Doha’s Development
By
Sungjoon Cho*

INTRODUCTION

On July 28, 2006, the General Council of the World Trade Organization (WTO)1 indefinitely suspended the Doha Round negotiation as members failed to reconcile differences in their positions on key issues such as farm tariffs and agricultural subsidies.2 After the negotiation was resumed, only nominally, in February 2007, it has still remained deadlocked, failing to deliver any significant progresses. These recent developments have pushed the Doha Round, as well as its development agenda, into a realm of doubt. Against this dismal background, this article ruminates on the developments of the Doha Round, probes causes and factors contributing to the current debacle, and scrutinizes its ramifications. The article concludes that the delivery of a successful Doha Round requires public participation regarding protectionist trade politics.

During its first decade in existence, the WTO has failed to live up to its appellation. As an organization where three out of four members are poor countries,3 the balance sheet of this global enterprise reveals a troublingly disproportionate distribution of profits in favor of rich countries,4 with the

---

* Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I thank Larry Helfer, Gregory Shaffer, Carolyn Shapiro, Dan Hamilton, Mike Scodro, Bernadette Atuahene and Patrick O’Donnell for their comments on earlier drafts. Darrin Halcomb provided excellent research assistance. My special thanks to Flynn Coleman, Jim Keenley and the staff of the Berkeley Journal of International Law for their superb editorial work. All errors are mine. This article is current as of April 14, 2007.


exception of a handful of advanced developing countries such as Brazil, China, and India. This development disparity is silhouetted against lavish protection of products in rich countries that are poor countries' only lifelines, such as rice, wheat, sugar, cotton, and clothing. For example, rich countries spend about one billion dollars a day to protect their agricultural industries from foreign competition, enough to fly rich countries' 41 million dairy cows in first class around the world one and a half times. These generous agricultural subsidies to rich countries' farmers eventually drive farmers from poor countries out of the global market. This is a situation hardly obliging for addressing a global poverty context in which twenty percent of the world's population lives on less than a dollar per day.

Sadly, the WTO's response to this "development deficiency" has been disconcerting. The 1999 WTO Ministerial Meeting in Seattle collapsed amid the poor countries' frustration over the lack of development empathy in rich countries. Although the WTO members managed to launch the ambitious development round in Doha in November 2001 against the backdrop of the September 11 terrorist attacks, the North-South clash over agricultural trade liberalization eventually felled yet another ministerial conference in Cancún in September 2003. The following ministerial conference in Hong Kong in December 2005 delivered only a modest outcome, in accordance with pre-arranged low expectations; just enough to prevent an immediate debacle. Disturbingly, however, it contributed little to the future of the Doha Round negotiation, which was eventually arrested in July 2006 after a series of missed deadlines and postponements.

The institutional ennui that the WTO has demonstrated in addressing development issues under the Doha Round, in particular agricultural protection, threatens its legitimacy. As a trade organization, its impotence in tackling protectionism is highly unsettling. Moreover, if a supermajority of members


cannot benefit from its operation, why should it continue to exist? This skepticism leads to a fatal loss of faith in the multilateral trading system. While the WTO has faltered in the Doha Round, preferential regional blocs have recently been proliferating at an exponential speed. The dialects of regionalism are rapidly replacing the global business language of multilateralism by encroaching upon the spirit of free trade—nondiscrimination—and spreading the ethos of mercantilism.

This image is déjà vu, a shocking parallel of the interwar period, when competitive regionalism precipitated global economic balkanization.

Against this depressing background, this article argues that the current development crisis within the Doha Round is inextricably linked to the nature of modern day trade negotiations. This Round reveals a bargaining process in which the powerful can too easily exploit and prevail over the powerless. This process is also vulnerable to domestic political maneuvers such as "capture," which signifies a phenomenon where government officials' decision-making is influenced by special interests at the expense of public interests. Under these circumstances, the development concerns of poor countries are not well represented, which accounts, despite years of talks, for the current sorry state of negotiations on agricultural subsidies and tariffs.

To overcome these flaws of trade negotiation, this article suggests that certain core legal precepts, such as anti-protectionism, should limit the ability of rich countries to pursue mercantilist options. Adjudication under the WTO dispute settlement mechanism can also provide further discipline over the negotiation process by shedding a legal light on power differentials. To tackle the problem of capture, a "bottom-up" formulation of negotiation positions through active public participation in the domestic arena will change the dynamic of the "two-level game." This depicts a subtle interface between


13. Id.


international agreement and domestic endorsement. Thus, it will deliver negotiating positions that cater to the broad public welfare, not to the most powerful special interests.

Part I chronicles the development of the Doha Round, followed by a sketch of the pre-Hong Kong negotiation status in Part II. Part III then analyzes the result of the Hong Kong Ministerial Conference and presents a mixed evaluation. Part IV forecasts that adjudication under the WTO will intervene, if not replace, the Doha negotiations for a better outcome in the area of agricultural subsidies, and warns that regionalism may fill in the gap that the loss of trust in multilateralism leaves. Part V proposes certain strategies to save the Doha Round. It first diagnoses the current situation as a combined symptom of parochialism and development failure, and then submits that the legal discipline should be able to set certain limits on the current negotiation to tame protectionist policies. It also calls for more public participation, such as hearings and public debates, to shift the current top-down domestic politics in formulating trade policies to a bottom-up process.

I.
HISTORY OF THE DOHA ROUND NEGOTIATION

A. Birth of the Doha (Development) Round

Although the eight-year Uruguay Round (UR) negotiations resulted in the historic launch of the World Trade Organization (WTO) in January 1995, the UR could not effectively address rich countries' long-standing protectionism in areas such as agriculture and textiles, where many poor countries hold their comparative advantages. Certain side agreements attached to the WTO Agreement, such as the Agreement of Agriculture, set up future negotiations to eventually deliver agricultural trade liberalization that would assist economic development and reduce poverty in poor countries.

But, developing countries soon became frustrated by the inadequacy of rich countries' implementation of early commitments in these areas, and began to raise their voices regarding the "uneven distribution" of UR benefits between the rich and the poor. This development failure allegedly cost poor countries


over $100 billion a year, about twice as much as the total annual amount of foreign aid the North gives the South.\textsuperscript{19} This frustration contributed to the collapse of the third WTO Ministerial Conference in Seattle in December 1999. The Seattle debacle\textsuperscript{20} was a serious blow to the newly established WTO and cast a dark cloud over future negotiations.

It was an exigent situation—the September 11 terrorist attacks—that put the WTO negotiations back on track. Based on a strong consensus among negotiators that they should deliver a powerful message of stability and prosperity to the international community, they managed to launch yet another historic WTO trade round in Doha, Qatar, in November 2001.\textsuperscript{21} Reflecting urgent calls from the international community for trade’s active role in development and reducing poverty, the new trade negotiation agenda was named the “Doha Development Agenda” (DDA). International development organizations had emphasized that it is in the developed countries’ interest to reduce poverty and achieve economic development in developing countries because it avoids social unrest and eventually contributes to global peace.\textsuperscript{22} Lack of development and subsequent abject poverty are inextricably linked to current conflicts and violence in many quarters of the world.\textsuperscript{23} Not surprisingly, high youth unemployment in these impoverished regions increases the likelihood of illegal and radical activities, including terrorism.\textsuperscript{24} Therefore, without integrating those who are marginalized into the mainstream global economy, the world simply cannot deliver peace and stability. Critically, international trade offers a vital vehicle for such integration.\textsuperscript{25}

\textsuperscript{19} GLOBALIZATION, GROWTH, AND POVERTY, supra note 6, at 53.

\textsuperscript{20} “The Seattle WTO ministerial meeting failed to launch a new round, not because of the protests in the streets, but because the major trading powers lacked the political will to accommodate the interests of developing countries . . . In order for developing countries to have confidence in a new round, rich countries must deliver on commitments made in the past, such as accelerating the agricultural trade negotiations and phasing out quotas on textiles and clothing.” GLOBALIZATION, GROWTH, AND POVERTY, supra note 6, at 60 (quoting the recent report of the UN High-Level Panel on Financing for Development). Cf. Diana Tussie & Miguel F. Lengyel, Developing Countries: Turning Participation into Influence, in DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK, 491 (Bernard Hoekman et al. eds., The International Bank for Reconstruction and Development/The World Bank, 2002) (Observing that “after the significant concessions made in the Uruguay Round, developing countries felt entitled to be included in the green-room process.”).

\textsuperscript{21} WTO, The Doha Ministerial Declaration, adopted on Nov. 14, 2001, WT/MIN(01)/DEC/1 [hereinafter the Doha Ministerial Declaration].


\textsuperscript{23} See Worldwatch Institute Warns Of Threat To Global Stability, UN WIRE, May 23, 2003.


\textsuperscript{25} See generally Sungjoon Cho, A New Agenda for Peace: International Trade Law as a Practical Discourse, in TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES 63 (Padideh Ala'i et al eds. 2006).
The DDA comprises, inter alia, trade liberalization for agricultural products (e.g., “substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support”), trade liberalization for services (e.g., “movement of natural persons”), and market access for nonagricultural products (e.g., reduction or elimination of tariff peaks and tariff escalation). It also addresses items on the developed countries’ wish list, such as the “Singapore issues” (investment, competition, transparency in government procurement, and trade facilitation), which were named after the venue of the first WTO Ministerial Conference in 1996 where those issues were first raised. These Singapore issues have been greatly controversial because they concern sophisticated regulations beyond the realm of conventional trade rules, and therefore irritate many members, especially developing countries.

