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Doha's Development

Sungjoon Cho[♦]

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Doha's Development

Introduction

During its first decade in existence, the World Trade Organization (WTO)¹ has failed to live up to its appellation. An organization with over three quarters of its membership being poor countries,² the balance sheet of this global enterprise reveals a troublingly disproportionate distribution of profits in favor of rich countries,³ with an exception of a handful of advanced developing countries such as Brazil, China, and India. This development disparity is silhouetted against lavish protection from rich countries in those products which are poor countries' only lifeline, such as rice, wheat, sugar, cotton, and clothing. For example, rich countries spend about 1 billion dollars a day to protect their agricultural industries from foreign competition, enough to fly rich countries' 41 million dairy cows in first class around the world one and a half times.⁴ These generous agricultural subsidies to rich countries' farmers eventually drive farmers from poor countries out of the global market. This situation can hardly be obliging in addressing the situation in which twenty percent of the world population lives on less than a dollar per day.⁵

However, the WTO's response to this "development deficiency"⁶ has been disconcerting. The 1999 WTO Ministerial Meeting in Seattle collapsed amid the poor countries' frustration over the lack of development empathy in rich countries.⁷ Although the WTO Members managed to launch the ambitious *development* round in Doha in

¹ Marrakech Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter WTO Agreement], LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 6, 6-18; 33 I.L.M. 1140, 1144-1153 (1994).

² See WTO, *Members and Observers*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited on Jan. 31, 2006).

³ See INCOME: *Global Gap Rising, World Bank Study Shows*, UN WIRE, Jan. 18, 2002; United Nation Millennium Declaration, A/res/55/2, para. 5, Sep. 18, 2000, available at <http://www.un.org/millennium/declaration/ares552e.pdf> (last visited on Oct. 15, 2005) ("For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed.").

⁴ See WTO, *The 10 Benefits: 4. Cost of Living*, available at http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b04_e.htm (last visited on Jan. 31, 2006).

⁵ See Nicholas Stern, *Forward*, in GLOBALIZATION, GROWTH, AND POVERTY: BUILDING AN INCLUSIVE WORLD ECONOMY ix (A World Bank Policy Research Report, 2002) [hereinafter GLOBALIZATION, GROWTH, AND POVERTY].

⁶ Celso L. N. Amorim, *The WTO from the Perspective of a Developing Country*, 24 FORDHAM INT'L L.J. 95, 96-99 (2000) (discussing "development deficit" under the WTO in the areas of agriculture and textiles).

⁷ See Sylvia Ostry, *Making Sense of It All: A Post-Mortem on the Meaning of Seattle*, in SEATTLE, THE WTO, AND THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 81 (Roger B. Porter & Pierre Sauvé eds. 2000).

November 2001 against the backdrop of the September 11 terrorist attacks,⁸ the North-South clash over agricultural trade liberalization eventually felled yet another ministerial conference in Cancún in September 2003.⁹ The following ministerial conference in Hong Kong in December 2005 delivered only a modest outcome, in accordance with pre-arranged low expectations, which was just enough to prevent another debacle. Disturbingly, however, it contributed little to the future of the Doha Round which should be concluded by the end of 2006.

The institutional ennui which the WTO has demonstrated in addressing development issues, in particular agricultural protection, under the Doha Round tends to threaten its legitimacy base. As a *trade* organization, its impotence in tackling protectionism is highly unsettling. Moreover, if a supermajority of members cannot benefit from its operation, why should it continue to exist? This skepticism leads to a fatal loss of faith in the multilateral trading system. While the WTO has faltered in the Doha Round, preferential regional blocs have recently been proliferating at an exponential speed.¹⁰ The dialectics of regionalism are rapidly replacing the global business language of multilateralism by encroaching upon the spirit of free trade—nondiscrimination—and spreading the ethos of mercantilism.¹¹ This picture portrays a shocking *déjà vu* of the interwar situation where competitive regionalism precipitated global economic balkanization.¹²

Against this depressing background, this Essay argues that the current development crisis within the Doha Round is inextricably linked to the nature of modern day trade negotiations. This Round reveals a bargaining process in which the powerful can too easily exploit and prevail over the powerless. This process is also vulnerable to domestic political maneuvers such as capture. Under these circumstances, poor countries' development concerns are not well represented, which accounts, despite years of talks, for the current sorry state of the negotiational outcome on agricultural subsidies and tariffs. To overcome these flaws of trade negotiation, this Essay suggests that certain core legal precepts, such as antiprotectionism, should limit ability to pursue mercantilist options. Adjudication under the WTO dispute settlement mechanism can also provide further discipline over the negotiation process by shedding a legal light on power differential. To tackle the problem of capture, a "bottom-up" formulation of negotiation positions through active public participation in the domestic arena will change the dynamic of the

⁸ WTO, *The Fourth Ministerial Conference (An Official Website)*, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm (last visited on Oct. 15, 2005).

⁹ See generally *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. INT'L ECON. L. 219 (2004) [hereinafter Cho, *A Bridge Too Far*].

¹⁰ See *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO Consultative Board Report), at 21, released on Jan. 17, 2005, available at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future (last visited on Jan. 27, 2006).

¹¹ *Id.*

¹² See Edward C. Luck, *American Exceptionalism and International Organization: Lessons from the 1990s*, in U.S. HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS 25, 39 (Rosemary Foot et al eds. 2003) (quoting remarks by the former U.S. Trade Representative Charlene Barshefsky).

“two-level game”¹³ and thus deliver negotiating positions that cater to the broad public welfare, not to the most powerful special interests.

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

I. History of Doha Round Negotiations

A. *The Birth of Doha (Development) Round*

Although the eight-year Uruguay Round (UR) negotiations resulted in the historic launch of the World Trade Organization (WTO) in January 1995, the UR could not effectively address rich countries’ long-standing protectionism in such areas as agriculture and textiles in which many poor countries hold their comparative advantages. Certain side agreements attached to the WTO Agreement, such as the Agreement of Agriculture, set up future negotiations¹⁴ for the purpose of an eventual delivery of agricultural trade liberalization which would assist the poor countries’ economic development and poverty reduction.

However, developing countries had soon become frustrated by the lack of rich countries’ implementation of early commitments in these areas and begun to raise their voices on the “uneven distribution”¹⁵ of UR benefits between the rich and the poor. This development failure allegedly cost poor countries over \$100 billion a year, twice as much as the total annual amount of foreign aid from North to South.¹⁶ This frustration

¹³ See notably Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

¹⁴ WTO, *Agriculture Gateway*, available at http://www.wto.org/english/tratop_e/agric_e/agric_e.htm (last visited on Jan. 31, 2006).

¹⁵ Cf. WTO, *WTO News: Speeches – DG Mike Moore (Sep. 23, 1999), Africa and the Multilateral Trading System: Challenges and Opportunities*, available at http://www.wto.org/english/news_e/spmm_e/spmm07_e.htm (last visited on Jan. 31, 2005) (“There must be something in the pie for everyone. Not pie in the sky when we die, but pie on the table.”).

¹⁶ GLOBALIZATION, GROWTH, AND POVERTY, *supra* note __, at 53

contributed to the collapse of the third WTO Ministerial Conference in Seattle in December 1999.¹⁷ The Seattle debacle was a serious blow to the newly established WTO and cast a dark cloud over future negotiations.

It was an exigent situation, the September 11 terrorist attacks, which put the WTO negotiations back on track. Based on a strong consensus among negotiators that they should herald a powerful message of stability and prosperity to the international community, they managed to launch yet another historic WTO trade round in Doha, Qatar, in November 2001.¹⁸ Reflecting urgent calls from the international community for trade's active role in development and poverty reduction, the new trade negotiation agenda was named the "Doha Development Agenda" (DDA). International development organizations had emphasized that it is in the developed countries' interest to reduce poverty and achieve economic development in developing countries because it avoids social unrest and eventually contributes to global peace.¹⁹

The DDA comprises, *inter alia*, trade liberalization for agricultural products (e.g., "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support"), trade liberalization for services (e.g., "movement of natural persons"), and market access for nonagricultural products (e.g., reduction or elimination of tariff peaks and tariff escalation).²⁰ It also addresses items on the developed countries' wish list, such as the "Singapore issues" (investment, competition, transparency in government procurement, and trade facilitation) which were named after the venue of the first WTO Ministerial Conference in 1996 where those issues were first raised.

B. The Stalelated Negotiation

The propitious inauguration of the Doha Round, however, was not crystallized into meaningful negotiations. In particular, developed countries failed to deliver the most critical promise of the Doha Round, the reduction of agricultural protection such as farm

¹⁷ "The Seattle WTO ministerial meeting failed to launch a new round, not because of the protests in the streets, but because the major trading powers lacked the political will to accommodate the interests of developing countries... In order for developing countries to have confidence in a new round, rich countries must deliver on commitments made in the past, such as accelerating the agricultural trade negotiations and phasing out quotas on textiles and clothing." GLOBALIZATION, GROWTH, AND POVERTY, *supra* note __, at 60 (quoting the recent report of the UN High-Level Panel on Financing for Development). Cf. Diana Tussie & Miguel F. Lengyel, *Developing Countries: Turning Participation into Influence*, in DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK 485, 490 (Bernard Hoekman et al. eds. 2002) (observing that "after the significant concessions made in the Uruguay Round, developing countries felt entitled to be included in the green-room process").

¹⁸ WTO, The Doha Ministerial Declaration, adopted on Nov. 14, 2001, WT/MIN(01)/1 [hereinafter the Doha Ministerial Declaration].

¹⁹ See DEVELOPMENT: Amman Calls For "Development Round" Of Trade Talks, UN WIRE, Sep. 19 2000; IMF/WORLD BANK: Wolfensohn Promotes Equitable Growth, UN WIRE, Sep. 22, 2000.

