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CHALLENGES OF POVERTY AND ISLAM FACING AMERICAN TRADE LAW

RAJ BHALA

AN EXERCISE IN TEMPORIZING

Was Doha a Success?

This article is all about questioning the conventional wisdom on a recent and seminal event in international trade law. The


In December 2001, I was privileged to present an earlier draft while in Dhaka, Bangladesh at the Independent University and the International University. I thank the Vice Chancellors of each, Professor M. Alimullah Miyan, and Dr. Bazlul Mobin Chowdhury, respectively, and their fine colleagues and students, for their many thoughtful comments.

In both Dhaka and Washington, D.C., I was honored to discuss trade issues with senior Bangladesh officials, including H.E. Amir Khosru M. Chowdhury, Minister of Commerce, and the Honorable A. Tariq Karim, Ambassador to the United States. They deepened my appreciation for developing country perspectives. I hope this article assists them in their work.

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All WTO documents cited herein are available on the WTO’s website, www.wto.org. Unless otherwise noted, throughout I use the term “developing country” to encompass both “developing country” and “least developed country,” which is a distinction made in international trade law. Without implying a pejorative implication, or the correctness of one development path, I also use commonly understood equivalent terms – “poor country,” “underdeveloped country,” and “Third World country.”

event was the Fourth Ministerial Conference of the World Trade Organization ("WTO") held at Doha, Qatar from 9 – 13 November 2001. The conventional wisdom is that the Doha Conference was a "success." Because of two unmet challenges that concern the Third World and the Muslim World, the conventional wisdom may be wrong – or, at least, giddy.

"This has been a hell of a good week for the WTO," said the European Union’s ("EU") Trade Commissioner – after complaining repeatedly that "We [the EU] have got nothing. We are the orphans of the WTO." The rosy conclusion about Doha is based not so much on the accession of China and Taiwan (though the end of their long road to Membership certainly was good news), and certainly not on the waiver granted to African, Caribbean, and Pacific countries for receipt of preferential trade benefits from the EU, as on the agreement of an agenda for a new round of multilateral trade negotiations. The sanguineness, urged WTO Director-General Mike Moore, extends to developing countries, because the new round should benefit them.

So, while not every day in Doha went swimmingly, the end result was an ostensible triumph – the "Doha Development Agenda" ("DDA"). The new round is scheduled to last 3 years, starting after the Fifth Ministerial Conference, in Mexico City in 2003, and completing on 1 January 2005.

What is on the DDA?

The DDA includes a large number of items, most notably the following:

3 See Guy de Jonquieres, WTO Agrees to Launch Trade Round, FIN. TIMES (London), Nov. 15, 2001, at 1.
4 See Guy de Jonquieres, All-Night Haggling in Doha Ends in Agreement, FIN. TIMES (London), Nov. 15, 2001, at 11.
5 See, e.g., Raj Bhala, Poverty, Islam, and Doha: Unmet Challenges Facing American Trade Law, supra note 1, at 160 n.8 (quoting Beyond Doha, ECONOMIST, Nov. 17, 2001, at 11, which stated that "at least they struck a deal").
6 See id. (stating the new round should benefit developing countries).
7 See, e.g., Guy de Jonquieres & Frances Williams, Global Activists Adopt New Tactics, FIN. TIMES (London), Nov. 12, 2001, at 10 (chronicling the disputes of the first few days of the Ministerial Conference).
8 The DDA is set forth in Ministerial Declaration, (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Apr. 6, 2003). Summaries of it are contained in Jonquieres, supra note 4; Jonquieres, supra note
AGRICULTURAL SUBSIDIES. Negotiations on "reductions of, with a view to phasing out, all forms of export subsidies" for farm products and "substantial reductions in trade-distorting domestic" support schemes, but "without prejudging the outcome" of these talks, and taking into account the need for special and differential ("S & D") treatment for under-developed countries.9

INDUSTRIAL PRODUCTS. Negotiations to eliminate or reduce tariff and non-tariff barriers, including tariff spikes (i.e., peaks) on sensitive products like textiles, with attention to exports from poor countries. The reduction commitments need not be on a reciprocal basis, so as to allow for S & D treatment for Third World countries.10

SERVICES. Continued negotiations on (1) market access for financial, telecommunication, and transport services, and (2) easing of immigration rules for employing workers on temporary contracts.

TRADE REMEDIES. Negotiations on "clarifying and improving disciplines" on anti-dumping ("AD") and countervailing duty ("CVD") rules (including fishing subsidies) as set forth in the Uruguay Round Agreement on Implementation of Article VI of the GATT 1994 (Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), but at the same time "preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives...."11 The meaning of "instruments" is not entirely clear, though the American position appears to be that it refers to the trade remedy laws of the Member countries (e.g., United


9 Ministerial Declaration, supra note 8, at ¶¶ 13-14.
10 See id. at ¶ 16 (dealing with market access for non-agriculture products).
11 Id. at ¶ 28.
States AD and CVD rules). Moreover, in the negotiations, the United States is likely to insist on disciplines against dumping and illegal subsidization, as distinct from restraints on AD and CVD measures that combat these unfair trade practices.

REGIONAL TRADE AGREEMENTS. Negotiations on "clarifying and improving disciplines and procedures" on customs unions and free trade areas.


INTELLECTUAL PROPERTY. A Declaration that developing countries will be immune from challenge under the Uruguay Round Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") if they seek to obtain medical supplies via compulsory licensing in order to meet a public health crisis. The Declaration provides that "The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health," and should be understood and enforced in a way "supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."\(^1\)

GEOGRAPHIC INDICATIONS. Negotiations on the protection of geographical indications of certain foods (namely, cheese, ham, and rice), and on the establishment of a global system for registering and notifying geographical indications on wines and

\(^{12}\) See Pruzin, supra note 8, at 1856 (stating how the U.S. will "undoubtedly" interpret instruments).

\(^{13}\) See Gary G. Yerkey & Daniel Pruzin, U.S. Makes Concession in WTO Agenda Talks on Clarifying Dumping, Subsidies Agreements, 18 INT'L TRADE REP. 1819 (Nov. 15, 2001) (pointing to its occurrence at the fourth ministerial meeting of the WTO).

\(^{14}\) Ministerial Declaration, supra note 8, at ¶ 29.

\(^{15}\) See Declaration on the TRIPS Agreement and Public Health, (Nov. 14, 2001), (recommiting to the TRIPs agreement) available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited Apr. 6, 2003), see also Geoff Dyer, Activists Point to Flaws in Declaration on Drug Patents, FIN. TIMES (London), Nov. 16, 2001, at 13 (discussing the Doha statement on TRIPs).

\(^{16}\) Williams, supra note 8.
spirits, with the possibility of extending the system to cover other items (such as cheese, ham, and yogurt).

S & D Treatment on Subsidies. Agreement on requests for extension of the period for phasing out export and import substitution subsidies under Article 27:4 of the SCM Agreement.

The Four “Singapore Issues”: Investment, Competition Policy, Trade Facilitation (i.e., Simplifying Customs Procedures), and Transparency in Government Procurement. Preparatory work to continue under WTO Working Groups established at the First Ministerial Conference in Singapore in 1996. Negotiations on the Singapore issues will not commence until after the Fifth Ministerial Conference in 2003, and only if there is an “explicit consensus” to begin them. (Any Member could take a position preventing the commencement – an assurance sought at Doha by India, and gained through a statement by the Conference Chairman, Qatar’s Youssef Kamal.) Such talks would deal with technical assistance for, and capacity building in, developing countries, so that they can assess the effects on them of alternative proposals.

Environment. Negotiations on the (1) relationship between WTO obligations and multilateral environmental agreements (“MEAs”) (e.g., between TRIPs and the U.N. Convention on Biodiversity, or between various WTO obligations and the Cartagena bio-safety protocol for genetically modified organisms), (2) information exchange between the WTO and

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18 See Ministerial Declaration, supra note 8, at ¶¶ 20, 23, 26 (recognizing various members’ needs); see also Pruzin, supra note 8, at 1857 (discussing developing countries who were successful).


20 See Daniel Pruzin, WTO Chief Outlines Budget Needs to Support Doha Development Agenda, INT’L TRADE REP. 1898, 1898-99 (Nov. 29, 2001) (reporting Director-General Mike Moore requested a $10.7 million budget increase).
MEAs, and (3) reduction of trade barriers to environmentally friendly goods and services. Possible negotiations, to be decided at the Fifth Ministerial Conference in 2003, on eco-labeling and other environmental matters.

_**Was Doha Really a Success?**_

The DDA sounds impressive. But, could it be the conventional wisdom about it is wrong? That is, could it be Doha was neither a success, nor a monstrous failure? Perhaps what happened was procrastination put in the veil of the DDA, as the _Financial Times_ suggested:

> Few vital economic interests were at stake, or tangible commercial gains made, and no bargaining positions irretrievably surrendered.

The Doha talks will not directly affect the wealth of nations or prices paid by consumers. They were talks about whether to hold further talks on global trade liberalisation, and what their broad parameters and goals should be.

...[T]he sparring was largely intended to defend national pride, manage political perceptions and square lobbies and constituencies at home.

The insinuation is reasonable. A careful read of the DDA list shows settlement of only two substantive trade law issues – on (1) compulsory licensing of pharmaceuticals (a breakthrough credited to Brazil in its bilateral negotiations with the United States), though not on imports of inexpensive copies of patented drugs, and (2) S & D treatment under the _SCM Agreement_. Surely the intense future negotiations in agriculture, industry, services, and electronic commerce that lie ahead, and the possibility of blockage of talks on the Singapore issues, offset

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21 Viewed most charitably to the WTO, the facts can be set aside that some items (namely, agriculture and services) were part of the built-in agenda leftover from the Uruguay Round, and other items have been on the agenda since 1996 (i.e., the Singapore issues). Similarly, the Doha negotiators agreed to continue on-going work on improving and clarifying dispute settlement rules with a target date of May 2003. See Fruzin & Yerkey, supra note 8, at 1817.

22 See All-Night, supra note 4.

23 See id. (noting that the U.S. improved relations with Brazil).
Indeed, starting in 2004, the chance of trade wars over agricultural export subsidies cannot be dismissed. The "peace clause" in the Uruguay Round Agreement on Agriculture ensures that export and domestic support subsidies conforming to the Agreement cannot be challenged as illegal. But, the clause has a sunset date – 31 December 2003. Thereafter, cases brought under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding," or "DSU") can be initiated against these subsidies, the infamous examples of which are the EU's Common Agriculture Policy ("CAP") and some American programs. The round launched at Doha is scheduled to finish one year after the peace clause expires, i.e., on January first, 2005, and even that deadline already has been cast in doubt as "hopelessly optimistic." (The Uruguay Round took seven years, 1986-1993.) Thus, the risk of agricultural trade wars is particularly high in 2004, assuming insufficient progress in the talks to eliminate the subsidies.

Unfortunately, the peace clause issue hardly was discussed at Doha. That raises the question of whether procrastination at Doha was inevitable. Arguably, it was, in no small part because the United States failed to meet two significant challenges in international trade law. Each failure stemmed from miscalculation wrought by inability to see the world trading system and its legal regime through the eyes of developing and Islamic countries. When the leading trade power on earth errs, dilly-dallying is not an occasion for rejoicing. Rather, it is – or ought to be – a stimulus for re-calculation. Since Doha, unfortunately, there has been little of that.