B. Deadlocked Negotiation

The propitious commencement of the Doha Round, however, did not develop into a meaningful negotiation. In particular, developed countries failed to deliver the most critical promise of the Doha Round: the reduction of domestic agricultural protection such as farm tariffs and subsidies. In fact, the $180 billion U.S. Farm Bill of 2002 as well as the E.U.’s recent failure to reform the notorious “Common Agricultural Policy” (CAP) made a “mockery of the idea that the Doha round was to be a development round.” These protectionist policies directly hurt developing countries—many of which export agricultural products to developed countries. Against this depressing backdrop, the fifth WTO Ministerial Conference in Cancún, Mexico, collapsed in September 2003. The U.S.-E.U. coalition on agricultural negotiation was strongly defied by the Group of 20 (G-20) coalition—a group of developing nations led by Brazil, China, and India. This deadlock over agriculture, as well as an irreconcilable divergence on the Singapore issues between developing and developed countries, finally torpedoed the Cancún meeting. The Cancún meeting even failed to deliver the desperate “Cotton Proposal” by four African

26. See Doha Ministerial Declaration, supra note 21.
cotton-producing countries (Benin, Burkina Faso, Chad, and Mali), to eliminate rich countries' cotton subsidies (in particular by the U.S.) that are harmful to their development. One African farmer reportedly said that "we are used to hardship, disease and famine, now the WTO is against us as well. I think this will stay in history."

There was an air of crisis and alarm among negotiators and outsiders. But that pressure was not enough to force the negotiators to achieve any satisfying results. Since the collapse of the Cancún meeting, the WTO Doha Round negotiations accomplished little. The only possible exception was the ambiguous "July Framework" agreement made in August of 2004 (also known as the "Doha Work Programme"). Under the July Framework, WTO members agreed that they would use a "tiered approach" in reducing farm subsidies and tariffs. In other words, the WTO would group a higher level of tariffs and subsidies into an upper tier and subject them to deeper cuts. But the WTO members agreed only to the general terms of the July Agreement—the specifics were as thorny and contentious as the rest of the Doha Round talks. At the end of July 2005, negotiators again failed to agree on the baseline package (the "July Approximation"), which would have been a preliminary deal covering critical issues such as agriculture, industrial tariffs, and services. It would also have helped facilitate a final delivery at the Hong Kong Ministerial Conference in December.

It was not until early October 2005 that the Doha negotiations gathered new momentum. The United States attempted to break the stalemate by making an ambitious offer in agricultural trade liberalization. On October 10th, 2005, U.S. Trade Representative Robert Portman submitted a serious reform proposal. The proposal had three pillars of agricultural protection that would have taken effect over the next five years. First, Portman proposed that countries substantially reduce their agricultural tariffs, in amounts ranging from fifty-five percent to ninety-percent percent. Second, countries would cut the most trade-distorting farm subsidies by at least sixty percent, such as those that directly affected production. In the third element of his proposal, Portman called for a fifty percent cut of a newly established cap for subsidies that did not distort trade, such as direct payments to farmers. The overall goal was an ambitious one: to

---

33. Id.
34. WTO, Doha Work Programme, Decision adopted by the General Council on August 1, 2004, WT/L/579.
35. Id., Annex A.
completely repeal export subsidies by the year 2010. 37

Although widely welcomed, the U.S. proposal was not without some negative reactions. On the positive side, The Economist opined that the proposal might rekindle the optimism that negotiators would complete the Doha Round in 2006, as originally scheduled.38 The newly-elected WTO Director-General, Pascal Lamy, also praised the proposal as an “important development.”39 Developing countries (the G-20 coalition), however, were not impressed by the proposal and demanded a bolder offer in agricultural trade liberalization from developed countries. For example, Brazil highlighted that the U.S. proposal tended to cut only the “ceilings,” the statutorily set maximum levels of farm subsidies rather than the actual payment levels.40 Likewise, Oxfam, a nongovernmental organization (NGO), criticized the Portman proposal on the grounds that it would cause only a negligible reduction in the current level of farm subsidies in the U.S.,41 allowing the U.S. to maintain its controversial “counter-cyclical payments” that guarantee farmers compensation for low produce prices.42 The Portman proposal would in effect allow the U.S. to maintain its farm subsidies at a level similar to the current one. According to critics, this would hardly constitute a true concession for the cause of development.

Japan and the E.U., the proposal’s two main targets, reacted more negatively. The proposal required these two parties to cut farm subsidies more than the U.S., since their subsidies are larger than U.S. subsidies.43 Japan argued that the proposal’s demands were “out of balance with the level of reduction the U.S. itself is ready to make.”44 While the European Commission tried to respond to the U.S. proposal by offering agricultural concessions,45 some E.U. member states fiercely opposed such a move. France in particular was still dealing with its negative vote on the E.U. Constitution.46 The French Interior

43. See Portman, supra note 37, at 15.
44. See Haggling Underway, supra note 40.
Minister, Nicolas Sarkozy, lambasted the U.S. proposal by stating: "the United States . . . is trying to suck us into a fool's bargain by demanding Europe make a disproportionate effort in exchange for concessions that are mostly tactical." The French President Jacques Chirac even threatened to "block a world trade deal" if the E.U.'s concessions went beyond the status quo of the Common Agricultural Policy (CAP).

Nonetheless, the Commission’s offer, although painfully crafted out of acrimonious exchanges with many E.U. member states, including France, failed to meet the expectations of E.U. trading partners. The level of the proposed E.U. tariff cuts (thirty-nine percent on average) and the broad exception for sensitive products disappointed both developed and developing countries. Furthermore, the terms of the offer were not as generous as they seemed at first glance. In exchange for making the offer, the E.U. aggressively requested concessions from developing countries in other sectors, such as industrial tariffs and services. Ultimately, Portman’s proposal only widened the chasm among key negotiators, rather than narrowing it.

On November 9, 2005, major negotiators, including the U.S., the E.U., and Brazil, admitted for the first time that WTO members would probably not be able to fulfill their original ambition at the upcoming Hong Kong Ministerial Conference. These negotiators failed to deliver the “final modalities,” which include specific numbers and formulas that are necessary to make the Hong Kong meeting useful for completion of the Doha Round during 2006. When the negotiators failed to deliver these modalities, the WTO members began to reduce their expectations for the Hong Kong meeting. Instead, they looked for another venue to reach these final modalities. One diplomat referred to this next best chance as a “Hong Kong II.” The situation was so bleak that Pascal Lamy also announced that WTO members must “recalibrate” their original expectations.

On November 26, 2005, against this ominous background, Pascal Lamy presented the first Draft Ministerial Text on the Doha Work Program. The text

---

48. See James Blitz et al., Chirac Prepared to Vote on Global Trade Deal, FIN. TIMES, Oct. 28 2005.
51. Stuck with the Second Best, ECONOMIST, Nov. 12, 2005, at 78 (citing the Brazilian Foreign Minister, Celso Amorim, who expressed the necessity of holding “Hong Kong II”).
would be used in the Hong Kong Ministerial Conference on December 13th-18th, 2005.\textsuperscript{53} As a testament to the little progress made in the prior negotiations under the Doha Round, the Draft Text revealed a weak base for negotiations. With very few specific commitments, it was basically a combination of a summary on the current status of negotiations and an urgent call for intensifying future negotiations. A serious disclaimer accompanying the Draft Text stated that it “does not purport to represent agreement overall, and it is without prejudice to any delegation’s position on any issue.”\textsuperscript{54} On December 7, 2005, WTO members adopted the Draft Text with some minor changes.\textsuperscript{55}

II. THE PRE-HONG KONG STATUS OF THE DOHA ROUND NEGOTIATION

The Draft Text was a culmination of numerous talks that WTO members had held since the launch of Doha Round in 2001. Despite four years of negotiations, however, members still failed to deliver even a basic formula for trade liberalization in key areas such as agriculture and industrial goods. While there was some sporadic convergence, the Draft Text was still rife with bracketed language, reflecting the wide divergences among Members’ positions. Negotiators could not marshal a sufficient level of domestic political capital to enable certain breakthroughs. Protectionist pressures from the special interest groups simply controlled the negotiation.

A. Agriculture

Without a doubt, agriculture has been the most controversial subject in the Doha trade negotiation. From their inception, a wide rift formed between developed and developing members over the appropriate level of trade liberalization. This schism slowed the pace of dialogue and forced participants to scale back their original ambitions. WTO members could not reach a consensus on basic issues such as the algorithm for determining eventual levels of tariff reductions.\textsuperscript{56} Most glaringly, the Draft Text omitted target deadlines for the proposed changes. In response to the widespread confusion precipitated by the talks, the Chairman of the Special Section Committee on Agriculture created


\textsuperscript{54.} Id., at i.

\textsuperscript{55.} Doha Work Program, Draft Ministerial Text, WT/MIN(05)/W/3, released on Dec. 7, 2005, \textit{available at} http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_text3_e.pdf [hereinafter the "Draft Text"].