²⁰ See Doha Ministerial Declaration, *supra* note __.

tariffs and subsidies. In fact, the \$180 billion U.S. Farm Bill of 2002 as well as the EU's recent failure to reform the notorious "Common Agricultural Policy" (CAP) made a "mockery of the idea that the Doha round was to be a development round."²¹ Against this depressing backdrop, the fifth WTO Ministerial Conference in Cancún, Mexico, in September 2003 collapsed.²² The U.S.-EU coalition on agricultural negotiation was strongly defied by the G-20 coalition, a group of developing nations led by Brazil, China, and India.²³ This deadlock over agriculture as well as an irreconcilable divergence on the Singapore issues between developing and developed countries finally torpedoed the Cancún meeting.²⁴ The Cancún meeting even failed to deliver the desperate "Cotton Proposal" by four African cotton-producing countries (Benin, Burkina Faso, Chad, and Mali) for the elimination of rich countries' cotton subsidies (in particular by the U.S.) which are pernicious to their development.²⁵ One African farmer reportedly said that "we are used to hardship, disease and famine. Now the WTO is against us as well. I think that this will stay in history."²⁶

Despite the alarming atmosphere of crisis among negotiators and outsiders alike, the WTO Doha Round negotiations had registered quite dissatisfying results since the collapse of Cancún meeting, except for the ambiguous "July Framework" agreement (also known as the "Doha Work Program") in August 2004.²⁷ Under the July Framework, WTO Members agreed that they would use a "tiered approach" in reducing farm subsidies and tariffs, with deeper cuts in those tariffs and subsidies with higher levels.²⁸ However, at the end of July 2005, negotiators again failed to agree on the baseline package (the "July Approximation"), which would have been a preliminary deal covering critical issues such as agriculture, industrial tariffs, and services, and would have helped facilitate a final delivery at the Hong Kong Ministerial Conference in December.²⁹

²¹ *World Trade: Coming Unstuck*, THE ECONOMIST, at 14, Nov. 2, 2002; *The Zoellick Plan: Trading Insults*, THE ECONOMIST, at 67, Nov. 30, 2002.

²² See Cho, *A Bridge Too Far*, *supra* note __, at 231-33.

²³ Rolf Kuntz, *G-21 conseguil nivelar campo para o jogo agrícola*, Sep. 11, 2003, www.estado.estadao.com.br; *Protests Dies at WTO Talks; Draft Agriculture Plan Withdrawn*, UN WIRE, Sep. 11, 2003.

²⁴ WTO, Summary of 14 September, 2003, Day 5, Conference Ends without Consensus, *available at* http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (last visited on Jan. 31, 2005); Bridges Daily Update on the Fifth WTO Ministerial Conference, Issue 6, Cancun Collapse: Where There is No Will There is No Way, Sep. 15, 2003, *available at* http://www.ictsd.org/ministerial/cancun/wto_daily/ben030915.htm (last visited on Jan. 31, 2006).

²⁵ Bridges Daily Update on the Fifth WTO Ministerial Conference, Issue 5, At the Eleventh Hour, Divergence All Over Again, Sep. 14, 2003, *available at* http://www.ictsd.org/ministerial/cancun/wto_daily/ben030914.htm (last visited on Jan. 31, 2006).

²⁶ *Id.*

²⁷ WTO, Doha Work Program, Decision by the General Council on August 1, 2004, WT/L/579.

²⁸ *Id.*, Annex A.

²⁹ See Sungjoon Cho, *The Troubled Status of WTO Doha Round Negotiations*, ASIL INSIGHTS, Aug. 25, 2005, *available at* <http://www.asil.org/insights/2005/08/insights050825.html> (last visited on Jan. 31, 2006).

It was not until early October 2005 that the Doha negotiations gathered new momentum. The United States attempted to break the stalemate by making an ambitious offer in agricultural trade liberalization. On October 10, 2005, U.S. Trade Representative Robert Portman submitted a serious reform proposal on three pillars of agricultural protection over the next five years.³⁰ First, as to market access (tariff reduction), this proposal, *inter alia*, involved steep tariff cuts ranging from 55% to 90% in the highest tariffs in rich countries. Second, as to farm subsidies, the proposal mandated a 60% cut of the most trade-distorting farm subsidies, such as those having a direct effect on production (“amber box” subsidies), and a 50% cut of a newly established cap for less trade-distorting subsidies, such as direct payments to farmers (“blue box” subsidies), with an aim of eventual elimination of blue box subsidies. Third, as to export subsidies, the proposal sets the year 2010 for their complete repeal.

The U.S. proposal was widely welcomed, yet not without some negative reactions. *The Economist* opined that the proposal might rekindle the optimism of the Doha Round being completed during 2006, as originally scheduled.³¹ The newly-elected WTO Director-General Pascal Lamy also praised the proposal as an “important development.”³² Yet, developing countries (the G-20 coalition) were not impressed by the proposal and demanded a bolder offer in agricultural trade liberalization from developed countries. For example, Brazil highlighted that the U.S. proposal tended to cut only the “ceilings” of farm subsidies, not actual payment levels.³³ Likewise, Oxfam, a nongovernmental organization (NGO), criticized the Portman proposal, stating that it would cause only a negligible reduction in the current level of farm subsidies in the U.S.,³⁴ which means that the U.S. could maintain the controversial “counter-cyclical payments” to farmers as compensation for low produce prices.³⁵

More negative were the reactions by the proposal’s two main targets, Japan and the EU. The proposal emphasized that these two parties should cut farm subsidies more than the U.S. since their subsidies are larger than U.S. subsidies.³⁶ Japan argued that the proposal’s demands were “out of balance with the level of reduction the U.S. itself is ready to make.”³⁷ While the European Commission tried to respond to the U.S. proposal by offering some concessions in agriculture,³⁸ some EU member states fiercely opposed such a

³⁰ See Rob Portman, *America’s Proposal to Kick-Start the Doha Trade Talks*, FIN. TIMES, Oct. 10, 2005, at 15.

³¹ See *To Doha’s Rescue*, THE ECONOMIST, Oct. 15, 2005, at 13;

³² See Keith Bradsher, *An Optimistic Voice for Deal on Farm Aid*, N.Y. TIMES, Oct. 17, 2005.

³³ AG *Subsidies on Negotiation Table: Haggling Underway*, Bridges Weekly Trade News Digest, vol. 9, No. 34, Oct. 12, 2005 [hereinafter *Haggling Underway*].

³⁴ Oxfam, *U.S. Farm Subsidies Offer ‘Smoke and Mirrors’*, Oct. 10, 2005, available at http://www.oxfam.org.uk/press/releases/trade_ussubsidies101005.htm (last visited on Jan. 13, 2006).

³⁵ See Alan Beattie & Raphael Minder, *U.S. Offer Farm Subsidies Cut*, FIN. TIMES, Oct. 10, 2005, at 1.

³⁶ See Portman, *supra* note __.

³⁷ See *Haggling Underway*, *supra* note __.

³⁸ See George Parker & Edward Alden, *Brussels in Push to Unblock World Trade Talks*, Fin. Times, Oct. 15, 2005, at 2.

move, in particular France which was still dealing with its negative vote on the EU constitution.³⁹ The French Interior Minister Nicolas Sarkozy lambasted the U.S. proposal by stating that “the United States ... is trying to suck us into a fool’s bargain by demanding Europe make a disproportionate effort in exchange for concessions that are mostly tactical.”⁴⁰ The French President Jacques Chirac even threatened to “block a world trade deal” if the EU’s concessions went beyond the status quo of the Common Agricultural Policy (CAP).⁴¹ Nonetheless, the Commission’s offer, although painfully made out of acrimonious exchanges with some EU member states, including France, failed to meet the expectations of its trading partners.⁴² The level of the proposed EU tariff cuts (39% on average), as well as its broad exception for sensitive products, disappointed both developed and developing countries. Furthermore, this thin offer was even conditioned by the EU’s aggressive requests for concessions by developing countries in other sectors, such as industrial tariffs and services.

On November 9, 2005, major negotiators, such as the U.S., EU, and Brazil, admitted for the first time that WTO members would not be able to fulfill their original ambition at the upcoming Hong Kong Ministerial Conference.⁴³ They failed to deliver the “final modalities” for the remaining Doha negotiations, including specific numbers and formulae, which would make the Hong Kong meeting useful for completion of the Doha Round during 2006. Subsequently, they began to reduce their expectations for the Hong Kong meeting and instead looked for another venue for reaching the final modalities, a “Hong Kong II.”⁴⁴ Pascal Lamy, the WTO Director-General, also announced that WTO members must “recalibrate” their original expectations.⁴⁵

Against this ominous background, the WTO Director-General Pascal Lamy presented on November 26, 2005, the first Draft Ministerial Text on the Doha Work Program which would be used in the Hong Kong Ministerial Conference on December 13-18, 2005.⁴⁶ In a testament to the little progress made in the prior negotiations under the Doha Round, the Draft Text revealed a weak base for negotiations. With very few specific commitments, it was basically a combination of a summary on the current status

³⁹ Cf. *Europe’s New Protectionism*, THE ECONOMIST, Jul. 2, 2005, at 49.

⁴⁰ See Martin Arnold et al, *Sarkozy’s ‘Fool’s Bargain’ Tirade Deepens French Rift with Brussels*, FIN. TIMES, Oct. 21, 2005, at 2.

⁴¹ See George Parker et al, *Chirac Fires Warning Shot on Trade Deal in Defense of Farm Subsidies*, FIN. TIMES, Oct. 28, 2005, at 4.

⁴² *EU Offer of Deeper Farm Tariff Cuts Fail to Restart Talks*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 9, No. 37, Nov. 2, 2005.

⁴³ *Members Scale Back Expectations for Hong Kong*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 9, No. 38, Nov. 9, 2005; *Dark Clouds over Doha*, THE ECONOMIST, Nov. 10, 2005.

