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# THE LOST PURPOSE OF THE DOHA ROUND

*Raj Bhala\**

## I. TRADE LIBERALIZATION AS COUNTER-TERRORISM

How should the world trading system be regulated? Not by using the Doha Round of multilateral trade negotiations as an example. Who should regulate the world trading system? Not the World Trade Organization (WTO) Members, if their behavior in this Round, particularly that of most major, and several developing Members, is an example.

The Members of the WTO have succumbed so completely to the pursuit of their commercial self-interest that the Doha Round has devolved from its grand launch in November 2001 as a counter-terrorist strategy to a monstrous mishmash of international trade law minutiae. The Round has lost its links to its original purpose, to fight Islamist extremism by attacking one (not the only, but one) of its causes: poverty. The correct idea was that multilateral trade liberalization could spur poverty alleviation among Muslim communities and countries, and integrate them more completely into the global trade order. Seeing and experiencing the benefits from this order, otherwise marginalized Muslims might be less susceptible to plotting

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For a more in depth treatment of the matters discussed herein, please see the Doha Round Trilogy by the author:

- *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy – Agricultural Tariffs and Subsidies*, UNIVERSITY OF SAINT THOMAS LAW JOURNAL (2011, Annual Law Journal Lecture);
- *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy – Non-Agricultural Market Access and Services Trade*, 44 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW issues 1 & 2 (2012, War Crimes Research Symposium on International Law in Crisis);
- *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy – Trade Remedies and Facilitation*, 40 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY issue 1 (2012, 40<sup>th</sup> Anniversary Symposium in Honor of Professor Ved Nanda).

against the order and some of its non-Muslim participants. Why take a dangerous job as a lowly courier for Osama Bin Laden when the WTO system offers the realistic possibility of a lucrative career with an import-export business and promises, in a legally binding manner, market access and a level competitive playing field for the merchandise of that trading house?

That the Round was supposed to be about counter-terrorism through creating poverty-reducing opportunities was evident from its official name: the Doha Development Agenda, or DDA. It is the middle "D" that has gone missing. The Round has become like all others in the history of the General Agreement on Tariffs and Trade (GATT), namely, a mercantilist exercise among the powerful, who cannot see much beyond the short term.

To be sure, not all terrorists are poor (or Muslim), and not all poor (or Muslims) are vulnerable to extremism. Some terrorists, especially the evil minds concocting various plots, suffer less from forced material deprivation and more from a distorted sense of reality and a misunderstanding of faith. But, among their recruiting grounds are the poor, who suffer through no fault of their own from educational and occupational deprivations, and thereby are vulnerable to manipulation. Barely two months after the September 11<sup>th</sup> terrorist attacks, deliberately holding their Ministerial Conference on the shores of the Gulf, in the Qatari capitol, the WTO Members understood a new multilateral trade round could not rid the world of the scourge of terrorism.<sup>1</sup> But, along with "hard" counter-terrorism efforts, *i.e.*, the use of force, a new round might be a "soft" effort. Fight *Al Qaeda* and the *Taliban* by proving they are lousy economists, that the world capitalist order does afford hope for a higher living standard and a more just distribution of resources. So, in brief, fighting terrorism through trade liberalization was the purpose of Members in launching the Round.<sup>2</sup>

What has happened since November 2001? A few examples from the latest Doha Round negotiations texts, issued in December 2008, provide the answer: loss of purpose. Succumbing to their own selfish commercial interests, the United States, European Union (EU), and other major trading powers, along with several major emerging countries, particularly Brazil, India, and China, have collectively failed to keep the Round loyal to its

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<sup>1</sup> See Warren Vieth, *WTO Talks Open Amid Drug Clash; Trade: Under Heightened Security in Qatar, Poor and Wealthy Nations Prepare for Battle Over Protection of Patents*, L.A. TIMES, Nov. 9, 2001 (Bus.), at 1.

<sup>2</sup> See Raj Bhala, *Doha Round Schemes: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT'L L. REV. 5, 169 (2008) (discussing the complexity of Doha Round proposals, including the pretence that trade liberalization would reduce the vulnerability of people in poor countries to radical Islamic extremism).

original intent. These draft modalities texts are long: the agriculture and non-agricultural market access (NAMA) texts are roughly 150 single-spaced pages, with footnotes.<sup>3</sup> They are convoluted: a rule purporting to cut a tariff or trim a subsidy is riddled with limitations and exceptions, which typically apply to a specific WTO Member or subset thereof.<sup>4</sup> But while these dilated texts, with their turgid prose, make for difficult reading, the payoff is worth the effort. The payoff is to see the broad pattern from the bowels: the loss of purpose.

Consider the December 2008 Draft Agriculture Modalities Text.<sup>5</sup> The original purpose of farm trade liberalization, which this Draft Text is supposed to provide, is clear enough. There are many poor Muslim farmers, including in the Cotton Four countries (Benin, Burkina Faso, Chad, and Mali).<sup>6</sup> Their incomes could be raised, and they could afford better education for their children (better, in particular, than some Islamist schools the curriculum of which is long on rigid religious education and short on practical job market skills), if trade in primary and processed agricultural products were freer and fairer.

To be “freer” would mean duty free, quota free (DFQF) treatment to export markets around the world. To be “fair” would mean an end to trade-distorting subsidies sponsored by the governments of rich countries. In a new environment, the farmers and their children would have no economic incentive, and no educational excuse, to entertain Islamist extremism or extremists. Therefore, the Draft Text ought clearly and expeditiously enhance market access for these farmers and free them from competing with the official treasuries of developed countries. Does the Draft Text fall short of fulfilling this purpose? To infer an answer, consider three revealing illustrations.<sup>7</sup>

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<sup>3</sup> See World Trade Organization, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.4 (Dec. 6, 2008) [hereinafter December 2008 Draft Agriculture Modalities Text], available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_dec08\\_a\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf); see also World Trade Organization, Negotiating Group on Market Access, *Fourth Revision of Draft Modalities for Non-Agricultural Market Access*, TN/MA/W/103/Rev.3 (Dec. 6, 2008) [hereinafter December 2008 Draft NAMA Modalities Text], available at [http://www.wto.org/english/tratop\\_e/markacc\\_e/namachairtxt\\_dec08\\_e.pdf](http://www.wto.org/english/tratop_e/markacc_e/namachairtxt_dec08_e.pdf).

<sup>4</sup> CHRIS MILNER ET AL., POLICY RESPONSES TO TRADE PREFERENCE EROSION: OPTIONS FOR DEVELOPING COUNTRIES 36 (2010) (explaining in depth the formula and guidelines that create a multitude of specific exceptions and limitations as applying to developed or developing countries with respect to agriculture and market access).