24 Cognizant of the risk that some developing countries might block negotiations on the Singapore issues, WTO Director-General Moore has written publicly of his belief that it is in the interests of developing countries to support these talks. He argues, quite plausibly, that investment rules would help attract FDI, competition rules would help break up cartels, transparency in procurement would help combat corruption, and trade facilitation rules would lower export costs. See Mike Moore, Development Needs More Than Trade, FIN. TIMES (London), Feb. 18, 2002, at 15; Guy de Jonquieres, Moore Speaks Out on WTO Rules, FIN. TIMES (London), Feb. 18, 2002, at 11.

25 See Trade Officials, supra note 8, at 1858 (describing actions some countries intend to take if agricultural negotiations fail by the expiration of the peace clause).
What are the Challenges?

What were – and still are – those two unmet challenges? “Poverty” and “Islam.” First, the United States did not build a consensus among developing countries for trade liberalization. That failure stemmed from its persistent under-estimation of the depth of suspicion in poor countries about the effects on them of trade liberalization under the WTO agreements reached during the Uruguay Round.

Second, the United States did not make a persuasive link between trade liberalization, on the one hand, and the enhancement of peace and stability through closer ties with Islamic countries, on the other hand. This failure reflected under-estimation of the potential contribution to national security (not only of the United States, but the entire industrialized world) from better integrating some of these countries into the global trading system.

Thus, the argument against the conventional wisdom is that the Doha Ministerial Conference was an exercise in temporizing. That disappointing result was ineluctable. Why? Because the WTO Member to which all other Members look for leadership had not addressed, and to some degree not even acknowledged the potency of, challenges involving the developing and Islamic worlds.

Metaphorically, what occurred at Doha was “the can was kicked down the road.” The can is the body of substantive trade law issues. The delegations did the kicking. Among those who kicked with the biggest foot and the greatest force was the United States (though the European Union (“EU”) wore a large shoe too). The disposition of the can – lying there, as it is now, several yards down the street – is highly uncertain. It could be kicked yet further down, it could be avoided entirely, or it could be picked up and disposed of, in the sense of the issues it metaphorically symbolizes could be resolved once and for all.

Why the Rosy Conventional Characterization?

If it is premature to dub Doha successful, then why is the buoyant characterization of Doha the conventional wisdom? Perhaps the community of civilized nations needed a “feel-good”
interpretation after the Dreadful Day, 11 September. Perhaps the courageous – and they were brave – delegates voyaging to Doha with security threats needed to believe the personal risks they took were not in vain. The answer also lies in the atmosphere on 8 November. Were the expectations not low? If little or nothing was expected by way of agreement on a substantive agenda, then by that meaninglessly low threshold, of course Doha was a “success.”

Conversely, inflated expectations must be disclaimed. WTO Ministerial Conferences would be wondrous affairs if they dealt conclusively with every trade law issue of the biennium. Because that is too much to ask of trade ministers – some of whom, in contrast to their deputies, are not programmed for detailed give-and-take sessions – in a week, agenda formulation is a necessary part of these Conferences. An agreement for future talk is, by definition, a possibility. But, the conventional wisdom sees lack of agreement on an agenda (as occurred after the Third Ministerial Conference in Seattle in 1999) as a melt down, and avoidance thereof as success. That risks acceptance of underachievement, and this risk seems implicit in the post-Doha buoyancy of United States Trade Representative (“USTR”), Robert Zoellick: “We have removed the stain of Seattle.” Well, yes, thank God. But, if escaping a debacle is the best to expect, then the casualty will be more than just a balanced characterization of what really was achieved. It will be a candid admission of the issues at stake, and a push to meet them. Precisely that was the casualty of Doha.

The Argument

The argument is that at Doha, the can was kicked down the road. Why was it kicked? Essentially (but, of course, not entirely), because of twin failures: to address definitively discordant views from poor countries, and to weave Muslim countries into a cogent vision for national security. This argument proceeds in four Sections.

Sections II and III lay out the trade law challenges not met by

26 See WTO Agrees to Launch Trade Round, supra note 3, at 1 (quoting Zoellick who also suggested such an agreement would position the U.S. to receive fast-track authority from Congress).
the United States, and the miscalculations that lay behind the
failure to meet them. Section II discusses the challenge of
forging a consensus for multilateral trade liberalization, unmet
because of under-estimating hostility among developing countries
toward freer trade. Section III deals with the challenge of
associating trade liberalization with security enhancement,
unmet because of under-estimating how trade relations with
some Islamic countries might strengthen this link. Section IV
concludes with points about empathy and humility.

CHALLENGE ONE: THE TRADE-POVERTY LINK

Facts About the DDA

Perhaps developing countries, especially the least-developed
countries, “did better [at Doha] than even they had expected”27 in
obtaining assurances that TRIPS patent provisions would not be
used to block access via compulsory licensing to essential medical
supplies, and in keeping an explicit trade – labor rights link off
the DDA. Yes, the USTR’s conciliatory style toward poor
countries won praise.28 True, they received “pledges of fresh
technical assistance”29 for capacity building, to include at least $9
million for a “Doha Development Agenda Trust Fund” for use in
training programs.30 (Put aside the fact that the figure is
proposed, and the funding is through voluntary contributions by
Members.31)

Still, is it excessive to identify contrasting views in the First
and Third Worlds of trade law and its effects as a great schism
plaguing the WTO? Third World activists urge a re-appraisal,
dubbing the new round a “disaster for the world’s poor,” with
Barry Coates, Director of the World Development Movement,

27 See All-Night, supra note 4. But see Seeds Sown for Future Growth, ECONOMIST,
Nov. 17, 2001, at 65 (reporting that “[p]oor countries were much less excited” about the
DDA).
28 See All-Night, supra note 4 (reporting that the U.S. adopted a more conciliatory
style towards other countries).
29 Id.
30 See Guy de Jonquieres, Move to Bring More Poor Countries to Trade Round, FIN.
TIMES (London), Feb. 4, 2002, at 6 (referring to plans for WTO fund to train trade
negotiators from poor countries).
31 See Daniel Pruzin, Moore Hails “Outstanding Year” for WTO, Says Budget Hike
Will Aid Poorer Members, 19 INT’L TRADE REP. (BNA) 9 (Jan. 3, 2002).
calling the DDA "empty of development."  

Consider four facts about the DDA from a developing country vantage point:

INTELLECTUAL PROPERTY AND COMPULSORY LICENSING: Arguably, the Doha TRIPS Declaration grants no new rights regarding compulsory licensing to developing countries. The text of the Declaration clearly re-affirms the existing TRIPS provisions. Paragraph 4 "reiterat[es] our [i.e., the WTO Members'] commitment to the TRIPS Agreement," and paragraph 5 "maintain[s] our commitments in the TRIPS Agreement." These re-affirmations appear designed to ensure compulsory licenses are granted in accordance with TRIPS Article 31, which deals with the matter.

INTELLECTUAL PROPERTY AND IMPORTS: Notwithstanding the possible controversy over whether the Doha TRIPS Declaration actually expands the right of WTO Members to grant compulsory licenses, the silence of the Declaration on imported pharmaceuticals is telling. The Declaration benefits only those poor countries with the capability to manufacture the necessary medicines - otherwise, a compulsory license has no practical value. The Declaration says nothing about whether a country without this ability can override a patent in the interest of public health by importing cheap copies of a patented drug from a third country. The WTO's TRIPS Council has until the end of 2002 to resolve the matter.

S & D TREATMENT FOR EXPORT SUBSIDY PHASE-OUTS: Article 27:4 of the SCM Agreement gives developing countries until 1 January 2003 to phase out these prohibited (or "red light") subsidies, while least-developed countries are exempt from the obligation to eliminate them. An extension beyond this date is possible, if an application was submitted to the WTO's SCM

32 James Harding & Michael Mann, Activists Call Deal "Disaster for Poor People", FIN. TIMES (London), Nov. 15, 2001, at 11 (quoting Coates).
34 See supra note 15 and accompanying text.
35 See supra note 17 and accompanying text.
Committee at least one year earlier (i.e., by 31 December 2002). Eighteen developing countries met the deadline. The DDA states that when the Committee approves the extension for phasing out an export subsidy program, it will be renewed automatically each year until the end of 2007, as long as the subsidizing country does not change its program to prefer local firms, and follows transparency obligations. However, only export subsidies involving the full or partial exemption from tariffs and internal taxes that existed before 1 September 2001 are eligible for automatic renewal. Likewise, only a developing country with a share of world merchandise export trade of less than 0.10 percent, and a gross national product in 2000 of $20 billion or less, is eligible.

**The Ban on Taxing E-Commerce:** The ban applies to digitized goods, i.e., goods like printed materials, software, music, films, and video games that could be shipped physically, but are transmitted across the internet. However, assuming many such goods were shipped in digitized form, the top 10 potential losers of tax revenue from this ban, other than the EU (the largest loser in dollar terms of foregone customs duties), Canada (6th), and Israel (10th), would be developing countries: India (2nd); Mexico (3rd); Malaysia (4th); Brazil (5th); China (7th); Morocco (8th); and Argentina (9th).

These facts suggest that it is sensible to re-appraise the heralded success of Doha. Lest there be any doubt, consider the post-Doha remark of Director-General Moore: “We’re setting ourselves up for a difficult fifth ministerial.”

**Translating Economic Theory into Trade Practice**

The starting point for a re-appraisal is to appreciate that for most developed country WTO Members, trade law translates into practice the economic theory in favor of eliminating tariff and non-tariff barriers. Trade law is the device to implement comparative advantage pioneered by classical economists, namely David Ricardo, and embellished by neo-classical and

36 See Daniel Pruzin, Developing Countries Seen Losing Most From WTO E-Commerce Duty Moratorium, 18 INT’L TRADE REP. (BNA) 1900 (Nov. 29, 2001).
37 Moore Warns, supra note 19.
modern economists. Yet, industrialized countries do not invariably use trade law for this purpose, hence the result is not perfect implementation of economic doctrine. Were that so, trade law texts would be blissfully short, mandating an end to barriers without delay, exception, or allowance for recidivism.

In fact, for the industrialized countries, indeed for all WTO Members, trade law has a key secondary function. It serves as a political regulatory device, as the Financial Times instructed in Doha’s wake:

Although countries benefit economically from dismantling their own trade barriers, rather than those of trading partners, political logic works the other way round. To win domestic support for trade liberalization, politicians need to show they are doing their utmost to open others’ markets, while conceding as little as possible.

That is, trade law is a means to reach a new equilibrium among domestic economic agents (producers, consumers, and the government) when a shift to freer trade is contemplated. Trade law manages the shift, typically eschewing a dramatic, instantaneous expurgation of tariffs and quantitative restrictions in favor of carefully crafted phase-out periods coupled with safeguard remedies should dis-equilibrium (i.e., unacceptably high short-term adjustment costs that might threaten the political or social order) arise.

The First World’s understanding of trade law as a translation device is premised on the belief that the freer trade regime it puts into practice is normatively good. The criterion for “goodness” is a utilitarian calculation that, on balance, trade liberalization is a gain for a country and, by extension, the world. It is a static net gain rationale Ricardo gave in the 19th century, and has been elaborated and refined in recent models of dynamic gains.