⁴⁴ *Stuck with the Second Best*, THE ECONOMIST, Nov. 12, 2005, at 78 (citing the Brazilian Foreign Minister Celso Amorim who expressed the necessity of holding “Hong Kong II”).

⁴⁵ *Members ‘Recalibrating’ Expectations for Hong Kong and Beyond*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 9, No. 39, Nov. 16, 2005.

⁴⁶ Doha Work Program, Preparations for the Sixth Session of the Ministerial Conference, Draft Ministerial Text, Job(05)/298, Nov. 26, 2005, available at http://www.wto.org/english/news_e/news_e.htm (last visited on Jan. 31, 2006).

of negotiations and an urgent call for intensifying future negotiations. The Draft Text was also accompanied by a serious disclaimer which stated that it “does not purport to represent agreement overall, and it is without prejudice to any delegation's position on any issue.”⁴⁷ On December 7, 2005, WTO members adopted the Draft Text with some minor changes.⁴⁸

II. The Pre-Hong Kong Status of Doha Round Negotiation

A. Agriculture

Without doubt, agriculture has been *the* most controversial subject in the Doha trade negotiations. It is also a main culprit for the tedious pace of the negotiations up until now, which forced WTO members to scale back their original ambitions. WTO members even failed to establish basic modalities on the basis of which each member would draft its own tariff schedule.⁴⁹ The Draft Text left the deadlines for these tasks simply blank and merely presented a “factual summary” on areas of convergence and divergence among negotiators under Annex A.⁵⁰

Annex A of the Draft Text reported a “very considerable potential convergence” on domestic support (subsidies). WTO members at least identified a general structure of “overall cuts” which comprised three different scales (bands) with corresponding subsidy levels (thresholds) as well as the cut range (31-80%).⁵¹ Annex A also found a significant convergence among negotiators on further constraints on blue box subsidies beyond the July 2004 Framework, yet with a divergence on how to actually achieve this. As to amber box subsidies (namely the “aggregate measurement of support” (AMS)), Annex A detected a significant convergence on a framework (three bands, 37-83% cuts) similar to

⁴⁷ *Id.*, at i.

⁴⁸ Doha Work Program, Draft Ministerial Text, WT/MIN(05)/W/3, released on Dec. 7, 2005, available at http://www.wto.org/english/thewto_e/minist_e/min05_e/draft_text3_e.htm [hereinafter the Draft Text].

⁴⁹ *Id.*, 2.

⁵⁰ *Id.*, at A-1.

⁵¹ The following matrix represents the tentative framework for overall cuts by developed countries. *Id.*, at A-2.

Bands	Thresholds (US\$ billion)	Cuts
1	0-10	31%-70%
2	10-60	53%-75%
3	> 60	70%-80%

that of the overall cuts.⁵² Importantly, however, these cuts offered by members were based on the subsidy level “caps” from the UR, not on actual levels which were usually lower than these caps.⁵³ In other words, the cuts offered, even if fully committed and implemented, might not be translated into actual cuts in current subsidies.

In terms of tariff cuts (market access), Annex A presented a framework consisting of four different bands for determining tariff cuts, although major gaps still exist as to the size of the actual cuts.⁵⁴ One propitious area of convergence was a “compression effect,” which means bigger cuts in higher tariffs under the agreed tiered formula.⁵⁵ This compression effect is expected to reduce certain antidevelopment phenomena such as tariff peaks and tariff escalation. Nonetheless, negotiators showed a wide range of divergence as to various exceptions and side rules, including intraband flexibility in tariff cuts (“pivots”), “sensitive products” (for developed countries), “special products” (for developing countries), and “special safeguard mechanisms” (for developing countries).⁵⁶

Regarding an end date for eliminating export subsidies, Annex A observed no convergence among negotiators.⁵⁷

B. Non-Agricultural Market Access (NAMA)

As in agriculture, the Draft Text revealed no timelines as to the establishment of modalities or regarding the drafting of new tariff schedules based on these modalities, reflecting the negotiators’ failure of any meaningful progress in the NAMA negotiations.⁵⁸ Annex B of the Draft Text merely observed that WTO members focused on the “Swiss formula,” which prescribes steeper cuts in higher tariffs, with a divergence among them as to certain technicalities such as the number of coefficients.⁵⁹ As is the case with agricultural market access, a “compression effect” under the Swiss formula is expected to

⁵² The following matrix represents the tentative framework for the AMS for developed countries. *Id.*, at A-3.

Bands	Thresholds (US\$ billion)	Cuts
1	0-12/15	37-60%
2	12/15-25	60-70%
3	>25	70-83%

⁵³ WTO, *Director-General’s Letter to Journalists*, available at http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief01_e.htm (last visited on Jan. 31, 2006) [hereinafter *Letter*].

⁵⁴ Draft Text, *supra* note __, at A-5.

⁵⁵ *Letter*, *supra* note __.

⁵⁶ Draft Text, *supra* note __, at A-5, A-6.

⁵⁷ *Id.*, at A-4.

⁵⁸ *Id.*, at 3.

⁵⁹ *Id.*, at B-1, B-2.

effectively address such problems as tariff peaks and tariff escalation which have plagued developing countries exporting textiles and clothing.⁶⁰

Annex B located other important issues on which negotiators were still split. For example, members diverged on the issue of whether flexibility given to developing countries in tariff cuts should be taken into account in the general formula cut—namely, whether developing countries should be required to cut more tariffs on account of this pre-established flexibility.⁶¹ As to unbound tariffs, Annex B noted a “growing sense” that they should also be subject to the formula cut, albeit with no consensus on the methodology.⁶²

Annex B concluded that members’ failure to even get close to the final modalities of NAMA negotiations is “highly troubling” and raises three priority areas for the Hong Kong meeting: the formula, flexibility for developing countries, and unbound tariffs.⁶³ Highlighting such lack of progress, NAMA Chair Stefan Johannessson warned that even if there would be progress in the agricultural talks, it should not be interpreted as any automatic progress in the NAMA talks.⁶⁴

C. Services

As a new approach to intensify and expedite negotiations on services, Annex C of the Draft Text brought up an interesting mode of negotiation—“plurilateral” negotiations. Unlike conventional bilateral negotiations, plurilateral negotiations permit a group of members to present “collective” requests to other members in any sector or mode of supply.⁶⁵ However, Annex C also failed to deliver any timelines for service negotiations, even in a preliminary sense.⁶⁶

D. Other Areas

The Draft Text also addressed various areas other than the aforementioned three major ones. These areas include antidumping and countervailing measures (e.g., further discipline on antidumping measures), trade-related aspects of intellectual property rights (e.g., a multilateral system of notification and registration of geographical indicators for wines and spirits), and environmental negotiations.⁶⁷ Although little progress had been

⁶⁰ Letter, *supra* note __.

⁶¹ Draft Text, *supra* note __, at B-2.

⁶² *Id.*, at B-3.

⁶³ *Id.*, at B-7.

⁶⁴ TNC: *Lamy Outlines Doha Round Roadmap for Hong Kong and Beyond*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 9, No. 35, Oct. 19, 2005.

⁶⁵ *Id.*, at C-3.

⁶⁶ *Id.*, at C-4.

⁶⁷ *Id.*, at 4-10.

made in most of these areas, trade facilitation negotiations registered a relatively impressive achievement. In trade facilitation, the report of the Negotiation Group came up with concrete recommendations (Annex E) which the Draft Text did “endorse.”⁶⁸

In areas related to development, such as special and differential treatment (S&D), and to the least-developed countries (LDCs), the Draft Text, without any convergence on specific mandates, simply spotted various issues and urged members to intensify negotiations with high aspirations. In this vein, one conspicuous commitment concerned a full implementation of “duty-free and quota-free market access” of products from the LDCs.⁶⁹

III. The Hong Kong Ministerial Conference (December 13-18, 2005)

A. *The Negotiation: Main Developments*

The overall structure of negotiations was similar to that of the last Ministerial Conference in Cancún (2003).⁷⁰ First, John Tsang, the Conference Chairperson, who was Hong Kong’s Secretary of Commerce, Industry, and Technology, appointed six “facilitators” in six major agendas (agriculture, NAMA, services, development, rules, and other areas).⁷¹ These facilitators helped the Chairperson manage the negotiations among nearly 150 members by coordinating small, informal consultations among various groups in a particular area and reporting these negotiations to the Chairperson. Then, based on such reports from the facilitators, the Chairperson held plenary sessions with the full membership (heads of delegation meeting) as well as other big and small informal meetings.⁷²

This format was a product of inevitable compromise between two competing concerns—inclusiveness (transparency) and expediency. While every WTO member should take part in the negotiations, practical considerations on the logistics of negotiation necessitates such intermediaries as facilitators. The Director-General Pascal Lamy also held numerous meetings, including the “Green Room” meeting with certain

⁶⁸ *Id.*, at 4.

⁶⁹ *Id.*, at 7.

⁷⁰ See Cho, *A Bridge Too Far*, *supra* note __, at 227.

⁷¹ WTO, Summary of December 13, 2005, Day 1: Conference Opens Formally and Ministers Consult on Industrial Goods, *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_13dec_e.htm (last visited on Feb. 2, 2006) [hereinafter WTO Brief 1].