<sup>5</sup> See December 2008 Draft Agriculture Modalities Text, *supra* note 3.

<sup>6</sup> See Raj Bhala, *Discovering Great Opportunity in the Midst of Great Crisis: Building International Legal Frameworks for a Higher Standard of Living: Doha Round Betrayals*, 24 EMORY INT'L L. REV. 147, 179 (2010).

<sup>7</sup> For example, under the December 2008 Draft NAMA Modalities Text, the proposed

A. *Example #1: OTDS*<sup>8</sup>

The December 2008 Draft Agriculture Modalities Text creates a base level for measuring all agricultural subsidies in a WTO Member, "Overall Trade Distorting Support (OTDS)," from which the Member is to impose cuts. OTDS is the sum of all farm subsidies.<sup>9</sup> Accordingly, OTDS covers product- and non-product specific support categorized in the Amber Box (*i.e.*, trade-distorting subsidies) and Blue Box (*i.e.*, production set-asides, and possibly counter-cyclical payments), along with *de minimis* support (*i.e.*, farm subsidies below a certain percentage of the total value of farm output). OTDS does not include agricultural export subsidies, which are subject to different proposed disciplines, nor Green Box subsidies, which by definition is non-trade distorting, and thus not subject to reduction obligations.

The Draft Text calls for tiered reductions to OTDS.<sup>10</sup> For instance, if a

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industrial product tariff cutting modality is the Swiss Formula, which happily should result in bringing down higher industrial tariffs, and thus remedy to some degree tariff dispersion. But, with so many exceptions for individual WTO Members, or groups thereof, only about 40 of the 153 Members would apply that Formula. For instance, there are country-specific exemptions, buried in the details of the Formula, for Bolivia and Venezuela. *See* December 2008 Draft NAMA Modalities Text, *supra* note 3, ¶ 13.

<sup>8</sup> This discussion is based on a paragraph-by-paragraph, line-by-line analysis of the December 2008 Draft Agriculture Modalities Text, *supra* note 3, and World Trade Organization, *Unofficial Guide to the Revised Draft Modalities – Agriculture* 9 (Dec. 6, 2008, corrected Dec. 9, 2008) [hereinafter WTO Unofficial Guide], available at [http://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_modals\\_dec08\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.htm).

<sup>9</sup> *See* December 2008 Draft Modalities Text, *supra* note 3, ¶¶ 1–2. Conceptually, it should not be necessary to define "OTDS." As its name ("aggregate" measure of support) suggests, the first figure, AMS, is supposed to capture the sum total of subsidies a Member provides to its farm sector. This figure does not do so, however, because (via the WTO *Agreement on Agriculture*), it excludes *De Minimis* and Blue Box payments. *See* RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* chs. 45–46 (3d ed. 2008). Hence, OTDS is closer to the truly aggregate measure of support that AMS ought to be, but for legally-permissible exemptions from AMS. To be sure, it is not perfectly all-inclusive.

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

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

<sup>10</sup> *See* December 2008 Draft Agriculture Modalities Text, *supra* note 3, ¶¶ 3, 11. WTO

WTO Member is in Tier 1, defined by an OTDS of U.S. \$60 billion or more annually, then it must cut its OTDS by 80 percent. If a Member is in Tier 2, meaning its annual OTDS is between \$10 and \$60 billion, then the Member must cut OTDS by 70 percent. A Member in Tier 3, with an OTDS of below \$10 billion annually, must impose a 55 percent cut.

The OTDS reduction commitment rule sounds simple enough. Applying it, the EU, with its hearty Common Agricultural Policy (CAP), is in Tier 1, and, therefore, would impose a cut of 80 percent to its base OTDS level of about € (euros) 110 billion. The U.S., which (along with Japan) is in Tier 2, given its generous legislated farm subsidy schemes, would reduce by 70 percent its base OTDS level of \$48.2 billion.<sup>11</sup> But, are these cuts

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

<sup>11</sup> In January 2009, the U.S. notified the WTO of its domestic agricultural support expenditures for marketing years (MYs) 2006 and 2007. (MYs do not correspond with calendar years. Hence, for example, MY 2007 carried over into mid-2008, and even further for certain crops.) Those figures, with certain updates, are summarized as follows:

- OTDS –  
In MY 2006, \$11.34 billion, and in MY 2007, \$8.52 billion. The average for MYs 2002-2005 was \$15.9 billion. The OTDS limit proposed for the U.S. (discussed in Table I, *infra*) is \$14.46 billion.
- Amber Box –  
In MY 2006, \$7.74 billion, and in MY 2007, \$6.26 billion. In MY 2008, the figure was \$6.25 billion. The Uruguay Round bound limit on Amber Box spending for the U.S. is \$19.1 billion. The proposed Doha Round cut (discussed in Table II, *infra*) would lower this limit by 60 percent to \$7.64 billion. Interestingly, virtually all American Amber Box support went to two categories of products – dairy (\$5.01 billion in MY 2007) and sugar (\$1.23 billion in MY 2007).
- *De Minimis* Support –  
In MY 2006, for Product-Specific *De Minimis* Support, \$171 million, and in MY 2007, \$237 million. For Non-Product Specific *De Minimis* Support, in MY 2006, \$3.6 billion, and in MY 2007, \$2.02 billion. For both MY 2006 and 2007, U.S. *De Minimis* support was under the 5 percent limit (discussed *infra*).
- Countercyclical Support –  
In MY 2006, \$1.49 billion, and in MY 2007, \$893 million. The U.S. classified countercyclical payments in the Amber Box, yet explained they were *de minimis* and thus exempt from Amber Box reduction commitments.

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- Cotton Subsidies –  
In MY 2006, \$1.37 billion, and in MY 2007 \$208 million. The U.S. classified cotton subsidies in the Amber Box. In MY 2006, over \$1 billion of this support was not exempt from Amber Box reduction commitments. But, in MY 2007, the U.S. declared its cotton subsidies were *de minimis*, because the \$208 million figure fell below the *de minimis* threshold of 5 percent of the total value of American cotton production (which was \$5.2 billion).
  - Non- or Minimally-Trade Distorting (Green Box) Subsidies –  
In MY 2006, \$76.04 billion, and in MY 2007, \$76.16 billion. U.S. spending in the Green Box jumped from \$58.3 billion in MY 2002 to \$71.8 billion in 2005, and thereafter has essentially reached a plateau. Child nutrition and food stamp programs account for roughly two-thirds of American Green Box subsidies.

See Daniel Pruzin, *U.S. Reports Less Trade-Distorting Subsidies for Farms in '06-'07, But Increase Expected*, 26 INT'L TRADE REP. (BNA) 146–47 (Jan. 29, 2009).