Translation is precisely what many non-industrialized countries dispute with wealthier WTO Members. In the view of

38 See Ronald A. Brand, GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory, 2 J. LEGAL ECON. 95 (1992) (arguing that the translation of economic theory into practice is far from perfect, particularly because of the (1) lack of private party participation in the application of trade rules, and (2) interference to the operation of comparative advantage caused by trade remedies).

39 All-Night, supra note 4.
these countries, the net gains are, first, theoretical. In practice, they do not always work out quite the way economists predict, because of the messy details of reality. That aside, the second and more important objection is that net gains tend to accrue in the First World.

Yes, some sectors in some developing countries benefit from more export opportunities, and consumers in those countries with sufficient incomes enjoy a broader and cheaper range of consumption opportunities. Still, on balance, the perception is that the legal regime of the General Agreement on Tariffs and Trade ("GATT") and WTO does not deliver the net benefits – in the form of faster growth and income-poverty reduction – that the First World and its economic theorists claim. Fifty years (i.e., since the GATT, dated 30 October 1947, entered into force on 1 January 1948) of trade liberalization may have done a lot of good, but only for a handful of countries – at least that is the impression. It is reinforced by assorted statistics and projections, such as those of the United Nations Conference on Trade and Development ("UNCTAD"). UNCTAD forecasts that by 2015, only one of the 49 of the world's poorest countries – Lesotho – will cross the threshold of $900 per capita GNP, and thenceforth graduate from the unhappy cohort of "least developed" countries (those with less than $1,000 per capita GNP) to "developing" countries. Of the remaining 48 countries, 21 will not cross it in 100 years.

Never mind there is empirical evidence to rebut this perception. Most recently, the World Bank's Policy Research Report, Globalization, Growth, and Poverty (2002) points to a strong association between (1) trade liberalization, and (2) economic growth and poverty reduction. Forget, also, the well-

41 See Alan Beattie & Frances Williams, Poor Countries' Talks to Aim at "Deliverables", FIN. TIMES (London), May 14, 2001, at 9 (citing UNCTAD statistics regarding poor countries' "graduation" from "least developed countries" status); Mike Moore, How to Lift the Barriers to Growth, FIN. TIMES (London), May 14, 2001, at 21 (discussing problems facing least developed countries).
42 Cf. David Dollar & Aart Kraay, Spreading the Wealth, 81 FOREIGN AFFAIRS 120 (Feb. 2002) (concluding that over the last 20 years, the integration of developing countries with developed countries has afforded poor people the opportunity to improve their lives); David Dollar & Aart Kraay, Growth Is Good for the Poor (Development Research Department, The World Bank Study, 2000) available at www.worldbank.org/research/growth/abiddolakray.htm (last visited Apr. 6, 2003) (using data from 80 countries over 40 years as evidence that openness to trade increases
developed body of "S&D" treatment rules to help developing countries manage political and social problems associated with adjustment to freer trade (i.e., rules just for them that play the secondary role of regulating the shift from an equilibrium associated with a closed macro-economy to a new equilibrium of an open macro-economy.) Focus on the incongruous outlook held by Third World countries, which account for roughly 80 percent of the WTO's Membership. By listening to trade law officials, practitioners, professors, and (tellingly) students in the Third World, it is easy to detect widespread skepticism about trade law and its effects.

The View from Poor Countries (Or Some of Them)

Even after Doha, the United States has yet to deal with anecdotal evidence easily gathered by traveling to, for example, South Asia (e.g., India, Pakistan, and Bangladesh), East Asia (e.g., China, Vietnam, Laos, Malaysia, and Thailand), and Latin America (e.g., Mexico and Argentina). The perceptions may be grouped into ten general categories:

1. DOMINANCE OF THE GLOBAL TRADING SYSTEM. The global trading system is dominated by a few hegemonic trading powers, led by the United States. This minority tends to be far more interested in gaining market access to, or shutting imports out from, developing countries than in promoting export-oriented growth in those countries. The powers preach free trade until they come to the negotiating table with developing countries, economic growth and that incomes of poor people in those countries rise proportionately with growth); DAN BEN-DAVID ET AL., Trade, Income Disparity and Poverty (World Trade Organization Special Studies No. 5) (1999) (arguing that developing countries that are more open to trade are catching up with the living standards of developed countries, and that trade liberalization contributes strongly to poverty alleviation).


when they become mercantilists.

DOMINANCE OF THE WTO. The faces at the WTO Secretariat evince dominance by a handful of industrialized countries. Of the 552 positions there in 2001, 129 of them were occupied by French citizens. The country with the second-highest representation was the United Kingdom (71 British nationals held WTO Secretariat positions), followed by Spain (36), Switzerland (31.5), Canada (26), the United States (23.5), Italy (16), Germany (13), and Ireland (13). In other words, the top nine represented countries were western and industrialized, accounting for 359 of the 552 jobs, or 65 percent of the posts. India was the only Third World country with notable representation (with 10 Indians holding positions). Hardly any nationals hailed from significant developing countries like Malaysia (1.5 persons) and Thailand (2). The Secretariat also fared poorly in staffing positions with citizens of newly industrialized countries. None came from Singapore, and a de minimis number from Korea (2), Brazil (2.5) and Mexico (2).

DOMINANCE OF THE LANGUAGES OF THE WTO. Any visitor to www.wto.org has observed that three languages pre-dominate the WTO: first and foremost, English, with French and Spanish the other two functional languages. The same observation is apparent from job ads posted by the WTO in prominent publications like The Economist. Typically, English is required, with proficiency in French or Spanish also required or highly desired. According English the highest status makes sense. It is the international language of business and the internet, and it is the second most-widely used language in the world, with 514 million speakers. But, it is a distant second to Mandarin Chinese, which boasts 885 million speakers. A close third to English is Hindi, with 496 million speakers. Spanish follows fourth, with 425 million, and then comes Russian (275 million),

45 The employment statistics can be found in Overview of the WTO Secretariat, Table of Regular Staff by Nationality, available at http://www.wto.org/english/thewto_e/secr_e/introe.htm (last visited Apr. 6, 2003) Notably, as of early 2003, there were 144.5 positions occupied by French citizens compared with 512.5 actual employees. The difference between positions and employees reflected vacancies.

46 The statistics set forth herein are from a table on World Languages in Darlene Superville, Global Forces Silence Ethnic Tongues, WASH. TIMES, Aug. 6, 2001, at A12.
Arabic (256 million speakers) and Bengali (215 million speakers). French is ninth in the top ten, with 129 million speakers (Japanese is tenth with 126 million speakers), just about half of the number who converse in Russian and Arabic, and 60 percent of the number of Bengali speakers. From a developing country perspective, even discounting the prominence of Spanish and French in many developing countries, it is entirely reasonable to wonder why both Spanish and French are featured so prominently, while no importance seems to be placed on the key non-western Third World languages, namely, Mandarin, Hindi, Arabic, and Bengali. That tilt in favor of the European languages – particularly French – may well reinforce the skewed employment hiring patterns at the Secretariat noted above. The tilt is all the more odd given that even in the affairs of the European Commission, the dominant language is English (used, for example, for two-thirds of all internal documents).

To put the point more controversially, the languages used for WTO affairs ought not to be selected with a view to appeasing proponents of a French cultural exception (or those, comme ce professeur, who admire French language and culture), nor to entrenching the interests of any one country or small group of countries in the Secretariat. Developing countries might reasonably ask whether an approach like that taken by the United Nations – designating a broader number of working languages – might enhance the legitimacy of the WTO and the ability of countries to participate. Or, they might take a more business-like approach, and lobby for a universal English rule.

UNEQUAL BARGAINING. It is true many developing countries “came of age” at Doha, by adroitly building coalitions, organizing tactics, and setting goals. Examples were Nigeria (which, on behalf of many African countries, argued successfully for deferral of negotiations on government procurement and customs procedures because poor countries lacked resources to negotiate immediately), Tanzania, and Uganda. Still, for two reasons,

48 Jonquieres, supra note 4 (discussing the importance of how talks were achieved).
the bargaining table where multilateral trade negotiations occur remains slanted. The powerful WTO Members have large armies of highly-trained trade lawyers, economists, and accountants arrayed against a smaller number of less-expert representatives from developing countries, some of whom hold multiple portfolios (i.e., are responsible for several non-trade fields, and thus are stretched in terms of time and energy). Moreover, there is a mismatch of economies represented by officials at the table. The dominant economies are diversified, hence they are unlikely to experience serious adverse effects should access to one export market be curtailed, or one export sector fair poorly. In contrast, many developing country WTO Members have non-diversified economies, reliant on one or a small number of commodity exports, and their largest customers are the powerful Members. Consequently, alienating the officials from those Members by taking a hard-line at the table is not a strategic option.

LEGAL CAPACITY AND EFFECTIVE IMPLEMENTATION. It is true that in 2001, the United States gave over $555 million in trade capacity assistance – more than any other country. But, that help must be juxtaposed with the problem. The Uruguay Round produced the broadest and most complex trade agreements in history. Establishing the legal capacity to untie them, and sew them into the fabric of domestic law, is the problem. The Decision taken at Doha on Implementation-Related Issues and Concerns bespeaks the problem. Developing countries, lacking legal capacity, have a far worse time coming to grips with the texts than developed countries, where the shortage of skilled trade lawyers is not acute. Some – like Bangladesh – have not yet enacted all of the accords into domestic law.

NEAR-IMPOSSIBILITY OF EFFECTIVE PARTICIPATION. Even if Third World WTO Members comprehended and implemented

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50 See id. In contrast, India's hectoring and obstructionism were highly controversial; see also Letter from Per Gahrton, Member of the European Parliament, to the Financial Times, FIN. TIMES, Nov. 24-25, 2001, at 8 (citing Pascal Lamy as real villain of WTO's Doha meeting).

51 See Zoellick Speech, supra note 44, at 10.

fully the legal agreements from the previous trade round, they could hardly be expected to keep up with the pace of activity at the WTO. Indeed, they have virtually no say over that pace. The key WTO Members, in terms of setting agendas and priorities, organizing meetings, formulating positions, and so forth, are the usual suspects. Many developing country Members cannot participate fully in WTO affairs as structured by the likes of the United States. For example, there are dozens of meetings at the WTO per week. However, many Third World Members cannot afford a permanent mission in Geneva, or if they can, to staff it with multiple delegates. Thus, coverage of these meetings — much less playing a leading role in them — is impossible.

**Skewed Benefits from Import Liberalization.** The Uruguay Round obligations aim to liberalize imports of goods and services, which means the rules benefit the hegemonic trading powers already possessing diversified economies. Their businesses gain from increased market access when developing countries, in compliance with the obligations, open to imports of goods and services. Indeed, these multi-national corporations sometimes are well-capitalized and expert enough to re-colonize developing country economies, should they be permitted to do so. As for import-competing sectors in developed countries, the risks from further trade liberalization are low. In most such sectors, tariff barriers already have been reduced to historically low levels, so they already have made the transition to freer trade. In sectors still protected by tariff spikes or quantitative restrictions, the developed country WTO Members are wealthy enough to afford adjustment assistance for dislocated workers and industries (even if they do not always provide it on generous or efficient terms), whenever liberalization occurs.

