

DOHA ROUND BETRAYALS

*Raj Bhala**

I. THE SHIFT BACK TO THE OLD PARADIGM	149
A. <i>The Two Betrayals</i>	149
B. <i>Two Reasons for the Betrayals</i>	150
C. <i>Organization</i>	153
II. FIGHTING THE GREAT GLOBAL RECESSION	154
A. <i>No Perfect Outcome</i>	154
B. <i>The Argument</i>	156
III. FIVE REBUTTALS	159
A. <i>It Won't Happen</i>	159
B. <i>Rhetoric Outstrips Courage</i>	160
C. <i>The G-20 Versus the WTO</i>	166

* Rice Distinguished Professor, The University of Kansas, School of Law, Green Hall, 1535 West 13th Street, Lawrence, KS 66045-7577 U.S.A., tel. 785-864-9224, fax. 785-864-5054, www.law.ku.edu; Foreign Legal Consultant, Heenan Blaikie, LLP, Canada.

J.D., Harvard (1989); M.Sc., Oxford (1986); M.Sc., London School of Economics (1985); A.B., Duke (1984). Marshall Scholar (1984–1986). Member, Council on Foreign Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author of the monograph, *Trade, Development, and Social Justice* (Carolina Academic Press 2003); treatise, *Modern GATT Law* (Sweet & Maxwell 2005); textbook, *International Trade Law: Interdisciplinary Theory and Practice* (3d ed. 2008); and reference, *Dictionary of International Trade Law* (2008). Author of *Understanding Islamic Law (Sharī'a)* (LexisNexis, forthcoming 2011).

The author is indebted to Mr. David Day, Executive Symposium Editor, *Emory International Law Review* (“*EILR*”), for his invitation to participate in this Symposium and to him and his colleagues on the *EILR* for their excellent support and assistance.

This Article assumes familiarity with my four prior publications on the Doha Round, or 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 Doha Round in November 2001;
- (2) Chapters 3 and 4 of the *International Trade Law* textbook, referenced above, particularly concepts and terms in Doha Round negotiations, and the status of those talks through the July 2007 Draft Modalities Texts issued by Ambassadors Crawford Falconer (New Zealand) and Donald Stephenson (Canada), Chairmen of the Agriculture and Non-Agricultural Market Access negotiations, respectively;
- (3) *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT’L L. REV. 5–171 (2008), which covers the Doha Round through the collapse of the July 2008 Ministerial meeting;
- (4) *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT’L L.J. 1–125 (2009), which analyzes the Doha Round from the July 2008 collapse through July 2009.

This Article is drawn in part from the *Texas International Law Journal* piece. All errors are the responsibility of the author.

D.	<i>Bank Capital Adequacy and Trade Finance Matter</i>	166
E.	<i>Back to the Original Purposes</i>	169
IV.	WHAT HAPPENED TO FIGHTING POVERTY?	170
A.	<i>Not About the Middle “D”</i>	170
B.	<i>From Generosity Back to Reciprocity</i>	172
V.	WHAT HAPPENED TO WINNING MUSLIM HEARTS AND MINDS?	179
A.	<i>Neglect and Need</i>	179
B.	<i>The Frightening Link</i>	182

I. THE SHIFT BACK TO THE OLD PARADIGM

A. *The Two Betrayals*

The Doha Round was supposed to be about the grandest themes of contemporary times, namely, wealth and poverty and Islam and globalization, both of which are inextricably linked to war and peace.¹ Thus, in a commercial sense, it is said the Round is “intended to improve global market access by cutting massive farm subsidies in rich countries and import tariffs in poorer ones”² That characterization 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.

Yet, the Doha Round has betrayed the two essential purposes for which it was launched in the Qatari capital in November 2001: fighting poverty and thereby fighting Islamic extremism. Paragraph 2 of the Ministerial Declaration that launched the Doha Development Agenda (“DDA”) lays them out:

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 Declaration³

Paragraph 2 explicitly refers to fighting poverty. The Paragraph implicitly connotes fighting Islamic extremism.

That is, the italicized language plainly refers to “the promotion of economic development and the alleviation of poverty.”⁴ Naturally, neither Muslims nor Islamic countries are singled out by name. Paragraph 2 refers to “all our

¹ Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT’L L.J. 1, 5 (2009).

² Tripti Lahiri, *New Delhi “Breakthrough” Sets Restart of Doha Round Ag. NAMA Talks for Sept. 14*, 26 Int’l Trade Rep. (BNA) 1191 (2009).

³ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm [hereinafter DDA] (emphasis added).

⁴ *Id.*

peoples.”⁵ That is both morally and legally correct. All people of all faiths are to be treated consistently with the principle of equal human dignity. All members of the World Trade Organization (“WTO”) have equal sovereign standing in the multilateral trading system.⁶ But, commenced in the immediate aftermath of the evil terrorist attacks of September 11, 2001, there is absolutely no doubt that the hearts and minds of Muslim populations and their governments were of utmost concern to WTO negotiators in Doha.⁷

B. Two Reasons for the Betrayals

So, why has the Doha Round betrayed its two clear, powerful purposes? There are two simple reasons. *First, the WTO members and Secretariat have failed to exercise statesman-like leadership.* Clinging to the truism that the WTO is a member-driven organization, the Secretariat has participated in a paradigmatic shift of the Round away from its origins. When it was launched, the members themselves widely appreciated that trade liberalization was needed to spur development in a post-9/11 context in which extremism is wrongly perceived by some disaffected, impoverished, and thus marginalized peoples as an alternative to the sinful temptations of global capitalism.⁸ In the intervening years, the members and Secretariat have done little to keep the Round from falling back into the historical paradigm of all previous multilateral trade negotiations under the General Agreement on Tariffs and Trade (“GATT”), namely, reciprocity.⁹ Indeed, the members and Secretariat have hastened the reversion by claiming the Round is necessary to fight global economic recession.¹⁰

Second, the WTO members have succumbed so completely to the pursuit of their commercial self-interest that the Round has become a monstrous mishmash of minutiae. Unfortunately, in the Doha Round, the WTO members, and chiefly among them the United States, the European Union (“EU”), Brazil, China, and India, have used legal details to advance their narrow agendas.¹¹

⁵ *Id.*

⁶ World Trade Org., 10 Common Misunderstandings about the WTO, http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m00_e.htm (last visited Mar. 15, 2010).

⁷ See generally PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS—CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADING SYSTEM 1–17 (2009) (describing the post-9/11 climate surrounding the Doha Ministerial Conference of November 2001).

⁸ *Id.* at 4.

⁹ Bhala, *supra* note 1, at 4.

¹⁰ See *infra* Part II.

¹¹ *Id.*

Since ancient times, city-states and countries have negotiated out of self-interest. But, 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),¹² not Samuel Huntington, in *The Clash of Civilizations* (1996),¹³ was right. Thus, the International Food Policy Research Institute (“IFPRI”), a prominent non-governmental organization (“NGO”), released a study on November 30, 2009, the second day of the Seventh WTO Ministerial Conference, concluding that:

The 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 market access and reduced trade costs.¹⁴

Notably, 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.¹⁵ 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.*¹⁶

To be sure, and to be fair, from time to time during these intervening years, some members and the Secretariat have recalled the two essential purposes. Speeches are made. Newspaper editorials are published. Blogging occurs. In all such instances, the sincerity of the proponent must be presumed. Thus, no

¹² FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

¹³ SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

¹⁴ Laura MacInnis, *World Economy Has Outgrown Doha, WTO Meet Told*, REUTERS, Dec. 1, 2009, <http://www.reuters.com/article/idUSGEE5B00G3> (emphasis added).

¹⁵ See RAJ BHALA, *Least Developed Country*, in *DICTIONARY OF INTERNATIONAL TRADE LAW* 279 (2008); Daniel Pruzin & Gary G. Yerkey, *U.S. Sought to Water Down Proposal for “Stock-Taking” Meeting on Doha*, 26 Int’l Trade Rep. (BNA) 1673 (2009) (discussing remarks by Mari Pangestu, Minister of Trade, Indonesia); see also World Trade Org., *Understanding the WTO, Developing Countries*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Apr. 14, 2010) (listing information on developing and least developed countries).

¹⁶ See, e.g., World Trade Org., *Seventh Ministerial Conference, Chairman’s Summary*, Dec. 2, 2009, available at <http://www.iatp.org/tradeobservatory/library.cfm?refID=107014>. See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944) (explaining Social Darwinism).

one member or Secretariat official is to be blamed, much less judged, for causing the Doha Round to go off track.

Rather, the paradigmatic change in the Round from fighting poverty and Islamic extremism to promoting market access and commercial self-interest is a collective failure. Likewise, there is no one moment to pin down as the critical turning point. Instead, the shift occurred during and through the slow accretion of negotiating texts. Between August 2004 and December 2008, a variety of texts on agriculture, non-agricultural market access (“NAMA”), rules (i.e. trade remedies), and services were issued, discussed, and debated.¹⁷ In August 2004, an initial, so-called “*Framework Agreement*” was issued. The December 2008 texts—or, in WTO-speak, “draft modalities agreements”—are the most recent output from the members and Secretariat.¹⁸ Over time, the mind-numbing details in these draft modalities agreements piled up, and their prose become ever-more turgid. Concomitantly, the sense of frustration, even depression, steadily worsened to anyone reading those texts line-by-line with a view to spotting in them new trade measures to advance the original purposes of the Round.¹⁹

¹⁷ See, e.g., Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, WTO Doc. TN/AG/W/4/Rev.4 (Dec. 6, 2008), available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf.

¹⁸ *Id.*; Negotiating Group on Market Access, *Fourth Revision of Draft Modalities for Non-Agricultural Market Access*, WTO Doc. TN/MA/W/103/Rev.3 (Dec. 6, 2008), available at http://www.wto.org/english/tratop_e/markacc_e/namachairtxt_dec08_e.pdf.

Chairman Falconer also issued two documents covering issues on which major disputes remained, offering possible compromise solutions: (1) on Sensitive Products, see Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture Sensitive Products: Designation*, WTO Doc. TN/AG/W/5 (Dec. 6, 2008), available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_c_e.pdf and (2) on SSMS, see Special Session of the Committee on Agriculture, *Revised Draft Modalities for Agriculture Special Safeguard Mechanism*, WTO Doc. TN/AG/W/7 (Dec. 6, 2008), available at http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_d_e.pdf.