Note that the American classification of some subsidy schemes is the subject of deep skepticism in the WTO, particularly in light of the Appellate Body decision in *United States — Subsidies on Upland Cotton*, WT/DS267/AB/R (adopted Mar. 21, 2005) (complaint by Brazil). This case is treated in Raj Bhala & David Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107–345 (2006). At the March 12, 2009 meeting of the Committee on Agriculture, Australia, Brazil, and Japan questioned whether the U.S. could rightly classify counter-cyclical support as non-product specific, as such support effectively requires recipients to produce, or eschew, certain crops. These three countries also cast doubt on whether direct payments to farmers are decoupled, and thus properly classified by the U.S. in the Green Box, because some funding depends not on fixed and unchanging base acreages and yields (but rather requires crops not to be produced on base acres). See World Trade Organization, *Committee Focuses on Monitoring Agriculture Commitments*, Mar. 12, 2009, [http://www.wto.org/english/news\\_e/news\\_09\\_e/ag\\_com\\_12mar09\\_e.htm](http://www.wto.org/english/news_e/news_09_e/ag_com_12mar09_e.htm).

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

- Green Box Subsidies –  
As reported in the January 2011 notification, €62.6 billion for MY 2007–2008, and €56.5 billion for 2006–2007, the largest share of which are payments under the EU Single Payment Scheme (discussed *infra*), namely, €31 billion in 2007–2008. As reported in the March 2009 notification, for MY 2006–2007, €37 billion, but included in this figure are Blue Box payments based on fixed areas and yield, or fixed livestock head, which are not subject to reduction under the Uruguay Round *Agreement on Agriculture*. For MYs 2004–2005 and 2005–2006, respectively, the figures are €24.4 and €40.3 billion.
- Amber Box Subsidies –  
For MY 2003–2004, the EU reported to the WTO in December 2006 it had spent €30.9 billion in Amber Box support (far below its annual spending

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limit of €67 billion, bound during the Uruguay Round), and €24.78 billion in the Blue Box. In its March 2009 notification, the EU again stated its Amber Box support for MYs 2004–2005 and 2005–2006, respectively, were €31.2 and €28.4. The commodity product categories to which the EU gave the largest Amber Box payments in MY 2005–2006 were sugar (€7 billion), butter (€4.1 billion), apples (€2.8 billion), and olive oil (€2.6 billion). Its subsidies for these products took the form of price support. In its January 2011 notification, the EU said Amber Box spending dropped by 54 percent, from €26.63 billion in MY 2006–2007, to €12.35 billion in MY 2007–2008. As in previous years, sugar and butter were the largest recipients of product-specific Amber Box support, so the large drop in such support was due mainly to cuts in sugar and butter subsidies: in sugar, a cut from €6.8 billion in MY 2006–2007 to €3.5 billion in MY 2006–2007, and in butter from €3.6 billion in MY 2006–2007 to €2.7 billion in MY 2007–2008.

- Blue Box Subsidies –

According to the March 2009 notification, Blue Box support totaled €27.2 billion for MY 2004–2005, and €13.4 billion for MY 2005–2006. In the January 2011 notification, the EU said Blue Box support declined by 9 percent, from €5.7 billion in 2006–2007 to €5.2 billion in 2007–2008.

See Daniel Pruzin, *EU Notifies WTO of Sharp Drop in Trade-Distorting Farm Subsidies*, 28 INT'L TRADE REP. (BNA) 150 (Jan. 27, 2011); Adriane Grace, *EU Issues New Farm Subsidy Notification; Trade-Distorting Support Remains Stable*, 26 INT'L TRADE REP. (BNA) 344–45 (Mar. 12, 2009); Daniel Pruzin, *EU to Exempt \$47 Billion from WTO Agricultural Subsidy Spending Caps*, 26 INT'L TRADE REP. (BNA) 307–08 (Mar. 5, 2009).

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

Conversely, the U.S. does not seem to be undertaking similar anticipatory structural reforms, and no optimistic inferences should be made from the above American figures. That is, just because these figures show a reduction in American farm subsidies does not mean the U.S. was ready to cut and bind its support at those lower levels. During MYs 2006–2007, commodity prices were at high levels. Especially because of counter-cyclical subsidies, farm support expenditures fall when prices are high, and *vice versa*. Commodity prices collapsed in 2008, and global economic recession deepened. For example, between March and December 2008, soybean prices fell 20 percent, and corn prices dropped 25 percent. Both crops are covered commodities under American farm subsidy law. Thus, American farm support spending, particularly counter-cyclical prices, is destined to rise. That is why the U.S. insists on significant headroom, *i.e.*, subsidy cuts and caps that leave bound levels above actual expenditures. To use the academic jargon, at issue is future policy space for American farm legislation. Viewed in retrospect, the failed Ministerial meeting in July 2008 was a critical missed opportunity to clinch a deal on agriculture when farm product prices were high and subsidy payments low. See Daniel Pruzin, *EU Notifies WTO of Sharp Drop in Trade-Distorting Farm Subsidies*, 28 INT'L TRADE REP. (BNA) 150 (Jan. 27, 2011); Adriane Grace, *EU Issues New Farm Subsidy Notification; Trade-Distorting Support Remains Stable*, 26 INT'L TRADE REP. (BNA) 344–345 (Mar. 12, 2009); Daniel Pruzin, *EU to Exempt \$47 Billion from WTO Agricultural Subsidy Spending Caps*,



meaningful for poor, Muslim farmers?

The reduction obligations are imposed not on actual farm subsidy expenditures, but rather on bound, or ceiling, levels.<sup>12</sup> The figures of €110 billion and \$48.2 billion are not what the EU and United States, respectively, actually spend, but rather the maximum amounts they could spend, if they chose to do so. The key, then, is whether they could raise actual outlays, despite cutting their ceilings—and, they could. America spends far less than \$48.2 billion annually on OTDS. In recent years, the actual figure has hovered in the range of \$6–10 billion, and with high commodity prices, expenditures are lower because some of the subsidies are triggered by, and designed to counter, low prices.<sup>13</sup>

Clearly, when a developed country is asked to cut OTDS from a high bound base level, and its actual expenditures are well below that level, then that country has commodious head room to raise its actual expenditures. Hence, a poor Muslim farmer in Africa, Asia, or the Near East could be told that “America and Europe are cutting their farm subsidies,” when in fact they are not. They are cutting only their bound ceiling levels. Consequently, this farmer could witness increases in American and European support for products he or she also grows and tries to sell overseas, possibly in some of the same third country markets as his or her American and European competitors. If this scenario is the much ballyhooed poverty-alleviating trade liberalization effected by the Draft Text, then could the farmer be blamed for feeling disillusioned with the Doha Round or oppressed by the global trade order?