**Victimization by Trade Remedies.** In some import-competing sectors considered sensitive, developed countries eagerly and vigorously use trade remedies — principally, AD, CVD, or safeguards — to extend the nature and duration of protection. There is a deliberate irony here. Those sectors tend to be precisely the ones in which developing countries are most likely to gain a comparative advantage (e.g., steel, textiles, low-value added manufacturing items, and agriculture, especially cotton,
rice, and sugar), were free trade allowed to reign in them. Indeed, roughly 70 percent of exports from the poorest countries are in farm products and labor-intensive manufactured goods like textiles. Applying trade remedies impedes infant industries growth in Third World countries, and thereby of competitive, diversified economies.

NEGATIVE EFFECTS ON LEAST DEVELOPED COUNTRIES. Quite evident are negative effects on the world's 49 least developed countries of *de facto* mercantilism by a handful of powerful countries, their dominance of the WTO and trade negotiations, and the application of trade law obligations and remedies. Of these 49 countries (the largest of which is Bangladesh), 34 are in Sub-Saharan Africa. The least developed countries are home to about 10 percent of the world's population – over 600 million people, who survive on an annual *per capita* GNP of less than $250. Yet, in 1990, the least developed countries accounted for 0.48 percent of world exports. In 1999, the figure fell to 0.40 percent. Even if it were to rise significantly, the increase would make little difference absent concomitant debt relief. Two-thirds of the world's poorest 49 countries have unsustainable debt burdens. Hence, investing new export earnings in local economies would be compromised by their use for debt service.

LEGAL CAPACITY AND WTO LITIGATION. Whenever a Third World country Member fails to meet its import liberalization obligations, or is suspected of an unfair trade practice, it faces a dumping or subsidization suit from a developed country. Likewise, if a poor Member, employing fair practices, manages to penetrate significantly a product market in a powerful WTO Member, then it is likely to face a safeguard action. Whatever the gravamen of the complaint, the consequent litigation will follow the **DSU**. In reality, most **DSU** cases are wars the powerful WTO Members are best able to fight. Yes, small countries have defeated large ones in some cases. But, in general

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53 See *Seeds Sown for Future Growth*, supra note 27.
54 The statistics are from Alan Beattie & Frances Williams, *Poor Countries' Talks to Aim at "Deliverables"*, FIN. TIMES, May 14, 2001, at 5 (doubting will to tackle issues facing LDCs); Mike Moore, *How to Lift the Barriers to Growth*, FIN. TIMES, May 14, 2001, at 21 (stating that most citizens in the forty-nine least developed countries have been bypassed by benefits in globalization).
it is only powerful Members that possess armies of trade lawyers, backed by multinational corporate interests. In some Third World government agencies responsible for trade matters, like the Bangladesh Ministry of Commerce, there is no full-time staff of attorneys versed in international trade law equipped to handle WTO complaints, much less to bring them. Nor is there a budget to obtain the legal weaponry necessary to fight in Geneva.

Introducing this anecdotal evidence is not a comment on the accuracy of the ten perceptions. It is offered for its probative value. It demonstrates views of WTO Members in which live roughly 4 of the world’s 6 ½ billion people. That demographic fact suggests, whether true or not, perception matters when held by so large a block. Indeed, there is more than just anecdotal evidence.

There is testimonial evidence of the lack of a consensus among Third World countries for further trade liberalization. The testimonies are from trade ministers representing these countries at Doha. In their prepared statements, posted on the WTO’s website during the Conference, they highlighted the disconnect between the promises of the Uruguay Round agreements and their actual effects.55

The Ancient Melian Dialogue in a New Context

Apparently, the United States did not deal with these perceptions in any systematic or effective way. Rather, it touted the benefits of freer trade. It repeated its faith in the Uruguay Round as a large part of the cure for Third World problems, essentially saying: “Yes, well, whatever, don’t worry; just look at

55 See, e.g., Statement by the Honourable Manuel Roxas II, Secretary of Trade and Industry, (stating that “Proponents [of a new round of trade negotiations] again remind us of the benefits that will accrue [to] developing countries if we agree to the issues which make up this new round. Proponents cite the benefits from increased trade; for them, this certainly has been their experience. Ours is different.”).

56 See, e.g., Statement by H.E. Mr. Robert B. Zoellick, United States Trade Representative, Nov. 10, 2001, at p. 2 (acknowledging implementation problems with Uruguay Round agreements, but stating that “[t]he trade liberalization ushered in by the Uruguay Round highlights the potential of more trade for developing nations”); Zoellick Speech, supra note 44, at 8-9 (stating that “[t]rade is a critical element – perhaps the most important element – in economic development, offering the biggest, and most lasting, dividends,” and discussing a World Bank study indicating that developing countries that open themselves to trade grow faster, and experience faster declines in poverty, than those that do not, pointing to the benefits of openness experienced by South Korea and the costs of protection incurred by Ghana, citing statistics on export growth from developing countries after the Uruguay Round, and linking open trade with political reform).
these statistics - keep liberalizing and things will improve.”

The benefits are not chimerical, and the earnestness of American’s belief is not in doubt. The United Nations Secretary General, Kofi Anan, may well be correct in declaring “[t]he poor are not poor because of too much globalization, but because of too little.”57 Yet, perceptions sometimes get confused with reality. It happened before and at Doha, and the mess has yet to be sorted out. No unscrambling will occur so long as the American response remains no more imaginative than sloughing off earnest perceptions.

What will continue is a string of American “successes,” in the sense of trade negotiation agendas that, like the DDA, accords with American producer interests. Yes, at Doha, the United States “gave” some on intellectual property and dumping. But, it made no dramatic pro-development commitments. To the contrary, it continued to push to the agenda issues deeply troubling to Third World WTO Members. Enforcing labor standards, and increasing participation in WTO adjudication by non-governmental organizations (“NGOs”) are examples.

Certainly, these innovations promise long-term gains, to developing country workers and to the legitimacy of the DSU mechanism. But, from a poor country’s perspective, both initiatives could drive up its costs of production (resulting from higher labor standards), and litigation costs (owing to more complex procedures involving multiple parties). Thus, the poor country might well view the Doha result not so much as a success, but as an extension of the Ancient Greek Melian Dialogue to international trade relations: that the strong will do what they do, and the weak will suffer what they must.

**CHALLENGE TWO: THE TRADE-ISLAM LINK**

*Enhancing Peace Through Trade*

Since at least the 1978-79 Islamic Revolution in Iran, Americans have gorged on a visual diet of scenes of angry Muslims, dressed in traditional garb, burning the *Stars and Stripes*, compelling women to wear a *hijab* (veil), and marching

unquestioningly to a mullah's call of *Allah-hu-Akbar* ("God is Great"). Imbalanced diets lead to bad health, and these victuals have caused both seizure and paralysis. The convulsions are about military defense — how to guard against the ostensible Islamic threat to America's interests. The lack of movement concerns trade law — how to integrate more fully Islamic countries into the GATT — WTO system, and how that integration might contribute to America's security.

A grand vision of international trade is that insofar as it leads to economic growth and poverty reduction, it gives trading nations a stake in the international economic order. As the standard Ricardian paradigm predicts, stakeholders benefit from a broader array of cheaper consumption opportunities owing to increased imports, and from broader market access for exported items they make. In turn, the incentive to engage in international war or conflict diminishes. No economically rational stakeholder would destroy the salubrious economic linkages.

Peace through trade is not a turn-of-the-millennium insight. In the 1930s, this vision prompted reversal of protectionist legislation, and in the 1940s, the birth of multilateral economic agreements like GATT. It was manifest in the work of President Franklin Roosevelt's Secretary of State, Cordell Hull. Secretary Hull helped dismantle many of the notorious Smoot–Hawley tariffs by negotiating 32 bilateral trade pacts with 27 countries, under the authority of legislation he supported, the Reciprocal Trade Agreements Act of 1934. In these bilateral deals, he inserted an unconditional most-favored nation ("MFN") clause, thereby ensuring the spread of barrier reductions to third countries. This vision — while not forgotten — has not been applied to the context in which it now is most needed: trade with Islamic countries.

If opportunities created by trade liberalization nourish would-

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58 See Michael A. Butler, CAUTIOUS VISIONARY — CORDELL HULL AND TRADE REFORM, 1933-1937, 164-65, 168-69 (1998) (explaining Hull's vision of liberal international economic order, and quoting Hull's suggested language, which the President did not accept, for the 1936 Democratic Party platform condemning any return to protectionism and arguing that "the permanent security of the United States will be better assured by the maintenance of the principles of international justice and fair dealing than by the sole force of arms").


60 See id.
be Islamic entrepreneurs who otherwise might feed off, or be ruined by, violence and terrorism, then surely it is in America’s — and the world’s — security to offer the healthy sustenance. What better way to do so than invite these countries to participate more fully in global trade? Given that Islam now boasts 1.2 billion adherents (second only to Christianity’s 2 billion followers), and appears to be the world’s fastest growing religion, is there really any choice but to make the invitation as attractive as possible?

Differentiating Among Potential Islamic Trading Partners

Invitations, done properly, are sent with care. Paying heed to which Islamic countries ought to be invited is no less important than coming around to the understanding that some ought to be invited. Precisely how is the United States to decide among the potential invitees to the trade liberalization gala? The gala really is a process, not a one-off event. It is meaningful and mutually rewarding participation in the GATT — WTO system and sensible regional and bilateral free trade arrangements.

Is one cause of paralysis in its trade law an implicit acceptance of the dichotomy between “fundamentalists” and “moderates”? That beguiling dichotomy is a veil over the variegated responses from the Islamic World in its struggle to come to terms with Western culture. Some parts of that World see the culture as decadent, and embodied in wave after wave of exports of goods and services. Trade links are regarded as the conduit for the marauding exports. By extension, the pre-eminent institution dedicated to widening the conduit, the WTO, and its prominent champion, the United States, are viewed with suspicion. The adjective “some” must be stressed. This perspective hardly is

61 See Tad Szulc, Abraham — Father of Three Faiths, 200 NATIONAL GEOGRAPHIC 90, 96 (Dec. 2001) (retracing trek of Abraham, patriarch of three major religions, through Middle East, and providing demographic statistics).

62 For a discussion of Iran’s fulfillment of free trade requirements in order to enter into WTO. See generally Jahangir Amuzegar, Iran’s Crumbling Revolution, FOREIGN AFFAIRS, Jan.-Feb. 2003, at 44. The matter of culture and trade tends to be viewed as a conflict between, on the one hand, France and Francophone countries, and, on the other hand, the rest of the world. The matter takes legal shape in terms of an exemption from GATT and WTO obligations for cultural industries. This approach is like viewing a splendid room in Versailles through a keyhole — many parts of the room remain hidden from view. Similarly, many linguistic, ethnic, and religious groups beyond the Francophone world are concerned about the effect of trade liberalization on their traditions and ways of life. Constituencies in the Islamic world are among such groups.
universal among Muslims. Moreover, an irony must not be lost – who is threatening whom? Many Americans believe their country’s interests are under siege from a “militant Islam,” all the more so after 11 September. This belief puzzles some Muslims, who think themselves threatened by an exploitative, well-financed, and militarily superior, West – ever since the Crusades.

