the 2008 Farm Bill—formally entitled the Food, Conservation, and Energy Act of 2008¹²²—setting appropriations through the end of 2012.) Other WTO Members undoubtedly faced similar issues of farm legislation timing in relation to outcomes from the Round.

Reducing agricultural subsidies, particularly in rich countries, had been a goal of the Doha Round since it commenced in November 2001. To achieve this aim in any meaningful sense, negotiators focused their efforts on a five-part strategy:

- (1) Tiered formula reductions (meaning steeper cuts on higher levels) to, and binding limitations on, overall trade-distorting domestic support (OTDS), which is the sum total of subsidies in the Amber Box, Blue Box, and De Minimis subsidies.¹²³

One notable issue unmentioned on which no rules were proposed in the *December 2008 Draft Agriculture Modalities Text* is tariff inversion (i.e., higher duties on raw materials than on processed products, a problem that is the mirror image of tariff escalation).

118. Generally speaking, the Annexes in the two documents (except as noted below) are identical or closely resemble one another.

119. *April 2011 Agriculture Document*, *supra* note 90, ¶ I.A.6.

120. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 12, 18, 29, 34, 52–53, 128, 146, 170, Annex M.

121. Daniel Pruzin, *Chief U.S. Ag Negotiator Admits Slow Progress in Doha Talks, Slams China*, 27 Int'l Trade Rep. (BNA) No. 40, at 1542 (Oct. 14, 2010).

122. Pub. L. No. 110-234 (2008).

123. Distortion, of course, is measured in relation to what occurs (in terms of prices and quantities), or would occur, in a competitive market (i.e., distortion is in relation to a free or nearly free trade equilibrium).

- (2) Tiered formula cuts to, and binding limitations on, domestic support in the Amber Box, or Aggregate Measure of Support (AMS), which is the most trade-distorting kind of subsidy (other than an outright export subsidy) because it is coupled with output, or it supports prices.
- (3) Cuts to, and binding limitations on, domestic support classified as “De Minimis” (i.e., subsidies that fall below thresholds defined in terms of a percentage of domestic agricultural output).
- (4) Cuts to, and binding limitations on, domestic support classified in the “Blue Box,” which contains subsidies tied to limits on output.
- (5) Binding limitations on Product-Specific Support (i.e., subsidies for individual products).

Point (1) reflects an effort to impose discipline on all subsidies, regardless of their Box category. Points (2), (3), and (4) are designed to prevent box-shifting, whereby a WTO Member renders cuts to subsidies in one Box but not to support categorized in a different Box. Point (3) also aims to lower the *de minimis* threshold, thus lowering the exemption from cuts and subjecting more subsidies to reduction. Point (5) is supposed to prevent crop-shifting, whereby a Member imposes a cut on a subsidy to one product but not to support for another product. For the most part, on all these points, throughout 2008 there were few material changes to provisions in the negotiating texts.¹²⁴

124. In January 2009, the United States notified the WTO of its domestic agricultural support expenditures for marketing years (MYs) 2006 and 2007. (MYs do not correspond with calendar years. Hence, for example, MY 2007 carried over into mid-2008, and even further for certain crops.) Those figures, with certain updates, are summarized as follows:

- OTDS—
In MY 2006, \$11.34 billion, and in MY 2007, \$8.52 billion. The average for MYs 2002–2005 was \$15.9 billion. The OTDS limit proposed for the United States (discussed in Table I, *infra*) is \$14.46 billion.
- Amber Box—
In MY 2006, \$7.74 billion and in MY 2007, \$6.26 billion. In MY 2008, the figure was \$6.25 billion. The Uruguay Round bound limit on Amber Box spending for the United States is \$19.1 billion. The proposed Doha Round cut (discussed in Table II, *infra*) would lower this limit by 60% to \$7.64 billion. Interestingly, virtually all American Amber Box support went to two categories of products—dairy (\$5.01 billion in MY 2007) and sugar (\$1.23 billion in MY 2007).
- *De Minimis* Support—
In MY 2006, for Product-Specific *De Minimis* Support, \$171 million and in MY 2007, \$237 million. For Non-Product Specific *De Minimis* Support, in MY 2006, \$3.6 billion and in MY 2007, \$2.02 billion. For both MY 2006 and 2007, U.S. *De Minimis* support was under the 5% limit (discussed *infra*).
- Countercyclical Support—
In MY 2006, \$1.49 billion and in MY 2007, \$893 million. The United States classified countercyclical payments in the Amber Box yet explained they were *de minimis* and thus exempt from Amber Box reduction commitments.
- Cotton Subsidies—
In MY 2006, \$1.37 billion and in MY 2007 \$208 million. The United States classified cotton subsidies in the Amber Box. In MY 2006, over \$1 billion of this support was not exempt from Amber Box reduction commitments. But, in MY 2007, the United

States declared its cotton subsidies were *de minimis* because the \$208 million figure fell below the *de minimis* threshold of 5% of the total value of American cotton production (which was \$5.2 billion).

- Non- or Minimally-Trade Distorting (Green Box) Subsidies—
In MY 2006, \$76.04 billion and in MY 2007, \$76.16 billion. U.S. spending in the Green Box jumped from \$58.3 billion in MY 2002 to \$71.8 billion in 2005 and thereafter has essentially reached a plateau. Child nutrition and food stamp programs account for roughly two-thirds of American Green Box subsidies.

Daniel Pruzin, *U.S. Reports Less Trade-Distorting Subsidies for Farms in '06-'07, But Increase Expected*, 26 Int'l Trade Rep. (BNA) No. 5, at 146 (Jan. 29, 2009).

Note the American classification of some subsidy schemes is the subject of deep skepticism in the WTO, particularly in light of the Appellate Body decision in *United States—Subsidies on Upland Cotton*. Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 21, 2005) (finding that U.S. cotton subsidies violated the *Agreement on Agriculture* and the *SCM* agreements). For a treatment of this case, see Raj Bhala & David Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107 (2006). At the 12 March 2009 meeting of the Committee on Agriculture, Australia, Brazil, and Japan questioned whether the United States could rightly classify counter-cyclical support as non-product specific, as such support effectively requires recipients to produce, or eschew, certain crops. These three countries also cast doubt on whether direct payments to farmers are decoupled and thus properly classified by the United States in the Green Box because some funding depends not on fixed and unchanging base acres and yields (but rather requires crops not to be produced on base acres). See *Committee Focuses on Monitoring Agriculture Commitments*, WORLD TRADE ORG. (Mar. 12, 2009), http://www.wto.org/english/news_e/news09_e/ag_com_12mar09_e.htm [hereinafter *Committee Focuses on Monitoring*].

By way of partial comparison, the EU lists the following figures as per its March 2009 and January 2011 WTO notifications:

- Green Box Subsidies—
As reported in the January 2011 notification, €62.6 billion for MY 2007–2008 and €56.5 billion for 2006–2007, the largest share of which are payments under the EU Single Payment Scheme (discussed *infra*)—namely, €31 billion in 2007–2008. As reported in the March 2009 notification for MY 2006–2007, €37 billion, but included in this figure are Blue Box payments based on fixed areas and yield, or fixed livestock head, which are not subject to reduction under the Uruguay Round *Agreement on Agriculture*. For MYs 2004–2005 and 2005–2006, respectively, the figures are €24.4 and €40.3 billion.
- Amber Box Subsidies—
For MY 2003–2004, the EU reported to the WTO in December 2006 it had spent €30.9 billion in Amber Box support (far below its annual spending limit of €67 billion, bound during the Uruguay Round) and €24.78 billion in the Blue Box. In its March 2009 notification, the EU again stated its Amber Box support for MYs 2004–2005 and 2005–2006, respectively, were €31.2 and €28.4. The commodity product categories to which the EU gave the largest Amber Box payments in MY 2005–2006 were sugar (€7 billion), butter (€4.1 billion), apples (€2.8 billion), and olive oil (€2.6 billion). Its subsidies for these products took the form of price support. In its January 2011 notification, the EU said Amber Box spending dropped by 54%, from €26.63 billion in MY 2007–2008 to €12.35 billion in MY 2007–2008. As in previous years, sugar and butter were the largest recipients of product-specific Amber Box support, so the large drop in such support was due mainly to cuts in sugar and butter subsidies: in sugar, a cut from €6.8 billion in MY 2006–2007 to €3.5 billion in MY 2007–2008 and in butter from €3.6 billion in MY 2006–2007 to €2.7 billion in MY 2007–2008.
- Blue Box Subsidies—
According to the March 2009 notification, Blue Box support totaled €27.2 billion for MY 2004–2005 and €13.4 billion for MY 2005–2006. In the January 2011 notification, the EU said Blue Box support declined by 9%, from €5.7 billion in 2006–2007 to €5.2 billion in 2007–2008.

See Daniel Pruzin, *EU Notifies WTO of Sharp Drop in Trade-Distorting Farm Subsidies*, 28 Int'l Trade Rep. (BNA) No. 4, at 150 (Jan. 27, 2011) [hereinafter Pruzin, *EU Notifies WTO*]; Daniel Pruzin, *EU Issues New Farm Subsidy Notification; Trade-Distorting Support Remains Stable*, 26

B. OTDS

For OTDS, on all key issues—namely, computation of the base level, tiered reduction formula, implementation period and staging, S & D treatment, recently acceded Members (RAMs), and other commitments—the deal on the table in December 2008 was the deal set out in Ambassador Crawford Falconer’s December 2007 Working Paper on *Overall Reduction of Trade-Distorting Domestic Support: A Tiered Formula*. The stability of the provisions throughout 2008 meant either the positions of Members had converged on essential elements of a deal on OTDS; or their positions had hardened, and they had not bridged any of their schisms.

In general terms, “OTDS” is the sum of support in the Amber Box, formally called “AMS,” defined below, plus *De Minimis* support and support in the Blue Box.¹²⁵ The December 2008 Text contained the same formulaic definition as did the December 2007 Working Paper for the so-

Int’l Trade Rep. (BNA) No. 11, at 344 (Mar. 12, 2009) [hereinafter Pruzin, *New Farm Subsidy Notification*]; Daniel Pruzin, *EU to Exempt \$47 Billion from WTO Agricultural Subsidy Spending Caps*, 26 Int’l Trade Rep. (BNA) No. 10, at 307 (Mar. 5, 2009).

Note the clear pattern in the EU CAP of shifting support away from the Amber and Blue Boxes and into the Green Box. This pattern indicates the EU is positioning itself for a Doha Round agreement in which caps on Amber and Blue Boxes constrain its spending in those Boxes (i.e., it is restructuring the CAP to ensure its farmers continue to get support, but of the kind that does not violate anticipated new international limitations).

Conversely, the United States does not seem to be undertaking similar anticipatory structural reforms, and no optimistic inferences should be made from the above American figures. That is, just because these figures show a reduction in American farm subsidies does not mean the United States was ready to cut and bind its support at those lower levels. During MYs 2006–2007, commodity prices were at high levels. Especially because of counter-cyclical subsidies, farm support expenditures fall when prices are high, and vice versa. Commodity prices collapsed in 2008, and global economic recession deepened. (For example, between March and December 2008, soybean prices fell 20%, and corn prices dropped 25%. Both crops are covered commodities under American farm subsidy law.) Thus, American farm support spending, particularly counter-cyclical prices, is destined to rise. That is why the United States insists on significant headroom (i.e., subsidy cuts and caps that leave bound levels above actual expenditures). To use the academic jargon, at issue is future policy space for American farm legislation. Viewed in retrospect, the failed Ministerial meeting in July 2008 was a critical missed opportunity to clinch a deal on agriculture when farm product prices were high and subsidy payments low. See *Committee Focuses on Monitoring*, *supra*.

125. Conceptually, it should not be necessary to define “OTDS.” As its name (“aggregate” measure of support) suggests, the first figure, AMS, is supposed to capture the sum total of subsidies a Member provides to its farm sector. This figure does not do so, however, because (via the *WTO Agreement on Agriculture*), it excludes *De Minimis* and Blue Box payments. BHALA, *supra* note 1, at 1479–80 (for a broader treatment, see chapters 45 and 46). Hence, OTDS is closer to the truly aggregate measure of support that AMS ought to be, but for legally-permissible exemptions from AMS. To be sure, it is not perfectly all-inclusive.

Under certain Doha Round proposals, *De Minimis* and Blue Box subsidies would remain largely exempt from cuts. Including the second variable in OTDS reflected an effort to discipline, albeit modestly, the extent to which a WTO Member could exempt Product- and Non-Product Specific subsidies from cuts by dubbing them “*De Minimis*.” Similarly, under either alternative for the third figure (but most obviously under the second one), including the third figure in the calculation of OTDS, was an effort to subject at least a portion of Blue Box Payments to cuts.

called “Base Level” for OTDS.¹²⁶ That Level is critical. Reduction coefficients are applied to it under the tiered formula (discussed below).

That is, the Base Level is the starting point for making cuts. The higher that Level, then for any given percentage cut, the less ambitious the end result (in terms of decreases in trade-distorting farm subsidies). The formula established Base Level as the sum of three figures:

Base Level for OTDS = Final Bound Total AMS + 10% (Average Total Value of Production in 1995–2000) + the higher of either 5% (Average Total Value of Agricultural Production in 1995–2000) or Blue Box payments¹²⁷

where:

The first figure on the right-hand side of the equation, “Final Bound Total AMS,” is the AMS a WTO Member sets out and binds in its Schedule associated with the *Agreement on Agriculture*. This figure consists of all Amber Box Support (i.e., subsidies not in the Blue Box and not *De Minimis*). That is, it is the Amber Box commitment ceiling.

The second right-hand side figure, 10% of the Average Value of Production in 1995–2000, consists of 5% of the Average Value of Production for Product-Specific Support that is in the Amber Box plus 5% of the Average Value of Production for Non-Product Specific that is in the Amber Box. (These domestic subsidies are called, respectively, “Product-Specific AMS” and “Non-Product Specific AMS.” Of course, a certain percentage of these subsidies qualify as *De Minimis*. That percentage is not classified in the Amber Box as Total AMS subject to reduction commitments (i.e., it is not in the first figure but captured in the second figure).) That is, the term for the second figure—“Average Value of Production”—is a generic one encompassing both Product- and Non-Product Specific subsidies.

Also in respect of the second figure, developing countries receive S & D treatment in the form of a 20% threshold (consisting of 10% each on Product- and Non-Product Specific AMS). That treatment means poor countries would be entitled to include a higher percentage of this support in their OTDS, thus increasing their Base Level from which they are to make funding cuts. Developing countries could select either 1995–2000 or 1995–2004 as the period in which to gauge average total value of agricultural output. The obvious choice would be to select the period in which the

In sum, the essence of the strategy in defining a Base Level was to cap OTDS. At no point in the Round did negotiators ever believe it would be economically viable, much less politically feasible, to eliminate all farm subsidies.

126. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 1–2.

127. The formula sometimes is simplified to: Base Level for OTDS = Bound Level of Amber Box + 15% of the Total Value of Agricultural Production, where the 15% term consists of: 5% of Non-Product Specific *De Minimis* support, 5% of Product-Specific *De Minimis* Support, and 5% of Blue Box support. *Unofficial Guide to Revised Draft Modalities*, *supra* note 116, at 6.

Base Level is highest so as to yield a higher Level and thereby reduce OTDS from a higher Base. The end result would be an elevated level of permissible OTDS expenditures.

As for the third right-hand side figure, Members would have to include the higher of two figures: (1) 5% of the Average Total Value of Farm Production in 1995–2000 or (2) existing average Blue Box Payments.

Manifestly, computing the Base Level OTDS would be intricate. Operationally, it would be impossible without accurate agricultural output and subsidy data from each Member.

As for cutting Base Level OTDS, between July and December 2008, essentially the same critical figures in the tiered formula remained in place.¹²⁸ Table I summarizes these figures as set out in the December 2008 Text, along with the various sorts of S & D treatment in that Text. The July 2008 Text identified ranges for OTDS reductions: 75% or 85% by the EU (in the Top Tier (i.e., \$60 billion and above)), 66% or 73% by Japan and the United States (in the Second Tier (i.e., between \$10 and \$60 billion)), and 50% or 60% by the rest of the developed countries (in the Third Tier (i.e., below \$10 billion)). For each range, the December 2008 Text split the difference. The new Text called for reductions in OTDS of 80%, 70%, and 55%, respectively, in the three Tiers. WTO Members would be expected to ensure their actual applied levels of OTDS in each component of the formula (i.e., Product- and Non-Product Specific Amber Box and Blue Box support) do not exceed their bound OTDS levels.¹²⁹

128. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 3; Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, ¶ 3, TN/AG/W/4/Rev.3 (July 10, 2008) [hereinafter *July 2008 Draft Agriculture Modalities Text*].

WTO Members would put their final bound OTDS figures in the appropriate part of their Schedules. Developing countries not required to make a reduction commitment would list only their Base Level OTDS in their Schedules. Two categories of Members would not have to list any OTDS figure in their Schedules: (1) a net food importing developing country that agreed not to sponsor Blue Box subsidy programs and (2) the five least developed countries—Cameroon, Congo (Brazzaville), Ghana, Nigeria, and Swaziland. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 10.

129. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 11; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 11.

*Table I: Reduction Commitments on OTDS in December 2008 Draft
Agriculture Modalities Text*

<p>Base Level for OTDS (all figures in U.S. dollars)</p>	<p>Top Tier Reduction Commitments (percentage cut required to Base Level OTDS) OTDS is over \$60 billion.</p>	<p>Second Tier Reduction Commitments (percentage cut required to Base Level OTDS) OTDS is over \$10 billion and up to \$60 billion.</p>	<p>Third Tier Reduction Commitments (percentage cut required to Base Level OTDS) OTDS is \$10 billion or less.</p>
<p>Reduction Coefficients for Developed Countries</p>	<p>80% The EU is in this Tier. The Base Level for fifteen EU states is estimated at €110.3 billion. The cut would mean a new annual spending cap of €22.06 billion.</p>	<p>70% The United States and Japan are in this Tier. The Base Level for the United States is estimated at \$48.2 billion. The cut would mean a new annual spending cap of \$14.46 billion.</p>	<p>55%</p>
<p>Implementation Phases for Developed Countries</p>	<p>The down payment is that one-third of cut must be made on the first day of the implementation period of any Doha Round agreement. Remaining cuts must be in equal annual installments over five years.</p>	<p>Same as Top Tier</p>	<p>The down payment is that 25% of cut must be made on the first day of implementation. Remaining cuts must be in equal annual installments over five years.</p>

<p>Additional Reduction Commitments for Developed Countries?</p>	<p>No</p>	<p>Yes A developed country in the Second Tier with a high Base Level OTDS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production (between 1995–2000), must make an additional cut to its Base Level of OTDS. The additional cut must be one-half of the difference between the Top and Second Tier reduction percentages (e.g., with a difference of 80% and 70%, then an additional cut of 5% is required). Japan is in this category, meaning that it would make a 75% cut to its Base Level OTDS.</p>	<p>No</p>
<p>Reduction Coefficients for Developing Countries</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Top Tier. $\frac{2}{3}$ of 80% = 53.33% cut</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Second Tier. $\frac{2}{3}$ of 70% = 46.67% cut</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Third Tier. $\frac{2}{3}$ of 55% = 36.67% cut</p>

<i>Implementation Phases for Developing Countries</i>	The first installment must be a 20% cut. Thereafter, actual OTDS must be less than 80% of Base Level OTDS. Remaining cuts to OTDS must be made in equal annual installments over eight years.	Same as Top Tier	Same as Top Tier
<i>Reduction Coefficients NFIDCs— Such as Jordan, Morocco, Tunisia, and Venezuela</i>	No cuts required	No cuts required	No cuts required
<i>Reduction Coefficients for RAMs</i>	None, if RAM has not made a bound AMS commitment. Otherwise, essentially same as for developing countries (i.e., two-thirds commitment in relation to developed countries, other than United States, EU, and Japan).	Same as Top Tier	Same as Top Tier
<i>Implementation Phase for RAMs</i>	Same as for developing countries	Same as for developing countries	Same as for developing countries
<i>Reduction Coefficients for Newer RAMs— Macedonia, Saudi Arabia, Ukraine, and Vietnam</i>	No cuts required	No cuts required	No cuts required
<i>Reduction Coefficients for Small, Low-Income RAMs with Transition Economies— Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia</i>	No cuts required	No cuts required	No cuts required

Left unchanged across the July and December Texts was a proposed down payment (i.e., an immediate cut) to OTDS of 33.3% by the top three subsidizers—the EU, Japan, and United States—and 25% by all other de-

veloped countries.¹³⁰ Remaining OTDS cuts would be phased in equal annual installments over five years for developed countries. Also left the same was the provision that larger cuts would be expected of developed countries—namely, Japan—the OTDS in which is over 40% of the value of agricultural output as measured between 1995–2000.¹³¹

In December 2010, Japan came under criticism for trying to dodge the larger cut required of it under the “40 percent rule.” Japan told the WTO it forgot to include its mushroom sector when calculating the total value of its agricultural production between 1995 and 2000.¹³² Including the mushroom sector raised the denominator (of the fraction in which OTDS is the numerator and the total value of agricultural output is the denominator) and thus lowered the fraction from over 40% to 39.7%. Therefore, Japan claimed, it would not have to make an additional 5% cut to its OTDS beyond the 70% required reduction. Japan asserted it would make a 75% cut, but only if it could protect additional agricultural products from proposed tariff cuts.¹³³ That is, Japan linked its position on OTDS reductions to its demand for a *sui generis* rule that it be allowed to designate an additional 2% of its farm tariff lines as “Sensitive” beyond the 6% maximum allowed under the December 2008 Text.

As a practical matter, many poor countries lack the resources to provide significant subsidies to their farmers. From a legal perspective, the December 2008 Text, like its predecessor, assured poor countries with the means to provide agricultural subsidies that they would not automatically be subject to OTDS reduction commitments. Only developing countries with existing Amber Box reduction commitments (i.e., ones with a ceiling above the *De Minimis* level of domestic support and thus obligated to cut Amber Box support) would have to make cuts to OTDS.¹³⁴ But, even those cuts would be two-thirds the amount for developed countries and could be phased in over eight years.¹³⁵

All other developing countries would commit to staying within their base levels of support. Net food importing developing countries (NFIDCs)—such as Jordan, Morocco, Tunisia, and Venezuela—would not have to reduce their OTDS, though they would not be permitted to go above

130. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 5; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 5.

131. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 4; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 4.

132. Daniel Pruzin, *Japan Slammed at WTO over Attempt to Dodge Subsidy Reduction Commitment*, 27 Int'l Trade Rep. (BNA) No. 50, at 1969 (Dec. 23, 2010).

133. *Id.*

134. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 6; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 6. A developing country would have an Amber Box reduction commitment if its ceilings exceeded the *De Minimis* levels. It thus would be obliged to reduce those ceilings.

135. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 7–8; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 7–8.

their Base Level OTDS. Least developed countries (for which sponsoring farm subsidies is financially improbable, if not impossible) would be entirely exempt from OTDS reduction commitments.

Regarding RAMs, the same rules for developing countries would apply to them. But, not all RAMs would be deemed alike. RAMs that had acceded to the WTO very recently or had low incomes would be exempt from OTDS reduction commitments.¹³⁶ Considered newer RAMs were Macedonia, Saudi Arabia, Ukraine, and Vietnam. The small, low-income RAMs with economies in transition were Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia. Mongolia was the new country on the list not only for OTDS purposes but also throughout the December 2008 Text. Mongolia acceded to the WTO on 29 January 1997.¹³⁷ Its addition to the new 2008 Text suggested Mongolia had a successful campaign during the fall of 2008 for inclusion for special benefits.

On OTDS, therefore, the pattern of creating special rules for special sovereign interests is unmistakable—carving out RAMs from developing countries, then carving out newly acceded and low-income transitional RAMs from RAMs, and finally, tossing in Mongolia. To any one anointed country, the pattern is satisfying. From a systemic perspective, the ever-finer gradations of anointment are a ludicrous distortion of the collective objectives of the Doha Round, explainable only by the pursuit of self-interest.

In historical context, this pattern heralded the end of the simple GATT-WTO S & D treatment classification system. In GATT Part IV (Articles XXXVI, XXXVII, and XXXVIII, which took effect in 1966) and the 1979 Tokyo Round *Enabling Clause*, the general distinction appeared between developed and less developed countries.¹³⁸ In the 1986–1994 Uruguay Round texts, the cohort of less developed countries was bisected into developing and least developed countries. Following the birth of the WTO on 1 January 1995, and as the Doha Round evolved following its launch in November 2001, developed countries occasionally agreed to slot themselves into separate categories. Developing and least developed countries—collectively, poor nations—demanded the right to slot themselves into all sorts of novel, narrow categories.

At a micro level, some of the new lines and groupings have a plausible, development-oriented justification. At a macro level, the pattern is astonishingly abstruse. It belies the notion of a substantively meaningful, stylistically comprehensible, transparent, single undertaking in pursuit of

136. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 9; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 9.

137. *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited June 25, 2012).

138. For a discussion of GATT Part IV and the *Enabling Clause*, see chapters 38 and 39 of RAJ BHALA, *MODERN GATT LAW* 1058–1108 (2005).

trade liberalization. Nevertheless, the pattern for OTDS—the metastasizing of S & D treatment categories—is repeated throughout the December 2008 Agriculture and NAMA Texts.

C. AMS (Amber Box)

On AMS (Amber Box) subsidies, there was little evolution throughout 2008. The December 2008 Text was based on the December 2007 Working Paper on *Final Bound Total AMS: A Tiered Formula* and established a tiered reduction formula along the lines of the methodology used to cut OTDS.¹³⁹ Table II summarizes the result, plus relevant attendant rules.

Under the tiered formula, the EU, which is in the highest tier of Amber Box support (over \$40 billion), would have to cut these subsidies by 70%. Japan and the United States, which are in the middle tier of Amber Box support (between \$15 and \$40 billion), would reduce Amber Box subsidies by 60%. The rest of the developed countries, which are in the lowest tier of Amber Box support (below \$15 billion), would decrease their support by 45%. All rich countries would make a down payment of an immediate 25% cut.¹⁴⁰ Larger cuts would be expected of developed countries—namely, Japan—in which the AMS is over 40% of the value of agricultural production.¹⁴¹ Implementation and staging would be via six equal annual installments over five years, starting on the first day of that period.¹⁴²

In keeping with traditional S & D treatment, the obligation on poor countries would be less than that on rich countries. Only developing countries with bound AMS levels would have to reduce those levels, and any such country with a total AMS level bound at or below \$100 million would be exempt from any reduction commitments.¹⁴³ In effect, the December 2008 Text maintained the *De Minimis* rule from the July Text for poor countries with low levels of Amber Box support, excepting them from the obligation to cut this support. Developing countries, along with older RAMs, would have a two-thirds reduction obligation and an eight-year phase-out period (nine equal annual installments commencing on the first day of implementation).¹⁴⁴

139. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 13; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 13.

140. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 15; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 15.

141. *See December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 14; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 14.

142. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 15; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 15.

143. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 16; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 16.

144. *See December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 16, 19; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 16, 19. These countries also would be given special consideration in calculating their AMS if they faced excessive rates of inflation or sudden, extraordinary rises in food prices relative to fixed external reference prices. *December*

Reflecting novel S & D treatment cohorts, NFIDCs (e.g., Jordan, Morocco, Tunisia, and Venezuela) would have no reduction obligations.¹⁴⁵ Newer RAMs—Macedonia, Saudi Arabia, Ukraine, and Vietnam—would have no reduction obligations either. Small, low-income RAMs with economies in transition—namely, Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia (the latter being added in the December 2008 Text)—also would have no such obligations.¹⁴⁶ Moreover, these RAMs would not have to include certain kinds of subsidies in their calculation of Total AMS.

Table II: Reduction Commitments on Total AMS (the Amber Box) in December 2008 Draft Agriculture Modalities Text

Bound Total AMS (all figures in U.S. dollars)	Top Tier Reduction Commitments (percentage cut required to Bound Total AMS) Total AMS is over \$40 billion.	Second Tier Reduction Commitments (percentage cut required to Bound Total AMS) Total AMS is over \$15 billion and up to \$40 billion.	Third Tier Reduction Commitments (percentage cut required to Bound Total AMS) Total AMS is \$15 billion or less.
Reduction Coefficients for Developed Countries	70% The EU is in this Tier. The Uruguay Round bound AMS level for the EU is €67.16 billion. ¹⁴⁷ The cut would drop this ceiling to €20.15 billion.	60% The United States and Japan are in this Tier. The Uruguay Round bound AMS level for the U.S. is \$19.1 billion. The cut would drop this ceiling to \$7.64 billion.	45%
Implementation Phases for Developed Countries	The down payment would be a first installment cut of 25%. That must be followed by equal annual cuts over five years.	Same as Top Tier	Cuts must be made in equal annual installments over five years.

2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 20; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 20.

145. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 17; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 17.

146. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 19; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 19.

147. This cap has been raised to account for EU enlargement. For example, following the 1 January 2007 accession of Bulgaria to the EU, the cap was raised by €500 million, and the new cap became €72.3 billion. A 70% cut would imply a drop in the cap to €21.69 billion.

<p>Additional Reduction Commitments for Developed Countries?</p>	<p>No</p>	<p>Yes A developed country in the Second Tier with a high Bound Total AMS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production, must make an additional cut to its Total AMS. The additional cut must be the difference between the Top and Second Tier reduction percentages (e.g., with a difference of 70% versus 60%, an additional cut of 10% is required). Japan is in this category.</p>	<p>Yes A developed country in the Third Tier with a high Bound Total AMS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production, must make an additional cut to its Total AMS. The additional cut must be one-half the difference between the Top and Second Tier reduction percentages (e.g., with a difference of 70% versus 60%, then additional cut of 5% is required).</p>
<p>Reduction Coefficients for Developing Countries</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment or has a bound level at or below \$100 million. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Top Tier. $\frac{2}{3}$ of 70% = 46.67% cut</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment or has a bound level at or below \$100 million. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Second Tier. $\frac{2}{3}$ of 60% = 40% cut</p>	<p>No cuts required for a developing country that has not made a bound AMS commitment or has a bound level at or below \$100 million. Otherwise, the percentage reduction is two-thirds the commitment that applies to developed countries in the Third Tier. $\frac{2}{3}$ of 45% = 30% cut</p>
<p>Implementation Phases for Developing Countries</p>	<p>Cuts must be made in equal annual installments over eight years.</p>	<p>Same as Top Tier</p>	<p>Same as Top Tier</p>
<p>Reduction Coefficients for NFIDCs— Such as Jordan, Morocco, Tunisia, and Venezuela</p>	<p>No cuts required</p>	<p>No cuts required</p>	<p>No cuts required</p>

<i>Reduction Coefficients for RAMs</i>	None, if RAM has not made a bound AMS commitment or has a bound level at or below \$100 million. Otherwise, essentially same as for developing countries (i.e., two-thirds the commitment as for developed countries, other than the United States, EU, and Japan).	Same as Top Tier	Same as Top Tier
<i>Implementation Phase for RAMs</i>	Same as for developing countries	Same as for developing countries	Same as for developing countries
<i>Reduction Coefficients for Newer RAMs—Macedonia, Saudi Arabia, Ukraine, and Vietnam</i>	No cuts required	No cuts required	No cuts required
<i>Reduction Coefficients for Small, Low-Income RAMs with Transition Economies—Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia</i>	No cuts required of Moldova, which is the only such RAM to have bound its Total AMS. No cuts required of Albania, Armenia, Georgia, Kyrgyz Republic, and Mongolia because they have not bound their Total AMS. In addition, this group of RAMs can exclude from their calculation of current Total AMS any (1) investment subsidy generally available to agriculture, (2) agricultural input subsidy, (3) interest subsidy to reduce financing costs, or (4) grant to cover debt repayment.	Same as Top Tier	Same as Top Tier

Beyond mandatory cuts to Total AMS, the December 2008 Text, like the December 2007 Working Paper and July 2008 Text on which it was built, called for limits on Product-Specific subsidies.¹⁴⁸ As its name connotes, a “Product-Specific” subsidy is direct support for a particular crop. The G-20 developing countries urged that such limits be fixed for individual products, not capacious sectoral categories like “cereals” or “oilseeds.” That way, a WTO Member would not be able to spread Product-Specific Support across multiple commodities or shift it among them within a broad designation. Accordingly, the December Text put restrictions on the amount of funds a WTO Member could channel to the direct support of a specific crop.

The basic limit for all developed countries other than the United States would be that Product-Specific Support must not exceed the average of that kind of support actually provided during the Uruguay Round implementation period.¹⁴⁹ That period corresponds to 1995–2000. The United States, however, received special dispensation as to the base period and calculation methodology.¹⁵⁰

The U.S. Product-Specific Support limit would be the proportionate average of its (1) average actual Product-Specific AMS during 1995–2004 and (2) average actual Total AMS for 1995–2000. In other words, the United States alone could include more years in its base period to establish the ceiling on its Product-Specific Support. This *sui generis* calculation would help the United States raise that ceiling. Its calculation would depend on the total Amber Box support it gave to specific products in 1995–2000, as shared among products according to the average share during 1995–2004. The United States sought to include the additional years (2001–2004) because during them it had high Product-Specific expenditures. It scarcely needs mentioning that this special American exception is yet another instance of a WTO Member—this one, uniquely powerful—negotiating out of naked self-interest regardless of broader systemic goals of the Doha Round, which include meaningful reductions to and restraints on per product farm subsidies.

For all developed countries, the implementation date by which limits on Product-Specific Support would have to be reached was immediate. Full implementation would be expected right away. In practice, that would mean rich countries would have to make the cuts by the first day on which any Doha Round accord takes effect.¹⁵¹

148. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 21; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 21.

149. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 22; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 22.

150. *See December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 23; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 23.

151. *See December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 26; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 26. Under certain circumstances, phasing

Developing countries, too, would be obligated to establish limits on any Product-Specific Support they provided. But, they would receive S & D treatment to do so, specifically in the manner in which they could calculate the cap on their Product-Specific AMS.¹⁵² Developing countries would have a choice among three alternatives in setting their limit: (1) average actual expenditures during 1995–2000 or 1995–2004, (2) twice the Product-Specific Support limit established in the Uruguay Round and set out in Article 6:4 of the *WTO Agreement on Agriculture*, or (3) 20% of the bound Total AMS for the relevant country. Obviously, a developing country would be inclined to choose the alternative offering the highest ceiling on subsidies it could channel to a specific crop.

The December 2008 Text maintained the flexibility of the December 2007 Working Paper and July Text in respect of the limits on Product-Specific Support in the Amber Box.¹⁵³ There were two possible scenarios in which the flexibility might be used. First, suppose actual Product-Specific Support of a WTO Member during the relevant base period was below the *De Minimis* level (as Article 6:4 of the *Agreement on Agriculture* defines this level). Then, the limit would be set at that level. This flexibility meant the *status quo ante* of the Uruguay Round limit set in Article 6:4 would be ratified and become the new cap. The December Text clarified that in this scenario, a Member would not be obliged to set its Product-Specific AMS limit at a level lower than the *De Minimis* level in the base period.¹⁵⁴

Second, suppose actual support provided by a WTO Member, after the relevant base period, rose above the *De Minimis* level. Then, the limit for that Member would be the average amount of Product-Specific subsidization by the Member in the two most recent years before adoption of the Doha Round agreements. Here again, the *status quo ante* would be ratified, effectively rewarding large spenders—ones that had spent, following the Uruguay Round, above their *De Minimis* thresholds. They got an entitlement to offer Product-Specific Support in the future at past high levels (subject only to their overall bound OTDS and Total AMS levels). The key point is they would not have to worry about including Product-Specific expenditures above the *De Minimis* threshold in Total AMS and subjecting the

would be permitted. If the average Product-Specific AMS in the two most recent years for which WTO notifications were available exceeded scheduled Product-Specific AMS limits, then cuts to reach the applicable limit could be made in three equal annual installments (with the starting point for implementation being the lower of the average figure from those two years or 130% of the scheduled Product-Specific support limits).

152. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 27–28; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 27–28.

153. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 24–25; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 24–25.

154. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 25 (final sentence), with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 25.

overage to reduction commitments. For past excessive spending, they got a “pass.”

D. *De Minimis Subsidies*

De Minimis thresholds are important. Expenditures up to them need not be included in the calculation of Total AMS. As the rubric connotes, *De Minimis* support consists of subsidies in the Amber Box, but which are in small amounts. Consequently, they are not subject to the cuts required of AMS. Lowering the thresholds means reducing expenditures previously considered insignificant, and thereby exempt from cuts. From the Uruguay Round, those thresholds are defined in terms of Product Specific and Non-Product-Specific Support, with different limits for developed and developing countries (and none for least developed countries).