#### B. Example #2: Blue Box Subsidies<sup>14</sup>

Along with OTDS reduction commitments, Blue Box subsidies are an example of why a poor, Muslim farmer might look askance at, and feel cheated by, the Doha Round negotiations on farm trade. This category of support, which emerged in the Uruguay Round (1986–1994), is defined

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26 INT'L TRADE REP (BNA) 307–308 (Mar. 5, 2009).

<sup>12</sup> WTO Unofficial Guide, *supra* note 8 (explaining bound, or ceiling, levels as related to the tiered reduction formula for cutting tariffs).

<sup>13</sup> See Raj Bhala, *Doha Round Schisms: Numerous, Technical, And Deep*, 6 LOY. U. CHI. INT'L L. REV. 5, 10 (2008) (noting that the United States spent \$10.2 billion in 2003 on OTDS).

<sup>14</sup> This discussion is based on a paragraph-by-paragraph, line-by-line analysis of the December 2008 Draft Agriculture Modalities Text, and on World Trade Organization, *Unofficial Guide to the Revised Draft Modalities – Agriculture*, (Dec. 6, 2008, corrected Dec. 9, 2008) [hereinafter WTO Unofficial Guide], available at [http://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_modals\\_dec08\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ag_modals_dec08_e.htm).

narrowly to cover only production set asides;<sup>15</sup> payments to farmers not to produce on a certain portion of their land, or not to raise a certain number of livestock, for example. This support is de-coupled from output, and indeed aims to avoid over-production associated with subsidies directly tied to production.<sup>16</sup> Historically, the CAP used production-linked subsidies, which resulted in mountains of butter and lakes of milk and wine. When pushed onto the world market, the increase in global supply depresses or suppresses prices, all to the detriment of poor Muslim farmers, especially if they are operating on thin profit margins that are erased by price declines.

The obvious solution, which would comport with the original purpose of the Doha Round, is to cut dramatically Blue Box subsidies. While the Draft Agriculture Text does call for their reduction, it also revises their definition.<sup>17</sup> The United States has championed an expansion in the definition of subsidies that qualify for Blue Box including: counter-cyclical payments (which, as their rubric suggests, counter the relevant product market price cycle by offering a larger subsidy to a farmer whose commodity experiences a greater price decline), as well as production set-asides.<sup>18</sup> The United States also succeeded in getting special and differential treatment for itself through a special rule that would allow it to increase product-specific Blue Box subsidies beyond that permitted for other WTO Members.<sup>19</sup> In brief, Blue Box subsidies might be cut, but the dimensions of the Box are expanded, especially for America. After any cuts, the Box might not be vastly smaller than before.

Once again, a poor Muslim farmer in a far-off land may be told that rich countries are slashing their production set-asides. But, the nuances of counter-cyclical payments may not be part of the story he or she hears. If that farmer witnesses price suppression or depression in his or her commodity markets, then can he or she be faulted for a less than enthusiastic sentiment toward the GATT–WTO system?

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<sup>15</sup> See WTO *Unofficial Guide*, *supra* note 14, at 2.

<sup>16</sup> See Michael J. Schumaker, *Comment: Tearing the Fabric of the World Trade Organization: United States-Subsidies on Upland Cotton*, 32 N.C.J. INT'L & COM. REG. 547, 562 (2007) (explaining how blue box subsidies are designed specifically for developing countries in order to limit agricultural production).

<sup>17</sup> See December 2008 Draft Agriculture Modalities Text, TN/AG/W/4/Rev.4 ¶¶ 32–33, 35–37 (Dec. 6, 2008), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_dec08\\_a\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf).

<sup>18</sup> See Raj Bhala, *Resurrecting the Doha Round: Develish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1, 118–19 (2009) (explaining how, in the Doha Round, the United States continuously sought a broader definition of the blue box that would include counter-cyclical payments).

<sup>19</sup> See December 2008 Draft Agriculture Modalities Text, *supra* note 17, ¶¶ 40, 42, 47.

C. *Example #3: Cotton Subsidies*<sup>20</sup>

To be sure, developing and even least developed countries share blame for rules in the December 2008 Draft Agricultural Text that stray away from the founding aim of the Doha Round. Rather than stick to a unified, resolute position, many of them mimic the major trading powers. That is, on almost all negotiating topics, they have sought and obtained *sui generis* rules and exceptions.

Jordan, Morocco, Tunisia, and Venezuela are examples: they have helped themselves to special provisions on cutting farm subsidies for net-food importing developing countries (NFIDCs).<sup>21</sup> Not to be left out, Macedonia, Saudi Arabia, Ukraine, and Vietnam have successfully argued for special exemptions from obligations to cut farm subsidies on the ground they are the most recent of recently acceded members (RAMs) to the WTO,<sup>22</sup> so they should not have to pay twice: once under their terms of joining the WTO, and a second time under the Doha Round. Then there is Albania, Armenia, Georgia, Kyrgyz Republic, and Mongolia. They, too, get special exemptions from farm subsidy reduction obligations,<sup>23</sup> not because they are very recent RAMs, nor because they have large Islamic populations. Their excuse is they are low-income countries with economies in transition from socialism to capitalism.

But, there is one topic on which developing and least developed countries are not to blame: cotton subsidies. The United States has long known, and been told directly at the WTO by delegates from the Cotton Four, that there is a causal link between its cotton subsidies (and, to be fair, those of the EU and China), on the one hand, and suppression or depression of world cotton prices, on the other hand.<sup>24</sup>

One study, issued in November 2010 by Fairtrade, a non-governmental organization (NGO), said the roughly \$1 billion rich countries spend on cotton subsidies depress the income of cotton farmers in the Cotton Four by

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<sup>20</sup> This discussion is based on a paragraph-by-paragraph, line-by-line analysis of the December 2008 Draft Agriculture Modalities Text, and on World Trade Organization, *Unofficial Guide to the Revised Draft Modalities – Agriculture*, (Dec. 6, 2008, corrected Dec. 9, 2008), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_modal\\_dec08\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/ag_modal_dec08_e.htm).

<sup>21</sup> See December 2008 Draft Agriculture Modalities Text, *supra* note 17, ¶¶ 4–5, 7–9.

<sup>22</sup> See *id.* ¶ 33.

<sup>23</sup> See *id.* ¶ 9 n.1.

<sup>24</sup> See Jonathan Lynn, *WTO Cotton Deal Will Do Little for Africa –Expert*, REUTERS, July 15, 2009, <http://www.reuters.com/article/2009/07/15/idUSLF451163> (noting that nine studies have shown that the world cotton prices would be between 2 and 28 percent higher without subsidies).