\textsuperscript{56.} Id., at A-2.
Annex A, an appendix claiming to be an objective summary of the areas of coincidence and conflict between members.57

Annex A of the Draft Text identified several points of “very considerable potential convergence” on domestic support (subsidies).58 First, WTO members approved an overarching framework with three different scales (bands) designating different subsidy levels (dollar thresholds) and cut ranges (thirty-one to eighty percent).59 Second, participants agreed to curb transitional (blue box) subsidies contemplated by the July 2004 Framework (though they disagreed on the specific steps necessary to achieve this end). Third, states approved a tri-band schema (thirty-seven to eighty-three percent cuts) for the most trade-distorting (amber box) subsidies, which mirrored the structure of the overall initiative.60 Importantly, however, these cuts offered by members were based on the subsidy level “caps” from the Uruguay Round, and not on current, and often lower levels.61 In other words, even if the Doha cuts were fully implemented, they might not reduce subsidies currently in place. Finally, members agreed on

<table>
<thead>
<tr>
<th>Bands</th>
<th>Thresholds (US$ billion)</th>
<th>Cuts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0-10</td>
<td>31%-70%</td>
</tr>
<tr>
<td>2</td>
<td>10-60</td>
<td>53%-75%</td>
</tr>
<tr>
<td>3</td>
<td>&gt; 60</td>
<td>70%-80%</td>
</tr>
</tbody>
</table>

57. Id., at A-1.
58. Id. at A-2, ¶ 8.
59. The following matrix represents the tentative framework for overall cuts by developed countries; Id., at A-2, ¶ 8.

<table>
<thead>
<tr>
<th>Bands</th>
<th>Thresholds (US$ billion)</th>
<th>Cuts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0-12/15</td>
<td>37-60%</td>
</tr>
<tr>
<td>2</td>
<td>12/15-25</td>
<td>60-70%</td>
</tr>
<tr>
<td>3</td>
<td>&gt;25</td>
<td>70-83%</td>
</tr>
</tbody>
</table>

60. The following matrix represents the tentative framework for the AMS for developed countries. Id. at A-3, ¶ 9.

tariff cuts (market access), divided into a tiered framework consisting of four different bands for determining tariff cuts, although the actual size of the cuts was disputed. The resulting arrangement subjected higher tariffs to bigger cuts in the hope of reducing antidevelopment phenomena such as tariff peaks and tariff escalation.

Nonetheless, negotiators diverged on various exceptions to agricultural trade liberalization, such as "sensitive products" (for developed and developing countries), "special products" (for developing countries), and "special safeguard mechanisms" (for developing countries). The end-date for eliminating export subsidies also provoked discord among negotiators. Although there were certain "concrete proposals," such as the year 2010 as the end date for export subsidies, negotiators failed to nail it down. This frustrating lack of progress on core development issues after years of talks eloquently demonstrates the enduring intensity of domestic protectionist politics. The international cause of development, no matter how urgent it is, simply could not alter how domestic politics works. Lobbies from farm industries in major developed countries, such as the United States and the E.U., resisted any substantial trade liberalization in agricultural products.

B. Non-Agricultural Market Access (NAMA)

As in agriculture, negotiators failed to achieve meaningful progress with regard to NAMA. The Draft Text did not establish a timeline for producing modalities or for drafting new tariff schedules based on these modalities. A second appendix—Annex B—simply laid out core issues in this arena. WTO members agreed to steeper cuts on higher tariffs, (the "Swiss formula"), but

---


63. Letter, supra note 61. Both tariff peak and tariff escalation are hallmarks of protectionism. Despite rounds of trade liberalization, tariffs on certain products, such as textiles and agricultural goods, are over fifteen percent higher than those levied against manufactured goods in developed countries (tariff peak). Also, tariffs on manufactured goods in developed countries increase with the level of goods processing (tariff escalation). International Monetary Fund, Global Trade Liberalization and the Developing Countries 2 (IMF Issues Brief, Nov. 2001), at 3, available at http://www.imf.org/external/pnp/exr/ib/2001/110801.htm (last visited Mar. 27, 2002).

64. Draft Text, supra note 55, at A-5-A-6. Members agreed to designate certain agricultural products as "sensitive products" excluded from farm tariff cuts in return for the expansion of import quotas. Yet they strongly disagreed on the scope of such products. See Fierce Debate on Tariff Cuts, infra note 127. Developing countries can maintain tariff barriers by designating another group of products as "special products" that will be immune to tariff reduction, on account of "food security, livelihood security and rural development concerns." See WTO Talks in "Crisis", infra note 121. They may also use "special safeguard measures" to respond to the surge of imports on agricultural products. Id.


66. Id. at A-4, ¶ 11, note 4.

67. Id., at ¶ B-1.
disagreed on certain technicalities such as the number of coefficients, which decide the eventual scale of those cuts. As is the case with agricultural market access, the tiered nature of the cuts was designed to address problems such as tariff peaks and tariff escalation plaguing developing counties exporting textiles and clothing. Thus, while members agreed on the basic goal of industrial tariffs reduction, they failed to settle on key details surrounding the method and extent of implementation.

Annex B indicated other important issues that split negotiators. For example, members differed on whether flexibility given to developing countries in tariff cuts should be taken into account in the general formula cut—namely, whether developing countries should be required to cut more tariffs on account of this pre-established flexibility. Members also failed to reach a consensus over how unbound tariffs, which are actually applied at the border and can be lower than bound tariffs (tariffs on the book), should be cut, though they agreed that the reductions should fall within NAMA’s overarching framework.

The lack of progress in the industrial tariff negotiation mirrored the development in the agricultural sector. Protectionist concerns deterred negotiators, in particular those from advanced developing countries such as Brazil and India, from offering any meaningful concessions in this sector and thus making progress in the negotiation. Annex B concluded that the members’ failure to even get close to the final modalities of NAMA negotiations was “highly troubling,” and raised three priority areas for the upcoming Hong Kong meeting: the formula, flexibility for developing countries, and unbound tariffs. Highlighting such lack of progress, NAMA Chair Stefan Johannesson warned that even if progress occurred in the agricultural talks, it should not be interpreted as a positive indicator for NAMA talks. He insinuated that no progress in NAMA was equally as serious as no progress agricultural talks.

C. Services

As a new approach to expediting negotiations on services, Annex C of the Draft Text raised an interesting mode of negotiation—“plurilateral” negotiations. Unlike conventional bilateral negotiations, plurilateral negotiations permit a group of members to present “collective” requests to other members in any

---

68. *Id.*, at B-1-B-2.
71. *Id.*, at B-3, ¶ 11.
72. *Id.*, at B-7.
74. *Id.*
sector or mode of supply.\textsuperscript{75} Developed countries might wish to use this mode of services negotiation in order to secure substantial concessions from developing countries under collective pressure, which the latter would certainly resist. Such a divergent attitude toward the plurilateral negotiations added yet another omen for the future negotiations. However, even in a preliminary sense, Annex C also failed to deliver any timelines for service negotiations.\textsuperscript{76}

\section*{D. Other Areas}

The Draft Text also addressed various other areas aside from the three major ones discussed above. These included trade remedies for unfair practices such as antidumping and countervailing measures (e.g., further discipline on antidumping measures), trade-related aspects of intellectual property rights (e.g., a multilateral system of notification and registration of geographical indicators for wines and spirits), and environmental negotiations.\textsuperscript{77} Although little progress had been made in most of these areas, trade facilitation negotiations registered a relatively impressive achievement. The negotiation group came up with concrete recommendations (Annex E) which the Draft Text “endorse[d].”\textsuperscript{78} One might attribute this rare consensus to the fact that trade facilitation concerns expediency in customs procedures, which serves the interests of all parties.

In areas related to development assistance, such as special and differential treatment (S&D), as well as areas related to the least-developed countries (LDCs), the Draft Text, without any convergence on specific mandates, simply spotted various issues and urged members to intensify negotiations with high aspirations. Along this vein, one conspicuous commitment concerned a full implementation of “duty-free and quota-free market access” of products from the LDCs.\textsuperscript{79} In conclusion, one might reasonably speculate that the Draft Text was just enough of a face-saver to enable the upcoming Hong Kong Ministerial Conference to go on as scheduled, despite the lack of solid substances upon which to base the Conference.

\section*{III. THE HONG KONG MINISTERIAL CONFERENCE (DECEMBER 13-18, 2005)}

\textit{A. The Negotiation: Main Developments}

Despite members’ readjusted expectations and a modest Draft Text, the Hong Kong Ministerial Conference held high hopes of saving the Doha Round.

\textsuperscript{75} Id., at C-3.
\textsuperscript{76} Id., at C-4.
\textsuperscript{77} Id. at 4-10., D1-2.
\textsuperscript{78} Id., at 4.
\textsuperscript{79} Id., at 7.
negotiation from its negative inertia. The overall structure of negotiations was similar to that of the last Ministerial Conference in Cancún (2003). First, John Tsang, the Conference Chairperson, who was Hong Kong’s Secretary of Commerce, Industry and Technology, appointed six of either “facilitators” or “facilitators-at-large” in six major agendas (agriculture, NAMA, services, development, rules, and other areas). These facilitators helped the Chairperson manage the negotiations among nearly 150 members by coordinating small, informal consultations among various groups in a particular area, and then report these negotiations to the Chairperson. Based on the facilitator reports, the Chairperson held plenary sessions with the full membership (heads of delegation meeting) as well as other big and small informal meetings.