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”) and countervailing duties (“CVDs”) and fishing subsidies. See Negotiating Group on Rules, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, WTO Doc. TN/RL/W/236 (Dec. 19, 2008), available at http://www.wto.org/english/tratop_e/rulesneg_e/rules_dec08_e.doc. He did so about one week after issuance of the agriculture and NAMA modalities texts. *Id.* The state of the services talks are discussed below.

For a detailed analysis of all the December 2008 texts, see Bhala, *supra* note 1, at 1–125.

¹⁹ See Bhala, *supra* note 1, at 4 (describing the Doha Round’s original purpose as “trade liberalization to spur development in a post-9/11 context in which extremism is wrongly perceived by some disaffected, marginalized peoples as an alternative to the sinful temptations of global capitalism”).

C. Organization

Part II discusses the paradigm shift in the Doha Round from the immediate post-9/11 focus on poverty and Islam back to the GATT emphasis on market access and reciprocity. The shift occurred amidst the “Great Global Recession,” which itself was triggered by exogenous, non-trade variables, particularly the American sub-prime mortgage crisis and September 2008 collapse of prestigious Wall Street investment firms. Part III explains why the argument that the Round is needed to help reinvigorate the global economy is largely poppycock. Part IV analyzes one of the original themes of the Round, namely, development. Part V examines another key founding purpose, fighting extremism by integrating Islamic countries more fully into the world trading system.

Much of the discussion below relates directly or indirectly to the December 2008 draft modalities agreements. If there is to be a conclusion of the Doha Round, even one that fails to live up to the original purposes of the Round, then the conditions set out in these texts will be the setting for it.²⁰ That is not

²⁰ See Pascal Lamy, Director-General, World Trade Org., Statement to the Trade Negotiations Committee, World Trade Organization (Dec. 17, 2008), available at 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 the appointment of a new Minister for Commerce and Industry—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 Lahiri, *supra* note 2, at 1191; Serena Tarling & George Parker, *New Delhi Ready to Resume Doha Round of World Trade Talks*, FIN. TIMES (London), June 23, 2009, at 6.

Likewise, the Group of 20 (“G-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) 840 (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. 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 Obama sought. 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) 1673 (Dec. 3, 2009); Lahiri, *supra* note 2, at 1191; see also Jonathan Lynn, *Intensified Doha Talks to Resume this Month*, REUTERS, Sept. 4, 2009, <http://www.reuters.com/article/idUSTRE58310Q20090904> (noting that key trade ministers—albeit representing just thirty-nine of the 153 WTO 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 United States Trade Representative 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) 841 (June 25, 2009) (quoting Minister Sharma as saying the United States Trade Representative agreed to build on the existing texts); Daniel Pruzin, *New WTO Ag Chair Vows*

to say WTO members will complete the Round based on each and every proposal in them. To the contrary, the draft texts almost surely will undergo revisions that vary from the insubstantial to the immense, depending on the topic.²¹ While Brazil, China, and India argue the draft modalities agreements ought not to be altered in any material way, the United States insists on significant changes.²² Some members, such as South Africa, have rejected them.²³

The point is that the December 2008 texts—particularly on farm trade and NAMA—embody a final judgment WTO 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 completion of the Doha Round. A “no” answer means the Round fails, at least in the sense of completion via a single undertaking (where nothing is agreed upon until everything is agreed upon, thus requiring horizontal trade-offs across different sectors and topics), which is the approach of all previous multilateral trade rounds.²⁴

II. FIGHTING THE GREAT GLOBAL RECESSION

A. *No Perfect Outcome*

In the United States, both the Bush and Obama Administrations have made it crystal clear that no deal is better than a bad deal reached simply for the sake

Fast Action to Revive Doha Round Farm Trade Talks, 26 Int'l Trade Rep. (BNA) 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) 180–81 (Feb. 5, 2009) (reporting that the trade ministers of Brazil and Switzerland regard the December 2008 texts as the basis for any Doha Round deal).

²¹ See Gary G. Yerkey, *U.S. Cautions Lamy Against Pushing for Early Restart of WTO Trade Talks*, 26 Int'l Trade Rep. (BNA) 404 (Mar. 26, 2009).

²² See Daniel Pruzin, *WTO Ministerial Ends with a Whimper; Members to Review Doha Talks in Early 2010*, 26 Int'l Trade Rep. (BNA) 1638 (Dec. 3, 2009).

²³ *Id.*

²⁴ As of the end of the Seventh Ministerial Conference in Geneva, held from November 30 through December 2, 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, and trade liberalization for environmental goods and services.

The United States 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, <http://www.reuters.com/article/idUSTRE5B229G20091203>. Each of these topics, including the U.S. position calling for reciprocity, is explored more fully below.

of accord.²⁵ Suppose the Doha Round is dead or moribund. Then, at least two repercussions are certain: (1) poverty will not be alleviated through multilateral trade liberalization and (2) Islamic countries will not be integrated more fully into the world trading system.

These consequences also are likely if the WTO members deliberately bury the Round for good. Unfortunately, even if WTO members complete the Doha Round, neither of the two happier, converse possibilities is guaranteed. If the final bargain—the resurrection—looks anything like the negotiating texts,²⁶ then that resurrection is quite unlikely to: (1) alleviate the suffering of the poor or (2) strengthen moderate Muslim countries. That is because of the hideously hacked up terms and conditions in the draft modalities agreements.²⁷ What might have been accepted, at least by seasoned trade professionals, is an appropriate level of complexity required to forge consensus among diverse interests that has crossed the boundary between a necessary evil and pure hell.²⁸

²⁵ 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) 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) 182 (Feb. 5, 2009) (quoting Secretary of State Hillary Clinton that the United States 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 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. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, *2009 TRADE POLICY AGENDA AND 2008 ANNUAL REPORT, THE PRESIDENT'S TRADE POLICY AGENDA* (2009), http://www.ustr.gov/sites/default/files/uploads/reports/2009/asset_upload_file810_15401.pdf.

²⁶ See Bhala, *supra* note 1, at 9–11.

²⁷ For a thorough discussion of terms and conditions of the draft agreements, see *id.* at 13–109.

²⁸ 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) 270–71 (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 Aaditya Mattoo & Arvind Subramanian, *From Doha to the Next Bretton Woods—A New Multilateral Trade Agenda*, FOREIGN AFF., Jan.–Feb. 2009, at 15, 15–26. 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-General, World Trade Org., Address before the Japan Institute of International Affairs (Feb. 25, 2009), http://www.wto.org/english/news_e/sppl_e/sppl116_e.htm. In his address to the WTO General Council on April 29, 2009 (in which he successfully sought reappointment as Director-

B. *The Argument*

Accordingly, a low-expectation, best-case scenario argument about completing the Doha Round is a technical, and technically correct, one: completion would mean most members would bind their

- (1) most-favored nation (“MFN”) tariff rates under Article II:1(b) of GATT at lower levels than their pre-Doha rates²⁹ and
- (2) service sector commitments under Article XVI:1 of the General Agreement on Trade in Services (“GATS”) on more open terms than their pre-Doha obligations, and in particular narrow the gap between their actual and bound commitments.³⁰

General), Mr. Lamy ruled out expansion of the DDA to topics such as climate change, competition policy, energy, financial protectionism, food security, foreign direct investment (“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) 603 (May 7, 2009).

²⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1,700, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT is reprinted in a variety of sources, including RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE—DOCUMENTS SUPPLEMENT*, 113–85 (3d ed. 2008).

³⁰ *See, e.g.*, Gary G. Yerkey, *Obama Administration Still Considering Whether to Participate in WTO Services Talks*, 26 Int’l Trade Rep. (BNA) 236–37 (Feb. 19, 2009); Jonathan Lynn, *WTO Sector Deals May Be a Step Too Far for Doha*, REUTERS, Dec. 11 2008, <http://www.reuters.com/article/idUUSTRE4BA2WV20081211> (noting the view that “negotiators should concentrate on locking in present levels of trade liberalization”); *see also* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Org., Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]. The General Agreement on Trade in Services (“GATS”) is reprinted in a variety of sources, including BHALA, *supra* note 29, at 489–522.

The basic goal of Doha Round service negotiations is to improve and clarify rules and regulations on services trade, with a view to opening service markets while at the same time giving poor countries flexibility. Each WTO member has the right to decide what sectors to open, which to keep closed, the degree of opening (if any), and whether to impose limits on national treatment, restrictions on foreign ownership of local service providers, or other domestic regulations (such as qualification requirements, technical standards, and consumer health and safety rules). There is no legal obligation under GATS to privatize any service, nor does GATS outlaw government or private monopolies. Thus, the negotiations sometimes are said to be an “a la carte approach.” *See* World Trade Org., Briefing Notes—Services, http://www.wto.org/english/tratop_e/dda_e/status_e/serv_e.htm (last visited Apr. 14, 2010). These notes were posted in connection with the Seventh Ministerial Conference held in Geneva from November 2 to December 1, 2009.

Service sector commitments would cover major areas such as air courier (express delivery), education, finance, telecommunications, and transportation, across all four ways in which services are traded across borders, including mode 4, the temporary migration of professionals. *See* GATS, *supra*, art. 2(d). Developed countries are keen to obtain more market access in energy, express delivery, financial, and telecom services. Some developing countries are eager to see greater opportunities for their medical and professional service and tourism service providers and seek liberalization from developed countries on mode 4. *See* World Trade Org., Briefing Notes—Services, *supra*.

Service trade liberalization negotiations occur through a request-offer approach. A WTO member transmits a request to another or other members stating what market access opportunities it seeks. The

recipient member or members then reply by presenting an initial offer. Then, the bargaining begins over the degree of market access that might be granted and any reciprocal requests in exchange for such access. Note, then, that the request-offer approach may be conducted on a bilateral or plurilateral basis. *See id.*

Following a “signaling” or “pledging” conference on July 26, 2008, which focused on possible new market access offers, there was no movement in services negotiations, though the Chairman of the Services Negotiations, Ambassador Fernando de Mateo, held occasional informal meetings. WTO members felt that any final offers on market access for services would have to await (1) a breakthrough in agriculture and NAMA negotiations and (2) completion of talks on commitments about domestic regulation of service providers under GATS Article VI.

