

2011

Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Two of a Trilogy - Non-Agricultural Market Access and Services Trade

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**POVERTY, ISLAMIST EXTREMISM, AND THE
DEBACLE OF DOHA ROUND COUNTER-TERRORISM:**

**PART TWO OF A TRILOGY –
NON-AGRICULTURAL MARKET ACCESS AND SERVICES TRADE***

Raj Bhala[†]

* Parts One and Three of the Trilogy appears as follows: Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part One of a Trilogy – Agricultural Tariffs and Subsidies*, 9 U. ST. THOMAS L. J. (forthcoming 2012), and Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counter-Terrorism: Part Three of a Trilogy – Trade Remedies and Facilitation*, 40 DENV. J. INT'L L. & POL'Y (forthcoming 2012), part of the 40th Anniversary Symposium in Honor of Professor Ved Nanda.

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(1) Raj Bhala, *Poverty, Islam, and Doha*, 36 INT'L LAW. 159 (2002), which covers the launch of the Round in November 2001.

(2) Chapters 3 and 4 of the textbook, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE referenced above, particularly concepts and terms in the negotiations, and status of those talks through the July 2007 Draft Modalities Texts issued by Ambassadors Crawford Falconer (New Zealand) and Donald Stephenson (Canada), Chairmen of the Agriculture and Non-Agricultural Market Access negotiations, respectively. Chairman of the Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4 (Aug. 1, 2007).

(3) Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 LOY. U. CHI. INT'L L. REV. 5 (2008), which covers the Round through the July 2008 collapsed Ministerial meeting.

I. SYNOPSIS	327
II. ENHANCING INDUSTRIAL MARKET ACCESS THROUGH THE SWISS FORMULA.....	328
A. <i>Product Coverage</i>	329
B. <i>Swiss Formula Coefficients, the Mark Up, and Implementation Periods</i>	330
C. <i>The Anti-Concentration Clause</i>	335
III. RESTRICTING INDUSTRIAL MARKET ACCESS THROUGH FLEXIBILITIES	336
A. <i>Flexibilities for Developing Countries</i>	336
B. <i>Further Flexibilities for CUs, Plus Argentina and Venezuela</i>	338
C. <i>Still Further Flexibilities for Members Engaged in Sectoral Negotiations</i>	342
D. <i>Still Further Flexibilities for Members with Low Binding Coverage</i>	360
E. <i>Still Further Flexibilities for SVEs, Plus Bolivia, Fiji, and Gabon</i>	361
F. <i>Still Further Flexibilities for Least Developed Countries</i>	363
G. <i>Still Further Flexibilities for RAMs</i>	364
IV. OTHER MANUFACTURING PROVISIONS	365
A. <i>Preference Erosion and Still Further Flexibilities for Beneficiaries and Non-Beneficiaries</i>	365
B. <i>Supplementary Modalities and Elimination of Low Duties</i>	370
C. <i>NTBs and Capacity Building</i>	370
D. <i>Non-Agricultural Environmental Goods</i>	373
V. EXPORT TAXES	379
VI. DITHERING ON SERVICES TRADE LIBERALIZATION	380
A. <i>Goal</i>	380
B. <i>Modalities</i>	384
C. <i>Schism</i>	385
D. <i>New Obama Strategy</i>	389
E. <i>Still No Deal, Despite Extra Time on the Built-in Agenda</i>	389

(4) Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. 1 (2009), which analyzes the Round from the July 2008 collapse through July 2009.

(5) Raj Bhala, *Doha Round Betrayals*, 24 EMORY INT'L L. REV. 147 (2010), which considers the Round from July 2009 through December 2009.

Portions of this article are drawn from Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, *supra*. All errors are the responsibility of the author. For a stimulating account of the Round set in a wide context of political economy, see William A. Lovett, *Beyond Doha: Multipolar Challenges for a Globalized World*, 17 TULANE J. INT'L & COMP. L. 3 (2008).

VII. IS CHINA HELPFUL?	394
A. <i>Seeking "Face"</i>	394
B. <i>Sobering Facts</i>	395
C. <i>A Global Problem Solver?</i>	397
D. <i>Thinking Locally, Acting Globally?</i>	401
E. <i>Can a Security State Make the Necessary Compromises?</i>	405

I. SYNOPSIS

The title of the Trilogy on the Doha Round, of which this article is Part Two, connotes the general argument: the Round is a failed instrument of counter-terrorism. The Round, launched in November 2001, was supposed to make the world safe for free trade, and in doing so, give hope and a stake in the global trading system to hundreds of millions of poor people, particularly in Islamic communities, who might otherwise be vulnerable to pernicious, ostensibly religious, ideologies. But as the decade-long negotiations of the Round progressed, commercial self-interest of World Trade Organization (WTO) Members dwarfed their shared interest, and thus the common good, in fighting poverty, thereby attacking one factor related to the spread of violent extremist organizations (VEOs) in the name (but, in fact, abuse) of Islam.

Part One of the Trilogy advanced this argument in the context of trade liberalization in agriculture, namely, efforts to reduce agricultural tariffs, discipline domestic support, and eliminate export subsidies. Part Two does so in the contexts of trade liberalization in industrial products, so-called "non-agricultural market access" (NAMA) negotiations, and services trade. As with Part One, the context of Part Two is technical. The "devil," in the sense of straying far away from the initial purpose of the Doha Round, is in the "details" of lengthy, mind-numbing draft modalities texts. The texts critically analyzed here are the December 2008 Draft NAMA Modalities Agreement,¹ the April 2011 NAMA Document,² and April 2011 Services Document.³

Part One concluded with observations on how the WTO and its Members artificially created a new logic for the Doha Round, namely, to

¹ 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].

² Negotiating Group on Market Access, *Textual Report by the Chairman, Ambassador Luzius Wasexcha, on the State of Play of the NAMA Negotiations*, TN/MA/W/103/Rev. 3Add.1 (Apr. 21, 2011) [hereinafter April 2011 NAMA Document]; see also Trade Negotiation Committee, *Report by the Director-General on his Consultations on NAMA Sectoral Negotiations*, TN/C/14 (Apr. 21, 2011) [hereinafter NAMA Report by Director-General].

³ Council for Trade in Services, *Negotiations on Trade in Services*, TN/S/36 (Apr. 21, 2011) [hereinafter April 2011 Services Document].

fight the global economic slump, so as to justify their collective but flagging endeavor. Part Two concludes with observations about the role the People's Republic of China has played in the Round. It proposes China has not lived up to its ballyhooed promise on the eve of its accession to the WTO, which occurred on December 11, 2001: to act with statesmanship and be a problem-solver.⁴ Failing to rise above the mercantilist fray, it has been a player along with the U.S., EU, and other significant powers. Gripped by fear of losing power amidst socioeconomic distress, ethnic tensions, and rising expectations about democracy and human rights, the Chinese Communist Party (CCP) has backed rules in the negotiating texts that incline more toward managed than free trade and have no link, or are even orthogonal, to the interest of the common good in counter-terrorism. These observations, like those of Part One, support the overall Trilogy argument that the Round is not about trade liberalization, poverty alleviation, or reducing threats from VEOs.

II. ENHANCING INDUSTRIAL MARKET ACCESS THROUGH THE SWISS FORMULA

“NAMA” is WTO-speak for all products not covered by the WTO *Agreement on Agriculture* and Doha Round agriculture negotiations. It includes not only industrial products, but also fish and fish products, forestry products, and mining products—though the terms “industrial” or “manufactured” goods usually are meant to connote all such products.⁵ NAMA negotiations are significant for at least two related reasons. First, industrial products account for nearly ninety percent of the value of world merchandise exports.⁶ Second, all or nearly all poor countries—Islamic and non-Islamic alike—seek to increase production and export capacity in their manufacturing sector. That is because industrial products are higher value added than primary and processed farm goods. For poor countries to develop economically, increasing their output and exports of higher value added goods, and thereby their earnings, is essential. These two reasons have long been known, and the importance of industrialization in the development process

⁴ This author was among the optimists. See Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1526 (2000) (asserting that China's entry into the WTO would make it a more responsible global citizen); see also Raj Bhala, *China, the WTO, and the Converse Question*, J. OF COM., 26 Apr. 1999.

⁵ See *A Simple Guide – NAMA Negotiations*, WTO, http://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm (last visited Feb. 9, 2012) [hereinafter NAMA Negotiations Guide].

⁶ *Id.*

is chronicled by (*inter alia*), Walt Rostow in his classic *The Stages of Economic Growth: A Non-Communist Manifesto*.⁷

The December 2008 Draft NAMA Modalities Text covered well-trodden issues. Large swathes of the text were nearly identical to its July predecessor. The new Text, running 126 pages, covered familiar topics, and spotlighted choices facing the Members.⁸ There were few remarkable changes, meaning WTO Members had not narrowed, much less healed, existing schisms on the following matters. Indeed, several innovations in the December 2008 Text (e.g., on Swiss Formula Coefficients, flexibilities, and the anti-concentration clause) came directly from the Friday Night Proposal put forth by the WTO Director-General, Pascal Lamy, in the July 2008 Ministerial meeting—the meeting that had broken up in disagreement.⁹ In turn, the April 2011 NAMA Document recorded few noteworthy developments, observing the “divergence in views between some Members about the appropriate level of ambition,” which has been “the main stumbling block of the NAMA negotiations since mid-2008.”¹⁰

A. *Product Coverage*

Product, or binding, coverage is important because the greater such coverage, the more predictable trade is. If an industrial product tariff line is unbound, then the importing country can raise duty rates on that product with no ceiling limit. In contrast, if that line is bound, then exporters can be certain as to the maximum duty rate their product will face. Uruguay Round negotiators were successful, but not entirely so, in increasing the binding coverage for industrial products. Among developing countries, binding coverage increased from twenty-one to seventy-three percent of all NAMA products.¹¹ Accordingly, Doha Round negotiators—especially from developed countries—sought to increase this coverage yet more, ideally to one hundred percent.

⁷ W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1968).

⁸ See December 2008 Draft NAMA Modalities Text, *supra* note 1. This synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the December 2008 and July 2008 Draft NAMA Modalities Texts. See Negotiating Group on Market Access, *Draft Modalities for Non-Agricultural Market Access*, TN/MA/W/103/Rev.2 (July 10, 2008) [hereinafter July 2008 Draft NAMA Modalities Text]; see also *The December 2008 Modalities Text Made Simple*, WTO, http://www.wto.org/english/tratop_e/markacc_e/guide_dec08_e.htm (last visited Feb. 9, 2012).

⁹ See Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 5 LOY. U. CHI. L.J. 5, 147–50 (2008) (piecing together the proposal through extensive research); see also *World Trade Talks End in Collapse*, BBC (July 29, 2008), <http://news.bbc.co.uk/2/hi/business/7531099.stm> (outlining reasons for the collapse of the DOHA round).

¹⁰ April 2011 NAMA Document, *supra* note 2, para. 2(i).

¹¹ NAMA Negotiations Guide, *supra* note 5.

At the same time, developed countries had little to give in return. Through the post-Second World War multilateral trade rounds under the General Agreement on Tariffs and Trade (GATT), they had generally increased their binding coverage to high levels, and lowered their average industrial product tariffs following the Uruguay Round from 6.3 to 3.8 percent. This asymmetry, namely, between low binding coverage and high tariffs in poor countries, and high binding coverage and low tariffs in rich countries, bedeviled Doha Round NAMA negotiations. It was obvious, as was the burgeoning middle classes in the likes of Brazil, China, and India, to which American manufacturers looked for customers and salvation from the forces of long-term de-industrialization. In turn, for American negotiators in the Round, the temptation of short-term mercantilism became irresistible, at the expense of identifying NAMA strategies that would put poor people to work in high value-added sectors and thereby give them a stake in the capitalist world trading system, not in Islamist extremist ideology.

As with the July 2008 Draft NAMA Modalities Text, the December 2008 Text proclaimed that product coverage must be comprehensive, and no *a priori* exclusions would be allowed.¹² Although that proclamation was technically correct, it lacked real meaning.

True, back in November 2001 when they signed the Doha Development Agenda (DDA), the WTO Members had not excluded from consideration for tariff cuts any industrial products. Yet, ever since then they had labored mightily to make sure that their favored sectors—their sensitivities—were taken off the bargaining table or at least shielded partially from full trade liberalization commitments. Put succinctly, to say there are no *a priori* exclusions is not to mean there are no *post hoc* exceptions. After seven years of negotiations over intricate minutiae, in retrospect it might well have been easier if at the Doha Ministerial Conference each Member had been permitted to designate ten products on which it would not negotiate.

B. Swiss Formula Coefficients, the Mark Up, and Implementation Periods

The Swiss Formula remained the methodology for industrial product tariff cuts. This Formula would yield non-linear cuts, meaning that for any given Coefficient, the deepest percentage reductions would be imposed on the highest bound tariffs.¹³ Critically, the lower the absolute value of the Coefficient, the greater the percentage cut in the pre-Doha rate. The Coeffi-

¹² December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 1–3, 6(a); *see also* July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 1–3, 6(a).

¹³ *See Tariff Negotiations in Agriculture: Reduction Methods*, WTO, http://www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm (last visited Feb. 9, 2012) (providing an explanation and example of the Swiss Formula Coefficient).

cient in the formula also would set the maximum bound rate, i.e., the highest tariff peak.

Cuts would be made to bound most favored nation (MFN) rates of duty. Any duties not expressed as an *ad valorem* tariff would have to be converted to their *ad valorem* equivalents (AVE) on the basis of the May 2005 Paris Methodology.¹⁴ Generally, the result from applying the Formula to bound rates would be some reduction in tariff dispersion across countries and a mopping up of a significant amount of the water in tariff schedules. (“Water” is GATT-WTO slang for a positive difference between bound and applied rates.) But, the Formula would not soak up all the water, and problems of tariff escalation would remain.¹⁵

For any unbound tariff line, a constant, non-linear markup would be applied to establish a base rate of duty from which to commence tariff cuts. The July 2008 Text called for a markup rate of twenty-five percentage points to applied MFN rates as a base level (as of 14 November 2001, the date on which the DDA was agreed).¹⁶ So, too, did the December Text.

With one exception, the Swiss Formula remained the same in the December 2008 Text as its predecessor. The new Text simply split the difference on the Coefficient that developing countries could choose.¹⁷ So, the Formula and its Coefficients became:

$$t_1 = \frac{\{a \text{ or } (x \text{ or } y \text{ or } z)\} \times t_0}{\{a \text{ or } (x \text{ or } y \text{ or } z)\} + t_0}$$

where

¹⁴ See December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 6(d)–(e); see also July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 6(d)–(e). The conversion methodology is laid out in Annex A of special session of the WTO committee on agriculture. Committee on Agriculture, *Draft Possible Modalities on Agriculture*, 28–33, TN/AG/W/3 (July 12, 2006).

¹⁵ See *Defrosting Doha*, THE ECONOMIST (July 17, 2008), http://www.economist.com/node/11745498?story_id=11745498. Chile continues to be one of many examples of these problems. Chile’s overall applied MFN rate was 6 percent, so a cut (implied by both the December and July Texts) from 25 to 12 percent would give other Members no substantive market access gains. Likewise, the new Text did not eradicate the problem of tariff escalation. The E.U.’s treatment of coffee provides an illustration. If coffee is unroasted and not decaffeinated, then it enters the E.U. duty-free. But, roasted and caffeinated coffee triggers an E.U. levy of 7.5 percent levy. Like its predecessor, the December Text would cut that duty in half—a notable decline—but would still result in some tariff escalation in a sector of importance to many poor countries. *See id.*

¹⁶ December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 6(b)–(c); July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 6(b)–(c).

¹⁷ See December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 5, 7(a)–(c); see also July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 5, 7(a)–(c).

t_1 = final bound rate of duty

t_0 = base rate of duty

a = Coefficient of 8 for developed countries, instead of 7–9 as in the July 2008 Text.

x = Coefficient of 20 for certain developing countries, instead of 19–21 as in the July 2008 Text.

y = Coefficient of 22 for other developing countries, instead of 21–23 as in the July 2008 Text.

z = Coefficient of 25 for still other developing countries, instead of 23–26 as in the July 2008 Text.

Like its predecessor of July, the December Text applied the same Coefficient to all developed countries, but defined three developing country categories, to which Coefficient x , y , or z would apply. The Text permitted developing countries to self-designate their category, and thereby to choose the category-specific rules on flexibilities (discussed below) that would apply to them.

Only about forty WTO Members (representing nearly ninety percent of world trade, and including four recently acceded members (RAMs)) would apply the Swiss Formula.¹⁸ All developed countries would use it. For developed countries, the result of using the Swiss Formula with a Coefficient of eight would be a peak tariff of eight percent and bound tariffs at an average of far below eight percent—even below three percent.¹⁹ The result for the U.S. would be significant.²⁰ Application of the Swiss Formula Coefficient of eight to its bound tariffs would mean it would have to cut one hundred percent of its applied tariffs, with an average reduction to applied tariffs of over forty percent, and it would have to eliminate all tariff peaks.

¹⁸ See *Briefing Notes: Non-Agricultural Market Access*, WTO, http://www.wto.org/english/tratop_e/dda_e/status_e/nama_e.htm (last visited Feb. 9, 2012) [hereinafter *NAMA Briefing Notes*]. These Notes were posted in connection with the Seventh Ministerial Conference held in Geneva from November 30–December 2, 2009.

¹⁹ *Id.*

²⁰ See Daniel Pruzin, *Key Emerging Nations Rule Out Improving Significantly Doha Offers on Market Access*, 27 INT'L TRADE REP. (BNA) 1669 (Nov. 4, 2010) [hereinafter Pruzin, *Key Emerging Nations*]. The U.S. ambassador to the WTO said that the market access gains from the draft Doha texts were “not insignificant, but nor are they sufficient.” *Id.*

The consequent average American trade-weighted industrial tariff would be a mere 0.7 percent.

What about developing countries obligated to apply the Swiss Formula? The answer depends on the developing country at issue, and in particular, (1) whether it is required to follow the Formula or benefits from some entitlement, and (2) the extent to which there is “water” in its tariff schedule. Brazil, for example, claimed that if it followed the Formula cuts to bound rates, then it would have to cut its applied rates by thirty-three percent (in order to bring applied rates at or below the newly bound rates), and such cuts would affect sectors that it regarded as strategic, such as automobiles, footwear, and textiles.²¹ Overall, among developing countries obligated to follow the Formula, their average bound duty rate would fall to 11–12 percent, with the majority of the tariff lines having a bound duty rate of less than 12–14 percent. Only a small number of their lines would have rates above fifteen percent. Small wonder, then, many developing countries sought exemptions of one sort or the other from the Swiss Formula.