In brief, appreciating subtleties and nuances among potential invitees in the Islamic World to the gala is necessary to treat the paralysis in American trade law, and to move toward a durable nexus between trade and security. That is, the challenge is to sort out the panoply and identify counterparts sharing the vision Secretary Hull embodied. To help meet this challenge, there is no dearth of journalistic and think-tank literature on trends in Islamic countries. But, among the highly-regarded academic discussions are the works of Professor John Esposito – namely, *Voices of Resurgent Islam* (1983), *Islam – The Straight Path* (1991), *Islam and Politics* (3rd ed. 1991), and *The Islamic Threat: Myth or Reality?* (rev’d ed. 1992). Professor Esposito moves beyond the dichotomy and uncovers three categories of response by the Islamic World over the last 100-150 years to the perceived Western threat.

The first response, also the most conservative, is “Traditional Reformism.” It calls for full implementation of, and strict adherence, to the *Shari'a* (“the Sacred Law of Islam”). The *Shari'a* is conceived as a body of principles and obligations grounded firmly in the *Koran* and *Sunna* (the words and deeds

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63 For a discussion of biases in media coverage that result in Islam being seen as synonymous with religious extremism and terrorism see, e.g., EDWARD W. SAID, *Covering Islam*. To be sure, not all of the accounts have taken this approach. For a collection of essays on possibility of Islamic renaissance see, e.g., RICHARD N. FRYE ED., *Islam and the West* (1957).


65 This typology, which is summarized below, is explained by Professor John Swanson in the lecture series, *Islam* (1997) (Part II of the “Great World Religions” course, available on tape from The Teaching Company), and the accompanying outline. I draw from that lecture as well as Professor Esposito’s works.


of the Prophet Muhammad (PBUH\(^{68}\)). According to the Classical Theory of the *Shari'a*,\(^ {69}\) these two are the most important – or "fundamental" – fonts of law. Lesser emphasis is placed on the remaining sources, *Qiyaas* (analogical reasoning\(^ {70}\)) and *Ijmaa* (consensus), which developed over the last 1,400 years (since the Prophet's death in 632 A.D.) through the work of the *ulama* (religious scholars\(^ {71}\)).

The logic behind the Traditional Reformist call is that the *Shari'a* is a complete system not in need of amendment or supplement by modernist legislation or policy-oriented reasoning. Its inherent sobriety makes it the most exacting and, not surprisingly, the least popular (in terms of the number of Islamic societies that have heeded this call) response to the West. Saudi Arabia under the influence of the *Wahhabi* movement, and Afghanistan under the former Taliban regime, are among the few examples of Traditional Reformism in practice.

In the Esposito-inspired scheme, the second response to Western values embedded in goods and services exports is "Neo-Traditional Reformism." Not unlike Traditional Reformists, Neo-Traditional Reformists seek to return to Islamic traditions based on the *Koran* and *Sunna*, which are accepted as the fundamental sources of the *Shari'a*.\(^ {72}\) Neither response wants to alter basic traditions in light of Western influence. However, the word "Neo" is the clue to the difference between the two responses.

Traditional Reformists see nothing they like in Western values or structures. Their "reform" is rather like turning back the clock to the time of the recitation of the *Koran* and establishment of the *Sunna*. Neo-Traditional Reformists also seek guidance in the *Koran* and *Sunna*, but with a view to the present and future. Indubitably, the consequent reactions must be consistent with

\(^{68}\) "PBUH" is an Islamic term of respect typically following a reference to the name of the Prophet Muhammad. It stands for "Peace Be Unto Him." To my mind, it is unfortunate when western writers ignore this acronym. Having stated it initially, for reasons of economy, hereinafter I shall assume it implicitly. No disrespect is intended by this economy.

\(^{69}\) See Schacht, *supra* note 66, at ch. 9 (explaining the Classical Theory).

\(^{70}\) *Id.*, at 300.

\(^{71}\) See Armstrong, *supra* note 68, at 202 (defining *"ulama"*).

\(^{72}\) Not surprisingly, IbnTaymiya is popular among Neo-Traditionalists. Living in Syria during the late 13\(^{th}\) and early 14\(^{th}\) Centuries A.D., he was one of the prominent "Rejectionists," a critic of the great synthesis of Al-Ghazali – and one who emphasized the *Koran* and *Sunna*. Neo-Traditionalists look to his methodology for inspiration in coming to terms with modernity.
patterns in traditional Islamic society — yet, they are novel rejoinders. In sum, the response earns its prefix, because it returns to fundamental sources to find new ways to revive Islamic society, and the innovations can be justified precisely because they are grounded in tradition.  

That is not to say Neo-Traditional Reformists want an accommodation with western values and structures. On the one hand, not everything about the West coming via cross-border trade is worthy of embargo. Science and technology can be value free, and used to benefit Islamic societies. On the other hand, contradictions with the essential values of the Koran and Sunna are to be avoided. Neo-Traditionalists examine the (sometimes literal) meaning of the Koran, with a view to re-directing their societies in response to modernity. Likewise, re-discovery of the Sunna may result in societal re-orientation respectful of patterns established during the Prophet’s days. Accordingly, there is a certain “case-by-case” methodology in this response, with an underlying wariness of the West.

The third response in Esposito’s typology is “Liberal Reformism.” It is unequivocally distinct from both Traditional and Neo-Traditional Reformism. It accepts as a legitimate objective accommodation with what the West has on offer. Liberal Reformists urge Islamic societies to change in the Global Age, albeit in a manner that accords with the guidance of the Koran and Sunna. Rather than seeing these fonts of the Shari’a as irreconcilable with the West (the Traditional Reformist tendency) or in an uneasy tension with the West (the Neo-Traditional Reformist tendency), Liberal Reformists see them illuminating a constructive and positive relationship with the West.

Their light reveals no contradiction between their essential precepts, on the one hand, and Western science, technology, and some Western values, on the other hand. In other words, for Liberal Reformists, it is possible to go back to the Koran and Sunna, and use them to construct a modern Islamic society. That society is well-adjusted to globalization, and seeks to draw out

What are examples of “new” responses — reforms to Islamic society from within — put forth by the Neo-Traditionalists? Most notably, there is the Iranian Revolution of 1978-79 and the subsequent development of the Islamic Republic of Iran, and the Muslim Brotherhood movement that began in Egypt in the 1920s, and remains active.
what is best from the West. But, it also is inspired by 1,400 years of defining and elaborating the Shari'a.

The obvious flexibility of Liberal Reformism derives from a concept of the divine origin of the "best." What is "best" in any society – Christian or Muslim – is so because God put it there in the first place. That origin imparts "best-ness." So, even if a good or service is exported from the West, if it is "best," then accommodating it surely is consistent with guidance from the Koran and Sunna. Certainly, accommodation does not mean capitulation. If the ultimate origin of the import is not divine, hence it is not the "best," then rejection would be appropriate, pursuant to guidance from the Koran and Sunna.

Two Important Types of Partners

By eschewing a division of the Islamic World into "fundamentalists" and "everyone else," and appreciating perceptive delineations of the type suggested by Esposito, it is easier to consider two tasks for American trade law toward the Islamic World: (1) identifying worthy invitees, and (2) issuing sincere invitations to the trade liberalization gala. Neither task is easy.

Each demands empathy from American trade officials, i.e., realization they are not alone in sensing threat, and thus appreciation for how the varied Islamic responses to the West and its values bespeak differences in enthusiasm for engagement in Hull's vision for world trade. Which response predominates in which country? In a single country, two, or even all three, responses, may co-exist (uneasily), depending on which geographic area, or which ethnic, linguistic, or ideological group is examined. Unscrambling the complexities and assessing which response is (or can be bolstered to become) dominant is the heart of the Islam Challenge.

This Challenge is tough in the post-11 September Era. Since then, the United States has re-invigorated the dichotomy, putting Islamic countries into one of two camps: evil terrorists and their rogue-nation supporters (i.e., the fundamentalists); and good allies seeking to bring terrorists to justice (i.e., everyone else). That rhetoric is appealing in the War on Terrorism. It is not a basis on which to build a network of trade ties in the War
for Prosperity. Indeed, it is a basis America rejected in its recent history. Had the good-versus-evil mind-set carried over from Second World War battles to post-War trading strategy, perhaps America would not have invited former enemies into the Marshall Plan or multilateral trading system. Arguably, the United States is rejecting the good-versus-evil approach in its economic policy toward Vietnam, Cambodia, and the Balkans.

Thus, the second task – having identified proper invitees, issue the invitations – really is more of an extension than a revolution. Evidently, adherents to one movement, Liberal Reformism, are favorably disposed to fuller participation in the multilateral trading system and appropriate regional and bilateral trading arrangements. Neo-Traditional Reformists may not be implacably averse. Sincere invitations ought to be issued to countries dominated (or possibly so) by them. Inviting Liberal Reformists, and possibly also Neo-Traditional Reformists, may encourage these responses. The invitations are an opportunity to show global trade is neither a vehicle for a Pax Americana nor inconsistent with the essential principles of the Koran and Sunna. The invitations could contribute to America's national security interest, and to international order.

How so? First, if there is anything to the Hull-type vision of peace through trade, then impoverished Islamic countries that grow economically in part through expanded trade will gain a stake hold in the global trade regime. (Their impoverished state is a point of intersection between the Poverty and Islam Challenges.) To a rational calculator, destroying that regime may be a lot less appealing once its bounties flow to all segments of a society.

Second, an invitation may impress Liberal Reformists, and possibly also Neo-Traditional Reformists, that another great schism in the world economy (one in addition to that between the First and Third Worlds) is unacceptable. That emerging divide is between the capitalist countries, mostly of Christendom or in which Christianity is growing, and developing countries of the Muslim World. The invitation may underscore that the destiny of WTO Members is a common one: economic prosperity and physical security; or, economic stagnation (if not worse) and physical insecurity (again, if not worse).

Third, the invitation may highlight the importance the United
States places on the first word in the WTO – “World.” Some trade gurus opined that the WTO was not worthy of its name until China, with 1.2 billion people, became a Member. They were right, and the same rationale applies to the Islamic World, with its comparable number of people. To be sure, many Islamic countries already are WTO Members – but (as discussed below) some prominent ones are not. And, those that hold Membership are not necessarily integrated into the club in the fullest degree.

Only the Jordan FTA Thus Far

Highlighting countries influenced by Liberal Reformism, and possibly also those swayed by Neo-Traditional Reformism, and sending off sincere invitations to them, does not seem to be on the agenda of American trade officials. The United States recently completed bilateral FTAs with Singapore (on 15 January 2003) and Chile (on 11 December 2002), and now is negotiating seriously an FTA with a major ally in the military campaign against Iraq, namely, Australia. With respect to pursuing comprehensive and deep FTAs with Muslim countries, it would be inaccurate to characterize American trade officials as completely paralyzed. But, perhaps it would be fair to say they have been at least partially immobile. Today, the only invitee is Jordan.

The United States signed a free trade agreement (“FTA”) with

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74 See Raj Bhala, Enter the Dragon, 15 AM. U. INT’L L. REV. 1469, 1480 (2000) (noting that the world’s most populated country is not a member of WTO).