For developed countries (as laid out in Article 6:4(a) of the WTO *Agreement on Agriculture*), the *De Minimis* level of Product-Specific Support was 5% of the total value of output of the basic agricultural product in question. Their *De Minimis* level for Non-Product Specific Support also was 5%, but of the total value of agricultural production of all commodities. The December 2007 Working Paper identified as a possible target reducing these 5% limits by at least 50% through five equal annual installments (using 1995–2000 as the base period). The December 2008 Text followed the pattern laid out in the Working Paper and was a nearly *verbatim* repetition of the relevant provisions in the July 2008 Text.¹⁵⁵ The obligation on developed countries would be to cut immediately the thresholds in half, to 2.5% of the value of domestic agricultural production (down from 5%), and thus reduce both the theoretical level and actual expenditure amount considered insignificant. Table III summarizes the proposed rules on *De Minimis* subsidies.

155. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 30, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 30.

*Table III: Limitations on De Minimis Subsidies in December 2008
Draft Agriculture Modalities Text*

<p><i>Developed Countries— Limitation on De Minimis Support in Article 6:4(a) of WTO Agreement on Agriculture</i></p>	<p>Product-Specific Support: Cap of 5% of total value of production of the basic agricultural product in question Non-Product Specific Support: Cap of 5% of the total value of all agricultural production</p>
<p><i>Developed Countries— Limitation on De Minimis Support in December 2008 Text</i></p>	<p>50% cut on both caps— Product-Specific Support: New cap of 2.5% of total value of production of the basic agricultural product in question Non-Product Specific Support: New cap of 2.5% of the total value of all agricultural production</p>
<p><i>Developed Countries— Implementation Period</i></p>	<p>Immediate</p>
<p><i>Developing Countries— Limitation on De Minimis Support in Article 6:4(b) of WTO Agreement on Agriculture</i></p>	<p>Product-Specific Support: Cap of 10% of total value of production of the basic agricultural product in question Non-Product Specific Support: Cap of 10% of the total value of all agricultural production</p>
<p><i>Developing Countries— Limitation on De Minimis Support in December 2008 Text</i></p>	<p>Cut of two-thirds of the amount for developing countries (i.e., $\frac{2}{3}$ of 50%, or $33\frac{1}{3}\%$ reduction to both caps)— Product-Specific Support: New cap of $6\frac{2}{3}\%$ of total value of production of the basic agricultural product in question Non-Product Specific Support: New cap of $6\frac{2}{3}\%$ of the total value of all agricultural production</p>
<p><i>Developing Countries— Implementation Period</i></p>	<p>Three years</p>
<p><i>Special Categories of Developing Countries—</i> (1) Developing countries that have not bound their Total AMS (2) Developing countries that allocate almost all of their subsidies to subsistence and resource-poor farmers (3) NFIDCs (such as Jordan, Morocco, Tunisia, and Venezuela)</p>	<p>No cuts required</p>

<p>Older RAMs (with a bound AMS and <i>De Minimis</i> Level of 5%) Limitation on <i>De Minimis</i> Support in December 2008 Text</p>	<p>Cut of one-third of the amount for developing countries (i.e., $\frac{1}{3}$ of 50%, or 16$\frac{2}{3}$% reduction of the 5% cap)— Product-Specific Support: Approximately 3.8% of total value of production of the basic agricultural product in question Non-Product Specific Support: Approximately 3.8% of the total value of all agricultural production</p>
<p>Older RAMs— Implementation Period</p>	<p>Five years</p>
<p>Newer RAMs— Macedonia, Saudi Arabia, Ukraine, and Vietnam</p>	<p>No cuts required to <i>De Minimis</i> Support caps</p>
<p>Small, Low-Income RAMs with Transition Economies— Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia</p>	<p>No cuts required to <i>De Minimis</i> Support caps</p>

For developing countries (as laid out in Article 6:4(b) of the *Agreement on Agriculture*), the *De Minimis* levels were double that of developed countries—for Product-Specific Support, 10% of the total value of output of the basic agricultural product in question, and for Non-Product Specific support, 10% of the total value of agricultural production of all commodities. The December 2007 Working Paper called for these 10% limits to be lowered by at least two-thirds of the cuts agreed upon for developed countries (using the 1995–2000 base period). Developing countries would have an extra three years (i.e., at least eight years) to reduce their *De Minimis* support. The December 2008 Text, like its predecessor of July, stuck to these figures.¹⁵⁶

Three categories of developing countries would not have to make any reductions in *De Minimis* support levels or spending: (1) developing countries that had not bound their Total AMS; (2) developing countries that allocated almost all of their subsidies to subsistence and resource-poor farmers; and (3) NFIDCs (e.g., Jordan, Morocco, Tunisia, and Venezuela). For these developing countries, the existing Uruguay Round *De Minimis* levels would continue to apply.¹⁵⁷ Likewise, newer RAMs—Macedonia, Saudi Arabia, Ukraine, and Vietnam—would have no obligations to cut *De Minimis* thresholds or spending.¹⁵⁸ Small, low-income RAMs with economies in transition—Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia—also would be free from any obligations in re-

156. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 31; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 31.

157. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 32; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 32.

158. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 33; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 33.

spect of *De Minimis* cuts. A final category of RAMs—the older RAMs that had bound Total AMS commitments and existing *De Minimis* Levels of 5% (for Product- and Non-Product Specific Support)—would have a modest obligation—namely, to cut their thresholds by one-third of the reduction figure for developed countries, with an extra five years in which to implement the cut.¹⁵⁹

E. Cutting Blue Box Subsidies but Expanding the Blue Box

The December 2008 Text followed *verbatim* the July Text as to proposals for the Blue Box, which in turn were sourced in the relevant December 2007 Working Papers. On this topic, too, no real evolution had occurred in a year. That was true for both the expanded definition of the “Blue Box” and the disciplines on Blue Box expenditures concerning an overall cap and Product-Specific limits. Table IV summarizes these proposals for this Box. Likewise, the April 2011 Agriculture Document indicated no final agreement on the proposals.¹⁶⁰

Uruguay Round negotiators (in Article 6:5 of the *Agreement on Agriculture*) defined the Blue Box only in terms of product-limiting support (i.e., payments to farmers to set aside acreage (or livestock) from cultivation). In other words, the traditional understanding of the “Blue Box” was it contained direct payments to farmers based on the size of the area they cultivate or the number of livestock they raise, but which are not a reward for more output. Rather, they are production-limiting (i.e., these payments are designed to circumscribe over-production).

The December 2008 Text maintained the earlier proposal to expand this traditional definition and include counter-cyclical payments in the Blue Box.¹⁶¹ Such payments are direct payments to farmers that do not require limits on production, but which are based on fixed bases and yields (or for livestock, fixed head) in the past. The amount of these payments varies with a prescribed benchmark for a relevant world market or target price. The intuitive idea underlying them is to protect the income of farmers if prices fall; thus, the larger the fall (the “cycle”), the higher the subsidy payment (the “counter” to insulate the farmer from the “cycle”). That is, a farmer is compensated when the price of a covered commodity tumbles below a fixed reference price, and the compensation varies directly with the magnitude of the fall.

159. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 33 (last sentence); *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 33 (last sentence).

160. *See April 2011 Agriculture Document*, *supra* note 90, ¶ 9.

161. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 35–37; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 35–37.

Table IV: Expanded Definition of, and Limitations on, Blue Box Subsidies in December 2008 Draft Agriculture Modalities Text

Definition of Blue Box in Article 6:5 of WTO Agreement on Agriculture	Production set-aside payments
Expanded Definition in December 2008 Text	Production set-aside payments plus counter-cyclical payments
Limitation on Blue Box Support in WTO Agreement on Agriculture	None, and all Blue Box payments are exempt from AMS and thereby from reduction commitments to AMS.
Developed Countries— Overall Limitation on Blue Box Support in December 2008 Text	2.5% of the average total value of agricultural production during the 1995–2000 base period Special lower threshold for countries like Norway that put 40% or more of their trade-distorting support in the Blue Box
Developed Countries— Implementation Period for Overall Limitation	Immediate
Developing Countries and RAMs— Overall Limitation on Blue Box Support in December 2008 Text	5% of the average total value of agricultural production during the 1995–2000 or 1995–2004 base period
Developing Countries and RAMs— Implementation Period for Overall Limitation	Immediate
Developed Countries other than the United States— Limitation on Product-Specific Support in the Blue Box in December 2008 Text	Average value of support provided to the product in question, at an individual product level, during the 1995–2000 base period
Special Rule for the United States— Limitation on Product-Specific Support in the Blue Box in December 2008 Text	110% (or 120%) of the average product-specific amount associated with the maximum permissible expenditure under the 2002 Farm Bill
Developed Countries (United States and all others)— Implementation Period for Product-Specific Blue Box Limitations	Immediate

Developing Countries and RAMs— Limitation on Product-Specific Support in the Blue Box in December 2008 Text	Same as for developed countries (other than the United States) but flexibility for “important crops” (ones accounting for more than (1) 25% of the average total value of farm production and (2) 80% of the average bound Total AMS during the base period). A developing country or RAM can shift these crops irreversibly into Product-Specific support in the Blue Box, even if the shift causes the country or RAM to exceed its overall Blue Box cap.
Developing Countries— Implementation Period for Product-Specific Blue Box Limitations	Immediate

The United States unabashedly championed the expanded definition. Recent farm legislation included counter-cyclical payments. The United States wanted the ability to move them from the Amber Box to the Blue Box, and thereby immunize these payments from reduction commitments to Total AMS (which includes Amber Box, but not Blue Box, spending). However, a WTO Member could not take advantage of both sides of the Box: it could put either set-aside payments or counter-cyclical support in the Box, but not both. Nonetheless, the clear proposal was to expand the Blue Box to include counter-cyclical payments, along with production-limiting support, but Members would have to choose whether to utilize one or the other kind of Blue Box payment.

To offset this expansion, there had to be a limit on Blue Box expenditures. Otherwise, a Member could engage in abusive Box-shifting, essentially playing with colors by taking support programs out of the Amber Box, where they would be subject to reduction commitments, and sticking them in the Blue Box, where they would be protected from such cuts. Critically, the Texts also made clear Blue Box payments count in OTDS and thereby are subject at least to cuts under the tiered OTDS formula. Moreover, the December 2008 Draft Text kept the two caps suggested in the July Text.

First, Blue Box support would be limited to 2.5% of the value of agricultural production for developed countries and 5% for developing countries.¹⁶² This limit meant the maximum amount of Blue Box spending a Member could exclude from its calculation of Total AMS would be 2.5% of the average total value of its agricultural production (with 1995–2000 as the base period). In essence, no more than 2.5% of the value of its farm output could be put in the Blue Box and excluded from AMS reduction commitments. Any additional amount in that Box would be subject to cuts. Thus,

162. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 38–39, 48; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 38–39, 48.

for example, the EU cap would be about €7 billion—still a whopping amount in absolute terms.¹⁶³

A further restraint would be demanded of Members (such as Norway) that put an exceptionally large percentage—namely, 40% or more during the 1995–2000 base period—of their trade-distorting support in the Blue Box. Their limit would not be 2.5% of the total value of their farm output. Rather, it would be a relatively lower threshold, computed by applying the same percentage reduction commitment they use for Total AMS (70%, 60%, or 45%) to their base-period Blue Box spending. They would have to reach this limit within two years.

Developing countries and older RAMs would receive S & D treatment. The limit on their overall Blue Box support would be 5% of the average total value of agricultural production (using either 1995–2000 or 1995–2004 as the base period).¹⁶⁴ If a developing country or RAM elected to transfer subsidies into the Blue Box from a component of AMS (e.g., the Amber Box), then it could select as its base period the most recent five-year period for which data are available.

Second, there would be limits on Blue Box spending set on a product-by-product basis. That is, the December 2008 Text maintained the same restrictions on Product-Specific Blue Box spending as set out in the July Text. Here, as with Total AMS, the United States got preferred treatment. For all Members other than the United States, including developing countries and RAMs, the Text mandated a Product-Specific limit equal to the average value of support to the product in question during 1995–2000.¹⁶⁵ In other words, past should be prologue so that there would be no back sliding. Whatever had been spent in the Blue Box on a particular crop during the Uruguay Round implementation period should be the future cap. But, the same past period limiting the rest of the world would not constrain the United States.

The United States successfully turned its domestic legislative position into a *sui generis* international legal obligation. The United States could set its Product-Specific Blue Box limit at 110% (or, possibly, 120%, depending on the outcome of negotiations) of the average Product-Specific amount for the crop in question. That is, the United States would have headroom of

163. Pruzin, *New Farm Subsidy Notification*, *supra* note 124, at 344. This estimate is based on production figures for MYs 2005–2006.

164. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 48; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 48.

165. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 40, 47; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 40, 47. Suppose a WTO Member had not made payments specifically to a particular crop, and its Blue Box programs consisted only of set aside payments during the entirety of the 1995–2000 base period. Then, that Member would use as its Product-Specific limit in the Blue Box the average level of support during a consecutive three years within that period. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 41; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 41.

10% (or possibly 20%) above the average amount it had spent under its previous farm legislation, the 2002 Farm Bill.¹⁶⁶ Specifically, the United States could compute its Product-Specific amount for a crop as a proportionate average of (1) the maximum permissible expenditures allowed in its 2002 Farm Bill and (2) 2.5% of the average total value of its farm production.¹⁶⁷ Put simply, if a bit simplistically, the limits the United States established for itself in a high spending period, 2002–2007, under the 2002 Farm Bill, would be its international legal constraints.

To create flexibility, any WTO Member could exceed its Product-Specific Blue Box spending limit.¹⁶⁸ If it did, then it would have to reduce irreversibly its Product-Specific AMS cap on a one-for-one basis. That is, for every dollar a Member spent in the Blue Box on a crop that exceeded its Product-Specific Blue Box cap, the Member would have to reduce its Product-Specific AMS limit. The penalty for excess would be more stringent if the crop were cotton. Then, the ratio would be two-to-one (i.e., for every one dollar of excess Blue Box support to cotton, the Product-Specific AMS on cotton would have to fall by two dollars). In effect, a Member could shift spending on specific commodities from the Amber to Blue Box, and exceed Product-Specific Blue Box caps, but not without lowering Amber Box caps. And, it would have to respect the overall Blue Box limit.

On Product-Specific Blue Box limits, developing countries would get S & D treatment for important crops.¹⁶⁹ “Important crops” would be defined as ones accounting for more than (1) 25% of the average total value of farm production and (2) 80% of the average bound Total AMS during the base period. For such crops, a developing country could shift irreversibly Product-Specific support into the Blue Box, even if the shift caused it to exceed its overall Blue Box cap. Presumably, the shift would occur from the Amber Box and immunize the subsidy from cuts to Total AMS.

166. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 42; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 42; Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended at 7 U.S.C. § 7901 (2006)) (conservation provisions of the 2002 Farm Bill were codified in Title 16 of the U.S.C.).

167. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 42, 47; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 42, 47.

168. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 43–46; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 43–46.

169. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 49–50; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 49–50.

For a developing country with no Product-Specific entitlement to a Blue Box limit for a particular product, and no support in the Amber Box for that product, the December 2008 Text, like its predecessor in July, offered the following rule: such Members could schedule a Blue Box limit for an individual agricultural product but only if the total support for that product does not exceed 30% of the overall Blue Box limit (and a single product limit of 10%). For least developed countries and NFIDCs, the limit on all Product-Specific Blue Box support would be 75% of the overall Blue Box limit (and 25% for any single product). *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 50; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 50.

F. Green Box

Green Box support takes the form of non- or minimally-trade distorting schemes such as agriculture research, disease control, environmental protection, regional assistance, restructuring aid, and direct payments to farmers not linked to the amount or type of crop grown or livestock raised. On Green Box support, there were no new insights in the December 2008 Text. That Text contained the familiar idea about amending the *WTO Agreement on Agriculture* to tighten criteria for developed countries. The criteria should ensure that income support payments, to qualify for the Green Box, are decoupled and based on a fixed and unchanging base period of production. They should be sufficiently nuanced to consider structural adjustment and regional assistance programs (e.g., government intervention to fight rural poverty or hunger) and food stockpiling purchases at above-market prices by developing countries from farmers with low incomes or few resources. As always, Green Box programs would remain exempt from reduction commitments. That is because they are not (or are only minimally) trade distorting, as per Article 6:1 and Annex 2 of the *WTO Agreement on Agriculture*.¹⁷⁰

170. Therefore, the pledges by President Barack H. Obama to cut American farm subsidies in the fiscal year (FY) 2010 budget (which started 1 October 2010) did not help jump-start the Doha Round agriculture talks. That would have been true even if Congress had implemented all of them. Those cuts were to direct payments to farmers, which are categorized in the Green Box insofar as they are decoupled from output or prices. Specifically, the FY 2010 proposals were:

- Phase out over three years direct payments to any farmer with annual sales revenue of more than \$500,000. (Under the 2008 Farm Bill, there are two income caps: subsidies are barred to farmers who earn more than (1) \$500,000 in adjusted gross income (AGI) or (2) \$750,000 in farm-related income. As of 2009, about one-third of all American farmers obtain a direct payment from the U.S. government, regardless of whether they produce any output.) The proposed change would save the U.S. government \$85 million in FY 2010, \$480 million in FY 2011, and a total of \$9.765 billion in FYs 2010–2019.
- Restrict commodity program payments to \$250,000 per farmer per year.
- Eliminate the obligation of the federal government to pay for the storage costs of cotton that is under loan to the Department of Agriculture. Cotton is the only crop for which the U.S. government subsidizes storage costs, and these payments have a negative effect on the amount of cotton available on the market. This change would save the U.S. government \$570 million over ten years.
- Reduce subsidies for crop insurance premiums.
- Decrease funding for the Market Access Program (MAP) of the Department of Agriculture by 20% a year and shifting the priority of MAP. Under MAP, American brands of farm products are promoted overseas. Funding would be cut for that kind of promotion, and emphasis would be placed on marketing generic American products in foreign countries.

Gary G. Yerkey, *President's Proposed Cut in Farm Subsidies Seen Sending "Positive Signal" to WTO Talks*, 26 Int'l Trade Rep. (BNA) No. 10, at 306–07 (Mar. 5, 2009).

In fact, these proposals were at best inconsequential in respect of prodding the Doha Round toward a conclusion. Precisely the opposite moves—shifting subsidies out of the Amber and Blue Boxes and into the Green Box, as the EU has done in its 2003 and 2008 reforms to the Common Agricultural Policy (CAP)—would increase the flexibility of the United States in the negotiations and thereby boost the prospects for the Round. See Roberta Rampton, *Obama Farm Subsidy Cut Won't Revive Doha: Experts*, REUTERS, Feb. 25, 2009, available at <http://www.reuters.com/article/2009/02/25/us-usa-agriculture-trade-idUSTRE51O6ES20090225>. Between MY 2006–2007

The lack of new insights meant rules on monitoring and surveillance of actual or purported Green Box programs, which are essential to prevent abuse, still were undefined. For example, to calculate decoupled income support, what fixed base period should be used? What assurances should be required of developed countries that they transfer only non-distorting subsidies into the Green Box? Similarly, what assurances should be obtained from them that their Green Box programs are budget neutral (to prevent an overall increase in farm subsidies)? These questions continued to be of particular interest to developing countries, such as Argentina and India, concerned about abusive box-shifting by developed countries.¹⁷¹

G. Cotton Subsidies

Since 1991, the U.S. government has spent in excess of \$50 billion on cotton subsidies and averaged \$3 billion annually in expenditures in the first decade of the new millennium.¹⁷² The subsidy schemes take the form of direct payments, export subsidies, market assistance loans, and price supports. Of the subsidies, 73% go to 10% of American cotton producers, and 25% of the payments go to the top 1% of American farmers.¹⁷³ In other words, the support goes not so much to small cotton farmers as to large, wealthy operators. None of these operators is as poor as their competitors in the Cotton Four countries—Benin, Burkina Faso, Mali, and Chad. Few (if any) of them are as efficient either: the U.S. Department of Agriculture admits the average cost of production of one pound of raw cotton in America is seventy-three cents, but just twenty-one cents in Burkina Faso, and the Congressional Research Service states that a sizeable proportion of American cotton production is not commercially viable, but possible only through subsidies.¹⁷⁴

Thus, at the launch of the Doha Round in November 2001, no issue was more obviously tied to the hope that trade liberalization could be a strategy for counter-terrorism than the end of cotton subsidies:

and MY 2007–2008, EU Green Box spending increased by 11%, from \$77.25 to \$85.59 billion (€56.5 to €62.6 billion). Pruzin, *EU Notifies WTO*, *supra* note 124, at 150. Under the Single Payment Scheme (SPS), which is a cornerstone of the CAP reforms, the EU provides support to farmers decoupled from the amount or type of crop they grow or livestock they raise. In MY 2007–2008, the largest share of EU Green Box subsidies were in the SPS category: \$42.38 out of \$85.59 billion (€31 out of €62.6 billion), or about half of all such subsidies. *See id.* at 150.

171. *See* David Haskel, *Argentina, India Call for Green Box “Budget-Neutrality” Assurances*, 25 Int’l Trade Rep. (BNA) No. 25, at 922 (June 19, 2008).

172. *Brazil’s Victory in Cotton Trade Case Exposes America’s Wasteful Subsidies*, WASH. POST, June 3, 2010, at A16.

173. *See* KEVIN WATKINS, *CULTIVATING POVERTY: THE IMPACT OF U.S. COTTON SUBSIDIES ON AFRICA* 23 (2002), available at www.oxfam.org.uk/resources/policy/trade/downloads/bp30_cotton.pdf.

174. *See* Kevin C. Kennedy, *The Doha Round Negotiations on Agricultural Subsidies*, 36 DENV. J. INT’L L. & POL’Y 335, 343–44 (2008).

In 2001, *in the wake of the 9/11 attacks on the United States*, a new series of multilateral trade negotiations began, known as the Doha Round. *The thinking was that a fairer system might reduce the possibility of attacks like those on New York and Washington.* One of the aims of the Doha Round was to set new global trading rules which would stimulate growth and wealth in underdeveloped countries. One way of doing this would be to reduce tariffs and subsidies, so creating a “level playing field.” *The cotton subsidies were seen quickly as a litmus test.* It seemed obviously iniquitous to many of the negotiators that poor people who actually produce cotton very cheaply should in effect be punished by richer people who produced it at higher cost. It is a problem which, so far, the Doha Round has failed to solve.¹⁷⁵

Many farmers in the Cotton Four countries (Benin, Burkina Faso, Chad, and Mali) are Muslim, and between 36–80% of the population in those countries lives below the poverty line.¹⁷⁶ The Cotton Four fare at the bottom in the world in respect of access to water, child and maternal mortality, and illiteracy.¹⁷⁷ The strategy, then, is obvious: help reduce the vulnerability of these farmers and broader populace to poisonous messages from Islamist extremists by giving them a greater stake in the global trading system.

This concept of peace-and-security-through-trade is not manifest in any cotton subsidy provision of any draft Agriculture Text. The December 2008 Text tracked identically the language on domestic support for cotton in the July Text.¹⁷⁸ (For the most part, the provisions in the July Text were unchanged from the February 2008 Text.) The formula for cotton subsidy cuts was proposed by the Cotton Four countries and incorporated into the negotiating texts by then-Chairman Crawford Falconer because no other WTO Member had offered a credible counter-proposal.¹⁷⁹ Under it, Members would be obliged to reduce their cotton subsidies as follows:

$$R_c = R_g + \frac{(100 - R_g) \times 100}{3 \times R_g}$$

175. Mark Doyle, *Campaigners Urge U.S. and Europe to Cut Cotton Subsidies*, BBC, Nov. 14, 2010, available at <http://www.bbc.co.uk/news/world-africa-11753215> (emphasis added).

176. See Cent. Intelligence Agency, *Benin*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/bn.html> (last visited Feb. 20, 2012); Cent. Intelligence Agency, *Burkina Faso*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/uv.html> (last visited Feb. 20, 2012); Cent. Intelligence Agency, *Mali*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html> (last visited Feb. 20, 2012); Cent. Intelligence Agency, *Chad*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/cd.html> (last visited Feb. 20, 2012).

177. See Watkins, *supra* note 173, at 7.

178. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 54–55; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 54–55.

179. See Daniel Pruzin, *U.S. Cotton Subsidy Compliance May Have Small Impact on Raising Prices*, *Study Says*, 27 Int'l Trade Rep. (BNA) No. 17, at 618 (Apr. 29, 2010).

where:

R_c = Reduction percentage specifically applicable to cotton

R_g = Reduction percentage generally applicable to AMS

1995–2000 = Base period during which to measure cotton subsidies, and from which to cut

The difference in the figures for R_c and R_g is the mathematical expression of the legal and policy desire to impose a deeper cut on cotton subsidies than on support for other agricultural products.

As an illustration, suppose the Amber Box reduction percentage, R_g , for the United States is 60%. Using this formula, the percentage cut the United States would have to apply to its cotton subsidies would be 82.2%:

$$82.2 = 60 + \frac{(100 - 60) \times 100}{(3 \times 60)}$$

The exact value for R_c had yet to be agreed, and the values for R_g had yet to be finalized.

The key point, in terms of potential poverty alleviation, is that R_c is not 100. To the chagrin of the Cotton Four countries, which are heavily dependent on the crop for export revenues, as well as to larger developing countries that produce significant cotton, such as India, it was a dead certainty R_c would not be 100. Nevermind that 10 million people in Central and West Africa depend on cotton for their livelihood. The United States simply would not agree to eradicate its cotton subsidies, notwithstanding the entreaties of poor countries or studies from NGOs like Oxfam.

Here, then, is a linkage the United States knew, but ignored, despite it being laid out not only by NGOs but also by Cotton Four representatives at WTO meetings, including the September 2003 Cancún Ministerial Conference: American cotton subsidies suppress or depress world market cotton prices. To be sure, the United States is not alone to blame. No fewer than nine economic studies show world cotton prices would be between 2% and 28% higher than market prices if government subsidies provided by the United States, EU, and China were eliminated.¹⁸⁰ A tenth study showed:¹⁸¹

180. Jonathan Lynn, *WTO Cotton Deal Will Do Little for Africa—Expert*, REUTERS, July 15, 2009, available at <http://af.reuters.com/article/maliNews/idAFLF45116320090715>.

Oxfam calculated that between 1995 and 2002, world cotton prices were depressed by 50%, to levels lower than at any period since the Great Depression. See Watkins, *supra* note 173, at 8, 28.

181. See Pruzin, *supra* note 179, at 618. This study was prepared by Professor Mario Jales of Cornell University and published in April 2010 by the International Center for Trade and Sustainable Development in Geneva.

This study also forecast the impact on American cotton production and global cotton prices (as against the 1998–2007 reference period) of compliance by the United States with the 2005 Appellate Body decision in favor of Brazil in the celebrated *Cotton* case:

(1) a drop in output of 7% and increase in prices of 3.5% if the United States eliminated all cotton subsidies (including counter-cyclical payments, Step 2 and GSM-103 export credit guarantee payments, and marketing loan programs); or

- If the above proposal is not implemented, and instead the regular draft provisions on agriculture subsidy cuts apply to cotton, then (using 1998–2007 as the reference period) American cotton production would fall by just 4%, and world cotton prices would rise by only 2.5%.
- If the above proposal is implemented, whereby sharper cuts are imposed on cotton subsidies than would be the case under the regular provisions to cut farm support, then American cotton production would decline by 9%, and world cotton prices would rise by an average of 6% (again compared to the 1998–2007 reference period).

In other words, under either scenario the “hit” to American cotton output is not dreadful, but the difference in the impact on global cotton prices is marked.

An eleventh study, issued in November 2010 by Fairtrade, an NGO, said the roughly \$1 billion rich countries spend on cotton subsidies depress the income of cotton farmers in the Cotton Four by 10%, or \$147 million in annual revenue.¹⁸² Conversely, Fairtrade pays premium prices for organic agricultural products, including cotton. Farming families use the extra income to send their children to school (with an enrollment rate of 95%, compared to the national average in the Cotton Four of 43%),¹⁸³ and Fairtrade has allowed the farming communities to build medical clinics. To be sure, the National Cotton Council, which represents American cotton producers, responds that cotton subsidies help over 340,000 people in several poor southern states of the United States.¹⁸⁴ The European Commission makes a similar argument in respect of Greece and Spain. But, by no stretch of the imagination are the American or European cotton farmers either as poor as or more numerous than their counterparts in the Cotton Four countries.

For the Cotton Four countries, the key nexus is that adverse price effects drive marginal farmers in poor countries off the land into city slums.

(2) a negligible effect on production and 0.7% increase in world cotton prices with partial compliance by the United States (through eliminating the Step 2 and GSM-103 export credit guarantees and amending the fee schedules under the Supplier Credit Guarantee Program).

Id. Partial compliance occurred, albeit in stages, as the United States (1) ceased accepting new applications for GSM-103 export credit guarantees in July 2006, (2) repealed the Step 2 scheme in August 2006, and (3) revised the fee schedules under the GSM-102 export credit guarantee scheme in April 2010. *See id.*; *see also* Daniel Pruzin, *USDA Hikes Export Credit Fee Rates to Fulfill Commitments in Cotton Dispute*, 27 Int’l Trade Rep. (BNA) No. 17, at 634 (Apr. 29, 2010).

But, because the United States did not comply fully with the ruling, it paid compensation to Brazil—in effect, protection money to shield American cotton farmers from losing all subsidies ruled illegal by the Appellate Body. The amount, \$147 million per year, staved off retaliation by Brazil against the United States. *See* Alan Beattie, *WTO Members Scramble to Salvage Crumbling Trade Talks*, FIN. TIMES, June 13, 2011, at 6.

182. Doyle, *supra* note 175.

183. *Id.*

184. *Id.*

They take up positions like lorry-driving. If and when some of them engage in risky sexual behavior, they catch and spread the HIV/AIDS virus in West African cities. Many of those erstwhile farmers happen to be as-yet moderate Muslims, not *Al Qaeda* or *Taliban* adherents. That fact makes the connection between cotton subsidies, poverty reduction, vulnerability to extremist messages, and national security all the more poignant.

Even if these farmers are not driven off the land, quite possibly their income is reduced, so they cannot afford private-school tuition for their children. They are left with little choice but to send their kids to the free Islamic schools, some of which are subsidized by Saudi interests, and not all of which teach either marketable skills or messages that serve America's national security. It takes nearly no imagination to see the disconnect between the December 2008 Text in respect of cotton subsidies, on the one hand, and the original purposes of the Doha Round concerning boosting development and thereby reducing vulnerability to extremism, on the other hand.

Nevertheless, following the July 2008 Text, the United States specifically avoided committing even to an 82.2% cut, as well as eschewing tabling any counter-proposal. Indeed, "U.S. officials have described the African proposal as *unacceptable*, arguing the general provisions on reducing farm subsidies would already reduce U.S. cotton subsidies by 50 percent."¹⁸⁵ In April 2009, Prosper Vokouma, Ambassador to the WTO from Burkina Faso, revealed that the Cotton Four countries tried to engage the United States in a cotton deal during the Ministerial meeting in July 2008, offering five different proposals.¹⁸⁶ The United States refused to negotiate, saying that resolution of other agricultural questions, plus NAMA issues, must occur first before it would make a final decision on cotton subsidy reductions.¹⁸⁷ The Director-General, Pascal Lamy, appeared to do nothing to move the United States from this rather self-defeating, and even heart-

185. Pruzin, *supra* note 179, at 618 (emphasis added).

186. Daniel Pruzin, *African Cotton Growers Say Crisis Continues in Absence of Doha Deal*, 26 Int'l Trade Rep. (BNA) No. 18, at 591-92 (Apr. 30, 2009).

187. *See id.* The United States has argued the Cotton Four has failed to take advantage of high world market cotton prices, as in July-August 2008, when they hit approximately \$1.54 per kilogram. (They were about \$1.10 per kilo in April 2009.) The United States urges that domestic reforms are needed in the Cotton Four to put farmers there in a better position to benefit from high cotton prices. The United States also points out that between 2004 and 2008, the acreage allocated in the United States to cotton has fallen by 40%, the lowest level in twenty-five years, and usage of cotton by American mills is at the lowest level since the 1880s.

However, there are three weaknesses in the American argument. First, a decision to plant cotton must be taken by a farmer a year in advance, especially if that farmer is poor and needs to arrange loans to finance the planting. A spike in cotton prices, as occurred in July-August 2008, is difficult to forecast a year in advance. Second, the overall picture of the world cotton market is one of glut. Annual cotton production is 25 million metric tons, but 2 million tons are held in reserve. This stock results from subsidization in the United States and other rich countries. Third, production of cotton has fallen in Africa, too, between 2006 and 2008 from 2 to 1 million metric tons annually and in Burkina Faso from 750,000 to 400,000 metric tons. *See id.*

less, position other than make public pronouncements about the importance of finding an eventual solution. The April 2011 Agriculture Document confirmed that “not all Members are in a position to agree to the text as drafted but no new contributions, technical or substantive, have been forthcoming to date.”¹⁸⁸

The Cotton Four countries foresaw exactly the “squeeze play” they perceived the United States was using against them: negotiate a nearly comprehensive arrangement on agriculture and NAMA, save for cotton subsidy cuts, and then present *fait accompli* a deal on those cuts to the Cotton Four. The Cotton Four would be under enormous pressure from all other WTO Members to acquiesce to the deal. Doing so would mean completion of the Doha Round. Conversely, no matter how bad the deal, the Cotton Four would not have the political and economic clout to hold out for its interests and block completion.

As a final technical matter, the December 2008 Text contained the same limit as its predecessor on Blue Box cotton subsidies. Such subsidies—for example, counter-cyclical payments to cotton farmers—would be restricted to one-third of the limit established by applying the above formula. That is, one-third of the amount resulting from application of R_c would be the cap on Blue Box support for cotton. As for the period in which to implement reductions to cotton subsidies, it would be one-third as long as the usual implementation period.¹⁸⁹ Developing countries (that had Amber and Blue Box commitments) would have an obligation to reduce cotton subsidies equal to two-thirds that for developed countries and would get a longer (albeit unspecified) time for implementing the cuts.¹⁹⁰

Ironically, it is not even clear that application of an 82.2% cut would help the Cotton Four countries.¹⁹¹ The cut would be based on cotton subsidies notified to the WTO during the 1995–2000 base period. However, the figures notified by the United States for that period exclude a variety of cotton subsidy programs, including some the Appellate Body held were in violation of WTO rules in the famous *Brazil Cotton Case*.¹⁹² By one estimate, the actual total amount of American cotton subsidies during the base period was \$1.74 billion; but the United States notified only \$623 million,

188. *April 2011 Agriculture Document*, *supra* note 90, ¶ 9.

189. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 56; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 56. The reference to “the implementation period” in this paragraph is unclear.

190. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 56–58; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 56–58.

191. See Lynn, *supra* note 180 (reporting on the work of Abdoulaye Zonon of the Centre d’Analyse des Politiques, Economiques et Sociales (CAPES) in Burkina Faso).

192. See Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 21, 2005) (complaint by Brazil). This case is discussed in Raj Bhala & David Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT’L & COMP. L. 107 (2006).

and an 82.2% cut would drop them to about \$111 million yet leave the other non-notified programs intact.

Following publication of the April 2011 Agriculture Document, the United States response to criticisms of its position in Doha Round cotton subsidy negotiations was a combination of denial and accusation. First, the United States insisted its cotton subsidies had tumbled because of recent increases in the world market price for cotton. That is, a sizeable portion of its cotton support took the form of counter-cyclical payments, but the price for such payments had not been triggered. The obvious rebuttal to this argument was that as soon as market conditions changed sufficiently—and, sooner or later, they would—the counter-cyclical payments would be triggered. What the Cotton Four and least developed countries required was a complete cut to American subsidies, made permanent through a meaningful, bound commitment.

Second, the United States faulted China for its cotton subsidies and for starting or expanding trade-distorting cotton subsidy schemes. Intoned Deputy USTR and U.S. Ambassador to the WTO, Michael Punke, in May 2011 stated:

“If people wish to discuss cotton, [then] everyone’s cotton programs must be on the table.” . . . “If we are going to have a discussion about cotton, [then] it must be a comprehensive discussion about all forms of market distorting practices.” . . . “We would need to discuss both direct subsidization and other practices such as import licenses, sliding tariff scales, and reserves management—that produce very substantial levels of effective support for domestic cotton producers.”¹⁹³

The United States accused China of failing to adhere to the commitment it made when acceding to the WTO on 11 December 2001—namely, capping its cotton subsidies at or below 8.5% of the total value of domestic cotton production.¹⁹⁴ Moreover, argued the United States, China had failed to notify the WTO of its cotton (and other farm support) programs since 2006 (with 2004 being the last marketing year (MY) covered) and that notification was incomplete.¹⁹⁵ Based on estimates from the International Cotton Advisory Committee, which is located in the United States, China gave

193. Daniel Pruzin, *WTO: WTO Chief Warns Members Not to Get Stuck on ‘Deliverables’ Package, Says LDCs Priority*, 28 Int’l Trade Rep. (BNA) No. 22, at 886, 887 (June 2, 2011) (quoting Michael Punke).