They were reasonably successful in doing so. The Swiss Formula would not apply in full force to the remaining 113 WTO Members, and no tariff reductions would be expected of the thirty-two least developed countries.²² Many developing countries would not apply the Formula at all or in part because they fell into a privileged category entitled to some kind of special and differential (S&D) treatment. These categories included the following:

- (1) Very recently acceded, or newer, RAMs. There were eleven of them—Albania, Armenia, Cape Verde, Saudi Arabia, Kyrgyz Republic, Macedonia, Moldova, Mongolia, Tonga, Vietnam, and Ukraine.²³
- (2) Regular, or older, RAMs. There were seven of them—China, Croatia, Ecuador, Georgia, Jordan, Panama, and Taiwan (Chinese Taipei).²⁴
- (3) Other older RAMs. There was one of them—Oman.²⁵

²¹ See Daniel Pruzin, *WTO Members Voice Growing Concerns Over Stalemate in Doha Round Negotiations*, 28 INT’L TRADE REP. (BNA) 382 (Mar. 10, 2011) [hereinafter Pruzin, *WTO Members Voice Growing Concerns*].

²² December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 14–17.

²³ *Id.* para. 20. Another account records sixteen RAMs overall. *NAMA Briefing Notes*, *supra* note 18.

²⁴ Sarita D. Jackson, *Eurasian Bargaining, Agriculture, and the DOHA Round*, 4 CAUCASIAN REV. INT’L AFF. 285, 290 (2010).

²⁵ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(g).

- (4) Small, vulnerable economies (SVEs). There were thirty-one such Members, including Bolivia, Fiji, and Gabon.²⁶
- (5) Developing countries with low levels of binding coverage. There were thirteen of them—Cameroon, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macao, China, Mauritius, Nigeria, Sri Lanka, Suriname, and Zimbabwe.²⁷
- (6) Customs Union (CU) countries in the Southern African Customs Union (SACU). There were five of them—Botswana, Lesotho, Namibia, South Africa, and Swaziland.²⁸
- (7) CU countries in *MERCOSUR*. There were four of them—Argentina, Brazil, Paraguay, and Uruguay.²⁹
- (8) Other special countries. There were two of them—Argentina and Venezuela.³⁰
- (9) Least developed countries. There were thirty-two of them, such as Bangladesh, none of which would have tariff-cutting obligations.³¹

Implementation periods would differ as between developed and developing countries.

In particular, developed countries would have five years from January 1st of the year after the entry into force of the Doha Round. Developing countries would have ten years from that date.³² Thus, if the effective date happened to be January 2nd, both groups of countries would get an additional year. That is, the earlier in the year the effective date, the greater the amount of time to phase in cuts. Certainly, by deferring tariff cuts by one extra year, from the perspective of trade liberalization, the December 2008 Text was less ambitious than it might have been.

²⁶ *Id.* para. 13(a).

²⁷ *Id.* at n.5; *NAMA Briefing Notes*, *supra* note 18.

²⁸ *See* December 2008 NAMA Modalities, *supra* note 1, para. 7(e).

²⁹ *See id.* para. 7(f).

³⁰ *See id.* paras. 7(h)-(i).

³¹ *See NAMA Briefing Notes*, *supra* note 18.

³² *See* December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 6(f), 8(d); *see also* July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 6(f), 8(d).

In appraising the Swiss Formula and derogations therefrom, it is important to keep in mind that this Formula offers five potential benefits vis-à-vis the request-offer approach that was used during the early GATT Rounds to cut tariffs on a selective, product-by-product basis:³³

- (1) *Efficiency*: It is easier to apply a formula (as long as the formula is simple) than to go through the cumbersome process of request-offer.
- (2) *Equity*: Cutting a tariff depends on implementing a rule, that is, a formula, rather than on the relative balance of power between countries engaged in reciprocal request-offer bargaining.
- (3) *Predictability*: It is easier to prognosticate the aggregate results of cutting tariffs through a formula than the effects of product-by-product cuts.
- (4) *Problem-Solving*: Depending on the precise formula, cutting tariffs with a formula can address the problems of tariff peaks and tariff escalation.
- (5) *Transparency*: Every country knows the manner and amount by which every other country is cutting a tariff.

In the Round, the long list of departures from the Swiss Formula, and the adulteration of what otherwise is a simple Formula with varying Coefficient values for Members, depending on their status, that do apply it, seriously undermined the value generally expected from using an arithmetic method to cut tariffs. To be sure, certain individual Members faced with the threat of Islamist extremism would gain from this adulterated Formula. But, the purported purpose of the Round to which Members dedicated themselves, i.e., a pursuit of a common good to fight poverty and terrorism, seemed lost amidst the adulterations.

C. *The Anti-Concentration Clause*

The December 2008 Draft Text contained an anti-concentration clause, a provision the EU had long championed.³⁴ This clause barred exclusion from Swiss Formula Cuts of an entire sector, that is, an entire Chap-

³³ Such advantages also are afforded by simpler formulas, such as the linear method applied by the GATT contracting parties in the Kennedy Round.

³⁴ See Daniel Pruzin, *Lack of Progress on Industrial Tariffs Sector; Hopes Fade for Convening of WTO Ministerial*, 25 INT'L TRADE REP. (BNA) 1739 (Dec. 11, 2008).

ter of the Harmonized System (HS). To ensure use of the Formula in every Chapter, each WTO Member would be required to apply full Formula reductions to a minimum of either twenty percent of total tariff lines under any HS product heading (e.g., automobiles, chemicals, and textiles and clothing), or nine percent of the total value of imports in each HS Chapter.

The new Text was somewhat of a departure from its predecessor. The July Text contained an anti-concentration clause bearing two sharp rules.³⁵ Developing countries would be forbidden from excluding an entire HS Chapter from tariff reductions. In each HS Chapter, these countries would have to apply full formula tariff cuts to a certain minimum percentage of national tariff lines, or a certain minimum percentage of the value of imports (of the developing country in question). Yet, given India's strenuous opposition to the clause, the July 2008 Text failed to state what the minimum figures would be.³⁶ Whether, in the intervening 6 months, India had warmed to the figures in the December 2008 Text was unclear.

III. RESTRICTING INDUSTRIAL MARKET ACCESS THROUGH FLEXIBILITIES

A. *Flexibilities for Developing Countries*

Not all developing countries necessarily would apply the same Swiss Formula Coefficient. They would have policy space to choose the right balance between the depth of industrial tariff cuts, on the one hand, and flexibility to deviate from the full force of such cuts and thereby protect sensitive manufacturing sectors, on the other hand. As intimated earlier, the higher the value of the Coefficient, the less severe the depth of the cuts; conversely, the lower the value, the greater the cuts. In other words, the Coefficient and the strength of the cuts are inversely related. Logically, if a developing country chooses a low Coefficient, such as 20, then it should be rewarded with greater flexibility. In contrast, choosing the highest permissible Coefficient, 25, should have the consequence of no flexibility.

That scheme is what the December 2008 Draft Text, like its predecessor, called for. The new Text made minor adjustments to the precise flexibility figures, namely, choosing the mid-points of ranges laid out in the

³⁵ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(d); July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 7(d).

³⁶ See *Developing Countries, EU Seek Changes to New WTO Negotiating Draft*, DOMAIN-B.COM (July 12, 2008), http://www.domain-b.com/organisation/wto/20080712_wto.html (quoting an unnamed Indian official saying "India will not accept a deal that includes an anti-concentration clause," and reporting that "Indian officials have also called for an increase in the level of protection proposed in the farm text for small and marginal farmers.").

July 2008 Text.³⁷ Accordingly, the December Text established the following three flexibilities, any one of which developing countries could select:

- (1) If a developing country selects 25, then it would have no flexibility.³⁸ There are no industrial product tariff lines it can shield, partially or wholly, from the full agreed-upon tariff reductions.
- (2) If a developing country opts for 20, then it has maximum flexibility.³⁹ It can choose between one of two flexibility options. First, it could shield 14 percent of its industrial product tariff lines from the full force of agreed-upon Swiss Formula cuts, subjecting these lines to half the agreed cuts. However, the value of industrial trade represented by these shielded lines must not exceed sixteen percent of the total value of industrial product imports into the developing country in question. Second, as an alternative flexibility, the developing country could keep 6.5 percent of its industrial product tariff lines unbound, or exclude them entirely from any tariff cuts, as long as the value of trade represented by these lines does not exceed 7.5 percent of the total value of industrial product imports.
- (3) If a developing country chooses the middle Coefficient, 22, then it has a medium degree of flexibility.⁴⁰ It has two options. First, it could decide to immunize ten percent of its industrial product tariff lines from the full cuts, and impose on them a cut of no less than half of that required by the Swiss Formula. However, these shielded lines must not exceed ten percent of the total value of its industrial product imports. Second, as an alternative flexibility, the developing country could keep five percent of its industrial product tariff lines unbound, or exclude five percent of its lines from any Swiss Formula cuts, provided these lines do not amount to more than five percent of the total value of its industrial product imports.

Obviously, the limitations on value of trade associated with the flexibilities under the Coefficients of 20 and 22 are designed to ensure that a developing country does not abuse the flexibilities, shielding so many industrial product

³⁷ See December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 7(a)–(c); see also July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 7(a)–(c).

³⁸ See December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(c).

³⁹ See *id.* paras. 7(a)(i)–(ii).

⁴⁰ See *id.* paras. 7(b)(i)–(ii).

tariff lines as to scupper the Swiss Formula cuts. Overall, the scheme is a sliding scale, with progressively more flexibility to protect sensitive industrial products in exchange for concomitantly deeper cuts to bound MFN duties overall in the manufacturing sector. Developed countries, of course, could not avail themselves of this flexibility—they all would be obliged to use the Coefficient of 8 without any derogation.

B. Further Flexibilities for CUs, Plus Argentina and Venezuela

The December 2008 Text contained all the details of *sui generis* flexibilities for certain poor countries and customs unions (CUs), and even added more of them. First, all countries in SACU—Botswana, Lesotho, Namibia, and Swaziland, as well as South Africa—would have recourse to a common list of flexibilities in their tariff schedules. The new Text eliminated an additional provision from the July 2008 text that would have permitted SACU countries to add percentage points to the percent of non-agricultural tariff lines they could shield from the full force of formula cuts. The July Text slated SACU countries for Coefficient y of 21–23, under which a normal developing country could apply less than formula cuts to up to ten percent of industrial tariff lines as long as those lines did not exceed ten percent of the total value of that country's non-agricultural imports. With the additional flexibility, SACU countries would have been able to apply less than formula cuts to 11–16 percent of their industrial tariff lines.⁴¹

Presumably, SACU countries believed that their common list of flexibilities would more than offset the deletion of this additional provision, provided that they scheduled industrial tariff lines on that list broadly and skillfully. Under the December 2008 Text, that list would permit SACU to exempt a further three percent of industrial tariff lines beyond the sixteen percent from the July Text and from Swiss Formula reductions. SACU intended to use the additional flexibility to shield labor-intensive textile and apparel (T&A) industries. Subsequently, on seventeen December 2008, the NAMA Chairman proposed the following in response to South Africa's request for additional flexibilities under the Formula:⁴²

- (1) SACU countries would have a common list of flexibilities in their tariff schedules through which they could exempt a further six percent of their industrial tariff lines from Swiss Formula cuts if they selected a Swiss Formula Coefficient of 22. Alternatively, they could exempt a further eight percent of those lines if they chose a Coefficient of 20. In other words, their flexibility in-

⁴¹ Compare December 2008 Draft NAMA Modalities, *supra* note 1, para. 7(e), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 7(e).

⁴² See April 2011 NAMA Document, *supra* note 2, para. 2(ii).

volved a trade-off: the higher the Coefficient value (22 versus 20), the lower the exemption from cuts (6 versus 8), because a higher value results in a lower percentage cut to industrial tariffs. For example, if a SACU country chose a Coefficient of 22, then under the December 2008 NAMA Text, it could exempt up to ten percent of its industrial product tariff lines from the full force of Swiss Formula cuts (imposing half the required cuts).⁴³ Under the Chairman's December 17 proposal, they could exempt a further six percent from the full force of the cuts, for a total of eleven percent (10 + 6) of its tariff lines exempt from the full cut. Without this additional flexibility, they could shield just ten percent of their industrial tariff lines from the full cuts, up to ten percent of the value of their total manufactured output.

- (2) Of the six or eight percent of the exempt industrial tariff lines, a SACU member would have to focus three percent of those lines on textile and clothing items (HS Chapters 61–62),⁴⁴ and possibly also footwear.⁴⁵
- (3) SACU countries would have a special grace period in which to implement Swiss Formula tariff cuts, namely, if they chose a Coefficient of 22, then three years (in equal annual installments effective January 1st) and if they chose a Coefficient of 20, then five years.⁴⁶ Here again, their flexibility posed a trade-off: less drastic cuts for a longer phase in period for those cuts, or *vice versa*.

This proposal—which essentially was one for S&D treatment in SACU infant industries—met with stern objections from the U.S. and EU. They insisted that SACU implement tariff reductions on those lines in three years and join in participating in at least two sectoral negotiations (discussed below).⁴⁷ The April 2011 NAMA Document indicated the disagreement be-

⁴³ See *id.* para. 2(ii); see also December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(b)(i) (tariff lines cannot exceed 10 percent of total value of non-agricultural imports).

⁴⁴ April 2011 NAMA Document, *supra* note 2, para. 2 (ii).

⁴⁵ *Id.*

⁴⁶ December 2008 Draft NAMA Modalities Text *supra* note 1, paras. 5, 13(e) (explaining the coefficient system in relation to tariff elimination period requirements); see also *id.* para. 2(ii) & n.3.

⁴⁷ See Daniel Pruzin, *U.S. Insists on Developing Country Participation on Sectoral for Chemicals*, 25 INT'L TRADE REP. (BNA) 1743 (Dec. 11, 2008) [hereinafter Pruzin, *Sectoral for Chemicals*].

tween SACU, on the one side, and the U.S. and EU, on the other side, remained unresolved.⁴⁸

Second, like the July 2008 Text, the December 2008 Text singled out *MERCOSUR* countries by name for favoritism.⁴⁹ These countries insisted that any position taken in the Doha Round must be harmonized with the interests of each one of them, i.e., that their bloc required a unified position.⁵⁰ Thus, under the Text, Argentina, Brazil, Paraguay, and Uruguay would have a common list of flexibilities in their tariff schedules. To determine the value of trade limitation (i.e., the restriction on the percentage of industrial tariff lines they could shield from the full force of cuts under the Swiss Formula), each country would not have to use the total value of its non-agricultural imports. Rather, the total value of Brazil's industrial imports would set the limit for all *MERCOSUR* countries. Because the value of Brazil's industrial imports is significantly larger than the value of the non-agricultural imports of Argentina, Paraguay, or Uruguay, the latter three countries would be able to shield a larger value of trade from agreed-upon formula cuts than otherwise would be the case.⁵¹

Significantly, following issuance of the July 2008 Text, Argentina had adamantly rejected this approach.⁵² It argued that because of the common external tariff (CET) associated with *MERCOSUR*, the individual countries in *MERCOSUR* would be forced to divide up among themselves the total number of tariff lines they are allowed to protect. (Of course, that would be a reality for any CU.) One country within *MERCOSUR*, but not another, might consider a line to be sensitive. Thus, the total number of lines that the countries could shield would have to be large enough to accommodate the varying individual country interests. From Argentina's per-

⁴⁸ See April 2011 NAMA Document, *supra* note 2, para. 2(ii) & n. 4 (inferring that "other members" refers to U.S. and EU opposition to special grace period for SACU countries).

⁴⁹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(f), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 7(f) (identifying Argentina, Brazil, Paraguay and Uruguay).

⁵⁰ See David Haskel, *Brazil to Harmonize Doha Round Stance with Mercosur Partners*, *Paraguay Says*, 26 INT'L TRADE REP. (BNA) 1038 (July 30, 2009) [hereinafter Pruzin, *Mercosur Partners*] (discussing how a unified position is required in light of the stalled Doha Round of global trade talks).

⁵¹ See Daniel Pruzin, *WTO Chief Cites Need to Broaden Doha Talks Beyond Agriculture*, *NAMA*, 26 INT'L TRADE REP. (BNA) 988 (July 23, 2009) [hereinafter Pruzin, *Beyond Agriculture*] (noting that Argentina, Paraguay, and Uruguay as member of Mercosure would be provided additional flexibilities to protect sensitive sectors).

⁵² See David Haskel & Ed Taylor, *NAMA Final Draft Text Still Inadequate After Changes*, *Argentina Tells MERCOSUR*, 25 INT'L TRADE REP. (BNA) 1047 (July 17, 2008) [hereinafter Pruzin, *Argentina Tells Mercosur*] (noting that the concessions offered to Mercosur members were insufficient).

spective, the July—and, by inference, December—2008 Text was wanting in this regard.

Third, the December 2008 Text identified two Latin American countries—Argentina and Venezuela—for special treatment.⁵³ In so doing, it departed from its predecessor, as the July Text had not so clearly singled out these countries. This departure meant that the new Text continued the trend of entertaining the possibility of further metastasizing of special treatment. As the April 2011 NAMA Document recorded, Venezuela continued to insist that it faced “structural problems” in its “foreign trade balance” and, therefore, that it “still need[ed] to negotiate additional flexibilities.”⁵⁴ Likewise, Argentina affirmed “its continuous need for additional flexibilities.”⁵⁵

As for Argentina, the December 2008 Text did not spell out what goodies it might get beyond the *MERCOSUR* provisions. That would be a matter for further negotiation. Argentina insisted on a Swiss Formula Coefficient of 35 with the right to designate sixteen percent of its industrial tariff lines as subject to half the agreed cuts (with no limitation on the volume of trade covered by these lines).⁵⁶ Alternatively, if its Coefficient were above 25 and below 35, then it would require not only the 16 percent dispensation, but also the right to exempt 8 percent of its tariff lines from any tariff cut. Argentina’s demands were stunningly greater than the most generous flexibilities afforded by the Text to developing countries. Argentina justified them by the fact that its trade deficit in industrial goods had skyrocketed by thirty-eight percent, from \$86 million in 2002 to \$22 billion in 2007. Trade liberalization in manufacturing, it said, would cause social unrest. As for Venezuela, the July 2008 Text had explained it would be treated as an SVE.⁵⁷ The December 2008 Text backed away from such specificity, and simply left the matter up to consultations.

⁵³ December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 7(h)–(i).

⁵⁴ April 2011 NAMA Document, *supra* note 2, para. 2(iv).

⁵⁵ *Id.* para. 2(iii).

⁵⁶ See Daniel Pruzin, *Argentina Pushes Special Treatment for Sensitive Sectors in NAMA Talks*, 25 INT’L TRADE REP. (BNA) 1708 (Dec. 4, 2008) [hereinafter Pruzin, *Special Treatment for Sensitive Sectors*].

⁵⁷ See July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 7(g). Before issuance of the July 2008 Text, Venezuela had succeeded in arguing it deserved unique treatment because of the highly concentrated pattern of its imports, and its particular development needs. Thus, the July Text slated Venezuela for Coefficient x, 19–21, and said it would have recourse to a certain (but as yet unspecified) number of additional percentage points to compute the value of trade limitation. *Id.* That is, a normal developing country applying Coefficient x would have been able to apply less than formula cuts on up to 12–14 percent of industrial tariff lines, as long as those lines did not exceed 12–19 percent of the total value of its non-agricultural trade. Venezuela would have had a trade limitation higher than 12–19 percent of its non-farm trade. The U.S. argued against this special dispensation for Venezuela,

C. *Still Further Flexibilities for Members Engaged in Sectoral Negotiations*

None of the flexibilities directly address Islamic countries or countries with large Muslim communities. That is the first short-coming: the flexibilities are not linked to fighting VEOs through poverty alleviation. Rather, they are a hodgepodge of exceptions arising from bargaining power, luck, or some other unprincipled factor. The second flaw is that the existence of so many flexibilities triggered a backlash from the U.S. and other developed countries that pulled the NAMA negotiations even further from the founding purpose of the Doha Round. These rich countries demanded a better deal on industrial products for themselves. Hence, the focus of the negotiations devolved onto reciprocity.