10 percent, or \$147 million in annual revenue.<sup>25</sup> Conversely, Fairtrade pays premium prices for organic agricultural products, including cotton.<sup>26</sup> Farming families use the extra income to send their children to school (with an enrollment rate of 95 percent, compared to the national average in the Cotton Four of 43 percent), and has allowed the farming communities to build medical clinics.<sup>27</sup> To be sure, the National Cotton Council, which represents American cotton producers, responds that cotton subsidies help over 340,000 people in several poor Southern states of the United States.<sup>28</sup> The European Commission makes a similar argument in respect of Greece and Spain.<sup>29</sup> But, by no stretch of the imagination are the American or European cotton farmers either as poor or more numerous than their counterparts in the Cotton Four countries.

Cotton farmers in the Cotton Four typically are poor and Muslim.<sup>30</sup> They operate on profit margins so narrow that a modest decline in world market prices pushes them into insolvency and drives them off the land. One recourse they have is to relocate to crowded, environmentally strained urban areas, and drive lorries, hauling cargo up and down West Africa. Some of them contract and spread HIV/AIDS, as a result of prostitution. Is this scenario in the national security interest of the United States (and the EU and China)? That is, does it make Cotton Four farmers more vulnerable to messages from Islamist extremists about oppression and injustice?

The answer is evident, as is the policy choice that should be reflected in the December 2008 Draft Agriculture Text: eliminate cotton subsidies entirely and immediately. The Text contains no such rule. Rather, it contains a formula for their reduction.<sup>31</sup> In a brazen triumph of short-term commercial self-interest over long-term national security interest, the United States has linked its position on cotton subsidies to that of China.<sup>32</sup>

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<sup>25</sup> Mark Doyle, *Campaigners Urge U.S. and Europe to Cut Cotton Subsidies*, BBC NEWS, Nov. 14, 2010, available at <http://news.bbc.co.uk/news/world-africa-11753215>.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See EU cotton production could decline with decoupling*, DELTA FARM PRESS (July 17, 2006), <http://deltafarmpress.com/eu-cotton-production-could-decline-decoupling> (noting that the EU cotton producers receive the highest subsidies per pound and that this income support has been considered a form of economic support for the lowest income regions in the EU, including Greece and Spain).

<sup>30</sup> *See Raj Bhala, Discovering Great Opportunity in the Midst of Great Crisis: Building International Legal Frameworks for a Higher Standard of Living: Doha Round Betrayals*, 24 EMORY INT'L L. REV. 147, 179 (2010).

<sup>31</sup> *See* December 2008 Draft Agriculture Modalities Text, TN/AG/W/4/Rev.4 ¶¶ 54–55 (Dec. 6, 2008), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_dec08\\_a\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf).

<sup>32</sup> *See* Doug Palmer, *Changed Market Makes WTO Cotton Deal Harder*, REUTERS,

Subsidized American cotton farmers seek market access in China, which holds many of the world's textile mills and apparel factories, and indeed is the largest market for cotton in the world.<sup>33</sup>

American farmers and their spokespersons at the United States Trade Representative (USTR) saw two impediments to such access. The change in the American Presidency following the November 2008 general election made no difference in perspective. The new Administration was headed by a President whose direct roots lay in Sub-Saharan Africa and who professed a desire to re-balance American foreign policy toward greater solidarity with the Third World. Still, the cotton subsidy issue was not about poverty alleviation or counter-terrorism in the Cotton Four countries. It was about commercial self-interest in, and economic rivalry with, China.

The first impediment was China's cotton tariff. At a 40 percent applied rate, it was high.<sup>34</sup> Second, China also subsidized its cotton producers. Intoned Michael Punke, the Deputy USTR and U.S. Ambassador to the WTO, in May 2011:

If people wish to discuss cotton, [then] everyone's cotton programs must be on the table.... If we are going to have a discussion about cotton, [then] it must be a comprehensive discussion about all forms of market distorting practices. We would need to discuss both direct subsidization and other practices such as import licenses, sliding tariff scales, and reserves management – that produce very substantial levels of effective support for domestic cotton producers.<sup>35</sup>

The Ambassador faulted China for renegeing on its obligation to notify, since 2004, the WTO of its agricultural subsidies, including its support for cotton, and for starting or expanding trade-distorting cotton subsidy schemes.<sup>36</sup>

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July 21, 2009, <http://www.reuters.com/article/2009/07/21/us-usa-africa-cotton-analysis-idUSTRE56K6XZ20090721>; see also Amy Tsui, *China's Imported Cotton System Violates WTO Commitments, Senators Tell Vilsack*, 26 INT'L TRADE REP. (BNA) 323 (Mar. 5, 2009).

<sup>33</sup> See Daniel Pruzin, *WTO Chief Earns Members Not to Get Stuck on "Deliverables" Package, Says LDCs Priority*, 28 INT'L TRADE REP. (BNA) 886 (June 2, 2011) (discussing U.S. interest in addition market access); see also U.S. INTERNATIONAL TRADE COMMISSION, *China's Agricultural Trade: Competitive Conditions and Effects on U.S. Exports*, Inv. No. 332-518, USITC Pub. 4219 (Mar. 2011), available at <http://www.usitc.gov/publications/332/pub4219.pdf> (noting that China is the world's biggest producer, consumer, and importer of cotton).

<sup>34</sup> See Daniel Pruzin, *supra* note 33.

<sup>35</sup> See *id.*

<sup>36</sup> See Daneswar Poonyth et al., *The Impact of Domestic and Trade Policies on the World Cotton Market* 5 (FAO Commodity and Trade Policy Research, Working Paper No.

On both points, the Chinese Communist Party (CCP) was prepared with a rebuttal. First, the CCP showed little interest in lowering cotton duty rates.<sup>37</sup> Many cotton farmers in China are Uyghur Muslims. This restive population does not need another excuse to protest authoritarian, atheistic CCP governance, or ethnic Han dominance. Granting greater market access to American competitors surely would be one. Second, said China, American cotton subsidies reached \$3 billion annually, thus depressing world market prices by 13 percent and injuring both Chinese and African cotton farmers.<sup>38</sup> Moreover, despite the unlevel playing field created by American subsidies, the share of world imports of subsidized American cotton accounted for by China rose from 17 percent in 1999 to 43 percent in 2005.<sup>39</sup> America retorted with statistics it selected from a time period benefitting its case: there was a sharp fall in American cotton exports between the 2004–2005 and 2008–2009 crop years, a fall of 25 percent.<sup>40</sup> India, too, came in for scrutiny. By 2009, it accounted for 24 percent of global cotton production and 19 percent of global cotton exports.<sup>41</sup> With a major textile and apparel (T&A) sector, the U.S. cotton farmers wanted T&A manufacturers on the Subcontinent, as well as China, to source inputs from them.