As the global economic recession deepened in late 2008 and early-to-mid 2009, many WTO members were reluctant to liberalize their service sectors, just as they were with respect to their agriculture and industrial sectors. China and India contemplated withdrawing pledges they had made in July 2008 to liberalize banking and asset management. Some WTO members inferred from the 1997–1999 Asian financial crisis that liberalization of the services trade pursuant to GATS would render them even more vulnerable to banking problems. Supporting their argument was the non-governmental organization (“NGO”) Public Citizen. Its Global Trade Watch Section pointed to specific provisions in GATS that were problematic:

- GATS Article VI(c) and (e) prevents a member from establishing a new regulation that would roll-back any previous trade-liberalizing commitment that member had made, and limits the ability of the member to oversee its financial services sector.
- GATS Article XVI bars a member from restricting the size of a banking, insurance, or other financial service firm.
- GATS Article XVI(c) and (e) forbid a member from setting up a firewall in banking and insurance firms that prevent those firms from using deposits for risky investments.
- Any domestic services regulations under GATS are subject to challenge before a WTO adjudicatory panel or the Appellate Body, which are required to rule against them if they are more trade restrictive than necessary—a determination that ultimately is subjective.
- GATS (along with the 1997 Telecommunications and Information Technology Agreements) restrict the ability of a member to implement new licensing or qualification standards, even though addressing the global economic recession may require heightened standards.

See Daniel Pruzin, Services Talks Turn Focus Away from Doha, WTO Members Seek Analyses of 20 Sectors, 26 Int’l Trade Rep. (BNA) 506–07 (Apr. 16, 2009).

However, other WTO members said liberalization was not a root cause of either the earlier Asian crisis or the contemporary global economic slump. They urged the correct lesson from the Asian crisis was not to liberalize but to strengthen domestic regulation first or simultaneously. Further, several members felt the multi-billion dollar banking bailouts of American and European banks amounted to an unfair subsidy, hence services liberalization would favor those banks. *See Daniel Pruzin, WTO Services Chair Fixes Dates for Next Round of Market Access Talks, 26 Int’l Trade Rep. (BNA) 206–07 (Feb. 12, 2009); Daniel Pruzin, Doha Negotiating Chairs Easing into New Talks in Bid to Save Round, 26 Int’l Trade Rep. (BNA) 145–46, Jan. 29, 2009.*

By April 2009, it was clear the schism meant the Doha Round services negotiations were “likely to remain in a state of hibernation for some time to come.” Daniel Pruzin, *Services Talks Turn Focus Away from Doha; WTO Members Seek Analysis of 20 Sectors, supra*, at 506–07. The members retreated from any substantive market-access talks and asked the WTO Secretariat to produce analyses of regulatory and policy issues in twenty service sectors, including audiovisual, distribution, financial, legal, and telecommunications, plus the cross-border movement of professionals. The WTO last did such analyses in 1999. *See id.*

The administration of Barack H. Obama developed a new services negotiating strategy, which it announced in October 2009. The Administration sought a services trade agreement under the auspices of the Asia-Pacific Economic Cooperation (“APEC”) forum. The twenty-one APEC countries then could take their deal to the WTO, in the hopes it might be the basis for a Doha Round agreement. *See Gary G. Yerkey, U.S. Seeking Services Trade Agreement in APEC to Take to Broader WTO Membership, 26 Int’l Trade Rep. (BNA)*

That is, completion of the Round would create an international legal duty for members not to implement trade measures more protectionist than they now do or could impose.³¹

This argument—that a Doha Round deal would limit the extent to which WTO members could boost applied rates, simply by virtue of a single undertaking to cut bound rates—is poignant in the climate of a global economic slump—the Great Recession. It is repeated ad nauseum by WTO Director-General Pascal Lamy.³² That repetition has been a critical impetus behind the shift in the paradigm away from the original focus of the Round on poverty and Islam to market access and reciprocity.³³

The argument is reinforced by the statistic that if every WTO 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.³⁴ In turn, exporters would be about 100% worse off than before.³⁵ Thus, the argument continues, avoid a rerun of the Great Depression, during which protectionist, beggar-thy-neighbor trade measures and competitive devaluations exacerbated

1380 (Oct. 15, 2009). In turn, ideally, a services agreement would provide robust new market-access opportunities for American service exporters that would balance concessions the United States, European Union (“EU”), and other developed countries would make on market-access for imported agricultural and industrial goods. Such an agreement is critical for them because the services sector (as of 2008) accounts for 70% of the average gross domestic product (“GDP”) and employment among the Organization for Economic Cooperation and Development (“OECD”) members (which, of course, are generally developed countries) and 80% of U.S. GDP. *See id.* Additionally, the administration did not reject out-of-hand proposals from the private sector to conclude a services agreement outside of the Doha Round, as through bilateral or plurilateral deals with the EU and Japan, even if that meant certain prominent service-providing countries, like Brazil, China, and India, did not join. *See* Gary G. Yerkey, *Negotiating Services Trade Pact Outside of WTO Not Feasible, Lamy Says*, 26 Int’l Trade Rep. (BNA) 1415 (Oct. 22, 2009). For the United States, the key to a plurilateral deal under the auspices of the Doha Round would be inclusion not only of countries with major services markets, but also of important sectors, such as distribution and express delivery services; energy and environmental services; and information, communications, and technology services. *See* Gary G. Yerkey, *U.S. Looking into Possible Side Agreements on Trade in Services to Help Spur WTO Talks*, 26 Int’l Trade Rep. (BNA) 1605 (Nov. 26, 2009).

³¹ The argument appears in several venues, including speeches by WTO Director-General Pascal Lamy, which are posted on the WTO website, <http://www.wto.org> and in op-ed pieces such as Dan Horowitz, *The Remedy of More Trade*, 15 INT’L TRADE LAW & REG. 35–39 (2009).

³² *See, e.g.*, Pascal Lamy, Director-General, World Trade Org., Speech to the German Engineering Federation (VDMA) Summit in Berlin: Doha Success Can Yield Double Dividend of Global Stimulus and Structural Reform (Oct. 13, 2009), *available at* http://www.wto.org/english/news_e/sppl_e/sppl137_e.htm.

³³ *See* Bhala, *supra* note 1, at 6.

³⁴ *See* Pascal Lamy, Director-General, World Trade Org., Speech to the WTO Public Forum of 2009: G20 Must Now “Walk the Walk” on Doha (Sept. 28, 2009), *available at* http://www.wto.org/english/news_e/sppl_e/sppl136_e.htm.

³⁵ *Id.*

the severity and length of 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.

III. FIVE REBUTTALS

A. *It Won't Happen*

The above 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.³⁶ In November 2009, the European Commission (“EC”) published its annual report in which it monitors protectionist measures around the world.³⁷ The report lists 223 “potentially trade-restrictive measures” implemented by the forty major trading partners of the EU between October 2008 and October 2009.³⁸ (The greatest number of such measures were put up by Russia (48), which is not a WTO member, Argentina (35), the United States (16), and China (13)).³⁹ But, the report explicitly stops short of labeling them “protectionist.”⁴⁰ Moreover, the report credits 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

³⁶ European Comm’n, *Fifth Report on Potentially Trade Restrictive Measures* (Nov. 2009), available at http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145270.pdf [hereinafter EC Report on Trade Restrictive Measures].

³⁷ *Id.*

³⁸ *Id.* at 6; Bengt Ljung, *Global War of Protectionism Resulting from Economic Crisis Avoided, EC Says*, 26 Int’l Trade Rep. (BNA) 1542 (Nov. 12, 2009).

³⁹ Ljung, *supra* note 38, at 1542; EC Report on Trade Restrictive Measures, *supra* note 36, at 16.

⁴⁰ EC Report on Trade Restrictive Measures, *supra* note 36, at 6.

schemes).⁴¹ Most importantly, the EC report declares the world has avoided the worst-case scenario of tit-for-tat protectionism.⁴²

Shortly after the EU issued its report, the WTO itself conceded the point.⁴³ 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 Members have resisted the allure of protectionism.”⁴⁴ Indeed, all of the trade-restricting or trade-distorting measures that members implemented since October 2008 collectively affected a maximum of 1% of world trade and were concentrated in a few sectors (particularly agriculture, iron, steel, and to some degree in electronics, footwear, and textiles and apparel (“T&A”)).⁴⁵ 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.”⁴⁶ In other words, the argument made by the WTO and Director-General—namely, the Doha Round is an essential tool to keeping trade open and fighting the global economic recession—was retracted by its very proponents. The lasting impression is that they grasp at any expedient assertion to exhort WTO members to finish the Round, rather than focus on the original purposes of the Round and the extent to which those purposes are fulfilled in negotiating texts.

B. Rhetoric Outstrips Courage

Second, political rhetoric outstrips political courage. Leaders of the Group of 20 (“G-20”) nations (an informal talk shop of nineteen industrialized and big emerging market countries plus the EU, with the International Monetary Fund (“IMF”) and World Bank as ex-officio members⁴⁷) champion this

⁴¹ *Id.*

⁴² *Id.*

⁴³ Jonathan Lynn, *WTO Urges Non-Discrimination as Crisis Ends*, REUTERS, Nov. 19, 2009, available at <http://www.reuters.com/article/idUSLJ379965>.

⁴⁴ *Id.*

⁴⁵ See Daniel Pruzin, *WTO Chief Says Protectionism Surge Has Been Avoided, but Vigilance Needed*, 26 Int'l Trade Rep. (BNA) 1606 (Nov. 26, 2009).

⁴⁶ Lynn, *supra* note 43.

⁴⁷ *Pope Urges World Leaders to Stabilize Markets Without Excluding Poor*, CATHOLIC NEWS SERVICE, Mar. 31, 2009, <http://www.catholicnews.com/data/stories/cns/0901475.html>.

The G-20 was created in response to the 1997–1998 Asian financial crisis and first met in December 1999 in Berlin. *FACTBOX—What is the G20?*, REUTERS, Mar. 30, 2009, <http://www.reuters.com/article/idUSLU96805420090330>. Accounting for 90% of the world gross national product (“GNP”), 80% of world trade, and two-thirds of the world population, the members are Argentina, Australia, Brazil, Canada, China, the EU, France, Germany, India, Indonesia, Italy, Japan, Saudi Arabia, South Korea, Mexico, Russia, South

argument.⁴⁸ 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.⁴⁹ Yet, as Professor Sally provocatively observes:

The G20 is unlikely to be more than a *chat forum given to non-binding pledges*. Even in the improbable event of a Doha conclusion any time 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*.⁵⁰

It is difficult to disagree.