Accordingly, the idea of sectoral agreements would be to eliminate duties, over a phase-out period, on all specified tariff lines in a designated economic sector, effectively creating a duty-free zone in that sector. Developing countries would have the same trade liberalizing obligation, but they would get an extended period in which to drop their tariffs in the sector to zero, and they possibly would have the right to maintain low duty rates on some tariff lines in the sector.⁵⁸

The word “guarantee” captures the crux of the issue on sectoral negotiations. Some WTO Members need more clarity or predictability as to the participation of other Members in sectoral negotiations, so that the outcome of those negotiations is not entirely unknown, before they are willing to agree to NAMA modalities. Other Members are willing to enter into good faith talks on liberalizing trade in certain sectors. However, these Members refuse to pre-judge the outcome of those talks by declaring that they will join one or more sectoral agreements. The Members in the two camps remained the same between issuance of the July and December 2008 Texts.

The U.S., along with Canada and the EU, demanded something closer to a guarantee. For them, the elimination of tariff and non-tariff barriers to trade in specific manufacturing sectors in which they had an export interest was critical. This elimination would offset (at least partly) the lack of trade liberalization that would result from flexibilities accorded to developing countries under the Swiss Formula, and from extra-special treatment

contending there were 20 other developing countries that met the SVE criteria better than Venezuela. See also Daniel Pruzin, *U.S. Firm on NAMA Sectoral Commitments, As Chair Issues Warning on Unresolved Items*, 25 INT'L TRADE REP. (BNA) 1013 (July 10, 2008) [hereinafter Pruzin, *U.S. Firm on NAMA Sectoral Commitments*].

⁵⁸ See Daniel Pruzin, *Doha Chairs Issue Final Revised Draft Texts on NAMA and Agriculture with Few Changes*, 25 INT'L TRADE REP. (BNA) 1044 (July 17, 2008) [hereinafter Pruzin, *Agriculture with Few Changes*] (expressing that developing nations have flexibility to “shield sensitive industrial tariff from those agreed cuts.”).

to the CU countries in SACU and *MERCOSUR*, RAMs, SVEs, and least developed countries. In other words, major emerging countries like Brazil, China, and India would have to make additional concessions, beyond what the Swiss Formula obligated them to do, because that Formula was so riddled with exceptions that the U.S. industrial product exporters would not gain much market access in these countries without additional concessions.

Accordingly, of the fourteen contemplated sectoral agreements (listed below), the U.S. insisted specifically that China, India, and Brazil participate in at least two of them.⁵⁹ For China and the other Group of Seven (G-7) countries, the U.S. demanded that one of those two be the chemicals agreement, and that they give a high priority to electronics and industrial machinery.⁶⁰ By October 2009, the American position solidified: there would be no Doha Round deal without participation by Brazil, China, and India in some sectoral agreements, especially chemical products, electronic goods, and industrial machinery.⁶¹

There were solid commercial grounds for the American emphasis on chemicals. Tariffs on them are low in developed countries—on average, the applied tariff rate in the U.S. is 3.7 percent, in Canada 2.7 percent, in the EU 4.4 percent, and in Japan 2.4 percent.⁶² But, the average applied duty rate on chemical imports is 6.5 percent in China, and higher still in Brazil, India, and Mexico.⁶³ China is the world's third largest chemical producer (after the U.S. and EU, respectively).⁶⁴ (One account ranks China second.)⁶⁵ China accounts for ten percent of global chemical imports (as of 2005), and

⁵⁹ See Daniel Pruzin & Gary G. Yerkey, *WTO's Lamy Calls Off Doha Ministerial; Deal Up to Obama Team*, U.S. Official Says, 25 INT'L TRADE REP. (BNA) 1766 (Dec. 18, 2008) [hereinafter Pruzin, *Lamy Calls Off Doha*]; see also Daniel Pruzin, *Lack of Progress on Industrial Tariffs Sector; Hopes Fade for Convening of WTO Ministerial*, 25 INT'L TRADE REP. (BNA) 1739–41 (Dec. 11, 2008) [hereinafter Pruzin, *Lack of Progress on Industrial Tariffs*].

⁶⁰ Pruzin, *Sectoral Chemicals*, *supra* note 47. For WTO purposes, the G-7 consists of Australia, Brazil, China, India, Japan, EU, and U.S. *Id.*

⁶¹ See Daniel Pruzin, *U.S. Told to Tone Down Demands If Doha Round Deal to be Concluded*, 27 INT'L TRADE REP. (BNA) 775 (May 27, 2010) [hereinafter Pruzin, *U.S. Told to Tone Down Demands*]; see also Daniel Pruzin, *WTO Chief Warns 2010 Deadline for Doha Hard to Meet without "Serious Acceleration,"* 26 INT'L TRADE REP. (BNA) 1414 (Oct. 22, 2009) [hereinafter Pruzin, *2010 Deadline for Doha*].

⁶² See Daniel Pruzin, *U.S. Frustrated with Lack of Interest by China in NAMA Chemicals Sectoral*, 26 INT'L TRADE REP. (BNA) 1003–04 (July 23, 2009) [hereinafter Pruzin, *U.S. Frustrated*].

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Daniel Pruzin, *Chinese Official Adamant in Opposing Doha Round "Sectoral" on Chemicals*, 26 INT'L TRADE REP. (BNA) 1312 (Oct. 1, 2009) [hereinafter Pruzin, *Opposing Doha Round*] (expressing there is no reason for China to refuse participation in the sectoral agreement because China is one of the biggest chemical producers in the world).

seven percent of global exports.⁶⁶ The U.S. argued chemicals were hit with an accumulation of tariffs if they are exported, processed, and re-exported, which they typically are, because most chemicals shipped abroad are inputs into other chemical manufacturing.⁶⁷ As for Brazil, it is the sixth largest importer of chemicals in the world (as of July 2010).⁶⁸ The U.S. hoped that Brazil would join China and India in signing and adhering to the Uruguay Round Chemicals Tariff Harmonization Agreement (CTHA), which cuts chemical import tariffs to 0, 5.5, or 6.5 percent.⁶⁹ Similarly, the U.S. asked Brazil to join the 1997 Information Technology Agreement (ITA) from that Round, to which (as of November 2010) 73 WTO Members adhered, and which cut to zero tariffs on computers, semiconductors, telecommunications equipment, and other high-technology items.⁷⁰

In brief, from the American perspective, market access in a key sector was at stake. Under a chemicals sectoral agreement, duties on all chemical tariff lines, which under the HS tariff classification system are set out in Chapters 28–39 (and which were covered by the CTHA), would be eliminated.⁷¹ Developed countries would have six years to phase out their chemical tariffs, and developing countries would have 11 years.⁷² Flexibility would be allowed to poor countries, in that they could exclude four percent of their chemical tariff lines from the obligation to eliminate duties.⁷³ Instead, they could maintain a tariff on the favored lines of up to 4 percent *ad valorem*.⁷⁴ They also would have a further five years, beyond the eleven year phase out period, in which to eliminate tariffs on up to five percent of their chemical product lines.⁷⁵

⁶⁶ See Pruzin, *U.S. Frustrated*, *supra* note 62.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ There are 50 WTO Members that have signed the *Agreement*. See Daniel Pruzin, *Punke Says U.S. Frustrated by Talks with Brazil, China, India on Doha Tariffs*, 27 INT'L TRADE REP. (BNA) 973 (July 1, 2010) [hereinafter Pruzin, *Brazil, China, India on Doha Tariffs*].

⁷⁰ See Daniel Pruzin, *U.S. Envoy Hears Positive Tone on Doha, But Actual Negotiations Are Still Missing*, 27 INT'L TRADE REP. (BNA) 1757 (Nov. 18, 2010) [hereinafter Pruzin, *U.S. Envoy Hears Positive Tone*] (addressing how Brazil, the world's tenth largest economy, has yet to sign another sectoral agreement, the Information Technology Agreement, while other developing countries have signed).

⁷¹ See generally December 2008 Draft NAMA Modalities Text, *supra* note 1, Annex 6, § 3, para. 10 (discussing liberalization of tariffs in the chemicals sector).

⁷² Pruzin, *U.S. Frustrated*, *supra* note 62, at 1003–04.

⁷³ See *id.* (stating that poor or developing nations have flexibility in commitment to eliminate tariffs).

⁷⁴ *Id.* (noting the maximum tariff percentage that can be maintained by developing nations).

⁷⁵ *Id.*

Of course, the idea of flexibilities within any sectoral agreement was oxymoronic. The whole point of a sectoral agreement is to offset imbalances perceived by the U.S. and other major trading nations caused by flexibilities in the main body of obligations in the Doha Round negotiating texts. Apparently, then, flexibilities in a sectoral agreement were a political cost that the U.S. would have to accept to get the likes of China to participate at all. This political cost came despite arguments from the Americans that China, along with many developing countries, would benefit from zero-duty global chemicals trade.⁷⁶

Nevertheless, China was distinctly uninterested in a chemicals sectoral agreement. To the frustration of the U.S., China argued that its chemicals tariffs, which it brought down as part of its WTO accession agreement that entered into force on December 11, 2001, ranged from 1.5 to 6.5 percent—hardly much of a barrier.⁷⁷ Moreover, said China, the American argument that countries competitive in a sector—like China is in chemicals—should participate in a sectoral is offset by the fact that the more competitive a country is in a particular sector, the more vulnerable it is to trade remedy actions.⁷⁸ Overall in respect of industrial tariffs, China proclaimed that as a result of implementing its WTO accession commitments, they were lower than in most developing countries.⁷⁹

China also accused the U.S. of hypocrisy.⁸⁰ China argued that annexes in the December 2008 Draft NAMA Text would permit the U.S. to phase out tariff reductions on sensitive products like textiles and clothes over an extended period so that it could maintain preferences under the Central American Free Trade Agreement – Dominican Republic (CAFTA–DR) and African Growth and Opportunity Act (AGOA).⁸¹ Why should the U.S. and EU be allowed to protect their sensitive products and preferences, but demand that China liberalize trade on chemicals, which are of some sensitivity to it?

⁷⁶ As an example, the U.S. and Canada import aluminum oxide, an ingredient in light bulbs and spark plugs, from countries like Brazil and India. *Id.*

⁷⁷ See Pruzin, *Opposing Doha Round*, *supra* note 65, at 1312 (noting that tariffs on chemicals are already low).

⁷⁸ *Id.*

⁷⁹ See Daniel Pruzin, *U.S. Chamber Official Cites Concerns on China's Lack of Engagement in WTO Talks*, 26 INT'L TRADE REP. (BNA) 1498 (Nov. 5, 2009) [hereinafter Pruzin, *China's Lack of Engagement*].

⁸⁰ See Alan Beattie, *Negotiators Sift Debris*, FIN. TIMES (July 29, 2008), <http://www.ft.com/cms/s/0/dde1e23a-5da0-11dd-8129-000077b07658,s01=1.html#axzz1eMVmtJzZ> (“[A]ccusing the U.S. . . . for heavily subsidizing its own cotton farmers . . . while asking other countries to expose theirs to harsh competition.”).

⁸¹ See, e.g., December 2008 Draft NAMA Modalities Text, *supra* note 1, Annex 6, § 13 (expressing that the modality for tariff reduction end rate is to be “as close to zero as possible”).

Worse yet, China, India, Brazil, and other developing countries refused to give a guarantee about their participation in any sectoral agreement.⁸² They continued to counter with five arguments. First, why should G-7 countries be saddled with sectoral obligations, but not major developing countries, such as Indonesia, Mexico, and Korea? There was no principled basis to differentiate between developing countries within and outside the G-7.

Second, there was no obvious coincidence of interests in some sectors. For example, the EU sought an accord for duty-free treatment on textiles, clothing, and footwear.⁸³ But, that would mean opening to free trade a broad swathe of domestic industries the U.S. had long sought to protect from further erosion in their global competitive position, and from Chinese T&A firms. The National Council of Textile Organizations (NCTO), an American lobbying group, alleged that the Chinese firms were receiving increased export subsidies.⁸⁴ As another illustration, Brazil pointed out that in some sectors—such as automobiles, chemicals, electronics, and machinery—the tariff lines for which the U.S. sought duty reductions were the same lines Brazil sought to protect.⁸⁵ Brazil accused the U.S. of “greed” adduced by its excessive demands that emerging countries open entire industrial sectors to foreign competition, an ironic stab given that the American pressure for market access was no more or less greed-driven than Brazilian insistence on protection.⁸⁶ The U.S. retorted that both the August 2004 Framework Agreement and December 2005 Hong Kong Ministerial Conference Declaration contained language emphasizing that sectoral negotiations would be a key element of any Doha Round deal, yet Brazil, China, India, and other Members had utterly failed to take these talks seriously.⁸⁷

Third, participation in sectoral negotiations never was intended to be mandatory. The DDA negotiating mandate makes clear that involvement

⁸² See Frances Williams, *WTO Fails to Set Outline Deal Date*, FIN. TIMES (Dec. 9, 2008), <http://www.ft.com/intl/cms/s/0/ac3a0ac8-c565-11dd-b516-000077b07658.html#axzz1eMVmtJZz> (discussing the failure to set a date for a ministerial meeting to set forth an outline deal in global trade talks).

⁸³ See Negotiating Group on Market Access, *Market Access for Non-Agricultural Products*, TN/MA/W/93/Rev.1 (Sept. 15, 2009) [hereinafter *Market Access for Non-Agricultural Products*].

⁸⁴ See *NCTO Calls for Tough Action from Obama on China as Textile Export Subsidies Rise*, 25 INT'L TRADE REP. (BNA) 1719 (Dec. 4, 2008).

⁸⁵ See Haskel & Taylor, *supra* note 52.

⁸⁶ See Alan Beattie & Frances Williams, *WTO Chief Drops Plans to Press Ministers for Outline Doha Deal*, FIN. TIMES, Dec. 13, 2008, at 3; Daniel Pruzin, *Brazil's Amorim Urges Obama Administration to Send Positive Signal, Salvage Doha Talks*, 25 INT'L TRADE REP. (BNA) 1769 (Dec. 18, 2008).

⁸⁷ See Pruzin & Yerkey, *supra* 59, at 1766–77.

in sectoral negotiations is voluntary.⁸⁸ Indeed, so too do the August 2004 *Framework Agreement* and December 2005 *Ministerial Declaration*. China worried that the term “critical mass” was a code for forcing it to participate in sectoral talks, because of China’s significance as an importer (as well as exporter).⁸⁹ In other words, proposals to define “critical mass” as a required percentage of world trade coverage by a sectoral agreement were thinly veiled efforts to compel Chinese participation in the negotiations.

Fourth, even one sectoral agreement could have dramatic effects on developing countries. Concerned about its own domestic sector, China rejected what it characterized would be massive tariff cuts on chemical products covering roughly 1,600 such items.⁹⁰ Mexico provided another instance. If Mexico accepted a zero-for-zero proposal in the chemical sector, thereby providing duty-free treatment to all chemical products if other WTO Members did so, too, then overall tariff cuts by Mexico would fall by one-third more than called for under the Swiss Formula. Still other examples were afforded by beneficiaries of preferential trade agreements covering T&A.⁹¹ A sectoral agreement on this merchandise would erode their margin of preference, possibly to zero if the accord ushered in duty-free treatment in the sector. Brazil pointed out that in chemicals, the U.S. demanded zero tariffs on 1,700 chemical products.⁹² Overall, Brazil intoned, if it succumbed to American pressure to unwind NAMA flexibilities through participation in sectoral agreements, its effective Swiss Formula Coefficient would fall from 20 to 10.⁹³

Fifth, empirical evidence clearly indicated the biggest beneficiaries from sectoral agreements would be developed countries, particularly the U.S., EU, and Japan in respect of chemicals, electric and electronic goods, environmental products, and high-tech merchandise.⁹⁴ That result would occur because tariffs in these sectors are low in developed countries, but

⁸⁸ See December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 9.

⁸⁹ See Daniel Pruzin, *NAMA Sectorals Take Center Stage on First Day of Intensified Doha Talks*, 25 INT’L TRADE REP. (BNA) 1671 (Nov. 27, 2008).

⁹⁰ See Pruzin, *WTO Members Voice Growing Concerns*, *supra* note 21; Pruzin, *Key Emerging Nations*, *supra* note 20; Bradley S. Klapper, *Doha Deal Falts as WTO Fails to Set Meeting Date*, USA TODAY (Dec. 8, 2008), http://www.usatoday.com/money/economy/2008-12-08-346700137_x.htm.

⁹¹ See Daniel Pruzin, *Chair Admits Deadlock on Three Key Issues in NAMA Negotiations*, 25 INT’L TRADE REP. (BNA) 1719 (Dec. 4, 2008) [hereinafter Pruzin, *Chair Admits Deadlock*].

⁹² See Pruzin, *WTO Members Voice Growing Concerns*, *supra* note 21.

⁹³ See Pruzin, *Key Emerging Nations*, *supra* note 20.

⁹⁴ See Daniel Pruzin, *NCTO Calls for Tough Action from Obama on China as Textile Export Subsidies Rise*, 25 INT’L TRADE REP. (BNA) 1719 (Dec. 4, 2008) (referring to a study released August 19, 2009 by the Peterson Institute for International Economics, Washington, D.C., the findings of which confirmed Brazil’s conclusions).

relatively higher in developing ones. The asymmetry, if corrected through sectoral deals, would lead to net increases in developed country exports, a boost in exports in certain sectors from some developing countries (such as Brazil, India, and China), but an overall net trade deficit in even those sectors and developing countries. In other words, statistical projections indicated it was not in the self-interest of developing countries to sign sectoral agreements.

The thrust of the December 2008 Text on possible sectoral agreements was the same as that of its predecessor. But, the wording was different in an effort to please WTO Members on both sides of the schism.⁹⁵ Like its predecessor, the December 2008 Text affirmed that participation in sectoral negotiations was voluntary.⁹⁶ It hastened to add that for some Members (namely, the U.S., Canada, and EU), sectoral initiatives that achieve a “critical mass of participation” help achieve an overall balanced outcome in NAMA. The December Text also made changes that were more than cosmetic. The new Text, unlike its predecessor, assembled a six-point compromise:⁹⁷

- (1) Participation in sectoral negotiations would not be mandatory.
- (2) Members would commit to join in sectoral negotiations, on a self-identifying basis, at the time they agreed to the Swiss Formula Coefficients. Within forty-five days of that agreement, the participating Members would name the specific sectoral negotiations in which they would participate.
- (3) Members would participate in sectoral negotiations with a view to making these initiatives “viable.”
- (4) Results of sectoral negotiations should not be pre-judged, and participation by any particular Member in a sectoral initiative should not prejudice whether that Member ultimately decides to join a final deal. At the same time, a critical mass of participation would help balance the overall outcome of NAMA negotiations.
- (5) Results of the negotiations would form part of a single undertaking.