194. See Pruzin, *supra* note 54, at 1229.

195. See Daniel Pruzin, *China to Submit New Subsidy Notification, Says U.S. Claims Exaggerated on Wind Power*, 28 Int’l Trade Rep. (BNA) No. 24, at 984, 984 (June 16, 2011). The 2006 notification was the only one China submitted since it acceded to the WTO on 11 December 2001. In October 2009, China promised a new notification that would chronicle subsidies from the central government to agriculture and industry between 2005 and 2008. But, as of July 2011, China failed to produce this notification. China’s 2006 notification covered the years 2001–2004, but it failed to include support from regional, provincial, or local governmental entities. That notification listed seventy-eight central government subsidy programs for agricultural and indus-

\$1.95 billion in subsidies for cotton production in the 2008–2009 MY and \$1.96 billion in the 2009–2010 MY.¹⁹⁶

Nevermind the fact Mr. Punke represented an Administration headed by a President whose ethnic paternal roots lay in Sub-Saharan Africa and who professed a desire to rebalance American foreign policy toward greater solidarity with the Third World. Cotton subsidies, for the Administration of President Barack H. Obama, were a matter of commercial self-interest and market access to, if not rivalry with, China. After all, with a sizeable share of textile mills and apparel factories, China is the largest cotton market in the world, and American cotton farmers want those production facilities to use American cotton.¹⁹⁷ Thus, the Ambassador faulted China for renegeing on its obligation to notify, since 2004, the WTO of its agricultural subsidies, including its support for cotton.

China countered with the contention that American cotton subsidies reached \$3 billion annually, thus depressing world market prices by 13% and injuring both Chinese and African cotton farmers.¹⁹⁸ Moreover, despite the unlevel playing field created by American subsidies, the share of world imports of subsidized American cotton accounted for by China rose from 17% in 1999 to 43% in 2005.¹⁹⁹ Amidst this familiar Doha Round pattern of accusation followed by counter-accusation, the interests of the Cotton Four countries, and the direct link between those interests to fighting poverty and terrorism, were lost.

V. ENHANCING AGRICULTURAL MARKET ACCESS THROUGH TARIFF CUTS

A. *Tiered Tariff Reductions*

It comes as a surprise to non-trade professionals that marked discrepancies exist in average most favored nation (MFN) tariffs maintained by developed countries on industrial versus agricultural products. The reason is clear enough: over a half-century of GATT trade rounds have yielded sub-

trial producers but gave expenditure details on only twenty-nine of those programs, most of which pertained to agriculture and rural development. *See id.* at 984.

196. Daniel Pruzin, *WTO: U.S., Others Stress Quick Decision Needed on Content of WTO 'Deliverables' Package*, 28 Int'l Trade Rep. (BNA) No. 26, at 1063, 1065 (June 30, 2011).

197. *See Pruzin, supra* note 193, at 887. China is losing its comparative advantage, owing to rising labor costs. Almost half of all EU garment imports, and 41% of America's garment imports, come from China (as of June 2011). *Good Darning, Vietnam: Rising Costs in China Are Sending More Buyers to South-East Asia*, *ECONOMIST*, June 2, 2011, at 78, available at <http://www.economist.com/node/18775499/>. But, increasingly, garment factories are shifting to Cambodia and Vietnam, where labor costs are lower than in China. Thus, Vietnam ranks as the second largest source of garments for the United States. If and when Cambodia, Vietnam, Indonesia, and other members of the Association of South East Asian Nations (ASEAN) create regional supply chains (for example, whereby Indonesia, which produces denim, can export it duty free to Vietnam, which does not make denim, for jeans to be sewn in Vietnam), then China's advantage may erode further.

198. Pruzin, *supra* note 193, at 887.

199. *Id.*

stantial reductions in industrial tariffs, but agricultural tariffs have fallen far less dramatically because major players such as the United States, EU, and Japan have protected their farm sector. Canada is a case in point: as of 2007, its average MFN tariff on industrial products was 3.8%, but its average farm tariff was 22.4%.²⁰⁰ The Doha Round was an opportunity to reduce this discrepancy. Yet, in all substantive respects on market access, the December 2008 Text was an exact reincarnation of its predecessor of July 2008. That predecessor, in turn, was grounded on a January 2008 Working Paper. So, as with most other areas of agricultural negotiations, little changed in 2008. Table V below summarizes the key proposals in the Texts designed to boost opportunities for agricultural exporters around the globe.

The basic strategy is to reduce farm tariffs according to a tiered formula. That is the same approach used to cut OTDS and Total AMS. Cuts would be made to bound *ad valorem* tariffs, and any non-*ad valorem* duty would be converted to its *ad valorem* equivalent (AVE) rate using the May 2005 Paris Methodology.²⁰¹ For developed countries, implementation would occur in six equal annual installments over five years, the first installment being due on the date of entry into force of any Doha Round agreements. For developing countries, the implementation would be eleven equal annual installments across a decade. Thus, poor countries would have twice as long as rich ones to phase in reductions to their farm tariffs (i.e., to protect their farmers from foreign competition).

200. Daniel Pruzin, *Canada Touts Its Commitment to Global Trade Liberalization Through Tariff Cuts*, 27 Int'l Trade Rep. (BNA) No. 18, at 679 (May 6, 2010).

201. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 59–60; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 59–60.

The Paris Methodology is memorialized in a WTO document, Committee on Agriculture Special Session, *Draft Possible Modalities on Agriculture*, TN/AG/W/3, Annex A (July 12, 2006), available at http://www.wto.org/english/tratop_e/agric_e/mod_ag_2006_e.htm.

This Methodology was agreed to in May 2005 at a meeting in Paris by the WTO Members to compute AVEs. It uses average prices of a commodity (the specific duty on which is being transformed into an AVE) during 1991–2001 as a basis for conversion. The computation also is affected by recent prices, or import values, of a commodity. The dramatic rise in commodity prices in 2008 caused agriculture importing and exporting countries to shift their positions on tariff simplification.

For much of the Doha Round, agricultural importers such as the EU, Switzerland, and Japan sought to limit the number of tariff lines subject to conversion. They hoped to maintain roughly 60% of their specific duties (i.e., they did not want to convert more than 40% of their specific duties into AVEs). Conversely, agricultural exporters, like Australia, Argentina, and Uruguay demanded the importing countries convert a high percentage—such as 90%—of their tariff lines. With the spike in world commodity prices, the WTO Members reversed their roles. That was because the Paris Methodology would yield far higher AVEs than before the spike. Thus, importing countries became eager to convert 90% or so of their tariff lines while exporting countries wanted them to limit conversions to a small number of lines. See Daniel Pruzin, *Ag, NAMA Chairs Give Bleak Assessment of Prospects for Doha Round Breakthrough*, 25 Int'l Trade Rep. (BNA) No. 44, at 1567–68 (Nov. 6, 2008).

*Table V: Tiered Reductions to Agricultural Tariffs in December
2008 Draft Agriculture Modalities Text*

Category of WTO Member Tariff Band, Reduction Commitments, and Implementation	<i>Developed Countries</i>	<i>Developing Countries, SVEs, Countries entitled to SVE-like Treatment, Venezuela, and Suriname</i>	<i>Older RAMs, Newer RAMs, and Small Low-Income RAMs with Economies in Transition</i>
<i>Tier 1 (Highest Band of Existing Bound Agricultural Tariffs)</i>	Over 75%	Over 130%	Same as developing country band
<i>Cut to Bound Agricultural Tariffs in Tier 1</i>	70%	Two-thirds of the cut required of developed countries (i.e., a 46 ² / ₃ % cut). SVEs may moderate cuts by a further ten percentage points (i.e., a 36 ² / ₃ % cut). Some countries, such as Bolivia, Congo, Côte d'Ivoire, and Nigeria, could use the SVE flexibility. Suriname would bind its tariffs, on a line-by-line basis, at the average figure of countries in its region after they cut their tariffs using the tiered formula used by developing countries.	No cuts required of newer RAMs (i.e., Macedonia, Saudi Arabia, Tonga, Ukraine, and Vietnam). No cuts required of small, low-income RAMs with economies in transition (i.e., Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia). All other RAMs may moderate the cuts they would otherwise have to make under the tiered formula used by developing countries by up to eight percentage points, and may exempt from cuts any bound duty equal to or below 10%.
<i>Tier 2 (Upper Middle Tier (i.e., Middle Band of Existing Bound Agricultural Tariffs))</i>	50% to 75% (above 50% but less than or equal to 75%)	80% to 130% (above 80% but less than or equal to 130%)	Same as developing country band
<i>Cut to Bound Agricultural Tariffs in Tier 2</i>	64%	Two-thirds of the cut required of developed countries (i.e., a 42 ² / ₃ % cut). SVEs may moderate cuts by a further 10% (i.e., a 36 ² / ₃ % cut).	Same special rules as above

Tier 3 (Lower Middle Tier (i.e., Lower Middle Band of Existing Bound Agricultural Tariffs))	20% to 50% (above 20% but less than or equal to 50%)	30% to 80% (above 30% but less than or equal to 80%)	Same as developing country band
Cut to Bound Agricultural Tariffs in Tier 3	57%	Two-thirds of the cut required of developed countries (i.e., a 38% cut). SVEs may moderate cuts by a further 10% (i.e., a 28% cut).	Same special rules as above
Tier 4 (Lowest Band of Existing Bound Agricultural Tariffs)	0% to 20% (above 0% but less than or equal to 20%)	0% to 30% (above 0% but less than or equal to 30%)	Same as developing country band
Cut to Bound Agricultural Tariffs in Tier 4	50%	Two-thirds of the cut required of developed countries (i.e., a 33 $\frac{1}{3}$ % cut). SVEs may moderate cuts by a further 10% (i.e., a 23 $\frac{1}{3}$ % cut).	Same special rules as above
Minimum Overall Average Cut on Bound Tariffs	54%	None	None
Maximum Overall Average Cut on Bound Tariffs	None	36% (including reductions to tariffs on Sensitive Products). For Venezuela, maximum overall average cut would be 30%.	None
Implementation Period	Equal annual installments over five years	Equal annual installments over ten years	Not applicable to newer RAMs or small, low-income RAMs with economies in transition (because they have no tariff reduction commitments). For all other RAMs, an additional two years beyond the implementation period for developing countries. To avoid overlap with accession commitments on any farm product, implementation of Doha Round tariff

			cuts would begin one year after the end of the implementation of their accession commitment on that product.
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As for the tiers into which to categorize developed country tariffs, there would be four of them: 0%–20%, 20%–50%, 50%–75%, and above 75%.²⁰² Cuts would be made to existing bound tariff rates, with each rate slotted into the appropriate tier. The higher the pre-reduction rate, the higher the tier into which that rate would be slotted. In turn, steeper cuts would apply to tariffs in the higher tiers. The reductions would be 50%, 57%, 64%, and 70%, respectively, in the four tiers, with the result that cuts would be non-linear and lead to some degree of rough harmonization across WTO Members. The December 2008 Text altered slightly the last figure. The July Text specified a range of 66%–73%, and the new Text embodied the midpoint.

Flexibilities abounded in the December 2008 Text. First, the obligation to cut agricultural tariffs incumbent on developing countries would be two-thirds as onerous as on developed countries.²⁰³ That would be true across all tiers of tariffs. The tiers themselves would be defined more generously than for developed countries; specifically, tariff tiers for developing countries would be wider in range and ascend to a higher zenith. Instead of a minimum average cut on final bound tariffs of 54%—which would be the rule for developed countries—there would be a maximum overall average cut, inclusive of Sensitive Products, required of developing countries.²⁰⁴ That maximum (i.e., a maximum average of all reductions in farm tariffs) for developing countries would be 36%. Put simply, rich countries would have to cut their farm tariffs by at least 54%, but could do more. Poor countries would have to do no more than cut their tariffs by 36%, but could do less.

In itself, this simple distinction between exhorting developed countries to do more and limiting the onus on developing countries was in keeping with the broad development-oriented purpose of the Doha Round. But, the delineation did not stop there. The December 2008 Text introduced five

202. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 61; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 61.

203. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 63; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 63.

204. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 62, 64; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 62, 64. If a developed country, after cutting all farm tariffs including on Sensitive Products and accounting for tariff escalation and tropical products, had an overall average cut of less than 54%, then it would be obligated to make an “additional effort . . . proportionately across all bands to reach that target [54%].” *Id.* ¶ 62. Conversely, if an SVE designated goods as “Special Products” (discussed below), then its maximum average cut would fall to 2%. *See id.* ¶¶ 65, 130, 157, Annex A.

further distinctions among developing countries; the first of which was between Venezuela and all others.²⁰⁵ Venezuela would have a ceiling maximum overall average cut of 30% (i.e., it would have to hit a less ambitious target than that expected of other developing countries).

Second, small, vulnerable economies (SVEs)—about forty-five WTO Members—would be entitled to temper cuts to their farm tariffs by a further ten percentage points.²⁰⁶ That is, in comparison with developing countries, SVEs could moderate their tariff cuts by ten *ad valorem* percentage points. Some countries, while not technically SVEs, could avail themselves of SVE-type treatment.²⁰⁷ Those countries would include Bolivia, Congo, Côte d'Ivoire, and Nigeria. Consequently, over half of developing countries would be eligible for smaller cuts than normally required for such countries.

Third, Suriname would be singled out for special treatment.²⁰⁸ That was an innovation in the December 2008 Text, albeit one that adduced the spreading of preferences. Instead of applying any tiered-tariff reduction formula, Suriname would rebind its agricultural tariffs at the average bound level of other designated countries in its region after they had applied the relevant tiered tariff cuts. Those countries would be the *CARICOM* (*Caribbean Community*) states—Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. These neighboring countries would apply the SVE formula. Suriname would bind its tariffs, on a line-by-line basis, at the average figure in its neighborhood.

Fourth, older RAMs would be entitled to moderate the cuts to agricultural tariffs they otherwise would be obliged to make under the tiered-formula. They would be treated like developing countries. But, they could deviate from the cuts incumbent on those countries by up to eight percentage points.²⁰⁹ In other words, in each tariff tier, the cut for developing countries would be two-thirds that for developed countries, and the cuts for older RAMs would be two-thirds that for developed countries minus eight *ad valorem* percentage points. Older RAMs also could exempt from a tariff cut

205. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 64 n.10. SVEs are WTO Members that, between 1999 and 2004, accounted for a tiny average share of global trade, specifically, no more than (1) 0.16% of total trade, (2) 0.1% of industrial product trade, and (3) 0.4% of world agricultural trade. See *id.* ¶ 157. The higher figure on farm trade reflects the reality that most SVEs specialize in commodities, not manufactured items. See also *id.* ¶ 159 (noting SVE provisions are scattered about the December 2008 Text).

206. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 65; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 65.

207. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 65 n.11 (third and fourth sentences). Paragraph 157 of the *December 2008 Draft Agriculture Modalities Text* set out the SVE criteria, and Annex I listed countries satisfying these requirements. See *id.* (first sentence).

208. See *id.* ¶ 65 n.11.

209. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 66, 70; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 66, 70.

on any existing bound tariff at or below 10%. RAMs would have an extra two years, beyond the implementation period for developing countries, to phase in farm tariff cuts.²¹⁰ In the event that their Doha Round market access commitment overlapped with their accession commitment on a particular farm product, they would commence the cut one year after they had finished implementing their accession commitment.²¹¹ That way, no RAM would be making two sets of cuts (under an accession commitment and under the Doha Round tiered formula) simultaneously.

Fifth, for newer RAMs, no reductions to agricultural tariffs would be required.²¹² That also would be true for small, low-income RAMs with economies in transition. The December 2008 Text identified the newer RAMs as Macedonia, Saudi Arabia, Tonga, Ukraine, and Vietnam. The small, transitional RAMs were Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia (the last one added by the December Text).

B. Sensitive Products Designations

Every WTO Member has certain sectors they are not willing to open to free trade. The goods from these sectors are “Sensitive Products,” and they are “Sensitive” for an admixture of economic, political, social, and cultural reasons. The relative proportions among the reasons vary depending on the Member and Product. The WTO does not, and cannot, dictate what the criteria must be to designate a good as a “Sensitive Product.” But, it also cannot allow every Member to make an unlimited number of designations. Were that to occur, the trade-liberalizing effects of subsidy and tariff cutting obligations would be more than offset by protecting Sensitive Products from those obligations.

Thus, a key exercise in multilateral farm trade negotiations during much of the Doha Round concerned rules on Sensitive Products and corollary provisions on enhanced market access for Sensitive Products through expanded tariff rate quotas (TRQs). The December 2008 Text was similar, albeit not identical, to the July 2008 Text. The predecessor drew largely on the May 2008 Text. Hence, not much had changed on the topic in nearly eight months. Table VI below summarizes the proposed rules.

Sensitive Product designations were the starting point. Any developed country would have the right to designate up to 4% of its total agricultural tariff lines as “Sensitive.”²¹³ That was a modest change from the range of

210. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 69; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 69.

211. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 68; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 68.

212. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 67; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 67.

213. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 71; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 71.

4% to 6% in the July Text. Developing countries would receive S & D treatment.

Table VI: Treatment of Sensitive Products in December 2008 Draft Agriculture Modalities Text

Sensitive Product Rule Category of WTO Member	Percentage of Total Agricultural Tariff Lines that can be designated as Sensitive	Deviation from the Full Tariff Reduction under the Tiered Formula <i>(Partial tariff cut is applied to bound MFN rate imposed on above-quota imports of the Sensitive Product)</i>	Required Expansion of In-Quota Volume Threshold on TRQ <i>(Access Opportunity)</i>
<i>Developed Countries (including RAMs and SVEs, if applicable)</i>	4%	Tariff cut may deviate from the full reduction by: $\frac{1}{3}$, $\frac{1}{2}$, or $\frac{2}{3}$	The greater the deviation from the full cut, the greater the access opportunity required: One-third deviation (imposition of two-thirds of the full cut) requires 3% access opportunity; One-half deviation (imposition of one-half the full cut) requires 3.5% access opportunity; Two-thirds deviation (imposition of one-third of the full cut) requires 4% access opportunity;
<i>Developed Countries with more than 30% of their Tariff Lines in the Top Tier (Final Bound MFN Rate of over 75%)</i>	6%	Same as above	Same as above but must increase access opportunities for each deviation by an additional $\frac{1}{2}$ % of domestic consumption.

A “tariff line” is a product as it is defined in lists of tariff rates. The product can be subdivided, and the extent of subdivisions is reflected in the Harmonized System (HS) of product classification. See RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 452–53 (2008); Info. & Media Relations Div., WTO Secretariat, *Unofficial Guide to the Revised Draft Modalities—Agriculture*, WORLD TRADE ORG., 2 (Dec. 6, 2008, corr’d Dec. 9, 2008), http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.pdf.

<i>Developing Countries (including RAMs and SVEs, if applicable)</i>	One-third more than developed countries (i.e., 5.33%)	Same as above	Obligation to expand access opportunity is $\frac{2}{5}$ the amount as for developed countries (above). Domestic consumption used to estimate in-quota TRQ threshold excludes consumption by subsistence farmers of their own produce. Alternative complex options whereby less-than-formula tariff cuts are made with no corresponding access opportunity required.
<i>Developing Countries with more than 30% of their Tariff Lines in the Top Tier (Final Bound MFN Rate of over 130%) (including RAMs and SVEs, if applicable)</i>	One-third more than developed countries (i.e., 7.33%)	Same as above	Same as above for developing countries

With remarkable candor, the December Text and April 2011 Agriculture Document hastened to add explicitly that Canada and Japan did not agree to the 4% limitation.²¹⁴ Canada demanded a limit of 6%, and Japan 8%.²¹⁵ Canada was concerned about its supply management system, which meant it had dairy and poultry products it sought to designate as Sensitive that would exceed the 4% limit.²¹⁶ Japan made a similar calculation in respect of its sensitivities, such as cereals, grain, and rice.²¹⁷ Japan hardened its position in December 2010, when it made an otherwise obligatory 75% in its OTDS conditional on permission for it to pick an additional 2% of its agricultural tariff lines (i.e., 8% of them) as Sensitive.²¹⁸

Evidently, neither Canada nor Japan was satisfied with a dispensation designed to placate them.²¹⁹ That dispensation was WTO Members with high farm tariffs, i.e., countries with more than 30% of their tariffs in the top tier of 75% *ad valorem* or more, could designate an additional 2 percentage points of their farm tariff lines as Sensitive—in effect, 6% (or so it appeared from the December Text). But, they would have to expand TRQs by an additional 0.5% of domestic consumption beyond the required access opportunity amounts (explained below).²²⁰

To the surprise of many Members, in October 2009, the U.S. signaled a possible change in its position on the number of agricultural tariff lines

214. See *April 2011 Agriculture Document*, *supra* note 90, ¶¶ 12–13; *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 71 n.*.

215. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Designation*, TN/AG/W/5 ¶ 4 (Dec. 6, 2008).

216. See Press Release, Market Wire, Minister Ritz Takes Strong Stand on WTO Agriculture Negotiations (Dec. 7, 2008), available at <http://www.reuters.com/article/2008/12/07/idUS85756+07-Dec-2008+MW20081207>.

217. See Toshio Aritake, *WTO: WTO Chief Lamy Urges Japan's Officials to Contribute to Doha Round's Completion*, 26 Int'l Trade Rep. (BNA) No. 9, at 282 (Feb. 26, 2009).

218. See Daniel Pruzin, *Japan Slammed at WTO Attempt to Dodge Subsidy Reduction Commitment*, 27 Int'l Trade Rep. (BNA) No. 50, at 1969 (Dec. 23, 2010).

219. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 71 (second sentence), 75, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 71 (second sentence), 75.

The 2% flexibility also applied to another category of developed countries: if they were disproportionately constrained in making Sensitive designations (specifically, in respect of the number of tariff lines they could select, because they were scheduling them at the six-digit level of Harmonized System (HS) classification), then they could increase their entitlement by 2%. See *id.*

220. Chairman Falconer proposed yet more flexibility for Canada—and presumably Japan—to consider in his *Revised Draft Modalities for Agriculture Sensitive Products: Designation*. Essentially, it was an option for Canada to designate more than 4% of its tariff lines as Sensitive if it expanded its TRQs by more than 4% of domestic consumption. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Designation*, ¶ 6, TN/AG/W/5 (Dec. 6, 2008). Specifically, each Sensitive line above the 4% threshold would require a TRQ increase of 5.5% of domestic consumption, and all of the Sensitive lines under the 4% limit would require an additional 0.5% increase, to 4.5%. The other option would be a TRQ expansion of 5% on all lines Canada designated Sensitive. However, the Chairman conceded that the option would not be acceptable to Japan. See *id.* ¶ 7.

that a developed country could designate as Sensitive.²²¹ Traditionally, the Americans championed the argument to limit the number of such lines. But, perhaps under pressure from domestic agricultural constituencies that viewed the December 2008 Draft Text as more “give” than “got,” the U.S. indicated it might seek to expand the key number to 6%. That is, it might insist that any developed country have the right to designate up to 6% of farm tariff lines as Sensitive. Whether the U.S. actually would designate 6% of its lines would depend on a cost-benefit analysis: was the benefit of the designation worth the cost of expanding TRQs on those lines? While the likes of the EU, Japan, and Korea welcomed the idea, Australia, Brazil, and Uruguay were deeply troubled by it.

Setting aside the disagreement on the percentage of farm tariff lines that may be designated as Sensitive, the next step concerned agreement on the appropriate tariff cuts to Sensitive Products. These Products would be subject to the tiered reduction formula, like any other agricultural good. However, they would be shielded from the full force of the cuts under that formula. All WTO Members would be entitled to deviate from the formula, for Sensitive Products, by one-third, one-half, or two-thirds.²²² That is, in reverse order, respectively, their obligation to cut tariffs on Sensitive Products would be only one-third, one-half, or two-thirds that of the normal cut:

- (1) The smallest deviation from the formula, one-third, would mean imposing a tariff reduction that is two-thirds as severe as called for by the formula. (Hence, the access opportunity, discussed below, is the least onerous—3%.)
- (2) The medium deviation from the formula, one-half, would mean imposing a tariff reduction that is one-half as severe as called for by the formula. (Hence, the access opportunity, discussed below, is moderate—3.5%.)
- (3) The largest deviation from the formula, two-thirds, would mean imposing a tariff reduction that is only one-third as severe as called for by the formula. (Hence, the access opportunity, discussed below, is the most onerous—4%.)

In contrast to the July Text, the December Text made clear each Member would be free to choose the degree of deviation but would have to apply that degree to all of its Sensitive Products (or, at least to all of them within a broad category).²²³ It could not, for example, derogate by one-third for some Sensitive Products yet by two-thirds for others.

221. See Daniel Pruzin, *Senior WTO Negotiators Downbeat After Week of Talks on Doha Round*, 26 Int'l Trade Rep. (BNA) No. 43, at 1457 (Oct. 29, 2009); Daniel Pruzin, *Agriculture: Trading Partners Concerned by U.S. Shift on Sensitive Products in Doha Farm Talks*, 26 Int'l Trade Rep. (BNA) No. 42, at 1413 (Oct. 22, 2009).

222. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 73; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 73.

223. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 73 (last sentence), with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 73.

C. *Sensitive Products and Access Opportunities Through TRQ Expansion*

To compensate exporters of products designated Sensitive by importing countries, the importing countries—having availed themselves of the entitlement to derogate from the full agreed-upon cuts—would have to yield something. That “something” proved to be a monstrously complicating factor in Doha Round negotiations. Essentially, Members agreed the compensation would take the form of a required minimum imported quantity of the Sensitive Product, defined in terms of an in-quota TRQ volume threshold, and technically called an “access opportunity.” That is because, typically, imports under a TRQ are duty-free, or face only a low duty, if they fall within the in-quota threshold. Raising that threshold would mean a larger volume of merchandise would enter the importing country with little or no duty. Above-quota (i.e., over- or out-of-quota) imports would continue to face a high rate of duty. However, the normally-applicable tiered tariff cuts, as modified by partial shielding through a Sensitive Product designation, would apply to the out-of-quota rate.

The essence of the trade-off in the December 2008 Text would be a lower cut to the bound MFN tariff on a Sensitive Product than otherwise required under the Doha Round tiered reduction formula. That partially-reduced tariff would affect the over-quota levy on Sensitive Product imports. But, there would be an appropriate increase in the in-quota threshold. Imports under this raised threshold would get zero or low-duty treatment, which of course is part and parcel of a TRQ. In sum, two movements would occur in respect of a Sensitive Product:

- (1) The in-quota threshold would be raised, but the low or zero-duty treatment would remain unchanged.
- (2) The tariff cuts would be applied to the out-of-quota bound MFN rate, albeit with less than full force.

The movements would be coordinated, indeed directly related to one another. Greater access opportunity (by virtue of the in-quota threshold increases) would be the requisite compensation for greater tariff cut derogation (in respect of the duty applicable to out-of-quota shipments). Therein lay the trade-off.

Thus, the ostensibly simple compensatory arrangement was a proportionate percentage TRQ expansion.²²⁴ Specifically, in exchange for shielding 4% of its tariff lines from full tariff cuts, a developed country that—

- (1) Selected the maximum deviation of two-thirds would have to expand the in-quota volume threshold for Sensitive Product imports by 4% of domestic consumption.

224. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 74; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 74.

- (2) Selected the minimum deviation of one-third would have to expand the in-quota volume threshold for Sensitive Product imports by 3% of domestic consumption.
- (3) Selected the middle degree of deviation of one-half would have to expand the in-quota volume threshold for Sensitive Product imports by 3.5% of domestic consumption.

There would be a direct relationship between deviation from agreed-upon tariff reductions and in-quota TRQ volume expansion for Sensitive Products: The greater the deviation, the greater the expansion.

Stated differently, TRQ expansion would be akin to a sliding scale. Members would pick the point on the scale they wished to sit based on the extent to which they protected Sensitive Products from the full force of Doha Round cuts to farm tariffs. A Member against cutting tariffs fully on a Sensitive Product would have a great onus to expand the quota threshold on that product. Conversely, a Member willing to reduce tariffs nearly fully on a Sensitive Product would have less of an obligation to expand the corresponding quota threshold. The TRQ expansions would apply on an MFN basis, and would be phased in, essentially across a three-year period.²²⁵

What if a WTO Member designates a good as Sensitive but does not have a TRQ established for it? Typically, Sensitive Products are protected by TRQs, but would a Member be barred from designating a new good as Sensitive, and creating a TRQ for it? Like its predecessor, the December 2008 Text left that question unanswered. It laid out the options. Either,

- (1) No tariff line could be designated as Sensitive unless it already was subject to a TRQ before the Round commenced in November 2001; or
- (2) Any product could be designated as such, regardless of its pre-Round status.²²⁶

The two basic alternatives were radically different. The first option inclines Members toward free trade. By disallowing Sensitive designations

225. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 82; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 79.

The precise details of the phase-in would be as follows. The first installment of a TRQ expansion would occur on the first day of implementation of any Doha Round agreement. It would have to be an expansion at least equal to one quarter of total domestic consumption. The subsequent three-quarters of that total would be added to the in-quota TRQ threshold in three steps at the end of each subsequent twelve-month period. *See id.* (second and third sentences).

In the event normal imports are comparatively large, a developed country could provide a reduced access opportunity. Specifically, if the existing bound TRQ volume already represents 10 percent or more of domestic consumption, then the access opportunity obligations would be reduced by 0.5 percent for each deviation. If that volume is more than 30 percent of domestic consumption, then the obligation to expand TRQ volumes would be lowered by 1 percent for each deviation. *See id.* ¶ 77.

226. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 83; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 80.

but for the existence of a TRQ, the first option restricts drastically farm goods the Members could designate as Sensitive.

In contrast, the second option creates much more policy space for protection. Establishing new TRQs is the way to create this space. A new TRQ would embody the familiar trade-off on a newly-designated Sensitive Product between (1) a lower duty imposed on in-quota shipments, and (2) a smaller tariff cut on the bound duty for out-of-quota shipments.

Unsurprisingly, the options reflected sharp battle lines between the U.S. and other major powers, which favored the first option, and China, India, and other developing countries, which favored the second option. On this issue, as a major exporting power, Brazil sided with the first group. Brazil argued the TRQ provisions should not permit WTO Members to establish new TRQs on farm products that they had not protected during the Uruguay Round. This opportunity could be a “black box in which any product could get in, with serious consequences for our interests in the markets of the rich nations.”²²⁷ Brazil was particularly concerned developed countries might create TRQs for ethanol, of which it is the world’s largest exporter.²²⁸

The December 2008 Text contained nearly the same S & D treatment rule for developing countries as set out in the July Text. They could designate up to one-third more tariff lines, i.e., 5.33% of their lines, as Sensitive than developed countries.²²⁹ (A developing country that had more than 30% of its products in the top tier of the tariff cutting formula, i.e., above 130%, could designate an extra 2 percentage points of its tariff lines as Sensitive, for a total entitlement of roughly 7.33%.) The deviations that developing countries could take from the tiered tariff cuts would be the same as for developed countries. That is, developing countries could apply a cut that is one-third, one-half, or two-thirds as severe as otherwise would be required under the formula.

Expansion of in-quota TRQ volumes for developing countries would be two-thirds as great as developed countries.²³⁰ (Numerically, the expansion figures for developing countries would be 2.67%, 2.33%, and 2%, respectively, for the maximum, moderate, and minimum deviation choices on the sliding scale.) The end result would mean foreign farm products would hit the quota ceiling more quickly, and exhaust the duty-free or low-duty allotment faster, in a developing country than in a developed country

227. David Haskel & Ed Taylor, *NAMA Final Draft Text Still Inadequate After Changes, Argentina Tells MERCOSUR*, 25 Int’l Trade Rep. (BNA) No. 29, at 1047, 1047–48 (July 17, 2008) (quoting Brazilian Foreign Minister Celso Amorim). The Foreign Minister holds the senior-most trade portfolio in the Brazilian government.

228. *See id.*

229. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 72, 78, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 72, 78.

230. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 72, 78; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 72, 78.

(*ceteris paribus*, i.e., assuming all other factors were equal). Domestic consumption data on which that expansion would be based would exclude consumption by subsistence farmers of their own produce. Developing countries would get longer phase-in periods.²³¹

Neither of the two extreme options garnered a consensus. Hence, some kind of compromise between them was needed. A possibility sketched out by Chairman Falconer in December 2008 was that a limited number of tariff lines not currently subject to TRQs could be declared Sensitive, and subject to a TRQ. But, the limits would have to be fairly tight:²³²

- (1) The number of such lines could not exceed one percent of the farm tariff lines of the Member concerned.
- (2) The 1% would be deducted from the maximum entitlement of Sensitive Product tariff lines to which the Member was entitled (i.e., if the limit on Sensitive Product designations were 4%, then the remaining entitlement would be 3%).
- (3) The above-quota volume threshold (i.e., the access opportunity) for a newly created TRQ would have to be raised by an additional 2% of domestic consumption beyond the otherwise obligatory expansion.²³³
- (4) The in-quota tariff rate of the newly designated Sensitive Product would have to be zero.
- (5) The TRQ on the new and indeed all Sensitive Products must be applied on an MFN basis.

Norway managed to obtain S & D treatment for itself in the proposal. For three product categories, Norway designates as Sensitive at the HS 7-digit level, Norway could provide an additional access opportunity of just

231. The December 2008 Text endeavored to clarify an alternative preferential rule for developing countries. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 78–81, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 78. The alternative consisted of three complicated options on Sensitive Products. Instead of following the scheme of taking on obligations two-thirds as onerous as for developed countries, a developing country could forgo TRQ expansion and simply impose a less severe tariff cut on Sensitive Products than otherwise would be required of them under the tiered formula, with an extended period for implementing the cuts. The three options concerned the degree of deviation from full tariff reductions under the tiered formula, and the implementation period to make the cuts. Briefly put, under the alternative three options, developing countries could specify a good as Sensitive without granting it any TRQ access, so long as they imposed the full tariff cut on that good over an implementation period 3 years longer than normal (or made one-quarter of the normal tariff cut, but in a period 2 years shorter than normal).

232. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Tariff Quota Creation*, TN/AG/W/6 (Dec. 6, 2008), ¶¶ 1–5. Adjustments to these limits might be made if there has been significant historical trade in the Sensitive Product at issue such that trade in that Product would be “manifestly and artificially restrain[ed]” *Id.* ¶ 6. Essentially, the access opportunity would be added to the historical trade figure for the Product concerned. If that adjustment did not work, then a *sui generis* solution would have to be devised. See *id.* ¶¶ 6–7.

233. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Tariff Quota Creation*, TN/AG/W/6 (Dec. 6, 2008), ¶¶ 1–5; *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 74.

0.5%, rather than 2%, of domestic consumption for the entire TRQ governing the three products.²³⁴ What the categories were was not evident from the relevant document, Attachment Ai, Part G.

Even this proposal did not garner a consensus. Thus, the April 2011 Agriculture Document stated that “views remain divided on whether such flexibility should be afforded.” That is, there was no agreement on whether a WTO Member could designate a new product as Sensitive if it had no TRQ in place for the product.²³⁵

D. Disaggregation of Sensitive Products and Data to Measure TRQ Expansion

A critical but technical question concerned the extent to which WTO Members could disaggregate product categories in making their Sensitive Product designations. For example, could a Member identify cheese as Sensitive, or must it be more precise and designate sub-categories like cheddar cheese, or perhaps hard cheese? Likewise, should it be allowed to designate wheat, or must it pick durum wheat?

On the one hand, the more detailed the designation, the more focused the protection to the Sensitive Product and the less the risk other products will be shielded in part from full tariff reductions. On the other hand, the more detailed the designation, the more difficult it is to get domestic consumption data.²³⁶ These data are essential to gauge the new or expanded TRQs.

All Members are supposed to maintain data at the 6-digit level under the Harmonized System (HS) of tariff classification maintained by the World Customs Organization (WCO). (That is, HS codes are harmonized among all Members at the 4- and 6-digit level, but not the 8- or 10-digit level.) More precise Sensitive Product designations would require data at the 8-digit level (e.g., cheddar or hard cheese, or durum wheat), which many countries—even as large as Brazil—do not have. When data on domestic consumption in a product sub-category are unavailable, then a proxy must be found. One controversial proxy is to estimate domestic consumption using trade figures, specifically, import data. A related problem is that

234. See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture Sensitive Products: Tariff Quota Creation*, TN/AG/W/6 (Dec. 6, 2008), ¶ 8.