This format was a product of inevitable compromise between two competing concerns—inclusiveness (transparency) and expediency. While ideally every WTO member should take part in every negotiation session, practical considerations on the logistics of negotiation necessitates such intermediaries as facilitators. Director-General Pascal Lamy also held numerous meetings, including the Green Room meeting with certain major groups and individual members in order to facilitate consensus. Various country groupings, such as the G-20, the FIPs (Five Interested Parties: the U.S., the E.U., Australia, Brazil, and India), and the New Quad (the U.S., the E.U., Brazil, and India), played critical roles in running the negotiations despite criticism of its lack of inclusiveness. The Chairman’s Consultative Group, made up of thirty to forty delegations representing these various groups, along with significant participants in the negotiations, drafted the Ministerial Text.

With members’ expectations “recalibrated” on the comprehensiveness of the Hong Kong package, it seemed that the priority of the conference became achieving an early harvest of a concrete “development package,” consisting of aid for trade programs, as well as duty and quota-free market access for the least developed countries’ exports. Under the development package, the world’s poorest countries would receive various assistance from international

82. Id.; WTO Website, Summary of December 14, 2005, Day 2: Convergence Elusive on First Full Day of Consultations; Cotton Also Discussed, http://www.wto.org/english/tratop_e/minist_e/min05_e/min05_14dec_e.htm (last visited Feb. 2, 2006) [hereinafter WTO Brief 2].
85. Bridges Brief 1, supra note 83; Richard Waddington, WTO Seeks Face-Saving Pact to Keep Talks Moving, REUTERS, Dec. 13, 2005.
organizations, such as the World Bank and the International Monetary Fund, in order to improve their supply capacity and trade infrastructure, enabling them to truly benefit from international trade. They would also receive barrier-free market access to the rest of the world to promote their economic development through exports. As another point on the development related agenda, the “Cotton Four” (Benin, Burkina Faso, Chad, and Mali) again pushed forward their cotton proposal, calling for the elimination of cotton subsidies by rich countries, in particular the U.S. Most members supported the cotton proposal. In fact, India referred to the cotton situation as a “bleeding wound on the conscience of the world.” Although the U.S. admitted its responsibility in this matter, its initial position was not very accommodative.

As negotiations passed the midpoint, major contentions among members became salient. In agriculture, negotiators focused on “export competition” issues, such as an end-date for the elimination of export subsidies, as well as “parallelism”—whether export credits, guarantees, insurance, exporting-state trading enterprises and food aid should also be covered by export competition principles. Regarding services, the G-90—consisting of African, Caribbean, and Pacific countries (ACP), the LDCs, and the African Union—circulated a new services draft that diluted the binding posture and strong language of Annex C of the draft text (the “prescriptive and mandatory” provisions). Developed countries, however, were strongly opposed to this attempt. The E.U. even warned that it would collapse the whole conference. Understandably, developed countries believed that absent binding commitments from developing countries, opening their service markets to a substantial degree would be very difficult.

In terms of negotiation dynamics, the developing countries’ position was surprisingly united and solidified. The G-20 and the G-90 formed the “G-110” and issued a joint statement identifying their common objectives: elimination of all agricultural export subsidies by 2010, duty and quota-free access for LDC exports, development assistance to those developing countries losing their tariff preferences, and addressing of the cotton problems. However, in stark contrast

86. Draft Text, supra note 55, at 7-8.
87. Id., Annex F.
88. WTO Brief 2, supra note 82.
89. Id.
90. Bridges Brief 1, supra note 83.
93. Id.
with the past alliance in Cancún two years ago, this time, the U.S. and E.U. failed to form a common ground on agriculture. While the U.S. criticized the disappointing level of concessions from Europe in the reduction of farm subsidies and tariffs, the E.U. attacked the U.S. food aid, stating that it was tantamount to farm subsidies. The aforementioned unity among a large number of developing countries toward the core development issues probably facilitated the “bottom-up” flow of negotiation proceedings.

B. Major Outcome: Hong Kong Ministerial Declaration

As predicted earlier, the Hong Kong meeting produced a modest, “face-saving” deal with an accent on development. Negotiators postponed resolving the most difficult issues, such as concrete modalities for market access negotiations, and instead elected to address easier issues, i.e. those that had already achieved relatively high levels of convergence.

Developing countries accepted the E.U.’s unyielding position on agricultural export subsidies, conceding their initial goal of 2010 and agreeing to an elimination of all export subsidies, including export credits, guarantees, and insurance, by the end of 2013. As for domestic support, the countries with higher levels of subsidies agreed to make greater cuts. The E.U. will enact the highest cuts, followed by the U.S. and Japan, then the remaining WTO members. The modalities for agricultural tariff reduction were to be decided by April 30, 2006. Yet even the full modalities for agricultural market access will be accompanied by various exceptions for sensitive products (for developed and developing countries), and special products (for developing countries). All forms of cotton export subsidies by developed countries will be eliminated in 2006, along with quotas on LDC cotton imports, while access for the LDCs’ cotton will be duty-free from the beginning of the implementation period. Further, members agreed to provide duty- and quota-free access to ninety-seven percent of exports from the LDCs by 2008. The three percent loophole is big enough, however, to protect certain sensitive industries in developed countries, such as textiles in the U.S. and leather and rice in Japan. In regard to non-


96. In fact, the U.S., along with Australia and Canada, wanted “to name the E.U. as the main obstacle to Doha round progress” in the APEC statement in November, 2005. See Anna Fifield & Victor Mallet, APEC Urges Drive on Doha Deadlock, FIN. TIMES, Nov. 21, 2005, at 8.


98. See e.g., Waddington, supra note 85.

agricultural market access (NAMA), members finally adopted the "Swiss formula," which requires greater cuts in higher tariffs, yet, again, final modalities for tariff reduction would not be established until April 30, 2006.100

During services negotiations, developing countries originally opposed a mandate of "plurilateral" request-offer negotiations, under which a group of members, not just individual members, can request and offer services market openings.101 However, the final Ministerial Declaration diluted the mandatory aspect of plurilateral negotiation: requesting members should take into account developmental levels of requested members which "shall consider" them.102

In conclusion, while the Hong Kong Ministerial Conference did deliver a certain development package as well as other timetables for future negotiations, it is unclear how effectively the Conference contributed to the goal of completing of the Doha Round by the end of 2006.

C. Evaluation: Half Full or Half Empty?

The procedural aspects of the Hong Kong Ministerial Conference, specifically the increased transparency and outreach, exhibited a number of encouraging signs for future ministerial meetings in the procedural aspects, but the Conference left much to be desired in substance, even considering recalibrated expectations.

The meeting deserves a certain amount of credit for its effort toward enhancing accessibility and fairness. The WTO allowed 2000 NGO representatives and 4000 journalists to attend the meeting103, a total equal to the delegations of WTO members, in addition to "webcasting" certain events in Hong Kong.104 Members were generally satisfied with the "bottom-up" approach to negotiating that emphasized input coming directly from members, as opposed to the approach that relied mostly on the Chair's text.105 Finally, Hong Kong proved a worthy host, providing "excellent facilities, good organization and a secure environment for the negotiations."106

---

101. Bridges Brief 4, supra note 92.
102. Brief 7, infra note 110.
103. Letter, supra note 63.
105. WTO Brief 5, supra note 82.
106. WTO, Summary of December 18, 2005, Day 6: Ministers Agree on Declaration that Puts Round Back on Track, http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e/min05_18dec_e.htm (last visited Feb. 2, 2006) [hereinafter WTO Brief 6].
In substance, however, the final outcome left little room for complacency. Even the upbeat WTO Director General Lamy indicated the net mileage added by the Hong Kong meeting towards the completion of the Doha Round was only five percent (from fifty-five percent to sixty percent). The most difficult part of the negotiations—how and how much members, in particular rich countries, will dismantle their protectionist barriers in major areas such as agriculture—still needed to be addressed. Yet, this “down and dirty” part of the negotiations was unlikely even then to meet the 2006 deadline for completion of the Doha Round. Now, with the indefinite suspension of the negotiation, it seems nearly impossible.

Even the face-saving development package agreed to in Hong Kong is porous, leaving enough room for rich countries to continue their current protection of selective products. For example, the three percent exception to duty and quota-free access for LDC exports allowed the U.S. and Japan to exempt certain traditionally protected goods, such as sugar and rice, and avoid stiff competition. One study demonstrates that this three percent niche may lead to the exclusion of as many as 330 tariff lines. Such a large loophole, perhaps enough to cover most of the least-developed countries’ main exports, undermines any practical values of the Hong Kong development package.

The new package also avoided forcing the U.S. to tangibly respond to the Cotton Proposal introduced by the Cotton Four. The final Ministerial Declaration failed to deliver concrete commitments on the reduction or elimination of domestic cotton subsidies, which are deemed to inflict the greatest damage to those poor African countries. The Cotton Four countries do not export cotton directly to the U.S. and thus will not benefit from the U.S. grant of duty-free access, while the continued subsidization by the U.S. of its domestic cotton industry makes these African cotton exporters less competitive in other markets, such as in Asia.