⁹⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 9–12, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 9–12.

⁹⁶ See December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 9.

⁹⁷ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 9, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 9.

- (6) There would be no credit for participation, i.e., no compensation, in the form of a larger Swiss Formula Coefficient, for developing countries.⁹⁸

The December Text stated a revised schedule for conducting these negotiations.⁹⁹ But, the compromise failed to placate either the U.S. or China, which was a key reason that the WTO Director-General opted not to call a meeting among trade ministers before year-end 2008.

The new Text explicitly discussed the possibility, in more focused terms than its predecessor, of S&D treatment for developing countries on zero-for-x tariff cuts. For developing countries, a zero-for-x approach would mean more generous treatment (1) under the tariff-cutting strategy in a particular sector than for developed countries, (2) as to implementation periods (i.e., giving them more time than developed countries to cut tariffs in a sector), and (3) partial product coverage (i.e., permitting them to exempt from tariff cuts certain goods).¹⁰⁰

The December 2008 Text reproduced Annex 6, the same Annex contained in the July Text. That Annex was a 47-page summary of sectoral proposals, and the draft modalities for liberalizing tariffs, in fourteen sectors. Table I, below, lists those sectors, the Member proponent, and what that proponent sought in terms of a “critical mass” as defined by a percentage of world trade.¹⁰¹ Note that the proponents and their allies cut across a variety of Members, both developed and developing, meaning that the debate over sectorals is not a simple one between rich and poor countries.

⁹⁸ See Pruzin, *Chair Admits Deadlock*, *supra* note 91.

⁹⁹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 12, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 12.

¹⁰⁰ See December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 10–11 (explaining in the last sentence of para. 10, the EU and U.S. would list (in Annexes 2 and 3, respectively) products they would exclude from sectoral initiatives (i.e., to which they would not apply trade liberalizing commitments for their import markets)). These products were the subject of non-reciprocal preferences, and essentially would be treated under the provisions covering such preferences. *Id.*

¹⁰¹ The data in this Table is extracted from Daniel Pruzin, *Lamy Cites Need for Two-Track Approach for Concluding WTO's Doha Round Talks*, 26 INT'L TRADE REP. (BNA) 696 (May 28, 2009). See *FACTBOX: Sectoral Deals at the WTO Trade Talks*, REUTERS (May 28, 2009), available at <http://www.reuters.com/article/2008/07/28/us-trade-wto-sectorals-idUSL863602220080728>.

**TABLE I:
SECTORAL NEGOTIATIONS PROPOSED IN DECEMBER 2008 DRAFT
NAMA TEXT**

Industrial Sector	WTO Member Proposing Sectoral Negotiation with a View to Global Duty-Free Treatment in that Sector (Other Members favoring a Sectoral Agreement)	Critical Mass (minimum percentage of global trade in the sector that would be covered by the sectoral agreement)
Automotive and related parts	Japan	99% in cars 98% in car parts
Bicycles and related parts	Taiwan	90%
Chemicals	U.S. (Canada, EU, Japan, Norway, Singapore, Switzerland, Taiwan)	Not defined
Electronics and electrical products	Japan	Not defined
Enhanced health care (health care products), pharmaceutical and medical devices	U.S.	Not defined
Fish and fish products	Norway	90%
Forestry products, possibly including paper and pulp products	Canada (Hong Kong, New Zealand, Norway, Singapore, Switzerland, Thailand, U.S.)	90%
Gems and jewelry	Thailand (EU)	90% of trade among WTO Members
Hand tools	Taiwan	90%
Industrial machinery	Canada (EU, Japan, Norway, Singapore, Switzerland, Taiwan, U.S.)	Not defined.
Raw materials	United Arab Emirates (UAE)	90%
Sports equipment	Taiwan	90%
Textiles, clothing, and footwear	EU	Not defined
Toys	Hong Kong	90%

Manifestly, the proponents are among (or seek to be among) the leading producer-exporters in the sector for which they seek trade liberalization, or at worst they hope to stave off slippage in their position vis-à-vis major emerging countries like China and India. For example, accounting for over eleven percent of world chemical output, the U.S. is the largest chemical producer in the world.¹⁰² In 2007, chemicals earned the U.S. more export revenues (\$153.8 billion) than any other sector, topping agricultural goods (\$89.9 billion) and aerospace merchandise (\$74.2 billion).¹⁰³ Thus, in all sectors, their preferred result would be duty-free treatment, or as close to that as possible.

Engaging in negotiations to reach agreement for low-duty or duty-free treatment under any of the fourteen sectoral initiatives would remain voluntary. Notably absent from the December 2008 Text were two points mooted earlier (including in the Friday Night Proposal). First, there was no requirement that every developed and developing country would commit to participating in at least two initiatives aimed at duty-free treatment in a particular sector. Second, there was no provision that any developing country agreeing to a final deal on duty-free treatment in a particular sector would be rewarded with permission to increase its otherwise-applicable Swiss Formula Coefficient. The actual increase would be decided later, but it would be commensurate with the level of participation by a developing country in the sectoral negotiations. Presumably, the more negotiations in which a developing country engaged, the greater it could boost its Coefficient.

Unsurprisingly, the December 2008 Text failed to heal the schism over sectoral negotiations. In February 2009, Canada mooted a proposal to abandon the horizontal methodology for these talks, whereby the same formula—getting zero or near-zero duty treatment in all fourteen sectors, thus going well beyond the Swiss Formula cuts on industrial product tariffs—would be used in every sector.¹⁰⁴ Canada, with the backing of the EU, Hong Kong, Korea, Norway, Oman, Singapore, Switzerland, Taiwan, Thailand, UAE, and U.S., called for a “vertical” approach. Under it, each sectoral deal would be negotiated as a *sui generis* arrangement. The end result might be different levels of participation among WTO Members, and different levels of ambition in terms of trade liberalization, in each sector. The vertical strategy, Canada hoped, would placate the resistance of China and India to a one-size-fits-all approach to the fourteen sectors. While it might achieve that goal, it would do so only at the expense of two broader Doha Round

¹⁰² See Pruzin, *Sectoral for Chemicals*, *supra* note 47.

¹⁰³ *See id.*

¹⁰⁴ See Daniel Pruzin, *Proponents to Try New NAMA Approach Aimed at Winning Support for Sectorals*, 26 INT’L TRADE REP. (BNA) 236 (Feb. 19, 2009).

aims: trade liberalization and simplicity. Free trade in certain sectors would be compromised, and specialty sectoral deals would be legally complex.

In April 2009, Canada announced that it was unilaterally dismantling all of its tariffs on manufacturing inputs and machinery.¹⁰⁵ Canada (as of 2007) maintained an overall average MFN tariff rate of 6.5 percent, gave duty-free treatment to about fifty-three percent of all imports, and had an average MFN tariff on industrial goods of 3.8 percent.¹⁰⁶ Canada was keenly self-interested in making its industrial producers more competitive globally by lowering the costs of imported components and machine tools they use. But, its April 2009 move to become a tariff-free zone on inputs and machinery highlighted the importance Canada placed on a sectoral agreement covering these goods, which it championed. The move also underscored Canada's frustration with the lack of progress in the Round: if a multilateral solution was not in the offing, then why not follow the precepts of David Ricardo and knock down trade barriers unilaterally? Accordingly, Canada reduced the duties on 214 tariff lines from a simple average tariff of 5.2 percent to zero (effective January 28, 2009), and got rid of the MFN applied rates on an additional 1,541 items (effective for most of them, with an average import duty of 7.2 percent, on March 5, 2010, with some duties on some items phased out by January 1, 2015).¹⁰⁷

The Canadian moves failed to break the logjam. Thus, in October 2010, Japan proposed a "basket" (or "product basket") approach.¹⁰⁸ Rather than take on large sectors, and mandate a single tariff cut for all tariff lines within a particular sector, why not divide each sector into smaller numbers of tariff lines? That would allow for different tariff reduction commitments on different lines within a single, large product sector.¹⁰⁹ For example, electronics could be divided into consumer goods and business goods. Japan's proposal had the benefit of tradition behind it: a similar approach was used in the Uruguay Round in the *Chemical Tariff Harmonization Agreement*.¹¹⁰ Nevertheless, the proposal to use a basket approach in the Round was met with confusion.

¹⁰⁵ *Canada Eliminates Tariffs on Manufacturing Inputs and Machinery*, WTO (Apr. 29, 2010), http://www.wto.org/english/news_e/news10_e/nama_29apr10_e.htm; see also Daniel Pruzin, *Canada Touts Its Commitment to Global Trade Liberalization Through Tariff Cuts*, 27 INT'L TRADE REP. (BNA) 679 (May 6, 2010).

¹⁰⁶ Pruzin, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ See Daniel Pruzin, *Recent Doha Efforts Yield Mixed Results; WTO Members Agree on Need to Continue*, 27 INT'L TRADE REP. (BNA) No. 1587 (Oct. 21, 2010) [hereinafter Pruzin, *Recent Doha Efforts Yield Mixed Results*].

¹⁰⁹ See Pruzin, *U.S. Envoy Hears Positive Tone*, *supra* note 70.

¹¹⁰ *Id.*

Several WTO Members, including the U.S., found it vague. In March 2011, the U.S. borrowed the approach, whereby Members would have flexibility to make different commitments on different tariff lines under a single product heading.¹¹¹ With respect to a particular line, a Member could:

- (1) eliminate the tariff on that line;
- (2) cut tariffs to a greater extent than required by the Swiss Formula; or
- (3) exempt the line as “Sensitive” from any tariff cut.

Upon examining the details of the American proposal, Brazil, China, and India rejected it, branding it “an old proposal in new wrapping.”¹¹² They saw in it the same demands from the U.S. as in the fall 2010: elimination or sharp reduction of tariffs on products of export interest to the U.S., namely, chemicals, industrial machinery, and pharmaceuticals.

Thus, the U.S. expected China to eliminate or cut tariffs on 1,600 tariff lines, mostly chemical products, and for Brazil to do the same on 1,700 chemical products. Brazil added, the U.S. was essentially demanding Brazil cut its tariffs to zero in the chemicals, electronics, forestry products, hospital equipment, and industrial machinery sectors—all of which are sensitive to Brazil.¹¹³ Additionally, said Brazil, in the automobile, footwear, T&A, and toy sectors, the U.S. was demanding a thirty-three percent cut in applied tariff rates under the Swiss Formula. All told, these sectors account for over 3.3 million jobs in Brazil. To do what America asked would lead to political and social turmoil in Brazil. Likewise, China pointed out the chemicals, electronics, and industrial machinery sectors are sensitive, accounting for over forty percent of its NAMA tariff lines and over half of all its imports of industrial goods.¹¹⁴

Interestingly, in March 2011, China tried its hand at a sectoral basket approach.¹¹⁵ It proposed four baskets:

- (1) Developed Country Basket #1—

¹¹¹ See Daniel Pruzin, *U.S. Fails to Advance Stalled Doha Talks in Latest Bilaterals with China, India*, 28 INT’L TRADE REP. (BNA) 480 (Mar. 24, 2011) [Pruzin, *U.S. Fails*]; see also Pruzin, *WTO Members Voice Growing Concerns*, *supra* note 21.

¹¹² See Pruzin, *WTO Members Voice Growing Concerns*, *supra* note 21.

¹¹³ See Daniel Pruzin, *Doha Round Talks in Disarray as Members Divided Over Future Course of Negotiations*, 28 INT’L TRADE REP. (BNA) 518 (Mar. 31, 2011).

¹¹⁴ See *id.*

¹¹⁵ See *id.*

Developed countries would be obliged to cut tariffs on merchandise in this basket to zero.

(2) Developing Country Basket #2 –

For merchandise in this basket, developing countries would agree to cuts going beyond those required by the Swiss Formula. But, developed countries would agree on cuts going beyond that Formula, too, on the same tariff lines.

(3) Developing Country Basket #3 –

For merchandise in this basket, developing countries would accept Swiss Formula cuts. But, developed countries would cut duties on the same tariff lines to zero.

(4) Developing Country Basket #4 –

Developing countries would not have to cut tariffs on merchandise in this basket.

The U.S. categorically rejected the Chinese proposal, declaring that “[i]ronically, it would significantly increase the imbalance” in manufactured tariffs between developed and developing countries.¹¹⁶

Adding to the confusion, and possibly complicating the entire Doha Round negotiations, was a February 2011 proposal by Brazil for a sectoral agreement in agriculture.¹¹⁷ WTO Members would negotiate this sectoral not under the auspices of NAMA, but rather in their agriculture talks. What prompted the Brazilian proposal was frustration over the entrenched position of the U.S., EU, and other major trading powers. They continued to argue they could make no more cuts to farm tariffs and subsidies, yet insisted developing countries make NAMA tariff cuts beyond the requirements of the Swiss Formula.¹¹⁸ Brazil, along with China, India, and other emerging

¹¹⁶ *Id.* (quoting Michael Punke, Deputy USTR and U.S. Ambassador to the WTO).

¹¹⁷ See Daniel Pruzin, *Brazil to Propose Sectoral Agreement for Doha Round of Farm Negotiations*, 28 INT'L TRADE REP. (BNA) 253 (Feb. 17, 2011) [hereinafter Pruzin, *Brazil to Propose Sectoral Agreement*].

¹¹⁸ In February 2011, the U.S. and EU suggested they might be open to additional cuts on farm subsidy spending limits, beyond those called for in the December 2008 Draft Agricultural Text. However, such cuts were to “water,” i.e., they would lower bound spending levels a bit, but not below actual spending levels, and thus not result in substantive market access gains for exporting countries. See, e.g., Daniel Pruzin, *U.S., China Seen as Holding Key to Doha Survival as Geneva Talks Falter*, 28 INT'L TRADE REP. (BNA) 298 (Feb. 24, 2011).

and developing countries, perceived this position as patently unfair. Brazil, therefore, opted to give rich Members a taste of their own medicine, essentially saying: “if you want us to commit to sectorals on industrial products, then you agree to a sectoral on farm products.”¹¹⁹ As for which farm goods Brazil sought coverage under such an agreement, the likely candidates were its main agricultural exports: beef, fruit juice, pork, poultry, and sugar.

Not surprisingly, then, at the end of March 2011, the U.S. declared the disagreements among Members on sectoral agreements could not be resolved.¹²⁰ The Director-General agreed, stating in his April 2011 Document:

[T]here are fundamentally different views on the ambition provided by the cuts to industrial tariffs under the Swiss formula as it currently stands, on whether the contributions between the different numbers are proportionate and balanced as well as on the contribution of the sectorals. I believe we are confronted with a clear political gap which, as things stand, under the NAMA framework currently on the table, and from what I have heard in my consultations, is not bridgeable today.¹²¹

This statement was accurate, but incomplete. True enough, the U.S. regarded mandatory participation in sectorals as necessary to offset the many limits and exceptions to the Swiss Formula, otherwise American industry would gain little from a NAMA deal. As the U.S. understandably pointed out, its economic studies indicated that if it accepted the entire December 2008 package and April 2011 Documents, i.e., the “deal on the table” covering not only NAMA, but also agriculture and services, then the “benefit to the U.S. economy would be the equivalent of only one day’s worth of U.S. exports.”¹²²

In contrast, Brazil, China, and India understandably viewed themselves as developing countries with infant industries to protect. The Brazilian steel industry is a case in point.

The U.S. faulted Brazil for its federal and state taxes that double or triple the effective actual tariff paid by importers of industrial products like steel. Whereas the U.S. and other developed nations impose no tariff on steel imports, Brazil has a twelve percent duty, on top of which it levies taxes and charges that cause a difference in the price of imported versus

¹¹⁹ See Pruzin, *Brazil to Propose Sectoral Agreement*, *supra* 117.

¹²⁰ See Daniel Pruzin, *As Doha Talks Falter, Efforts Get Under Way on Alternative Approaches to Salvage Gains*, 28 INT’L TRADE REP. (BNA) 644 (Apr. 21, 2011).

¹²¹ Pascal Lamy, Trade Negotiation Comm., *Cover Note by the TNC Chair*, TN/C/13 (Apr. 21, 2011).

¹²² See Rossella Brevetti, *U.S. Has Not Given Up on Doha Round*, *Commerce Undersecretary Sanchez Says*, 28 INT’L TRADE REP. (BNA) 688 (Apr. 28, 2011).

domestic steel of over thirty percent.¹²³ With that difference, small wonder why foreign steel producers are uncompetitive in the Brazilian market, even though as a major emerging market in the throes of industrialization, Brazil has a large demand for steel and ought to be a net importer of it. For Brazil, steel was precisely the kind of industry it sought to protect as an infant, and see it mature as part of its industrial growth.

In emphasizing their short- and medium-term commercial interests, both sides forgot about how any NAMA deal would advance the needs of poor countries with burgeoning young Muslim populations and high unemployment rates—and, in turn, their own long-term security interests. If idle hands are the devil's playmate, then providing opportunities for those hands in those countries ought to have been the focal point of a deal. In turn, such opportunities would advance the national security interests of all four countries, and dozens of others, insofar as they would reduce the vulnerability of poor Muslims to Islamist extremism.

In his April 2011 Report on NAMA Sectoral Negotiations, the NAMA Chairman tried to be as optimistic as possible. He stated that: “None of the seven [WTO] Members [with which he had individually consulted: Australia, Brazil, China, the EU, India, Japan, and the U.S.] totally exclude[s] the possibility of sectoral participation.”¹²⁴ But, he continued, whether they would participate in one or more sectorals would depend on “the specifics of the treatment and how sensitivities on specific tariff lines would be accommodated.”¹²⁵ Moreover, while some Members sought additional market access in priority sectorals, namely, chemicals and electronics and electrical products, other Members identified sensitivities in exactly those sectors.¹²⁶ Each Member had “its own vision on a product basket approach,” and the “level of detail of the sectoral product coverage . . . varied” among them, with “[n]o real back and forth negotiation” taking place in respect of the chemical sector.¹²⁷ Members also failed to agree on the type of treatment under the sectorals, with some seeking zero-duty treatment in sectors like chemicals, electric and electronic products, and industrial machinery, but others insisting duty-free status in those sectors was impossible and arguing for a Swiss Formula Coefficient in these sectors of 4 (instead of

¹²³ See Timothy C. Brightbill, *NTE Identifies Trade Barriers in More than 60 Countries, as Well as Some Hard Truths About the WTO's Doha Round*, 28 INT'L TRADE REP. (BNA) 834 (May 19, 2011) (recounting statistics presented in the 26th annual *National Trade Estimate on Foreign Trade Barriers*). See generally RONALD KIRK, OFFICE OF U.S. TRADE REP., 2011 NATIONAL TRADE ESTIMATE ON FOREIGN TRADE BARRIERS (2011).

¹²⁴ NAMA Report by Director-General, *supra* note 2, paras. 2, 6.

¹²⁵ *Id.* para. 6.

¹²⁶ *Id.* paras. 7–8.

¹²⁷ *Id.* para. 9–10.