235. See *April 2011 Agriculture Document*, *supra* note 90, ¶ 18.

236. In the fall of 2009, WTO Members spent an enormous amount of time and effort compiling and checking these data, as well as data on values of production, which are necessary to calculate and implement rules on domestic support reductions. See, e.g., World Trade Organization, *Negotiators Focus on Data Gaps in Farm Trade Talks* (Nov. 20, 2009), available at http://www.wto.org/english/news_e/news09_e/agng_16nov09_e.htm. Their investment adduces what should be an obvious point: the more technically complex a trade rule is, the more likely it will require time and effort to marshal data to ensure that rule is properly followed. This point mitigates in favor of simpler rules.

products in close sub-categories may be substituted. Cheddar and hard cheese may compete with one another.

Thus, the bottom-line question is how domestic consumption should be estimated when Sensitive Products are designated with great precision. The December 2008 Text, like its predecessor in July, addressed this question through Annex C, accompanied by an “Attachment A” and “Attachment Ai.” Even to the most seasoned international trade professionals, these documents contained monstrous complexities of TRQ expansion calculations. These nearly unfathomable details represented a so-called Consensus Approach worked out in April 2008 and left largely unchanged thereafter.

Attachment A concerns Sensitive Product categories. This Attachment identifies the agricultural product categories WTO Members intend to designate as Sensitive. Attachment Ai—called “Partial Designation Modalities for Sensitive Products” and occupying 16 pages—addresses the problem of estimating domestic consumption for such Products. Unhelpfully, however, Attachment Ai was scarcely more comprehensible in the December 2008 Text than in the July Text.

As before, both Attachments presumed domestic consumption would be the yardstick to determine the extent to which quota sizes for Sensitive Products would need to be expanded. Generally, for a good declared Sensitive at the detailed HS 8-digit level, the expansion would depend on estimated consumption of the broader HS 6-digit level category in which that Sensitive Product is classified. The thrust of Attachment A and Ai was to explain how domestic consumption would be calculated for Sensitive Products, particularly in light of the fact consumption would have to be estimated using a proxy, namely, trade figures.

Attachment A laid out, at the 6-digit level, the product categories that could be designated as Sensitive. Two other Attachments (B and D) explained precisely how to calculate domestic consumption for each Sensitive Product category. The methodology consisted of two steps. Every product category that a Member could designate as Sensitive would have some “Core” Products and some “Non-Core” Products. Core Sensitive Products would be raw or basic farm goods. Non-Core Products would consist of (1) farm products that have a low amount of processing, and (2) farm products that are highly processed. For instance, the broad product category of wheat has twenty-eight products at the HS 6-digit level, including two basic grains that are Core, some products that have undergone modest processing, like wheat flour, and still other products that are highly processed, such as bread and pasta.²³⁷

237. See World Trade Organization, *Unofficial Guide to the Revised Draft Modalities-Agriculture*, (Dec. 6, 2008 *corr'd* Dec. 9, 2008) at 12, available at http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.pdf.

Reading Attachments A and Ai shows how trade negotiations devolve from high-minded, well-intentioned free trade aspirations to stunningly abstruse, product-by-product protectionism. The Attachments speak of a “two step partial designation methodology.” Yet, nowhere do they clearly indicate “Step 1” or “Step 2.” They continue with special rules for TRQ expansion for dairy products that are all but impenetrable, except (perhaps) to their drafter and Canada, the Member especially eager to protect its supply management system from the full-force of any Doha Round tariff cuts. That said, the basic goal of the two steps, respectively, would be to calculate domestic consumption for each broad category (e.g., wheat) and then estimate consumption of products at a detailed sub-category level (e.g., wheat flour).

Accordingly, in Step 1, consumption would be estimated at the HS 6-digit level. That is, for each detailed Sensitive Product type, consumption would be a percentage of consumption in the relevant broad product category. The percentage would depend on the share of trade of the detailed product in the broad category. That percentage would be adjusted to give a higher weighting to Core Products (e.g., 67%) than to Non-Core Products (e.g., 23%). This adjustment would ensure Core Products, which are more heavily traded than Non-Core Products, would account for at least 90% of each HS 6-digit category. In Step 2, consumption would be estimated at the HS 8-digit level. The percentage of consumption at the 6-digit level would be adjusted, using the import data of the WTO Member in question, at the 8-digit level.

The end result would be a percentage figure for domestic consumption of a detailed Sensitive Product. In other words, for every detailed product sub-category (8-digit level), consumption would be some percentage of consumption of the broad product category (6-digit level) in which the detailed product appears. The percentage would depend on the share of the sub-product in the broad product category. That percentage would be adjusted to ensure Core Products account for 90% or more of the consumption in the broad category. That is because they are the most heavily traded kind of agricultural good.

In turn, the estimate of domestic consumption of a Sensitive Product sub-category would be used to set the expansion of the in-quota threshold of a TRQ for that Product. That is, this estimate would establish the quota size—the access opportunity—whenever a Member designates a sub-category as a Sensitive.

However, to make matters yet more complicated, special variations on these two steps would apply to certain Sensitive Products, particularly dairy (eggs and milk), fruit, and vegetables. Moreover, special rules—set out in Annex C and Attachment Ai to the December 2008 Text—deal with the possibility that estimates of domestic consumption might result in an in-quota TRQ threshold that is too small. These rules establish a minimum

quota size, or floor, in the event the trade data used as a proxy for domestic consumption consists of unusually low figures.

Not surprisingly, how the aforementioned criteria would operate in practice remained a mystery to most Members, even after months of study and contemplation. The April 2011 Agriculture Document acknowledged the mass confusion, albeit in the tortured language of Geneva bureaucrats: “There is a sense that the operability of criteria . . . is difficult to conceive in the abstract,” and “further factual clarification,” including on products for which consumption data is used as a proxy for trade volumes was needed.²³⁸

E. Maximum Tariff Levels (Caps)

Like the July 2008 Text, the December 2008 Text dealt with an issue related to Sensitive Products and TRQ expansion, namely, the maximum bound MFN tariff level a WTO Member could maintain on a Sensitive Product. Ought there to be a tariff cap on high-tariff developed countries (specifically, on rates charged on above-quota shipments of the Product)? The answer on which most Members settled was “yes.” They also agreed a high-tariff country should make a so-called extra payment. But, countries with high farm tariffs, like Japan and Switzerland, disagreed.²³⁹ The high-tariff Members, which banded together in the Group of 10 (G-10), opposed a tariff cap and, if there had to be one, likely wanted a broad exemption to it.²⁴⁰

Suppose after applying all of its Doha Round tariff cut obligations to agriculture products under the tiered tariff formula, including any deviations for Sensitive Products, a developed country still sought to keep some of its Sensitive Product tariff lines bound at *ad valorem* rates of over 100%. To be sure, the number of such lines would not exceed 4%—the total number of lines that a developed country could designate as Sensitive. And, the 100%-plus duty would be the over-quota rate for a TRQ on a Sensitive Product. The developed country would have to apply to all of its Sensitive Products an additional TRQ expansion of 0.5% of domestic consumption. That one-half percent would be the extra payment, in exchange for keeping such high duty rates.²⁴¹

The extra payment reflected the aspirations of poor countries. They argued no developed country should have an agricultural duty rate above 100%. However, if they could not push through a lower cap, then at least they could urge an extra payment. The trade-off, in other words, was that a

238. See *April 2011 Agriculture Document*, *supra* note 90, ¶ 19.

239. See Daniel Pruzin, *Week of WTO “Crunch” Ag Talks Ends with No Decision on Next Step*, 25 Int’l Trade Rep. (BNA) No. 48, at 1707 (Dec. 4, 2008).

240. See Pruzin, *supra* note 221, at 1457.

241. *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 76; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 76.

developed country could maintain an above-quota duty rate in excess of 100% on a good it designated as Sensitive if it applied to that good a TRQ expansion of 0.5% greater than the expansion requirement for Sensitive Products with duty rates below 100%. Put simply, a rich country could exceed a 100% tariff rate, albeit with a supra-generous increase in quota volume. Precisely whether that generosity would matter, when the above-quota rate was stuck above 100%, was uncertain.

As for a duty rate over 100% on a non-Sensitive Product, the general rule proposed was that such instances would be limited to no more than 1% of tariff lines beyond the usual entitlement for Sensitive items. (That is, if a developed country were entitled to designate up to 4% of lines as Sensitive, then it could not have duty rates in excess of 100% on more than 5% of its non-Sensitive lines. The December 2008 Text eliminated the range of 1–2% set out in the July Text.)²⁴² Members affected—Iceland, Japan, Norway, and Switzerland²⁴³—would have to pay compensation to the rest of the Membership for the privilege of maintaining a tariff rate above 100% on a non-Sensitive Product. That compensation would consist of:

- (1) Expansion of the TRQs on all their Sensitive Products by an additional 0.5% of domestic consumption, or
- (2) Acceleration of tariff reductions by two years faster than the normal implementation, or
- (3) Addition of ten percentage points to the tariff cuts it is obliged to make. (The December Text boosted this figure from five, which the July Text contained.)²⁴⁴

Briefly put, the December 2008 Text retained (and modestly strengthened) incentives to eradicate tariffs above 100%.

Yet, that Text did not require their elimination. On this point, the fundamental question of whether any Member should be allowed to maintain a tariff in excess of 100% *ad valorem*, there was no agreement. So, the April 2011 Agriculture Document characterized the views of the WTO Members as “remain[ing] sharply divided.”²⁴⁵

What about developing countries—would they have a tariff cap? The December 2008 Text contained the same answer as its predecessor. Developing countries would have a cap of 150%, which was one-third more than the developed country limit.²⁴⁶ Presumably, they would also make an extra payment, albeit a less onerous one than required of developed countries.

242. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 76, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 76.

243. See December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 76 n.15.

244. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 76 (last sentence), with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 76 (last sentence).

245. See April 2011 Agriculture Document, *supra* note 90, ¶ 16.

246. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, at ¶ 76 n.14, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, at ¶ 76 n.12.

F. *Tariff Escalation*

On how to reduce tariff escalation, the December 2008 Text was a *verbatim* repetition of the July Text. The July Text was premised on Texts from February and May 2008 and a January 2008 Working Paper on *Tariff Escalation*. Not much had occurred in negotiations during 2008. Like its predecessor, the December 2008 Text included special provisions for commodity-dependent producing countries in the event the adverse effects of tariff escalation were not mitigated by the agreed-upon tiered tariff cutting formula²⁴⁷ and a provisional list of products (in Annex D) vulnerable to tariff escalation.²⁴⁸

Tariff escalation occurs if a processed product has imposed on it a duty rate significantly above the unprocessed product. “Significance” is defined as an escalation of more than five percentage points (i.e., the tariff rate on a processed product is more than five *ad valorem* percentage points than on the primary product related to it).²⁴⁹ The effect of tariff escalation is to protect processing operations, typically in rich countries, against providers of raw materials and intermediate goods, which usually are in poor countries. Tariff escalation discourages the establishment of vertically integrated industries in poor countries, leaving them dependent on rich countries for finished products.

The December 2008 Text contained a reasonably straightforward strategy to combat tariff escalation.²⁵⁰ It would apply to all developed countries and—on a voluntary basis—any developing country that happened to have escalated tariffs. The strategy would not apply to any Sensitive Products.

Instead of imposing the tariff reduction to the final bound MFN rate in the band in which a processed product (benefitting from tariff escalation)

247. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 91–102, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 88–99. In brief, these provisions covered (1) the methodology to help commodity-producing countries deal with tariff escalation on items of interest to them, including appropriate tariff escalation reductions, (2) elimination of non-tariff measures affecting trade in commodities, (3) joint action under GATT Article XXXVIII (which concerns such action) by WTO Members to help these producing countries, including the adoption of inter-governmental commodity agreements, (4) the relationship of GATT Article XX(h) (which exempts those arrangements from normal GATT obligations) to arrangements by commodity-dependent producing countries, and (5) technical assistance to improve world markets for commodities and the adoption and implementation of inter-governmental commodity agreements.

248. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 84, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 81.

249. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 87, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 84.

250. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 85–90, Annex D, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 82–87, Annex D. If the tariff reduction on a tropical product (discussed below) were larger than the tariff cut under the escalation rules, then the tropical reduction cut would be applied. See December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 85–90, Annex D; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 82–87, Annex D.

belongs, that escalated processed product would be subject to the cut of the next highest tier from the tier it is in. Thus, suppose an escalated product attracts a 60% tariff. It is in the second-highest tier (tariffs between 50–75%), and the tariff is cut by 64%. However, as an escalated product, it is re-classified—bumped up—into the highest tier (tariffs over 75%). The consequent tariff cut is 70%. What if the escalated product already is in the highest tier? Then, the tariff cut would be an additional six percentage points (i.e., a cut of 76% to the tariff).

Interestingly, the above strategy would not apply in full if doing so would reduce the tariff of the processed product to below the primary product.²⁵¹ Consequently, the strategy would mitigate tariff escalation but not create tariff inversion (the occurrence of a higher tariff on the primary than on the processed good). If tariff inversion were to occur by applying the strategy, then the cut would be moderated so as to produce tariff equivalence (the same duty rate on the primary and processed good).²⁵²

G. *Tariff Simplification*

Tariff simplification provisions in the December 2008 Text were nearly identical to the contents of the July Text. Both texts laid out the obvious prohibition against binding a tariff in a form that is more complex than its current one.²⁵³ However, the December Text created two stark options for WTO Members.²⁵⁴ As indicated in the April 2011 Agriculture Document, the Members had yet to choose between these options.²⁵⁵

First, Members could agree all bound MFN tariffs must be expressed as simple, *ad valorem* tariffs. In other words, “tariff simplification” would apply to 100% of the bound tariff lines in the schedules of every Member. Second, Members could decide that simplification should apply to at least 90% of the bound rates in the schedules of a developed country. For the residual unconverted tariff lines, a developed country would have a year

251. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 88, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 85.

252. A development in the Doha Round negotiations that occurred in December 2009 illustrates the complexity of many issues at stake in the Round. The EU said it would revise its “Meursing Table.” The EU uses this Table to determine the customs duty owed on certain processed agricultural products, such as biscuits, cakes, and confectionaries. That duty is based on the composition of the products, with tariffs being defined according to the level of milk fat, protein, starch, and sugar in the processed product. Stunningly, under the Table, there are 27,720 possible combinations of tariffs. The EU offered to reduce that figure to under 300—still a large matrix of possibilities, but a 90 percent cut from an outrageous number. See *Chair Plans Fortnights on Substance in Early 2010*, WORLD TRADE ORG. (Dec. 11, 2009), http://www.wto.org/english/news_e/news09_e/agng_07dec09_e.htm.

253. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 103, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 100.

254. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 104–08, Annex N, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 101–04, Annex N.

255. See April 2011 Agriculture Document, *supra* note 90, ¶¶ 21–25.

after implementation of any Doha Round agreement to decide on how to achieve simplification and reach 100% coverage. The EU managed to retain special dispensation. The EU would need to have only 85% of its tariff lines expressed as *ad valorem* rates within five years of implementation and could keep 5% of its lines as compound tariffs (i.e., a hybrid of a specific duty, which is a levy on a per unit basis, and an *ad valorem* tariff).

Under either alternative, Members would use the May 2005 Paris Methodology to convert non-*ad valorem* tariffs into their AVEs. An implementation period had yet to be set but presumably would be upon, or within a year or so after, the entry into force of any Doha Round accords. Also under both options, any developing country simplifying its tariff schedule would have an additional two years to complete the process. No tariff simplification obligations would be imposed on least developed countries. Critically, under either option all simplified bound tariffs must not increase the level of protection over their original complex form.

H. Tariff Quotas

TRQs are used in more contexts than just the protection of Sensitive Products. Yet, in all contexts, TRQs provide protection that can be greater than a simple *ad valorem* tariff. An *ad valorem* tariff, unless it is set at a prohibitively high level, does not block imports. A TRQ can have that effect if the in-quota threshold is low, the above-quota duty is high, and the administration of the scheme is not transparent. Accordingly, the reduction of duties associated with TRQ, and the improvement of TRQ administration, were topics addressed in the December 2008 Text.

The relevant provisions in the December Text were nearly identical to their counterparts in the July Text, with modest substantive and stylistic changes. The provisions applied to all TRQs, whether or not they protected a Sensitive Product. The new Text set out eight basic rules.

First, all developed countries must slash their bound in-quota MFN tariffs by 50%, or to a rate of 10%. (So, 10% would be the ceiling in-quota tariff on any TRQ.) That would be true for all TRQs, whether or not they protected a Sensitive Product. The July Text had listed a range of 50–70%, and a rate of 0–15%.²⁵⁶ Thus, the December Text chose the low end of the range and a high end for the rate—both less ambitious choices from the perspective of free trade. The bindings would be in *ad valorem* form. The new Text provided greater provision than its predecessor on implementation of the cuts: reductions to in-quota tariffs on all TRQs would be phased in on the same schedule as expansions of in-quota volume thresholds for TRQs

256. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 109, 114, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 105. If a TRQ covered two or more tariff lines that were Sensitive Products, and thereby subject to expansion requirements under the rules for those Products, then the reduction would commence with the lowest of the bound in-quota rates applicable to the lines under the single TRQ.

on Sensitive Products. The maximum in-quota tariff on the first day of implementation would have to be 17.5%. Notably, reductions of in-quota tariffs would not count for the purposes of calculating average farm tariff cuts under the tiered tariff reduction formula.

Second, for all developed countries, low in-quota rates would have to be eliminated. Specifically, if the in-quota MFN rate already was bound at or below 5%, then a developed country would have to reduce it to zero. The developed country would have to do so by the end of the first year of implementation.

Third, Switzerland—obviously a developed country—would get S & D treatment in two respects.²⁵⁷ It would not be obligated to reduce to 10% the bound in-quota tariffs on two lines of bread cereals. It also would not be obligated to cut to zero its in-quota tariff for two specific tariff lines covering wine. However, to compensate bread and wine cereal exporters, Switzerland would have to provide new market access opportunities equal to 1% of domestic consumption. The *sui generis* rules for Switzerland were in the December, but not July, Text, implying it had lobbied effectively in the fall of 2008 on behalf of the interested domestic industries.

Fourth, developing countries would get S & D treatment.²⁵⁸ They would have to reduce their bound in-quota MFN tariffs by 15%, which essentially represented an obligation one-third as onerous as on developed countries. However, developing countries would not have to reduce their tariffs to a set rate, even if that would produce a lower duty rate, nor would they have to cut to zero rates that already were at or below 5%. There would be no cap on the level of their in-quota rates. Similarly, as an innovation in the December 2008 Text, if a tariff line protected by a TRQ is a Special Product (discussed below) designated by a developing country for no tariff cut, then the country would not have to cut its in-quota rate at all.²⁵⁹

Fifth, SVEs would get even more generous S & D treatment than developing countries. They would be treated like developing countries (as above). But, they would be obliged to reduce their bound in-quota MFN tariffs by just 7.5%. There would be no cap on the level of their in-quota rates. Similarly, as an innovation in the December 2008 Text, SVEs would not have to reduce the in-quota tariff on any Special Product, regardless of whether they had slated that Product for a zero tariff cut.²⁶⁰ Venezuela would be treated as an SVE for these purposes.

257. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 109 n.19.

258. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 111, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 105.

259. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 111 (last sentence), with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 105.

260. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 112, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 105.

Sixth, RAMs also would get enhanced S & D treatment.²⁶¹ Older RAMs would be entitled to reduce their bound in-quota MFN tariffs by one-third of the percentage of the cut required of developing countries. They would not need to reduce any in-quota rate at or below 15%. The July Text set that threshold at 10%. Hence, the December Text moved in favor of the RAMs and away from trade liberalization. Newer RAMs—Macedonia, Saudi Arabia, Tonga, Ukraine, and Vietnam—would have no reduction obligations. For this purpose, it appears Venezuela was treated as a newer RAM. Likewise, small, low income RAMs with economies in transition—Albania, Armenia, Georgia, Kyrgyz Republic, Moldova, and Mongolia—would have no such obligations.

Seventh, if a TRQ is not operational, then a WTO Member—whether it is a developed or developing country—should consider eliminating that TRQ.²⁶² This provision was an innovation in the December 2008 Text. “Non-operational” means the bound MFN in-quota rate equals or exceeds the above-quota rate. A Member that agreed to eradicate non-operational TRQs would be rewarded by a less onerous obligation to cut tariffs on its remaining operational TRQs. Specifically, it would be permitted to cut the in-quota rates by 50%, or to a threshold of 8% (2 percentage points less than the normal 10%).

And finally, the December Text contained the identical proposed rules on TRQ administration set out in the July Text.²⁶³ They explained that this administration would be deemed an instance of import licensing under the *WTO Agreement on Import Licensing Procedures*.²⁶⁴ They also laid out requirements on publication of information about TRQs, processing applications for licensing to import under a TRQ, TRQ fill rates, and ways to improve market access if the volume of imports persistently is less than the quota (i.e., the TRQ under-fill problem where there is less than full utilization of the in-quota threshold).

I. SSGs

The general safeguard remedy against fair foreign trade, first established in GATT Article XIX and refined in the *WTO Agreement on Safeguards*, has a long history and plenty of underlying justifications.²⁶⁵ Newer,

261. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 113, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 105.

262. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 110, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 105.

263. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 115–25; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 106–16. In both Drafts, Annex E contained details about a proposed TRQ underfill mechanism.

264. This *Agreement* is reprinted in a variety of sources, including BHALA, *supra* note 1, Supp., Document 26, at 423–30.

265. Those justifications are set out in BHALA, *supra* note 1, ch. 37, and BHALA, *supra* note 138, at 939–52.

and perhaps more obviously protectionist, are special safeguards (SSGs) targeted at specific kinds of products. Article 5 of the WTO *Agreement on Agriculture* introduced this remedy for farm products. However, not all WTO Members were able or in a position to take advantage of it. The disadvantaged Members—largely poor countries with little legal capacity during the Uruguay Round, when the *Agreement on Agriculture* was negotiated—clamored for its removal.

Specifically, the December 2008 Text dealt with the problem many developing countries face; namely, in the Uruguay Round, they gave up their right to use the SSG remedy under Article 5 of the WTO *Agreement on Agriculture*. They are ineligible for use of the SSG. That is because the remedy applies only to products that have been tariffed (i.e., farm goods that before the Uruguay Round had been protected by non-tariff barriers (e.g., discretionary import licensing, import bans, quotas, or variable duties) but subsequently by tariffs because of conversion from non-tariff barriers to duty rates). On several products, many developing countries elected to establish a ceiling binding on their levels of non-tariff barrier protection but not convert that protection to a tariff. For such products, the SSG technically was inapplicable.

Accordingly, for both rich and poor countries, the December 2008 Text modified the SSG proposals that the July Text had set out.²⁶⁶ In the earlier Text, the choices were that developed countries would (1) have to cease using the SSG or (2) reduce the number of products to which they could apply this remedy to 1.5% of tariff lines. The new Text combined the options. Developed countries would have to reduce to 1% of their tariff lines the number of lines eligible for an SSG. They would have to do so as soon as any Doha Round accords entered into force. Critically, at the end of the seventh year of implementation of the accords, developed countries would have to eliminate all SSG designations. That is, the SSG remedy would sunset in seven years. Further, no SSG could lead to a remedial duty in excess of the pre-Round bound tariff level.

The December Text also changed the provisions from the July Text on developing country entitlement and usage of SSGs.²⁶⁷ Any developing country could use an SSG, but the product lines to which they might apply an SSG could not exceed 2.5% of their total tariff lines. The July Text set a coverage threshold of 3%. Obviously, the higher the threshold, the greater the risk to agricultural exporters that the farm products they ship might get whacked with an SSG. Thus, the slight reduction was a step in the direction of free trade. If a developing country already has designated more than that threshold, then it would have to reduce the coverage to 2.5% of tariff lines

266. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 126, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 117.

267. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 127, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 118.

as soon as any Doha Round accords took effect. For SVEs, that coverage threshold would be higher—5% of tariff lines could be subject to an SSG. The SVEs would have twelve years to reach this target.

VI. RESTRICTING AGRICULTURAL MARKET ACCESS THROUGH S & D TREATMENT

A. *Special Products*

The invention of fine distinctions, such as between “Special” and “Sensitive” merchandise, is one reason why the world of international trade law sometimes is a strange one, at least to everyday commercial market participants. The designation of an agricultural good as a “Special Product” is another form of S & D treatment for poor countries, but another restriction on market access. For much of the Doha Round, developing countries, led by China and India, had insisted on the right to identify some of the farm goods they produce as Special and thereby exempt them—partially, or even entirely—from any tariff cut under the tiered tariff formula. This right would not be conferred on developed countries. And, it was in addition to the right of all WTO Members, whether developing or developed, to designate Sensitive Products.

The December 2008 Text largely replicated the proposed rules on Special Products contained in the July Text. Thus, the new Text dealt with four key issues:

- (1) What criteria should govern the designation of a good as Special?
- (2) How many goods could receive the Special Product designation?
- (3) How many Special Products could be exempt from any tariff cut as so-called Super Special Products?
- (4) What should the average tariff cut on Special Products be?

The proposed rules endeavored to balance a free trade outcome in which Special Product designations would be tightly restricted; none would be shielded entirely from tariff cuts, and average cuts would be steep; and a protectionist result in which developing countries would have plenty of policy space in these areas.

On the first issue, the December 2008 Text reaffirmed the right of developing countries to self-designate a good as Special.²⁶⁸ These countries would have to apply three criteria: food security, livelihood security, and rural development. In other words, the designation could not be for the purpose of protecting a politically favored domestic farm sector but rather had to advance some fundamental purpose. Annex F to the Text contained specific indicators under each of these three criteria.

268. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 129, Annex F, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 120, Annex F.

On the second issue, the December 2008 Text altered the key figure from what the July Text stated. The July Text said the minimum and maximum entitlement for Special Product designations would be between 10% and 18% of all agricultural tariff lines, respectively. The December Text set the entitlement at 12%. Without doubt, that number was too low for China, India, the Philippines, and other members of the Group of 33 (G-33) developing countries.²⁶⁹ They continued to press for the right to designate at least 20% of their farm tariff lines as Special.²⁷⁰ However, the April 2011 Agriculture Document indicated no consensus existed on these key numbers.²⁷¹

On the third issue, the December 2008 Text embodied the same two-tier system for Special Products, but again altered the key figures. Super Special Products would be entitled to immunity from tariff cuts. But, no more than 5% of agricultural tariff lines could fall into this tier. The July Text had specified 6%. Hence, the new Text was a small step toward trade liberalization. Yet, again, the April 2011 Agriculture Document showed no agreement on these important figures.²⁷²

As to the fourth issue, the December Text called for an overall average tariff cut on Special Products of 11%. The July Text identified a range of 10–14%; thus the new Text chose the more trade-liberalizing end of that range.²⁷³ However, on the 11% target, and indeed on the limitation of Special Product designations to 12% of agricultural tariff lines and Super Special Products to 5% of the lines, many poor countries objected. The December Text, with remarkable candor, noted that they disagreed with these figures, and a resolution suitable to them would depend on outcomes of other agricultural trade issues.

Finally, the December Text retained essentially the same S & D treatment for RAMs and SVEs that the July Text had set out.²⁷⁴ RAMs would have the ability to identify up to 13% of their agricultural tariff lines as Special Products (whereas the July Text had specified one-tenth more than developing countries). The new Text also said RAMs would be obliged to reach an overall average tariff cut on Special Products of 10%. SVEs would

269. The G-33 actually has 46 WTO Members in it: Antigua and Barbuda, Barbados, Belize, Benin, Botswana, Bolivia, China, Congo, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Madagascar, Mongolia, Mauritius, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe.

270. See *Hopes High that Doha Round to Move Anew*, BUS. MIRROR (Dec. 7, 2008), available at <http://businessmirror.com.ph>.

271. See *April 2011 Agriculture Document*, *supra* note 90, ¶¶ 26–28.

272. See *id.*

273. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 129; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 120.

274. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 130–31, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 121–22.

have the option of following the same rules on Special Products as for developing countries, along with moderated reductions under the tiered tariff formula cuts. Alternatively, they could eschew application of the tiered tariff formula to Special Products and reach an overall average tariff cut of 24% on as many tariff lines as they sought to designate as Special.

B. SSMs

Disputes over the Special Safeguard Mechanism (SSM) had been the proximate cause of the collapse of the July 2008 Ministerial meeting at the WTO. The basic idea of an SSM was to allow a developing country to raise tariffs on agricultural imports, on a temporary basis, to protect its vulnerable domestic farmers producing a like product from a sudden, disruptive surge of those imports. That surge would occur, if at all, because of lower tariffs the developing country was obliged to maintain as a result of a Doha Round agreement. This idea, simple as it sounded, proved notoriously contentious.

America was deeply suspicious of the SSM, fearing its use by the likes of Brazil, China, and India would erode any market access gains the United States had won through general formulaic tariff cuts.²⁷⁵ Islam Siddiqui, the Chief American Agriculture Negotiator for the Obama Administration, outlined the basic differences in October 2010 at which point serious differences on the issue continued:

On the one hand, you have countries like China that continue to want a “simple and easy to use” SSM that would allow China to walk back on its previously bound tariff commitments and raise its duties on soybeans, pork, processed products, and other goods through the use of a newly created SSM. Our concerns, shared by other developed- and developing-country agricultural exporters, are that such an “easy-to-use” SSM—one without reasonable criteria defining its use—would be “easy to abuse.”²⁷⁶

In his April 2011 Agriculture Document, Chairman Walker recounted that in October 2010, he:

advised the Negotiating Group . . . that the stage of useful analytical discussion [on topics such as price trigger criteria, price and volume cross-checks, seasonality, flexibilities for SVEs, and pro-rata] appeared to have been exhausted. What was needed beyond that was “problem solving” engagement among Members to design a [special safeguard] mechanism capable of being used to address cases of disruptive import surges while not disrupting demand-induced trade.²⁷⁷

275. See Daniel Pruzin, *Latest Round of WTO Farm Talks Reveals Mixed Progress on SSM, Special Products*, 26 Int'l Trade Rep. (BNA) No. 47, at 1602 (Nov. 26, 2009).

276. Pruzin, *supra* note 121, at 1542.

277. See *April 2011 Agriculture Document*, ¶ 35; see also *id.* ¶¶ 29–30.

The need for “problem solving” persisted, with “no compromise options” even being offered for consideration following his admonition.²⁷⁸

The United States’ concern was not without cause. China (in 2010) became the top destination for American agricultural exports (generating \$17.5 billion in export sales out of total American farm exports of \$115.8 billion), importing 58% of American soybean exports (the single largest product) and 20% of both U.S. cotton and vegetable oil.²⁷⁹ The United States wanted to secure, and expand, this robust market.²⁸⁰ Notably, every \$1 billion in agricultural exports supports 8,000 jobs in the United States.²⁸¹ Hence, China’s purchases accounted for about 140,000 jobs.

Manifestly, the United States was not alone in its concern. Even some developing countries, with major exporting interests such as Costa Rica, Malaysia, and Thailand, did not like the idea of an SSM. But, Brazil, China, and India regarded inclusion of an SSM as a non-negotiable matter. Thus, negotiations during fall 2008 on the issue produced no breakthrough. Not surprisingly, the December 2008 Text was a *verbatim* repetition of the July 2008 Text (i.e., the same proposed rules that led to the Ministerial failure reappeared).

About 100 developing countries, led by China and India, continued to demand an SSM remedy they could use with reasonable ease so as to protect the livelihood of subsistence farmers—upwards of 700 million of them in China and 600 million in India.²⁸² China and India were concerned not only about surges of agricultural products from developed (and even some developing) countries but also with surges of farm goods subsidized by the United States and EU. Developed countries led by the United States rejected that position as an opportunity to scupper all market access gains won through other rules. They also saw the SSM as a device to impede normal trade growth by mischaracterizing such growth as a surge. In other words, the two sides had entirely different views of what the SSM was all about. Most developing countries saw it as an operationally simple and effective device to mitigate a sudden surge in imports in a timely fashion, not

278. *See id.* ¶ 36.

279. *Vilsack Says China Top Market for U.S. Agriculture Exports in 2010*, 28 Int’l Trade Rep. (BNA) No. 9, at 352, 352 (Mar. 3, 2011) [hereinafter *Vilsack Says*].

280. *See id.* Canada is the second largest market for American agricultural exports. In 2000, the year before China joined the WTO, it accounted for 19% of the total U.S. soybean export market. *Id.* *See also* Liz White, *2011 Crop Stocks Still Tight as Prices Climb, Affects ‘12 Farm Bill, Agriculture Leaders Say*, 28 Int’l Trade Rep. (BNA) No. 9, at 351, 351 (Mar. 3, 2011) (containing some of the above-referenced figures).

281. *Vilsack Says, supra* note 279, at 352.

282. *See WTO May Call Meeting on Doha Pact*, INT’L HERALD TRIB., Dec. 8, 2008, <http://www.truthabouttrade.org/2008/12/10/wto-may-call-meeting-on-doha-pact/>; Arun S., *Differences in Revised WTO Texts Will Lead to Doha Round Failure*, FIN. EXPRESS, Dec. 8, 2008, <http://www.financialexpress.com/news/differences-in-revised-wto-texts-will-lead-to-doha-round-failure/395483/#>.

as an impediment to market access.²⁸³ Developed countries viewed the SSM as a burden on, and potentially a closure of, market access.

Helpfully, Chairman Falconer issued a three-page document—Revised Draft Modalities for Agriculture Special Safeguard Mechanism—that suggested elements of convergence. First, the SSM would be a remedy available only to developing countries.²⁸⁴ That remedy would be a tariff calculated on the basis of the post-Doha Round bound MFN rate (even if the applied rate were below the bound rate). Thus, there was a kind of symmetry proposed: just as Sensitive Product designations would be available to all WTO Members, but Special Product designations only to developing countries, the SSG would be available to all Members, but the SSM only to developing countries. The July 2008 Text removed an important limitation from the May 2008 Text concerning the scope of SSMs when invoked by a developing country.²⁸⁵

Unlike an SSG, however, an SSM could be used on any product—there would be no *a priori* product limitations. Also unlike the SSG, an SSM would be invoked on the basis of either a price or volume trigger. So as to avoid multiple layers of remedial trade measures, a developing country could not invoke an SSM if it had an SSG, or a general safeguard under GATT Article XIX and the *Agreement on Safeguards*, in place on the same product.²⁸⁶ Similarly, the same product could not be subject simultaneously to a price and volume based SSM. In brief, “one remedy at a time” would be the rule.

Would SVEs be included in the grouping of developing countries? The December 2008 Text did not resolve the question. Following the pattern of a metastasizing of S & D treatment into ever-finer gradations of Members, in February 2009, the G-33 developing countries called for extra flexibility for SVEs. Because of their status, surely it ought to be easier for SVEs to invoke an SSM more easily, and with greater protective effect, than for a normal developing country.²⁸⁷ Thus, the G-33 proposal called for lower price and volume triggers, and perhaps also a stronger remedy, under the SSM. That proposal seemed likely to meet with resistance from the United States or other developed countries.

283. See Daniel Pruzin & Gary G. Yerkey, *U.S. Sought to Water Down Proposal for “Stock-Taking” Meeting on Doha*, 26 Int’l Trade Rep. (BNA) No. 48, at 1673, 1674 (Dec. 3, 2009).

284. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 132; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 123.

285. Compare Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, ¶ 121, TN/AG/W/4/Rev.2 (May 19, 2008) (last sentence), with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 123.

286. This *Agreement* is reprinted in a variety of sources, including BHALA, *supra* note 1, Supp., Document 28, at 479–88.

287. See Fratini Vergano, *The EC Prepares Countervailing Measures Against Exports of Biodiesel from the US*, TRADE PERSP. (Feb. 27, 2009), http://www.fratinivergano.eu/TradePerspectives/Issue_4_27_02_09.html.

Second, the July 2008 Text restricted the use of an SSM to no more than between three and eight products in any twelve-month period. The July Text said the SSM, in principle, could be invoked on all tariff lines. Manifestly, that statement vastly expanded the scope of the remedy, though the twelve-month limit remained in the new Text (and the same six-month limit for seasonal products). No developing country could apply an SSM consecutively to the same imported farm good for more than two periods.