⁷² *Id.*; WTO, Summary of December 14, 2005, Day 2: Convergence Elusive on First Full Day of Consultations; Cotton Also Discussed, *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_14dec_e.htm (last visited on Feb. 2, 2006) [hereinafter WTO Brief 2].

major groups and individual members, to facilitate consensus among members. Various country groupings, such as the G-20, the FIPs (Five Interested Parties: the U.S., the EU, Australia, Brazil, and India), and the New Quad (the U.S., the EU, Brazil, and India), played critical roles in running the negotiations, despite the criticism on their lack of inclusiveness.⁷³ The drafting of the Ministerial Text was conducted in the “Chairman’s Consultative Group,” comprising 30-40 delegations representing these various groups and other key players in the negotiations.⁷⁴

With recalibrated expectations among members on the comprehensiveness of the Hong Kong package, it seemed that the priority of the conference had been set on achieving an early harvest of a concrete “development package,” consisting of trade for aid programs as well as duty- and quota-free market access for exports from the LDCs.⁷⁵ As another development-related agenda, the “Cotton Four” (Benin, Burkina Faso, Chad, and Mali) pushed forward its cotton proposal again, calling for elimination of cotton subsidies by rich countries, in particular the U.S., as well as compensation for lost exports due to these subsidies.⁷⁶ Nearly all members supported the cotton proposal. India referred to the cotton situation as a “bleeding wound on the conscience of the world.”⁷⁷ Although the U.S. admitted its responsibility in this matter,⁷⁸ its initial position was not very accommodative.⁷⁹

As the negotiations passed the midpoint, major contentions among members became salient. In agriculture, negotiators focused on “export competition” issues, such as an end date for the elimination of export subsidies as well as “parallelism”—whether export credits, guarantees, insurance, exporting-state trading enterprises, and food aid should also be covered by export competition principles.⁸⁰ Regarding services, the G-90—consisting of African, Caribbean, and Pacific countries (ACP), the LDCs, and the African Union—circulated a new services draft watering down the binding posture of Annex C and its strong language (the “prescriptive and mandatory” provisions).⁸¹ However,

⁷³ Bridges Daily Update on the Sixth Ministerial Conference, Issue 1, Dec.13, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/13_December/en051213.htm (last visited on Feb. 2, 2006) [hereinafter Bridges Brief 1].

⁷⁴ WTO, Summary of December 17, 2005, Day 5: Revised Draft Circulated; Ministers Comment, *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_17dec_e.htm (last visited on Feb. 2, 2006) [hereinafter WTO Brief 5].

⁷⁵ *Id.*; Richard Waddington, *WTO Seeks Face-Saving Pact to Keep Talks Moving*, REUTERS, Dec. 13, 2005.

⁷⁶ Bridges Brief 1, *supra* note __.

⁷⁷ WTO Brief 2, *supra* note __.

⁷⁸ *Id.*

⁷⁹ Bridges Brief 1, *supra* note __.

⁸⁰ WTO, Summary of December 16, 2005, Day 4: Ministers Start Preparing Revised Draft Ministerial Text, *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_16dec_e.htm (last visited on Feb. 2, 2006).

⁸¹ Bridges Daily Update on the Sixth Ministerial Conference, Issue 4, Dec.16, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/16_December/en051216.htm (last visited on Feb. 2, 2006) [Bridges Brief 4].

developed countries were strongly opposed to this attempt. The EU even warned that it would collapse the whole conference.⁸²

In terms of negotiational dynamics, the developing countries' position was surprisingly united and solidified. The G-20 and the G-90 formed the "G-110" and issued a joint statement identifying their common objectives: elimination of all agricultural export subsidies by 2010, duty- and quota-free access for LDC exports, development assistance to those developing countries losing their tariff preferences, and addressing the cotton problems.⁸³ However, in stark contrast with the past alliance in Cancún two years ago,⁸⁴ the U.S. and EU failed to form a common ground in agriculture this time. While the U.S. kept criticizing the disappointing level of concessions from Europe in the reduction of farm subsidies and tariffs,⁸⁵ the EU attacked the U.S. food aid, stating that it was tantamount to farm subsidies.⁸⁶

*B. Major Outcome: Hong Kong Ministerial Declaration*⁸⁷

As had been predicted earlier,⁸⁸ the Hong Kong meeting produced a modest, "face-saving" deal with an accent on development. Negotiators postponed cracking the hardest nuts, such as concrete modalities for market access negotiations, and instead elected to address easier issues, those which had already achieved relatively high levels of convergence.

Regarding agricultural export competition, members agreed that all forms of export subsidies, including export credits, guarantees, and insurance, will be eliminated by the end of 2013. Developing countries accepted the EU's unyielding position on this issue by conceding their initial position of 2010. On domestic support, in accordance with the principle that greater cuts will be made in higher bands (higher levels of subsidies), the EU will enact the highest cuts (the top band), followed by the U.S. and Japan (middle

⁸² *Id.*

⁸³ Bridges Daily Update on the Sixth Ministerial Conference, Issue 5, Dec.17, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/17_December/en051217.htm (last visited on Feb. 2, 2006).

⁸⁴ See United States Department of Agriculture (USDA), Statement, Regarding the US-EU Framework for WTO Agricultural Negotiations, August 13, 2003, *available at* www.usda.gov/news/releases/2003/08/0287.htm (last visited on Feb. 2, 2006).

⁸⁵ In fact, the U.S., along with Australia and Canada, wanted to name the EU as the "main obstacle to progressing the Doha round" in the APEC statement in November, 2005. See Anna Fifield & Victor Mallet, *APEC Calls to Break Doha Talks Deadlock*, FIN. TIMES, Nov. 21, 2005, at 3.

⁸⁶ Bridges Daily Update on the Sixth Ministerial Conference, Issue 2, Dec.14, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/14_December/en051214.htm (last visited on Feb. 2, 2006) [hereinafter Bridges Brief 2].

⁸⁷ WTO Ministerial Conference (Sixth Session, Hong Kong, Dec. 13-18, 2005), Doha Work Program: Draft Ministerial Declaration (Revision), WT/MIN(05)/W/3/Rev., Dec. 18, 2005, *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (last visited on Feb. 2, 2006).

⁸⁸ See e.g., Waddington, *supra* note ____.

band), and the rest of the WTO members (bottom band). The concrete formulas (modalities) for agricultural tariff reduction are to be decided by April 30, 2006. Yet, even the full modalities for agricultural market access will be accompanied by various exceptions under the rubric of sensitive products (in the case of developed countries) and special products (in the case of developing countries). In terms of cotton, all forms of export subsidies by developed countries will be eliminated in 2006, and duty- and quota-free access for the LDCs' cotton provided from the beginning of the implementation period.

In regard to nonagricultural market access (NAMA), members finally adopted the "Swiss formula," which requires greater cuts in higher tariffs. Yet, again, final modalities for tariff reduction will be established by April 30, 2006. In services negotiations, developing countries had originally opposed the position by developed countries to mandate further liberalization in such areas as cross-border supply (Mode 1) and commercial presence (Mode 3), and to introduce "plurilateral" request-offer negotiations.⁸⁹ However, these issues, which are stipulated under Annex C, are now linked to the main text of declaration and thus will guide future services negotiations. Developing countries eventually gave in to a firm position led by the EU and the U.S.⁹⁰

Regarding the LDCs, members agreed to provide duty- and quota-free access to exports from the LDCs by 2008, yet only to the extent of 97% of products from LDCs. This 3% loophole is big enough to protect certain sensitive industries in developed countries, such as textiles in the U.S. and leather in Japan.⁹¹

C. Evaluation: Half Full or Half Empty?

The Hong Kong Ministerial Conference exhibited a number of encouraging signs in the procedural aspects, but it left much to be desired in substance, even considering the recalibrated expectations prior to the meeting.

The meeting deserves a certain amount of credit in its effort toward enhanced transparency and outreach. The WTO allowed 2000 NGO representatives and 4000 journalists to attend the meeting.⁹² These nondelegation participants equaled the delegations of WTO members in number. The WTO also provided the public with the "webcasting" of certain events taking place in Hong Kong.⁹³ In terms of negotiational format, members were generally satisfied with the so-called "bottom-up" approach,

⁸⁹ Bridges Brief 4, *supra* note ____.

⁹⁰ *Id.*

⁹¹ Bridges Daily Update on the Sixth Ministerial Conference, Issue 3, Dec.15, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/15_December/en051215.htm (last visited on Feb. 2, 2006).

⁹² *Letter*, *supra* note ____.

⁹³ WTO, *Webcasting*, *available at* <http://www.wtmc6.gov.hk/eng/webcasting/webcasting.html> (last visited on Feb. 2, 2006).

emphasizing input coming directly from members, compared to the “top-down” approach, relying mostly on the Chair’s text.⁹⁴ The host country, Hong Kong, to its credit provided “excellent facilities, good organization and a secure environment for the negotiations,” which would make it hard for future Ministerial Conferences to exceed its performance.⁹⁵

In substance, however, the final outcome certainly left little room for complacency. The net mileage added by the Hong Kong meeting alone toward the completion of the Doha Round was only 5% (from 55% to 60%).⁹⁶ The most difficult part of the negotiations—*how* and *how much* members, in particular rich countries, will dismantle their protectionist barriers in major areas such as agriculture—still needs to be addressed. Yet, this “down and dirty” part of the negotiations⁹⁷ now needs to be crammed within a year to meet the 2006 deadline for completion of the Doha Round.

Even the face-saver, the development package agreed to in Hong Kong, is porous, leaving enough room for rich countries to continue the current protection on selective products. For example, because of the 3% exception to duty- and quota-free access for LDC exports, the U.S. managed to exempt textiles from this concession, arguing that such countries as Bangladesh and Cambodia are too competitive.⁹⁸ Japan also would exempt certain products which have traditionally been protected, such as leather and rice. One study demonstrates that this 3% carve-out may lead to the exclusion of as much as 330 tariff lines.⁹⁹

The U.S. also promised little in response to the Cotton Proposal introduced by the Cotton Four. The declaration failed to deliver concrete commitments on the reduction or elimination of domestic cotton subsidies, which are deemed to inflict the greatest damage to those poor African countries.¹⁰⁰ While the Cotton Four countries do not export cotton directly to the U.S. and thus do not benefit from the U.S. grant of duty-free access, the continued subsidization by the U.S. to its domestic cotton industry tends to make these African cotton exporters less competitive in other markets, such as Asia.¹⁰¹

⁹⁴ WTO Brief 5, *supra* note ____.