8) for developed countries and 8 (instead of 20–22) for developing countries.¹²⁸

Thus, the Chairman's assessment in April 2011 was blunt and bleak:

But where the gap was largest was on the role of sectoral negotiations in achieving the overall level of ambition in the NAMA negotiations. On one end of the spectrum, I heard the need for sectorals to complement the outcome of the formula tariff reductions by delivering significant additional market access. The objective of sectorals would be to rebalance the disparity in the contribution between developed and emerging countries and to achieve, if not equalisation, a harmonization of their tariffs. In other words, the goal of sectoral negotiations would be for emerging countries to "catch up" with developed members regarding the level of market opening. Other Members indicated that the Swiss formula should be the main determinant of the overall level of ambition of the NAMA negotiations. Sectorals should be seen as a supplement to the tariff cuts achieved through the formula. In this respect, some of them reiterated the non-mandatory nature of the sectoral participation as well as the links between the level of ambition in NAMA and that in Agriculture.

As one can see from the above, there is a fundamental gap in expectations in sectorals. This gap is not a technical one that one could bridge through adjustments in the architecture of sectorals. One side considers tariff cuts achieved through the formula as being insufficient to meet its expectations for the level of ambition of the Doha Round on industrial tariffs. They argue that the formula only provides for limited cuts in applied tariffs in emerging countries. They also argue that given the already low level of developed country industrial tariffs, and the application of the formula reductions with no exceptions, they would lose all leverage to obtain future industrial tariff reductions from emerging economies. Therefore, they saw the Doha Round as the last opportunity towards a harmonisation of tariffs with emerging economies. For that, the essence of tariffs on chemicals, industrial machinery and electric and electronic products should be eliminated. The other side considers that the formula delivers a significant level of ambition. These Members point at the unilateral tariff reductions that many developing countries have undertaken since the Uruguay Round and point at the value in binding them in the Doha Round. They also indicate that, for the first time in the history of the multilateral trading system, developing countries are systematically cutting their tariffs, including some of their applied tariffs. As to sectorals, these Members see them as a means to improve the level of ambition, but according to them, such negotiations must be faithful to the mandate of the Doha Round, be balanced and proportionate. On this last point, some Members point at the disproportionate efforts that emerging countries would be undertaking when eliminating tariffs on chemicals, industrial machinery and electric and

¹²⁸ *Id.* para. 11.

electronic products, considering the current very low level of tariffs applied by developed countries.

In sum, there are fundamentally different views on the ambition provided by the Swiss formula as it currently stands, on whether the contributions between the different members are proportionate and balanced as well as on what is the contribution of sectorals. I believe we are confronted with a clear political gap which, as things stand, under the NAMA framework currently on the table, and from what I have heard in my consultations, is not bridgeable today.¹²⁹

The EU followed up this assessment with a sectorals proposal, which its Director for Trade, Jean-Luc Demarty, issued on April 28th.¹³⁰ Its goal was to ensure major developed and developing countries took part in at least some sectorals, but in a manner that was reasonable to each of them.

In specific, there were four key points to the April 2011 Demarty Proposal:¹³¹

(1) Chemicals, Industrial Machinery, and Electronics Sectors:

Developed countries would eliminate all of their duties on all tariff lines in these sectors. Developing countries would cut their tariffs on some products in these sectors, especially on pharmaceuticals, because they were covered by a sectoral agreement from the Uruguay Round. In these respects, the tariff reductions would be zero-for-zero by developed countries, and likewise on certain products for developing countries.

But, on other chemical, industrial machinery, and electronic products, developing countries would have a zero-for-X obligation. They would cut tariffs on these other products according to the Swiss Formula, plus an additional, fixed percentage point (or points). Possibly, that additional percentage reduction could be three percent. Hypothetically, a developing country obligated under the Swiss Formula to cut its chem-

¹²⁹ *Id.* paras. 12–14.

¹³⁰ *WTO Roundup*, 10 TRADE NEGOT. INSIGHTS 13 (2011), available at <http://ictsd.org/i/news/tni/108569/>.

¹³¹ 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 (May 5, 2011) (outlining the Demarty Proposal based on its effects on developed countries and its effects on developing countries); Daniel Pruzin, *E.U. Floats Compromise Proposal to End Doha Round Stalemate on Industrial Tariffs*, 28 INT'L TRADE REP. (BNA) 727 (May 5, 2011) ("The proposal . . . would require major developed and developing exporters to take part in so-called sectoral initiatives aimed at slashing tariffs on chemicals, pharmaceuticals, industrial machinery, and electronics/electrical goods.").

ical tariffs from twenty to fifteen percent then would have to impose a further cut of three percent, down to a duty rate of twelve percent. The theory behind the additional reduction was that it would result in significant further liberalization, but not foist on developing countries a zero-for-zero obligation.

(2) Chemicals Sector:

Developing countries would be obliged to reduce their duties on all tariff lines in this sector to the amount called for by the Uruguay Round CTHA. But, this obligation would apply only if the CTHA level were below the level resulting from the Swiss Formula reduction plus the additional fixed percentage point reduction.

Suppose a developing country already applied the CTHA duty levels? Then, it would have to impose a fixed percentage point cut on its chemical tariffs, beyond the Swiss Formula, with the result that its end tariffs were between the CTHA levels and zero.

(3) Electronics Sectors:

Developing countries would be expected, but not obliged, to eliminate duties on tariff lines on electronics and electrical machinery in which they had become highly competitive as exporters.

(4) Flexibilities:

Developing countries, including Brazil, China, and India, would have recourse to the flexibilities outlined in the December 2008 Draft NAMA Text.

The Demarty Proposal failed to break the deadlock over sectorals. While the U.S. was willing to use it as a basis for continued negotiations, Brazil, China, India, and other developing countries rejected it in May 2011.¹³²

The sentiment among developing countries on any obligation to participate in sectors still was strongly negative. They saw the Demarty Proposal as nothing more than an abstruse repackaging of the basket approach the U.S. set out in March 2011. They were particularly irked by in-

¹³² *No Consensus on EU Proposal on Duty Removal in Doha Talks*, BUS. STANDARD (May 12, 2011), <http://www.business-standard.com/india/news/no-consensuseu-proposal-duty-removal-in-doha-talks/134989/on> (discussing countries that either opposed or fully rejected the sectoral proposal).

clusion of any zero-for-zero obligations applicable to them.¹³³ Conversely, the sentiment among the U.S. and other developed countries was that developing countries not only must participate in sectorals, but also offer up commercially meaningful concessions, including some zero-for-zero reductions. Put simply, what rich countries demanded, namely, to go further in opening markets for their industrial products, poor countries rejected as going too far, and *vice versa*.

Here, then, is another key juncture at which the strategy of deploying trade liberalization in the Doha Round to counter terrorism failed. This juncture, cutting industrial tariffs, is one of the oldest and most understood aspects of trade bargaining in the history of GATT-WTO. And yet, the Members could not see past their short-term interests in industrial market access toward a common objective of poverty alleviation and reducing vulnerability to Islamist extremism.

D. Still Further Flexibilities for Members with Low Binding Coverage

The December and July 2008 Texts closely resembled each other on S&D treatment for developing countries with tariff schedules containing a sizeable percentage of unbound tariff lines. "Sizeable" meant thirty-five percent, i.e., less than thirty-five percent of the non-agricultural tariff lines of the country have a bound MFN duty rate.¹³⁴ These countries would be exempt entirely from the Swiss Formula, and could use a simplified method to cut their duty rates, namely, a two-tiered formula.¹³⁵ The thrust of the method for them was to increase the percentage of bound tariff lines, and then achieve a basic cut in tariffs. They would contribute to the Doha Round NAMA exercise by increasing their binding coverage, and then binding their tariffs at an average level that does not exceed the average of post-Uruguay Round bound tariffs for all developing countries.¹³⁶

¹³³ See Daniel Pruzin, *APEC Ministers Set to Bury Hopes for Doha in 2011, to Call for Urgent Work on Options*, 28 INT'L TRADE REP. (BNA) 810 (May 19, 2011) (describing the "zero for zero" provisions as a "deal breaker"); Daniel Pruzin, *Talks on Future of Doha Round Reveal Divergent Views on Way Forward*, 28 INT'L TRADE REP. (BNA) 816 (May 19, 2011) (discussing reactions to the EU sectorals proposal).

¹³⁴ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(a) ("[D]eveloping Members with a binding coverage of non-agricultural tariff lines of less than 35 percent will be exempt from making tariff reductions . . ."), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(a) ("[D]eveloping Members with a binding coverage of non-agricultural tariff lines of less than 35 percent will be exempt from making tariff reductions . . .").

¹³⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(a) ("Each member shall bind at an average level that does not exceed 30 percent."), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(a) ("Each member shall bind at an average level that does not exceed 28.5 percent.").

¹³⁶ NAMA Negotiations Guide, *supra* note 5.

Tier one covered any developing country with a binding coverage of non-agricultural tariff lines below fifteen percent. These countries would be obligated to bind seventy-five percent of their industrial tariff lines. The July Text had listed a range of between seventy and ninety percent of those lines. Tier two covered any developing country with a binding coverage at or above fifteen percent. They would have to bind between seventy-five percent of their industrial tariff lines. The July Text had identified a range of seventy-five to ninety percent. Thus, on both tiers, the December Text picked a specific figure, but one that was at or near the least ambitious of the possibilities in the July Text. Binding more tariff lines, and cutting the resultant duty rates, obviously is a more pro-free trade outcome than the opposite.

As for the tariff cuts to the new bound rates, the key number was thirty percent. That is, a developing country with low binding coverage would have to bind its MFN tariffs at an average level that would not exceed thirty percent. Here, too, the December 2008 Text backed away from a more ambitious outcome. The July Text identified 28.5 percent as the figure. Initial bindings would take effect on January 1st of the year following the year in which any Doha Round agreements were implemented.¹³⁷ Duties would have to be bound on an *ad valorem* basis, and any unbound non-*ad valorem* tariffs would have to be converted using the May 2005 Paris Methodology.¹³⁸ The initial bound rates of unbound levels would be up to each developing country to decide.¹³⁹ After that, developing countries would have eleven years in which to cut their initial bindings to reach the thirty percent average target. They could make cuts in equal annual installments, commencing on January 1st of the second year after entry into force of Doha Round accords.¹⁴⁰

E. Still Further Flexibilities for SVEs, Plus Bolivia, Fiji, and Gabon

Flexibilities for SVEs, on top of that for RAMs, SACU and MERCOSUR members, identified countries, and least developed countries, continued to bedevil WTO negotiators. Too much flexibility undermined free trade. Too little flexibility imposed too severe adjustment costs on certain countries. A balanced outcome required painstaking negotiations with

¹³⁷ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(b), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(b).

¹³⁸ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(e), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(e).

¹³⁹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(c), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(c).

¹⁴⁰ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 8(d), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 8(d).

each country that clamored for extra S&D treatment. SVEs, in particular, were defined as any WTO Member—other than a developed country—with a share of less than 0.1 percent of world industrial trade for the reference period 1999–2001 (or other period for the best available data).¹⁴¹ Precisely because of their small size and unique vulnerability to adjustment problems from trade liberalization, they would be exempt from Swiss Formula tariff cuts. Instead, this category of Members would get a custom-tailored methodology to cut their barriers to trade in manufactured items.

Concerning this S&D treatment for SVEs, the December 2008 Text made precious few changes to its predecessor. The December Text continued with nearly the same overall average bound tariff level on non-agricultural products SVEs would have to reach across four bands of tariffs. For the top tier of tariffs (at or above fifty percent), the July Text said SVEs would be obliged to bind duties at an average of between twenty-eight and thirty-two percent, and the December Text split the difference at thirty percent.¹⁴² For the middle tier of tariffs (duty rates at or above thirty percent, but below fifty percent), the July 2008 Text indicated SVEs would have to cut the overall average rate to between twenty-four and twenty-eight percent.¹⁴³ The December Text chose twenty-seven percent as the target.¹⁴⁴ In both the July and December Texts, for the lower middle tier of duties (at or above twenty percent, but below thirty percent), SVEs would have to cut duty rates to an average of eighteen percent.¹⁴⁵ Also in both texts, for bottom-tier tariffs (duties below twenty percent), SVEs would have to apply a minimum, line-by-line reduction (on ninety-five percent of all lines in the lowest tier) of five percent.¹⁴⁶

The December 2008 Text, like its predecessor, singled out three countries—Bolivia, Fiji, and Gabon—from among the SVEs for *sui generis* treatment. Bolivia would be encouraged, but not required, to follow the tariff-cutting modalities for SVEs. That meant Bolivia would be free not to cut tariffs on industrial imports at all.¹⁴⁷ Fiji would be deemed to fall into the top tariff tier, and thus be obliged to cut its tariffs to an average of thirty

¹⁴¹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a).

¹⁴² Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a)(i), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a)(i).

¹⁴³ July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a)(ii).

¹⁴⁴ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a)(ii).

¹⁴⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a)(iii), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a)(iii).

¹⁴⁶ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a)(iv), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a)(iv).

¹⁴⁷ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a).

percent.¹⁴⁸ In other words, notwithstanding the fact Fiji actually would be in a lower tier, and thus have to cut its tariffs to a level such as twenty-seven percent (the second tier), or eighteen percent (the lower-middle tier), Fiji could keep the highest overall average permitted to SVEs. Gabon was given leave to engage in tariff schedule modifications under GATT Article XXVIII so as to hit an overall average of twenty percent.¹⁴⁹ That figure was higher than the 18 percent in the July 2008 Text, meaning Gabon successfully pushed up the ceiling on its average level of protection.

The initial bound rates from which to apply the tiered tariff reduction methodology would be existing bindings, or for unbound tariff lines, a level established by the SVE in question.¹⁵⁰ The December and July Texts specified that SVEs would have to bind all of their tariff lines by January 1st of the year following the entry into force of any Doha Round accords.¹⁵¹ Here, again, Fiji received an additional flexibility. It could retain up to ten percent of its non-agricultural tariff lines as unbound. Finally, the two Texts contained the same implementation period: eleven years starting with January 1st on the year after entry into force of the accords.¹⁵² RAMs, however, that also qualified as SVEs would get a grace period for reductions to tariffs on product lines that were the subject of an accession commitment they were still implementing.¹⁵³ That period would be three years following the date on which they fully implemented their accession commitment. In all instances, SVEs would have to bind tariffs on an *ad valorem* basis, and convert non-*ad valorem* duties to their AVE using the May 2005 Paris Methodology.¹⁵⁴

F. *Still Further Flexibilities for Least Developed Countries*

Least developed countries were not obligated to implement any tariff reductions—that much was clear in both the December and July 2008

¹⁴⁸ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a).

¹⁴⁹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(a), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(a).

¹⁵⁰ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(c), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(c).

¹⁵¹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(b), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(b).

¹⁵² Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(d), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(d).

¹⁵³ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(e), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(e).

¹⁵⁴ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 13(f), with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 13(f).

Texts.¹⁵⁵ These thirty-two poorest of poor countries pressed for clear assurances that ninety-seven percent of products originating in their territories would receive duty-free, quota-free (DFQF) treatment. They continued to argue that clarity on this issue would help mitigate the problem of preference erosion for them. The loss of preferences would not matter, because their products would be within the ninety-seven percent of goods that qualified for unrestricted market access.

Though it well should have, in light of the original purpose of the Round, the December 2008 Text did little to provide this assurance.¹⁵⁶ True, it tightened language in the relevant provisions concerning DFQF treatment on ninety-seven percent of merchandise originating in least developed countries. Whether the truly important sectors—like T&A, and footwear—would fall within this ninety-seven percent was uncertain, despite new language committing developed countries to “provide meaningful[] enhanced market access for all” of the poorest of the poor.¹⁵⁷ Like its predecessor, the December 2008 Text set out procedural details to implement any commitments to least developed countries.¹⁵⁸

Interestingly, following the issuance of the December 2008 Draft Text, the Maldives graduated from the “least developed country” status. Still eager to obtain flexibilities, however, the Maldives sought them as an SVE. The April 2011 NAMA Document confirmed their new status as such.¹⁵⁹

G. *Still Further Flexibilities for RAMs*

The December 2008 Text closely resembled the July 2008 Text in respect of RAMs, except the new Text included more special provisions for RAMs.¹⁶⁰ First, under both texts, newer RAMs would not have to make any tariff cuts beyond their accession commitments. To the list of newer RAMs (namely, Albania, Armenia, Kyrgyz Republic, Macedonia, Moldova, Mongolia, Saudi Arabia, Tonga, Vietnam, and Ukraine), the December 2008 Text added Cape Verde, which acceded to the WTO on July 23, 2008.¹⁶¹

¹⁵⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 14, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 14.

¹⁵⁶ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 15, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 15.

¹⁵⁷ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 15(b).

¹⁵⁸ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 16–17, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 16–17.

¹⁵⁹ April 2011 NAMA Document, *supra* note 2, para. 2(vi).

¹⁶⁰ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 18–20, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 18–20.

¹⁶¹ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 20.

Second, the December Text changed the period during which older RAMs would be obliged to implement Swiss Formula reductions to industrial product tariffs. The July Text identified a three or four year period, and the December Text settled upon three years—a modest concession in favor of faster liberalization.¹⁶² In other words, older RAMs would have three years beyond the standard implementation period of ten years for developing countries. Yet, “faster” is a contextual adjective. It appeared China still would have up to fourteen years to complete its industrial product tariff reductions.¹⁶³

Third, Oman, an older RAM, would not be obliged to cut any bound tariff below five percent.¹⁶⁴ The special preference for Oman was an innovation of the December 2008 Text. The derogation could not be justified on the ground Oman was a very recent RAM, so what rationalization was picked? It was that Oman was a member of the Gulf Cooperation Council (GCC).¹⁶⁵ One other GCC member, Saudi Arabia, was benefiting from special treatment as a very recent RAM, so why not give such treatment to Oman, too, albeit on a separate pretext? Perhaps the notion was Oman is poorer than the other GCC countries (Bahrain, Kuwait, Qatar, and the United Arab Emirates). Or, perhaps, the *sui generis* treatment for Oman provided further evidence the Round had devolved into a feeding frenzy of sovereign special interests.

IV. OTHER MANUFACTURING PROVISIONS

A. *Preference Erosion and Still Further Flexibilities for Beneficiaries and Non-Beneficiaries*

Throughout the second half of 2008, many poor countries that had long relied on non-reciprocal preferences debated proposals designed to offset the anticipated erosion of those preferences. The basic problem remained the same as it had since the Doha Round commenced in November 2001. Preference schemes for eligible articles originating in beneficiary countries would not be scrapped. But, the value of the preferences would erode as WTO Members phase in industrial product tariff cuts under the Swiss Formula. Thus, exporters from poor countries that had enjoyed duty-free access to preference-granting developed country markets would face

¹⁶² Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 19, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 19.

¹⁶³ *FACTBOX: What's New in the WTO Text*, REUTERS (July 10, 2008), <http://www.reuters.com/article/2008/07/10/idUSL10715600>.

¹⁶⁴ See December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 7(g) (describing the coefficients and flexibilities for Oman).