Amidst this familiar Doha Round pattern of trading accusations and counter-accusations, Cotton Four countries became a sideshow, and the direct link between their interests in poverty alleviation and fighting terrorism was lost. The Sino-American deadlock precluded eradication of cotton subsidies, to the benefit of American cotton farmers, and to the detriment of their counterparts in the Cotton Four.<sup>42</sup> As for Uyghur Muslim

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8, 2004), <http://www.fao.org/docrep/007/j2731e/j2731e00.htm> (noting that analysts studying cotton issues have had the most difficulty estimating domestic subsidies for China due to China's failure to submit notifications to the WTO).

<sup>37</sup> See Razeen Sally, *Chinese Trade Policy After (Almost) Ten Years in the WTO: A Post-Crisis Stocktake* 10 (ECIPE Occasional Paper No. 2/2011), <http://www.ecipe.org/chinese-trade-policy-after-almost-ten-years-in-the-wto-a-post-crisis-stocktake/PDF> (discussing China's long standing resistance to U.S. pressures to reduce its cotton tariff).

<sup>38</sup> See Daniel Pruzin, *supra* note 33.

<sup>39</sup> See *id.*

<sup>40</sup> See Doug Palmer, *supra* note 32.

<sup>41</sup> See LESLIE MEYER ET AL., USDA, ECONOMIC RESEARCH SERVICE, COTTON AND WOOL OUTLOOK 6 (Sept. 14, 2009), available at <http://usda01.library.cornell.edu/usda/ers/CWS//2000s/2009/CWS-09-14-2009.pdf>.

<sup>42</sup> See Edward Alden & Justine Lau, *Cheap Cotton Threatens Chinese Farmers*, FIN. TIMES, Dec. 6, 2005, available at <http://www.ft.com/intl/cms/s/0/81f40c6-6698-11da-884a-0000779e2340.html#axzz1asvjELsc> (discussing issues that arose between the U.S. and China when an influx of cheap subsidised cotton from the U.S. resulted in a surge in imports to China benefitting U.S. cotton farmers); see also PBS.org, *The Dying Fields, Global Cotton Industry: Cotton Subsidies and the World Trade Organization*, Aug. 24, 2007, <http://www.pbs.org/wnet/wideangle/episodes/the-dying-fields/global-cotton->

cotton farmers, it is interesting to consider whether they, too, might benefit from an end to all American, European, and Chinese subsidies, and if so, under what conditions (*e.g.*, maintenance of a high Chinese cotton tariff).

## II. PURPOSE STILL LOST

Following issuance of the December 2008 Draft Modalities Texts in Agriculture and NAMA, and over the course of negotiations in 2008 through mid-2011, did the Doha Round regained its sense of original purpose? The answer is no. On April 21<sup>st</sup> 2011, for the first time in the history of the Doha Round, the Chairmen of all nine negotiating groups simultaneously summarized the work that had occurred to date. The groups and associated “Documents” covered:

- (1) Agriculture.<sup>43</sup>
- (2) NAMA.<sup>44</sup>
- (3) Services.<sup>45</sup>
- (4) Rules, which cover not only the conventional trade remedies of antidumping (AD) and countervailing duties (CVDs), but also the matter of fisheries subsidies and regional trade agreements (RTAs), specifically, transparency and systemic RTA issues.<sup>46</sup>

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industry/ cotton-subsidies-and-the-world-trade-organization/1945/ (elucidating the Cotton Four countries’ struggle to gain revenue from the cotton exports in the face of large payments to cotton farmers in the U.S., China, and E.U., encouraging overproduction and depressed world cotton prices).

<sup>43</sup> See World Trade Organization, Committee on Agriculture, Special Session, *Negotiating Group on Agriculture – Report by the Chairman, H.E. Mr. David Walker, to the Trade Negotiations Committee*, TN/AG/26 ¶ I.A.6. (Apr. 21, 2011) [hereinafter April 2011 Agriculture Document] available at [http://www.wto.org/english/tratop\\_e/agric\\_e/negoti\\_tnc\\_21apr11\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negoti_tnc_21apr11_e.htm). This Document also provides minor typographical corrections to the December 2008 Draft Agriculture Modalities Text. *See id.* ¶ 49.

<sup>44</sup> See World Trade Organization, Negotiating Group on Market Access, *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations*, TN/MA/W/103/Rev.3/Add.1 (Apr. 21, 2011) [hereinafter April 2011 NAMA Document], available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/nama\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/nama_e.doc); see also World Trade Organization, Trade Negotiation Committee, *Report by the Director-General on His Consultations on NAMA Sectoral Negotiations*, TN/C/14 (Apr. 21, 2011), available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/chair\\_texts11\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/chair_texts11_e.htm).

<sup>45</sup> See World Trade Organization, Council for Trade in Services, Special Session, *Negotiations on Trade in Services – Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee*, TN/S/36 (Apr. 21, 2011) [hereinafter April 2011 Services Document], available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/serv\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/serv_e.doc).

<sup>46</sup> See World Trade Organization, Negotiating Group on Rules, *Communication from*

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the Chairman, TN/RL/W/254 (Apr. 21, 2011) [hereinafter April 2011 Rules Document], available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/adp\\_subsidies\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/adp_subsidies_e.doc).

Concerning RTAs, see World Trade Organization, Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Transparency Mechanism for Regional Trade Agreements – Report by Ambassador Dennis Francis, Chairman, Negotiating Group on Rules*, TN/RL/W/252 (Apr. 21, 2011) [hereinafter April 2011 RTA Transparency Mechanism Document], available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/transparency\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/transparency_e.doc), and World Trade Organization, Negotiating Group on Rules, *Negotiations on Regional Trade Agreements: Systemic Issues – Report by Ambassador Dennis Francis, Chairman, Negotiating Group on Rules*, TN/RL/W/253 (Apr. 21, 2011) [hereinafter April 2011 RTA Systemic Issues Document], available at [http://www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/systemic\\_issues\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/systemic_issues_e.doc).