⁹⁵ WTO, Summary of December 18, 2005, Day 6: Ministers Agree on Declaration that ‘Puts Round Back on Track,’ *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm (last visited on Feb. 2, 2006) [hereinafter WTO Brief 6].

⁹⁶ See Paul Blustein, *WTO Keeps Talks Alive with Deals on Some Trade Barriers*, WASH. POST, Dec. 19, 2005, at A 19.

⁹⁷ *Id.*

⁹⁸ See USTR, Briefing by Senior U.S. Government Officials, *available at* http://www.ustr.gov/Document_Library/Transcripts/2005/December/Briefing_by_Senior_US_Government_Officials,_World_Trade_Ministerial,_Hong_Kong_Convention_Exhibition_Center.html (last visited on Feb. 2, 2006).

⁹⁹ Bridges Daily Update on the Sixth Ministerial Conference, Issue 7, Dec. 19, 2004, *available at* http://www.ictsd.org/ministerial/hongkong/wto_daily/19%20December/en051219.htm (last visited on Feb. 2, 2006) [hereinafter Bridges Brief 7].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Attesting to the foregoing mixed picture of the Hong Kong deal, different evaluations were released from the inside and outside of the WTO. A self-assessment by the WTO was understandably optimistic. Director-General Pascal Lamy emphasized that the Doha round was “back on track” and its development priority rebalanced.¹⁰² However, the outsiders’ appraisal was reserved and critical. Some even observed that rich countries attempted to “buy off” poor countries with a cheap development package in lieu of bigger deals later.¹⁰³ In particular, NGOs launched harsh criticism on the lack of development sensitivity in the deal. Oxfam condemned the outcome as a “betrayal of development promises.”¹⁰⁴ Greenpeace also downplayed the much advertised development package as rhetorical and criticized the final compromise as being heavily tilted in favor of rich countries.¹⁰⁵

[Table 1: Evolution of Commitments under the Doha Round]

	Doha Development Agenda (Nov. 2001)	Doha Work Program (Aug.2004)	Hong Kong Ministerial (Dec. 2005)
Agriculture (Export Competition)	Reductions of, with a view to phasing out, all forms of export subsidies	Parallel elimination of all forms of export subsidies by the end date to be agreed	Parallel elimination of all forms of export subsidies by the end of 2013 / Other disciplines completed by April 30, 2006
Agriculture (Domestic Support)	Substantial reductions in trade-distorting domestic support	A tiered formula / Greater cuts in higher levels of subsidies	Higher linear cuts in higher bands / Top band (EU); middle band (US, Japan); bottom band (the rest of Members)
Agriculture (Market Access)	Substantial improvements	A tiered formula / Greater Cuts in Higher Tariffs with certain exceptions (sensitive products)	Adopted four bands for structuring tariff cuts (with certain exceptions) / Modalities established by April

¹⁰² WTO Brief 6, *supra* note 1.

¹⁰³ See *Hard Truths in Hong Kong*, THE ECONOMIST, Dec. 19, 2005 [hereinafter *Hard Truths*].

¹⁰⁴ Oxfam Press Release, *WTO Agreement A Betrayal of Development Promises*, available at http://www.oxfam.org/en/news/pressreleases/2005/pr051218_wto_betrayal (last visited on Jan. 31, 2006).

¹⁰⁵ Greenpeace, *Face-Saving Declaration by the WTO Fails to Address the Real Impact of Free Trade*, Dec. 18, 2005, available at http://www.greenpeace.org/international/press/releases/WTO_declaration_fails_address_real_impacts_free_trade (last visited on Jan. 30, 2006).

			30, 2006
Cotton	N.A.	Ambitious and expeditious solution / A subcommittee on cotton	All forms of export subsidies eliminated in 2006 / Duty and quota-free access for cotton from LDCs
Non-Agricultural Market Access (NAMA)	Reduction (Elimination) of tariff peaks and tariff escalation / Modalities to be agreed	A formula approach (to effectively tackle tariff peaks and tariff escalation) / <i>Ad valorem</i> terms	Adopted the “Swiss formula” (greater cuts in higher tariffs) / Modalities established by April 30, 2006
Services	Continuation of Negotiation	Progressively higher levels of liberalization with no a priori exclusion of any service sector or mode of supply	Negotiations intensified according to the Objectives, Approaches and Timelines set out in Annex C
Least-Developed Countries (LDCs)	Committed to the objectives of duty and quota-free access for exports from LDCs	Should provide duty and quota-free access for exports from LDCs	Duty and quota-free market access on a lasting basis, for all products originating from all LDCs by 2008 (for at least 97% of products)

IV. Prospects: The Hazy Future of the Doha Round

A. *A Mission Impossible?*

With a new roadmap at hand, WTO members are likely to double up their efforts to bridge the wide negotiational gaps in major unsettled areas. Negotiations would be ubiquitous, taking place in Geneva or on the sidelines of major international gatherings of, for example, the IMF, OECD or APEC.¹⁰⁶ They would even need to hold “mini-ministerials” and/or a Hong Kong II (or III) to facilitate the negotiation.

¹⁰⁶ On January 27-28, 2006, trade ministers from about 25 countries gathered in Davos, Switzerland on the sidelines of the World Economic Forum (WEF) to hold a mini-ministerial on the Doha Round. However, this meeting ended without any substantial outcome. See *Davos: Ministers Reaffirm Hong Kong Deadlines, and a Bit More*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 10, No. 3, Feb. 1, 2006.

Undoubtedly, the biggest challenge that still remains is how to beat the clock. The Doha Round's mileage up to Hong Kong (55%)¹⁰⁷ still runs short of the original ambition (75%).¹⁰⁸ Pascal Lamy once predicted that it would take about ten months to convert any agreed formula (modalities) into individual commitments in writing.¹⁰⁹ Even if full modalities of market access, both agricultural and nonagricultural, will have been achieved by April 2006, as was agreed in Hong Kong, members would end up with only eight months to finish the job by the end of 2006. On top of this tight schedule, the remaining issues are the hardest nuts to crack, which have been procrastinated all along during the Doha round.

Granted, this gloomy forecast based on the current timetable should not unduly issue a death certificate for the Doha Round. Many past successful negotiations, including the UR, were fed by crises. If enough political capital is poured, the future negotiations could be sped up and the Doha Round still be saved. The real question is, however, whether and how members, in particular the EU, could mobilize such political capital under the current protectionist atmosphere at home.¹¹⁰ Moreover, the EU's refusal to offer beyond the status quo tends to confer on the U.S. excuses to keep its own offer low.¹¹¹

More seriously, if poor countries are further frustrated by the inadequacy of rich countries' concessions in agriculture, they might lose the incentives to remain in this "Development Round."¹¹² In this line, the EU's overreliance on reciprocity to avert criticism on its lack of agricultural concessions should be put into question. As Joseph Stiglitz and Andrew Charlton aptly observed, rich countries' demands for a *quid pro quo* deal to poor countries disregard the "egregious unfairness" already embedded in the current world trading system.¹¹³ "The Doha round is biased against European and American farmers in the way that courts are biased against criminals."¹¹⁴ While poor countries should also open their service markets and cut their industrial tariffs, such reciprocal concessions should not be disproportionate, especially considering their developmental stages.¹¹⁵ To reiterate, it should be rich countries which move first and afar in this *development* round.¹¹⁶

¹⁰⁷ See Blustein, *supra* note 1.

¹⁰⁸ Letter, *supra* note 1.

¹⁰⁹ WTO, *Lamy Says the Engine of Negotiations Are "Buzzing" Again*, Oct. 13, 2005, available at http://www.wto.org/english/news_e/news05_e/tnc_13oct05_e.htm (last visited on Jan. 31, 2006).

¹¹⁰ See Raphael Minder, *Trade Chief Says EU United on Farm Stance*, FIN. TIMES, Dec. 21, 2005 (reporting that the EU's protectionist position has even been solidified among Member States after the Hong Kong Ministerial Conference).

¹¹¹ See Philip Bowring, *Silver Lining in WTO Talks*, INT'L HERALD TRIBUNE, Dec. 19, 2005.

¹¹² Cf. Robert Hunter Wade, *Doha Failure Would Not in Fact Amount to Disaster*, FIN. TIMES, Nov. 4, 2005, at 14; A *Dead Heat for Last Place*, N.Y. TIMES, Oct. 14, 2005.

¹¹³ Joseph Stiglitz & Andrew Charlton, *The Doha Round Is Missing the Point on Helping Poor Countries*, FIN. TIMES, Dec. 13, 2005, at 17.

¹¹⁴ *The Dawdling That Delays Doha*, FIN. TIMES, Aug. 1, 2005, at 10.