75 To be sure, on the eve of the Doha Conference, the USTR wrote of the Hull-type link between trade liberalization and advancing the causes of political reform and economic growth. See Robert B. Zoellick, Countering Terror with Trade, WASHINGTON POST, Sept. 20, 2001, at A35 (noting that the application of the argument to Congress was not well-received by the ranking Democrat on the House Ways and Means Committee, Charles Rangel, who accused the U.S. Trade Representative of questioning the patriotism of opponents of fast-track negotiating authority, and that the Trade Representative disclaimed that implication); see also Trading Barbs, FIN. TIMES, Sept. 28, 2001, at 15; Jim Landers, Trade-Terrorism Rhetoric Faulted, THE DALLAS MORNING NEWS, Oct. 1, 2001, at 1D. Yet, the link was spelled out more for the benefit of a Congress hesitant to grant trade-negotiating authority to the President than for the benefit of an Islamic World (or parts thereof) dubious about how it fits into the multilateral trading system. The emphasis is understandable in the calculus of inside-the-Beltway trade politics, but it hardly matters in that “other” World.

Jordan, which entered into force on 17 December 2001 following President Bush’s proclamation on 7 December. Under it, tariff and non-tariff barriers on almost all agricultural and industrial products traded between the two countries will be eliminated within 10 years, with the longest phase-out period for the tariffs currently at the highest levels. The pact also reduces barriers to trade in services (especially finance, telecommunications, couriers, and energy distribution), and mandates adherence to international standards for intellectual property rights.

However, from the perspective of Liberal Reformists and Neo-Traditional Reformists, especially those in Arab countries, surely three facts about the Jordan FTA are telling. First, the FTA came about more than 15 years after America’s first FTA with another country in the Middle East – Israel. The Israel – United States FTA was signed on 22 April 1985, and implementing legislation was passed by both houses of Congress and signed by President Reagan on 11 June 1985. The Jordan deal remains America’s only FTA with an Arab nation, indeed with any Islamic nation.

Second, the Jordan FTA is commercially insignificant, and thus economically unthreatening to the United States. In 2000, the United States exported $306 million worth of goods to Jordan, while Jordan exported $73 million to the United States.

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77 Id.
78 See Gary G. Yerkey, U.S. Signs Free-Trade Pact with Jordan that Includes Labor, Environment Rules, 17 INT'L TRADE REP. (BNA) 1653 (Oct. 26, 2000). Specifically, there are four broad categories for eliminating industrial tariffs: (1) existing tariffs below 5 percent are phased out in 2 years, (2) existing tariffs between 5 and 10 percent are phased out in 4 years, (3) existing tariffs between 10 and 20 percent are phased out in 5 years, and (4) existing tariffs over 20 percent are phased out in 10 years. Id. at 1653.
79 See Yerkey, supra note 78, at 1653 (noting agreement terms covering both services market and intellectual property rights standards).
80 See HANDBOOK, supra note 40, at 58.
82 Id., at 264-65 (noting that in 1995, Congress delegated to the President proclamation authority to modify tariffs on products from the West Bank, Gaza Strip, and industrial zones between Israel and Egypt and Israel and Jordan, and that this delegation took the form of an amendment to the Israel FTA).
83 See President Signs, supra note 76.
These statistics evince a large bilateral trade surplus that the FTA is unlikely to dent. The International Trade Commission confirmed that lack of a threat. Its report\textsuperscript{84} concluded the FTA would have no measurable impact on American exports, given the insignificant share of American exports to Jordan relative to total American exports ($270 million and $642 billion, respectively, in 1999). As for imports, again there would be no measurable impact, save for one sector – textiles and apparel – where Jordanian imports would rise. Yet, the overall impact on imports into, and production and employment in, the United States of the rise in Jordanian textiles and apparel imports would be negligible, because of the small share of Jordanian imports in total American imports ($31 million versus $1 trillion in 1999).

In brief, Liberal Reformists and Neo-Traditional Reformists might say the United States was sacrificing nothing by entering into an FTA with Jordan. Indeed, they might note (with a touch of cynicism) that the pact contains a safeguard clause to guard against import surges of a particular commodity by “snapping back” the pre-pact level of protection (though, of course, the remedy is not one-sided, as Jordan could invoke it).\textsuperscript{85} Also, they might point to usage in the FTA of the “Breaux-Cardin” rule of origin for textile and apparel products, specifically certain fabric products, and silk handkerchiefs and scarves.\textsuperscript{86} That rule deems the country of origin of such products to be the country in which the base fabric is knit and woven. The rule shifts backward in the multi-step production process (growing or cultivation of fiber, spinning of yarn from fiber, knitting and weaving of yarn to make fabric, cutting and sewing of fabric, and final assembly of cut and sewn pieces) the key event determining origin. The further back the dispositive event, the more protectionist the origin rule. Hence, the Reformists could point out, duty free treatment would not be given to these products from Jordan,


\textsuperscript{85} \textit{See} Yerkey, \textit{supra} note 78, at 1653 (describing the method for dealing with over-importation of an individual commodity).

unless they were made of fabric knit and woven in Jordan.

The third telling fact is that the delivery of the invitation to Jordan was contentious. Negotiating the FTA led to a polarized debate, though less so with the Jordanians as within Congress, over labor and environmental provisions.\textsuperscript{87} With the Jordanians, the agreement to start negotiations was announced by President Clinton and King Abdullah on 6 June 2000.\textsuperscript{88} Negotiations finished, and the FTA was signed, on 24 October 2000.\textsuperscript{89} President Clinton sent the FTA to Congress on 6 January 2001,\textsuperscript{90} and the Senate passed the pact on 24 September 2001,\textsuperscript{91} following House passage on 31 July.\textsuperscript{92} Because the Clinton Administration negotiated the FTA, the views of its labor and environmental supporters were manifest, namely, by the inclusion of labor and environmental provisions in the text of the FTA itself. The Jordanians acquiesced, but the Republicans in Congress did not drop the matter quietly.

Movement of these provisions from side agreements, to which they were relegated in the North American Free Trade Agreement ("NAFTA") into the main body of the document, was of great symbolic significance. Republicans in Congress feared a precedent was being set by the change of position,\textsuperscript{93} the first time in American trade law history that provisions on the enforcement


\textsuperscript{88} See Gary G. Yerkey, \textit{U.S., Jordan Make "Substantial" Progress in Talks on Free Trade Agreement, USTR Says}, 17 \textit{Int'l Trade Rep.} (BNA) 1224 (Aug. 3, 2000) (stating "agreement to initiate negotiations was announced by U.S. officials following a meeting between President Clinton and King Abdullah on June 6 in Washington, D.C.").

\textsuperscript{89} See \textit{U.S. Signs, supra} note 78, at 1653 (stating the U.S. and Jordan signed free-trade agreement on October 24).

\textsuperscript{90} See Gary G. Yerkey, \textit{President Clinton Sends Congress Bill to Implement Jordan Free-Trade Pact with Jordan}, 18 \textit{Int'l Trade Rep.} (BNA) 80 (Jan. 11, 2001) (stating that on January 6 President Clinton sent proposed legislation to implement free-trade agreement to Congress).

\textsuperscript{91} See Gary G. Yerkey, \textit{Senate Approves Free Trade Pact with Jordan, Clearing Way for Enactment}, 18 \textit{Int'l Trade Rep.} (BNA) 1533 (Sept. 27, 2001) (stating on September 24, the Senate approved legislation to implement U.S.-Jordan Free Trade Agreement).

\textsuperscript{92} See Rossella Brevetti, \textit{Senate Panel, House Approve Measure on Jordan FTA, but Gramm Still Dissatisfied}, 18 \textit{Int'l Trade Rep.} (BNA) 1244 (Aug. 2, 2001) (stating the House approved implementation of the U.S.-Jordan Free Trade Agreement on July 31).

\textsuperscript{93} See \textit{Senate Panel, Houser Approve, supra} note 92, at 1244 (mentioning Rep. Sander Levin of Michigan, criticized the exchange of letters as setting bad precedent); see also Gary G. Yerkey, \textit{House Democrats Hail "Precedent" Set by Labor, Environmental Clauses in Jordan FTA}, 17 \textit{Int'l Trade Rep.} (BNA) 1685 (Nov. 2, 2000) (stating U.S.-Jordan free-trade agreement sets important new precedent).
of labor and environmental rights were placed in the main body of a trade pact.\textsuperscript{94} Worse yet, the provisions called for the imposition by one country of "appropriate or commensurate"\textsuperscript{95} measures—possibly meaning trade sanctions, but perhaps also including fines or decreases in foreign aid\textsuperscript{96}—against the other country if the second country violated its own labor or environmental laws.\textsuperscript{97} These measures would follow a decision of a three-person arbitral panel, which would be selected (one member by the United States, one member by Jordan, and the third member by mutual agreement) to rule on any dispute.\textsuperscript{98} Any measures imposed by the United States ultimately would be for the President to decide. Republican opposition was overcome in part by letters from the USTR to the Jordanians, in which the USTR stated its intention not to invoke these enforcement procedures in a way that would block trade.\textsuperscript{99} The 11\textsuperscript{th} September attacks virtually ensured Republicans would support the FTA, notwithstanding the labor and environmental provisions and their centrality in the text, because they saw Jordan as analyzably in counter-terrorism.\textsuperscript{100}

\textsuperscript{94} See Gary G. Yerkey, \textit{USTR Vows to Work for Compromise Between GOP, Democrats on Jordan FTA}, 18 INT'L TRADE REP. (BNA) 554 (Apr. 5, 2001) (stating "[t]he Agreement—for the first time in the test of any U.S. trade pact—contains provisions requiring both the United States and Jordan to enforce their labor and environmental laws or face the possibility of sanctions).

\textsuperscript{95} See Rossella Brevetti, \textit{Gramm Vows to Block Jordan FTA Unless Sovereignty Concerns Addressed}, 18 INT'L TRADE REP. (BNA) 1159 (July 19, 2001) (stating FTA contains the language "appropriate or commensurate" measures if either country does not enforce its labor or environmental laws in order to gain trade advantage).

\textsuperscript{96} See Rossella Brevetti, \textit{Baucus Sees Flexibility in Language on Environment, Labor in Jordan FTA}, 18 INT'L TRADE REP. (BNA) 757 (May 10, 2001) (stating phrase could encompass a variety of measures).

\textsuperscript{97} See Senate Approves, supra note 91, at 1533 (mentioning the pact allows either country to impose trade sanctions where domestic laws governing labor or environmental standards have been violated).

\textsuperscript{98} Under the pact U.S. and Jordan are permitted to name one member each to a panel that will adjudicate disputes and a third member will be mutually agreed on by both parties. \textit{See U.S. Signs, supra} note 89, at 1653. One senior trade official from the United States indicated the dispute resolution mechanism was more informal than that contained in the DSU or NAFTA, and modeled after the procedures in America's FTA with Israel. \textit{Id.}

\textsuperscript{99} \textit{See Senate Panel, House Approve, supra} note 92, at 1244 (mentioning the Zoellick letter states "[m]y Government would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade"); \textit{see also Senate Approves, supra} note 91, at 1533 (mentioning Zoellick, sent his letter to Jordan saying "the United States would not expect or intend to apply the dispute settlement 'enforcement procedures' with respect to labor or environmental matters in a matter that results in blocking trade.").