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

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

As for systemic issues posed by RTAs, the April 2011 RTA Systemic Issues Document merely recounted that discussions among WTO Members had focused on the “substantially all the trade” discipline in GATT Article XXIV:8(a)(i) (for customs unions) and XXIV:8(b) (for free trade agreements), and special and differential treatment for poor countries. See April 2011 RTA Systemic Issues Document, *supra*, ¶¶ 1–5. On the first issue, one-third of the proposals advocated a minimum benchmark to qualify as “substantially all the trade,” which would be based on bilateral trade (between proposed RTA partners), tariff lines covered (by the proposed RTA), or both, or would be based on a combined average of bilateral trade and tariff lines covered. Such proposals called for measuring the benchmark at the time a proposed RTA entered into force, and at the end of a transition period prescribed by the RTA. See April 2011 RTA Systemic Issues Document, *supra*, ¶ 4. On special and differential treatment, Members debated whether any flexibilities they agreed to should be placed in GATT Article XXIV, the 1994 *Uruguay Round Understanding on the Interpretation of Article XXIV*, the 1979 *Tokyo Round*



(5) Intellectual Property (IP), in particular, multilateral notification and registration of geographic indications (GIs) for wines and spirits, extension of GI protection to non-alcoholic products, and protection of traditional knowledge and biodiversity.<sup>47</sup>

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*Enabling Clause*, or both. That is, Members had reached consensus neither on the substance of flexibilities nor on their placement.

Thus, the Chairman reported:

8. To conclude, it is clear that notwithstanding the mandate in Doha and the Ministerial Declaration in Hong Kong, China:

- (i) in essence, the objectives of various Members in these negotiations *remain conceptually different*; an
- (ii) *gaps persist* in Members' positions on all elements proposed.

9. I reaffirm my advice to Members that *unless they adopt a pragmatic, flexible and less doctrinaire approach* to these negotiations it is unlikely that this impasse will be overcome.

*See id.* ¶¶ 8–9 (emphasis added).

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

<sup>47</sup> *See* World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session, *Report by the Chairman, Ambassador Darlington Mwape (Zambia) to the Trade Negotiations Committee, Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, TN/IP/21 (Apr. 21, 2011) [hereinafter April 2011 Geographical Indications Document], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11.../trips\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11.../trips_e.doc); *see also* World Trade Organization, Council for Trade-Related Aspects of Intellectual Property Rights, Special Session, Attachment, *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits – Draft Composite Text, Revision*, JOB/IP/#/Rev.1 (Apr. 21, 2011), available at [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/trips\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/trips_e.doc). Hereinafter, April 2011 Geographical Indications Draft Composite Text; *see also* World Trade Organization, General Council, Trade Negotiations Committee, *Report by the Director-General, Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPs Agreement to Products Other than Wines and Spirits and those Related to the Relationship between the TRIPs Agreement and the Convention on Biological Diversity*, WT/GC/W/633, TN/C/W/61 (Apr. 21, 2011) [hereinafter April 2011 TRIPs Article 23-CBD Document], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair...e/dg\\_trips\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair...e/dg_trips_e.doc); *see also* World Trade Organization, *Intellectual Property: Geographical Indications Negotiations – Formal Meeting, Geographical Indications Draft Completed Swiftly but with 208 Differences* (Mar. 3, 2011), available at [http://www.wto.org/english/news\\_e/news11\\_e/trip\\_ss\\_03mar11\\_e.htm](http://www.wto.org/english/news_e/news11_e/trip_ss_03mar11_e.htm).

Reporting on the status of the negotiations and production of the nine-page draft composite text. The topic of geographical indications, while set in the context of intellectual property, also relates to agriculture. Though this topic is not addressed in the December 2008 Draft Agriculture Modalities Agreement, many geographically-indicated

- (6) Environment.<sup>48</sup>
- (7) Development.<sup>49</sup>
- (8) Trade Facilitation.<sup>50</sup>
- (9) Dispute Settlement.<sup>51</sup>

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products are primary or processed farm products. *See* December 2008 Draft Agriculture Modalities Agreement § V.B. Negotiations on a proposed multilateral register for GIs pre-date the Doha Round, having commenced in 1997 under the auspices of Article 23:4 of the WTO *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which states:

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

*See* RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT 533* (3<sup>rd</sup> ed., 2008).

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

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

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

*See* RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT 637* (3<sup>rd</sup> ed., 2008).

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

<sup>48</sup> *See* World Trade Organization, Committee on Trade and Environment, Special Session, Committee on Trade and Environment in Special Session – *Report by the Chairman, Ambassador Manuel A. J. Teehankee, to the Trade Negotiations Committee*, TN/TE/20, (Apr. 21, 2011) [hereinafter April 2011 Trade and Environment Document], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11.../envir\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11.../envir_e.doc).

<sup>49</sup> *See* World Trade Organization, Committee on Trade and Development, Special Session, *Special Session of the Committee on Trade and Development – Report by the Chairman, Ambassador Shahid Bashir (Pakistan), to the Trade Negotiations Committee*, TN/CTD/26 (Apr. 21 2011) [hereinafter April 2011 Trade and Development Document], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11.../devel\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11.../devel_e.doc).

<sup>50</sup> *See* World Trade Organization, Negotiating Group on Trade Facilitation, *Draft Consolidated Negotiating Text – Revision*, TN/TF/W/165/Rev.8 (Apr. 21, 2011) [hereinafter April 2011 Draft Trade Facilitation Text].

<sup>51</sup> *See* World Trade Organization, Dispute Settlement Body, Special Session, *Special*

As always had been true in the Round, the first four negotiating groups were the most important. Without a deal in them, a comprehensive Round, agreed to by all WTO Members as a single undertaking (*i.e.*, that nothing is agreed until everything is agreed, and that all Members ultimately must agree to everything), was impossible.

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

The WTO Director-General, Pascal Lamy, characterized the Documents as both “impressive and realistic.”<sup>52</sup> Those adjectives were euphemisms. If they were “impressive,” then it was as much because of their cleverness in obfuscating simple trade liberalization issues with hideously complex rules, as it was for whatever economic gains they might happen to yield. As for the Documents being “realistic,” the more accurate assessment would be “depressing.” After a decade of negotiations, the Documents were long, convoluted regurgitations showing that nothing much had happened since the issuance of the December 2008 negotiating texts.<sup>53</sup> Indeed, following 12 single-spaced pages of discussion, the April 2011 Agriculture Document

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*Session of the Dispute Settlement Body – Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee, TN/DS/25 (Apr. 21 2011) [April 2011 DSU Report], available at [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11.../dispu\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11.../dispu_e.doc).*

Appendix A to this Report contained another Report by the Chairman, and Annex 1 to Appendix A contained the July 2008 “Consolidated Draft Legal Text (proposed as a basis for further work).” Hereinafter, April 2011 DSU Appendix A Report, and July 2008 Draft DSU Text, respectively. (Both the Appendix A Report and the Draft DSU Text bore the TN/DS/25 document coding number of the Report to which they were appended.) Also in April 2011, the Chairman issued Annex 2 to Appendix A, entitled “Thematic Overview,” which discussed various DSU reform issues (and which also bore the TN/DS/25 coding number). Hereinafter, April 2011 DSU Thematic Overview. Finally, at the same time, the Chairman published “Appendix B: Informal DSB Special Session Meetings (May 2010 to April 2010) – Chairman’s Summaries of Recent Work.” Appendix B (which bore the TN/DS/25 coding number) essentially contained minutes of meetings of the DSB on DSU reform.