Different evaluations were released from the inside and outside of the WTO that attest to the foregoing mixed picture of the Hong Kong deal. A self-assessment by the WTO was predictably optimistic. Director-General Pascal Lamy emphasized that the Doha round was “back on track” and its development priority rebalanced. The Economist observed that rich countries attempted to

---

108. Id.
109. See infra Part IV.
111. Id.
112. Id.
113. WTO Brief 6, supra note 106.
"buy off" poor countries with a cheap development package in lieu of offering bigger deals later.114 NGOs launched harsh criticism on the lack of development sensitivity in the deal. Oxfam condemned the outcome as a "betrayal of development promises."115 Greenpeace also downplayed the much-advertised development package as rhetorical and criticized the final compromise as being heavily tilted in favor of rich countries.116

Table 1: Evolution of Commitments under the Doha Round

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture (Export Competition)</td>
<td>Reductions of, with a view to phasing out, all forms of export subsidies</td>
<td>Parallel elimination of all forms of export subsidies by the end date to be agreed</td>
<td>Parallel elimination of all forms of export subsidies by the end of 2013 / Other disciplines completed by April 30, 2006</td>
</tr>
<tr>
<td>Agriculture (Domestic Support)</td>
<td>Substantial reductions in trade-distorting domestic support</td>
<td>A tiered formula / greater cuts in higher levels of subsidies</td>
<td>Higher linear cuts in higher bands / Top band (E.U.); middle band (US, Japan); bottom band (the rest of members)</td>
</tr>
<tr>
<td>Agriculture (Market Access)</td>
<td>Substantial improvements</td>
<td>A tiered formula / greater cuts in higher tariffs with certain exceptions (sensitive products)</td>
<td>Adopted four bands for structuring tariff cuts (with certain exceptions) / Modalities established by April 30, 2006</td>
</tr>
<tr>
<td>Cotton</td>
<td>N.A.</td>
<td>Ambitious and expeditious solution / A subcommittee on cotton</td>
<td>All forms of export subsidies eliminated in 2006 / Duty and quota-free access for cotton from LDCs</td>
</tr>
<tr>
<td>Non-Agricultural Market Access (NAMA)</td>
<td>Reduction of tariff peaks and tariff escalation / Modalities to be agreed</td>
<td>A formula approach (to effectively tackle tariff peaks and tariff escalation) / Ad valorem terms</td>
<td>Adopted the &quot;Swiss formula&quot; (greater cuts in higher tariffs) / Modalities established by April 30, 2006</td>
</tr>
<tr>
<td>Services</td>
<td>Continuation of</td>
<td>Progressively</td>
<td>Negotiations</td>
</tr>
</tbody>
</table>


negotiation

higher levels of liberalization with no a priori exclusion of any service sector or mode of supply

intensified according to the Objectives, Approaches and Timelines set out in Annex C

Least-Developed Countries (LDCs)

Committed to the objectives of duty and quota-free access for exports from LDCs

Should provide duty- and quota-free access for exports from LDCs

Duty-and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 (for at least 97% of products)

IV.
INDEFINITE SUSPENSION (JULY 28, 2006)

A Series of Missed Deadlines: The Post-Hong Kong Developments

Though WTO members had originally planned to agree on the basic template determining the scale of concession for each member by the end of April 2006, the April deadline lapsed without any progress and was extended to June. Yet, most members still showed little flexibility and did no more than repeat their original positions while heavily criticizing other members' inflexibility. As the talks continued, it became evident that “triangle” issues, i.e., farm subsidies, farm tariffs, and industrial tariffs, would determine the destiny of the Doha Round. A successful Doha Round would compel the U.S. to substantially reduce its farm subsidies, the E.U. to offer heavier cuts in its agricultural tariffs, and developing countries, such as Brazil and India, to further decrease their tariffs on manufactured goods. While members could agreed that these triangle issues should be resolved at the same time, disagreements ensued over the triangle’s ultimate “shape.” The U.S. wanted considerable cuts in farm tariffs, minimizing any exemptions such as sensitive products, special products, and special safeguard mechanism (the “three S’s”). The E.U. believed that the U.S. should guarantee a minimum cut of $15 billion in its

119. Id.
current farm subsidies. Developing countries, meanwhile, objected to any drastic tariff cuts for industrial goods for fear of "social dislocation and adjustment." They argued that the triangle should not be "equilateral" since one could not equate developed nations' reduction of farm protection with the dislocation in the developing nations which cuts in industrial tariffs would precipitate. Amid these unbridgeable gaps amongst the main players in the negotiation, the June deadline frustratingly lapsed. In response, WTO Director General Pascal Lamy declared a "crisis" in the Doha Round talks.

B. Doha-Lite? Diverging Ambitions for the Negotiation Outcome

As the Doha Round negotiation became deadlocked, a voice for a rather modest deal surfaced. In fact, this call for curbed enthusiasm, departing from what was an originally conceived as a grand deal that might have resembled the previous Uruguay Round package, was in sync with the "recalibrated expectations" among members before the Hong Kong Ministerial Conference. As the June deadline approached, Pascal Lamy presented his own version of the Doha-lite, which he offered a "magic number 20." Lamy's vision was for key members to agree on the triangle of issues (farm subsidies, farm tariffs, and industrial tariffs), in a way that would satisfy all of them at a modest level, centered on the number 20. According to Lamy, the U.S. would lower its domestic farm subsidies below $20 billion; the E.U. would reduce its agricultural tariffs to the point that G-20 developing counties demanded (fifty-four percent); and developing countries, such as India and Brazil, would limit their industrial tariffs to twenty percent (a coefficient of twenty).

At first, Lamy's proposal seemed a legitimate possibility. The E.U. cautiously hinted that it might alter its original position, a thirty-nine percent cut in farm tariffs, close to the level proposed by G-20 developing countries of fifty-four percent. Nonetheless, this reduction proved inadequate to please the recalcitrant U.S. farm lobbies, who which pushed for an at least sixty-six percent cut in farm tariffs. In a testament to the U.S. farm lobbies' stalwart position,
fifty-seven out of one hundred U.S. Senators signed a letter pressing the President George W. Bush not to offer any substantial reduction of farm subsidies. Against this background, the newly appointed United States Trade Representative (USTR), Susan Schwab, finally declared that the U.S. would not accept the “Doha-lite” plan.

C. The Debacle: The Doha Round Suspended Indefinitely

After they missed the June deadline, WTO members set yet another deadline for the end of July. Key players formed a new cluster, the G6 (the U.S., the E.U., Australia, Brazil, India and Japan) and held two intensive negotiation sessions at the WTO headquarters in Geneva in order to reach a last-minute deal on the modalities. Even leaders attending the July G8 meeting in St. Petersburg, Russia called for the deal. However, even these desperate efforts could not deliver a necessary breakthrough. Upon this failure, Director General Pascal Lamy immediately called a time-out. He recommended that the negotiations be suspended indefinitely on July 24, 2006. On July 28, 2006, the WTO General Council approved Director General Pascal Lamy’s recommendation to suspend the negotiation. According to Kamal Nath, India’s Commerce Minister, the Doha Round is now “between intensive care and the crematorium,” though it may be completely dead. Major players, the U.S., the E.U. and developing countries (India and Brazil), exchanged rancorous criticism, blaming each other for the failure of the negotiations.

Absent any further negotiation timetable, this suspension placed the Doha Round in a realm of total uncertainty. Most seriously, due to the suspension, the materialization of the hard-earned development package, including the elimination of export subsidies and tariff/quota-free market access of exports by the least-developed countries, also became uncertain.

129. Regarding the G8 statement on the Doha round talks, see http://en.g8russia.ru/docs/16.html.
133. Id.
D. No Major Progresses after the Nominal Resumption of Negotiations

The “Mini-Ministerial” meeting in Davos in January 2007 where thirty governments reaffirmed their commitments toward the Doha Round rekindled the dying light of negotiations. WTO Director-General Pascal Lamy declared in February that “we have resumed our negotiations fully across the board.” Nonetheless, trade diplomats have failed thus far to deliver any meaningful progresses, if not major breakthroughs. The current status quo in negotiations seems little different from where it used to be at the time of suspension. Even the widely anticipated high-level talks among four major players – the U.S., E.U., India and Brazil – and the Director-General Lamy in March ended with no steps forward. Frustrated, Pascal Lamy called urgently for “full speed” negotiations.

In the meantime, the current U.S. domestic political situation is not very favorable to the Doha Round. Many members of Congress still seem reluctant in extending the president’s trade promotion authority (TPA), formerly known as the fast track authority, which is critical to pass any trade deal in Congress without amendment. The ever-growing U.S. trade deficit also tends to question the current administration’s trade policies and augment the aforementioned reluctance in Capitol Hill.

V. PROSPECTS: THE HAZY FUTURE OF THE DOHA ROUND

A. Mission Impossible?

The suspension undoubtedly dimmed the prospect of the successful completion of the Doha Round. From a technical standpoint, the suspension made it impossible to complete the Round by the original deadline (the end of 2006) agreed upon in the Hong Kong Ministerial Conference in December 2005. While the Doha Round’s mileage up to Hong Kong (fifty-five percent) ran quite short of the original ambition (seventy-five percent), members had

139. *Id.*
140. *See Bluestein, supra note 107.*
141. *Letter, supra note 61.*
made no significant progress by the time of the suspension, perhaps because the remaining issues were the most difficult issues to tackle and were pushed aside during the Doha Round. Even with the modalities in hand, at least six months would be necessary to convert this abstract template into concrete individual national schedules. These schedules would need to contain numerous product-by-product tariffs and subsidy liberalization timelines, as well as an agreed scope of exemptions, such as for sensitive products (for both developed and developing countries) and special products (for developing countries).