¹⁶⁵ See *NAMA Briefing Notes*, *supra* note 18 (referencing Oman's status as a GCC member).

stiffer challenges from exporters in third countries that had not benefitted from the preferences.

That is, in head-to-head competition on like or substitutable merchandise exported to a preference-granting rich country from a poor country that is a preference beneficiary, and from a third country that also is poor but is not a beneficiary, the playing field in the market of the rich country would be increasingly more level. That is because the difference in market access to the preference-granting developed country market between (1) duty-free treatment for eligible merchandise from a preference beneficiary and (2) the MFN rate for a like or substitute product from a third country would be smaller. It would be even smaller because of Doha Round cuts to the MFN rate.

Time was the key question for all poor countries. How fast should preference-granting developed countries implement tariff reductions? Should preference-granting developed countries apply reductions under the Swiss Formula to exports from poor countries not immediately, but over an "X" year period in equal annual installments? Put differently, what should "X" be, so developing or least developed countries enjoying preferences have time to adjust to erosion in the value of those preferences?

The varying answers spotlighted a schism within the Third World. The quicker the cuts were implemented, the faster the erosion of the margin of preference. Fast erosion could prove a shock to preference beneficiary countries and their export industries. (Truly, some of those industries had been lulled into complacency by the preferences and could well use a shock.) However, fast erosion would help developing countries that had not received a preference in the same export sectors. Thus, the preference beneficiaries lobbied for a long phase-in period, a high "X" value. Their non-beneficiary brethren sought rapid staging of reductions, a low "X" value.

A zero-sum game was afoot. Developing countries that had not traditionally enjoyed preferences (or at least not many preferences), such as Pakistan and Sri Lanka, dubbed themselves "disproportionately affected Members."¹⁶⁶ How that label should be defined was both critical and unclear. It is used in the preference provisions of the July 2008 Draft Text. It covers Pakistan and Sri Lanka, which are listed in Annex 4 of that Text, and those two countries plus Bangladesh, Cambodia, and Nepal, which are listed in Annex 4 of the August 12, 2008 Report by the NAMA Chairman.¹⁶⁷ By

¹⁶⁶ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 30 (describing disproportionately affected Members and pointing to Annex 4 for a list); December 2008 Draft NAMA Modalities Text, *supra* note 1, Annex 4 (listing Pakistan and Sri Lanka among the disproportionately affected Members).

¹⁶⁷ July 2008 Draft NAMA Modalities Text, *supra* note 8, Annex 4; Don Stephenson, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products*, JOB(08)/96 (Aug. 12, 2008).

December 2008, Vietnam sought to be included on the list.¹⁶⁸ Ought there to be some quantitative benchmark to define “disproportionate effect”? Or, could third countries simply lay claim to being thusly affected? If exports from a third country of a product like, or directly competitive with, that of the preferred product register an acute increase, then should the jump disqualify the third country from being “disproportionately affected”?

These definitional problems aside, Pakistan and Sri Lanka pointed out they export products in the same tariff lines to countries that grant preferences (e.g., to the U.S. or EU) to other poor countries (e.g., Lesotho or Mauritius).¹⁶⁹ But, they lose out to the other poor countries by not getting the preference on those products. Those products were T&A items, such as brassieres, shirts, sweaters, and trousers. Pakistan and Sri Lanka were eager to see preference-granting developed countries apply as soon as possible any Doha Round tariff cuts to these products.

Accordingly, Pakistan and Sri Lanka sought a five-year grace period, during which time preference-granting developed countries would phase in tariff reductions.¹⁷⁰ That period was shorter than the time the developed countries would take to implement tariff cuts on the same products from preference-beneficiary countries. The July 2008 Draft Text called for a six-year staging for Pakistani and Sri Lankan merchandise identified in Annex 4, and a nine-year staging for preference beneficiaries on products subject to a preference.¹⁷¹ Yet, six years was not fast enough for Pakistan and Sri Lanka.

Under their hoped-for outcome, during the five-year period, Pakistani and Sri Lankan exports would enjoy progressively lower MFN duties in preference-granting developed countries, closing the gap with the duty-free treatment enjoyed by preference beneficiaries. After the five-year period, developed countries would apply the final, reduced post-Doha Round MFN rate to Pakistani and Sri Lankan exports, thereby narrowing to the smallest agreed-upon amount the gap vis-à-vis duty-free preferential treatment. In years six to nine, exports from preference beneficiaries still would get a margin of preference, but one that diminished yearly as the gap shrank between duty-free treatment (the preference) and the MFN rate as cut by the Swiss Formula. After full implementation of tariff cuts by preference-

¹⁶⁸ See Pruzin, *Chair Admits Deadlock*, *supra* note 91 (mentioning Vietnam as one of four countries at the time seeking tariff preferences).

¹⁶⁹ *Id.* (stating that special preferences could disproportionately affect Pakistan and Sri Lanka).

¹⁷⁰ See Permanent Mission of Pakistan to the World Trade Org., *Pakistan and NAMA*, para. B.3, available at <http://www.wto-pakistan.org/documents/nama/PakistanandNAMA.pdf> (stating that Pakistan would accept an implementation period of less than five years, but prefers a period between two and three years).

¹⁷¹ July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 28, 30.

granting developed countries, i.e., after nine years, the playing field in developed country markets would be as level as possible assuming the continued existence of preferences.

The proposal backed by the likes of Pakistan and Sri Lanka to benefit non-preference beneficiaries was called “back loading.”¹⁷² To effect back loading, a waiver from the basic MFN obligation of GATT Article I:1 for the grace period would be awarded to the preference-granting developed countries. They would need it. During the special period for Pakistan, Sri Lanka, and their cohorts, the developed countries would be imposing on like products a duty rate different from that they applied to preference beneficiary countries. In effect, at least during the 5-year period, the preference granting developed countries would have three tariff regimes:¹⁷³

- (1) the generally applicable MFN rate, which would be subject to normally-staged Swiss Formula cuts;
- (2) the duty free or low-preferential rate for goods from beneficiaries; and
- (3) the special rate for Pakistan, Sri Lanka, and other non-preference beneficiary poor countries, which would be the MFN rate subject to accelerated Swiss Formula reductions.

This prospect smacked of old-fashioned colonialist divide and rule policies, dressed up in neo-colonialist complexity with a veneer of rhetoric from rich countries that they are trying to help, but cannot please, all poor countries.

In terms of textual changes to help forge a consensus, the December 2008 Text was a disappointment. Except for two references to the Annex related to the provisions on non-reciprocal preferences (Annex 4), the new Text was a *verbatim* repetition of its predecessor.¹⁷⁴ The same deal on the table for six months remained on the table. In particular, the implementation periods to reduce bound MFN tariffs on product lines that are the subject of non-reciprocal preferences and thereby of vital export interest to developing countries would be nine years.¹⁷⁵ This period would be tacked onto a two-year grace period starting with the conclusion of the Round, i.e., cuts would

¹⁷² See December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 30; July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 30.

¹⁷³ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 28–30, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 28–30.

¹⁷⁴ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 28–30, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 28–30.

¹⁷⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 28, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 28.

begin on January 1st in the second year following the entry into force of any Doha Round agreements.¹⁷⁶ Thus, the proposal adduced lesser ambition, from the perspective of free trade. Under the new Text, the U.S. and EU would have eleven years (the two-year grace period plus nine years of implementation) to phase in tariff cuts on industrial products subject to preferences.¹⁷⁷

As in the past, the major trading powers identified (in Annexes 2 and 3, respectively, for the EU and U.S.) the relevant tariff lines on which they would cut duties across a dilated period. The EU listed forty affected tariff lines (up from twenty-three lines under an earlier text), embracing not only T&A goods, but also fisheries and steel products. African, Caribbean, and Pacific countries are the beneficiaries of the EU preferences on these items. For the U.S., there were twenty-five affected tariff lines (up from sixteen lines the U.S. identified in association with an earlier draft NAMA modalities text), all of which were T&A products given special treatment under AGOA, or a free trade agreement (FTA) such as the CAFTA-DR.¹⁷⁸

Obviously, the stated goal of a lengthy phased tariff reduction was to assist beneficiaries of preferences. But what about the detrimental impact on industrial goods exporters in non-beneficiary poor countries? Along with Pakistan and Sri Lanka, Bangladesh, Cambodia, and Nepal voiced their concerns. For them, and presumably other “disproportionately affected members,” developed countries would implement their Swiss Formula tariff cuts in six years, through six equal annual rate reductions.¹⁷⁹ The developed countries would commence these reductions on January 1st of the year after the entry into force of any Doha Round agreement. Given the two-year grace period, that meant a difference in reduction of eleven versus seven years.¹⁸⁰ The April 2011 NAMA Document records this argument, from the

¹⁷⁶ December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 28.

¹⁷⁷ *Id.* Of course, the two-year grace period would be an outer limit, based on the assumption that the entry into force occurred on January 2nd of a particular year. For example, if the entry into force were January 2, 2010, then developed countries would begin on January 1, 2012 to apply the Swiss Formula to reduce tariffs on products that are the subject of non-reciprocal preferences.

¹⁷⁸ See Pruzin, *Chair Admits Deadlock*, *supra* note 91; Daniel Pruzin, *Allgeier Hits Out at Chinese Demand for Tariff Compensation at NAMA Talks*, 25 INT’L TRADE REP. (BNA) 1094 (July 24, 2008).

¹⁷⁹ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 30, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 30.

¹⁸⁰ Here, the one-year period would be an outer limit, based on the assumption that the entry into force occurred on January 2nd of a particular year. For example, if the entry into force were January 2, 2010, then developed countries would begin on January 1, 2011 to apply the Swiss Formula to reduce tariffs on products that are the subject of non-reciprocal preferences. This year, plus the six-year phase in period, sums to seven years, and is four years faster than the eleven-year implementation period relevant to exports from preference beneficiary countries.

likes of Bangladesh and Sri Lanka, again: they continue to be concerned “about either what they consider the limited number or value of the tariff lines allotted to them.”¹⁸¹

Notably, a host of larger developing countries, such as China, India, and Argentina, continued to castigate proposals on non-reciprocal preferences. Such proposals, they suggested in the April 2011 NAMA Document, might destabilize not only a deal on preference erosion, but also other parts of the NAMA text that are stabilized.¹⁸² The preference grantors were disingenuous in claiming they were trying for a kind, gentle transition period for the beneficiaries. What was really going on, averred China and India, was protracted protectionism for sensitive rust belt industries in America and Europe. The longer the margin of preference held in place, the longer the nearly moribund enterprises in those industries would be safe from competition from young, dynamic firms in non-preference beneficiaries, like China and India. China again demanded—and again was rebuffed—adequate compensation, through larger, quicker market access on other tariff lines in which it had an export interest.

B. Supplementary Modalities and Elimination of Low Duties

On an array of matters that had not been the focus of contention in the latter half of 2008, the December 2008 Text resembled in all material respects the July Text. The request-and-offer approach remained a methodological option—a “supplementary modality,” in the sometimes strange language of Geneva—to WTO Members, as a supplement to the Swiss Formula, to slash industrial tariffs.¹⁸³ Further, Members were exhorted to consider eliminating low duties, as they are essentially nuisance tariffs, costing at least as much to administer as they provide in revenue.¹⁸⁴

C. NTBs and Capacity Building

To enhance market access, the December 2008 Text encouraged Members to attack non-tariff barriers (NTBs), i.e., measures other than a tariff that protect a domestic industry), particularly those on products of export interest to developing countries.¹⁸⁵ Two strategies, horizontal and vertical, were urged. Under the horizontal approach, Members would con-

¹⁸¹ April 2011 NAMA Document, *supra* note 2, at part 1, para. 2(vii).

¹⁸² *Id.*

¹⁸³ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 21, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 21.

¹⁸⁴ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 22, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 22.

¹⁸⁵ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, paras. 23–26, with July 2008 Draft NAMA Modalities Text, *supra* note 8, paras. 23–26.

sider Ministerial Decisions that would facilitate solutions to NTBs, and deal with trade in re-manufactured goods, thus cutting across all industrial product categories. Under the vertical approach, Members would consider proposals cutting NTBs in specific sectors, namely, (1) chemical products and substances, (2) electronics, (3) electrical safety and electromagnetic compatibility (EMC) of electronic goods, (4) textiles, clothing, footwear, and travel goods, and (5) automotive products.¹⁸⁶ Developed Members also re-committed themselves to enhancing trade capacity building measures in least developed countries, and in countries in the early stages of development.¹⁸⁷

Establishing horizontal and vertical disciplines on NTBs was the only area in the entire Doha Round negotiations in which substantive progress was made following the publication of the December 2008 Text. The April 2011 NAMA Document contained, in Annexes A, B, and C, a summary of results and proposals for a deal on NTBs.¹⁸⁸ The gist of the deal

¹⁸⁶ Labeling requirements for T&A merchandise are one example of an NTB. See Daniel Pruzin, *Latest Doha Round Push Gets Off to Slow Start in Ag, Industrial Tariff Talks*, 28 INT'L TRADE REP. (BNA), at 143 (Jan. 27, 2011) ("Washington in particular has been insisting the emerging economies take part in sectoral negotiations for chemicals, industrial machinery, and electronics/electrical goods.").

¹⁸⁷ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 27, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 27.

¹⁸⁸ April 2011 NAMA Document, *supra* note 2, para. 3. Annex A (entitled "Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers") contains the horizontal mechanism. *Id.* Most of its 23 paragraphs and two Annexes are dedicated to constructing a procedure for resolving concerns or disagreements about technical barriers to trade informally, possibly with the assistance of a facilitator, and within the structure of existing WTO Committees, without having to use the formal *DSU* procedures, but without prejudice to rights and obligations under the *DSU*. *Id.* Annex B (entitled "Understanding on the Interpretation of the Agreement on Technical Barriers to Trade with respect to the Labeling of Textiles, Clothing, Footwear, and Travel Goods") sets out a draft decision on labeling in textiles, clothing, footwear, and travel goods. *Id.* Annex B, para. 4. For example, textile and clothing labeling requirements (as per paragraph 2:1 of Annex B) should be limited to country of origin, size, fiber content, and care instructions. *Id.* Annex B, para. 2.1. Footwear labeling requirements should be confined to country of origin, size, and predominant materials of core parts. *Id.* Annex B, para. 2.2. However, Members had not resolved all relevant issues. For instance, with respect to textiles, clothing, and footwear, Members were not in agreement as to country of origin and size. Also, what limits on labeling of travel goods (such as fiber or composition), other than country of origin, were not agreed. *See id.* Annex B, para. 2.3. Additional disciplines on labeling, if agreed, would include presumptions that certain rules are more trade restrictive than necessary (e.g., forbidding a label from being in multiple languages, requiring pre-approval of a label, prohibiting the use of brand names, mandating that a label be made of a certain material, or requiring a label to state that the product complies with applicable domestic rules). *See id.* Annex B, para. 6, and rules about notification, comment, and publication of labeling requirements, including in urgent circumstances involving protection of the environment, health, safety, or national security. *See id.* Annex B, paras. 7–8. An Annex to Annex B lists the products that are subject to the Understanding, namely, textiles, clothing and footwear in the Harmonized Commodity Description

was two-fold. First, WTO Members would be encouraged to refer to international standards in respect of technical barriers. Where such standards exist, they would be discouraged from deviating from them. Second, Members would embrace proposals to reduce or eliminate NTBs in specific sectors, such as the five mentioned above. By no means had the Members achieved consensus, though.¹⁸⁹

First, on the first facet of the proposed deal, they could not agree on whether international standards should be mentioned *expressis verbis* (in express terms) in the WTO *Agreement on Technical Barriers to Trade* (as, for example, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* does with respect to various IP conventions).¹⁹⁰ Indeed, the Members could not even reach consensus on whether there should be a horizontal agreement on NTBs that covers all sectors, or whether there should be separate accords for specific sectors.¹⁹¹ Second, on the second facet of the proposed deal, there were “large divergences” among them on how to deal with technical barriers to trade (TBTs) affecting remanufactured goods.¹⁹² Third, in respect of both parts of the deal, Members had not begun work on drafting an agreement on conformity assessment (i.e., laboratory and other testing procedures), which can itself be a TBT.¹⁹³

and Coding System (HS) Chapters 50–65, and certain travel goods in Chapters 42 and 96. *See id.* Annex to Annex B. Annex C (entitled “Transparency”) contained language on transparency issues (e.g., publication and regulatory agendas in Part 1, notice and comments in Parts 3–4, a repository of technical regulations and conformity assessment procedures in Part 5, implementation in Part 6, urgent problems in Part 7, good regulatory practice in Part 10, and technical assistance and S&D treatment in Parts 11–12) relating to TBT. However, Members could not agree on several transparency-related questions, including: (1) the role, if any, of non-governmental stakeholders in contributing to the identification and elimination of TBTs, (2) the nature and scope of information a Member must provide when drafting a TBT measure, and (3) the rights and obligations between Members that use WTO languages and those that do not. *See id.* para. 4(iv); *id.* Annex C.

¹⁸⁹ The Chairman set forth his thoughts on a NTB package in a rather bizarre graphic involving a jigsaw puzzle in Annex D (entitled “Structure of the NTB Package”) to the April 2011 NAMA Document. The picture of a puzzle only served to underscore the complexities of the Doha Round NAMA talks. *See id.* Annex D.

¹⁹⁰ *See id.* para. 4(v) (“Whilst the idea of further promoting the use of relevant international standards is welcomed, a certain number of Members are opposed to the idea that the TBT Agreement should mention *expressis verbis* standard setting bodies.”).

¹⁹¹ *See id.* para. 5 (“Members will have to decide *inter alia* whether (1) there will be a specific horizontal decision on these issues in all sectors; or (2) only for sectors that have been introduced in the NTB negotiations; or (3) parallel identical provisions on these issues for the sectors under examination.”).

¹⁹² *Id.* para. 3.

¹⁹³ *See id.* para. 4(vi) (stating that work on drafting conformity assessments needs to occur).

D. Non-Agricultural Environmental Goods

Finally, the December 2008 Draft NAMA Modalities Text indicates that all Members agreed that the WTO Committee on Trade and Environment in Special Session should work toward an understanding on the reduction, if not outright elimination, of tariffs and NTBs on non-agricultural environmental goods.¹⁹⁴ The goals are laudable enough, as the April 2011 Trade and Environment Document explained:

Members agree that a successful outcome of the negotiations under Paragraph 31(iii) [i.e., Paragraph 31(3) of the DDA] should deliver a triple-win in terms of trade, environment and development for WTO Members. First, the negotiations can benefit the environment by improving countries' ability to obtain high quality environmental goods at low cost or by enhancing the ability to increase production, exports and trade in environmentally beneficial products. This can directly improve the quality of life for citizens in all countries by providing a cleaner environment and better access to safe water, sanitation or clean energy.

The liberalization of trade in environmental goods and services can be beneficial for development by assisting developing countries in obtaining the tools needed to address key environmental priorities as part of their ongoing development strategies. Finally, trade wins because these products become less costly and efficient producers of such technologies can find new markets. In addition, liberalizing trade in environmental goods will encourage the use of environmental technologies, which can in turn stimulate innovation and technology transfer.¹⁹⁵

There is even a reasonably clear link between these goals and combatting poverty and terrorism: enhancements in the environmental quality in which poor people find themselves represent tangible gains, which in turn may impress upon them a sense that they can benefit from trade liberalization. Seeing such progress, they develop hope in the world trading system, and their hope in the world trading system can supplant vulnerability to extremist ideologies. Unfortunately, these goals, and the December 2008 agreement language, are little else than a repetition of Article 31:3 of the DDA, which called for negotiations on environmental goods and services.