<sup>52</sup> World Trade Organization, Trade Negotiations Committee, *Cover Note by TNC Chair*, TN/C/13 (Apr. 21 2011), *available at* [www.wto.org/english/tratop\\_e/dda\\_e/chair\\_texts11\\_e/dg\\_e.doc](http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/dg_e.doc).

<sup>53</sup> See Daniel Pruzin, *WTO Chief Calls for Rethink on Doha Talks, Says Differences on Sectorals “Unbridgeable,”* 28 INT’L TRADE REP. (BNA) 686 (2011) (noting that the 2008 Doha negotiations have been ineffective, as the current talks have reached an impasse).

simply attached the December 2008 Draft Agriculture Modalities Text. Likewise, following 22 single-spaced pages of discussion, the April 2011 NAMA Document simply attached the December 2008 Draft NAMA Modalities Text.

Also “depressing” was the lack of agreement on the cause of stagnation. Lamy said the entire Doha Round was blocked by a “classic mercantilist issue: tariffs on industrial products, the bread and butter of WTO negotiations since their inception.”<sup>54</sup> True, sectoral negotiations within NAMA were a major obstacle. True also, some of the major trading powers behaved like mercantilists in these negotiations. But, as the Deputy USTR and Ambassador to the WTO, Michael Punke, indicated, by no means would the rest of the pieces of the Round fall into place if a NAMA deal were reached.<sup>55</sup> Large, sometimes extraordinarily large, gaps remained on agriculture, services, and essentially all of the topics covered in the Round.

Thus, the roughly 600 pages of Documents highlighted the difference between “work” and “progress,” between “motion” and “productivity,” that so often mars international organizations. The Director-General blatantly over-stated the strengths of the Documents in saying they represented “greater opportunities for the poorest [and] for the first time plac[ed] development at the heart of the global trading system.”<sup>56</sup>

In truth, the April 2011 Documents marked the fact the Round had “entered the most serious crisis since a failed ministerial meeting in July 2008, when trade ministers from key WTO members came close to clinching a deal.”<sup>57</sup>

Moreover, the Documents could be faulted for their scandalous evasion of the purpose on which the Round was founded: fighting poverty, enhancing development, and thereby countering terrorism.

Perhaps one of the most glaring examples came from the Committee on Trade and Development. Pursuant to the DDA, this Committee was charged with considering how best to monitor and evaluate special and differential treatment provisions in multilateral trade agreements. Such provisions, by definition, are supposed to offer more favorable treatment to developing countries, and still more favorable treatment to least developed countries, than to developed countries. After a decade of talks, the Committee had done little, as evident from the April 2011 Trade and Development

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<sup>54</sup> See Daniel Pruzin, *U.S. Criticizes WTO Chief Lamy's Assessment of Doha Impasse, Says NAMA Not Only Issue*, 28 INT'L TRADE REP. (BNA) 724 (2011) (quoting from the TNC chair's statements on certain nations' disagreement on the issue of tariffs).

<sup>55</sup> See *id.*

<sup>56</sup> World Trade Organization, Trade Negotiations Committee, *Cover Note by TNC Chair*, *supra* note 52.

<sup>57</sup> See Daniel Pruzin, *supra* note 53 (discussing the WTO's July of 2008 negotiations which neared an agreement before ultimately falling apart).

Document. Its author, the Chairman of the Trade and Development negotiations, could not have been a stranger to the links between trade, poverty, and Islamist extremism: he was Ambassador Shahid Bashir of Pakistan.

Had the WTO Members reached a consensus on a “Monitoring Mechanism” by which to check the extent to which developed countries were implementing special and differential treatment rules? No. They agreed the Mechanism should include not only all GATT–WTO texts and any Doha Round agreements, but also Ministerial and General Council Decisions.<sup>58</sup> They also agreed the Mechanism should convene biannually.<sup>59</sup> But, they could not agree on what they would do. That is, there was no clear consensus on what “Monitoring” means, *i.e.*, whether it is “meant to be an exercise in “transparency,” overseeing the implementation of S&D [special and differential] provisions, or a permanent negotiating forum on S&D provisions, even after conclusion of the DDA.”<sup>60</sup>

In a proposed compromise, they waffled: “Monitoring” would not be a negotiating body, but it could make recommendations or proposals for other WTO bodies, and it will complement, not replace, other relevant WTO mechanisms.<sup>61</sup> The Members also failed to make headway on special and differential treatment proposals for specific GATT–WTO texts. Put bluntly, the decade-long work of the Doha Round negotiating group most obviously entrusted with managing the link between trade liberalization and poverty alleviation, by ensuring the existence and operation of development-friendly rules, was singularly unimpressive.

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<sup>58</sup> See April 2011 Trade and Development Document, *supra* note 49 (establishing that the Mechanism applies to all World Trade Organization Agreements, Ministerial and General Council Decisions).

<sup>59</sup> See *id.* ¶¶ (c)–(d); Annex 1, ¶¶ 9, 12 (noting that WTO Members would reappraise the Mechanism 3 years after its operation, and thereafter as necessary).

<sup>60</sup> See *id.* ¶ (b); Annex 1 (quoting the functions of the Mechanism upon which the members have already agreed).

<sup>61</sup> See *id.* Annex 1, ¶¶ 3–8 (explaining that the Mechanism will evaluate and improve the implementation of the S & D provisions and initiate discussion with other WTO Bodies); see also Bernard Hoekman, *Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment*, 8 J. INT’L ECON. L. 405, 412 (2005) (stating that proposals for a new approach to SDT is “a process of multilateral monitoring and surveillance, with input by international development agencies...to ensure that decisions are subject to scrutiny and debate”).

### III. PURPOSE STILL REASONABLE

In sum, the Doha Round has failed as an instrument of counter-terrorism. Wandering far from the original purpose they professed to share in November 2001, the WTO Members – most notably, many developed and some less-developed countries – have championed their own commercial causes above their common interest in enhancing peace and security through trade liberalization. It is not the purpose that is flawed.

Surely trade that is more free and fair can assist (along with other appropriate policy measures) in poverty alleviation. Surely enlarging the number of stakeholders in the global trading system, particularly among Muslim constituencies, is one (among other) ways to depopulate recruitment pools for Islamist extremist groups. This purposeful vision is self-evidently reasonable. Rather, it is the failure to implement this purpose, in the writing of new international trade laws, which is at fault.