G-20 leaders have issued a plethora of commitments to resist protectionism and complete the Doha Round on what they promise would be ambitious, balanced terms.⁵¹ They toss in a preferred target date, if they can agree to one, or default to an ambiguous future period.⁵² The anodyne phrase “ambitious and balanced” is commonly used among politicians and trade negotiators when pressed to characterize their expectations for the Round.⁵³ Notably, the phrase does not appear in the Ministerial Declaration that launched the Round, nor does the word “ambitious.”⁵⁴ The word “balanced” appears three times, in Paragraphs 2, 11, and 22 of that Declaration.⁵⁵ In Paragraph 2, in a sentence that highlights the importance of poor country interests, it is remarked that “enhanced market access [and] balanced rules” are also important.⁵⁶ In Paragraph 11, the Work Program for the Round is characterized as “broad and balanced.”⁵⁷ In Paragraph 22, it is said that any deal on trade and investment

Africa, Turkey, the United Kingdom, and the United States *Id.* The G-20 is a forum for discussing global economic governance and stability, and resolving cross-border problems. *See id.*

⁴⁸ *See id.*

⁴⁹ Razeen Sally, *The Quest for a Global Solution Is Misguided*, FIN. TIMES (London), Mar. 19, 2009, at 9. *See generally* RAZEEN SALLY, NEW FRONTIERS IN FREE TRADE: GLOBALIZATION’S FUTURE AND ASIA’S RISING ROLE (2008) (critiquing global economic organizations and governance).

⁵⁰ *Id.* at 9 (emphasis added).

⁵¹ *See, e.g., Kirk Meets with Japanese Agriculture Minister*, 26 Int’l Trade Rep. (BNA) 1397 (Oct. 15, 2009).

⁵² *See* Tripti Lahiri, *APEC Leaders Call for Completion of Doha Round in 2010, Urge Flexibility*, 26 Int’l Trade Rep. (BNA) 1580 (Nov. 19, 2009).

⁵³ *See id.* It 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 Round in 2010—following the November 2009 summit of the Asia Pacific Economic Cooperation (“APEC”) forum hosted by Singapore. *Id.*

⁵⁴ *See* DDA, *supra* note 3.

⁵⁵ *Id.* ¶¶ 2, 11, 22.

⁵⁶ *Id.* ¶ 2.

⁵⁷ *Id.* ¶ 11.

“should reflect in a balanced manner the interests of home and host countries,” following which the interests of poor countries are highlighted.⁵⁸

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 Doha Round.⁵⁹ 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 Round deal is at least as good, and preferably better, than what its country conceded. Certainly, in a world of *realpolitik* bargaining, developing and less developed countries could well apply the same meanings to these terms. For the United States in particular, under the administration of President Barack 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 was unthinkable.⁶⁰ Those ways were unsustainable, as the global economic recession revealed.

In any event, the G-20 has made pledges for an ambitious, balanced, and timely conclusion of the Doha Round at its November 2008 Summit in Washington, D.C., at its April 2009 Summit in London, and at its September 2009 Summit in Pittsburgh.⁶¹ But, the summits have failed to kick-start the

⁵⁸ *Id.* ¶ 22.

⁵⁹ See Gary G. Yerkey, *G-20 Leaders Seek (Again) to Revive WTO Talks But Success Far From Certain*, 26 Int'l Trade Rep. (BNA) 1279 (Sept. 24, 2009).

⁶⁰ *See id.*

⁶¹ See Guy Dinmore & Marco Pasqua, *Trade Promise Lies at Heart of Communiqué*, FIN. TIMES (London), Mar. 30, 2009, at 5; Daniel Pruzin, *Indian Minister Affirms Plans to Host G-20 Trade Meeting on WTO Doha Round*, 26 Int'l Trade Rep. (BNA) 874 (July 2, 2009) (reporting on efforts in the run-up to the Pittsburgh Summit to draft a positive final communiqué); Yerkey, *supra* note 59 (quoting from the draft joint communiqué of the Pittsburgh Summit); . The April 2, 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.*” Communiqué, G-20, *The Global Plan for Recovery and Reform* ¶ 23 (Apr. 2, 2009) (emphasis added). 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

Round.⁶² Worse yet, after the November 2008 Summit, fourteen of the twenty countries raised trade barriers in one manner or another.⁶³ By September 2009,

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, <http://www.reuters.com/article/idUSTR5806TZ2009092>.

The ideas of an “ambitious and balanced conclusion” based on existing progress, including modalities, are not new. Referring to 2010 three times 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 United States 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. 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) 1310 (Oct. 1, 2009). Led by the Deputy National Security Advisor for International Economic Affairs, Michael Froman, the United States thought substance, not artificial timelines, should govern. See *id.* That argument is, of course, correct. However undisciplined by deadlines, talks can drag on, and the impression conveyed can be one that the United States is either ambivalent or reluctant to lead. In that regard, roughly 100 developing countries issued a joint statement during the Pittsburgh Summit supporting the conclusion of the Doha Round by 2010, so long as developed nations showed “true engagement, flexibility, and political will.” *Id.*

⁶² See Amy Tsui, *Avoiding Protectionism Key to Reversing Economic Downturn, Former USTR Asserts*, 26 Int’l Trade Rep. (BNA) 359 (Mar. 12, 2009).

⁶³ *Id.* 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. Diana I. Gregg, *World Bank Takes 17 Nations in G-20 to Task for Implementing Trade-Restricting Measures*, 26 Int’l Trade Rep. (BNA) 406 (Mar. 26, 2009). 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: Several governments had subsidized their domestic auto industry, with the amount summing to \$48 billion. The United States 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.

Id.

seventeen of the twenty G-20 states had violated the pledge they retook at the April 2009 Summit—namely, not to resort to protectionism to fight the global economic recession.⁶⁴ 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.⁶⁵ Trade remedies (that is, AD, CVD, and safeguard measures) typically strike only a small percentage of commerce. For example, between the first quarters of 2008 and 2009, trade remedies affected only 0.4% of the value of imports into the United States and the EU.⁶⁶ The proposed remedies in that period, if fully implemented, would affect just 0.6% and 1.8% of imports into China and India, respectively.⁶⁷ 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 an imposition of a

Note, however, many WTO members—including India and the United States—rejected the characterization of WTO Director-General Pascal Lamy that there had been “significant slippage” toward protectionism since the advent of the crisis. Daniel Pruzin, *U.S. Challenges WTO Chief Lamy’s Assertion of “Significant” Slippage Toward Protectionism*, 26 Int’l Trade Rep. (BNA) 505 (Apr. 16, 2009). To the contrary, they urged, WTO disciplines had helped prevent a descent into protectionism. *Id.* Moreover, the world was a different place—far more interdependent through global supply chains and manufacturing processes—than in the 1930s, when the United States passed the notorious *Smoot-Hawley Act* and other countries responded with protectionist and beggar-thy-neighbor policies. *Id.*

Additionally, not all WTO Members raised barriers following the onset of the global economic crisis. G-20 countries such as Brazil, China, India, Indonesia, Mexico, and Saudi Arabia, as well as Russia (which is not a WTO Member), all reduced import duties, fees, and surcharges, and removed non-tariff barriers on a range of products. Daniel Pruzin, *Agencies Say G-20 Countries Have Avoided “Widespread Resort” to Trade Protectionism*, 26 Int’l Trade Rep. (BNA) 1235 (Sept. 17, 2009). China even lessened restrictions on some services. *Id.* Thus, suggesting worldwide descent into protectionism is akin to using fear-mongering to push WTO members to complete the Round. *See id.*

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 actions that were trade restrictive, seven of which were by the United States. *See* Diana I. Gregg, *World Bank Says More Trade Restrictions Imposed by G-20 Countries Since Summit*, 26 Int’l Trade Rep. (BNA) 569 (Apr. 30, 2009). Yet, several of the actions, including the American imposition of a 10% duty on Canadian softwood lumber, and the Section 421 safeguard investigation of Chinese tires, were pursuant to normal trade remedy procedures. *See id.* There is a certain automaticity built into these procedures, and inferring that they are taken in response to the global economic crisis, and in defiance of G-20 pledges, is a bit of a stretch.

⁶⁴ *See* Yerkey, *supra* note 59, at 1279. 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. *Id.*

⁶⁵ *See* Alan Beattie, *Barriers Fail to Dent Global Trade, Says World Bank*, FIN. TIMES (London), Oct. 21, 2009, at 5.

⁶⁶ *Id.*

⁶⁷ *Id.*

remedial measure in 50% of the cases as of 2009, which is a decrease from the 80–90% figure of 2008.⁶⁸

Nevertheless, the point is that what the 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, who produced a communication in May 2009 urging the entire WTO membership to back the G-20 pledge to refrain from any new trade barriers through 2010.⁶⁹ 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.⁷⁰ To the extent the G-20 (and indeed, all other) leaders sincerely seek to conclude the Round with alacrity, then their representatives would do more than wrap up unresolved technical matters. These representatives would also engage seriously in horizontal discussions that cut-across sectors.⁷¹

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. 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, 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 negotiations such as the Free Trade Area of

⁶⁸ *Id.*

⁶⁹ See Daniel Pruzin, *WTO Members Fighting Protectionism Gain Support in Push for Trade Barrier Standstill*, 26 Int'l Trade Rep. (BNA) 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. *Id.* They had the support of Israel, Lichtenstein, South Korea, Macedonia, Thailand, and Ukraine, as well as of least-developed countries (for which Tanzania spoke). *Id.* Australia, China, and the United States all welcomed the support for the G-20 standstill pledge. *Id.*

⁷⁰ See Daniel Pruzin, *WTO Members Highlight "Mismatch" in Doha Ambitions, U.S. Cites Mixed Progress*, 26 Int'l Trade Rep. (BNA) 1023 (July 30, 2009).

A related mismatch exists between the ambitions of WTO Director-General Pascal Lamy and the chairs of the negotiating groups. In summer 2009, the Director-General pushed the chairs to issue revised draft modalities texts. *Id.* 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.*

⁷¹ See Daniel Pruzin, *WTO Chief Cites Need to Broaden Doha Talks Beyond Agriculture, NAMA*, 26 Int'l Trade Rep. (BNA) 988–89 (July 23, 2009).

the Americas.⁷² With the Round going nowhere, and with pressure from the Brazilian business community, Brazil said it would seek a pact between the Southern Common Market (“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.⁷³

C. *The G-20 Versus the WTO*

Third, the argument leads to a problem of forum, which has cascaded into a problem of puissance. The G-20 is not a forum for negotiating trade deals. That mandate rests with the WTO.⁷⁴

The WTO Director-General was not invited to the November 2008 summit.⁷⁵ When he is asked to join a meeting such as 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.⁷⁶ The more the G-20 grabs headlines on trade policy, the more it vaults itself into the role of the puppeteer, and the more marginal the WTO becomes, transforming the Director-General into a G-20 marionette. A cynic might say that is precisely what some G-20 leaders prefer to happen.