\textsuperscript{100} \textit{See Senate Approves, supra} note 91, at 1533 (mentioning U.S.-Jordan FTA as part of Bush administrations counterterrorism efforts).
The history of the Israel – United States FTA is a contrast not lost on Islamic reformists. The Israelis originally proposed a bilateral FTA in 1981. On 29 November 1983, President Reagan and Prime Minister Shamir agreed to commence negotiations, which began in earnest in mid-January 1984. These negotiations were conducted by the U.S. Trade Representative ("USTR") pursuant to the Trade and Tariff Act of 1984, wherein Congress delegated authority to the Executive branch to enter into the negotiations. Labor and environmental issues did not snag the negotiations, and no provisions on these issues were included in the final text. To be sure, the linkages between trade and labor, and between trade and the environment, were not as politically prominent in the early and mid 1980s as they would become at the turn of the millennium. Still, they could not have been unknown during the negotiations with Israel.

The View from the Islamic World (Or Part of It)

What has happened in the period since the Jordan FTA entered into force? Arguably, little progress on invitations to Islamic countries has been made. To the contrary, the record of American trade law toward the Islamic World could be characterized, not entirely unfairly, as one of more snubs than invitations.

Consider the following eight points as they might be seen through the eyes of trade officials from Muslim countries.

NO OTHER FTAS. The United States has eschewed – consciously or not – commencement of FTA negotiations with other Islamic countries. Egypt is an obvious, commercially significant, and highly strategic candidate. Its political and cultural influence in many parts of the Arab world are enormous. Egypt could be the anchor for a Middle East FTA into which the existing pacts with Israel and Jordan could be folded. Twenty-six Senators have

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101 This history, as well as an explanation of the agreement and the implementing legislation, is set forth in HOUSE COMM. ON WAYS AND MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, H.R. DOC. NO. 107-4, at 262-64 (2001).

102 See generally, BERNARD HOEKMAN & JAMEL ZARROUK EDS., CATCHING UP WITH THE COMPETITION (2000) (containing economic essays on regional trade integration in Middle East); see also BERNARD HOEKMAN & HANAA KHEIR-EL-DIN EDS., TRADE POLICY DEVELOPMENTS IN THE MIDDLE EAST AND NORTH AFRICA (2000) (containing economic essays on trade and investment in Middle East).
supported these ideas, yet no substantial progress has been made beyond a "Trade and Investment Framework Agreement" ("TIFA") between the United States and Egypt signed in 1999, and an expression of interest by the United States in November 2001 in starting talks.


104 See Gary G. Yerkey, U.S. Wants FTA Talks with Egypt, Links Trade to Global War on Terrorism, 18 INT'L TRADE REP. (BNA) 1806 (Nov. 8, 2001) (stating U.S. wants to begin free trade negotiations with Egypt). The USTR has expressed an interest in an FTA with Egypt, but also said that a large amount of preparatory work would be required first, not the least of which would be reforms in Egypt (e.g., simplifying customs procedures, so as to facilitate the movement of merchandise into and out of Egypt, and liberalizing access to foreign exchange markets, in order to facilitate import purchases). See Gary G. Yerkey, U.S. Wants Free Trade Pact with Egypt But Says Start of Talks Still Long Way Off, 19 INT'L Trade Rep. (BNA) 1062 (June 13, 2002). Trade between the United States and Egypt now is valued at $4.2 billion, and the United States is Egypt's largest trading partner. Egypt has a keen export interest in textiles and clothing, the imports of which remain subject to quotas until the WTO Agreement on Textiles and Clothing takes full effect. Egypt has urged that American businesses could lose market share to EU competitors, because of an agreement between the EU and Egypt to reduce tariffs over a 12-year period. See Abeer Alam, Egypt Hopes for Free Trade Pact with U.S., N.Y. TIMES, Mar. 6, 2002, at W1.

The Clinton Administration discussed the idea of an FTA with three Maghreb countries, Algeria, Morocco, and Tunisia (but not Libya), and USTR Zoellick also mentioned this possibility on his January 2002 trip in Morocco. The United States has a TIFA with Morocco, and one with Algeria as well (the latter, signed in July 2001, is posted on the USTR's website at www.ustr.gov). See Gary G. Yerkey, USTR Zoellick Plans Travel to Africa, Latin America, and Asia in Coming Weeks, 19 INT'L Trade Rep. (BNA) 177 (Jan. 31, 2002).

Thusfar, the extent of material progress on turning the idea of an FTA with Morocco into reality is questionable. Negotiations were launched on 21 January 2003, with the aim of concluding a deal by the end of 2003. The United States exports about $475 million worth of products to Morocco a year, and the top products are aircraft, corn, and machinery. The USTR urges that an FTA with Morocco would expand market access opportunities for American farmers and industrial workers, and that it would support the process of economic reform in Morocco. Nonetheless, persuading Morocco that its self-interest lies in reducing its considerable barriers to imports, especially agricultural products, from the United States may prove difficult. American exports to Morocco face an average tariff of 20 percent, while Moroccan merchandise entering the United States is subject to an average 4 percent tariff. Morocco's tariffs on beef and wheat are particularly high, the latter because of the government's policy to keep the price of bread low. Thus, to satisfy American commercial interests, a considerable degree of non-reciprocal duty reductions, with Morocco bearing the heavier responsibility, may be necessary. The French Foreign Trade Minister, Francois Loos, certainly did not facilitate matters when he apparently told Morocco "You have to decide to choose" as between an FTA with the United States and closer trade relations with the EU. (Morocco and the EU entered into an association agreement in 1995, the aim of which is to provide preferential tariff treatment for most industrial and some agricultural products by 2012. Presently, France is Morocco's largest trading partner, and trade with the EU represents two-thirds of all of Morocco's trade.) See Gary G. Yerkey, U.S. and Morocco Launch Free Trade Talks, With Agriculture Likely to Be Toughest Issue, 20 INT'L Trade Rep. (BNA) 193 (Jan. 23, 2003).
LACK OF INCLUSIVENESS IN THE WTO MEMBERSHIP. Of the 144 WTO Member countries, a rough estimate is that only 20 are Muslim, or about 14 percent of the Membership. The Islamic countries that have not acceded yet to the WTO are Afghanistan, Algeria, Azerbaijan, Iran, Iraq, Libya, Saudi Arabia, Syria, Tajikistan, Turkmenistan, Uzbekistan, Yemen. To be sure, it is important not to stretch this point. It cannot be inferred that Muslims as people, as distinct from sovereign Islamic states, are under-represented. The largest Muslim countries in the world – Indonesia, Pakistan, Bangladesh, Turkey, and Egypt – are Members, accounting for 207, 135, 128, 64, and 63 million people, respectively, or nearly 600 million of the 1.2 billion

Finally, Turkey has proposed a preferential trading arrangement with the United States, but no concrete action appears to have occurred toward realizing this goal. See Gary G. Yerkey, Turkish Leader Proposes Trade Pact with U.S. to Cut Tariffs, Non-Tariff Barriers, 19 Int'l Trade Rep. (BNA) 118 (Jan. 24, 2002). Turkey has gone so far as to say that it would like to join NAFTA, especially if its application to join the EU is unsuccessful. Traditionally, the United States is said to have been wary of an FTA with Turkey because of concerns about Turkey's human rights record. See Gary G. Yerkey, Turkish Leader Tells President Bush Ankara Wants to Join NAFTA if EU Bid Fails, 19 Int'l Trade Rep. (BNA) 2172 (Dec. 19, 2002). Arguably, that concern is inconsistent with the constructive engagement approach, which (coupled with a realistic appraisal of America's commercial interests) prevailed with respect to China's accession to the WTO. That concern also might be somewhat dated, insofar as it does not account for progress in Turkey. However, as a practical political matter, Turkey's delayed support for the military campaign in Iraq may well have reduced the likelihood of an FTA between it and the United States. If so, that would be unfortunate. Arguably, Turkey's delay ought to be a reason for hastening progress toward this goal. An FTA might well strengthen the bond between the two countries on a range of matters going beyond strictly trade. (To be sure, it would not be a guarantee of unconditional support on future military issues, as illustrated by the positions taken by Mexico and Chile, both of which have FTA deals with the United States, in the United Nations Security Council on the use of force against Iraq.)

I count as "Islamic" those countries with a Muslim population of 66 percent or higher. JOHN L. ESPOSITO, THE OXFORD HISTORY OF ISLAM X, Introduction (1999). The book contains a handy map, "The World of Islam – Distribution of World Population." Accordingly, the Islamic countries included are: Afghanistan; Albania; Algeria; Azerbaijan; Bahrain; Bangladesh; Brunei; Egypt; Gambia; Guinea; Indonesia; Iran; Iraq; Jordan; Kyrgyzstan; Kuwait; Libya; Mali; Mauritania; Morocco; Oman; Pakistan; Qatar; Saudi Arabia; Syria; Tajikistan; Tunisia; Turkey; Turkmenistan; United Arab Emirates; Uzbekistan; Yemen.

Admittedly, the threshold of a two-thirds domestic Muslim population may be high. It results in the exclusion from my calculations of: Bosnia & Herzegovina; Burkina Faso; Chad; Guinea Bissau; Kazakhstan; Lebanon; Malaysia; Nigeria; and Sierra Leone. In each of these countries, Muslims account for between 36 and 65 percent of the population. See id.

In July 2001, the WTO General Council accepted the application for membership from Tajikistan, and established a working party on accession to negotiate membership terms. See Daniel Pruzin, WTO Accepts Membership Applications from Bahamas, Tajikistan; Delays on Iran, 18 INT'L TRADE REP. (BNA) 1200 (July 26, 2001).

Muslims. Tens of millions more Muslims living in non-Muslim countries like China and India are represented through the Membership of those countries. The point is that if the count is by sovereign states, there is reason for concern about inclusiveness, especially given some of the prominent Islamic states – such as Iran, Syria, and Saudi Arabia (all discussed below) – that remain outside the club.