¹¹⁵ In the middle of the Hong Kong Ministerial Conference, nine developing countries (Argentina, Brazil, Egypt, India, Indonesia, Namibia, the Philippines, South Africa, and Venezuela) sent a letter to

Finally, facing a déjà vu of crisis similar to the end of the Uruguay Round negotiations, one might call for an active leadership role by WTO Director-General Pascal Lamy, as was shown by the late Arthur Dunkel. Although the context of negotiations has dramatically changed since then,¹¹⁷ a still possible role by the Director-General may be to broker *intersectoral* deals, such as those between agriculture and services, to accelerate the overall pace of negotiations. Yet, first of all, Lamy should help break the current deadlock by persuading or pressuring his fellow Europeans to provide a better offer in agriculture.¹¹⁸

B. Negotiation v. Adjudication

To the surprise of many developed countries, developing countries have successfully challenged the former's agricultural subsidies before the WTO tribunal. In *U.S. – Subsidies on Upland Cotton* (2005), Brazil won a dramatic victory over the U.S. controversial cotton subsidy regime when the WTO Appellate Body (AB) ruled that certain programs under the regime were prohibited subsidies under the Agreement on Subsidies and Countervailing Duties (SCM Agreement) and injured Brazil's cotton industry in the global market.¹¹⁹ In *EC – Export Subsidies on Sugar* (2005), the AB raised the hands of Brazil and Thailand not only by condemning certain aspects of the EU export subsidy regime as violations of the Agreement on Agriculture but also by implying that those export subsidies might violate the SCM Agreement as well.¹²⁰

Undoubtedly, these recent victories under the WTO dispute settlement procedure are inspiring to those poor countries whose crops are forced to compete with heavily subsidized products from rich countries. In fact, some countries, like Uruguay, have already expressed interest in filing complaints before the WTO against rich countries over their subsidies.¹²¹ As long as the legality of rich countries' subsidies in areas other than cotton and sugar is still questionable under the WTO,¹²² an impetus for litigation may

Chairman John Tsang stating that the foundation of the negotiations was antidevelopment, in that developed countries requested too drastic cuts in industrial tariffs by developing countries in return for agricultural reform. See Bridges Brief 2, *supra* note ____.

¹¹⁶ See Oxfam Press Release, *Responsibility on EU and US to Deliver Fair Trade Rules for 2006*, Dec.20, 2005, available at http://www.oxfam.org/en/news/pressreleases/2005/pr051220_hongkong (last visited on Feb. 2, 2006) [hereinafter *Responsibility on EU and US*].

¹¹⁷ See Keith Bradsher, *W.T.O. Chief Won't Count on Consensus*, N.Y. TIMES, Nov. 25, 2005.

¹¹⁸ Lamy acknowledged that the EU should improve its offer for the Doha Round to be successful. See *Hard Truths*, *supra* note ____.

¹¹⁹ *U.S. – Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R, circulated on Mar.3, 2005.

¹²⁰ *EC – Export Subsidies on Sugar*, Report of the Appellate Body, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, circulated on Apr. 28, 2005.

¹²¹ See Alan Beattie, *Farming Subsidies 'Could Face Legal Threat'*, FIN. TIMES, Nov. 30, 2005, at 3.

¹²² See generally OXFAM, *TRUTH OR CONSEQUENCES: WHY THE EU AND USA MUST REFORM THEIR SUBSIDIES, OR PAY THE PRICE*, OXFAM BRIEFING PAPER NO. 81 (Nov. 2005).

persist for the remaining period of the Doha Round talks, in particular when further negotiations fail to deliver solid agricultural trade liberalization. Several reasons justify this observation.

First of all, most developing countries would consider this adjudication option superior to a negotiation option since the former need not cost any concessions from them. Second, to dismantle trade barriers by a judicial remedy seems to hold a stronger appeal for economic justice than by a bargain. Third, developing countries have nothing to lose even if they fail to win the case. On the contrary, litigation under the WTO dispute settlement mechanism tends to raise awareness about developed countries' protectionist policies and thus attracts a number of third-party interventions. This heightened level of consciousness tends to make it more difficult for rich countries to defend their protectionist positions. Fourth, prospects of litigation as well as defeat therein may also give developed countries certain incentives to reach a bargain with potential complainants, i.e., developing countries. Even the U.S. government invokes such prospects of litigation when it persuades domestic farmers into agricultural reform.¹²³ Fifth, for most developing countries only a limited number of exports, such as corn, rice, and tomatoes, are at stake in greater access to rich countries' markets.¹²⁴ Therefore, they may achieve more effective and targeted market access by litigation than by general reduction of subsidies through negotiation.

The past experience under the UR also attests to these critical influences that adjudication exerts on the pending negotiation. For example, the bitter row between the U.S. and the EC concerning the latter's subsidies for processors and producers of oilseeds was addressed in the UR after the U.S. victory on this issue in the GATT panel brought significant pressure to bear on the EC.¹²⁵ Even to the losing party, it might be easier to implement the decisions of a neutral third party, such as the GATT/WTO panel, than to concede or succumb to the counterpart's position in the negotiation setting.¹²⁶

In sum, an adjudicative option, if exercised properly and with good timing, would have significant influence on WTO members' bargaining positions in the reduction of farm subsidies.

C. Multilateralism v. Regionalism

The recent proliferation of regional trading blocs, which are preferential and thus discriminatory in nature, threatens the operation of an MFN-based multilateral trading

¹²³ *Id.*

¹²⁴ Regarding a list of agricultural products subsidized by the U.S. and the EU which are potentially subjects of the WTO complaints, *id.*, at 1-2.

¹²⁵ See John M. Weeks, *The External Dynamics of the Dispute Settlement Understanding and its Impact on Trade Relations and Trade Negotiations: An Initial Analysis*, Conference Paper Presented in the Conference on International Trade and Dispute Settlement (Montevideo, April 15, 2004), at 8-9.

¹²⁶ *Id.*, at 5.

system, which the Sutherland Report warned about in 2005.¹²⁷ Yet, if the Doha Round negotiations continue to exhibit the same frustrating pattern, it may further stimulate such regional propensity in regionalism as negotiators search for alternative venues for trade talks.¹²⁸

Upon the collapse of the Cancún meeting in 2003, the U.S. had already pronounced its preference for bilateral, regional trade deals, announcing that regionalism is an “option” for U.S. trade policies¹²⁹ and that it would proceed only with “can do” countries.¹³⁰ Since the Cancún meeting, the U.S. has completed regional trade deals with Australia (May 18, 2004), Central American countries (CAFTA: Costa Rica, Dominica, El Salvador, Guatemala, Honduras, and Nicaragua) (May 28, 2004), Morocco (June 15, 2004), and Bahrain (September 14, 2004), and it is negotiating similar deals with Panama, Andean countries (Peru, Colombia, Bolivia, and Ecuador), and the Southern African Customs Union (SACU) members.¹³¹ Problematically, however, the Bush administration has already spent considerable political capital when it pushed forward the ratification of these regional trade deals in Congress, especially CAFTA, which with its non-U.S. members covers an economy only the size of Nevada.¹³² The resulting exhaustion of political capital in the hands of the executive casts doubt over the prospects of the Doha Round.

To make things worse, regionalism tends to be highly contagious. Under what may be termed “reactionary regionalism,”¹³³ East Asian countries which have traditionally been staunch advocates for multilateralism, and thus even labeled the “Friends of MFN,”¹³⁴ have recently become converts to regional trade deals. China, Japan, Korea and members of the Association of South East Asian Nations (ASEAN) have competitively formed bilateral (e.g., Korea – Chile FTA), trilateral (ASEAN – AUS/NZ), and other sub-regional trade deals (e.g., ASEAN plus Three) among themselves and with other non-Asian trading partners.¹³⁵ While each country’s motivation in jumping on the

¹²⁷ *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO Consultative Board Report), ch. II, released on Jan. 17, 2005, available at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future (last visited on Feb. 2, 2006).

¹²⁸ See Ken Heydon, *After the WTO Hong Kong Ministerial Meeting: What is at Stake?*, OECD TRADE POLICY WORKING PAPER No. 27 (2006), at 6.

¹²⁹ The Office of the US Senator Charles Grassley, Memorandum: Collapse of Trade Negotiations in Cancún, Sep. 14, 2003.

¹³⁰ USTR, *Press Release, Statement of U.S. Trade Representative Robert B. Zoellick*, Sep. 14, 2003.

¹³¹ USTR, *Bilateral Trade Agreements*, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited on Feb. 2, 2006).

¹³² See *The CAFTA Conundrum*, THE ECONOMIST, Jun. 18, 2005, at 15.

¹³³ See Mark Beeson, *ASEAN plus Three and the Rise of Reactionary Regionalism* (2003), available at <http://eprint.uq.edu.au/archive/00000496/> (last visited on Dec. 28, 2004).

¹³⁴ ROBERT SCOLLAY & JOHN P. GILBERT, *NEW REGIONAL TRADING ARRANGEMENTS IN THE ASIA PACIFIC?* 4 (2001).

¹³⁵ See *ASEAN Looks to Deepen Integration, Forge New Trade Ties*, BRIDGES WEEKLY TRADE NEWS DIGEST, Vol.8, No. 29, Sep. 8, 2004.

regional bandwagon may vary, one common explanation that can be offered is in relation to these countries' reactions to U.S.-led regionalist policies.¹³⁶

These regionalist developments certainly do not bode well for future Doha Round talks. One might reasonably speculate that these regionalist policies would dry up the political capital and other scant resources necessary for multilateral trade deals.¹³⁷ Some negotiators seem to have already become lukewarm to the WTO negotiations.¹³⁸ Without a serious political recommitment to multilateralism, global trade discourse under the Doha Round would languish, as the negotiators' dissidence on the WTO rises and public support for the WTO becomes lackluster.

This consequence would be highly troubling in two particular aspects. First, regionalism is inferior to multilateralism in creating global gains. According to one simulation,¹³⁹ all developing countries' bilateral deals with rich countries would generate only 112 billion dollars in 2015, while multilateral trade liberalization would bring global gains of 263 billion dollars in the same year. Moreover, developing countries, epically low-income countries, would suffer net losses, 22 billion and 19 billion dollars, respectively, by these bilateral deals, while rich countries could still record net gains. In sum, regionalism is not only an inferior income generation mechanism to multilateralism but also a developmentally unsound option in that it tends to *hurt* poor countries.