D. *Bank Capital Adequacy and Trade Finance Matter*

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 WTO members cut their applied rates unilaterally. For

⁷² See Ed Taylor, *Brazil Losing Hope on Doha Round, to Concentrate on MERCOSUR–EU Trade Pact*, 26 Int'l Trade Rep. (BNA) 1059 (Aug. 6, 2009).

⁷³ *Id.*

⁷⁴ See Daniel Pruzin & Gary G. Yerkey, *Bilateral Talks on Possible WTO Deal Will Continue for Months, USTR Says*, 26 Int'l Trade Rep. (BNA) 1671 (Dec. 3, 2009).

⁷⁵ See Yoko Nishikawa, *WTO Urges G20 to Uphold Pledge to Fight Protectionism*, REUTERS, Feb. 25, 2009, <http://www.reuters.com/article/idUSTRE51O1TN20090225>.

⁷⁶ 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 Communiqué*, WALES ONLINE NEWS, Apr. 2, 2009, <http://www.walesonline.co.uk/news/wales-news/2009/04/02/g20-six-pledge-communiqué-91466-23299550/>. By at least one indicator, adherence was dubious. In spring 2009, the EU reintroduced 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 Murray Griffin, *Cairns Ministers Seek Rapid Re-engagement on Doha: USTR Urges Openness to New Ideas*, 26 Int'l Trade Rep. (BNA) 772 (June 11, 2009).

example, on industrial products, the average worldwide applied rate fell from 26% in 1986 to 8.8% in 2007.⁷⁷ Thus, as of 2008, the average amount of “water” (the difference between bound and actually applied tariff rates) was three-fold: Countries could raise duties by three times before hitting their bound ceiling level.⁷⁸ 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 percent is marginally significant. A trebling from 20 to 60 percent imposes major commercial hardships on producer-exporters. In brief, the gain from binding duty rates hinges on the Member and merchandise at issue.”⁷⁹

Central to this fourth rebuttal 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 and performance guarantees, and the global market for trade finance is about \$10 trillion annually.⁸⁰ 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 has fallen even more than the decline in the availability of trade finance.⁸¹ Nevertheless, to improve trade credit flows, leaders at the April 2009 G-20 Summit in London agreed to set up a two-year, \$250 billion Global Trade Liquidity Program (“GTLP”).⁸² 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.⁸³

⁷⁷ See *Barriers to Entry*, ECONOMIST, Dec. 20, 2008, at 121.

⁷⁸ See *Fare Well, Free Trade*, ECONOMIST, Dec. 20, 2008, at 15.

⁷⁹ See Bhala, *supra* note 1, at 8.

⁸⁰ See Daniel Pruzin, *Global Downturn Drives down Demand for Trade Financing, Funding Stabilizes*, 26 Int'l Trade Rep. (BNA) 1237 (Sept. 17, 2009).

⁸¹ According to World Bank President Robert Zoellick, trade finance (i.e. the higher cost of it) accounted for no more than 10–15% of the overall contraction in global trade following the onset of the global economic recession. Alan Beattie, *Global Trade Sees Fastest Rise for Five Years*, FIN. TIMES (London), Sept. 25, 2009, <http://www.ft.com/cms/s/0/851cfa18-a9f8-11de-a3ce-00144feabdc0.html>. Those figures, while hardly inconsequential, are debated among observers. See *id.*

⁸² See Pruzin, *supra* note 80, at 1237.

⁸³ *Id.*

Trade finance is just as important to reigniting trade as is vigilance against protectionism. 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. The key to unlocking trade finance, to “un-stick” lending, is reform of the banking system. Banks are the purveyors of trade 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.⁸⁴ They also are correct to re-examine international bank capital adequacy standards—the so-called “*Basle II Framework*,” which was finalized in June 2004 by the Basle Committee On Banking Supervision.⁸⁵ The *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.⁸⁶ The *Framework* sets higher capital requirements for riskier credit exposures.⁸⁷ Longer-term exposures are riskier; thus, capital-set-aside rules are more stringent in proportion with the maturity length of an exposure.⁸⁸ The *Framework* imposes a one-year maturity floor for all lending facilities.⁸⁹ In doing so, it fails to recognize that short-term trade finance is self-liquidating, almost always with a maturity of less than one year.⁹⁰ Posting large amounts of capital for a year is irrational. The disproportionate capital requirement results in a diminution of funds available for trade finance (because the funds are tied up to meet capital requirements),

⁸⁴ 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 restart trade finance. See Peggy Hollinger, *Lamy in Warning over Bank Bail-Outs*, FIN. TIMES (London), July 6, 2009, at 4.

⁸⁵ BASEL COMM. ON BANKING SUPERVISION, BASEL II: INT’L CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK (2004) [hereinafter BASEL II], available at <http://www.bis.org/publ/bcbs107.htm>.

⁸⁶ See Daniel Pruzin, *Experts Cite Basel Capital Accord as Barrier to New Trade Financing*, 26 Int’l Trade Rep. (BNA) 1272, 1274 (Sept. 24, 2009); Alan Beattie, *Doubts Remain over Resilience of Trade Finance System*, FIN. TIMES (London), Sept. 23, 2009, <http://www.ft.com/cms/s/5f969f04-a86a-11de-9242-00144feabdc0.html>. For an analysis of the *Basel I Framework*, see RAJ BHALA, PERSPECTIVES ON RISK-BASED CAPITAL: A GUIDE TO THE NEW RISK-BASED CAPITAL ADEQUACY RULES (1989). For an analysis of the transition to value at risk (“VAR”) models of capital adequacy and Basel II, see Raj Bhalal, *Applying Equilibrium Theory and the FICAS Model: A Case Study of Capital Adequacy and Currency Trading*, 41 ST. LOUIS U. L.J. 125 (1996).

⁸⁷ BASEL II, *supra* note 85, pt. 2.

⁸⁸ *Id.*

⁸⁹ *Id.* pt. 2, para. 45.

⁹⁰ See MONETARY & ECON. DEP’T., BANK FOR INT’L SETTLEMENTS, CENTRAL BANK SURVEY OF FOREIGN EXCHANGE MARKET ACTIVITY IN APRIL 1992, at 19 (1993) [hereinafter CENTRAL BANK SURVEY].

an increase in the costs of this finance (to cover the costs of the capital set aside), or both.

E. Back to the Original Purposes

Fifth, and perhaps most importantly, 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 the 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 vituperative of al-Qaeda, the Taliban, and their misguided sympathizers. She appreciates that the bad guys are not only evil, but also lousy economists. Certainly, in November 2001, some Members anticipated that trade liberalization would assist in fighting a future, then-unseen recession.⁹¹ But, to catapult that anticipation into the key argument for finishing the Round is to risk betraying the original intent for the Round.

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 Doha Round.⁹² In May 2009, the WTO General Council announced a Ministerial Conference to be held in Geneva from November 30 to December 2, 2009.⁹³ That proclamation was a de facto admission the WTO had operated in violation of its own rules. The Ministerial Conference was two years overdue, given that the Agreement Establishing the World Trade

⁹¹ See Press Release, World Trade Org., Czech Republic: October 2001 (Oct. 19, 2001), <http://www.wto.org> (search “Czech Republic”; then follow “Trade Policy Review: Czech Republic 2001” hyperlink).

⁹² See PAUL BLUSTEIN, MISADVENTURES OF THE MOST FAVORED NATIONS—CLASHING EGOS, INFLATED AMBITIONS, AND THE GREAT SHAMBLES OF THE WORLD TRADING SYSTEM 281–85 (2009); 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 ECON. & DEV., Dec. 5, 2008, available at http://www.brookings.edu/~media/Files/rc/articles/2008/1205_trade_blustein/1205_trade_blustein.pdf.

⁹³ See World Trade Org., WTO to Hold 7th Ministerial Conference on November 30 to December 2, 2009, May 26, 2009, <http://www.wto.org> (search “7th Ministerial Conference”; then follow “WTO to hold 7th Ministerial Conference” hyperlink) [hereinafter 7th Ministerial Conference]; Daniel Pruzin, *WTO Members Will Hold Fall Ministerial with Focus on Global Economy, Not Doha*, 26 Int’l Trade Rep. (BNA) 699 (May 28, 2009).

Organization requires a Ministerial Conference to be held every two years and the last Ministerial Conference was in Hong Kong in December 2005.⁹⁴

Worse yet for Doha Round optimists, the announcement came with a disclaimer: The Round was not the purpose for the Conference.⁹⁵ 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.”⁹⁶ 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.⁹⁷

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.”⁹⁸ The International Policy Network (“IPN”), based in London, called the Conference a “pointless exercise.”⁹⁹ The *Financial Times* sarcastically remarked that 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.”¹⁰⁰

IV. WHAT HAPPENED TO FIGHTING POVERTY?

A. *Not About the Middle “D”*

Is the Doha Round truly about the middle “D” in the acronym DDA? That is, is the Round about development, specifically about fighting poverty in the third world? The question became all the more acute during the Round. As trade negotiators fiddled with and quibbled over excruciating details, the number of chronically hungry people in the world rose from 848 million in 2003–2005 to nearly 1 billion (specifically, 963 million) in 2008.¹⁰¹ The

⁹⁴ See World Trade Org., The Sixth WTO Ministerial Conference, <http://www.wto.org> (search “6th Ministerial Conference”; then follow “Hong Kong 6th Ministerial” hyperlink).

⁹⁵ 7th Ministerial Conference, *supra* note 93.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Daniel Pruzin, *WTO Ministerial Ends with a Whimper; Members to Review Doha Talks in Early 2010*, 26 Int’l Trade Rep. (BNA) 1638 (Dec. 3, 2009).

⁹⁹ *Id.*

¹⁰⁰ Alan Beattie, *Retread Required*, FIN. TIMES (London), Dec. 1, 2009, at 7.

¹⁰¹ Javier Blas, *Almost 1bn People Now Going Hungry*, FIN. TIMES (London), Dec. 10, 2008, at 8.