From a political standpoint, the future of the Doha round appears bleak. The U.S. government has failed to make any meaningful concessions concerning the reduction of farm subsidies before, and even after, the mid-term election in November 2006. One might predict that any negotiation might not at all recommence until after the U.S. mid-term election, or even in 2009 with the election of a new U.S. president. Admittedly, the original Doha Round deadline may be extended if the U.S. Congress extends the “fast track” authority, by which Congress can only vote up or down on a trade agreement without any amendment, beyond the current expiration date of July 2007. Along the same lines, the USTR, Susan Schwab, has recently implied that a deal on the modalities in early 2007 may help her to persuade Congress into conferring such an extension. Yet, this scenario will only materialize if the protectionist sentiments prevalent in the current U.S. Congress subside. Likewise, the E.U. may find it politically daunting to offer meaningful concessions in farm tariffs under the recent protectionist atmosphere at home. Unfortunately, the E.U.’s refusal to offer more than the status quo gives the U.S. excuses to keep its own offer low.

More seriously, if poor countries continue to become frustrated by the inadequacy of rich countries’ concessions in agriculture, they may lose the incentives to remain involved in this “Development Round.” This draws into question the E.U.’s demands for reciprocity from developing nations as a means

142. Magic Number 20, supra note 15.
144. Doha Round Suspended, supra note 132.
146. Doha Round Suspended, supra note 132.
147. See Raphael Minder, Trade Chief Says EU United on Farm Stance, FIN. TIMES, Dec. 21, 2005 (reporting that the E.U.’s protectionist position has been solidified among Member States after the Hong Kong Ministerial Conference).
of averting criticism of its lack of agricultural concessions. As Joseph Stiglitz and Andrew Charlton have aptly observed, rich countries' demands for a *quid pro quo* deal with poor countries disregards the "egregious unfairness" already embedded in the current world trading system.\(^{150}\) "The Doha round is biased against European and American farmers in the way that courts are biased against criminals."\(^{151}\) While poor countries should also open their service markets and cut their industrial tariffs, the burden of such reciprocal concessions should not be disproportionately fall on them, especially in the early developmental stages.\(^{152}\) Therefore, rich countries should move first in this development round.\(^{153}\)

With the WTO facing a crisis similar to the end of the Uruguay Round negotiations, WTO Director-General Pascal Lamy should play an active leadership in ensuring the future of the Doha Round, as the late Arthur Dunkel once illustrated. Although the context of negotiations has changed dramatically since then,\(^{154}\) and Lamy himself has been lukewarm on such a prospect,\(^{155}\) the Director-General may still be able to broker intersectoral deals, such as those between agriculture and services, to accelerate the overall pace of negotiations. Thus, first of all, Lamy must help break the current deadlock by persuading or pressuring his fellow Europeans to provide a better offer in agriculture.\(^{156}\)

**B. Negotiation v. Adjudication**

To the surprise of many developed countries, developing countries have successfully challenged the former's agricultural subsidies before the WTO tribunal. In *U.S. – Subsidies on Upland Cotton* (2005), Brazil won a dramatic victory over the U.S.'s controversial cotton subsidy regime when the WTO

---


152. During the Hong Kong Ministerial Conference, nine developing countries (Argentina, Brazil, Egypt, India, Indonesia, Namibia, the Philippines, South Africa, and Venezuela) sent a letter to Chairman John Tsang stating that the foundation of the negotiations was antidevelopment; specifically, in return for agricultural reform, developed countries were requesting cuts in industrial tariffs that were too drastic for developing countries. See Bridges Brief 2, supra note 97.


155. Lamy reportedly said that "we’ve got plenty of [text] on the table... what we do not have on the table is numbers." *WTO Talks In “Crisis” as High-Level Meeting Fails: Lamy to Try to Facilitate Consensus*, BRIDGES WEEKLY TRADE NEWS DIGEST, Special Update, July 3, 2006, available at [http://www.ictsd.org/weekly/06-07-03/story1.htm](http://www.ictsd.org/weekly/06-07-03/story1.htm).

156. Lamy acknowledged that the E.U. should improve its offer for the Doha Round to be successful. See *Hard Truths*, supra note 114.
Appellate Body (AB) ruled that certain programs under the regime were prohibited subsidies under the Agreement on Subsidies and Countervailing Duties (SCM Agreement) and that injured Brazil's cotton industry in the global market.\textsuperscript{157} In \textit{EC – Export Subsidies on Sugar} (2005), the AB sided with Brazil and Thailand, not only by condemning certain aspects of the E.U. export subsidy regime, such as violations of the Agreement on Agriculture, but also by implying that those export subsidies might further violate the SCM Agreement.\textsuperscript{158}

Undoubtedly, these recent victories under the WTO dispute settlement procedure are inspiring to those poor countries whose crops are forced to compete with heavily subsidized products from rich countries. In fact, some countries, like Uruguay, have already expressed interest in filing complaints with the WTO against rich countries over with respect to their subsidies.\textsuperscript{159} As long as the legality of rich countries' subsidies in areas other than cotton and sugar is still questionable under the WTO,\textsuperscript{160} an impetus for litigation may persist for the remaining period of the Doha Round talks, particularly when further negotiations fail to deliver solid agricultural trade liberalization. Several reasons justify this observation.

First, most developing countries may consider this the adjudication option superior to a negotiation option, since the former need not cost them any concessions. Second, dismantling trade barriers by judicial decree holds stronger appeal for economic justice than would does bargaining. Third, developing countries have nothing to lose even if they fail to win the litigation because any way they would not have come to a superior outcome by means of negotiation with developed countries. On the contrary, litigation under the WTO dispute settlement mechanism raises awareness about developed countries' protectionist policies and thus attracts a number of third-party interventions. This heightened level of consciousness tends to make it more difficult for rich countries to defend their protectionist positions. Fourth, threats of litigation may also give developed countries certain incentives to reach a bargain with potential complainants, i.e., developing countries. Even the U.S. government invokes the prospect of international litigation when it persuades domestic farmers to accept agricultural reform.\textsuperscript{161} Fifth, for most developing countries, only a limited number of exports, such as corn, rice, and tomatoes, are at stake in greater


\textsuperscript{159} See Alan Beattie, \textit{Farming Subsidies 'Could Face Legal Threat,'} \textit{FIN. TIMES}, Nov. 30, 2005, at 3.

\textsuperscript{160} See generally \textit{OXFAM, TRUTH OR CONSEQUENCES: WHY THE EU AND THE USA MUST REFORM THEIR SUBSIDIES, OR PAY THE PRICE, OXFAM BRIEFING PAPER NO. 81} (Nov. 2005).

\textsuperscript{161} \textit{Id.}
access to rich countries’ markets. Therefore, they may achieve more effective and targeted market access through litigation than by a general reduction of subsidies through negotiation. Some even argue that the WTO’s retaliation mechanism should be strengthened to enhance its effectiveness after the suspension of the Doha Round talks.

The past experience of the UR also attests to the critical influence that potential adjudication exerts on pending negotiation. For example, the UR addressed the bitter row between the U.S. and the EC concerning the latter’s subsidies for processors and producers of oilseeds after the U.S. victory on this issue in the GATT panel brought significant pressure to bear on the EC. It is easier, even for losing parties, to implement the decisions of a neutral third party, such as the GATT/WTO panel, than to concede or succumb to the counterpart’s position in the negotiation setting. Admittedly, an overzealous use of litigation in the WTO could backfire in those developed countries that are potential defendants. In this context, Pascal Lamy warned that “shifting priority away from negotiations and to litigation . . . could damage the fragile balance that exists between interpreting existing rules and creating new and more relevant WTO agreements.”

In sum, an adjudicative option, if exercised properly and with good timing, will have significant influence on WTO members’ bargaining positions in the reduction of farm subsidies. Of course, for this option to materialize in a way that truly empowers developing countries, the WTO Secretariat, non-governmental organizations, and other WTO members must provide a great deal of technical and financial assistance, as well as other capacity-building support.

C. Multilateralism v. Regionalism

The recent proliferation of regional trading blocs, which are preferential and thus discriminatory in nature, threatens the operation of the multilateral trading system based on the Most-Favored Nation (MFN) principle, as the Sutherland Report warned in 2005. Yet, if the Doha Round negotiation

162. Regarding a list of agricultural products subsidized by the U.S. and the E.U. which are potentially subjects of the WTO complaints, see id., at 1-2.
165. Id. at 5.
166. Doha Round Suspended, supra note 8; The Future of Globalization, ECONOMIST, Jul. 29 2006, at 11 (observing that after the suspension of the Doha round talks, the U.S. Congress seems to become more hostile to WTO rulings against the U.S.).
167. How to Restart Talks, supra note 145.
168. WTO Consultative Board, The Future of the WTO: Addressing Institutional Challenges in
remains comatose, it may further stimulate such propensity for regional propensity association as negotiators search for alternative venues for trade talks. 169

Upon the collapse of the Cancún meeting in 2003, the U.S. had already pronounced its preference for bilateral, regional trade deals, implying that regionalism is an “option” for U.S. trade policies 170 and that it would proceed only with “can do” countries. 171 Since the Cancún meeting, the U.S. has completed regional trade deals with Australia (May 18, 2004), Central American countries (Central American Free Trade Agreement (CAFTA): Costa Rica, Dominica, El Salvador, Guatemala, Honduras, and Nicaragua) (May 28, 2004), Morocco (June 15, 2004), and Bahrain (September 14, 2004), and it is negotiating similar deals with Panama, Andean countries (Peru, Colombia, and Ecuador), and the Southern African Customs Union (SACU) members. 172 Problematically, the Bush administration has already spent considerable political capital by pushing forward the ratification of these regional trade deals in Congress, especially CAFTA. 173 This exhaustion of political capital by the executive casts doubt over the prospects of the Doha Round.