As for the volume-based trigger, the essential idea would be the greater the import volume surge over a defined threshold, the more severe the protective remedy allowed, with the range being additional tariffs (above the normal MFN rate) of 25–50%. However, a surge must be distinguished from a normal increase in trade volume. Consequently, the December 2008 Text set three tiers of trigger surges and correlative remedies. Table VII summarizes them.²⁸⁸

Table VII: Volume-Based Trigger for SSM Remedy in December 2008 Draft Agriculture Modalities Text

Tier	Import Volume— Actual Imports in Any Year Measured Against Base Imports (rolling average of imports in preceding three-year period)	SSM Remedy— Maximum Permissible Additional Duty (on top of Applied Rate)
<i>Lowest</i>	Actual import volume exceeds 110%, but not 115%, of Base Imports	25% of the current bound MFN tariff, or twenty-five percentage points, whichever is higher
<i>Middle</i>	Actual import volume exceeds 115%, but not 135%, of Base Imports	40% of the current bound MFN tariff, or forty percentage points, whichever is higher
<i>Highest</i>	Actual import volume exceeds 135% of Base Imports	50% of the current bound MFN tariff, or fifty percentage points, whichever is higher

The import volume triggers supposedly synthesized calls by the G-33, which proposed allowing an SSM when imports are as little as 5% over the

288. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 133, 138, 141, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 124, 129, 132. In checking whether a volume trigger was met, a developing country could count imports under an obligatory TRQ increase, unless the volume increase under that TRQ was attributable solely to a scheduled access opportunity for a Sensitive Product. But, no SSM remedy could be imposed on imports within that increase. In other words, an importing country could not take away the enhanced market access from a scheduled TRQ expansion by slapping an SSM on the farm products imported under the higher in-quota threshold. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 134.

average of the preceding three years, and *MERCOSUR*, which sought to limit the remedy to a maximum additional duty of between 20% and 30%.

As Table VII indicates, import volume would be calculated from data in the relevant preceding three-year period. (The technical details of how to calculate this base period, as well as that for the price trigger SSM, were not spelled out in the December 2008 Draft and were the subject of debate.)²⁸⁹ The average during that period would be the Base Level against which to measure current imports during any year. If current imports exceeded the Base Level trigger, then the prescribed remedy could be applied. A *de minimis* exception existed: if a volume trigger is satisfied but the absolute level of imports is “manifestly negligible” relative to domestic production and consumption, then a developing country would not be permitted to take action.²⁹⁰ There was no numerical definition of “manifestly negligible”; hence the exception remained ambiguous.

The price trigger SSM would be fairly straightforward. There would have to be a 15% drop in the actual import price of a shipment of the farm product in question before a developing country could apply an SSM.²⁹¹ That import price would be judged against a benchmark—namely, the trigger price. The trigger price would be the monthly average CIF (cost, insurance, and freight) import price during the most recent three-year period. Thus, if the import price of the farm product in question fell below 85% of the average monthly price in the preceding three years, then the price-trigger SSM could be invoked. The comparison of actual import prices against the benchmark would be made, and any price-trigger SSM applied, on a shipment-by-shipment basis. As for the remedy with a price-based SSM, it would be an additional duty not to exceed 85% of the difference between the import price of the shipment concerned and the trigger price.²⁹²

All price data would be converted (if necessary) into the domestic currency of the importing developing country. If that currency had depreciated by 10% or more during the previous year relative to the international currency or currencies against which it is normally measured, then the actual import price would be computed and converted using an average exchange rate of the currency vis-à-vis the international currency or currencies. This proviso would help ensure a large depreciation, which would exacerbate the gap between actual and target prices, and would not be the cause for apply-

289. See Pruzin, *supra* note 275, at 1602.

290. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 133(d), with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 124(d).

291. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 135–36, 138, 141, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 126–27, 129, 132.

292. An SSM remedy, whether price- or volume-based, would not apply to shipments of the product in question that had been contracted for, and were en route, before the effective date of the remedy. In other words, the SSM would not apply retrospectively. See December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 139; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 130.

ing an SSM. Moreover, a developing country would not normally be allowed to apply a price-triggered SSM if the volume of imports in question in the current year was “manifestly declining” or was at a “manifestly negligible level incapable of undermining the domestic price level.”²⁹³ A cross-check mechanism existed: a developing country could not invoke a price-triggered SSM if prices fell but import volumes did not rise.

The volume-based SSM remedy would be constrained in duration. No volume-triggered SSM could be maintained for longer than twelve months.²⁹⁴ For a seasonal agricultural product, the maximum period would be the longer of (1) six months and (2) the period of seasonality. No farm product could be subject to a volume-based trigger consecutively for more than two periods. If a developing country used the remedy for two consecutive periods, then it would be obliged to respect a mandatory holiday—namely, not resort to the remedy again on the same product until another two periods had elapsed. Oddly, perhaps, this limitation did not apply expressly to the price-based SSM remedy; to adapt the calculation for triggering the safeguard so that it takes into account the possibility that imports in an earlier period, when a safeguard was being used, might be lower than the general trend and therefore might exaggerate an import surge in a subsequent year, triggering the use of the safeguard again.

A related problem, known as “pro-ration,” bedeviled the negotiators.²⁹⁵ If an SSM remedy is applied, then it obviously will dampen imports. That decline could make it easier to impose an SSM on the same product in the future. Why? Because measuring volume from the most recent three-year period as a base would show a low level of import volume on account of the SSM. In turn, it would be easier to find a surge, owing to that lower base. Thus, negotiators needed to find a way to calculate an SSM volume trigger that would account for the possibility that during an earlier period, when an SSM was in place, imports were lower than the general trend, and thus an import surge in a subsequent year would be exaggerated. Failure to do so would mean the volume trigger could be reached erroneously, as it were.

Could an SSM remedy lead to a tariff imposed on the farm product in question in excess of the bound MFN tariff rate as set before the Doha Round? The question was one of the most controversial topics debated among WTO Members in 2008, pitting China and India on one side and the United States on the other side. The general answer would be “no,” said the December 2008 Text, like its predecessor. That is, no SSM remedy, either volume- or price-based, could lead to a duty rate that exceeded the pre-

293. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 137, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 128.

294. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 140, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 131.

295. See Pruzin, *supra* note 275, at 1602.

Round bound tariff level.²⁹⁶ The rate a developing country had before the Round would be the upper boundary of the SSM remedy.

However, there would be three exceptions:

- (1) Least developed countries could breach their pre-Doha Round bound rate, but not by more than 40 *ad valorem* percentage points, or 40% of their bound rate, whichever proved higher.²⁹⁷
- (2) On up to 10–15% of their tariff lines, SVEs, along with Bolivia, Congo, Côte d'Ivoire, and Nigeria (and possibly other Members), could exceed their pre-Doha bound rates by up to 20 *ad valorem* percentage points, or 20% of their bound rate, whichever is higher.²⁹⁸
- (3) Some developing countries, other than SVEs, would be able to apply a maximum SSM remedy above the pre-Round level on between 2–6% of their tariff lines.²⁹⁹ They could not exceed the higher of 15 *ad valorem* percentage points above that level, or 15%, of the bound rate.

In sum, the general constraint would ensure that a post-Round MFN tariff binding, plus an SSM remedy, would not put affected exporting countries worse off than they had been before the Doha Round. But, the S & D treatment afforded to least developed countries, SVEs, and certain developing countries meant exporters of targeted farm goods indeed could be worse off than before.

As for the document from Chairman Falconer on Revised Draft SSM Modalities, it tried to bridge the gap between the likes of China and India, on one side, and the United States, on the other side. This document offered rules, some as alternatives, some as complements, to the December 2008 Text provisions on SSM.

- (1) A so-called double volume-based SSM trigger could lead to a remedy above the bound rate. First, if the import surge exceeded 120%, but was less than 140%, of the base import level (calculated as an average of imports in the three preceding years), then the maximum additional duty could not exceed the higher of one third of the bound tariff, or 8 percentage points. Second, if the surge were greater than 140% of the bound level, then the SSM remedy could lead to an additional duty not in excess of the higher of one-half the bound rate, or 12 percentage points. In brief, the greater the

296. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 142, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 133.

297. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 143, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 134.

298. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 144, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 135.

299. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 145, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 136.

surge, the greater the permissible remedial duty in excess of the pre-Round bound rate.

- (2) Absent exceptional circumstances (namely, an imminently foreseeable price decline based on reliable price data), a volume-based SSM could not be invoked unless domestic prices of the protected product were falling (and then only subject to review, if requested, by a standing panel of experts). In other words, there was a cross-check mechanism on the volume-based SSM: a developing country could not invoke a volume-triggered SSM if import volumes rose but prices did not decline.
- (3) The volume-based SSM could be applied for a maximum of four to eight months, and not re-applied until a further equivalent number of months had elapsed. There would be an overall cap on applying the volume-based SSM—it could not be used against more than 2.5% of tariff lines in any twelve-month period.
- (4) On seasonable perishable products, an SSM could be paused, so that it could apply for a few months in one twelve-month period, and then a few months in the next twelve-month period. But, it could not spill over into a third twelve-month period. The months in which the remedy would be applied would be the peak periods in which domestic producers in the importing country faced the greatest amount of competition from abroad.
- (5) Least developed countries and SVEs would have greater flexibility than regular developing countries on the aforementioned points, as determined by subsequent negotiations.

Whether any of these suggestions would bridge the gap was unclear. Yet two points were obvious. First, the integrity of the Uruguay Round tariff bindings would be seriously compromised by exceptions to the general constraint and the double-volume based trigger. Second, the entire area of SSMs was littered with mind-numbing technical hoops through which a developing country would have to jump before invoking the remedy. The first point entailed a clear deviation from free trade principles. The second point manifests a deviation from clarity itself.

The Chief Spokesman for the WTO, Keith Rockwell, later tried to put a brave face on the SSM conflict:

“If the question is: do we need something in place to protect poor farmers? Then the answer is yes, by consensus. If the question is: do we want to ensure that a tariff mechanism is not abused and that normal trade flow is not disrupted? Then the answer is also yes, by consensus.” This reduces the debate to numbers, such as thresholds, duration periods, and flexibilities. While admittedly complicated, these provide a more concrete negotiation currency

than plain rhetoric. “If you look at it this way, the likelihood of reaching an agreement increases,” Mr. Rockwell says.³⁰⁰

The skeptical response about that likelihood is “not necessarily.” The proposition in the passage is that there is a consensus among WTO Members on a SSM to protect poor farmers that, on the one hand, is a substantively useful remedy but, on the other hand, is subject to strict disciplines so that the remedy is not abused for protectionist purposes. That proposition is milk toast (i.e., it is so bland that nearly any Member can agree to it). It is akin to the statement often heard from Members and their political leaders that they want free trade, but it must be fair trade, too. After all, if the level of generality of a proposition is sufficiently high, then of course consensus can be reached.

That there was indeed no consensus was apparent from a January 2010 communication circulated by the G-33 developing countries to the Members.³⁰¹ They belittled the argument of the United States and certain other Members that the SSM would disrupt normal trade flows, observing that the concept of “normal trade” had never been defined in GATT-WTO history. No less significantly, the G-33 all but called the United States and developed countries “hypocrites.” The G-33 pointed out that with respect to the Uruguay Round SSG, 2,433 safeguard measures were notified to the WTO between 1995 and 2008. Which Members accounted for most of them? The answer was developed countries—they invoked 78% of the measures, suggesting that the developed country argument that developing countries would be “trigger happy” on the SSM was poppycock. Lest there be any doubt, the SSM was riddled with restrictions that made it difficult to invoke, especially strict trigger volumes and prices, restrictions on exceeding bound tariff rates, pro-ration rules, and cross-check mechanisms. Thus, the G-33 intoned:

It is remarkable that an instrument meant to address the development concerns of most developing country members is sought to be burdened with conditions far more restrictive than those on the SSG, which is mainly being used by developed countries.³⁰²

Not surprisingly and in diametric contrast to the American position, the G-33 demanded amendment or removal of the limitations on the proposed SSM that would render it a remedy nearly impossible to invoke. For instance, in April 2011, one G-33 country, the Philippines, circulated a proposal that would provide extra S & D treatment for countries that have a low average bound tariff rate, which the Philippines defined at 40% or be-

300. See Sudeep Doshi, *Leading the Way to a Trade Deal*, FAR E. ECON. REV., Sept. 14, 2009, www.feer.com (quoting Mr. Rockwell).

301. See Daniel Pruzin, *G-33 Defends SSM in Agriculture, Stresses Need to Simplify Mechanism*, 27 Int'l Trade Rep. (BNA) No. 5, at 153 (Feb. 4, 2010).

302. *Id.*

low.³⁰³ Such countries, it argued, should be allowed to invoke the SSM, and thereby raise tariffs as a safeguard under either a volume or price trigger, more easily than other countries. SVEs, which also sought additional flexibility on the SSM, supported the idea. Predictably, agriculture exporting countries opposed it.

Evidently, the devil truly is in the details of turning a general proposition into a legal and operational reality. The numbers, thresholds, duration periods, and flexibilities are all-important in determining whether an SSM is substantively useful to help poor farmers or whether it is susceptible to misuse by favored domestic agricultural interests in poor countries. Insofar as the Doha Round supposedly is about development—that middle “D” in the “DDA” acronym—the key SSM numbers should favor poor countries. That is, while endeavoring to steer a middle course, the Members should not hesitate to reach a consensus around numbers that might, on occasion, err in favor of developing country interests. That means, in the end, if a choice must be made, then helping poor farmers should take precedence over avoiding disruption to normal trade flows. It is precisely this choice on which there was no consensus.

C. *Tropical Products and Preference Erosion*

The problem of preference erosion in respect of agricultural products is conceptually no different from that of industrial products. The basic issue is the decline in the margin of preference—the difference between MFN duty rates and the preferential duty rate (which typically is zero)—as MFN rates fall through the implementation of successive multilateral trade round cuts. Preference granting countries, almost exclusively rich nations such as the United States and EU, are obliged to implement the cuts. Preference beneficiary countries invariably are a select group of poor countries (selected, of course, by the grantors according to criteria they set). The beneficiaries argue for delayed implementation of those cuts. That is because they fear export competition from like or substitutable products originating in third countries, both rich and poor, in the markets of the preference grantors. Why not urge the beneficiaries and phase in agricultural tariff cuts, especially on tropical products, which are of keen export interest to them, over an extended period of time? Because, reply third countries, every extra day of implementation beyond the normal period is a day their products do not benefit from agreed-upon tariff cuts.

In brief, the debate about preference erosion pits (*inter alia*) some poor countries against others in a zero-sum game. One side seeks to string out the maximum margin of preference for as long as possible. The other side

303. See *Farm Talks' Chair Prepares 'Contribution', Next Steps to Be Discussed After 29 April*, WORLD TRADE ORG. (Apr. 15, 2011), http://www.wto.org/english/news_e/news11_e/agng_15apr11_e.htm [hereinafter *Farm Talks' Chair*].

wants a playing field leveled by MFN rates as quickly as possible. The game typically involves tropical products. That is because they are the archetypical kind of agricultural commodity eligible for a preference, given that the grantors tend to be former colonial powers, and the beneficiaries (and, ironically, several third countries, too) are their poor former colonies. Ironically, given that the middle “D” in the DDA is for development, this zero-sum game was endemic in the Round since its November 2001 launch. That is because the Agenda calls both for the fullest liberalization of trade on tropical products, meaning cuts in tariffs on them above and beyond the reductions under the general tariff-cutting formula for other agricultural goods. Yet, the Agenda also asks that erosion of long-standing tariff preferences be addressed.

Not surprisingly, the December 2008 Text failed to resolve the zero-sum game, a failure intimated in the April 2011 Agriculture Document, despite “significant developments” in December 2009 in respect of preference erosion and a settlement to the infamous Bananas War.³⁰⁴ On tropical products and preference erosion, the December 2008 Text was the *verbatim* equivalent of the July 2008 Text.³⁰⁵ Tariffs on tropical products currently above 25% *ad valorem* would be cut by 85%. Tariffs at or below the 25% threshold would be put to zero. As on other farm issues, the identical nature of the Texts did not intimate consensus.

The first problem was to agree to the list of products that would count as “tropical” and, therefore, be subject to tariff cuts that would (depending on the steepness of the reduction) erode a preference. Negotiations focused on a list of approximately forty-two products. This problem appeared resolved via an agreement to defer to the African, Caribbean, and Pacific (ACP) interest to preserve preferential access to the EU market on bananas, pineapples, rum, and sugar by excluding these products from the list.³⁰⁶ But, that resolution was not broad, deep, or conclusive.

304. See *April 2011 Agriculture Document*, *supra* note 90, ¶¶ 38–39, 43.

305. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 147–50, Annexes G–H, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 138–41, Annexes G–H.

Annex G to the *July 2008 Draft Agriculture Modalities Text* expanded the list of tropical products to include a wide array of fruit and vegetable items, coffee and tea, cigarettes and cigars, and rum. It may be observed that the inclusion for any trade liberalization benefits of tobacco and tobacco-related products, as tropical products, is ludicrous, in light of their well-known health risks.

306. See *Progress on EU-Latin American Banana Deal Made Before Collapse of Doha Round Talks*, 25 Int’l Trade Rep. (BNA) No. 32, at 1160, 1160–61 (Aug. 7, 2008). In respect to preference erosion, pineapples appear not to have been a source of great controversy between ACP and Latin American exporters of the fruit, because the latter group enjoys preferential access to the EU market through the EU Generalized System of Preferences (GSP). See *id.* Other such products include arrowroot, cut flowers, and tobacco. See Jonathan Lynn, *Update 1—EU Says Banana Deal Near, Some Producers Unhappy*, REUTERS, Dec. 2, 2009, available at <http://af.reuters.com/article/commoditiesNews/idAFGEE5B11Z620091202?sp=true>.

As negotiations dragged on, both before and after December 2008, it became clear a significant and controversial link existed between settlement of the Bananas War, on the one hand, and the problem of tropical products and preference erosion, on the other hand. (This settlement is discussed in section X below.) Notably, under the terms of the 15 December 2009 deal that ended the War, the signatories agreed to significant reductions in tariffs on certain tropical products in exchange for longer time periods for the EU to implement cuts on products of key export interest to ACP countries.³⁰⁷ That is, part of the Bananas War settlement was a deal on tropical products and preference erosion, which would (it was hoped) enter into a final Doha Round agreement on agriculture. Accordingly, the parties to this deal identified a list of goods that would qualify as “tropical products.” And, the EU agreed to trim the margin of preference enjoyed by ACP producer-exporters on such tropical products, and likewise for the United States in respect of its preference schemes, in exchange for an extended phase out of tariffs on those products via the Round.

The “preference erosion list,” which was drafted by the EU and agreed to by ACP and Latin American countries, contained sixty-two tropical lines.³⁰⁸ This list was not made public. Reportedly, the lines excluded bananas; included *bona fide* tropical products such as pineapples, palm oil, sugar, and rice; and included some products that arguably are not tropical ones—citrus fruits, fresh cut flowers, fresh fruit (with some exceptions), fresh or chilled vegetables (with some exceptions), meats (such as beef), orange (and certain other fruit) juice, peas, roasted coffee, rum, table grapes, tobacco, and tomatoes.

Additionally, the United States had a list of eighteen tariff lines covering tropical products, the tariffs on which would be subject to longer phase out periods. The U.S. list included:³⁰⁹

- Avocados;
- Beverages, spirits, and vinegar;
- Cigars, cheroots, and cigarillos;
- Fresh or dried guavas, mangoes, and mangosteens;
- Fruits and nuts;
- Frozen orange juice;
- Ground-nut oil;

307. The signatories to the tropical products-preference erosion portion of the settlement were the EU, ACP countries, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Nicaragua, Panama, and Peru. The U.S. was not a formal signatory. See Daniel Pruzin, *EU, ACP Compromise on Tropical Products, Gives U.S., EU 10 Years to Make Tariff Cuts*, 27 Int'l Trade Rep. (BNA) No. 1, at 7 (Jan. 7, 2010). Nevertheless, the U.S. was a contributor to the deal, and apparently agreed to adhere to its terms.

308. See *id.*; Daniel Pruzin, *India, Pakistan Issue Warning on Doha Tropical Products/Preference Erosion Deal*, 26 Int'l Trade Rep. (BNA) No. 51, at 1761 (Dec. 24, 2009) [hereinafter Pruzin, *India Pakistan*].

309. See Pruzin, *supra* note 308, at 7.

- Roots and tubers of arrowroot, salep, Jerusalem artichokes, and similar roots;
- Rum and tafia;
- Sauces;
- Three tariff lines for fresh cut flowers;
- Two tariff lines for cane sugar; and
- Two tariff lines for tobacco.

This U.S. list included many items covered under American preference schemes such as the *African Growth and Opportunity Act (AGOA)* and *Central American Free Trade Agreement (CAFTA–DR)*. Thus, not surprisingly, the United States agreed with ACP and Latin American countries on its list.

Ostensibly, the goods on any preference erosion list are there to help preference beneficiaries, such as the ACP countries. As explained earlier, because goods on the list are considered “tropical” and are the subject of a preference, rapid tariff reduction under a Doha Round agreement would erode the margin of preference enjoyed by the beneficiaries quickly. But, a number of third countries—that is, poor countries that were not recipients of preferences in respect of the tropical products at issue—claimed that the real goal harbored by developed countries that grant preferences was to shield their sensitive sectors from third-country competition. For example, the presence of sugar on both the EU and U.S. lists suggested an interest in protecting their own sugar producers from low-cost imports from non-preference receiving third countries.

Thus, just two days after the 15 December 2009 Bananas War settlement, India and Pakistan jointly declared they might not accept the tropical products terms that were part of that settlement. They were not even signatories to the deal, which was among the EU, United States, ACP countries, and Latin countries. That fact in itself meant the tropical products terms could not automatically become part of a larger deal. India and Pakistan had legitimate trade concerns at stake. They were among the prominent third-country exporters of tropical products. Agricultural exports account (as of 2008) for 12% of total merchandise exports for India and 19% for Pakistan.³¹⁰ In both countries, the growth trend has been upward: from \$3.5 to \$21.4 billion between 1990 and 2008 in India and from \$1.1 to \$3.9 billion between those same years in Pakistan. Manifestly, the larger the number of items on a “tropical products” list and the longer the phase out of tariffs on them by developed countries, the worse for India and Pakistan, and the better for their preference-recipient competitors in the Third World.

Achieving consensus on a “tropical products” list was only the first matter. A second problem was to agree on how to balance the basic tension between preference beneficiary countries and third countries. The rules proposed in the December 2008 Text, as in its predecessor, suggested that to

310. See Pruzin, *India, Pakistan, supra* note 309, at 1761.

achieve the fullest possible liberalization of trade in tropical products, all WTO Members would cut their bound MFN duty rates on these products according to the tiered tariff formula. Further, they would apply the following modality, which consisted of two options.

First, if the scheduled tariff on a tropical product is equal or below 25% *ad valorem*, then that tariff must be cut to zero. If the tariff is 25% or more, then it must be cut by 85%.³¹¹ All developed countries would have four years to phase in the cuts (through four equal, annual installments), and they could not treat as a Sensitive Product any tropical good. Second, alternatively, if the scheduled tariff on a tropical product is equal or below 25% *ad valorem*, then that tariff must be cut to zero. If a tropical product tariff is equal to or above 10%, then it must be cut by 70%. (A steeper cut would apply if the tariff exceeded 75%.) All developing countries would phase in the tariff cuts in a prescribed implementation period.

Interestingly, under the 15 December 2009 agreement, developing countries also agreed to cut their tariffs on many tropical products.³¹² They promised to do so by 80% on tropical product tariff lines that had an MFN rate over 20%. For products attracting a duty of 20% or less, they said they would cut that MFN rate to zero. The cuts would cover 65% of all tariff lines on a list (which was not finalized) of tropical products.

A third problem in dealing with preference erosion was timing. How fast or slow should developed countries phase in tariff reductions on tropical products that are the subject of a preference? Obviously, preference beneficiaries favored the slowest possible implementation (to preserve their margin of preference for as long as possible), and non-preference beneficiaries favored the speediest (to get to a level playing field at an MFN rate as quickly as possible). The terms of the 15 December 2009 Bananas War settlement called for the EU and United States to cut their tariffs on products covered by one of their trade preference agreements over ten years, with no cuts in the first two years of implementation—in effect, a twelve-year phase out.³¹³ The December 2008 Text, like its predecessor, created a reverse age discrimination rule that had two options.

Under the first option, no tariff cuts would be imposed by any preference-granting country on a product that has been the subject of a preference (listed in Annex H to the Texts) for ten years.³¹⁴ After a decade, tariff cuts would be implemented across five years through equal annual installments.

311. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 147–48, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 138–39.

312. Daniel Pruzin, *EU, Latin Nations Formally Sign Agreement on Bananas; First Tariff Cuts Take Effect*, 27 Int'l Trade Rep. (BNA) No. 22, at 828 (June 3, 2010) [hereinafter Pruzin, *EU, Latin Nations*]; Pruzin, *supra* note 308, at 7.

313. Pruzin, *EU, Latin Nations*, *supra* note 312, at 828.

314. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 149–50, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 140–41.

In other words, the longer a poor country had relied on a preference, the slower the phase out of that preference—a presumptively fair result that would minimize adjustment costs from the long-standing detrimental reliance.

Under option two, as an alternative, preference-grantors could impose tariff cuts on a preferential product in equal annual installments in a period that is two years longer than the implementation period for developing countries under the tiered formula (i.e., over twelve years). But, these cuts would apply only to a preferred product if its pre-Round bound MFN rate exceeded 10%, the value of trade from the beneficiary was above a threshold (U.S. \$50,000 or 3% exports from that beneficiary to the grantor country), and there is an unconstrained, long-standing preference in the market of the grantor country.

The 15 December 2009 deal provided the following compromise: a ten-year phase out, with no cuts in the first two years, for most tropical products.³¹⁵ That is, for all sixty-two tropical product tariff lines, the EU said it would phase in tariff reductions over ten years, with no cuts in the first two years. The United States agreed to implement tariff cuts over eight years, with the first two years free from any cuts on cane sugar, fresh cut flowers, and ground-nut oil. It pledged to cut tariffs on cigars over five years. For all other tropical products on the U.S. list, cuts would be phased in over ten years, with none in the first two years.

Contrary to the December 2008 Text, the 15 December 2009 deal allowed for the designation of tropical products as Sensitive. Under the deal, if (1) a tropical product were designated as Sensitive and (2) imports of that product from preference beneficiary countries accounted for more than 10% of total domestic consumption in the importing country, then the importing country would have to adjust its TRQ on the product.³¹⁶ Specifically, the importing country would have to cut the out-of-quota tariff rate of the TRQ, and phase in the new in-quota quantity limits, over a seven-year period. Supposedly, this complex rule would help ensure that the EU and United States would not abuse the Sensitive Product designation for the protectionist purposes in respect of tropical products. Rather, they would liberalize, albeit gradually, trade in that product. Yet, the very allowance to designate an item as Sensitive surely was a step back from free trade. After all, the December 2008 Text had prohibited designation of any tropical product as Sensitive and called on developed countries to implement tariff cuts in four years.

315. Pruzin, *supra* note 308, at 7.

316. *Id.*

D. *Settlement of the Bananas War: The General Agreement on Trade in Bananas (GATB)*

Linked to the problem of tropical products and preference erosion was a difficulty that had plagued the world trading system since before the creation of the WTO (specifically, 1993) and had become the longest-running dispute in WTO history. The EU, which is the largest importer of bananas in the world and imports (as of 2011) over 70% of the fruit from Latin America, battled several Latin American countries over bananas, many of which market their fruit through prominent American companies like Chiquita Brands and Dole.³¹⁷ Following losses in eleven GATT and WTO cases, including a November 2008 Appellate Body ruling in favor of the United States and Ecuador that discriminatory EU tariffs giving preference to ACP bananas (which are far more expensive than Latin bananas) continued to violate WTO rules, the EU promised to change its offending regime.

The EU pledged to implement a single-tariff (i.e., tariff-only) regime by 1 January 2006 and grant at least the same level of market access to third country exporters as to its preferred ACP trading partners.³¹⁸ Indeed, without such a pledge, third country producers (located mainly in Latin America) had threatened in November 2001 to block the launch of the Doha Round. While the EU did drop its quota and licensing system and shift to a tariff-only system in 2006, it also maintained a duty-free quota of 775,000 tons for ACP producers. Thus, the regime generated one of the legal cases against the EU, yielding another WTO judgment that is discriminatory.

Initially in the regime it commenced in 2006, the EU set the tariff at €230 per metric ton. Latin American countries challenged that rate successfully in two WTO arbitration proceedings as the €230/ton level failed to maintain equivalent market access for their banana exports to the EU. The EU responded by dropping the tariff to €176/ton but also set up an annual duty-free quota of 775,000 metric tons for ACP exporters. Ecuador (the world's largest banana exporter) and the United States (headquarters of two major banana distributors, Chiquita and Dole) prevailed against the EU in WTO proceedings, obtaining rulings that the EU quota was illegal because it unfairly discriminated among WTO Members.³¹⁹

317. Joe Kirwin, *EU Parliament Backs Banana Trade Deal With Latin America to Reduce Tariffs*, 28 Int'l Trade Rep. (BNA) No. 6, at 224, 225 (Feb. 10, 2011); Joshua Chaffin, *End of Banana Wars Brings Hope for Doha*, FIN. TIMES, Dec. 16, 2009, at 8. As of June 2010, the EU imported \$4 billion worth of bananas. Len Bracken, *U.S., EU Agree to Settle Dispute Over Latin American Bananas*, USTR Says, 27 Int'l Trade Rep. (BNA) No. 23, at 856 (June 10, 2010).

318. See Raj Bhala, *The Bananas War*, 31 McGEORGE L. REV. 839, 948-49 (2000) (detailing the EU's pledge); Alan Beattie, *Expectations Low as Doha Talks Commence*, FIN. TIMES, July 22, 2008, at 8; Daniel Pruzin, *WTO's Lamy Delivers Compromise Text Aimed at Resolving EU Banana Dispute*, 25 Int'l Trade Rep. (BNA) No. 29, at 1048 (July 17, 2008) (quoting an unnamed Latin American official).

319. Those rulings also included a WTO Appellate Body compliance report, issued Nov. 26, 2008, which upheld two Panel decisions that the EU had failed to comply with previous adjudica-

To avoid further adjudicatory proceedings, WTO Director-General Pascal Lamy agreed to mediate a solution. His report, delivered on 12 July 2008, suggested a compromise whereby the EU would make an immediate down payment to Latin American exporters of a large cut to its €176/ton tariff and make further cuts across a defined transition period. Specifically, the final tariff would be €114/ton, which the EU would reach over an eight-year period starting on 1 January 2009 with an immediate cut on that date of €28/ton.³²⁰ (The July 2008 Text called for the EU to reach the final rate of €114/ton by the end of 2016.) Thus, there would be a tariff cut of just over 35% (from €176/ton to €114/ton). In exchange, the Latin banana exporting countries would drop all WTO litigation and rights of retaliation against the EU and acquiesce to the EU giving ACP exporters duty-free access.³²¹

The Lamy compromise pleased no one—even though, ironically, a single tariff-only regime of €176/ton was the deal struck years earlier to end the Bananas War.³²² The ACP countries—most of which were former British, French, or Portuguese colonies—feared for their historical preferences. If a banana tariff cut through the Lamy compromise were too steep, then their access to the EU market would be jeopardized. Likewise, if bananas were not designated as Sensitive and subject to the July 2008 Text proposal of an 85% tariff reduction, the new tariff would be €26.4/ ton—effectively eroding the ACP margin of preference.

The ACP position was influential in the EU. It accorded with the commercial interests of the two major banana producers in the EU, France and Spain, which have considerable operations in the ACP. The EU insisted that if it cuts its banana tariff via the compromise, then the compromise must unambiguously permit it to exclude bananas (along with melons, rum, and sugar) from the list of tropical products slated for Doha Round tariff reductions. That is, the EU should be allowed to declare bananas as a Sensitive Product, so that it does not have two legal obligations to slash banana tar-

tory rulings, as its banana import regime continued to discriminate in favor of ACP bananas and against Latin and other non-ACP supplying countries. Daniel Pruzin, *Latin Countries Slam EU Inaction on Banana Tariffs, Push 2008 Side Deal*, 26 Int'l Trade Rep. (BNA) No. 5, at 155 (Jan. 29, 2009).

320. *Id.*

321. Daniel Pruzin, *EU Official Optimistic on Banana Deal, But Latin Exporters See Key Differences*, 26 Int'l Trade Rep. (BNA) No. 15, at 484 (Apr. 9, 2009).

322. See Bhala, *supra* note 318, at 948–49 (detailing the deal that ended the Bananas War); Jeremy Smith, *EU, Latin America Look to WTO Talks for Banana Deal*, REUTERS, Dec. 5, 2008, available at <http://www.reuters.com/article/2008/12/05/us-eu-banana-analysis-idUSTRE4B427320081205> (describing displeasure with Lamy's compromise).

Note that a few Latin banana exporting countries, namely, Colombia, Costa Rica, Ecuador, Guatemala, and Panama, were reported to have agreed with the EU to the deal. Pruzin, *supra* note 321, at 484. Of course, Colombia and Costa Rica were Banana Framework Agreement (BFA) countries, and thus had cut a deal with the EU in the past.

iffs. Further, the EU was adamant that any deal on bananas would have to be contingent on an overall agreement in agriculture.

The EU position, shaped by the ACP, was the diametric opposite of the Latin American stance. For Latin banana exporting countries, resolving the Bananas War was a separate matter. There should be no deal in the Round without its settlement. Latin American countries attacked the Lamy compromise as “very much biased” in favor of the EU, which they said already had agreed in negotiations to an immediate 20% cut in the €176/ton figure.³²³ The implementation period, too, was a battlefield, with the EU arguing for a transition period of fifteen years and the Latin American exporting countries demanding four or five years. In brief, the Bananas War heated up, and Ecuador—the largest banana exporter in the world—said that without a settlement it found agreeable, it would not join a consensus to conclude the agriculture modalities.³²⁴

Seeking a middle ground, the EU proposed in February 2009 that the €114/ton end-tariff for non-ACP bananas apply even if there were no, or a delayed, Doha Round deal.³²⁵ Negotiations proceeded through 2009, with the EU on one side and five key Latin banana exporters on the other side—Colombia, Costa Rica, Ecuador, Guatemala, and Panama. Once all countries agreed on a bananas deal, then the EU would commence cuts for three years. The EU would freeze further reductions for three years, if the Round were not concluded, and then resume the cuts, regardless of the status of the Round.

Accordingly, the new EU proposal would mean a cut from the initial MFN tariff of €176/ton to €114/ton by 2019 (approximately an eight-year period, and three years later than the July 2008 Text specified), with a reduction to €136/ton in the interim. As a down payment, the EU would make an immediate cut of €28/ton (to €148/ton) from €176/ton (with “immediate” meaning in October 2010).³²⁶ The €136/ton rate would apply from 2011 to 2014, followed by gradual cuts. The final result of a €114/ton tariff would be reached by the end of 2019 (instead of 2016, under the Lamy compromise), if the Round were not concluded.³²⁷ Likewise, the EU

323. Pruzin, *supra* note 318, at 1048–49 (quoting an unnamed Latin American official).

324. *Update 1—Ecuador Threatens Doha Deal Over Banana Dispute*, REUTERS, Nov. 26, 2008, available at <http://www.reuters.com/article/2008/11/26/ecuador-banana-doha-idUSN2636452920081126>.

325. Joshua Chaffin, ‘Banana Wars’ Pact Between EU and Latin America Nears Fruition, FIN. TIMES, Nov. 18, 2009, at 4; Pruzin, *supra* note 321, at 484.

326. Daniel Pruzin, *EU, Latin Americans Conclude Banana Deal, but Haggling Remains over Tropical Products*, 26 Int’l Trade Rep. (BNA) No. 48, at 1662 (Dec. 3, 2009).

327. Note that following the Seventh WTO Ministerial Conference in Geneva in November–December 2009, the precise details of the transition period were not entirely clear. By one account, following the cut in October 2010 to €148/ton, the EU would reduce the tariff in annual installments to €132/ton in 2013. If no Doha Round agreement were reached by the end of 2013, then the €132/ton rate would remain in effect until the Round was completed. *Id.*

would cut tariffs on other tropical products, such as pineapples and sugar, at least until the outcome of the Doha Round was clear.