United Nations Millennium Development Goal (“MDG”) of halving world hunger between 1990 and 2015 was further off than ever before.¹⁰²

“No” is the response to the above question. Why not, as the United States urges in the first trade agenda report of the Obama Administration (the *2009 Trade Policy Agenda and 2008 Annual Report*), demand a correction of the imbalance in the Doha Round negotiations between (1) a known, calculable value of America’s concessions (including cuts to farm subsidies) and (2) an unknown value of new market access opportunities from other countries for America’s farmers, ranchers, manufacturers, and service providers, which is unclear because of special flexibilities?¹⁰³ Why not, as the United States Trade Representative (“USTR”) professes, focus on winning for the American people market-opening concessions from foreign governments and make it clear that “no deal is better than a bad deal?”¹⁰⁴ Why not, as some in Congress demand, amend American law to require the USTR to stick strictly to reciprocity, forbidding it to agree to a tariff concession unless it secures the elimination of foreign tariff and non-tariff barriers?¹⁰⁵ Why not, as the American business lobby insists, demand a balance among agriculture, NAMA, and services

¹⁰² For an overview of the Millennium Development Goals, see BHALA, *supra* note 15, at 296–97 (2008).

¹⁰³ See Gary G. Yerkey, *U.S. Expected to Come Under Pressure at WTO Ministerial over Doha Trade Talks*, 26 Int’l Trade Rep. (BNA) 1604 (Nov. 26, 2009) (reporting on the confirmation hearing of Michael Punke for U.S. Ambassador to the WTO before the Senate Finance Committee, at which he said the concessions made by the United States were “very clear,” but “what’s unclear is what we’re going to receive in return”); Doug Palmer, *U.S. Warns “Imbalance” in Doha Talks Needs Fixing*, REUTERS, Mar. 2, 2009, <http://www.reuters.com/article/idUSTRE5215RU20090302>; see also Daniel Pruzin, *Officials Downbeat After U.S., India, Brazil Talks in Paris on Doha Round*, 26 Int’l Trade Rep. (BNA) 1381 (Oct. 15, 2009) (reporting that Brazil and India insisted the United States “start showing its cards,” while the United States demanded “greater clarity in regards to the developing country flexibilities”; and quoting an unnamed trade diplomat as saying “I don’t think they’re [the Doha Round talks among the three countries] going anywhere”); Daniel Pruzin, *G-20 Trade Diplomats See Positive Outcome from Summit, but Business Groups Skeptical*, 26 Int’l Trade Rep. (BNA) 1311 (Oct. 1, 2009) (paraphrasing acting U.S. Ambassador to the WTO, David Shark, that “the United States knows what concessions it will have to make on agriculture and industrial tariffs under the draft texts now on the table” and quoting him as saying it is “still not sufficiently clear what the others will be doing”); Lahiri, *supra* note 2, at 1191; Gary G. Yerkey, *U.S. Says No WTO Deal Possible Until Other Countries Improve Their Offers*, 26 Int’l Trade Rep. (BNA) 304 (Mar. 5, 2009).

¹⁰⁴ See Gary G. Yerkey, *U.S. Still Needs More Time to Decide Next Steps in WTO Trade Talks, Punke Says*, 26 Int’l Trade Rep. (BNA) 1529 (Nov. 12, 2009) (reporting on the confirmation hearings of Michael Punke for U.S. Ambassador to the WTO before the Senate Finance Committee).

¹⁰⁵ A legislative proposal—the Reciprocal Market Access Act—was introduced to Congress in October 2009 to make this change. Amy Tsui, *Brown-Slaughter Bill Would Require USTR to Eliminate Barriers Before Cutting Tariffs*, 26 Int’l Trade Rep. (BNA) 1386 (Oct. 15, 2009). The co-sponsors were Senator Sherrod Brown (Democrat-Ohio) and Representative Louise Slaughter (Democrat-New York), hence the proposal also is known as the Brown-Slaughter Act. *Id.* The Act also would establish authority to enforce a reciprocal bargain by raising American tariffs if a foreign government reneged on its promise to cut its tariff or non-tariff barriers. *Id.*

opportunities and greater ambition in all three areas, as well as strong trade remedy rules, rather than allow other WTO Members to focus on the farm sector?¹⁰⁶ Why not, as American agricultural interests intone, obtain commercially meaningful market access for U.S. farm products, especially in light of the severe concessions the United States is being asked to make in respect of domestic support and export competition?¹⁰⁷ Why not, then, reject any attempt to reap an “early harvest” of separate agreements on particular issues, rather than await a comprehensive single undertaking?¹⁰⁸

B. From Generosity Back to Reciprocity

Indubitably, each of these questions is reasonable on the assumption that the paradigm for the Doha Round is reciprocity, not generosity. From the official American perspective, reciprocity is—and should be—the paradigm. The American argument boils down to an assertion that the difficulties in the Round are due to a standoff.¹⁰⁹ On the one side is the United States, which rightly demands greater market access in developing countries for its agricultural and industrial products. On the other side are big emerging countries, particularly Brazil, China, and India, which wrongly resist these demands and thereby fail to shoulder greater responsibilities in the world trading system, despite their professed desire to be major players in this system. Thus, when in November 2009 former Deputy USTR Peter Allgeier suggested a three-pronged compromise to break the impasse—(1) Brazil, China, and India forgo any exceptions to agreed upon NAMA tariff cuts and any right to make no cuts on Special Products; (2) the United States abandon its zeroing methodology in calculating dumping margins; and (3) the EU drop its proposal to extend the higher degree of protection afforded in the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) Article 23 to wine and spirits to a broad range of other

¹⁰⁶ See Gary G. Yerkey, *U.S. Business, Farm Groups Urge Obama to Reassess Approach to WTO Trade Talks*, 26 Int'l Trade Rep. (BNA) 308–09 (Mar. 5, 2009) (discussing a letter from U.S. business and agriculture organizations making recommendations to President Obama concerning the WTO negotiations); Amy Tsui, *NAM Issues Economic Recovery Agenda to Congress Calling for Open Markets*, 26 Int'l Trade Rep. (BNA) 314–15 (Mar. 5, 2009) (“calling on the 111th Congress to open international markets through more free trade agreements”).

¹⁰⁷ See Yerkey, *supra* note 104, at 1529 (reporting on the confirmation hearings of the Senate Finance Committee).

¹⁰⁸ See Gary G. Yerkey, *USTR Nominee Rejects “Early Harvest” of Agreements in WTO Trade Negotiations*, 26 Int'l Trade Rep. (BNA) 372–73 (Mar. 19, 2009) (discussing the rejection of the idea to work towards smaller agreements instead of an overall agreement in the WTO negotiations).

¹⁰⁹ See Yerkey, *supra* note 103, at 1604 (comment from U.S. Ambassador to the WTO, Peter Allgeier).

geographically indicated items¹¹⁰—it was a reasonable idea. But, it was an idea firmly rooted in a paradigm of reciprocity between rich and poor countries not generosity of the rich toward the poor.

In May 2009, the above-posed questions prompted the newly appointed USTR Ambassador Ron Kirk, to advocate in favor of a suggestion originating from Canada: Negotiate direct, bilateral tariff concessions on an individual, line-by-line basis first, using the December 2008 draft modalities texts as reference points for minimum commitments, and thereafter conclude negotiations on the language of the texts themselves.¹¹¹ This alternative, top-up approach would allow the United States to deal directly with major developing countries like Brazil, China, and India to ensure that the United States had a clear indication of what its agricultural and industrial product exporters could expect in terms of new market access opportunities before giving its final judgment on a Doha Round deal.

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

Thus, the USTR had no choice but to propose that during the remainder of 2009, WTO Members would prepare and circulate draft schedules of tariff concessions and in 2010 commence negotiations on tariff lines of keen interest. Those talks could wrap up in 2010,

¹¹⁰ *Id.*

¹¹¹ See Daniel Pruzin, *Lamy Cites Need for Two-Track Approach for Concluding WTO’s Doha Round Talks*, 26 Int’l Trade Rep. (BNA) 696 (May 28, 2009) (discussing Ron Kirk’s support of WTO Director General Pascal Lamy’s suggestion for a two-track approach towards negotiations); Daniel Pruzin, *Kirk Sees Need for New Approach to Doha, Indicates Retreat from Scheduling Proposal*, 26 Int’l Trade Rep. (BNA) 632 (May 14, 2009) (discussing Kirk’s support for the Canadian model).

and a final consensus on the texts would follow shortly thereafter. For the USTR, the texts were too vague to accept, hence waiting for post-modalities tariff schedules made no sense. To buttress this proposal, the Obama Administration widened the context and “upped the ante.” What was at stake was nothing short of a new world economic order in which imbalances in the global economy—not merely those in the Doha Round texts—needed correcting. President Barack H. Obama bluntly stated in September 2009, on the eve of the G-20 Summit in Pittsburgh, “We can’t go back to the era where the Chinese or Germans or other countries just are selling everything to us, we’re taking out a bunch of credit card debt or home equity loans, but we’re not selling anything to them.”¹¹²

The statement itself is economically correct. Serious deficits run by some countries, surpluses by others, and financing from the latter to the former is neither healthy nor sustainable in the long run. But, the statement is irrelevant to the original aim of the Doha Round—namely, that the Round be a key tool for development to wean countries and peoples away from radicalism and integrate them into the global economy. The statement forgets this aim, and establishes post hoc a new goal for the Round, namely, structural adjustment. From an American perspective, U.S. insistence on knowing the full value of concessions developing countries will make and how they will use their flexibilities before signing off on any deal is sensible because the new American-established goal is to reduce its chronic trade deficit and concomitantly reduce the chronic trade surpluses of the likes of China.

As intimated, the obvious answer to this line of argument—understandable as it may be from an American perspective—is that the Doha Round never was supposed to produce a perfectly balanced outcome. The middle “D” meant that there would be a preferential option for the poor. That is why India insisted on the right to self-select farm goods as “special” after modalities were agreed at the time each country prepared its Doha Round tariff schedule. That also is why China insisted that self-designation implies a developing country does not have to publicize the list of goods it plans to shield from agreed-upon cuts until after consensus has been reached on the overall modalities texts.¹¹³ And, that is why South Africa argued it cannot do more to open up its market to foreign competition, given that it made concessions during the Uruguay Round that

¹¹² Patrick Wintour, *Gordon Brown’s Plan for Chinese to Put World Economy Back in Balance*, GUARDIAN (London), Sept. 22, 2009, at 4.