To make things worse, regionalism tends to be highly contagious. Under what may be termed “reactionary regionalism,” 174 major East Asian countries that have traditionally been staunch advocates for multilateralism, and even labeled the “Friends of MFN,” 175 have recently become converts to regional trade deals. China, Japan, Korea and members of the Association of South East Asian Nations (ASEAN) have competitively formed bilateral (e.g., Korea – Chile FTA), trilateral (ASEAN – AUS/NZ), and other sub-regional trade deals (e.g., ASEAN plus Three) among themselves and with other non-Asian trading partners. 176 While each country’s motivation in jumping on the regional...
bandwagon may vary, one common explanation that can be offered is in relation to these countries' reactions is that such regionalism is a reaction to U.S.-led regionalist policies.\textsuperscript{177}

These regionalist developments certainly do not bode well for the future of multilateral trade negotiation. One might reasonably speculate that these regionalist policies will dry up the political capital and other scant resources necessary for multilateral trade deals.\textsuperscript{178} Some negotiators have already become lukewarm to the WTO negotiations.\textsuperscript{179} Without a serious political recommitment to multilateralism, global trade discourse under the Doha Round will languish, as the negotiators’ dissidence on the WTO rises and public support for the WTO becomes lackluster.

This consequence would be highly troubling for two reasons. First, regionalism is inferior to multilateralism in creating global welfare gains.\textsuperscript{180} According to one simulation,\textsuperscript{181} all developing countries' bilateral deals with rich countries would generate only $112 billion dollars in 2015, while multilateral trade liberalization would bring global gains of $263 billion dollars in the same year. Moreover, developing countries, especially low-income countries, would suffer net losses, $22 billion and $19 billion dollars, respectively, by these bilateral deals, while rich countries could still record net gains. Therefore, regionalism is not only an inferior income-generating mechanism to multilateralism, but is also a developmentally unsound option in that it tends to hurt poor countries.

Second, the mercantilist nature of the current competitive regionalism tends to evoke the strikingly similar phenomenon of the interwar period, which precipitated economic balkanization and led to the outbreak of the Second World War.\textsuperscript{182} Highly preferential regional trading blocs instituted worldwide during this period eliminated the political space needed for multilateral economic cooperation and instead nurtured the Hobbesean struggle among major economic powers.\textsuperscript{183} The interwar regionalist competition is a textbook

\begin{flushleft}
\textsuperscript{178} See Cho, The Troubled Status, supra note 36.
\textsuperscript{179} See Bowring, supra note 143 (observing that East Asia’s recent regional policies reflect illusions that regionalism can be a substitute for the WTO).
\textsuperscript{180} See In the Twilight of Doha, ECONOMIST, Jul. 29, 2006, at 63-64.
\textsuperscript{183} Id.
\end{flushleft}
example of the prisoners’ dilemma. Beggar-thy-neighbor trade policies entailed a global economic crisis that eventually exacerbated, not reduced, the evils of the Great Depression. Out of this history comes an undeniable historical lesson: the fragmented global trading system is vulnerable to a chain of unfortunate events such as tension, hostility, and violence. Considering that recent trade policies are inextricably linked to security and other foreign affairs concerns, this lesson should be taken seriously lest we repeat the same historical errors and are punished for them.

VI.
SAVING THE DOHA ROUND: TOWARD THE GLOBAL TRADING COMMUNITY

A. Dual Crisis of Development Failure and Parochialism

The phenomenological interpretation of the current impasse under the Doha Round may be epitomized as mercantilist brinkmanship between the North and the South. Rich countries’ governments continue to reject poor countries’ demands for greater market access for agricultural and textile products on account of domestic lobbying by import-competing industries. Poor countries also resist dismantling their high barriers to foreign industrial products under the frail logic of protecting infant industries. These trade policies that attempt to negate each other’s comparative advantage undermine the very foundation of free trade, even if they do make political sense.

Nonetheless, under the current development round, developed countries deserve a large portion of the criticism for their uncompromising stance on protectionism, even over those products that are the world’s poorest countries’ only lifelines, such as African cotton, Moldovan fruits, and Cambodian garments. Granting market access for these products is not a “special favor” but merely “playing by the rules.” However, developed countries often rationalize their lack of concessions by referring to developing countries’ poor offers. This logic of reciprocity is highly troubling under the development round, which should, in fact, be tilted in favor of poor countries.

Markedly, this protectionist position does not serve the general economic welfare of rich countries themselves. Protectionism simply feeds small

188. WTO Brief 1, supra note 81.
189. See Responsibility on EU and US, supra note 153.
190. See Sungjoon Cho, A Dual Catastrophe of Protectionism, 25 NW. J. INT’L L. & BUS. 315,
groups at the expense of the interests of many. In the U.S., a lavish sum of nineteen billion dollars of taxpayers’ money is showered each year to a handful of already rich corporate farmers in the name of agricultural subsidies. This practice seems to be at odds with constitutional strictures. In the Federalist Papers, James Madison viewed the Union’s power to control these special interests (“faction”) as one of its most paramount advantages. More troubling is the fact that the enormous economic burden from such protectionism falls disproportionately on the poor. If one is wealthy enough not to shop at a discount store that sells mostly cheap foreign imports, one need not worry about that burden. But, if one routinely gathers coupons and cares about every dollar, one should certainly be aware of the huge tax that protection deviously imposes on everyday items such as bras, shirts, and shrimp. After all, the real crisis of the Doha Round can be epitomized as the total absence of the foregoing two critical considerations, development empathy and protectionist cost, in the ethos of trade negotiation.

After all, the real crisis of the Doha Round can be epitomized as the total absence of the foregoing two critical considerations, development empathy and protectionist cost, in the ethos of trade negotiation.

B. Negotiation, Legal Discipline and Community

Trade negotiations are basically a process of reciprocal bargaining in which power plays a critical role in shaping final terms. In this inevitable political process, the voices of the powerless can easily be marginalized and silenced. This explains why the LDCs’ desperate demands, such as the Cotton Proposal, have been largely ignored or addressed incompletely, even if as many of these demands claim high moral grounds. As long as rich countries’ negotiators are captured by special interests at home, trade talks are predestined to deliver limited, if any, benefits to the poor as well as to rich countries’ economies in general.
Therefore, in order to stop the Doha Round negotiations from going adrift at the mercy of narrow-minded political battles, and instead to steer them firmly in the direction of the WTO's telos, WTO members, especially rich ones, should, departing from the customary assumption that everything can go on the negotiation table, tie themselves to the mast of the WTO's normative strictures.\(^{197}\) For example, the U.S. should not seek refuge in trade negotiations to block the import of Cambodian textiles if it could not invoke any WTO-legal restrictions, such as safeguards. Until developed countries play by the trade rules, they are in no position to preach the same to developing countries. Only when rich countries' practices truly match their rhetoric of free trade can they effectively alter developing countries' own mercantilist behaviors.

Trade negotiations must be anchored by an apposite use of litigation under the WTO dispute settlement mechanism. As discussed above, the prospects of adjudication tend to confer on protectionist governments material incentives to come forward with better offers to cut farm subsidies. Furthermore, such legal discipline can also rekindle domestic reform movements by raising the cost of protectionism in the international arena. In fact, most developed countries have considered domestic reform agendas that are directly linked to trade liberalization. For example, the U.S. "Freedom to Farm" legislation in the U.S. a decade ago could have phased out all farm subsidies, but it was eventually aborted by a Congress that remained captured by special interests.\(^{198}\) Presently in the E.U., the ambitious "Lisbon Agenda" mandates further market openness to make the European economy more dynamic and competitive.\(^{199}\) These domestic reforms share ground with the WTO norms,—namely, trade liberalization,—and therefore claim broad justification in defiance of parochialism.

If the inter- and intra-national dimensions of trade discourse, such as negotiation, litigation, and domestic reform, are were firmly guided by the WTO norms—not only the black letter laws but also their broad strictures and/or certain undeniable precepts, such as antiprotectionism—then a true legal community can exist among WTO members. In this community, both trading nations and individual businesspeople can effectively communicate and become fully interconnected through the stability and predictability that the WTO rules offer.\(^{200}\) This community-building eventually leads to common prosperity by

\(^{197}\) See Robert E. Hudec, GATT or GABB?: The Future Design of the General Agreement on Tariffs and Trade, 80 YALE L.J. 1299, 1309-36 (1971) (using the rhetoric of "lashing oneself to the mast" in describing GATT contracting parties' commitments to trade rules).

\(^{198}\) See Victor Davis Hanson, A Gastronomical Awakening, Chi. Tribune, Nov. 4, 2005, at 27.


\(^{200}\) See Sungjoon Cho, A New Agenda for Peace: International Trade Law as a Practical Discourse, in TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL,
the realization of efficient allocation of resources and the consequent increased welfare among participants in the community.