As part of its proposal, the EU insisted on three conditions.³²⁸ First, any settlement would obligate Latin American countries to drop their outstanding legal challenges at the WTO and waive any rights of retaliation they had based on their previous adjudicatory victories. (After their major victory at the Appellate Body level in 1997, the United States and Ecuador won the right to retaliate against the EU.³²⁹ The United States was authorized to impose \$191 million of sanctions, which it did on goods from coffee makers to handbags, though it lifted the sanctions in 2001. Ecuador was authorized to impose \$202 million in trade sanctions on EU imports, including—for the first time in the annals of GATT-WTO dispute resolution—the right to suspend intellectual property protection and wholesale distribution rights for EU goods and services. Ecuador never imposed the sanctions.) The EU did not want to come to a settlement in the Bananas War, only to have that War reignited by another legal fight or suffer retaliation based on a previous one. The EU wanted the “Peace Clause” to take effect as soon as the settlement deal was signed by all relevant parties.³³⁰ However, some of those parties—potential complainants—argued the Clause should not enter into force until the EU registered the deal with the WTO. Until such registration—technically known as “certification,” whereby the WTO approves in the tariff schedule of the EU and the new rates become legally binding³³¹—the EU could renege on the deal.

Second, the EU would be permitted to continue to grant duty-free access to ACP bananas. The EU had no interest in entirely abandoning its former colonies. Moreover, these cuts would slash the margin of preference historically enjoyed by ACP countries. To help those countries face adjustment costs and restructure, the EU would grant them €190 million in development aid. That figure was too low to mollify some ACP producers, such as Cameroon. Caribbean countries queried how the EU would divide the funds among ACP countries with divergent interests.³³² After all, as the Trade Minister of Trinidad poignantly noted, banana exports are critical to Caribbean economies, and not exporting them would be “like not exporting watches from Geneva.”³³³

Third, bananas would be treated as a normal agricultural good, not as a tropical product. Consequently, bananas would not be subject to the faster, deeper tariff cuts imposed on tropical products under the proposed July

328. Jonathan Lynn, *Exclusive—Banana Deal Emerging—Trade Sources*, REUTERS, NOV. 3, 2009, available at <http://in.reuters.com/article/2009/11/02/idINL21012120091102>.

329. Daniel Pruzin, *EU, Latin, U.S. Officials Welcome Beginning of End to WTO Dispute on Banana Imports*, 26 Int'l Trade Rep. (BNA) No. 50, at 1733 (Dec. 17, 2009).

330. Lynn, *supra* note 306.

331. Pruzin, *supra* note 326, at 1662.

332. Lynn, *supra* note 306.

333. *Id.* (quoting Mariano Browne).

2008 Doha Round agricultural text. If they were, then the problem of preference erosion would be exacerbated, against the interests of the ACP, because those cuts would be applied on top of the special transitional rules for bananas.

This purported middle ground appeared to the ACP to be tilted in favor of the EU and Latin America. In May 2009, the ACP asked the EU for compensation of €500 million, along with any agreed-upon tariff-cutting deal.³³⁴ No less than that level of compensation would be needed to cover the drastic economic losses, and the attendant social dislocations and political instability, which assuredly would occur immediately after the EU implemented any deal. The ACP averred they would occur because, in a liberalized trading regime for bananas, its fruit would lose yet more share of the EU market to competition from Latin suppliers (i.e., Latin bananas would flood the EU market, drowning out the ACP bananas). Initially, the EU balked at the compensation figure, offering what the ACP regarded as a paltry sum—€100 million—before boosting it to €190 million.

Happily, on 15 December 2009, the Bananas War finally ended with a settlement along the above-delineated lines of the EU's middle-ground proposal of February 2009. The settlement consists of two key documents.

First, there is the “*General Agreement on Trade in Bananas*” (*GATB*), formally signed on 31 May 2010 at the WTO, and contingent in part on completion of the Doha Round. The signatories to *GATB* were the EU and eleven Latin American countries—Brazil, Colombia, Costa Rica, Ecuador (which is the largest banana exporter in the world), Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and Venezuela.³³⁵ The EU Parliament approved the settlement in February 2011.³³⁶ Second, on 8 June 2010, the EU and United States signed a separate, linked deal, the “*Agreement on Trade in Bananas Between the United States of America and the European Union*.” The only material changes rendered by this *Agreement* and *GATB* from the above-described parameters in the February 2009 EU proposal were the exact transition dates and compensation figure:³³⁷

334. Darren Ennis & Bate Felix, *African States Seek 500 Mln Euros in EU Banana Deal*, REUTERS, May 29, 2009, available at <http://www.reuters.com/article/2009/05/29/trade-eu-acp-bananas-idUSLT58973220090529>.

335. Bracken, *supra* note 317, at 856; Pruzin, *supra* note 329, at 1733.

336. Kirwin, *supra* note 317, at 224. The EU Parliament was granted veto power over trade agreements under the *Treaty of Lisbon*, which was signed in December 2007 and entered into force in December 2009, and following its approval of the *EU-South Korea Free Trade Agreement*, the Bananas Settlement was its second use of that power. In approving the Settlement, the Parliament asked the EU to boost aid for ACP banana producers, and for EU producers (which are in the Canary Islands and the French territories of Guadeloupe and Martinique), as they cannot compete with large Latin American producers. *See id.*

337. Pruzin, *supra* note 312, at 828; Pruzin, *supra* note 329, at 1733; Chaffin, *supra* note 317, at 8; Darren Ennis, *Update 1—EU Ends Banana War With Latin America—Diplomats*, REUTERS, Dec. 14, 2009, available at <http://www.reuters.com/article/2009/12/14/eu-bananas-deal-idUSLDE5BD24K20091214>.

- The EU will cut its MFN tariff on bananas from Latin America and any other non-ACP origin from €176/ton to €114/ton by 1 January 2017 (or, possibly, 2019). The overall cut in the tariff, from €176/ton to €114/ton, is 35%.
- The EU will make an immediate, initial cut (i.e., a down payment) to €148/ton (as of 1 June 2010 retroactive to 15 December 2009 when the *Agreement* and *GATB* were initialed).
- After the first cut, the EU will drop its tariff to €143/ton on 1 June 2011; €136/ton on 1 January 2012; and €132/ton on 1 January 2013.
- As of 1 January 2013, if there is a Doha Round agreement on agriculture, then the EU will continue to cut the tariff to €127/ton in 2014, €122/ton in 2015, and €117/ton in 2016. Thus, the final rate of €114/ton will apply on 1 January 2017.
- However, if there is no final deal on farm trade, then the EU will freeze its tariff at €132/ton for two years—2014 and 2015—before re-commencing cuts in January 2016. Then, it will reach the final rate of €114/ton in January 2019. In other words, the final duty level will be achieved two years faster under the scenario of a successful outcome to the Round, which itself is an incentive for some Members to achieve that success.
- The EU agreed to boost the compensation figure to ACP countries to roughly €200 million.

Accordingly, the Latin countries agreed to all three of the EU's aforementioned conditions. First, there will be no more law suits, and an end to all legal proceedings, as soon as the EU inscribes its new tariff commitment into its legally-binding Schedule of Concessions. Second, the EU can continue its tariff-only preference for ACP bananas under the new Economic Partnership Agreements the EU reached with ACP countries, which entered into force in January 2008, and which are WTO compliant. Third, bananas will be treated as a good subject to normal tariff reductions under any deal (not accelerated duty elimination as a tropical good).

E. Least Developed Countries

As the poorest of the poor countries, least developed countries always knew they could count on the most favorable derogations from any Doha Round obligation. After all, they account for just one percent of world trade.³³⁸ Thus, even under the most mercantilist of calculations by developed countries, a grace for the poorest hardly would be a sacrifice for the richest. What the least developed countries did not know, nor had much practical control over, was how generous those derogations might be. They

338. Pascal Lamy, Director Gen., World Trade Org., Address to the UN Conference on Least-Development Countries (May 9, 2011), in *Global Trading System Must Deliver More to the Least-Developed—Lamy in Istanbul*, WORLD TRADE ORG. (May 9, 2011), http://www.wto.org/english/news_e/sppl_e/sppl191_e.htm.

had secured, at the December 2005 Hong Kong Ministerial Conference, a Decision on Measures in Favor of Least Developed Countries. The December 2008 Text, like its July predecessor, essentially incorporated the text of this Decision, with minor adjustments.

With these developments, the extent of generosity started to become clear. Least developed countries would not have to undertake reductions in bound MFN tariff rates on agricultural products.³³⁹ But, most of the rest of the provisions for least developed countries were exhortative in nature.³⁴⁰ For instance, WTO Members reaffirmed their commitment to integrate these countries into the world trading system and to ensure preferential rules of origin would be simple and transparent.

The key substantive commitment from developed countries, and from developing countries in a position to make the commitment, concerned duty free, quota free (DFQF) treatment for exports originating in least developed countries.³⁴¹ The obvious generous rule would be to provide immediate, lasting DFQF treatment on 100% of these exports immediately upon the entry into force of any Doha Round accords. Indeed, Australia, New Zealand, Norway, and Switzerland all provide DFQF treatment to 100% of their imports from least developed countries.³⁴² As of 2009, the EU provides 100% coverage, except for arms and ammunition, under its “Everything but Arms” (EBA) initiative.³⁴³ Thus, the EU eliminated tariff quotas on rice and sugar imports from least developed countries.³⁴⁴

Shamefully, though, that level of generosity—towards the poorest of the poor—is too much to ask of some rich countries, even though non-oil exports from least developed countries account for only 0.7% of total imports by developed countries.³⁴⁵ Several developed countries protect their sensitive sectors from competition from least developed countries: Canada excludes from DFQF treatment dairy products, eggs, and poultry and Japan denies such treatment to fisheries products, leather goods, sugar, and rice.

339. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 151, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 142.

340. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 152, 154, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 143, 154.

341. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 153, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 145. If a developing country was not in a position to provide DFQF treatment to least-developed country cotton exports, then it would have “to look positively at possibilities for increased import opportunities” of the product. December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 156; July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 146.

342. Daniel Pruzin, *Key WTO Members Discuss Elements for LDCs in Doha ‘Deliverables’ Package*, 28 Int’l Trade Rep. (BNA) No. 27, at 1112 (July 7, 2011).

343. *Id.*

344. Daniel Pruzin, *WTO Lauds EU on Resisting Protectionism; Trading Partners Hit Out at Some Barriers*, 28 Int’l Trade Rep. (BNA) No. 28, at 1173 (July 14, 2011). Also in 2009, the EU adopted more flexible rules of origin under its Generalized System of Preferences (GSP) scheme to widen the eligibility of products from poor countries. *Id.*

345. Pruzin, *supra* note 54, at 1229.

As for the United States, it says “no” to (*inter alia*) cotton, dairy, leather, sugar, and T & A merchandise.³⁴⁶ Consequently, for all least developed countries, the United States gives DFQF access on just 82.4% of tariff lines and, for such countries that participate in AGOA, 90% of tariff lines.³⁴⁷ Indeed, the United States maintains more DFQF exceptions on least developed country exports—covering 1,800 tariff lines—than any other rich country in the world.³⁴⁸

Thus, the rule proposed for the Doha Round, in the December 2008 Draft NAMA Modalities Text, was to grant DFQF treatment on at least 97% of least developed country exports, by a date yet to be agreed. That is, the target of 100% DFQF treatment remained, but Members unable to hit it would have to provide such treatment for at least 97% of their imports from least developed countries and try to achieve progressive compliance with the 100% target.³⁴⁹

SVEs, in contrast to least developed countries, were unable to secure any numerical target. Developed countries, and developing ones in a position to do so, agreed only to provide “enhanced improvements in market access” for products of export interest to SVEs.³⁵⁰ Unsurprisingly, rich countries hunted for the 3% exemption for farm sectors they aimed to protect. A few major developing countries made some effort to help their least developed brethren, which, on the one hand, was symbolically important, but, on the other hand, substantively limited.³⁵¹

First, India became the first developing country to offer DFQF treatment to least developed country exports, doing so in 2008. India boasted it grants DFQF access to 94% of all goods from least developed countries (i.e., 94% of the products exported by least developed countries).³⁵² Covered products of keen export interest to those countries included cane sugar, cocoa, cotton, and ready-made garments (RMGs). India pledged that by 2013, it would give DFQF to 85% of all tariff lines.³⁵³ But, India’s scheme was fully operational (as of April 2010) for only fourteen least developed

346. Pruzin, *supra* note 342, at 1112–13.

347. *Id.* at 1112.

348. *Id.*

349. See Daniel Pruzin, *U.S. Textile Industry Group Slams WTO Push for LDC Duty-Free/Quota-Free Deal*, 28 Int’l Trade Rep. (BNA) No. 24, at 972, 973–74 (June 16, 2011).

350. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 158, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 148.

351. See, e.g., *Brazil, India to Push Ahead on Duty-Free Schemes for the Poorest Countries*, WORLD TRADE ORG. (Mar. 18, 2010), http://www.wto.org/english/news_e/news10_e/devel_18mar10_e.htm. In addition to the Indian measures noted above, India signed FTAs with Afghanistan and MERCOSUR in 2009–2010, invoking the Tokyo Round *Enabling Clause*, and notifying the WTO Committee on Regional Trade Agreements. India also has FTAs with Chile and Bhutan, and is part of the *South Asian Free Trade Agreement (SAFTA)*. See *id.*

352. Pruzin, *supra* note 349, at 974.

353. Pruzin, *supra* note 342, at 1112.

countries, including neighboring Bangladesh. Most of the eligible countries simply did not take advantage of it.

Second, Brazil offered DFQF treatment on 80% of its tariff lines, though coverage would start at 60%. Brazil promised to increase it to 80% over four years.³⁵⁴ Eventually, Brazil promised, coverage would reach 100%. Yet, it failed to implement this pledge.

Third, China said it already was generous to least developed countries. It said it commenced DFQF benefits (as of June 2011), covering nearly 4,800 tariff lines.³⁵⁵ DFQF treatment on those lines represented 60% of tariff lines and 98% of export value (i.e., 98% of the value of exports from least developed countries). So, China boasted, it was the largest market for exports from least developed countries in the world—taking 23% of all such exports. China said it expected to raise the percentage of tariff lines eligible for DFQF treatment to 95%.³⁵⁶ Unfortunately, China's claims—plus those of India and Brazil—proved difficult to verify.

As indicated above, T & A was one sector in which the United States and other developed countries were reluctant, if not loathe, to offer DFQF treatment to least developed country exports. Cotton was another such sector. The United States had poured billions of dollars into cotton subsidies, as had been widely reported throughout the Doha Round.³⁵⁷ Protecting these subsidies was important; all the more so after Brazil successfully attacked them in WTO litigation and won retaliatory rights against the United States.³⁵⁸ Less widely known was the Chinese stance in favor of protecting its cotton producers.

Many of China's cotton farmers are Muslim, and ethnically not Han. They reside in the far western province of Xinjiang. About the last outcome from the Round that the Chinese Communist Party (CCP) wanted was to enrage these Uyghur Muslims. What the CCP calls the "Xinjiang Uyghur Autonomous Region" might become a movement for "Uyghurstan" or "East Turkistan," redolent of a "Free Tibet" campaign, threatening not only

354. *Id.*; Pruzin, *supra* note 349, at 972–73; Gary G. Yerkey & Daniel Pruzin, *U.S. Ready for 'Endgame' of WTO Talks But Needs More from Others*, *Kirk Says*, 26 Int'l Trade Rep. (BNA) No. 48, at 1675 (Dec. 3, 2009).

355. Pruzin, *supra* note 196, at 1065; *see* Pruzin, *supra* note 349, at 974 (reporting China claimed to have increased the percentage of least developed country exports eligible for DFQF treatment from 38% to 97%); Geoff Dyer & James Lamont, *China and World Bank in Talks to Establish Industrial Zones in Africa*, *FIN. TIMES*, Dec. 4, 2009, at 1 (reporting China added that it planned to eliminate tariffs on 60% of exports from least developed countries).

356. Pruzin, *supra* note 342, at 1112; Pruzin, *supra* note 196, at 1065.

357. *See, e.g.*, Bradley S. Klapper, *Doha Deal Falters as WTO Fails to Set Meeting Date*, *SEATTLE TIMES*, Dec. 8, 2008, available at http://seattletimes.nwsourc.com/html/business/technology/2008482430_apeuwtotradetalks.html?syndication=rss (observing "the U.S. was on the defensive over the hundreds of millions of dollars in cotton subsidies it hands out each year").

358. Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 763, WT/DS267/AB/R (Mar. 3, 2005) (*adopted* Mar. 21, 2005) (complaint by Brazil); Bhala & Gantz, *supra* note 124, at 215–27.

the monopoly of the CCP on political power but the integrity of China itself. The tragic Han-versus-Uyghur violence in Urumqi (capital of Xinjiang) in July 2009, which left over 197 dead and 800 injured, and which provoked a predictable iron-fisted response from the CCP that restored order but not real peace because it addressed symptoms, not causes, of the violence, graphically illustrates the problem.³⁵⁹ Thus, for the ruling elite in Beijing, retaining China's 40% tariff on imported cotton was critical.³⁶⁰

The United States took the position it would not cut its cotton subsidies unless China cut its cotton tariff so as to increase market access for American farmers. It took this position notwithstanding the fact that between 2004 and 2008, cotton was the second largest American farm export to China, totaling \$7.8 billion.³⁶¹ From the American perspective, the potential to ship yet more cotton to China's T & A mills was enormous, and the unscrupulous behavior of the Chinese government—manifest in a new non-tariff barrier against cotton, namely, a registration system for imports—was of serious concern. Moreover, with a sharp fall in American cotton exports that occurred between the 2005–2006 and 2008–2009 crop years—a fall of 25%—the American side was all the more insistent.³⁶² That insistence applied to India too, which by 2009 accounted for 24% of global cotton production and 19% of global cotton exports. In brief, the Americans demanded market access for their cotton in China and India in exchange for relenting on cotton subsidies. As for the Cotton Four countries, they had become a sideshow in a high-stakes game played by giants.

The Chinese response was silence; that is, right through July 2011 and beyond, China refused to state its position on cotton.³⁶³ To the CCP, given its fear of restive Muslims, the Americans had taken a position that had to be resisted. Textually, the result was obvious—a fudge. The December 2008 Text, like its predecessor, stated that developed and developing countries alike must give DFQF treatment to cotton exports from least developed countries, but only if they “declar[ed] themselves to be in a position to do

359. David Pilling, *Beijing Strains to Hear the Voice of the People*, FIN. TIMES, Sept. 10, 2009, at 13; Kathrin Hille, *Ethnic Violence in China Leaves at Least 150 Dead and 800 Injured*, FIN. TIMES, July 7, 2009, at 1; Kathrin Hille & Richard McGregor, *'Premeditated' Violence Blamed on Outsiders*, FIN. TIMES, July 7, 2009, at 7; *Beijing is Unwise to Play with Fire: China Must Address, Not Suppress, Its Ethnic Tensions*, FIN. TIMES, July 7, 2009, at 8.

360. See Pruzin, *supra* note 54, at 1229 (noting the forty percent rate); Pruzin, *supra* note 342, at 1113 (noting the forty percent rate); Pruzin, *supra* note 196, at 1065 (also noting the forty percent rate); Daniel Pruzin, *G-7 Makes No Progress on Resolving Differences on WTO December Package*, 28 Int'l Trade Rep. (BNA) No. 25, at 1016, 1017 (June 23, 2011) (also noting the forty percent duty rate); Pruzin, *supra* note 193, at 887 (also noting the forty percent rate).

361. See Amy Tsui, *China's Imported Cotton System Violates WTO Commitments, Senators Tell Vilsack*, 26 Int'l Trade Rep. (BNA) No. 10, at 323 (Mar. 5, 2009).

362. See Doug Palmer, *Changed Market Makes WTO Cotton Deal Harder*, REUTERS, July 21, 2009, available at <http://www.reuters.com/article/2009/07/21/us-usa-africa-cotton-analysis-idUSTRE56K6XZ20090721>.

363. See Pruzin, *supra* note 196, at 1064.

so.”³⁶⁴ Practically, the losers from the Sino-American gridlock on generosity to foreign cotton farmers became clear—least developed countries. More particularly, the Muslim farmers of the Cotton Four seemed forgotten, if not doomed.

America’s reluctance to accord DFQF treatment to 100% of the exports from least developed countries was based on more than concerns specific to sensitive domestic sectors like cotton. The United States questioned whether all least developed countries wanted such treatment. Deputy USTR and U.S. Ambassador to the WTO, Michael Punke, said in May 2011: “[F]rankly, we hear very different viewpoints from different LDCs [least developed countries], with some expressing grave concern about [tariff] preference erosion.”³⁶⁵ Was this remark meant to divide-and-conquer, pitting poor countries that benefit from tariff preferences (and thus fear across-the-board preference erosion that would occur from DFQF treatment) against ones that do not get such preferences (and thus clamor for DFQF treatment)? Was it an effort to link DFQF treatment to resolution of the problem of preference erosion and thus buy extra time for American producers who benefit from tariff protection on merchandise exported by least developed countries? Was it an honest assessment of divergent interests among the poorest of poor countries? Or, was it an adulteration of concern for these countries with commercial self-interest?

Reiterated in May 2011, the American position shed light on the answer: namely, a deal on DFQF was certain to be rejected by Congress unless the United States benefited from some other dimension of the Doha Round package, such as trade facilitation obligations implemented by poor countries in a manner that enhanced market access for American exporters, or an elimination of trade barriers on environmental goods and services.³⁶⁶ Offering DFQF treatment, without reciprocal benefits, was regarded on Capitol Hill as “unilateral disarmament.”³⁶⁷ In June 2011, Lloyd Wood, spokesman for the American Manufacturing Trade Action Coalition (AMTAC), which represents American T & A producers, explained:

With U.S. unemployment hovering at nearly 9 percent, conceding duty-free/quota-free market access for all LDC [least developed country] textile and apparel exports would only put more middle-class manufacturing jobs on the chopping block to be offshored. This would be a tough sell to the industry and [the United States] Congress during a booming economy, let alone . . . in these uncertain times.

364. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 155, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 143(e).

365. Pruzin, *supra* note 193, at 887.

366. *Id.*

367. Beattie, *supra* note 181, at 6 (quoting an unnamed senior aide in the U.S. House of Representatives).

A key reason why any such early harvest proposal would be a nonstarter for U.S. textile manufacturing [is] because LDCs like Bangladesh and Cambodia already are textile and apparel exporting superpowers.³⁶⁸

Why should Bangladesh or Cambodia, which are internationally competitive in certain T & A merchandise markets and are the sixth and ninth largest clothing suppliers to the United States, respectively, get a boost from DFQF treatment?³⁶⁹ Similarly, under *AGOA*, the United States offers DFQF treatment to 99.7% of all non-petroleum exports from thirty-seven Sub-Saharan African countries.³⁷⁰ Why should T & A exporters in Ghana or Zambia, which enjoy *AGOA* preferences, get a Doha Round benefit too? What if DFQF treatment through the Round helped some poor countries, like Bangladesh and Cambodia (because of the elimination of barriers to their exports), but hurt others, especially in Sub-Saharan Africa (because of unrestricted competition their exports would face vis-à-vis Bangladeshi and Cambodian exports)?³⁷¹

Plausible responses, to be sure, exist to these questions. First, generosity towards the poorest of the poor should know no bounds, if America indeed prides itself as being the most generous of nations. Second, America has a good national security motive to be magnanimous. Many least developed countries—Bangladesh included—have both produced and been a victim of terrorism. And, actually benefitting from an *AGOA* preference is contingent on satisfying restrictive rules of origin, including the use of American-grown cotton.³⁷² As for a differential impact of DFQF treatment across least developed countries, surely a simple formula embracing competitive need limits could be negotiated. That is, once achieving a sustainably strong position in relevant product markets, an exporting country would graduate from DFQF treatment, thereby ensuring the benefits of such treatment are targeted for the poor countries based on need.

Gripped by its short-term manufacturing interests at home rather than its long-term national security interests in poverty alleviation and threat reduction overseas, the United States was in no mood to broker a compromise. The United States, along with other major trading powers, was unwilling to revert to an exclusive focus on the key original intention behind the DDA, conveyed by the middle “D” in the acronym—development. The better acronym, from the perspective of American and other developed countries, was “DRA”—the Doha Reciprocity Round. Reciprocal conces-

368. Pruzin, *supra* note 349, at 973.

369. *See id.*

370. *See id.* at 974.

371. *See Pruzin, supra* note 54, at 1229.

372. *See Raj Bhala, The Limits of American Generosity*, 29 *FORDHAM INT’L L.J.* 299, 380 (2006) (discussing Oxfam’s finding that African countries must use U.S. or African fabrics to benefit from *AGOA* which discriminates against Asian fabric).

sions should be expected of even the poorest countries most vulnerable to spawning and suffering from Islamist extremism.

To be clear, the United States was not the only WTO Member blocking a slimmed-down “deliverables” package in the Doha Round for the December 2011 Ministerial Conference in Geneva that would have included reaffirmation of the 2005 Hong Kong Ministerial Conference Decision on DFQF treatment. That is, the United States was by no means alone in its unwillingness to grant 100% DFQF treatment to least developed countries without gaining a reciprocal benefit.³⁷³ Brazil said it would not offer such treatment unless its demands on export competition were met—namely, restraints by developed countries.³⁷⁴ Canada countered by refusing to link export competition to DFQF treatment because it wanted to avoid disciplines on its state trade enterprises (STEs).³⁷⁵ The EU and Switzerland approved of a link between DFQF treatment and export competition, but not in the way Brazil hoped: they refused to eliminate agricultural export subsidies unless other Members (especially China) imposed disciplines on industrial subsidies and on state owned enterprises (SOEs).³⁷⁶ The EU and Switzerland also refused to give least developed countries DFQF treatment unless their demands for extended protection for geographical indications were satisfied.³⁷⁷ In brief, driven if not blinded by their own short-term demands for reciprocity, Members could not forge even a simple, development-friendly agreement on just a few topics—an accord that would have at least indirect counter-terrorist benefits in the poorest of countries.

VII. FARM EXPORTS

A. *Export Competition*

Support for agricultural product exports is the most pernicious form of farm subsidy, in the sense of distorting global trade patterns. The intrinsic purpose of a farm export subsidy is to boost exports from the subsidy-granting country to the detriment of competitive products from third countries. It does so by making up the difference between a domestic floor or target price, on the one hand, and the world market price, on the other hand. Thus, a high-profile goal in the Doha Round of almost all WTO Members—with the notable exception of some EU states, like France, which traditionally use export subsidies—was to eradicate this kind of support, and as quickly as possible, to boot.³⁷⁸ That is true even though, or perhaps because, the EU

373. See Daniel Pruzin, *Hopes Fading for WTO ‘Deliverables’ Deal as Delegations Take Hard Line on LDC-Plus*, 28 Int’l Trade Rep. (BNA) No. 28, at 1164 (July 14, 2011).

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. The EU spent over € 3 billion annually, for Marketing Year 2002–2003, on agricultural export subsidies, far in excess of the U.S. or any WTO Member. See Daniel Pruzin, *EU Reports*

committed under the Uruguay Round *Agreement on Agriculture* to reduce its export subsidies.

The December 2008 Text bore the same pledge as its predecessor—namely, that developed countries eliminate agricultural export subsidies by the end of 2013.³⁷⁹ This obligation would include eliminating subsidies disguised as non-emergency food aid or veiled by credit programs.³⁸⁰ It also would include eradicating cotton export subsidies by the end of the first year of the implementation period of any Doha Round agreement.³⁸¹

The pledge was not new. WTO Members had agreed to it in the December 2005 Hong Kong Ministerial Conference. Likewise, they also agreed in that Ministerial Conference to a rule against back-end loading.

Continued Decline in Spending on Export Subsidies for Agricultural Goods, 25 Int'l Trade Rep. (BNA) No. 48, at 1716, (Dec. 4, 2008). However, the general expenditure trend has been down, with the EU notifying the WTO of agricultural export subsidies of € 1.46 billion for Marketing Year 2006–2007. *See id.* The largest crop receiving an EU export subsidy is sugar. *See id.* Dairy products (butter, cheese, milk, and skim milk powder), grains, poultry, wheat and wheat flour are other major recipients. *See id.*

An issue related to elimination of export subsidies is the identification of Members that are “significant exporters.” Article 9 of the Uruguay Round *Agreement on Agriculture* contains commitments to reduce export subsidies. *See* Agreement on Agriculture, art. 9, Apr. 15, 1994, 1867 U.N.T.S. 410, 417–18. Any Member obliged to reduce its export subsidies must notify the WTO Committee on Agriculture of the amounts of the products it exports that it subsidizes. *See Restricted Exports, Breached Limits and Cotton Aired in Farm Committee*, WORLD TRADE ORG. (June 23, 2011), www.wto.org/english/news_e/news11_e/agcom_23jun11_e.htm. That is true whether or not the Member actually has paid out export subsidies. *See id.* In addition, a Member that did not make export subsidy reduction commitments in the Uruguay Round, but which is a “significant exporter” of a product, must notify the Committee of its export amounts. *See id.* That is true even if the “significant exporter” has not paid out or is too poor to pay out export subsidies. *See id.* The Chairman of the WTO Committee on Agriculture compiles a list, on a product-by-product basis, of “significant exporters” that have no export subsidy reduction commitment. *See id.* A Member that is a “significant exporter” of a particular agricultural product is not supposed to do so.

In other words, there are two categories of Members for export subsidy purposes: (1) Members that made reduction commitments during the Uruguay Round; and (2) Members that did not make such commitments, but which are “significant exporters.” The discipline on the first category is to adhere to the reduction commitment. The discipline on the second group is not to commence subsidization.

What, then, is the criterion for “significant exportation”? The term is nowhere used in the *Agreement on Agriculture*. However, in 1995, the WTO agreed that a Member is defined to be a “significant exporter” of a commodity if it has a share of total world exports in excess of five percent. *See id.*

379. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 160, 162, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 150, 152. The new Text made modest alterations to quantity commitment levels. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 162(b), with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 152(b) (the July text requires a reduction in equal annual installments to zero or an eventual reduction in actual applied or bound levels by twenty percent while the December text requires no new subsidies and a standstill in quantity commitment levels).

380. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶ 167, Annex L, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶ 157, Annex L.

381. Compare December 2008 Draft Agriculture Modalities Text, *supra* note 74, ¶¶ 168–69, with July 2008 Draft Agriculture Modalities Text, *supra* note 128, ¶¶ 158–59.

They would cut half of the export subsidies by 2010 in equal annual installments and get to zero by the end of 2013. For their part, developing countries agreed to eliminate their farm export subsidies in equal annual installments by the end of 2016.³⁸² The December Text added that during the phase-out period, no new export subsidy programs (either in respect of new markets or products) could be created.³⁸³

Arguably, the pledge was not resolute either. With a 50% fall in the wholesale price of milk amidst the global economic recession that started in 2008 and amidst loud protests from EU farmers, in early 2009 the EU Commission temporarily re-established export subsidies for dairy products.³⁸⁴ The Commission also acquiesced to continued public intervention buying of surplus butter and skim milk powder and granted private storage aid for these products.³⁸⁵ However, it averred it would not abandon its agricultural reforms agreed to in November 2008.

Indeed, by July 2011, it was clear the pledge was not resolute at all. As the Doha Round talks continued to flounder in 2010 and 2011, the WTO Director-General, Pascal Lamy, called for agreement by the December 2011 Ministerial Conference in Geneva on at least a five-part package—a “deliverables” deal, or “early harvest” of accords, which would emphasize the interests of developing and least developed countries:

(1) Trade facilitation.

382. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 163, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 153. Developing countries would be permitted to continue to subsidize marketing costs (including international transport and freight) and internal transport and freight charges, associated with farm products, as allowed under Article 9:4 of the *WTO Agreement on Agriculture*, until the end of 2021. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 164; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 154. This dispensation also was not new, having been set out in the December 2005 Hong Kong Ministerial Conference. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 164; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 154.

383. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 162(b) (last sentence), with *July 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 152.

384. See *Fischer Boel Says Protesting Dairy Farmers Tarnish Image of Common Agricultural Policy*, 26 Int'l Trade Rep. (BNA) No. 40, at 1358 (Oct. 8, 2009); *European Commission Calls for Continued Dairy Export Subsidies to Help EU Farmers*, 26 Int'l Trade Rep. (BNA) No. 31, at 1030 (July 30, 2009).

385. See *European Commission to Offer New Dairy Support to Prop Up Prices*, 26 Int'l Trade Rep. (BNA) No. 1429 (Oct. 22, 2009).

Specifically, the Commission proposed to (1) extend the time for intervention buying from the normal period of March 1 through August 31 of each year to March 1 through the end of February 2010, and (2) to make purchases above the normal quota limits of 30,000 tons of butter and 109,000 tons of skim milk powder. See *Fratini Vergano, Are the Measures Taken by the EC to Combat the Dairy Crisis WTO Compatible?*, TRADE PERSP. (Oct. 30, 2009), available at <http://www.fratinivergano.eu/TradePerspectivesArchive.html>. All such purchases are stored in public warehouses. See *id.* In other words, the Commission agreed to make year-round purchases and storage with no quantitative limit. On 19 October 2009, the EC Council approved the proposal of the Commission. See *id.*

- (2) Export competition, including export subsidies, as well as export credits and food aid.
- (3) A mechanism to monitor commitments on S & D treatment for poor countries.
- (4) Progress on addressing fishing subsidies.
- (5) Progress on cutting market access barriers to trade in environmental goods and services.

However (as intimated above in the discussion of DFQF treatment), demands for reciprocity and linkages of various sorts impeded any such deal. The EU responded that elimination of export subsidies was contingent on an overall agreement.³⁸⁶ It was linked to other items on the DDA, including reductions in farm and industrial subsidies, enhancements in market access, and protection for geographical indications. In other words, a matter of keen interest to developing and least developed countries—that developed countries cut their farm export subsidies—was a bargaining chip for ambitious, reciprocal concessions from those countries.

Consequently, as demands from various WTO Members piled up, the prospect of a slimmed down, development-friendly Doha Round package died in July 2011. The Director-General himself conceded defeat:

What we are seeing today is the paralysis in the negotiating function of the WTO, whether it is on market access or the rule-making. . . .

What we are facing is the inability of the WTO to adapt and adjust to emerging global trade priorities, those you cannot solve through bilateral trade deals.³⁸⁷

The first sentence is objectively correct. However, in the second sentence, Mr. Lamy erred. The correct diagnosis is not an inability to adapt but an inability to stick to the plan. The Members had lost sight of their original purpose, and the Director-General appeared to have done little to remind them of it. As the Members strayed, they sought to obtain as many of their self-interested objectives through bilateral deals as possible—and understandably so.

What about other development-friendly objectives, in particular, export credits, export credit guarantees, and insurance programs? The term “export competition” refers not only to overt export subsidies but also to implicit support through domestic policies like export promotion, and even taxes. The EU had long claimed that these programs, utilized intensively by the United States, were a hidden export subsidy. The United States had long

386. See Pruzin, *supra* note 196, at 1064.

387. Pascal Lamy, Director Gen., World Trade Org., Statement to Informal Trade Negotiations Committee Meeting (July 26, 2011), in *Members to Think About ‘What Next for Doha, WTO’ for December Meeting*, WORLD TRADE ORG. (July 26, 2011), www.wto.org/english/news_e/news11_e/tnc_infstat_26jul11_e.htm; see also Pruzin, *supra* note 54, at 1228 (quoting and discussing the Lamy speech).

responded that they were not *per se* export subsidies but also had agreed to eliminate any trade-distorting element in them. The December 2008 Text followed the July Text, which in turn followed earlier documents. The key rules would be as follows:³⁸⁸

- (1) There would be disciplines on export credits. For instance, the repayment period would be limited to 180 days, or between 360 and 540 days for least developed countries and NFIDCs. Obviously, the longer the repayment period, the more a credit looks like a subsidy. Programs would have to be self-financing, in the sense of not making losses over a period and recovering costs according to a commercially viable standard over a rolling four- or five-year period. Manifestly, a loss-making credit scheme is presumptively a subsidy. There also would be disciplines on export credit guarantees or insurance programs.
- (2) International food aid could be subject to loose disciplines. Essentially, for such aid to qualify for a Safe Box (and thereby be immune from a WTO lawsuit), an international organization (such as the United Nations, World Food Program, or Red Cross) would have to declare an emergency. Such a declaration would alleviate doubts as to whether the food was aid or an offloading of surplus production. Non-emergency food aid would be subject to a needs assessment conducted by an appropriate United Nations agency to ensure this aid does not displace commercial trade.