¹¹³ Daniel Pruzin, *Trade Ministers Meeting Calls for New Push to Move Doha Round Before September G-20*, 26 Int’l Trade Rep. (BNA) 872 (July 2, 2009).

went far beyond commitments made of less developed countries, and why it found the December 2008 draft texts on agriculture and NAMA unacceptable—namely, they failed to address the “developmental imbalance” between rich and poor countries.¹¹⁴

Unfortunately, as the third world began to take the middle “D” seriously, claims came from the first world that it was a mistake to use that middle “D.” Doing so was a teaser, falsely raising expectations among poor countries. “Why give hope to the poor?” was the cold, sarcastic, rhetorical question hard-headed trade realists whispered to each other. Thus, Argentina remarked (in respect of the December 2008 draft NAMA text), “[i]t’s a developed country agenda,” because the focus is on market access issues in which rich countries are interested.¹¹⁵ Argentina also criticized the United States for flip-flopping, as early on in the Round the United States agreed to modalities that included flexibilities for developing countries.¹¹⁶

That was not the only answer to the American effort to flip the order of events and put bilateral tariff schedules before the modalities texts. First, Switzerland explained that the August 2004 *Framework Agreement* contemplated bilateral negotiations on specific tariff concessions, but only after modalities agreements were finalized.¹¹⁷ Second, not all developed countries agreed with the United States. Notably, the EU opposed the approach suggested by the USTR.¹¹⁸ Commencing bilateral negotiations before modalities were agreed could mean a rewriting, even unraveling, of the December 2008 texts, i.e., a loss of years of hard work. Third, and perhaps most importantly, developing countries—including the entire G-20, led by Brazil, China, Egypt (speaking for many African countries), and India—were steadfast against it.¹¹⁹ They suspected the United States wanted to engage them in bilateral talks because the United States would have greater leverage dealing with them individually and could even exercise a divide-and-rule strategy.

¹¹⁴ Gary G. Yerkey, *Finishing WTO Talks by End of 2010 “Very Unlikely,” South African Minister Says*, 26 Int’l Trade Rep. (BNA) 1313 (Oct. 1, 2010) (quoting Rob Davies, South African Trade Minister).

¹¹⁵ See Daniel Pruzin, *NAMA Chair Outlines “Gradual” Approach for Restarting Doha Industrial Tariffs*, 26 Int’l Trade Rep. (BNA) 181–82 (Feb. 5, 2009) (quoting Alfredo Dumont, Argentina’s WTO Ambassador).

¹¹⁶ Pruzin, *Lamy Cites Need for Two-Track Approach for Concluding WTO’s Doha Round Talks*, *supra* note 111, at 696.

¹¹⁷ Pruzin, *Kirk Sees Need for New Approach to Doha, Indicates Retreat from Scheduling*, *supra* note 111, at 632.

¹¹⁸ *Id.*

¹¹⁹ Pruzin, *Lamy Cites Need for Two-Track Approach for Concluding WTO’s Doha Round Talks*, *supra* note 111, at 696.

Thus, the USTR had little choice but to beat a hasty retreat, with one valuable consolation. The Director-General, Pascal Lamy, said that perhaps WTO members could consider a two-track approach.¹²⁰ Under it, the members would continue discussions on modalities, while contemporaneously engaging in bilateral negotiations on cutting farm tariffs and subsidies, reducing trade barriers to industrial products, and clarifying the scope of flexibilities for poor countries.¹²¹ That is, the members would develop so-called “templates” whereby they would get data from each other with a view to scheduling draft commitments based on modalities formulas and would then work on those modalities formulas. There was irony in this consolation.¹²² Eight years into the Doha Round, there was no clear consensus, much less unanimity, on whether to proceed solely with modalities, commence bilaterals and scheduling, or do both at once.¹²³ The end result, which was clear by September 2009, was to do both at the same time.¹²⁴

This two-track approach is exactly the path some WTO members began to tread with the United States. To be sure, the compromise language at the July 2009 summit of G-8 leaders (i.e., from Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States) in L’Aquila, Italy, which also was agreed to by Australia, Brazil, China, India, Indonesia, South Korea, Mexico, and South Africa, was a fudge: “We regard enhancing the transparency and understanding of the [Doha Round] negotiating results to date as a necessary means to facilitate the conclusion of an agreement.”¹²⁵ Supposedly, this language means the United States is entitled to ascertain how poor countries intend to use their flexibilities under Doha Round texts and whether they plan to join a sectoral agreement before agreeing to those texts.¹²⁶ Yet, poor countries insist they need not bargain over the precise products for which they seek special or sensitive designation.¹²⁷ Self-designation of those products might allow them to tell the United States what they will do, as a

¹²⁰ *Id.*

¹²¹ World Trade Org., Lamy Calls for Intensified Text-Based Doha Negotiations to Bridge Gaps, Oct. 23, 2009, http://www.wto.org/english/news_e/news09_e/tnc_dg_stat_23oct09_e.htm.

¹²² *Id.*

¹²³ Doug Palmer & Darren Ennis, *G20 Leaders Pledge Quick Action on Doha Deal: Draft*, REUTERS, Sept. 25, 2009, <http://www.reuters.com/article/idustre58o5mo20090925>.

¹²⁴ See World Trade Org., Chair Consults on ‘Energizing’ Farm Talks for Coming Months, Sept. 16, 2009, http://www.wto.org/english/news_e/news09_e/agng_16sep09_e.htm (discussing the two-track system).

¹²⁵ Daniel Pruzin, *G-8-Plus Declaration Sets Stage for Battle over Developing Country Flexibilities in Doha*, 26 Int’l Trade Rep. (BNA) 950 (July 16, 2009).

¹²⁶ *Id.*

¹²⁷ *Id.*

matter of information. However, it does not give the United States a right of consultation, or negotiation, over what the products will be, or whether they will join a sectoral agreement.

Not surprisingly, given the fuzzy compromise language and increasingly entrenched positions, the two-track approach met with mixed results.¹²⁸ On the margins of the Seventh WTO Ministerial Conference in November to December 2009 in Geneva, the United States declared it had “good” bilateral consultations with India.¹²⁹ But, China was unwilling to engage in bilateral talks with the United States, particularly on lowering its industrial tariffs on chemicals, electronic goods, and machinery.¹³⁰ Further, China accused the United States of behaving in a protectionist manner and unfairly subsidizing its farmers to the detriment of the market access interests of Chinese farmers.¹³¹ The Chinese Vice Agriculture Minister, Niu Dan, said he had no interest in talking with the United States at the Conference, and added, rather rudely: “I don’t have time.”¹³² As for Brazil, it revealed that the United States had presented it with a list in early October of 3,000 industrial tariff lines covering, *inter alia*, chemicals, machinery, and medical equipment for which the United States demanded tariff cuts beyond the general NAMA formula reductions.¹³³ The United States neither identified for Brazil precisely how many lines on which it ought to impose extra cuts nor indicated the priority lines.¹³⁴ Brazil balked at the demand and accused the United States of making it as a tactic to delay completion of the Doha Round.¹³⁵ Brazil also reminded the United States that it and other developing countries already had made significant market access concessions, thus the United States had no basis for asking for more.¹³⁶

The USTR retreat (if it could be called that) did not mean the United States, or developed countries generally, had a new-found appreciation for the middle “D” in the DDA. Once bargaining began in the Doha Round, especially in earnest after the October 2005 Portman Proposal from the United States,¹³⁷ the

¹²⁸ See Daniel Pruzin & Gary G. Yerkey, *Bilateral Talks on Possible WTO Deal Will Continue for Months*, *USTR Says*, 26 Int’l Trade Rep. (BNA) 1671 (Dec. 3, 2009).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* ch. 4 (3d ed. 2008).

major powers settled into a familiar theme: protecting their interests. Put differently, no satisfactory response has emerged to the observation long-held by Kamal Nath, India's former Minister of Commerce and Industry: for India (and other poor countries), lives are at stake, whereas for America (and other rich countries), the only issue is commerce.¹³⁸

As a final point about the middle "D," it is important for developing countries—especially major ones—to assume responsibility for fostering a coherent world trade regime in which the poverty-alleviating effects of trade may be felt. The United States rightly points out that South–South trade must increase, i.e., poor countries must lift themselves out of poverty in part by trading more with each other than they do currently.¹³⁹ To be sure, the United States has its own interest at stake: Many American businesses operate in multiple developing countries and would benefit from reduced tariff and non-tariff barriers that inhibit these businesses from supplying goods (either for captive consumption or the merchant market) to other developing countries.¹⁴⁰ That said, as long as nations such as Brazil, China, and India inhibit real trade flows amongst themselves and other developing countries, they block the evolution of a coherent trade regime between countries that experience different levels of development.¹⁴¹ In this regard, the new South–South trade agreement, launched in June 2004 under the auspices of the United Nations Conference and Trade and Development and its so-called "São Paulo Round,"

¹³⁸ See Charles Giles, *Acrimony Dashes Doha Hopes*, FIN. TIMES (London), Feb. 2, 2009, at 2 (paraphrasing Minister Nath). Following the sweeping victory of the Congress Party in India's general election in May 2009, and the post-election cabinet reshuffle, Mr. Nath was reassigned as Minister of Road Transport and Highways. His replacement as Minister of Commerce and Industry was Anand Sharma. Speculation in the Indian media about the shift was that Mr. Sharma might prove more diplomatic in trade negotiations than Mr. Nath, given that Mr. Sharma had experience at the Ministry of External Affairs. See *Kamal Nath's New Portfolio Takes Industry by Surprise*, THAI INDIAN NEWS, May 28, 2009, http://www.thaindian.com/newsportal/business/kamal-naths-new-portfolio-takes-industry-by-surprise_100198104.html. A different conjecture was that Mr. Nath was needed to deal with India's infamous transportation infrastructure problems. See G. Seetharaman, *For Infra Firms, Nath's Just the Man*, DAILY NEWS & ANALYSIS (DNA), June 4, 2009, http://www.dnaindia.com/money/report_for-infra-firms-nath-s-just-the-man_1261748.

¹³⁹ See Amy Tsui, *USTR Seeks Coherent World Trade Regime in WTO, Trade Among Developing Nations*, 26 Int'l Trade Rep. (BNA) 73 (Jan. 15, 2009).

¹⁴⁰ See John Boudreau & Brandon Bailey, *Doing Business in China Getting Tougher for U.S. Companies*, SAN JOSE MERCURY NEWS, Mar. 28, 2010, available at http://www.mercurynews.com/business/ci_14766613?nclck_check=1.