BLOCKAGE OF IRANIAN ACCESSION. The rise to power of a cautious modernizer in Iran President Mohammad Khatami bespeaks the influence of Liberal Reformism in that country, and suggests Iran might be a good candidate for WTO Membership. That Membership could encourage economic liberalization, and foster trade linkages that re-integrate it into the community of peaceful, prosperous nations. Yet, a strategic opportunity is not how the United States approaches Tehran's interest in the WTO. (To the contrary, Iran is said to be part of an “axis of evil,” along with Iraq and North Korea.\footnote{See George Bush and the Axis of Evil, ECONOMIST, Feb. 2, 2002, at 13 (describing President Bush's comments that Iran is one of nations in “axis of evil”); Judy Dempsey, Europeans Reject Bush “Axis of Evil” Line on Iran, FIN. TIMES, Feb. 5, 2002, at 4 (discussing reactions to President Bush's labeling of Iran as part of “axis of evil”).}) To join the WTO, a working party needs to be established to negotiate terms of accession, and the General Council (which operates by consensus) must agree to form the working party.\footnote{See Bhala, supra note 74, at 1471-74 (describing the accession process).} Iran applied to join in 1996. The initial American response was to block the General Council from even considering formation of a working party.\footnote{See Daniel Pruzin, U.S. Blocks Iranian WTO Application; Syria Prevented from Placement on Agenda, 19 INT'L TRADE REP. (BNA) 36 (Jan. 3, 2002) (stating that the U.S. blocked Iran's application for membership in 1996).} In May 2001, the United States agreed to placement of the issue on the agenda. But, on the ground it is reviewing the matter internally, presumably a euphemistic way of stating its suspicion of Iran's support for terrorism, the United States continues to block approval of Iran's request to establish a working party.\footnote{See Guy Dinmore & Frances Williams, Iran Signals WTO Hopes, FIN. TIMES, May 9, 2001, at 9; Daniel Pruzin, supra note 110 (stating that U.S. has continued to withhold approval of Iran's membership recently).} Supported by Israel, but opposed by the EU, the United States formally blocked Iran's application again in February 2002.\footnote{See Frances Williams, Iran's Bid to Join WTO is Blocked by U.S., FIN. TIMES, Feb. 14, 2002, at 5 (stating that the U.S. and Israel have blocked Iran from entering the WTO}
BLOCKAGE OF SYRIAN AND LIBYAN ACCESSIONS. The rise to power of a purported modernizer in Syria, President Bashar al-Assad, may be a hopeful sign of influence of Liberal Reformists in that country. So, too, may be Syria's indication in October 2001 that it would like to join the WTO. The United States blocked the General Council from putting on the agenda the question of formation of an accession working party. It appears to have done so because of Syria's support for the Arab League boycott of Israel.\(^{113}\) The United States has taken the same position on Libya's request for WTO Membership — blockage, presumably out of concern for Libya's support for this boycott.\(^{114}\) In both cases, the American position is at odds with that of the EU, which supports the Syrian and Libyan accession moves. Indeed, the EU is going so far as to negotiate a trade association accord with Syria, which is part of a grander design to create a Europe-Mediterranean FTA by 2010.\(^{115}\)

HESITANCY TOWARD THE PALESTINIANS. The United States has told the Palestinian Authority that, given tensions with Israel, it would not be appropriate for the Authority to gain WTO observer status.\(^{116}\) That status would be an initial step toward possible Membership.

NO REAL PROGRESS ON SAUDI ACCESSION. It is not clear how what appears to be a debate in Saudi Arabia about the nature and pace of economic reform will play out, and in particular whether Traditional Reformism will triumph.\(^{117}\) The strategic argument for including Saudi Arabia in the WTO is encouragement of Liberal Reformists, or at least Neo-Traditional

\(^{113}\) See Daniel Pruzin, *Syria to Seek WTO Membership; Objections of U.S., Israel Expected*, 18 INT'L TRADE REP. (BNA) 1806 (Nov. 8, 2001) (stating that American companies are prohibited from complying with foreign boycotts fostered or imposed against countries friendly to the United States).

\(^{114}\) See Williams, supra note 112 (stating that Washington has privately served notice that it will continue to block recent requests for WTO membership from Syria and Libya).

\(^{115}\) Id. (stating EU plans to create a Europe-Mediterranean free trade area by 2010).

\(^{116}\) See Pruzin, supra note 113.

\(^{117}\) See Roula Khalaf, *A wind of change must rise in Riyadh, says Prince Talal: Once exiled for his views, he believes the desert kingdom must now adapt, says Roula Khalaf*, FIN. TIMES, Jan. 30, 2002, at 20 (stating that prince of Saudia Arabia Talal bin Abdelaziz believes political reform is necessary).
Reformists, who in turn will protect the oil flowing from one quarter of the world’s proven reserves. The Kingdom applied to join the GATT in July 1993, though little progress was made in accession negotiations until the birth of the WTO on 1 January 1995. Since then, talks have bogged down over the terms. On the one hand, the United States (and other developed country WTO Members) wants market access the Saudis appear unwilling to provide, because of a threat to the birth of infant industries that might help wean their economy off of its present dependence on oil, and a fear of an invasion of western culture embedded in imported goods and services that would undermine Islamic values. More than just maintenance of an import ban on alcohol and pork is at stake. In March 2001, the Saudis produced a broad “negative list” of industrial and service sectors that would be off limits to foreign companies: all insurance and reinsurance businesses; telecommunications (public telecom, data and message transmission, and business network services); wholesale trade; retail distribution; auto dealerships and auto parts outlets; road and air transport (passenger and freight); audiovisual businesses (film and video production and distribution, cinemas, radio, and television); printing and publishing; education; nursing and paramedical services; real estate commission businesses; and, of course, oil exploration and production, and pipeline transport. On the other hand, perhaps the United States is chary of what Saudi Arabia could use: oil subject to the disciplines of trade law, including bound tariff schedules, so its exports would not be subject to excessive or discriminatory import barriers.

LACK OF REPRESENTATION IN THE WTO SECRETARIAT. Of the

118 See Robin Allen, Saudis Blame “Unique Status” for Delays in Joining WTO, FIN. TIMES, June 14, 2000, at 8 (including statements of Osama El-Faqih, Saudia Arabia’s Commerce Minister).

119 See Frances Williams, Saudis Start Talks on Joining the WTO, FIN. TIMES, May 3, 1996, at 4 (stating that Saudia Arabia hopes to join the WTO).

120 See Daniel Pruzin, U.S., EU Push Saudis to Improve Market Access Offers for WTO Entry, 17 INT’L TRADE REP. (BNA) 1654 (Oct. 26, 2000) (noting that Saudis have taken offense to efforts by WTO nations to force them to make commitments to import taboo goods).

121 See Daniel Pruzin, Trade Officials Express Disappointment with Saudi Foreign Investment Exclusion List, 18 INT’L TRADE REP. (BNA) 446 (Mar. 15, 2001) (noting WTO nation’s disappointment with the Saudis “negative” list of industries that foreigners would be prohibited from participating in).
512.5 actual employees at the WTO Secretariat, few are from Islamic countries. There are 3 Egyptians, 1 Moroccan, 4 Tunisians, and 2 Turks. In other words, representation among employees in the Secretariat from the Islamic World is about 2 percent. Of course, there may be Muslims from non-Muslim countries (but that is not easy to ascertain from available sources), and the point of working for the Secretariat is not to be a lobbyist for the interests of one's own country. Still, the lack of nationals in the Secretariat from Indonesia, Pakistan, and Bangladesh – the world's three largest Islamic countries – is stunning.

SANCTIONS. It has been suggested America has a sanctions-based foreign policy, though former Senator Jesse Helms has disputed the charge that the United States is sanctions happy. What is difficult to deny is that Islamic countries are frequent targets of America's trade sanctions, particularly those taking aim at state-sponsored terrorism. For example, in August 2001, President Bush agreed to an extension of the Iran and Libya Sanctions Act of 1996 ("ILSA"), which otherwise would have lapsed pursuant to a sunset clause in that legislation, after both houses of Congress voted for the extension by a veto-proof margin. There is a vigorous and world-wide debate as to the efficacy of isolating regimes in order to bring about a change in them, or their behavior, as opposed to constructively engaging them.

122 See Overview of the WTO Secretariat, supra note 45; see also Esposito, supra note 105.
124 See Jesse Helms, What Sanctions Epidemic?: U.S. Business' Curious Crusade, FOREIGN AFFAIRS, February, 1999 (stating that the U.S. has not overused sanctions as a foreign policy tool).
125 See U.S. INT'L TRADE COMM'N, USITC PUB. 3124, OVERVIEW AND ANALYSIS OF CURRENT U.S. UNILATERAL ECONOMIC SANCTIONS, 1-8-11 and Table 1-3 at 1-12-13 (Inv. No. 332-391, Aug. 1998) (listing countries under U.S. sanctions and the reasons for the sanctions).
127 See generally, Bhala, supra note 126, at 116-21 (discussing several of the studies that analyze the debate).
Certainly, whether these eight points are "snubs" is a matter of perspective and context. Doubtless American trade officials would claim to have made greater efforts at inviting into the family of trading nations the Islamic countries. But, as is the case with developing countries (discussed in Section II), there is the problem of perception and reality merging in a fuzzy way. If one side sees itself being told it is not invited to share in the opportunities from a liberal trade order, then that is a real problem the other side ignores at its peril.

Whatever the accuracy of the perception, the Islam Challenge is critical. Failure to meet it is a second reason for abjuring the characterization of Doha as a "success." Extending Secretary Hull's vision means linking (1) the integration into the trading system of Liberal Reformist, and possibly also Neo-Traditional Reformist, Islamic countries, with (2) the peace and security necessary for that system to operate. That link is not yet a feature of American trade law as it relates to the Islamic World.

CONCLUSION

European Commission President Romano Prodi declared the DDA indicated the new negotiating round "would not be one world against another but a shared agreement." Is he right? Two Challenges, Poverty and Islam, reflect two great schisms in global trade - between rich and poor, and Muslim and non-Muslim. If trade law is to liberalize trade, and not be the tool for protectionist abuse, then these schisms must be narrowed. If they are not narrowed, then surely Prodi will be wrong.

To say the dominant trading power must take the lead is not to take a position hostile to American trade law. If the argument were that American trade policy is a study in failure, then there would be a legitimate counter-attack. That argument would make matters sound far worse than they are. But, if the argument is trade law has not met the two Challenges, which it is, then it might be taken in the spirit in which it is meant - constructive criticism.

128 Jonquieres, WTO Agrees to Launch New Trade Talks, supra note 3.
Empathy is not agreement. Not every point put forward by every official from a developing or Islamic country about how trade law ought to be changed is correct. There is rhetoric, even whining unmindful of self-inflicted wounds like domestic corruption. More apologies for the Third World are unnecessary. Is it not a fact that of the 24 poorest African countries that made economic reforms between 1990-99, 10 of them endured wars and coups, while bureaucracy, graft, and dreaded diseases plagued virtually all of them? There is blame to go around, but pointing fingers is not the hallmark of good lawyers. Rather, empathy is the indispensable quality for effective advocacy in any forum. The WTO is no exception.

Likewise, humility is needed to avoid overstatement. It would be excessive to imply that had the United States met successfully the Poverty and Islam Challenges, all or virtually all of the outstanding substantive trade law issues would have been resolved at Doha. Who can gainsay that there were, and still are, other obstacles in the way? Many WTO Members face domestic constituency pressures, coupled with internal government constraints, which conspire against dramatic agreement to new multilateral trade agreements. In the United States, the confederates – sometimes in concert, sometimes not – include many labor unions, environmental lobbyists, human rights groups (including activists for religious freedom), and consumer advocates. Not all of the arguments from these non-governmental actors can be dismissed as simplistic or selfish. And, of course, there are serious threats posed by unresolved disputes among the major trading powers (e.g., the Foreign Sales Corporation case, and numerous AD and safeguards cases).

Rather, the point in challenging the conventional wisdom about Doha is that had the two Challenges been addressed, then Doha might well have produced agreements on more substantive points than it did. Indeed, insofar as overlap exists between concerns raised by NGOs, or parts of governments, in some WTO Members, and concerns of developing and Islamic countries,

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130 See Not By Their Bootstraps Alone, ECONOMIST, May 12, 2001, at 52 (hypothesizing that not giving the poor countries support during the transition to liberalization can be a recipe for economic instability).

there is reason for confidence in this historical counter-factual claim. However, that intriguing overlap is for another article.