Likewise, the agreement in the December 2008 Text that Members seek greater coherence between GATT-WTO rules and multilateral agreements on the environment (MEAs) simply repeats the obligation they set for themselves when they launched the Doha Round. After all, Article 31:1 of

¹⁹⁴ Compare December 2008 Draft NAMA Modalities Text, *supra* note 1, para. 31, with July 2008 Draft NAMA Modalities Text, *supra* note 8, para. 31.

¹⁹⁵ Special Session of the Committee on Trade and Environment, *Report by the Chairman to the Trade Negotiations Committee*, TN/TE/20 (April 21, 2011), paras. 13–14 [hereinafter *Report by the Chairman to the TNC*].

the DDA called for an examination of the relationship between those trade rules and MEAs,¹⁹⁶ and Article 31:2 urged greater collaboration between the WTO and MEA Secretariats.¹⁹⁷

Certainly, a more open market for environmental goods and services would bolster the ability of an importing country to obtain high-quality items to help it deal with air pollution, renewable energy, waste management, water, and wastewater treatment.¹⁹⁸ Developing countries were keenly interested in technology transfer and S&D treatment in respect of these goods and services. The topic took on particular poignancy as discussions about climate change continued amidst a new, more flexible approach signaled by President Barack H. Obama than had been taken by his predecessor. Frustrated by the lack of progress under WTO auspices on liberalizing trade in environmental goods and services, some American politicians and business groups advocated removal of the topic from the Doha Round agenda.¹⁹⁹ They wanted fast action, namely, an FTA on “green” goods and services akin to the 1997 ITA. They pointed out that developing countries like China and India maintain the highest tariffs and NTBs to such goods and services, and that if these obstacles were removed, considerable progress could be made on reducing greenhouse gas emissions that cause global warming. There would be a larger volume of trade, at cheaper prices, in environmental goods and services, thus more firms and individuals would have access to them.

But, advocates for breaking off this topic from the DDA met with two arguments. First, doing so would imperil further the Round. Having removed the promising topics, what would be left in the Round would be the hardest issues. Second, doing so would help American businesses, which have an international competitive advantage in goods like wind turbines, smart meters used to make electricity grids more efficient, and replacement parts for extant power plants. In other words, dominant multinational companies like General Electric were motivated by market access that

¹⁹⁶ MARKUS KNIGGE, REPORT ON TRADE AND MULTILATERAL ENVIRONMENTAL AGREEMENTS 4 (2005), available at http://ecologic.eu/download/projekte/1800-1849/1800/3_1800_cate_meas.pdf.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Briefing Notes: Trade and Environment*, WTO, http://www.wto.org/english/tratop_e/dda_e/status_e/envir_e.htm (last visited Feb. 12, 2012). These Notes were posted in connection with the Seventh Ministerial Conference held in Geneva from November 30–December 2, 2009.

¹⁹⁹ See Amy Tsui, *Environmental Goods, Services Agreement Critical to Green Exports*, *DOC Official Says*, 26 INT'L TRADE REP. (BNA) 1382 (Oct. 15, 2009) (discussing General Electric and others' favorable stance on removing tariff and non-tariff barriers on environmental goods and services); Doug Palmer, *Remove Environmental Goods Talks from Doha: U.S. Groups*, REUTERS (Aug. 4, 2009), <http://www.reuters.com/article/2009/08/04/us-usa-trade-environment-idUSTRE5725Z520090804>.

would benefit them, particularly because they feared a loss of their competitive advantage.²⁰⁰

Not surprisingly, therefore, the WTO Secretariat announcement in January 2011 that Members were ready “to move forward on environmental negotiations” was more bluster than substance.²⁰¹ The Members were prepared to discuss the three aforementioned issues:

- (1) relationship between GATT–WTO rules and MEAs;
- (2) cooperation among Secretariats of relevant international organizations, including the WTO and MEA entities; and
- (3) trade liberalization, i.e., the elimination of tariffs and NTBs, in environmental goods and services.

But, all they did was identify options. They laid out no clear road map for a consensus.

The first topic involved issues such as national coordination, technical assistance, capacity building, and special trade obligations (STOs) set out in MEAs. In connection with the second topic, the EU asserted that MEAs already at work in the WTO should be given official status in the WTO as observers. On the third topic, Members could not agree on how to define an “environmental good.” They talked about tariff cuts on roughly 400 products, in categories such as air pollution control, environmental technologies (including carbon capture and control), renewable energy, waste management, and water treatment. But, should “environmental goods” be defined by using the approach of a list, a project, or the classic GATT request-offer? What about technical assistance and capacity building to facilitate the acquisition of environmental technologies by poor countries, and S&D treatment for them? Liberalizing trade in environmental services hardly was simpler than goods. It, too, involved the same kinds of issues.

Despite its rhetoric to the contrary, the April 2011 Trade and Environment Document showed WTO Members had little substantive progress on these three issues since the issuance of the December 2008 NAMA Text. Indeed, as to the first two issues, they made no progress at all. The Document contained an Annex (namely, Annex I), with an introductory comment

²⁰⁰ As of October 2009, among the 30 leading companies in international trade in environmental goods and services, only 6 were American. *See* Tsui, *supra* note 199 (discussing General Electric’s managing director Timothy Richard’s view that the United States should “be negotiating an international agreement that removes tariff and nontariff barriers for environmental goods and services.”).

²⁰¹ *Members Ready to Move Forward on Environment Negotiations*, WTO (Jan. 10 & 14, 2011), http://www.wto.org/english/news_e/news11_e/envir_10jan11_e.htm.

and draft ministerial decision on trade and the environment. The proposed comment and decision were largely a summary of bland discussions among Members: the importance of national-level coordination of STOs in MEAs should be highlighted;²⁰² information exchange is important;²⁰³ a textual formulation to facilitate appropriate observer status had yet to be agreed;²⁰⁴ an outcome on technical assistance and capacity-building is needed;²⁰⁵ and perhaps a non-mandatory approach to the relationship between WTO rules and STOs in MEAs, in the context of dispute settlement, might be appropriate.²⁰⁶ On these and related topics, the Members had not taken the key step of making choices.

On the third issue, as to the definition of an “environmental good,” the April 2011 contained an Annex (specifically, Annexes II.A and II.B) that did nothing more than compile all merchandise, at the HS six-digit level, which various Members proposed should qualify as such a good.²⁰⁷ By its own admission, the compilation was a “work in progress” and a mere “starting point for discussion . . . towards a credible core list of environmental goods”²⁰⁸ Annex II covered six broad product categories:

- (1) Air pollution control.
- (2) Carbon capture and storage.
- (3) Environmental technologies.
- (4) Renewable energy.

²⁰² See *Report by the Chairman to the TNC*, *supra* note 195, Annex 1 (“Substantially all Members agree that an outcome should highlight the importance of *coordination at the national level* in the negotiation and implementation of STOs”); *id.* Annex I, pmb., para. 1 (encouraging members to coordinate domestically and internationally when negotiating or implementing WTO rules).

²⁰³ See *id.* at Annex I (discussing a need for coordination and the basic elements for information exchange for inclusion in a final outcome); *id.* pmb., paras. 1–2, 5(a)–(b) (discussing coordination and facilitating information exchange).

²⁰⁴ See *id.* Annex I (stating that Members have not agreed to a textual formulation that can facilitate appropriate MEA observer status); *id.* pmb., paras. 2–4 (stating that the document is not in final form and is not an agreed text).

²⁰⁵ See *id.* Annex I, para. 5(c)–(d) (discussing groups that would enhance existing technical assistance mechanisms for least-developed countries).

²⁰⁶ See *id.* Annex I; *id.* pmb., para. 5(e).

²⁰⁷ See *Report by the Chairman to the TNC*, *supra* note 195, Annex II.A (providing a reference universe of environmental goods); *id.* Annex II.B (sample core list of environmental goods by official HS 2002 descriptions).

²⁰⁸ *Id.* Annex II.A, para. 1; *id.* Annex II.B, para. 1.

- (5) Waste Management and Water Treatment.
- (6) Other.

Thus, by no means did the Members reach consensus on the proposals. In WTO-speak, the compilation was a “reference universe.”²⁰⁹ That “universe” did not expand to environmental services, which the Members—despite the DDA negotiating mandate—seemed to have all but forgotten.

Indeed, the Introductory Comment to Annex II shows how far apart the Members were after a decade of negotiations:

According to a submission presented [by Mexico and Chile on March 11, 2011] during the recent intensification of negotiations, there would be two lists, one for developed and one for developing country Members with both being self-selected from the reference universe and subject to an agreed *alpha* minimum number of tariff lines for developed country Members and a *beta* minimum number of tariff lines for developing country Members, with *alpha* being greater in number than *beta*.

The idea of developing two lists had been put forward by two proposals in the past. In one of these proposals [from the U.S., in July 2003], there would be a *core list* of environment products that could deliver an ambitious and significant outcome. In addition, there will be a *complementary list* on which consensus could not be reached from which Members would have to self-select a certain *x* per cent of tariff lines.

According to another proposal [from China, in July 2004], there would be a *common list* for all Members, which comprises specific product lines that constitute environmental goods. The second list would be a *development list* which could comprise products selected from the common list by developing countries for exemption or a lower level of tariff treatment

In an effort to combine the various elements of all proposals on the table, the *hybrid* approach includes the following components: (i) an agreed core list which would comprise a targeted set of environmental goods on which all Members would take commitments; (ii) a complementary self-selected list: developed countries would individually select a number of environmental products for tariff elimination and developing countries are encouraged to participate; (iii) as a complement to the common core list and complementary lists, products would be identified through a request/offer process, the outcome of which would be multilateralized in accordance with the MFN principle; and (iv) environmental projects could be used to identify lines for inclusion in the common core list, the complementary

²⁰⁹ *Id.* paras. 7–9; *id.* Annex II, para. 2.

self-selected list or the request-offer list or by unilateral liberalization if used in environmental projects.²¹⁰

Worse yet, the Members failed to agree on a methodology to discipline, and on the disciplines for, tariffs on the goods in this universe.

Some WTO Members (such as Argentina and Brazil) called for application of the old-fashioned request-offer approach, whereby an interested country would seek a tariff concession on a good it deemed “environmental” with an importing country.²¹¹ Trade liberalization, as well as the identification of what articles qualified as “environmental, then would occur only on a product-by-product basis. Other Members sought a more ambitious approach, calling for a reduction of tariffs to zero. Still other Members advocated a zero-for-X strategy, i.e., duty-free treatment on some environmental goods in exchange for a certain minimum cut of X on other goods. And, there were Members who proposed a formula that would cut tariffs by fifty percent quickly, followed by an eventual elimination of all tariffs.²¹²

Regrettably, the Members could not reach even a “standstill agreement.” In July 2011, the U.S. proposed all Members pledge to freeze their applied duty rates on 155 “green” tariff lines.²¹³ Brazil and India balked at the proposal, arguing they and other developing countries would be most affected. Why? Because developed countries already apply tariff rates up at their bound levels. Hence, while rich countries cannot raise their green tariffs anymore, poor countries would be unable to do so. In effect, their applied rates would become their *de facto* bound rates. Developing countries countered with a proposal for a standstill agreement on twenty-five green tariff lines. Here, the U.S. balked, arguing the number of lines was too low to give the proposal credibility.

Likewise, there was no consensus among Members on reducing NTBs on environmental goods, nor on S&D treatment (e.g., in the form of flexibilities from tariff cuts) for poor countries.²¹⁴ The juxtaposition of the lofty goals of trade liberalization in environmental goods, along with their link to poverty and extremism, on the one hand, and lack of progress in this area of the Doha Round, on the other hand, illustrates well how the Round betrayed its original purposes as time passed. However “environmental goods” may be defined, it is axiomatic that this universe is smaller than that of all industrial products (and for that matter, agricultural goods). To have

²¹⁰ *Id.* Annex II, paras. 4–6 (footnotes omitted). For the identification of countries associated with various proposals, see *id.* Annex II, nn.5–6, 9.

²¹¹ *Id.* Annex II, para. 3.

²¹² See Report by the Chairman to the TNC, *supra* note 195, para. 17.

²¹³ See Daniel Pruzin, *Hopes Fading for WTO “Deliverables” Deal as Delegations Take Hard Line on LDC-Plus*, 28 INT'L TRADE REP. (BNA) 1164 (July 14, 2011).

²¹⁴ See Report by the Chairman to the TNC, *supra* note 195, para. 18.

achieved next-to-nothing in a decade in a smaller-scale universe—a decade in which the science of climate change advanced considerably to emphasize a commonality of interests among all countries—is nothing short of scandalous.

V. EXPORT TAXES

One of the NAMA topics pitting the EU and U.S. against China, and indeed many developing countries led by Argentina, is export taxes. While the American Constitution bars such levies, many relatively poorer countries apply them, including not only China and Argentina, but also India and Ukraine. Non-WTO Members, principally Russia (which has export taxes on 450 products, many of which are primary inputs to make steel), also impose these measures.²¹⁵

Developed countries complain that taxing exports unfairly constricts the global supply of important raw materials and inputs. That constriction drives up the prices of these raw materials and inputs, and thus ultimately the cost of finished manufactured products made in their countries. As an example, the export price (in September 2008) from China of coking coal, which is an input into steel, is \$680–\$730 per metric ton.²¹⁶ But, because of a forty percent export tax on coke, the Chinese domestic price of this input is just \$395 per metric ton.²¹⁷ Conversely, Argentina and the developing countries insist export taxes are not covered by the DDA mandate. Moreover, they aver that such taxes are necessary to assure their industries of a steady, low-cost source of raw materials and inputs. Of course, that low cost, such as the difference in the Chinese export and domestic coke prices, is precisely what the EU and U.S. say is an unfair competitive advantage for Chinese producers of finished goods like steel.

Until 2006, the EU position in the Doha Round was that export taxes should be banned.²¹⁸ In that year, it softened its approach, saying Members should agree to maximum permissible export tax rates.²¹⁹ Since then, and particularly with the global economic crisis, the EU observed that the number and range of export tax measures has proliferated among supplier countries of key raw materials and inputs.²²⁰ On some taxed items, there was even a global shortage, yet a surfeit in the domestic taxing country. The

²¹⁵ Daniel Pruzin, *EU, in New Turnaround on NAMA Issue of Export Taxes, Insists Proposal Still in Play*, 26 INT'L TRADE REP. (BNA) 308 (Mar. 5, 2009) [hereinafter Pruzin, *EU, in New Turnaround*].

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

EU suggested in July 2008 that it might drop its proposal, if consensus was reached on NAMA modalities—a condition that was not fulfilled.²²¹ Thus, the EU was thoroughly displeased by the deletion in the December 2008 NAMA Text of its modified proposal. Predictably, China, India, Argentina, and other Members stayed on the side of the line they had drawn, insisting the EU drop its proposal.

VI. DITHERING ON SERVICES TRADE LIBERALIZATION

A. *Goal*

Doha Round services negotiations actually predate the Round. They were part of the built-in agenda left from the Uruguay Round, and they took place in the 1990s and 2000.²²² At the November 2001 Doha Ministerial Conference, they were incorporated into the single undertaking scheme of the Round. The basic goal of service talks is to improve and clarify rules and regulations on services trade, with a view to opening services markets while at the same time giving poor countries flexibilities. After all, services account for over two-thirds of global Gross Domestic Product (GDP) and for over fifty percent of employment in developed countries.²²³ In turn, there is a link to fighting poverty and thereby Islamist extremism.

Poor people typically suffer from a dearth of services. For instance, they lack suppliers of reliable, high-quality, and affordable educational, energy, health care, legal, water treatment, and waste management services. Indeed, the dearth of such services, which developed country denizens take for granted in their daily lives, is a hallmark of poverty. In turn, living without them contributes to a sense of oppression, a mentality that only a privileged urban elite has access to such services. Yet, such access is indispensable to economic advancement of oneself and one's family. How, for example, can a poor child do homework if there is no local school by day to assign it, and no electricity for lighting by night to see it?

To be sure, if such services are provided only by foreign suppliers, the sense of oppression can be one of neo-colonialism, i.e., that locals are dependent on major powers like the U.S. for their essential services. Deprivation of services, and attendant feelings of oppression, cannot be discounted as contributory factors for disenchantment with the global economic order in general, and world trading system in particular—and, in turn, to vul-

²²¹ Pruzin, *EU, in New Turnaround*, *supra* note 215.

²²² *Understanding the WTO: The Uruguay Round*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Feb. 12, 2012).

²²³ Rick Mitchell, *Doha Conclusion Unlikely to Ease Barriers to Trade in Legal Services*, 28 INT'L TRADE REP. (BNA) 729 (May 5, 2011); KIRK, *supra* note 123.

nerability to radical doctrines calling for violent action against this *status quo*.

There is no mystery as to the points to address if providing services to poor people is the goal during multilateral trade negotiations. There are four key facets to Doha Round services talks:²²⁴

- (1) Market access, i.e., enhancing it.
- (2) Domestic regulation, e.g., ensuring it is reasonable and not a protectionist barrier that keeps foreign suppliers from providing relevant services.
- (3) Rules, specifically, drafting provisions for the General Agreement on Trade in Services (GATS) on safeguards, subsidies, and government procurement, all of which were left over from the Uruguay Round.
- (4) S&D treatment, especially for least developed countries, to ensure they receive key services, but are not re-colonized by developed country service providers.

Following a decade of negotiations, the sobering reality is that WTO Members were far away from a deal to reach that goal. As the April 2011 Services Document put it with respect to each of the four facets:

While Members have intensified their engagement in the negotiations as of January 2011, *gaps remain*. Limited progress has been achieved in the *market access* negotiations since July 2008. On *domestic regulation*, recent intensification of negotiations has produced notable progress, even if *disagreement persists on important and basic issues*. On *GATS rules*, while technical work continues, there *does not seem to be any convergence* regarding the expected outcome in any of the three negotiating subjects (safeguards, government procurement and subsidies). On the implementation of *LDC modalities*, while Members support a waiver permitting preferential treatment to LDCs, *disagreements continue*, mainly regarding the scope of the waiver, and rules of origin for services and service suppliers.²²⁵

The collective failure to reach a services deal surely was not because of a want of impediments to services trade needing removal.

²²⁴ April 2011 Services Document, *supra* note 3, para. 1.

²²⁵ April 2011 Services Document, *supra* note 3, para. 2 (emphasis added).