It remained unclear how monetization of food assistance (i.e., selling donated products to raise funds for aid) might be disciplined. Also left ambiguous was whether monopoly power associated with agricultural exporting state trading enterprises (STEs, as defined in GATT Article XVII) would be prohibited or simply restricted in some way.³⁸⁹

Finally, the December 2008 Text included the same conflict of law, or pre-emption, rule as its predecessor in July on food crises.³⁹⁰ The rule ensured commitments made to NFIDCs during the Uruguay and Doha Rounds would be undiminished by any other provision in the Text. Indubitably, this provision reflected the global economic context in which it was drafted in the summer of 2008—namely, one of sharp food price increases threatening tens of millions of people, especially in poor countries.

388. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 165, Annexes J, K, L, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 155, Annexes J, K, L.

389. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 166, Annex K; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 156, Annex J.

390. Compare *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 161, with *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 151.

B. Export Restrictions

As for restrictions on exports, especially food, the December 2008 Text was nearly identical to the July Text, which in turn had not changed much following issuance of the February 2008 Text. Accordingly, the December Text proposed strengthening Article 12 of the *WTO Agreement on Agriculture*, the only provision in the GATT-WTO regime containing direct disciplines on measures to limit farm product exports.³⁹¹ (GATT Articles XI:2(a) and XX(i)–(j) condone such limits, under certain circumstances.)

In particular, Article 12 of the *Agriculture Agreement*, which is inapplicable to developing and least developed countries, contains two loose requirements: a WTO Member (1) should give due consideration to the effects on NFIDCs of any prohibitions or restrictions it might impose on its food exports as well as (2) provide notice of the nature and duration of any constraints as far in advance as practicable to the WTO Committee on Agriculture.³⁹² From the perspective of NFIDCs, “due consideration” and “notice” are not strong restrictions on their food imports falling victim to export restrictions from food exporting countries. Accordingly, in April 2011, one change NFIDCs sought in the December 2008 Draft Agriculture Text was an explicit rule that neither they nor least developed countries would be subject to food export restraints.³⁹³ In effect, this S & D treatment would be a waiver from an MFN requirement (i.e., that food export restraints would apply equally to all Members).

Broadly speaking, a key concern with export constraints is if they cover food, including food aid, such constraints put NFIDCs at the mercy of the restraining countries. The December 2008 Text contained five further disciplines:

- (1) Extant food export restrictions must be eliminated by the first year of implementation of any Doha Round deal.³⁹⁴

391. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 171; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 161. For journalistic accounts, see, for example, Daniel Pruzin, *French Trade Minister Sees No Action in Doha Round on Food Export Restrictions*, 25 Int'l Trade Rep. (BNA) No. 18, at 637 (May 1, 2008) (discussing different countries' proposed export restrictions in addition to the restrictions found in Article 12 of the *Agreement on Agriculture*); Daniel Pruzin, *WTO Members in Ag Talks Fail to Tackle Growing Problem of Food Export Restrictions*, 25 Int'l Trade Rep. (BNA) No. 14, at 479, 479–80 (Apr. 3, 2008) (discussing a proposed limit in export restriction length).

392. See *Agreement on Agriculture*, *supra* note 117, art. 12. Effective March 2010, exchanges by WTO Members of information on their agricultural policies become publicly available, 60–90 days after restricted circulation among the Members, on the WTO website, www.wto.org. See *Committee Going Public on Farm Trade Concerns*, WORLD TRADE ORG. (Mar. 10, 2010), www.wto.org/english/news_e/news10_e/ag_com_10mar10_e.htm.

393. See *Farm Talks' Chair*, *supra* note 303.

394. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 178; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 166 (both texts contain the provision).

- (2) The duration of any new limits must be capped at twelve months (or eighteen months, if affected importing Members agreed).³⁹⁵
- (3) The exporting Member implementing the restrictions must give notice of the reason for them.³⁹⁶
- (4) Notice of export restrictions is required within ninety days of their entry into force.³⁹⁷
- (5) Annual updates must be provided by the exporting Member about its export constraints to the Committee on Agriculture, which is in charge of monitoring compliance with all disciplines.³⁹⁸

The December 2008 Text added a sixth discipline that was not explicit in its predecessor, about consultation.³⁹⁹

The sixth discipline had an interesting history. As commodity prices rose in 2007–2008, proposals to help NFIDCs, such as rice importers like Bangladesh, Indonesia, and the Philippines, were floated in WTO circles. But, exporting WTO Members like Argentina, Brazil, China, Egypt, India, Indonesia, Thailand, and Vietnam, as well as non-Members like Kazakhstan and Russia, resisted any constraint on their sovereign freedom to manage domestic food problems. All of these exporting countries had, in early and mid 2008, imposed export tariffs, outright export bans, or other export restrictions on basic staples and foodstuffs such as barley, edible oils, rice, soybeans, and wheat. They took these measures to promote their own food security. Consequently, the exporting Members fervently opposed an April 2008 joint proposal by Japan and Switzerland—each of which is a net food importer—to strengthen Article 12 of the *Agriculture Agreement*.⁴⁰⁰ That

395. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 179; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 167 (both texts contain the provision).

396. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 173; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 163 (both texts contain the provision).

397. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 172; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶ 162 (both texts contain the provision).

398. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 176–77; *July 2008 Draft Agriculture Modalities Text*, *supra* note 128, ¶¶ 164–65 (both texts contain the provisions).

399. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶¶ 174–75 (requiring a Member intending to institute export prohibitions and restrictions to consult with any other Member having substantial interest as an importer upon request and to report progress made in consultations to the Committee on Agriculture).

400. See Daniel Pruzin, *Developing Countries Cool to Ag Proposal by Japanese, Swiss on Export Restrictions*, 25 Int'l Trade Rep. (BNA) No. 19, at 673, 673–74 (May 8, 2008).

In June 2010, it was suggested by Charlotte Hebebrand, President, International Food and Agricultural Trade Policy Council, that:

Developing countries could use export restrictions as a bargaining chip in Doha Round trade negotiations, as they have little else to offer beyond market access. . . . Revisiting the issue of export restrictions could introduce a negotiating dynamic that could help to break the present logjam.

Len Bracken, *Rebalancing of Exporter, Importer Rights, Responsibilities Could Help Revive Doha Talks*, 27 Int'l Trade Rep. (BNA) No. 25, at 930 (June 24, 2010). While a creative argument, its

proposal was to require advance notice to the WTO Committee on Agriculture of any impending export restriction (especially as to the duration and reasons for the measure) and consultations in the event of a dispute. The proposal also called for establishment of a standing committee of experts to be used if consultations failed, and which would render a binding judgment as to whether the disputed restriction is necessary. Its implementation would be prohibited pending outcome of the case.

The sixth discipline in the December 2008 Text was a compromise of sorts. An exporting Member that intends to institute an export restriction or prohibition would have to consult with any other Member that has a “substantial interest” as an importer of the product in question. This requirement of *a priori* consultation effectively offset the fact that under the fourth discipline, formal notice need not be given in advance of implementing an export constraint. The exporting Member would be obliged to provide (upon request by the importing Member) necessary economic information about the expected constraint. However, the new Text did not define “substantial interest”; thus it remained unclear precisely which countries might invoke the consultative mechanism. Equally unclear was what would happen in the event of a disagreement—other than, perhaps, formal WTO adjudication.

Notwithstanding all six disciplines, as a practical matter of political economy, no government—except one of pirates and bandits—would sell domestic food production to the highest bidder overseas when its citizens were desperately short of food. The above six disciplines all amount to procedural checks to give warning, and modest comfort, to third country food importers. None of the restrictions is a substantive benchmark to gauge whether the restrictions enhance the global distribution of a foodstuff during a crisis to ensure that goods reached in a timely fashion the people in greatest need. Perhaps, then, the real consolation for food-importing countries would be the fact that none of the disciplines applied to least developed countries or NFDCs.⁴⁰¹ Assuming they had an exportable surplus, they could impose export prohibitions or restrictions as they saw fit.

VIII. LOSING THE PLOT

A. *The Doha Round as a Stimulus Package*

The argument—that a Doha Round deal would limit the extent to which WTO Members could boost applied tariff rates and farm subsidy levels, simply by virtue of a single undertaking to cut bound rates and levels—is poignant in the climate of a global economic slump. It is repeated

vulnerability is the negotiating dynamic introduced might well pit developing country food exporters against NFDCs. Any kind of poor-versus-poor dynamic is regrettable. Moreover, the logjam is not so much between these two groups, but between the U.S. and major developed countries on one side, and Brazil, China, India and their allies, on the other side—though even this characterization is simplistic, as there are plenty of schisms in the Round.

401. See *December 2008 Draft Agriculture Modalities Text*, *supra* note 74, ¶ 180.

ad nauseum by WTO Director-General Pascal Lamy.⁴⁰² In June 2010, he did so and testified that the Round is not anchored by its original purpose of poverty alleviation and counter-terrorism: “in 2009 our *focus* was on *fighting protectionist tendencies*, [and] the 2010 *focus* will be on making the case for the Doha Round as a *low cost fiscal stimulus* package for all.”⁴⁰³ The statement almost gives the impression of grasping at straws: saying anything that might somehow coax out a conclusion.⁴⁰⁴

Certainly, the argument about fighting recession and economic stimulus is reinforced by the statistic that if every Member raised all of its applied tariff levels to the maximum legally permissible bound rates, then the average tariff level in the world would roughly double.⁴⁰⁵ In turn, exporters would be about 100% worse off than before. Thus, the argument continues, avoid a re-run of the Great Depression, during which protectionist, beggar-thy-neighbor trade measures and competitive devaluations exacerbated the severity and length of the world-wide declines in output, employment, and wages. Act now to counter protectionism, and thereby stimulate the global economy and foster the political economy dynamics of reform.

402. See, e.g., Pascal Lamy, Director Gen., World Trade Org., Address to German Engineering Federation Summit (Oct. 13, 2009), in *Doha Success Can Yield Double Dividend of Global Stimulus and Structural Reform—Lamy*, WORLD TRADE ORG. (Oct. 13, 2009), www.wto.org/english/news_e/sppl_e/sppl1137_e.htm.

403. Pascal Lamy, Statement to Trade Negotiations Committee (June 11, 2010), in *Lamy: No Ambitious Doha Result Possible Unless All Parties Gain*, WORLD TRADE ORG. (June 11, 2010), www.wto.org/english/news_e/news10_e/tnc_dg_stat_11jun10_e.htm (emphasis added).

404. As another example, one claim by the Director-General is that a Doha Round conclusion will enhance energy security (whatever that means) by (1) building on existing disciplines like national treatment and applying them to trade in energy goods and services, (2) cutting tariffs on renewable fuels like biodiesel and ethanol and on equipment used in energy production and distribution, (3) strengthening rules on subsidies, (4) improving rules on transit and trade facilitation, (5) liberalizing trade in energy-efficient, climate-friendly technology, and (6) opening energy services such as engineering, drilling, technical testing, pipeline construction, and distribution. See Pascal Lamy, Director Gen., World Trade Org., Address to World Energy Congress 2010 (Sept. 16, 2010), in *Lamy: “A Stronger WTO Rule Book Could Benefit the Energy Sector,”* WORLD TRADE ORG. (Sept. 16, 2010), www.wto.org/english/news_e/sppl_e/sppl1169_e.htm.

Still another example is the claim by Lamy the Doha Round will lead to enhanced rules on trade in natural services. See *Lamy: Doha a “Stepping Stone” to Better Trade Rules in Natural Resources*, WORLD TRADE ORG. (Oct. 26, 2010), www.wto.org/english/news_e/sppl_e/sppl1175_e.htm. And, yet another example is that a deal will enhance world commodities trade, leading to lower commodity prices, by dismantling barriers to such trade. See *Lamy: Doha Will Oil the Wheels of World Commodities Trade*, WORLD TRADE ORG. (Jan. 31, 2011), www.wto.org/english/news_e/sppl_e/sppl1184_e.htm.

Perhaps such happy outcomes might occur. The point here simply is that virtually any potential salubrious benefit is seized upon by the Director-General in his pleas for concluding the Round. The larger the number of straws grasped at, the further the Round drifts from its original purposes of employing trade as a weapon against poverty and Islamist extremism.

405. See Pascal Lamy, Director Gen., World Trade Org., Keynote Address at World Trade Organization Public Forum (Sept. 28, 2009), in *G20 Must Now “Walk the Talk” on Doha—Lamy*, WORLD TRADE ORG. (Sept. 28, 2009), www.wto.org/english/news_e/sppl_e/sppl1136_e.htm.

B. *Five Rebuttals*

Yet this argument has five serious limitations. The first is the obvious point that not all WTO Members are going to raise all of their applied duties to the maximum bound rates. The fact that the policy space exists for them to do so does not mean they are likely to move into that space. To the contrary, it would be more reasonable to expect many Members would resist raising their barriers at all, so as not to trigger or hasten a march toward protectionism, a march that would reciprocally redound to their detriment. It also would be more reasonable to expect that a Member boosting applied rates would not do so on every single tariff line. Why raise the applied rate to the bound level on, for example, artificial Christmas trees, and thereby penalize consumers through higher costs, if there is no vociferous domestic constituency to protect?

Empirical evidence buttresses this first point. Consider the fact the WTO itself, in its 2010 biennial review of American trade policy, lauded the United States for resisting protectionist pressures and maintaining some of the most open trade and investment markets in the world.⁴⁰⁶ Consider, too, that in November 2009, the European Commission put out its annual report in which it monitors protectionist measures around the world.

The European Commission report listed 223 “potentially trade-restrictive measures” implemented by the forty major trading partners of the EU between October 2008 and October 2009.⁴⁰⁷ (The greatest number of such measures were put up by Russia (forty-eight), which is not a WTO Member; Argentina (thirty-five); the United States (sixteen); and China (thirteen).⁴⁰⁸ They included buy national policies in government procurement contracts and certain discriminatory criteria in fiscal support schemes.) But, the report explicitly stopped short of labeling them “protectionist.” Moreover, the report credited existing GATT-WTO disciplines for containing traditional protectionism measures, namely, tariff hikes and non-tariff barrier increases (e.g., import bans, quota or license restrictions, and reference pricing schemes). Most importantly, the Commission declared that the world had avoided the worst-case scenario of a tit-for-tat, downward spiral of protectionism.⁴⁰⁹

Shortly after the EU issued its report, the WTO itself conceded the point. In a report of its own on annual developments in international trade, the WTO admitted “[t]here has been no systemic breakdown in the international trading system and WTO [M]embers have resisted the allure of pro-

406. See Daniel Pruzin, *WTO Praises United States for Resisting Protectionism, Partners Voice Complaints*, 27 Int'l Trade Rep. (BNA) No. 39, at 1506 (Oct. 7, 2010).

407. Bengt Ljung, *Global War of Protectionism Resulting from Economic Crisis Avoided, EC Says*, 26 Int'l Trade Rep. (BNA) No. 45, at 1542 (Nov. 12, 2009).

408. See *id.*

409. See *id.*

tectionism.”⁴¹⁰ Indeed, all of the trade-restricting or trade-distorting measures that Members implemented since October 2008 collectively affected a maximum of one percent of world trade and were concentrated in a few sectors (particularly agriculture, iron, steel, and to some degree in electronics, footwear, and textiles and clothing).⁴¹¹ Likewise, WTO Director-General Pascal Lamy wrote in a letter to trade ministers that “[t]he world economy is about as open for trade today as it was before the crisis started.”⁴¹²

The Director-General had little choice but to climb down. In March 2010, in their joint second Report on Group of 20 (G-20) Trade and Investment Measures, the WTO, Organization for Economic Cooperation and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD) admitted the G-20 countries had imposed fewer trade-restrictive measures between September 2009 and February 2010 than they had in the preceding six-month period (April–August 2009) covered in the first Report.⁴¹³ (The G-20 is an informal talk shop of 19 industrialized

410. Jonathan Lynn, *WTO Urges Non-Discrimination as Crisis Ends*, REUTERS, NOV. 19, 2009, available at www.reuters.com/article/2009/11/19/idUSLJ379965.

411. See Daniel Pruzin, *WTO Chief Says Protectionism Surge Has Been Avoided, but Vigilance Needed*, 26 Int'l Trade Rep. (BNA) No. 47, at 1606 (Nov. 26, 2009).

412. Lynn, *supra* note 410; see also Daniel Pruzin, *WTO Chief Says Economic Downturn Led to 12 Percent Drop in 2009 Global Trade*, 27 Int'l Trade Rep. (BNA) No. 9, at 294 (Mar. 4, 2010) (quoting Director-General Lamy as saying that import demand and trade finance were the causes for the twelve percent drop in the volume of world trade in 2009 and “[t]o a much lesser degree, trade has been adversely affected by some instances of increased tariffs and domestic subsidies, new non-tariff measures, and more antidumping actions”) (emphasis added).

413. See Daniel Pruzin, *OECD, WTO, UNCTAD Find Major Economies Eased Protectionist Measures in Last Period*, 27 Int'l Trade Rep. (BNA) No. 11, 375, 375–76 (Mar. 18, 2010). In October 2010, UNCTAD also reported that at least 41 countries around the globe had implemented new investment measures to attract FDI in the preceding 6 months, plus 50 new international investment agreements involving 79 countries, leading it to conclude that despite the global economic slump, the review period “witnessed an ongoing trend towards more investment liberalization, facilitation, and promotion.” Daniel Pruzin, *UNCTAD Report Cites Continued Trend Toward Liberalization in Investment Pacts*, 27 Int'l Trade Rep. (BNA) No. 40, at 1548 (Oct. 14, 2010).

Likewise, in its November 2010 report on new measures that impede trade and investment, UNCTAD said G-20 countries generally resisted protectionist pressures. Covering the period mid-May to mid-October 2010, UNCTAD observed the rate of increase in new protectionist measures slowed. See Daniel Pruzin, *Reports Say G-20 Countries Resisting Protectionism, Despite Increase in Measures*, 27 Int'l Trade Rep. (BNA) No. 44, at 1712 (Nov. 11, 2010) (citing fifty-six trade-restrictive measures between March and May 2010 and 54 such new measures—including thirty-three trade remedies, fourteen border measures, and four export restrictions—in May–October 2010).

Notably, some of the new trade-restrictive measures take the form of sanitary and phytosanitary (SPS) and technical barriers to trade (TBT) rules, and they may be either entirely new rules, or stricter application of existing rules. It may well be that governments resort increasingly to SPS and TBT measures for protectionist purposes, notwithstanding the global economic slowdown, as these devices have a politically palatable basis for legitimacy: the protection of consumer health and welfare. See generally Amy Tsui, *USTR Will Seek to Address NTBs, Outstanding Trade Disputes*, Reif Says, 27 Int'l Trade Rep. (BNA) No. 12, at 413 (Mar. 25, 2010) (reporting on the view of Tim Reif, General Counsel, USTR, that non-tariff barriers are the hardest kind of problem to

and big emerging market countries, plus the EU, with the International Monetary Fund (IMF) and World Bank as *ex-officio* members.)⁴¹⁴ The second Report also conceded that new AD, CVD, and safeguard measures affected only about 0.7% of G-20 imports, or 0.4% of total world imports. (The comparable figures for the first Report were 1.3% and 0.8%, respectively.) Overall, the WTO omitted in its November 2010 report on protectionism, from October 2008 through October 2010, trade restrictions imposed by G-20 countries during this period covered in aggregate only 1.8% of G-20 imports and 1.4% of total world imports.⁴¹⁵ Even these miniscule amounts were over-estimates for two reasons.

First, the trade coverage of a measure is not exactly equal to the diminution of trade caused by the measure, unless that measure is prohibitive and shuts down trade in the targeted product. Second, trade coverage estimates are at the six-digit customs classification level when in fact the value of trade affected by the measure may be at the eight-digit level. So, the argument that the Doha Round is an essential tool to keeping trade open and fighting the global economic recession was retracted by its proponents. The lasting impression is the WTO Secretariat and its Director-General grasp at any expedient assertion to exhort Members to finish the Round, rather than focus on the original purposes of the Round and the extent to which negotiating texts match those purposes.

The results from the joint second Report, which the WTO, OECD, and UNCTAD issued in June 2010 covering the period November 2009 through mid-May 2010, were even more encouraging.⁴¹⁶ G-20 countries continued

deal with in dispute resolution proceedings and that bilateral negotiation often is preferable to litigation to resolve them).

414. The G-20 was created in response to the 1997–1999 Asian financial crisis and first met in December 1999 in Berlin. See *Factbox—What is the G20?*, REUTERS, Mar. 30, 2009, available at in.reuters.com/article/2009/03/30/financial-g20-group-idINLU96805420090330. Accounting for ninety percent of world Gross National Product (GNP), eighty percent of world trade, and two-thirds of world population, the members are Argentina, Australia, Brazil, Canada, China, the EU, France, Germany, India, Indonesia, Italy, Japan, Kingdom of Saudi Arabia, South Korea, Mexico, Russia, South Africa, Turkey, the United Kingdom, and the U.S. *Id.* The G-20 is a forum for discussing global economic governance and stability, and resolving cross-border problems.

415. See Daniel Pruzin, *G-20 Leaders Say Time to Conclude Doha; Obama Prepared to Take Risks for Approval*, 27 Int'l Trade Rep. (BNA) No. 45, at 1755 (Nov. 18, 2010).

416. See Daniel Pruzin, *Survey Sees G-20 Warding Off Protectionism, as Limits on Exports, Bailouts Cause Concern*, 27 Int'l Trade Rep. (BNA) No. 24, at 886 (June 17, 2010).

Likewise, a report by an NGO, Global Trade Alert (GTA), issued in September 2010 found that in the first 8 months of 2010, the rate of discrimination against foreign commercial interests was about the same as in 2009. This report, the seventh issued by GTA, was notable in that for the first time, it covered not only traditional import protectionist measures, but also export management measures, that is, export-enhancing measures such as bailouts, export subsidies, local content requirements, and tax rebates. It did so for two reasons: first, such measures consume domestic resources that could be used for alternative purposes, and make the cost of exports cheaper for foreigners to purchase; and, second, export incentives allow exporters to lower their prices, which compels exporters from other countries to follow suit so as not to lose out on profits or market share. Both reasons mean export-enhancement is tantamount to a beggar-thy-neighbor policy, benefiting one country (specifically, its exporters) at the expense of another (*i.e.*, harming

to refrain from imposing trade-restrictive measures though some Members had resorted to or extended export restrictions on commodities, particularly food products. As for trade remedies, AD, CVD, and safeguard measures collectively covered just 0.4% of annual world imports, but this trade coverage probably over-stated their actual impact. Moreover, the Members had cooled off in their recourse to remedial actions during the first four months of 2010.

Certainly, past is not always prologue. In their joint fifth Report, issued in May 2011 and covering mid-October 2010 to April 2011, the WTO, OECD, and UNCTAD said protectionist pressures were more manifest than before: there were 122 new trade-restrictive measures, more than double the previous reporting period, and the highest recorded in any of the five reports.⁴¹⁷ Export restrictions (such as export quotas and taxes) increased, and protectionist measures (especially tariffs and non-automatic import licensing) impacted 0.6% of all G-20 imports.⁴¹⁸ Thus, the fifth Report sounded a negative tone. But, the export restraints were no surprise: imposed particularly on agricultural products, metals, and minerals, they could be explained as defensive measures against rising food and commodity prices. As for the import measures, they still affected only 0.5% of global imports, and trade remedy actions were in decline. Moreover, of the 550 measures that countries had taken since October 2008, 18% had been rescinded or modified to reduce their negative impact on trade whereas 15% had been altered since issuance of the fourth Report in November 2010. Such measures tended to be temporary duty increases or trade remedy actions. Also, WTO Members were adhering to their market access commitments across services sectors,

exporters from other countries). See Len Bracken, *NGO Finds 2010 Rate of Protectionism Tracks Previous Year Despite Trade Rise*, 27 Int'l Trade Rep. (BNA) No. 36, at 1375 (Sept. 16, 2010).

417. See Daniel Pruzin, *WTO Cites Jump in G-20 Trade Protection: OECD, UNCTAD See Positive Investment News*, 28 Int'l Trade Rep. (BNA) No. 23, at 938 (June 9, 2011).

418. *Protectionist Pressures on the Rise, Latest G20 Monitoring Report Says*, WORLD TRADE ORG. (May 24, 2011), http://www.wto.org/english/news_e/news11_e/figo_24may11_e.htm; Pruzin, *supra* note 417, at 938.

A WTO report circulated in June 2011 to the Trade Policy Review Body (TPRB) offered conclusions nearly the same as those in the joint fifth Report. Covering the period mid-October 2010 through the end of April 2011, and based on data from 30 of the then 153 WTO Members, the WTO report said import-restrictive measures had increased. But, the amount of trade affected by them had fallen—to just 0.53 percent of global trade, from 0.8 percent in the previous six-month review period—and nearly half of the share of affected trade was the result of only three measures: (1) EU restrictions on steel; (2) EU AD and safeguard proceedings against Chinese wireless modems; and (3) an increase by China in its import tariffs on fuel oil and jet fuel. Moreover, the WTO report conceded AD investigations fell by 10 percent, CVD investigations by 36 percent, year-on-year during the six-month review period, and the number of safeguard cases fell from 13 to 7. See Daniel Pruzin, *WTO Report Says Members Have Boosted Trade Restrictions as Crisis Resolve Fades*, 28 Int'l Trade Rep. (BNA) No. 25, at 1021 (June 23, 2011).

The point, then, is that the argument made by the WTO Director-General, Pascal Lamy, that a conclusion to the Doha Round is necessary to prevent a descent into protectionism is false. There was no such descent during or in the aftermath of the global recession.

though understandably some emerging countries were resorting to capital controls, thus affecting the supply of financial services.⁴¹⁹

If there is any worrying possibility about trade-restrictive measures implemented in the wake of the global economic crisis, then it concerns persistence. In May 2010, the European Commission put the number of such measures at 278 and said that none had been lifted even though the overall trade climate had improved during the first half of 2010.⁴²⁰ Further, some measures took the form of traditional protectionism, like the decision by *MERCOSUR* to increase certain tariffs and the decision by Russia, Belarus, and Kazakhstan to create a customs union as of 1 January 2010 that consolidated tariff hikes implemented by Russia since the onset of the crisis. To be sure, the 278 measures affected only 1.7% of EU exports (mainly in agri-food, automotives, steel, and textiles) and only 1% of total world trade in goods. Nonetheless, the concern was the trade-restrictive measures may linger long after a full economic recovery has occurred. And yet, after a 13% contraction in the volume of world goods traded in 2009, 2010 saw a surge of 15.1%, bringing world trade back to its 2008 level.⁴²¹

Second, political rhetoric outstrips political courage. Leaders of the G-20 nations champion this argument.⁴²² The G-20 calls for “Keynes [i.e., fiscal stimulus] at home and Smith [i.e., free trade] abroad,” as Professor Razeen Sally puts it.⁴²³ Yet, as he provocatively observes:

The G-20 is unlikely to be more than a *chat forum given to non-binding pledges*. Even in the improbable event of a Doha conclusion anytime soon, it will not contain protectionism: what is on the table is a *very low common denominator* and a *dog’s breakfast of loopholes and exemptions*.⁴²⁴

The “very low common denominator” and “dog’s breakfast” are the subject of much of the present article. For now, the key point is the chatter.

G-20 leaders issue a plethora of commitments to resist protectionism and complete the Doha Round on what they promise would be ambitious, balanced terms.⁴²⁵ Likewise, apparently oblivious to the original develop-

419. See Pruzin, *supra* note 417, at 938–39.

420. See Joe Kirwin, *Trade Restrictions Adopted During Economic Crisis Still in Place*, *EC Says*, 27 Int’l Trade Rep. (BNA) No. 22, at 820 (June 3, 2010).

421. See Alan Beattie, *World Trade Back at 2008 Levels*, *FIN. TIMES*, Feb. 24, 2011, at 6.

422. See *Pope Urges World Leaders to Stabilize Markets without Excluding Poor*, *CATH. NEWS SERVICE* (Mar. 31, 2009), <http://www.catholicnews.com/data/stories/cns/0901475.htm>.

423. Razeen Sally, *The Quest for a Global Solution Is Misguided*, *FIN. TIMES*, Mar. 19, 2009, at 9 [hereinafter Sally, *The Quest*]. See generally RAZEEN SALLY, *NEW FRONTIERS IN FREE TRADE—GLOBALIZATION’S FUTURE AND ASIA’S RISING ROLE* (2008) (critiquing global economic organizations and governance).

424. Sally, *The Quest*, *supra* note 423, at 9 (emphasis added).

425. See, e.g., *Kirk Meets with New Japanese Agriculture Minister*, 26 Int’l Trade Rep. (BNA) No. 1397 (Oct. 15, 2009). The G-20 is not the only plurilateral venue in which such calls are issued. They come, for example, from the World Economic Forum in Davos, Switzerland. In January 2011, trade ministers from nineteen countries (Australia, Brazil, Canada, China, Costa

ment orientation of the Round in a post-9/11 context, WTO Director-General Lamy calls for “a combination of ambition and balance for ALL participants.”⁴²⁶ They even (1) toss in a preferred target date, if they can agree to one; (2) default to an ambiguous future period; (3) abandon an earlier target completion date entirely, as they did at the June 2010 G-20 Summit in Toronto; or (4) somehow proclaim trade remains high on their agenda, and they are determined to resist protectionism, engage in horizontal negotiations, and conclude the Round as they did at the November 2010 G-20 Summit in Seoul.⁴²⁷ The anodyne phrase “ambitious and balanced” is commonly used among politicians and trade negotiators when pressed to characterize their expectations for the Doha Round.⁴²⁸

Rica, Hong Kong, India, Indonesia, Jamaica, Japan, Kenya, Malaysia, Mexico, New Zealand, Norway, Peru, South Africa, Switzerland, and the U.S.) vowed to “seriously accelerate” efforts to reach a Doha Round breakthrough by mid-2011. Daniel Pruzin, *Trade Ministers Vow to Overcome Differences, Achieve Doha Breakthrough*, 28 Int’l Trade Rep. (BNA) No. 5, at 178 (Feb. 3, 2011).

426. Lamy, *supra* note 403 (emphasis in original).

427. See Daniel Pruzin, *South Korea Pushing to Put Trade Talks High on Agenda of November G-20 Meeting*, 27 Int’l Trade Rep. (BNA) No. 29, at 1102–03 (July 22, 2010). At the Toronto Summit, the G-20 backed away from earlier commitments to finish the Doha Round by the end of 2010. See Len Bracken, *G-20 Omits Doha Round Target Date, Seeks Jobs from Trade in Declaration*, 27 Int’l Trade Rep. (BNA) No. 26, at 974 (July 1, 2010); see also Paul Taylor, *Do-Little G20 Summit Cheers Spared Bankers*, REUTERS, June 28, 2010, available at <http://www.reuters.com/assets/print?aid=USTRE65L3O720100628> (stating “that the G-20 has stepped away from imposing an arbitrary timeline”). Notably, just prior to the G-20 meeting, at the June 2010 Group of Eight (G8) Summit in Toronto, the G8 countries (Canada, France, Germany, Italy, Japan, United Kingdom, and United States, which are the G-7 countries, plus Russia) not only backed off from earlier calls to finish the Round in 2010, but also from multilateral trade liberalization in favor of regional trade agreements (RTAs):

We will continue . . . to promote liberalisation of trade and investment under the WTO, through the national reduction of barriers, and through bilateral and regional negotiations.

Alan Beattie & Chris Giles, *U.S. Pledge to Revise S Korea Trade Deal*, FIN. TIMES, June 27, 2010, at 2 (emphasis added) (quoting final communiqué of G8).

428. The ambitious-and-balanced formula was used, for example, by the leaders of the Asia-Pacific countries in their joint declaration—calling for an “ambitious and balanced conclusion to the Doha Development Agenda (DDA) in 2010”—following the November 2009 summit of the Asia Pacific Economic Cooperation (APEC) forum hosted by Singapore. Tripti Lahiri, *APEC Leaders Call for Completion of Doha Round in 2010, Urge Flexibility*, 26 Int’l Trade Rep. (BNA) No. 46, at 1580 (Nov. 19, 2009). It was used again by the Deputy USTR in a 5 June 2010 press release. See also Toshio Aritake, *APEC Ministers Deliver Statement in Support of Concluding Doha Round ‘As Soon As Possible,’* 27 Int’l Trade Rep. (BNA) No. 23, at 845 (June 10, 2010). Similarly, in Seoul, the G-20 heads of state reaffirmed their:

strong commitment to direct our negotiators to engage in across-the-board negotiations to promptly bring the Doha Development Round to a successful, ambitious, comprehensive, and balanced conclusion consistent with the mandate of the Doha Development Round and built on the progress already achieved. We recognise that 2011 is a critical window of opportunity, albeit narrow, and that engagement among our representatives must intensify and expand. We now need to complete the end game. Once such an outcome is reached, we commit to seek ratification, where necessary, in our respective systems. We are also committed to resisting all forms of protectionist measures.

G-20 Leaders Statement from Seoul Summit (Nov. 12, 2010), available at www.bbc.co.uk/news/business-11741674 (emphasis added). This statement, while providing somewhat more detailed instructions to trade negotiators than previous communiqués, left out any reference to a target date for completing the Round. Pruzin, *supra* note 415, at 1755.

Notably, the phrase does not appear in the *Ministerial Declaration* that launched the Round, nor does the word “ambitious.”⁴²⁹ The word “balanced” appears three times, in Paragraphs two, eleven, and twenty-two of that *Declaration*. In Paragraph two, in a sentence that highlights the importance of poor country interests, it is remarked that “enhanced market access [and] balanced rules” are important, too. In Paragraph eleven, the Work Program for the Round is characterized as “broad and balanced.” In Paragraph twenty-two, it is said that any deal on trade and investment “should reflect in a balanced manner the interests of home and host countries,” following which the interests of poor countries are highlighted.

On reflection, it appears the terms “ambitious” (or a synonym, such as “broad”) and “balanced” are meant by developed countries to counter-balance the aspirations poor countries have (or once had) for the Round. Interpreted literally, if cynically, “ambitious” connotes coverage of every topic a developed country thinks is important, and “balanced” means the developed country believes what its country gained from a Doha Round deal is at least as good, and preferably better, than what its country conceded. Certainly, in a world of *real politik* bargaining, developing and least developed countries could well apply the same meanings to these terms. For the United States, at least under the Administration of President Barack H. Obama, “balanced” means a return to the ways of the past, in which Asia exported manufactured goods, America imported them, and thus the American consumer was indispensable to Asian growth and prosperity, and is unthinkable. Those ways were unsustainable, as the global economic recession of 2008–2009 had revealed.

In any event, the G-20 made pledges for an ambitious, balanced, and timely conclusion of the Doha Round at their November 2008 Summit in Washington, D.C., at their April 2009 Summit in London, and at their September 2009 Summit in Pittsburgh.⁴³⁰ But, the Summits have failed to kick-start the Round. Worse yet, after the November 2008 Summit, fourteen of

429. The *Ministerial Declaration* is available on the WTO website, www.wto.org, and reprinted in BHALA, *supra* note 1, at 633–45.

430. See Gary G. Yerkey, *G-20 Leaders Seek (Again) to Revive WTO Talks but Success Far From Certain*, 26 Int'l Trade Rep. (BNA) No. 1279 (Sept. 24, 2009) (quoting from the draft joint communiqué of the Pittsburgh Summit) [hereinafter Yerkey, *G-20 Leaders Seek*]; Daniel Pruzin, *Indian Minister Affirms Plans to Host G-20 Trade Meeting on WTO Doha Round*, 26 Int'l Trade Rep. (BNA) No. 27, at 874 (July 2, 2009) (reporting on efforts in the run-up to the Pittsburgh Summit to draft a positive final communiqué); Guy Dinmore & Marco Pasqua, *Trade Promise at Heart of Draft Communiqué*, FIN. TIMES, Mar. 30, 2009, at 5 (reporting on efforts to complete the stalled global trade talks at the London Summit). The 2 April 2009 communiqué, entitled “The Global Plan for Recovery and Reform,” states in paragraph 23 that the G-20:

remain[s] committed to reaching an ambitious and balanced conclusion to the Doha Development Round, which is urgently needed. This *could* boost the global economy by at least \$150 billion per annum. To achieve this we are committed to building on the *progress already made, including with regard to modalities.*

The Global Plan for Recovery (Apr. 2, 2009), available at <http://www.g20.org/Documents/final-communicue.pdf>, (Apr. 3, 2009) (emphasis added).

the twenty countries raised trade barriers in one manner or another.⁴³¹ By

The first sentence is standard rhetoric but lacks a deadline, the second sentence is speculative and cites a small figure in light of the magnitude of the crisis, and the third sentence suggests the December 2008 Draft Texts would be the basis for any conclusion.