¹⁴¹ Relatedly, the large amount of tariff revenues collected by one developing country on imports from another developing country bespeaks the reliance of these countries on customs duties for government revenue. Thus, openness to South–South trade is linked to reform of domestic tax regimes in poor countries, with a view to enhancing income and sales tax collection systems. Such reform, in turn, often depends on a serious anti-corruption campaign, as well as enhanced administrative systems for recording and keeping track of assets.

which was announced (ironically) during the Seventh WTO Ministerial Conference in November to December 2009, is promising.¹⁴²

V. WHAT HAPPENED TO WINNING MUSLIM HEARTS AND MINDS?

A. *Neglect and Need*

One of the extraordinary features of the December 2008 draft modalities texts is their silence about the Islamic world.¹⁴³ For all the categories these texts identify among WTO Members (such as recently acceded members, or RAMs, and small, vulnerable economies, or SVEs), one cohort they do not identify is Muslim countries. Indeed, that is true of all major Doha Round documents.¹⁴⁴

Consider cotton subsidies. From the Uyghur people of China to many residents of the Cotton Four countries (Benin, Burkina Faso, Chad, and Mali), the farmers are predominantly Muslim.¹⁴⁵ Adjustment costs to the United States and other non-Muslim developed countries of cotton market access and subsidy concessions might be more than offset by economic, political, and national security gains from healthier, wealthier cotton farmers in western China and sub-Saharan Africa.

Similar arguments can be made in other agricultural and industrial sectors. A key reason for meeting in Doha in the aftermath of the September 11, 2001 attacks, and pushing through the DDA, was to show that evil extremists not only are un-Islamic, but also are hideously lousy economists.¹⁴⁶ The world—aside from the extremists—shares an interest in cross-border commercial intercourse and, therefore, in the concomitant necessary conditions of peace

¹⁴² For a summary of this pact, see Daniel Pruzin, *Developing Country Ministers Hail “South–South” Trade Breakthrough*, 26 Int’l Trade Rep. (BNA) 1642 (Dec. 3, 2009); Daniel Pruzin, *Developing Country Trade Initiatives Set to Take Center Stage at WTO Ministerial*, 26 Int’l Trade Rep. (BNA) 1567 (Nov. 19, 2009); Daniel Pruzin, *South-South Pact Hits Resistance, Core Group to Proceed with Interim Deal*, 26 Int’l Trade Rep. (BNA) 1602 (Nov. 26, 2009).

¹⁴³ See *supra* note 18 and accompanying text.

¹⁴⁴ See, e.g., Special Session of the Committee on Agriculture, *supra* note 17; Negotiating Group on Market Access, *supra* note 18.

¹⁴⁵ See William Foreman, *Armed Mobs Spread Ethnic Strife in China’s West*, GUARDIAN (London), July 7, 2009, <http://www.guardian.co.uk/world/feedarticle/8595617>.

¹⁴⁶ See William A. Lovett, *Bargaining Challenges and Collective Interests: Implementing the Doha Round*, 17 AM. U. INT’L. L. REV. 951, 955–59 (2002) (describing the September 11 attacks and security concerns in general as encouraging countries to engage in trade negotiations).

and security.¹⁴⁷ War impedes trade. As trade declines, so do job and income growth. These points hold true for Muslims as for Catholics, Protestants, Jews, Buddhists, Sikhs, and so on.

To be sure—aside from particular issues arising under the *Shari‘a* (Islamic Law), such as forbidden products (alcohol, pork, and pornography), forbidden banking transactions (those that involve *riba*, which loosely translated is interest), and forbidden insurance policies (those that involve *gharar*, which means uncertainty)—there is no such thing as “Muslim trade law.”¹⁴⁸ That is similarly true of other faiths—there is no Catholic trade law, for instance, though Catholic countries may have distinct concerns about certain trade policies and their implications.

Nevertheless, it just so happens that Muslim countries are in special need of integration into the GATT-WTO order. Consider just a few stark realities in the Arab Muslim world:¹⁴⁹

- The GDP of Arab countries combined is (as of 1999) \$531.2 billion, which is less than that of Spain.¹⁵⁰
- The total value of non-oil exports from Arab countries is less than that of Finland. There are 300 million people in the Arab world and 5 million people in Finland.¹⁵¹
- During the 1990s, the growth rate of exports from Arab countries was 1.5% per year. The average global growth rate was 6%.¹⁵²
- The export base of Arab countries is not diversified. Oil and oil-related products account for 70% of their exports.¹⁵³
- Regarding intellectual development, Arab countries lag the rest of the world. The number of books translated into Arabic each year in the entire Arab-Muslim world is just 20% of the number translated into Greek in Greece. The number of books published per million people in the Arab-Muslim world (whether written in Arabic or translated into

¹⁴⁷ *Id.* at 957–59.

¹⁴⁸ See QUR’AN 5:90–91 (forbidding intoxicating beverages); QUR’AN 2:173, 5:3, 6:145, 16:115 (forbidding eating swine); QUR’AN 24:31 (forbidding pornography); QUR’AN 3:130, 4:161, 30:39 (forbidding usury); QUR’AN 2:219, 5:93–94 (forbidding gambling).

¹⁴⁹ The statistics below are from Bernard Lewis, *Free at Last? The Arab World in the Twenty-First Century*, FOREIGN AFF., Mar.–Apr. 2009, at 77, 81–83.

¹⁵⁰ *Id.* at 81.

¹⁵¹ *Id.* at 82.

¹⁵² *Id.*

¹⁵³ *Id.*

Arabic) is lower than every other region of the world, except sub-Saharan Africa.¹⁵⁴

- On intellectual property generation, the Arab countries also lag the rest of the world. Between 1980 and 2000, Israel registered 7,652 patents in the United States and South Korea registered 16,328 patents in the United States. In that same 20-year period, Saudi Arabia led the Arab-Muslim world in registering patents in the United States—with a pathetic 171. Egypt had seventy-seven, Kuwait fifty-two, the United Arab Emirates thirty-two, Syria twenty, and Jordan fifteen. Further, Arab countries have one of the lowest numbers of research scientists who publish frequently cited articles.¹⁵⁵
- Concerning education, the Arab countries again lag the rest of the world. In 2003, China began publishing a list of the 500 best universities in the world. None of the over 200 Arab universities were on that list, nor do any of them appear in the subsequent annual rankings. Even when the “in” list is narrowed to the Asia-Pacific region (covering the Middle East), no Arab university is listed.¹⁵⁶
- In political development, the countries of the Middle East and North Africa are consistently ranked by Freedom House as having the lowest freedom rating.¹⁵⁷
- On women’s rights, nowhere in the world is the situation more dreadful than in Arab countries. Women account for slightly more than half of the Arab population. But, they are largely absent from economic and political life,¹⁵⁸ and (as is widely known) from the driver’s seat in cars in Saudi Arabia.
- On overall average standard of living, only sub-Saharan Africa has a lower figure than Arab countries.¹⁵⁹

Contrary to assertions of Islamic extremists,¹⁶⁰ neither supposedly wicked foreign powers nor the legacy of colonialism are to blame for these problems. Arabs have to take responsibility for themselves and their children.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 82–83.

¹⁵⁹ *Id.* at 82.

¹⁶⁰ See, e.g., Henry F. Carey, *The Postcolonial State and the Protection of Human Rights*, 22 COMP. STUD. S. ASIA, AFR., & MIDDLE E. 59, 69 (2002). In the historical context of post-colonialism, extremism based on prejudice encourage political violence and repression, including Occidentalism, the anti-Western hatred that has inspired some to a “war against the West.” *Id.* He quotes Richard Haas, formerly of the U.S.

Yet, candidly, these realities are scary. Left unchanged, they play into the evil hands of extremists. That is because the Arab masses—the street, as it were—develops a sense of oppression and exclusion. All faith that domestic politicians and the global economic regime can help change reality for the better is lost. The poison of extremism starts to appear to be an antidote.

The obvious inference from the above-listed points is that the Doha Round should focus in part on boosting trade with and among Muslim countries. That was an initial goal for the Round, one that regrettably has been lost.¹⁶¹ Consequently, the perception among Arab countries, and throughout the Muslim world, that the Round does little to address the above-listed serious problems is not irrational.

B. The Frightening Link

If there is a frightening link between susceptibility to extremist ideology, on the one hand, and oppressive economic circumstances (or at least the perception thereof), on the other hand, then the Doha Round is (or was) a strategic opportunity. Why not, then, consider the following elements as part of a new grand bargain:

- An accelerated accession of Iran and Syria into the WTO;
- Duty-free treatment for all non-oil exports, without exceptions for T&A or footwear or for otherwise sensitive farm products, from all Arab Muslim countries;
- A list of farm and industrial products of keen, potential, future export interest to Muslim countries with free trade of those products;
- A “Muslim Sectoral Agreement,” to be followed by all WTO members without exception;
- A “Muslim Technical Facility,” to boost as rapidly as possible the legal capacity in trade ministries from Morocco to Malaysia.

Might there be other terms of a package that could support reform in the Arab world? Such elements of a Doha Round deal would not change all of the above-listed realities in the short term; but, they would be small, practical and big, symbolic steps.

National Security Council under President George W. Bush, as agreeing with the author: “[N]either colonialism nor US policy should be used as explanations for the lack of democracy and the prevalence of human rights violations in Muslim-majority states.” *Id.* at 72 n.4.

¹⁶¹ See *supra* notes 2–3 and accompanying text.

French Director-General, Pascal Lamy, who led much of the Doha Round and who works in a secular international organization in a Europe that sometimes prides itself as post-religious, never asked these kinds of questions.¹⁶² Preach the virtues of free trade, yes, but preach the link between free trade, religion, and a better future, no. Rather, anointing major developing countries—Brazil, China, and India—into the elite group of WTO members—that could make or break a deal in the confines of the Green Room of the WTO Secretariat—has been as much of a revolution as the Director-General and Secretariat could either orchestrate or imagine. Islam calls roughly 1.5 billion people followers, second only to Christianity, which has about 2.2 billion followers. Who in that Green Room represents the Muslim world?

That anointing of Brazil, China, and India is also part of the unwinding of the relatively straightforward, Uruguay Round-era distinction among developed, developing, and least developed countries. It is redolent of the metastasizing of categories among WTO members. Yet, if there is to be a new category, then surely that of “Islam” is a compelling one consistent with the DDA.

¹⁶² See WTO Director-General: Pascal Lamy, http://www.wto.org/english/thewto_e/dg_e/dg_e.htm (last visited Mar. 14, 2010). Lamy is the Honorary President of Notre Europe, a European think-tank. See Presidents of Notre Europe, <http://www.notre-europe.eu/en/about-us/presidents> (last visited Mar. 14, 2010).