Second, the mercantilist nature of the current competitive regionalism tends to evoke the strikingly similar phenomenon of the interwar period, which precipitated economic balkanization and led to the outbreak of the Second World War.¹⁴⁰ Highly preferential regional trading blocs instituted worldwide in this period eliminated the political space needed for multilateral economic cooperation and instead nurtured the Hobbesean struggle among major economic powers.¹⁴¹ The interwar regionalist competition is a textbook example of a prisoners' dilemma. Beggar-thy-neighbor trade policies entailed a global economic crisis which eventually exacerbated, not reduced, the evils of the Great Depression. Out of this, one should learn an undeniable historical lesson: that the fragmented global trading system is vulnerable to a chain of unfortunate

¹³⁶ See Mari Pangestu & Sudarshan Gooptu, *New Regionalism: Options for East Asia*, in EAST ASIA INTEGRATES: A TRADE POLICY AGENDA FOR SHARED GROWTH 40-41 (Kathie Krumm and Homi Kharas eds. 2004). See also *East Asian Trade: Everybody's Doing It*, THE ECONOMIST, Feb. 28, 2004, at 39-40.

¹³⁷ See Sungjoon Cho, *The Troubled Status of WTO Doha Round Negotiations*, ASIL INSIGHTS (Aug. 25, 2005), available at <http://www.asil.org/insights/2005/08/insights050825.html> (last visited on Dec. 12, 2005).

¹³⁸ See Bowring, *supra* note __ (observing that East Asia's recent regional policies reflected illusions that regionalism can be a substitute for the WTO).

¹³⁹ Dominique van der Mensbrugghe et al., *Regionalism vs. Multilateralism?*, in TRADE, DOHA, AND DEVELOPMENT: WINDOW INTO THE ISSUES (Richard Newfarmer ed., 2005), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,,contentMDK:20732399~pagePK:148956~piPK:216618~theSitePK:239071,00.html> (last visited on Jan. 13, 2006).

¹⁴⁰ See Edward D. Mansfield & Helen V. Milner, *The New Wave of Regionalism*, 53 INT'L ORG. 589, 597 (1999).

¹⁴¹ *Id.*

events, such as tension, hostility, and violence. Considering that recent trade policies are inextricably linked to security and other foreign affairs concerns,¹⁴² this lesson should be taken seriously lest we should be punished by repeating the same historical errors.

V. Saving the Doha Round: Toward the Global Trading Community

A. A Dual Crisis of Development Failure and Parochialism

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

Nonetheless, under the current *development* round, developed countries deserve a large portion of the criticism for their uncompromising stance on protectionism, even over those products which are the world's poorest countries' only lifelines, such as African cotton,¹⁴³ Moldovan fruits¹⁴⁴, and Cambodian garments.¹⁴⁵ Granting market access for these products is not a "special favor" but merely "playing by the rules."¹⁴⁶ However, developed countries often rationalize their lack of concessions by referring to developing countries' poor offers. This logic of reciprocity is highly troubling under the development round which should in fact be tilted in favor of poor countries.¹⁴⁷

Markedly, this protectionist position does not serve the general economic welfare of rich countries themselves.¹⁴⁸ Protectionism simply feeds small groups at the expense of the interest of the many. In the U.S., a lavish sum of 19 billion dollars, which is nothing but taxpayers' money, is showered to a handful of already rich corporate farmers each year in the name of agricultural subsidies.¹⁴⁹ This practice seems to be at odds with constitutional strictures. In the Federalist Papers, James Madison earnestly warned against

¹⁴² See Daniel Drezner, *Trade Talk*, 1 AM. INTEREST 68, 73 (2005).

¹⁴³ See *Stitched Up: African Irritation at Rich Countries' Cotton Subsidies*, THE ECONOMIST, at 71, Jul. 24, 2003.

¹⁴⁴ See *Moldova's Poverty: Outsiders Aren't Helping*, THE ECONOMIST, at 48, Feb. 15, 2003.

¹⁴⁵ See David Woods, *Two Queries – and Same Answer – for U.S. Textile Lobbyists*, FIN. TIMES, Dec. 22, 2005, at 12.

¹⁴⁶ WTO Brief 1, *supra* note 1.

¹⁴⁷ See *Responsibility on EU and US*, *supra* note 1.

¹⁴⁸ See Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315, 336-38 (2005) [Cho, *Protectionism*].

¹⁴⁹ See Laurie Goering, *End to Subsidies Is Best Aid for Africa*, CHI. TRIBUNE, Jul. 3, 2005, at 4.

these “factions.” More troubling is the fact that the enormous economic burden from protectionism falls disproportionately on the poor. If you are wealthy enough not to shop at one of those discount stores which mostly sell cheap foreign imports, you need not worry about that burden. But, if you routinely gather coupons and care for every dollar, you should certainly be aware of huge tax that protection sneakily imposes on everyday items such as bras, shirts, and shrimp.¹⁵⁰

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

B. Negotiation, Legal Discipline and Community

Trade negotiations are basically a process of reciprocal bargaining in which power plays a critical role in shaping final terms.¹⁵¹ In this inevitable political process, the voices of the powerless can be easily marginalized and silenced.¹⁵² This explains why the LDCs’ desperate demands, such as the Cotton Proposal, have been largely ignored or addressed incompletely, even if many of these demands claim high moral grounds. Therefore, as long as rich countries’ negotiators are captured by special interests at home, trade talks are preordained to deliver limited, if any, benefits to the poor as well as to rich countries’ economies in general.¹⁵³

Therefore, in order to stop the Doha Round negotiations from becoming adrift at the mercy of narrow-minded political battles and steer them firmly toward the direction of the WTO’s *telos*, an “integrated” trading system, WTO members, especially rich ones, should, departing from the customary assumption that everything can go on the negotiation table, tie themselves to the mast of the WTO’s normative strictures.¹⁵⁴ For example, the U.S. should not seek refuge in trade negotiations to block the import of Cambodian textiles if the U.S. cannot have recourse to WTO-legal instruments, such as safeguards. Unless developed countries do not play by the trade rules, they are in no

¹⁵⁰ According to one estimate, such a protection tax is equivalent to a national sales tax of 6 percent. See Consumers for World Trade, *Protectionism in America: Watch Your Wallet!*, available at <http://www.cwt.org/> (last visited on Jan. 20, 2006).

¹⁵¹ See Sungjoon Cho, *The WTO’s Gemeinschaft*, 56 ALA. L. REV. 483, 492 (2004) [hereinafter Cho, *Gemeinschaft*].

¹⁵² *Id.*

¹⁵³ See Jeffery Atik, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 22 GEO. WASH. INT’L L. REV. 451, 459 (2001) (observing that not only domestic producers but also multinational enterprises have become dominant in the domestic trade policy-making process); Joseph LaNasa, *Rules of Origin under the North American Free Trade Agreement: A Substantial Transformation into Objectively Transparent Protectionism*, 34 HARV. INT’L L. J. 381, 400 (1993) (describing the US auto industry’s protectionist influence in the drafting of NAFTA’s rules of origin).

¹⁵⁴ See Robert E. Hudec, *GATT or GABB?: The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1309-36 (1971) (using the rhetoric of “lashing oneself to the mast” in describing GATT contracting parties’ commitments to trade rules).

position to preach the same to developing countries. Only when rich countries' practices truly match their rhetoric of free trade, can they effectively alter developing countries' mercantilist behaviors.

Anchoring trade negotiations by legal discipline can be facilitated and reinforced by an apposite use of litigation under the WTO dispute settlement mechanism. As discussed above, the prospects of adjudication tend to confer on protectionist governments material incentives to come forward with better offers to cut farm subsidies. Furthermore, such legal discipline can also rekindle domestic reform movements by raising the cost of protectionism in the international arena. In fact, most developed countries have considered domestic reform agendas directly linked to trade liberalization. For example, the "Freedom to Farm" legislation in the U.S. a decade ago could have phased out all farm subsidies but was eventually aborted by a Congress captured by special interests.¹⁵⁵ Also, in the EU the ambitious "Lisbon Agenda" mandates further market opening and competition to make the European economy more dynamic and competitive.¹⁵⁶ These domestic reforms share the same ground with the WTO norms—trade liberalization—and therefore claim broad justification in defiance of parochialism.

If those *inter-* and *intranational* dimensions of trade discourse, such as negotiation, litigation, and domestic reform, are firmly guided by the WTO norms—not only the black letter laws but also their broad strictures and/or certain undeniable precepts, such as antiprotectionism—a true legal *community* can be envisioned among WTO members. In that community, both trading nations and individual businesspeople can effectively communicate and become fully interconnected with one another on account of the stability and predictability that the WTO rules can offer.¹⁵⁷ This community building eventually leads to common prosperity by realizing an efficient allocation of resources and the consequent increased welfare among participants of the community.

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

If trade norms can discipline trade politics in the field of the foregoing international legal community as a constitution does in the domestic arena, much of the

¹⁵⁵ See Victor Davis Hanson, *A Gastronomical Awakening*, CHI. TRIBUNE, Nov. 4, 2005, at 27.

¹⁵⁶ Q&A: EU's Lisbon Agenda, BBC NEWS, Mar. 22, 2005, available at <http://news.bbc.co.uk/2/hi/business/4373485.stm> (last visited on Jan. 31, 2006).

¹⁵⁷ See Sungjoon Cho, *A New Agenda for Peace: International Trade Law as a Practical Discourse*, in *TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* (Padideh Ala'i et al eds., *forthcoming* 2006).

political capture and parochial trade policies will be rethought and forced to be altered. Under these circumstances, many citizens, especially the poor, can be relieved of the huge protection taxes which used to burden them via high tariffs and restrictive quotas. The government can also save its budget by reducing subsidy payments¹⁵⁸ and redirect this surplus to trade adjustment programs to assist those who are dislocated by trade competition.¹⁵⁹ These trade reforms in turn help poor countries earn hard currency by enabling them to export what they are good at producing, such as agricultural products or labor-intensive manufactured products.