Such a community is also in a better position than politics or charity to tackle the “double distribution” challenge. The “double distribution” challenge refers to a deterioration of income distribution both domestically and internationally, despite the steady growth of aggregate welfare through increased trade. In other words, certain domestic workers lose their jobs due to foreign competition, while others get new jobs thanks to increased exports. Internationally, certain trading nations, such as LDCs, are getting poorer while other nations are getting richer through trade.

If trade norms can discipline trade politics in the foregoing international legal community as a constitution does in the domestic arena, much of the political capture and parochial trade policies will be rethought and forcibly altered. Under these circumstances, many citizens, especially the poor, would no longer suffer from the huge protection taxes that have burdened them via high tariffs and restrictive quotas. The government can also save its money by reducing subsidy payments \(^{201}\) and redirecting this surplus to trade adjustment programs to assist those who are dislocated by trade competition.\(^{202}\) These trade reforms, in turn, would help poor countries earn hard currency by enabling them to export what they are good at producing, such as agricultural products or labor-intensive manufactured goods.

Importantly, poor countries as well as rich countries should stick to the WTO’s legal discipline and stay within the legal community. Poor countries should depart from the culture of exemptions and lower their trade barriers for their own sake. There is enormous room for improvement in South-South trade, particularly considering the relative erosion of preferences and intensified competition among the poor as rich countries’ preferential programs are being scaled back.\(^{203}\)

In sum, in the foregoing legal community, legal discourse supersedes the mercantilist bargaining process. Thus, normatively-mandated open trade can increase domestic welfare-cum-economic justice and discharge a communitarian duty to assist in the global community. In this global trade Gemeinschaft, trade negotiations can facilitate, as opposed to restrict, international commerce and constitute, as opposed to fracture, a world trading system. Unfortunately, the current pattern of negotiation under the Doha Round does not correspond to this ideal type and thus cannot be conducive to achieving the vision of a legal

\(^{201}\) See Clayton Yeutter & Warren Maruyama, A Doha Trade Deal Can Be Struck Beyond Hong Kong, FIN. TIMES, Dec. 15, 2005, at 17.

\(^{202}\) See Loukas Tsoukalis, The Fund to Protect Threatened Workers Is a Good Plan, FIN. TIMES, Nov. 3, 2005, at 15 (supporting the European Commission’s recent proposal for a “global adjustment fund”).

\(^{203}\) Bridges Brief 7, supra note110; Do Despair, ECONOMIST, Dec. 10, 2005, at 12.
community within the WTO. Therefore, the very nature of negotiation itself should be transformed in order to break the current deadlock. For this reason, WTO members desperately need a paradigm shift in the way they formulate trade policies and conduct trade negotiations.

C. A Paradigm Shift to Save the Doha Round

The interim deal struck in Hong Kong last December was hardly a genuine success by any standard, despite its face-saving appearance. Negotiators basically postponed tackling the most difficult issues (most agricultural subsidies, industrial tariffs, and services). Yet, considering wide gaps in positions among negotiators, in particular between developed and developing countries over agricultural trade liberalization, any significant breakthrough to mark the Doha Round as a success would be difficult, if not impossible, to emerge any time soon.

Critically, however, such a distance in the WTO members’ current stances may not necessarily reflect the majority preferences of their home constituencies. Agricultural protectionism in rich countries, an epicenter of major spats in the Doha Round, caters to special, not general, interests. Although this “supercapture” is a Madisonian “constitutional failure” in that broad public interests are hijacked by those of factions, this disheartening political reality is still controlling trade negotiators. In other words, trade negotiations are largely disconnected from the general public, and at the same time from a unified legal community. Therefore, trade negotiations defy an inclusive, consistent, and thus normative approach, and instead are led by a myopic calculation of political economy.

The only remedy to this situation is for WTO members to radically change the way they formulate trade policies, from the current parochial, top-down approach to an open, “bottom-up” approach that fully reflects the general welfare of citizens and the domestic economy in its entirety. In other words, the virtues of direct democracy, such as public deliberation and participation, should be mobilized in order to overcome certain vices of representative democracy in trade policy making, such as capture. If members want to build a more coherent negotiation position domestically that achieves greater national welfare, they

204. See Bush the Anti-Globalizer, ECONOMIST, at 14, May 11-17, 2002 (observing that the new U.S. farm bill benefits only the “biggest and richest 10%” of farmers); Cleansing the Augean Stables, ECONOMIST, at 12, July 13-16, 2002 (criticizing the E.U.’s Common Agricultural Policy (CAP) which feeds a small number of farmers (“less than 5% of the workforce”) with half of the E.U. budget at the expense of taxpayers and consumers); Michael Kitchen, IMF-WORLD BANK: Meetings Focus on Reform, Millennium Goals, UN WIRE, Sep. 30, 2002 (citing World Bank Chief Economist Nicholas Stern who criticized rich countries’ hypocrisy of preaching free trade in the developing world “while imposing protectionist measures that cater to powerful special interests”).

must devise more institutionalized channels for public input, including various hearings and public discussion, in the trade policy-making process. As renowned economist Anne Krueger has observed, "If citizens could easily identify and directly vote on the magnitudes of gains and losses [from trade restrictions]," U.S. trade policies would be different from what they are now.206

In this regard, (public) ignorance is not bliss in the making of trade policy. It is under through this ignorance, or neglect, that many protectionist policies are passed without rigorous cost-benefit analyses.207 They eventually encroach upon the economic health of the nation and deteriorate the income distribution. Therefore, citizens should educate themselves about the hidden cost of protectionism through more participation and deliberation on this issue. They have to diligently attend hearings and debates on trade policies and express their informed views to local representatives. Out of the failure of this political engagement emerged the ill-conceived Smoot-Hawley Tariff Act of 1930208 and soon triggered the global tariff wars that contributed to the outbreak of the Second World War.

Yet, the public should also be cautious of certain psychological biases in interpreting the various consequences of trade. There exists an asymmetry between people's perception of gains and that of pains.209 The gains from trade, such as job creation and increased consumer welfare,210 tend to diffuse to the unidentified, and thus unorganized, many. These gains also materialize over a long period of time. In contrast, the pains of trade, such as dislocation of workers, tend to transpire quickly, and are concentrated on a relatively small number of people who are very well organized. This asymmetry in the manifestation of pains and gains of trade in turn creates yet another asymmetry in how people feel about those pains and gains. While people tend to take trade gains for granted and do not pay much attention to them, they certainly react sharply, and often emotionally, to trade pains, particularly when these pains occur in their own neighborhoods or are broadcast graphically by the media. In other words, people usually do not associate trade with the countless affordable

207. See e.g., Cho, supra note 185, at 322-23 (criticizing a "rider" which is a "legislative provision which cannot pass on its own merits but which is nonetheless attached to a separate, unrelated important bill, such as an appropriations bill, and thus rides unchecked throughout the legislative process").
amenities at the local store, while they are often furious about outsourcing to foreign countries, which exerts only minimal impact on domestic unemployment.\textsuperscript{211} Therefore, people should acknowledge and prepare for the dark side of social psychology before they engage in any public deliberation and participation. Obviously, these cognitive biases can only be remedied by deliberation and participation. Only then can citizens cast their votes from out of reason instead of anxiety.

All in all, only prudent trade policies, based on deliberation and education, not on capture and cognitive bias, can bring collective prosperity and security to both the domestic and international economies. Rather than relying on a wholesale delegation to politicians, whose balance sheets on free trade and discount rates on trade policies are different from the rest of the nation, individual economic players, such as consumers and consuming industries, should actively intervene in the domestic formulation of negotiation stances before they are realized at the negotiation table.\textsuperscript{212} Only then can members break away from the myopia of mercantilism, use trade talks as a catalyst for domestic reform,\textsuperscript{213} and reach better deals more quickly at the international level. Until then, the world will remain a prisoner of the Ancien Régime of protectionism.

VII. CONCLUSION

The recent WTO Hong Kong Ministerial Conference was a managed half-success resulting from a deliberate recalibration of the original ambition. Now facing heavier burdens after the indefinite suspension of the negotiation, any meaningful final delivery under the Doha Round seems to rest on WTO members' political will, rather than the mere assiduousness of negotiators. Perhaps we need a certain "political jolt" to inject fresh momentum in the current atmosphere of inertia.\textsuperscript{214} Yet this new momentum is not likely to arrive from the top—from politicians and bureaucrats who have narrow and short attention spans and are thus vulnerable to capture by a few powerful groups. Instead, this momentum should come from the bottom—the general public, whose broad and long-term interests are at stake in the Doha Round.

\begin{footnotes}
\item[211] See Drezner, supra note 184, at 70-71.
\item[212] Certain organizations have recently begun to mobilize consumers and consuming industries to challenge protectionist policies. See e.g., Consumers for World Trade (CWT), http://www.cwt.org/ (last visited Feb. 2, 2006); The Consuming Industries Trade Action Coalition (CITAC), http://www.citac.info/ (last visited Feb. 2, 2006).
\item[213] Cf. Heydon, supra note 169, at 11 (taking the view that trade policies should be "seen in a broader domestic context" that takes into account potential contributions such as increased competition).
\end{footnotes}
The Doha Round is currently situated at a crossroads between glory and oblivion. Critically, the decisive factor leading to either route lies in the domestic, not international, arena. The challenge that the Doha Round faces is a litmus test for democracy in major countries. If the domestic machines of democracy operate effectively enough to truly represent the general, public interests, they are certainly capable of putting the Doha Round back on track.