The pledge made at the Pittsburgh Summit was modestly more detailed and hopeful. Paragraph 49 of the communiqué states:

We are determined to seek an *ambitious and balanced* conclusion to the Doha Development Round in 2010, consistent with its mandate, based on the *progress already made, including with regard to modalities*. We understand the need for countries to directly engage with each other, within the WTO bearing in mind the centrality of the multilateral process, in order to evaluate and close the remaining gaps. We note that in order to conclude the negotiations in 2010, closing those gaps should proceed as quickly as possible. We ask our ministers to take stock of the situation *no later than early 2010*, taking into account the results of the work program agreed to in Geneva following the Delhi Ministerial, and seek progress on Agriculture, Non-Agricultural Market Access, *as well as Services, Rules, Trade Facilitation* and all other remaining issues. We will remain engaged and review the progress of the negotiations at our next meeting.

Text: G20 Final Communiqué—Opening the Global Economy, REUTERS, Sept. 25, 2009, available at <http://www.reuters.com/assets/print?aid=USTRE58O6TZ20090925> (emphasis added).

The ideas of an “ambitious and balanced conclusion” based on existing progress, including modalities, are not new. Referring to 2010 thrice at least identifies a target end-point, along with an interim stock-taking exercise. The second sentence is a reference to the two-track approach (discussed later in this article) whereby multilateral consensus on modalities and bilateral negotiations on concessions occur simultaneously. Mentioning topics other than agriculture and NAMA in the penultimate sentence is useful in identifying how much further negotiations have to proceed for closure to occur.

Notably, however, the U.S. rejected a proposal made at the Pittsburgh Summit by Australia, Brazil, the EU, and other WTO Members to reach agreement on core formulas—that is, modalities—on agriculture and NAMA by early 2010. Led by the Deputy National Security Advisor for International Economic Affairs, Michael Froman, the U.S. thought substance, not artificial timelines, should govern. See Gary G. Yerkey, *G-20 Leaders Vow to Work on Completing Doha in 2010, See No Early Breakthrough*, 26 Int’l Trade Rep. (BNA) No. 39, at 1310 (Oct. 1, 2009). That argument is, of course, correct. However undisciplined by deadlines, talks can drag on, and the impression conveyed can be one that the U.S. is either ambivalent about or reluctant to lead. In that regard, roughly 100 developing countries issued a joint statement during the Pittsburgh Summit supporting conclusion of the Doha Round by 2010, so long as developed nations showed “true engagement, flexibility, and political will.” *Id.* at 1311.

431. Amy Tsui, *Avoiding Protectionism Key to Reversing Economic Downturn, Former USTR Asserts*, 26 Int’l Trade Rep. (BNA) No. 11, at 359 (Mar. 12, 2009).

In March 2009, the World Bank published a study identifying forty-seven trade-restrictive measures that countries, including seventeen of the G-20 nations, had implemented since the onset of the global economic crisis in fall 2008. Prime illustrations were:

- **Tariff increases**, which made up one-third of the trade-restrictive measures:
For example, Ecuador raised tariffs on over 600 products, and Russia boosted tariffs on used cars.
- **Non-tariff barriers**:
For instance, Argentina imposed non-automatic import licensing requirements for auto parts, leather goods, televisions, textiles, and toys. Indonesia announced all imports of five categories of merchandise—electronics, food and beverages, garments, shoes, and toys—could be admitted only at five of its air or sea ports.
- **Tightened Product or Sanitary Standards**:
For example, China banned imports of some kinds of Belgian chocolates, British sauce, Dutch eggs, Irish pork, and Spanish dairy products. India banned imports of Chinese toys.
- **Export Subsidies**:
The EU temporarily implemented new subsidies for exports of butter, cheese, and milk powder.
- **Sector-Specific Subsidies**:

September 2009, seventeen of the twenty G-20 states had violated the pledge they re-took at the April 2009 Summit—not to resort to protectionism to fight the recession.⁴³²

Put bluntly, hypocrisy abounds. Fortunately—from a free trade perspective—the hypocrisy does not always manifest itself in measures that affect a broad swath of traded goods.⁴³³ Trade remedies (that is, AD, CVD, and safeguard measures) typically strike only a small percentage of com-

Several governments had subsidized their domestic auto industry, with the amount summing to \$48 billion. The U.S. had provided direct subsidies of \$17.4 billion, and Argentina, Brazil, Canada, China, France, Germany, Italy, Sweden, and the United Kingdom had given either direct or indirect subsidies to their national producers.

Diana I. Gregg, *World Bank Takes 17 Nations in G-20 to Task for Implementing Trade-Restricting Measures*, 26 Int'l Trade Rep. (BNA) No. 13, at 406 (Mar. 26, 2009).

Note, however, many WTO Members—including India and the U.S.—rejected the characterization of WTO Director-General Pascal Lamy that there had been “significant slippage” toward protectionism since the advent of the crisis. To the contrary, they urged, WTO disciplines had helped prevent a descent into protectionism. Moreover, the world was a different place—far more inter-dependent through global supply chains and manufacturing processes—than in the 1930s, when the U.S. passed the notorious *Smoot–Hawley Act* and other countries responded with protectionist and beggar-thy-neighbor policies. See Daniel Pruzin, *U.S. Challenges WTO Chief Lamy's Assertion of 'Significant' Slipping Toward Protectionism*, 26 Int'l Trade Rep. (BNA) No. 16, at 505, 505–06 (Apr. 16, 2009).

Additionally, the fact is that not all Members raised barriers following the onset of the global economic crisis. G-20 countries such as Brazil, China, India, Indonesia, Mexico, and the Kingdom of Saudi Arabia, as well as Russia (which is not a Member), all reduced import duties, fees, and surcharges, and removed non-tariff barriers on a range of products. China even lessened restrictions on some services. Thus, suggesting world-wide descent into protectionism is akin to using fear-mongering to push Members to complete the Round. See Daniel Pruzin, *Agencies Say G-20 Countries Have Avoided 'Widespread Resort' to Trade Protectionism*, 26 Int'l Trade Rep. (BNA) No. 37, at 1235 (Sept. 17, 2009).

Note, too, that some skepticism of the World Bank's analysis may be appropriate. After the April 2009 G-20 Summit, the Bank reported G-20 countries had taken, or were contemplating taking, twenty-three actions that were trade restrictive, seven of which were by the U.S. Yet, several of the actions, including the American imposition of a 10 percent duty on Canadian softwood lumber, and the Section 421 safeguard investigation of Chinese tires, were pursuant to normal trade remedy procedures. See Diana I. Gregg, *World Bank Says More Trade Restrictions Imposed by G-20 Countries Since Summit*, 26 Int'l Trade Rep. (BNA) No. 18, at 569 (Apr. 30, 2009). There is a certain automaticity built into these procedures, and inferring they are taken in response to the global economic crisis, and in defiance of G-20 pledges, is a bit of a stretch.

432. Yerkey, *G-20 Leaders Seek*, *supra* note 430, at 1280. In September 2009, Global Trade Alert, a London-based monitoring service at the Center for Economic Policy Research, reported that since the November 2008 Washington, D.C. Summit, the G-20 states had implemented 121 “blatantly protectionist” measures—roughly one every three days—and were on the verge of enacting another 134 such measures. *Id.* Here again, some skepticism is in order. The service is supported by the World Bank, and its ideological inclination appears to be toward free trade.

433. Interestingly, and not surprisingly in an era of globalization, over fifty percent of world trade in goods, and seventy-five percent of services trade, is in intermediate products or services used to make or offer other goods or services. See Rick Mitchell, *Protectionist Measures Had Small Role in 12.5% Trade Plunge of 2009, OECD Says*, 27 Int'l Trade Rep. (BNA) No. 23, at 854 (June 10, 2010). The Boeing 787 Dreamliner is a case in point: its engines are made in the United Kingdom and U.S., its doors are made in Sweden and France, its flaps and ailerons are made in Canada and Australia, the fuselage is made in Japan, Italy, and the U.S., its horizontal stabilizers are made in Italy, its landing gear is made in France, and its wings are made in Japan. Overall, there are 43 suppliers in over 135 production sites around the world. See *id.* (reporting on

merce. For example, between the first quarter of 2008 and first quarter of 2009, trade remedies affected only 0.4% of the value of imports into the United States and EU. Proposed remedies in that period affected just 0.6% and 1.8% of imports into China and India, respectively.⁴³⁴ By the account of the OECD, the use of protectionist measures in general, by all countries, was “relatively muted,” affecting only about one percent of world trade.⁴³⁵ (However, dollar-for-dollar, the effect is serious: raising tariff revenues by \$1, which entails a direct trade-distorting measure, causes a \$2.16 fall in world exports and \$0.73 fall in world income.) Moreover, launching a trade remedy investigation—while it might have an *in terrorem* effect on respondent producer-exporters, forcing them to raise their prices or otherwise change their behavior—results in imposition of a remedial measure in 50% of the cases as of 2009, which is a decrease from the 80–90% figure of 2008.⁴³⁶

Nevertheless, the point is that what G-20 leaders say with aplomb, eloquence, and gravitas in a G-20 communiqué does not translate into paradigmatic shifts at the WTO bargaining table. That is true notwithstanding efforts by thirteen WTO Members, which in May 2009 produced a communication urging the entire WTO Membership to back the G-20 pledge to refrain from any new trade barriers through 2010.⁴³⁷ In other words, there is a mismatch between, on the one hand, grandiloquent political rhetoric, and, on the other hand, foot-dragging behavior of WTO Members in multilateral negotiations and protectionist-oriented domestic trade policy.⁴³⁸ To the extent G-20 (and indeed, all other) leaders sincerely seek to conclude the Round with alacrity, their representatives would do more than wrap up unresolved technical matters. These representatives also would engage seriously in horizontal discussions that cut across sectors.⁴³⁹

a May 2010 report from the Organization for Economic Cooperation and Development, *Trade and the Economic Recovery: Why Open Markets Matter*).

434. See Alan Beattie, *Barriers Failing to Dent Global Trade*, FIN. TIMES, Oct. 21, 2009, at 4.

435. Mitchell, *supra* note 433, at 854 (reporting on a May 2010 OECD report, *Trade, Policy, and the Economic Crisis*).

436. See Beattie, *supra* note 434, at 5.

437. Daniel Pruzin, *WTO Members Fighting Protectionism Gain Support in Push for Trade Barrier Standstill*, 26 Int'l Trade Rep. (BNA) No. 22, at 698 (May 28, 2009). The thirteen Members were Colombia, Costa Rica, Hong Kong, Malaysia, Mexico, New Zealand, Norway, Pakistan, Peru, Singapore, Switzerland, Turkey, and Uruguay. They had the support of Israel, Lichtenstein, South Korea, Macedonia, Thailand, and Ukraine, as well as of least-developed countries (for which Tanzania spoke). Australia, China, and the U.S. all welcomed the support for the G-20 standstill pledge. See *id.*

438. See Daniel Pruzin, *WTO Members Highlight 'Mismatch' in Doha Ambitions; U.S. Cites Mixed Progress*, 26 Int'l Trade Rep. (BNA) No. 31, at 1023 (July 30, 2009). A related mismatch is between the ambitions of WTO Director-General Pascal Lamy, and the Chairs of the negotiating groups. In the summer of 2009, the Director-General pushed them to issue revised draft modalities texts. But, as the Chair of the agricultural negotiations, Ambassador David Walker said in July 2009, there was no basis for doing so, as no material progress had been made. *Id.* at 1023–24.

439. See Daniel Pruzin, *WTO Chief Cites Need to Broaden Doha Talks Beyond Agriculture, NAMA*, 26 Int'l Trade Rep. (BNA) No. 30, at 988, 988–89 (July 23, 2009).

That is, WTO Members would put out on the bargaining table proposed trade-offs in agricultural, non-agricultural, and services trade, and in rules, so that each Member could come to a final decision, at the political level, as to whether the overall package was ambitious and balanced. And, in the meantime, Members would eschew any new protectionist measures. Yet, summits of the leaders simply were not matched by this kind of vigorous follow up. Not surprisingly, then, in July 2009 Brazil announced a reversal of its long-standing policy of focusing exclusively on completion of the Doha Round and eschewing free trade agreement (FTA) negotiations such as the Free Trade Area of the Americas (FTAA).⁴⁴⁰ With the Round going nowhere, and with pressure from the Brazilian business community, Brazil said it would seek a pact between *MERCOSUR* (of which it, of course, is a member along with Argentina, Paraguay, and Uruguay, with Bolivia, Chile, and Venezuela as associate members) and the EU.⁴⁴¹ By May 2010, EU officials, frustrated at the lack of progress in the Round, no longer insisted on waiting for the outcome of the Round or trying to resolve market access and farm subsidy issues on a multilateral level, and negotiations commenced—after a six-year hiatus—in July.⁴⁴²

Third, the argument has led to a problem of forum, which has cascaded into a problem of puissance. The G-20 is not a forum in which to negotiate trade deals. That mandate rests with the WTO. The WTO Director-General was not invited to the November 2008 Summit. When he is asked to join a meeting, as in the April 2009 Summit, he can do little else than (1) report on the state of the Doha Round, (2) re-dedicate his good offices to the Round, and (3) offer to serve as a watchdog by shaming WTO Members through public blacklisting if they raise trade barriers.⁴⁴³ The more the G-20

440. See Ed Taylor, *Brazil Losing Hope on Doha Round, To Concentrate on Mercosur-EU Trade Pact*, 26 Int'l Trade Rep. (BNA) No. 32, at 1059 (Aug. 6, 2009).

441. See Beattie, *supra* note 434, at 5.

442. See David Haskel, *EU Lawmakers Minimize Hostility to FTA with Mercosur, Say Talks to Begin in June*, 27 Int'l Trade Rep. (BNA) No. 23, at 869 (June 10, 2010); David Haskel, *Mercosur, EU to Hold First Round of Formal Free Trade Talks in Early July*, 27 Int'l Trade Rep. (BNA) No. 783 (May 27, 2010); David Haskel, *Mercosur-EU Free Trade Negotiators Meet; Mood Upbeat but No Sign of Solid Progress*, 27 Int'l Trade Rep. (BNA) No. 18, at 678 (May 6, 2010).

To be sure, the negotiating issues are difficult. All *MERCOSUR* states are major exporters of beans, beef, fruit, and grain, as are many EU states. On such products, *MERCOSUR* seeks greater market access to the EU through lower tariffs and an end to quotas, as well as the reduction or elimination of EU farm subsidies—all of which EU members like Austria, Cyprus, Finland, France, Greece, Hungary, Ireland, Luxembourg, Poland, and Romania oppose. *MERCOSUR* also demands greater and speedier concessions from the EU given the asymmetry in development between the two sides. Conversely, the EU seeks greater market access from *MERCOSUR* for industrial goods, in conflict with the interests of infant industries in *MERCOSUR* states, as well as better opportunities for EU financial service providers and government procurement bidders, plus better protection for EU copyrights and geographically-indicated products.

443. Indeed, the G-20 communiqué from the April 2009 summit calls on the WTO to monitor, on a quarterly basis, adherence of the G-20 countries to their pledge not to implement new protectionist barriers. See Sion Barry, *G20 Six Pledge Communique*, WALES ONLINE (Apr. 2, 2009),

grabs the headlines on the trade policy and the more it vaults itself into the role of the puppeteer, the more marginal the WTO becomes and the more the Director-General becomes the G-20 marionette. A cynic might say that is precisely what some G-20 leaders would like to happen.

Fourth, the strength of the argument depends on critical details. In the 1990s and early years of the new millennium, amidst favorable economic conditions, many Members cut their applied rates unilaterally. For example, on industrial products, the average world-wide applied rate fell from 26% in 1986 to 8.8% in 2007.⁴⁴⁴ Thus, as of 2008, the average amount of “water” (the difference between bound and actually applied tariff rates) was three-fold (i.e., countries could raise duties by three times before hitting their bound ceiling level).⁴⁴⁵ But, it is important to look past averages and focus on individual countries and product categories. A trebling of an applied duty from 2% to 6% is marginally significant. A trebling from 20% to 60% imposes major commercial hardships on producer-exporters. In brief, the gain from binding duty rates hinges on the Member and merchandise at issue.

Related to this fourth point is a critical reality about how international trade works. Over 90% of import-export transactions are paid for through trade finance, such as commercial and standby letters of credit, performance guarantees, and insurance, and the global market for trade finance is about \$10 trillion annually.⁴⁴⁶ Suppose the G-20 commitments were more than chatter and catalyzed a Doha Round deal that resulted in pure free trade in agriculture and industrial goods. With all tariff and non-tariff barriers set to zero under this unlikely deal, would the value and volume of import-export transactions jump immediately?

The surest answer is “no.” What is needed to boost trade flows is trade finance, not merely the eradication of trade barriers, nor the discipline on WTO Members not to hike their barriers. To be sure, the decline in global trade following the onset of the global economic recession fell even more than the decline in the availability of trade finance.⁴⁴⁷ In other words, a key reason for the decline in world trade (which was 12% by volume in 2009,

<http://www.walesonline.co.uk/news/wales-news/2009/04/02/g20-six-pledge-communicue-91466-23299550/550/>. By at least one indicator, adherence was dubious. In the spring 2009, the EU re-introduced dairy export subsidies, and on May 22, 2009, the U.S. Secretary of Agriculture, Tom Vilsack, announced allocations under the Dairy Export Incentive Program for 2008–2009 to counter the EU subsidies and level the playing field for American exporters. See Griffin, *supra* note 79, at 772.

444. *Barriers to Entry: A Rise in Protection Would Worsen the Already Grim Outlook for World Trade*, ECONOMIST, Dec. 20, 2008, at 121.

445. *Fare Well, Free Trade*, ECONOMIST, Dec. 20, 2008, at 15.

446. See Daniel Pruzin, *Global Downturn Drives Down Demand for Trade Financing, Funding Stabilizes*, 26 Int'l Trade Rep. (BNA) No. 37, at 1237 (Sept. 17, 2009).

447. According to World Bank President Robert Zoellick, trade finance (i.e., the higher cost of it) accounted for no more than 10–15 percent of the overall contraction in global trade following the onset of the global economic recession. Those figures, while hardly inconsequential, are de-

bigger than in any year since the Second World War, and was about 20% between October 2008 and January 2009, a faster drop relative to economic growth than during the Great Depression) was the synchronized drop in import demand in all major economies.⁴⁴⁸ That drop was made worse by global supply chains, which quickly transmitted a decline of one component from one country to a decline for other parts in other countries. Nevertheless, trade finance was a causal factor, too. To get unstuck trade credit, leaders at the April 2009 G-20 Summit in London agreed to set up a two-year, \$250 billion Global Trade Liquidity Program (GTLP).⁴⁴⁹ The result was a drop in the cost of trade finance, measured in terms of fees above the London Inter-Bank Offer Rate (LIBOR), though this consequence also followed from a drop in demand for trade finance with the fall in trade.

Fortunately, by March 2010, trade financing had recovered to its pre-financial crisis levels.⁴⁵⁰ But, the recovery did not necessarily benefit developing or least developed country exporters. The International Chamber of Commerce (ICC) reported in March 2010 that of 5.2 million letter of credit transactions between 2005 and 2009, only 1,140 of them (0.02%) resulted in default. However, in the sixty poorest countries of the world, two-thirds of exporters get no trade finance support from regional development banks (e.g., African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank). That means the exporters and importers must deal with the international financial markets directly, which can unfairly punish them simply because of their location.⁴⁵¹ As one example, traders in a particular poor country may be asked to pay an extra 10% (1000 basis points) and post 50% of the value of the merchandise being traded as collateral to secure issuance of a letter of credit. As another example, although there never has been a case of a Pakistani trader defaulting on a letter of credit, Pakistani traders find it difficult to get letters of credit to finance their import-export deals.

The point is two-fold. First, trade finance is every bit as important to reigniting trade as is vigilance against protectionism. Second, resolving market inequities in trade finance can assist poor countries. Focusing on the latter phenomenon as a justification to complete the Doha Round is a *post hoc* rationale for the Round, one in no way associated with the launch of the Round in November 2001. Moreover, the indispensable mechanism for unlocking trade finance is reform of the banking system, to unstick lending.

bated among observers. See Alan Beattie, *Volume of Global Trade Rises at Sharpest Rate in over Five Years*, FIN. TIMES, Sept. 26, 2009, at 1.

448. See Pruzin, *supra* note 412, at 294; Alan Beattie, *Global Trade Index Shows Rapid Recovery*, FIN. TIMES, Mar. 2, 2010, at 4.

449. See Pruzin, *supra* note 446, at 1237.

450. See Daniel Pruzin, *Reinforce Regional Development Banks to Close Trade Finance Gap*, *Group Says*, 28 Int'l Trade Rep. (BNA) No. 13, at 521 (Mar. 31, 2011).

451. See *id.*

That is because banks are the purveyors of that finance. Consequently, whatever politicians say about the trade-promoting effects of a successful outcome in the Round, they are right to focus on the removal of toxic assets from the balance sheets of banks and the recapitalization of those banks.⁴⁵²

They also are quite correct to reexamine international bank capital adequacy standards—the so-called *Basle II Framework*, which was finalized in June 2004 by the Basle Committee on Banking Supervision. That *Framework* compels banks to post more capital than is necessary for extensions of trade finance because it assigns unreasonably high risk weightings and long maturities to fixed, short-term, trade-related finance transactions.⁴⁵³ The *Framework* sets higher capital requirements for riskier credit exposures. Longer-term exposures are riskier; thus capital set aside rules are more stringent in proportion with the maturity length of an exposure. The *Framework* imposes a one-year maturity floor for all lending facilities. In doing so, it fails to recognize that short-term trade finance is self-liquidating, almost always with a maturity of 0 to 180 days. Posting large amounts of capital for a year is not rational. The disproportionate capital requirement results in a diminution of funds available for trade finance (because the funds are tied up to meet capital requirements), an increase in the costs of this finance (to cover the costs of the capital set aside), or both.

Ominously, new international capital adequacy rules, known as the *Basle III Framework*, categorize trade finance instruments as off-balance sheet exposures, just like credit derivatives.⁴⁵⁴ These rules are scheduled to be phased in through 1 January 2019. The rules compel banks to allocate up to 100% of the value of a trade finance transaction as capital against the risk of default by the obligor on the instrument. Under the *Basle III Framework*, an import/export letter of credit required a 20% capital charge, and a performance guarantee required a 50% capital charge. Yet, the default rate on

452. In this respect, the July 2009 statement by WTO Director-General Pascal Lamy, that “government bailouts had constrained risk-taking” outside of national boundaries, and his fear that the “finance industry will be on the side of the forces of deglobalization,” simply misses the greater need to re-start trade finance. See Peggy Hollinger, *Lamy in Warning Over Bank Bail-Outs*, FIN. TIMES, July 6, 2009, at 4 (quoting Mr. Lamy).

453. See Daniel Pruzin, *Experts Cite Basel Capital Accord as Barrier to New Trade Financing*, 26 Int’l Trade Rep. (BNA) No. 38, at 1272 (Sept. 24, 2009); Alan Beattie, *Doubts Remain Over Resilience of Trade Finance System*, FIN. TIMES, Sept. 24, 2009, at 2. For an analysis of the *Basle I Framework*, see generally RAJ BHALA, PERSPECTIVES ON RISK-BASED CAPITAL (1989), and for the transition to value at risk (VAR) models of capital adequacy and *Basle II*, see Raj Bhala, *Applying Equilibrium Theory and the FICAS Model: A Case Study of Capital Adequacy and Currency Trading*, 41 ST. LOUIS U. L.J. 125, 125–262 (1996).

454. See Pruzin, *supra* note 450, at 522. The reason for classifying a letter of credit as an off-balance sheet activity is that a letter of credit typically has a provision known as a “cancelable payment commitment.” This provision can be invoked if all of the necessary documents concerning collateral to back the letter of credit are not presented. But, only a payable commitment may be included on the balance sheet of a bank. See Daniel Pruzin, *Survey Finds Recovery from Crisis for Trade Financing; Fears About Basle III Rules Linger*, 28 Int’l Trade Rep. (BNA) No. 14, at 576, 577 (Apr. 7, 2011).

letters of credit is extraordinarily low. A study published by the Banking Commission of the International Chamber of Commerce in March 2011 covered a five-year period (including the 2008–2010 global economic slump), nine banks, and 5.2 million transactions: it found only 1140 letter of credit transactions, or 0.02% of them, resulted in default.⁴⁵⁵ Ironically, if the *Basle III* rules are not changed, then banks subject to them may sell their trade finance businesses to non-bank entities not subject to the rules, such as hedge funds, or securitize their trade finance portfolios—with the likely investors being hedge funds.

Fifth, and perhaps most importantly, as just intimated, the argument obfuscates (and maybe even suppresses) the whole purpose of the DDA. Neither eliminating water in tariff schedules nor fighting global economic slumps was the primary motivation for a Doha Round. Rather, in the immediate post-9/11 environment, it was the nexus between trade liberalization, alleviating poverty, and fighting extremism that galvanized WTO Members. Continue the march to an open international capitalist system in which all persons—including Muslims—can compete on a reasonably level playing field. With every victory on that field, a person obtains a greater stake in the global economic order and becomes that much more immune to the vile, violent vituperation of *Al Qaeda*, the *Taliban*, and their misguided sympathizers. She appreciates the bad guys not only are evil but also are lousy economists. Certainly, some Members anticipated in November 2001 that trade liberalization would assist in fighting a future, then-unseen recession. But, to catapult that anticipation into the key argument for finishing the Round is to risk betraying the original intent for the Round.

Indubitably, following the July 2008 collapse of multilateral trade negotiations under the DDA, only truly optimistic trade souls could keep faith in the resurrection of the Round.⁴⁵⁶ In May 2009, the WTO General Council announced a Ministerial Conference for Geneva from 30 November to 2 December 2009.⁴⁵⁷ That proclamation was a *de facto* admission the WTO had operated in violation of its own rules. It was two years overdue, given the (1) legal fact of Article IV:1 of the *Agreement Establishing the World Trade Organization (WTO Agreement)* and (2) practical fact the WTO had

455. See Pruzin, *supra* note 454, at 576–77.

456. For a gossipy account of the collapse, see generally PAUL BLUSTEIN, *MISADVENTURES OF THE MOST FAVORED NATIONS—CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADING SYSTEM* (2009) (narrating the slide into dysfunctionality of the July 2008 ministerial meeting); Paul Blustein, *The Nine-Day Misadventure of the Most Favored Nations: How the WTO's Doha Round Negotiations Went Awry in July 2008*, BROOKINGS GLOBAL ECONOMY AND DEVELOPMENT (Dec. 5, 2008), http://www.brookings.edu/~media/Files/rc/articles/2008/1205_trade_blustein/1205_trade_blustein.pdf (narrating the unraveling of the July 2008 ministerial meeting).

457. *WTO to Hold 7th Ministerial Conference on 30 November–2 December 2009*, WORLD TRADE ORG. (May 26, 2009), http://www.wto.org/english/news_e/news09_e/gc_chair_stat_26may09_e.htm; Daniel Pruzin, *WTO Members Will Hold Fall Ministerial with Focus on Global Economy, Not Doha*, 26 Int'l Trade Rep. (BNA) No. 22, at 699 (May 28, 2009).

not held a Ministerial Conference since the December 2005 Hong Kong meeting.

Worse yet for Doha Round optimists, the announcement came with a disclaimer: the Round was not the purpose for the Conference. Rather than negotiate DDA items, the trade ministers would chat about the Conference theme, “The WTO, the Multilateral Trading System, and the Current Global Economic Environment.” To boot, in that “Environment,” the Chairman of the General Council, Ambassador Mario Matus of Chile, instructed them to chat without materialist extravagance or fanfare. In retrospect, the pessimists proved correct. The Institute for Agriculture and Trade Policy (IATP), headquartered in Minneapolis, said “This Ministerial [Conference] was so meaningless that many trade ministers actually left before the meeting was over.”⁴⁵⁸ The International Policy Network (IPN), based in London, called the Conference a “pointless exercise.”⁴⁵⁹ The *Financial Times* sarcastically remarked the Round was “deadlocked,” and the exclusion of it from the formal agenda was “the rough equivalent of holding the 1919 Versailles Conference without talking about the war.”⁴⁶⁰

As is well known, the DDA launched the Round in the Qatari capital, Doha, in November 2001. It is the ninth iteration of multilateral trade negotiations since the birth of the modern world trading system with the signing of the GATT on 30 October 1947. Coming immediately in the wake of the terrorist attacks of 11 September 2001, the launch was dramatic. In the subsequent eight years, most of the high drama in the Round took the form of incremental evolutionary developments toward a yet-elusive consensus among Members on agriculture and NAMA issues, and to a lesser degree on trade remedies. The discussion below chronicles and critiques this drama, as it were.

C. *The Challenge of Resurrection*

Metaphorically speaking, the key Doha Round challenge is resurrection. To many participants and observers, the Round is dead, and has been since at least July 2008 when a major Ministerial meeting collapsed. Another figurative phrase is the Round is “at least comatose if not dead.”⁴⁶¹ Less conclusively, the characterizations of the Round facing a “cold snap,” or being in “hibernation,” “semi-hibernation,” or a “deep freeze,” sometimes are used.⁴⁶² So also are the terms “deadlock,” “impasse,” “fatigue,”

458. Pruzin, *supra* note 78, at 1638 (quoting Anne Laure Constantin, IATP).

459. *Id.* (quoting Alec van Gelder, Trade Policy Analyst, IPN).

460. See Alan Beattie, *Retread Required*, FIN. TIMES, Dec. 1, 2009, at 7.

461. Yerkey, *supra* note 430, at 1279 (quoting Steven P. Schrage, Analyst, Center for Strategic and International Studies, Washington, D.C.).

462. See, e.g., Daniel Pruzin, *Hopes for Conclusion to Doha Round Talks Go into Hibernation in Early 2009*, 26 Int'l Trade Rep. (BNA) No. 4, at 107, 107–08 (Jan. 22, 2009); Daniel Pruzin, *USTR Schwab Sees Period of 'Quiet' Talks on Doha Round Negotiations in Early 2009*, 26 Int'l Trade Rep. (BNA) No. 2, at 37 (Jan. 8, 2009).

“frustration,” and “absence of trust and confidence.”⁴⁶³ Indubitably, the most antipathetic diagnosis and prescription is this: the Doha Round “has been dead for some time and the *corpse* is *putrefying*: so a burial, a wake, and some appropriate words of farewell” are in order.⁴⁶⁴

For its part, the United States—both under the Bush and Obama Administrations—has made it crystal clear that no deal is better than a bad deal reached simply for the sake of accord.⁴⁶⁵ For instance, in May 2010, when again confronted with the demand that to kick-start the Round, the United States must lay out hypothetical additional concessions it would make if Brazil, China, and India offered further concessions of their own, President Obama’s USTR, Ambassador Ron Kirk, said:

We’ve asked everyone to engage with us in honest, tough negotiations, [and] we’ll do that. *But the notion that we somehow have to prepay or advance pay in those negotiations is one we expressly reject.* [The United States has] paid a pretty heavy price to produce what are the results in agriculture without having the ability to balance that with what we might be able to achieve in services and [industrial tariffs]. *I will tell you unequivocally that we reject the notion that we now have to make another advance*

There are sometimes radically different perceptions of the same events (as fans of Akira Kurosawa’s 1951 classic movie, *Rashomon*, can well appreciate). At the World Economic Forum in Davos, Switzerland in January 2009, trade ministers met to discuss prospects for the Doha Round. WTO Director-General Pascal Lamy gave a rosy review to the WTO General Council, saying:

They continue to attach the highest priority to a successful conclusion of the Round and they recognized the major progress made in 2008 towards finalizing modalities, which they believe provides a sound basis for an early resolution of the remaining differences.

Pascal Lamy, Director Gen., World Trade Org., Report to General Council (Feb. 3, 2009), in “*Ministers Continue to Attach Highest Priority to the Round’s Conclusion*”—Lamy, WORLD TRADE ORG. (Feb. 3–4, 2009), http://www.wto.org/english/news_e/news09_e/tnc_chair_report_03_feb09_e.htm. The *Financial Times*, however, did not play the role of cheerleader:

The completion of the Doha trade round appeared as far away as ever at the week-end, when a gathering of trade ministers at the World Economic Forum in Davos descended into acrimony.

Normally, the closing session of the forum displays ritualistic expectation that the trade round will be completed in the coming year, but there was little such optimism in 2009.

Chris Giles, *Acrimony Dashes Doha Hopes*, FIN. TIMES, Feb. 1, 2009, at 2.

463. See Aritake, *supra* note 428, at 845; Daniel Pruzin, *WTO Doha Round Talks at Impasse, but Negotiators Commit to Press on*, 27 Int’l Trade Rep. (BNA) No. 22, at 810 (June 3, 2010).

464. Jean-Pierre Lehmann, *End the Charade in Talks on Global Trade*, FIN. TIMES, Aug. 25, 2011, at 8 (emphasis added).

465. See, e.g., Gary G. Yerkey, *U.S. Says No WTO Deal Possible Until Other Countries Improve Their Offers*, 26 Int’l Trade Rep. (BNA) No. 10, at 304 (Mar. 5, 2009); Gary G. Yerkey, *Clinton Says Chances of Reviving WTO Talks Still Unclear, U.S. Will Not Accept ‘Bad Deal,’* 26 Int’l Trade Rep. (BNA) No. 6, at 182 (Feb. 5, 2009) (quoting Secretary of State Hillary Clinton that the U.S. will not accept a “bad deal just for the sake of an agreement,” and observing this position is a long-standing one of the Bush Administration). Indeed, the *2009 Trade Policy Agenda and 2008 Annual Report* from the Obama Administration USTR shows no sense of urgency to obtain from Congress trade promotion (*i.e.*, fast track) authority, which it requires to negotiate an agreement that Congress would have to consider without amending.

*payment to have negotiations that we contemplated from the very beginning.*⁴⁶⁶

China replied with its own bluster: America was making “dangerous unilateral” demands that contributed to a “lack of good faith” in the talks and “could kill the Round.”⁴⁶⁷

If the Doha Round is dead or moribund, then what happens? Given the content of the negotiating texts, poverty will not be alleviated, nor will Islamic countries be more fully integrated into the world trading system. Unfortunately, even if WTO Members complete the Round, the same outcomes are likely: little dent will be made to reduce the suffering of the poor. Hence an opportunity to reduce vulnerability to Islamist extremism will have been lost. Why? Simply put, because of the hideously hacked-up terms and conditions in the negotiating texts that betray the initial purpose of the Round. What might have been accepted—at least by seasoned trade professionals—as an appropriate level of complexity required to forge consensus among diverse, selfish interests has crossed the boundary between a necessary evil and pure hell.⁴⁶⁸

466. Pruzin, *supra* note 463, at 810 (emphasis added).

467. *See id.* (quoting Chinese Vice Minister for Commerce Yi Xiaozhun).

468. No less an authority than Aaditya Mattoo, the lead economist in the developmental research group of the World Bank, and a former economic counselor in the Trade in Services Division of the WTO, declares that “Doha’s promise is very limited,” and argues against resurrecting the Round, because it is an “inconsequential enterprise.” Gary G. Yerkey, *WTO Negotiations Need to be ‘Repositioned’ to Address New Protectionism, Mattoo Says*, 26 Int’l Trade Rep. (BNA) No. 9, at 270 (Feb. 26, 2009). His solution is a change in the DDA to cover what he views as more significant issues than traditional trade protectionist devices (*e.g.*, tariff barriers) and subsidies, namely, exchange rate misalignment and climate change. *See Mattoo & Subramanian, supra* note 12, at 15–26 (2009). That solution is dubious, because if the WTO Members cannot come to a reasonably balanced bargain on territory that is familiar to them, *a fortiori* they will have greater difficulty doing so on a radically expanded agenda covering unfamiliar matters. In other words, while care must be taken to assure the DDA remains relevant, just as much care must be given to ensuring the agenda does not crumble under its own weight.

Interestingly, even the WTO Director-General, Pascal Lamy, concedes “elements of the Washington consensus . . . have failed, such as deregulation,” though understandably he warns against increased protectionism. Pascal Lamy, Director Gen., World Trade Org., Address to Japan Institute of International Affairs (Feb. 25, 2009), in *Lamy Underscores Doha Round Benefits for Japan*, WORLD TRADE ORG. (Feb. 25, 2009), http://www.wto.org/english/news_e/sppl_e/sppl116_e.htm. In his address to the WTO General Council on 29 April 2009 (in which he sought—successfully—reappointment as Director-General), Mr. Lamy ruled out expansion of the DDA to topics such as climate change, competition policy, energy, financial protectionism, food security, FDI, or labor rights. *See Daniel Pruzin, Lamy Rules Out Expanding Doha Agenda to Tackle Climate Change, Other Topics*, 26 Int’l Trade Rep. (BNA) No. 19, at 603 (May 7, 2009).