Importantly, not only the rich but also the poor should stick to the WTO's legal discipline and stay within the legal community. Poor countries should depart from the culture of exemptions and lower their trade barriers for their own sake. There is enormous room for improvement in South-South trade, particularly considering the relative erosion of preferences and intensified competition among the poor as rich countries' preferential programs are scaled back.¹⁶⁰

In sum, in the foregoing legal community, legal discourse supersedes the mercantilist bargaining process. Thus, normatively mandated open trade can increase domestic welfare-cum-economic justice and discharge a communitarian duty to assist in the global dimension. In this global trade Gemeinschaft, trade negotiations are to facilitate, not restrict, international commerce and to constitute, not fragment, a world trading system. Unfortunately, however, the current pattern of negotiation under the Doha Round does not correspond to this ideal type and thus cannot be conducive to achieving the vision of a legal community within the WTO. Therefore, the very nature of negotiation itself should be transformed in order to break the current deadlock. This is why WTO members desperately need a paradigm shift in the way that they formulate trade policies as well as conduct trade negotiations.

C. A Paradigm Shift to Save the Doha Round

The interim deal struck in Hong Kong last December was hardly a genuine success by any standard, despite a face-saving development accent on it. Negotiators basically postponed cracking the hardest nuts (most agricultural subsidies, industrial tariffs, and services). Yet, considering such wide gaps in positions among negotiators, in particular between developed and developing countries over agricultural trade liberalization, any significant breakthrough which could mark the Doha Round as a success would be hard, if not impossible, to achieve within less than a year.

¹⁵⁸ See Clayton Yeutter & Warren Maruyama, *A Doha Trade Deal Can Be Struck Beyond Hong Kong*, FIN. TIMES, Dec. 15, 2005, at 17.

¹⁵⁹ See Loukas Tsoukalis, *The Fund to Protect Threatened Workers is a Good Plan*, FIN. TIMES, Nov. 3, 2005, at 15 (supporting the European Commission's recent proposal for a "global adjustment fund").

¹⁶⁰ Bridges Brief 7, *supra* note __; *Do Despair*, THE ECONOMIST, Dec. 10, 2005, at 12.

Critically, however, such a diametrical distance in the WTO members' current stances may not necessarily reflect the majority preferences of their home constituencies. Agricultural protectionism in rich countries, which is an epicenter of major spats in the Doha Round, tends to cater to *special*, not general, interests.¹⁶¹ Although this supercapture is a Madisonian "constitutional failure"¹⁶² in that broad public interests are hijacked by those of factions, this disheartening political reality is still controlling trade negotiators. In other words, trade negotiations are largely disconnected from the general public, and at the same time from a unified legal community, as discussed above. Therefore, trade negotiations tend to defy an inclusive, consistent, and thus normative gravitation, and instead are led by a myopic calculation of political economy.

The only remedy to this situation is for WTO members to radically change the way in which they formulate trade policies, from the current esoteric, top-down approach to an open, "bottom-up" approach which fully reflects the general welfare of citizens and the domestic economy in its entirety. In other words, the virtues of direct democracy, such as public deliberation and participation, should be mobilized in order to overcome certain vices of representative democracy in trade policy making, such as capture. If members want to build a more coherent negotiation position domestically which can achieve the greater national welfare, they must devise more institutionalized channels for public input, including various hearings and public discussions, in the trade policy-making process than currently exist. As renowned economist Anne Krueger has observed, "If citizens could easily identify and directly vote on the magnitudes of gains and losses from protection," U.S. trade policies would be different from what they are now.¹⁶³

In this regard, (public) ignorance is not bliss in the making of trade policy. It is under this ignorance, or neglect, that tons of protectionist policies are passed without rigorous cost-benefit analyses.¹⁶⁴ They eventually encroach upon the economic health of the nation and deteriorate the income distribution. Therefore, citizens should educate and enlighten themselves about the hidden cost of protectionism via more participation and deliberation on this issue. Out of the failure of this political engagement emerged the

¹⁶¹ See *Bush the Anti-Globalizer*, THE ECONOMIST, at 14, May 11-17, 2002 (observing that the new U.S. farm bill benefits only the "biggest and richest 10%" of farmers); *Cleansing the Augean Stables*, THE ECONOMIST, at 12, Jul. 13-16, 2002 (criticizing the EU's Common Agricultural Policy (CAP) which feeds a small number of farmers ("less than 5% of the workforce") with half of the EU budget at the expense of taxpayers and consumers); Michael Kitchen, IMF-WORLD BANK: *Meetings Focus on Reform, Millennium Goals*, UN WIRE, Sep. 30, 2002 (citing World Bank Chief Economist Nicholas Stern who criticized rich countries' hypocrisy of preaching free trade in the developing world "while imposing protectionist measures that cater to powerful special interests").

¹⁶² ROBERT E. HUDEC, *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 133 (1999). See generally JAN TUMLIR, *PROTECTIONISM: TRADE POLICY IN DEMOCRATIC SOCIETIES* (1985).

¹⁶³ ANNE O. KRUEGER, *AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING* 3 (1995).

¹⁶⁴ See e.g., Cho, *Protectionism*, *supra* note __, at 322-23 (criticizing a "rider" which is a "legislative provision which cannot pass on its own merits but which is nonetheless attached to a separate, unrelated important bill, such as an appropriations bill, and thus rides unchecked throughout the legislative process").

ill-conceived Smoot-Hawley Tariff Act of 1930¹⁶⁵ and soon triggered the global tariff wars which contributed to the outbreak of the Second World War.

Yet, the public should also be forewarned against certain psychological biases in interpreting various consequences of trade. A critical prerequisite of greater public participation in trade policy making is to inoculate the public against certain cognitive biases toward the gains and pains of trade. There exists an asymmetry between people's perception of gains and that of pains.¹⁶⁶ The gains from trade, such as job creation and increased consumer welfare,¹⁶⁷ tend to diffuse to the unidentified, and thus unorganized, many. These gains also materialize over a long period of time. In contrast, the pains of trade, such as dislocation of workers, tend to transpire quickly and be concentrated on a relatively small number of people who are very well organized. This asymmetry in the manifestation of pains and gains of trade in turn creates yet another asymmetry in how people *feel* about those pains and gains. While people tend to take trade gains for granted and do not pay much attention to them, they certainly react actively, and often emotionally, to trade pains, in particular when these pains occur in their very neighborhood or are broadcast rather graphically in the media. In other words, people usually do not associate trade with the countless affordable amenities at the store, while they are often furious about outsourcing to foreign countries which in fact exerts only minimal impact on domestic unemployment.¹⁶⁸ Therefore, people should acknowledge and prepare for the gloomy side of social physiology before they engage in any public deliberation and participation. Obviously, these cognitive biases can only be remedied by nothing but enlightening experiences which such deliberation and participation tends to bring.

In sum, only prudent trade policies, which are based on deliberation and enlightenment, not on capture and cognitive bias, could bring collective prosperity and security to both the domestic and international economies. Rather than relying on a wholesale delegation to politicians whose balance sheets on free trade and discount rates on trade policies are different from the rest of the nation, individual economic players, such as consumers and consuming industries, should actively intervene in the domestic formulation of negotiation stances before they are realized at the negotiation table.¹⁶⁹

¹⁶⁵ See notably E. E. Schattschneider, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935).

¹⁶⁶ See Sungjoon Cho, *Vox Populi: People's Images on the WTO and Its Legitimacy*, unpublished manuscript presented in the 2004 Annual Meeting of the Law and Society Association (Chicago, May 31, 2004) (on file with author). See also Drezner, *supra* note __, at 70-71.

¹⁶⁷ One organization estimated that the completion of the Doha Round could generate \$2,000 of additional purchasing power for an average family of four. See Business Roundtable, *Trade and Consumers: Trade Provides a Wide Variety of Affordable Products for U.S. Families*, available at http://trade.businessroundtable.org/trade_basics/trade_consumers.html (last visited on Jan. 20, 2006).

¹⁶⁸ See Drezner, *supra* note __, at 70-71.

¹⁶⁹ Certain organizations have recently begun to mobilize consumers and consuming industries to challenge protectionist policies. See e.g., Consumers for World Trade (CWT), available at <http://www.cwt.org/> (last visited on Feb. 2, 2006); The Consuming Industries Trade Action Coalition (CITAC), available at <http://www.citac.info/> (last visited on Feb. 2, 2006).

Only then can members break away from the myopia of mercantilism, use trade talks as a catalyst for domestic reform,¹⁷⁰ and finally reach better deals more quickly at the international level. Until then, people, and the world, will still remain a prisoner of the Ancien Régime of protectionism.

Conclusion

The recent WTO Hong Kong Ministerial Conference was a managed half-success resulting from a deliberate recalibration of the original ambition. Now facing heavier burdens with a shorter timeframe, any meaningful final delivery under the Doha Round seems to rest on WTO members' political determination, rather than the mere assiduousness of negotiators. Perhaps we need a certain "political jolt" to inject fresh momentum in the current atmosphere of inertia.¹⁷¹ Yet, this new momentum is not likely to arrive from the top—from politicians and bureaucrats who have narrow and short attention spans and thus are vulnerable to capture by a few powerful groups. Instead, this momentum should be brought from the *bottom*—the general public, whose broad and long-term interests are at stake in the Doha Round.

The Doha Round is currently situated at a crossroad between glory and obliviousness. Critically, the decisive factor leading to either route lies in the domestic, not international, arena. The challenge which the Doha Round faces is a litmus test for domestic democracy in major countries. If the domestic machines of democracy operate effectively enough to truly represent the general, public interests, they are certainly capable of making the Doha Round a genuine success by the 2006 deadline. Or, more importantly, we can set aside this deadline which has been artificially imposed by the very political failure of the most powerful trading nation.

¹⁷⁰ Cf. Heydon, *supra* note __, at 11 (viewing that trade policies should be "seen in a broader domestic context" which takes into account potential contributions such as increased competition).

¹⁷¹ See Jeffrey J. Schott, *A Political Jolt Needed to Break WTO 'Alphonse and Gaston' Routine*, FIN. TIMES, Dec. 23, 2005.