To the contrary, stories of services trade barriers are legion.²²⁶ For instance, in express delivery services (which of the four Modes of service supply may be provided via Mode III, foreign direct investment (FDI)), Brazil imposes a flat sixty percent levy on all merchandise shipped using those services and so-called “simplified customs clearance process.”²²⁷ As another example, consider India and FDI in the retailing sector. For most of its post-1947 Independence history, India closed its retail sector to overseas firms. Only in 2006 did India begin to permit FDI in retail stores, but restricted the opening to single-brand stores.²²⁸ Thus, because of Indian measures restricting ownership and sales, a multi-brand store like Wal-Mart can function only as a wholesaler to small “mom-and-pop” stores. In Argentina, zoning rules hamper efforts of big-box stores like Wal-Mart to enter the country. As still another instance, trade liberalization in services that rely on information technology, like media and telecommunications, is distorted by national security and privacy claims of some governments (notably China in respect of the former), or outright protectionism (as is the case of Brazil, which imposes high mobile termination rates).

Legal services are another example where substantial barriers exist, and there is a link between these barriers and FDI.²²⁹ Multinational companies typically prefer lawyers from their home country to be available to them in the host countries in which they operate. For instance, an American corporation doing business in Brazil would prefer to seek legal representation from the Brazilian office of an American firm than from a local Brazilian firm. But, while Brazil allows foreign law firms to open offices in its country, it does not allow a foreign lawyer to practice in them.²³⁰ Thus, the “American” law firm office in Brazil must be staffed only with Brazilian lawyers. (To be sure, titles like “Foreign Legal Consultant” sometimes work to get around these kinds of strictures.) Similarly, full admission to the bar of many EU countries is possible only if the lawyer is a citizen of an EU country.²³¹ China forbids foreign firms from practicing Chinese law, thus such firms cannot hire a Chinese-qualified lawyer to give advice on local law.²³² Moreover, China prohibits foreign lawyers from representing a client before the Chinese government, and even from accompanying local counsel

²²⁶ See, e.g., Len Bracken, *Atkinson Sees Many Barriers to Trade in Services, Explains Virtual Embassies Idea*, 27 INT'L TRADE REP. (BNA) 1471 (Sept. 30, 2010) (chronicling the Indian, Argentine and information technology cases noted above).

²²⁷ Brightbill, *supra* note 123. Recounting statistics presented in KIRK, *supra* note 123.

²²⁸ *Id.* (recounting statistics presented in KIRK, *supra* note 123).

²²⁹ Mitchell, *supra* note 223.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

to a regulatory proceeding.²³³ Notably, the U.S. permits Chinese lawyers to appear before the Department of Commerce and International Trade Commission (though such appearances are rare).

Through such barriers, governments playing host to FDI ensure foreign companies hire only local firms and lawyers, i.e., they protect their local bars at least to some degree. In so doing, they discourage FDI. In turn, reduced FDI flows may mean a reduction or denial of certain services to poor people—if, indeed, the foreign company at issue would have catered to lower-income groups, or would have catalyzed competition from local companies to do so.

Ideally, services negotiations would lead to the elimination of these barriers. They do not. Each WTO Member has the right to decide what sectors to open, which to keep closed, the degree of opening (if any), and whether to impose limits on national treatment, restrictions on foreign ownership of local service providers, or other domestic regulations (such as qualification requirements, technical standards, and consumer health and safety rules). There is no legal obligation under GATS to privatize any service, nor does GATS outlaw government or private monopolies. Thus, the negotiations sometimes are said to be an “à la carte approach.”²³⁴ The better term is “positive list:” no sector is open unless affirmatively scheduled, in contrast to a “negative list,” whereby all sectors are open unless affirmatively stated otherwise.

Again, ideally, service sectors commitments would cover major areas such as air courier (express delivery), education, finance, medicine, telecommunications, and transportation, across all four ways in which services are traded across borders, including Mode IV, the temporary migration of professionals.²³⁵ Developed countries are keen to obtain more market access in energy, express delivery, financial, and telecom services. Some developing countries are eager to see greater opportunities for their medical and professional service and tourism service providers, and seek liberalization from developed countries on Mode IV.²³⁶

²³³ *Id.*

²³⁴ See *Briefing Notes: Services*, WTO, http://www.wto.org/english/tratop_e/dda_e/status_e/serv_e.htm (last visited Feb. 12, 2012). These Notes were posted in connection with the Seventh Ministerial Conference held in Geneva from November 30–December 2, 2009.

²³⁵ See General Agreement on Trade in Services art. 1.2(d), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 233 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

²³⁶ *Briefing Notes: Services*, *supra* note 234.

B. *Modalities*

Service trade liberalization negotiations occur through a request-offer approach. A WTO Member transmits a request to another or other Members stating what market access opportunities it seeks. The recipient Member or Members then reply by presenting an initial offer. Then, the bargaining begins over the degree of market access that might be granted, and any reciprocal requests in exchange for such access. Note, then, that the request-offer approach may be conducted on a bilateral or plurilateral basis.²³⁷ This approach is cumbersome, and encourages clever negotiators to wait until the anticipated end of talks in order to extract the best possible deal from another or other Members. They can do so by deliberately asking for large concessions and offer small ones in return, and stick to such positions for a protracted period.

Following a “signaling” or “pledging” conference on July 26, 2008, which focused on possible new market access offers, there was no movement in services negotiations, though the Chairman of the Services Negotiations, Ambassador Fernando de Mateo, held occasional informal meetings.²³⁸ The conference revealed a schism in perception, if not reality. On the one side, the U.S. insisted major emerging markets open up more service sectors than they had put on the negotiating table. On the other side, Brazil said its offer would open up 31 new sub-sectors to foreign providers (while asking developed countries to liberalize only a handful of sub-sectors), China claimed to offer 11 additional sub-sectors (covering over 100 sub-sub-sectors), and India asserted it had added 58 sub-sectors to its offer list.²³⁹ Members felt that any final offers on market access for services would have to await (1) a breakthrough in agriculture and NAMA negotiations, and (2) completion of talks on commitments about domestic regulation of services providers under GATS Article VI.

In September 2010, the WTO Director-General, Pascal Lamy, dubbed the request-and-offer method “medieval,” and called for use of a formula approach, as used in agriculture and NAMA talks.²⁴⁰ But, whether a formula methodology for services talks is better than a request-offer is unclear. In the farm and NAMA talks, the formula approach is plagued by the complexities of the formula and exceptions to it, and it is not as transparent as heralded. A further complicating factor in services talks is that many of the services traded across borders did not exist, or were early stages of development, when the Round was launched in November 2001. Examples

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See Pruzin, *Key Emerging Nations*, *supra* note 20.

²⁴⁰ Len Bracken, Lamy, *Kirk Offer Views on Doha Round Negotiations at Global Services Summit*, 27 INT'L TRADE REP. (BNA) 1470 (Sept. 30, 2010).

include cloud computing, social networking, and voice-over-internet-protocol. Consequently, as the U.S. pointed out in September 2010, WTO Members cannot expect to conclude a services trade deal based on decade-old data.²⁴¹

In October 2010, Australia sought to advance the service talks through a “clusters” approach.²⁴² Proposed concessions could be offered and swapped not in individual sectors, but in related clusters. Australia proposed a transportation cluster embracing logistics/supply chains, which would cover normal and express delivery, inventory, and transit. Backing the clusters approach, the U.S. called for liberalizing services trade in an information technology cluster that included computer consulting and telecommunications.²⁴³ Yet, by year-end December 2010, the proposal failed to gain traction among the Members.

C. *Schism*

As the global economic recession deepened in late 2008 and early and mid-2009, many WTO Members were reluctant to liberalize their service sectors, just as they were with respect to their agriculture and industrial sectors. China and India contemplated withdrawing pledges they had made in July 2008 to liberalize banking and asset management. Some Members inferred from the 1997–99 Asian financial crisis that liberalization of services trade pursuant to GATS would render them even more vulnerable to banking problems.²⁴⁴ Supporting their argument was the non-governmental organization (NGO) Public Citizen.²⁴⁵ Its Global Trade Watch Section pointed to specific provisions in GATS that were problematic.²⁴⁶

- GATS Article VI(c) and (e) prevents a Member from establishing a new regulation that would roll-back any previous trade-liberalizing commitment that Member had made, and limits the ability of the Member to oversee its financial services sector.²⁴⁷
- GATS Article XVI bars a Member from restricting the size of a banking, insurance, or other financial service firm.²⁴⁸

²⁴¹ *Id.*

²⁴² Pruzin, *Recent Doha Efforts Yield Mixed Results*, *supra* note 108.

²⁴³ Pruzin, *U.S. Envoy Hears Positive Tone*, *supra* note 70.

²⁴⁴ See Daniel Pruzin, *Services Talks Turn Focus Away from Doha; WTO Members Seek Analyses of 20 Sectors*, 26 INT’L TRADE REP. (BNA) 506 (Apr. 16, 2009) [hereinafter Pruzin, *Services Talks*].

²⁴⁵ See generally PUBLIC CITIZEN, <http://www.citizen.org/trade> (last visited Feb. 12, 2012).

²⁴⁶ See Pruzin, *Services Talks*, *supra* note 244.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

- GATS Article XVI(c) and (e) forbids a Member from setting up a fire-wall in banking and insurance firms that prevent those firms from using deposits for risky investments.²⁴⁹
- Any domestic services regulations under GATS are subject to challenge before a WTO adjudicatory panel or the Appellate Body, which are required to rule against them if they are more trade restrictive than necessary—a determination that ultimately is subjective.²⁵⁰
- GATS (along with the 1997 *Telecommunications and Information Technology Agreements*) restricts the ability of a Member to implement new licensing or qualification standards, even though addressing the global economic recession may require heightened standards.²⁵¹

However, other Members said liberalization was not a root cause of either the earlier Asian crisis or the contemporary global economic slump. They urged the correct lesson from the Asian crisis was to liberalize, but to strengthen domestic regulation first or simultaneously. Further, several Members felt the multi-billion dollar banking bailouts of American and European banks amounted to an unfair subsidy, hence services liberalization would favor those banks.²⁵²

Not surprisingly, in February 2010, the WTO Secretariat issued a paper exonerating the GATS from any blame in exacerbating the world financial meltdown that had commenced in 2008.²⁵³ Rather than services trade liberalization, such as granting market access and national treatment, the root causes of the crisis were:

- (1) excesses in monetary policy,
- (2) bubbles in real estate markets,
- (3) loopholes in regulation (e.g., inadequate capital and liquidity regulation, regulatory arbitrage, and unregulated service providers), and

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See Daniel Pruzin, *WTO Services Chair Fixes Dates for Next Round of Market Access Talks*, 26 INT'L TRADE REP. (BNA) 206 (Feb. 12, 2009); Daniel Pruzin, *Doha Negotiating Chairs Easing into New Talks in Bid to Save Round*, 26 INT'L TRADE REP. (BNA) 145 (Jan. 29, 2009).

²⁵³ Daniel Pruzin, *WTO Report Absolves Services Pact from Exacerbating Global Financial Crisis*, 27 INT'L TRADE REP. (BNA) 214 (Feb. 18, 2010).

- (4) idiosyncrasies in financial services (e.g., absence of due diligence, excessive leverage, lowering of lending standards, relentless search for yields).²⁵⁴

The Secretariat paper, however, conceded that a large exposure to foreign financial institutions and markets could exacerbate the transmission of shocks across a border, even if the shocks themselves were not caused by that exposure.²⁵⁵

The Secretariat paper also conceded governmental responses to the shocks to prop up financial institutions, such as bailouts, bank debt guarantees, limits on the size of financial institutions (particularly to avoid any one becoming “too big to fail”), and retail deposit insurance mechanisms, if promulgated in an uncoordinated way, can affect the evenness of the international playing field on which those institutions compete, leading to cross-border arbitrage and affecting financial flows.²⁵⁶ Fortunately, the paper concluded, in 2008–2009, WTO Members eschewed trade restrictions on financial services providers, such as incorporation requirements or foreign equity caps.²⁵⁷ The paper hastened to add GATS does not inhibit Members from taking efforts to strengthen financial regulation²⁵⁸—a debatable point, because its truth depends on the substantive content of those efforts in relation to GATS obligations. In the event of an inconsistency, a Member would have to invoke the prudential regulation carve out in the GATS Annex.²⁵⁹

By April 2009, it was clear the schism between Members that embraced continued financial services liberalization and ones that were suspicious of it meant the Doha Round services negotiations were “likely to remain in a state of hibernation for some time to come.”²⁶⁰ The Members retreated from any substantive market access talks, and asked the WTO Secretariat to produce analyses of regulatory and policy issues in 20 services sec-

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ This carve out provides that notwithstanding any other provision of GATS, a WTO Member:

[S]hall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

GATS, Annex on Financial Services, *supra* note 235, para. 2(a).

²⁶⁰ Pruzin, *Services Talks*, *supra* note 244.

tors, including audiovisual, distribution, financial, legal, and telecommunications, plus the cross-border movement of professionals. The WTO last did such analyses in 1999.²⁶¹

To be sure, financial services were not the only contentious sector. For example, in March 2011, China asked the U.S. to offer commitments in its services schedule that would allow the People's Republic to launch American-built commercial satellites.²⁶² The U.S. refused, perhaps out of a well-founded concern China would steal valuable aerospace technology.

Notably, in November 2010, the UAE called for horizontal negotiations linking services trade liberalization with freer trade in goods markets.²⁶³ It proposed to open its professional services sectors (covering accountants, architects, consultants, designers, engineers, and lawyers).²⁶⁴ It would eliminate the equity limit of forty-nine percent ownership by foreign providers of these services in the Emirates outside of UAE free trade zones.²⁶⁵ That is, foreign providers would be able to own up to one hundred percent of a professional services firm located anywhere in the Emirates. They would not have to partner with an Emirati sponsor that holds at least a fifty-one percent stake in the venture and gets an annual fee. And, foreign providers would not be restricted to locating their firm in an Emirati free trade zone (e.g., Dubai Media City or Jebel Ali Free Zone) to have sole control—a major benefit, because each zone has its own requirements to qualify for one hundred percent ownership, such as minimum capitalization requirements, and rules on office and warehouse space, and typically has higher property rental rates than outside the zone.²⁶⁶ But, in exchange for this liberalization, the UAE said tariffs imposed by other countries on Emirati goods, particularly aluminum and petrochemical exports, would have to fall.

The UAE proposal was a good one. If implemented, the proposal would help the Emirates build a knowledge-based economy, and boost its efforts to diversify exports of goods. In these respects, the proposal was consistent with the key original purpose of the Round: helping Muslim countries. Regrettably, the proposal garnered little attention from developed countries.

²⁶¹ *See id.*

²⁶² Pruzin, *U.S. Fails*, *supra* note 111.

²⁶³ Toulia Murphy, *U.A.E. Open to Foreign Ownership of Companies if Import Tariffs Lowered*, 27 INT'L TRADE REP. (BNA) 1939 (Dec. 16, 2010) (quoting Luis V. Ople, WTO Senior Information Officer, "It seems that the U.A.E. is making an offer to liberalize professional services in the trade in services part of the Doha Round. In return, it wants other WTO members to lower customs tariffs on its exports.>").

²⁶⁴ *Id.*

²⁶⁵ *See id.*

²⁶⁶ *Id.*

D. New Obama Strategy

The Administration of Barack H. Obama developed a new services negotiating strategy, which it announced in October 2009.²⁶⁷ The Administration sought a services trade agreement under the auspices of the Asia-Pacific Economic Cooperation forum. The twenty-one APEC countries then could take their deal to the WTO, in the hopes it might be the basis for a Doha Round agreement.²⁶⁸ In turn, ideally, a services agreement would provide robust new market access opportunities for American services exporters that would balance concessions the U.S., EU, and other developed countries would make on market access for imported agricultural and industrial goods.

Such an agreement is critical for them. The services sector (as of 2008) accounts for seventy percent of the average GDP and employment among the members of the Organization for Economic Cooperation and Development (OECD) (which, of course, are generally developed countries), and eighty percent of U.S. GDP.²⁶⁹ Additionally, the Obama Administration did not reject out-of-hand proposals from the private sector to conclude a services agreement outside of the Round, as through bilateral or plurilateral deals with the EU and Japan, even if that meant certain prominent service-providing countries, like Brazil, China, and India, did not join.²⁷⁰ For the U.S., the key to a plurilateral deal in the Round would be inclusion not only of countries with major services markets, but also of important sectors, such as distribution and express delivery services, energy and environmental services, and information, communications, and technology services.²⁷¹

E. Still No Deal, Despite Extra Time on the Built-in Agenda

Alas, the Obama Administration strategy failed to produce a breakthrough. The April 2011 Services Document spoke of the failure of WTO Members to reach consensus on any of the four facets of services trade ne-

²⁶⁷ See Gary G. Yerkey, *U.S. Seeking Services Trade Agreement in APEC to Take to Broader WTO Membership*, 26 INT'L TRADE REP. (BNA) 1380 (Oct. 15, 2009) ("U.S. Trade Representative Ron Kirk said Oct. 13 that the United States is actively promoting the negotiation of an agreement to liberalize trade in services among the 21 economies of the Asia-Pacific Economic Cooperation (APEC) forum that could be brought to the World Trade Organization membership for its consideration.").

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See Gary G. Yerkey, *Negotiating Services Trade Pact Outside of WTO Not Feasible, Lamy Says*, 26 INT'L TRADE REP. (BNA) 1415 (Oct. 22, 2009).

²⁷¹ Gary G. Yerkey, *U.S. Looking into Possible Side Agreements on Trade in Services to Help Spur WTO Talks*, 26 INT'L TRADE REP. (BNA) 1605 (Nov. 26, 2009).

gotiations—market access, domestic regulation, rules, or S&D treatment.²⁷² On market access, the best the Members could muster was a summary of the stalemate in market access negotiations since July 2008.²⁷³ That summary covered the major sectors and sub-sectors: accounting, air transport, architecture and engineering, audiovisual, computer, construction, distribution, energy, environmental, financial, legal, logistics, maritime transport, postal and courier, private education, agriculture, telecommunications, and tourism.²⁷⁴ It also dealt with each of the four modes of supply: cross-border supply (I), consumption abroad (II), commercial presence (III), and temporary migration (IV).²⁷⁵ But, their summary made clear the Members had produced no deal, not even in draft form, whatsoever.

In respect of domestic regulation, despite “intensive drafting sessions” in which Members engaged, they could not produce a revision to the text the Chairman of the Working Party on Domestic Regulation had issued in March 2009 on a confidential basis.²⁷⁶ So, the April 2011 Services Document bore a cover note from that Chairman, and released the previously-secret text from 13 months earlier.²⁷⁷ The upshot was that:

[T]he various paragraphs of the draft disciplines could be said to be at different stages of progress. There were paragraphs where agreement had been reached on an *ad referendum* [i.e., for reference and further consideration for final approval] basis; paragraphs where there had been no agreement but language proposals reduced to a single alternative with brackets, in addition to the Chair’s March 2009 text; and paragraphs where there was limited progress and multiple alternatives and language options remain. In addition, the question of whether a normative standard in the form of a “necessity test” should be included into the disciplines remained unresolved.²⁷⁸

The best that could be said was Members agreed on an *ad referendum* basis on a few introductory points, definitions, some general provisions, transparency, certain licensing and qualification procedures and requirements (which must be followed to obtain authorization as a service supplier), and development.²⁷⁹ But, on each point, there was bracketed language contain-

²⁷² April 2011 Services Document, *supra* note 3, para. 2.

²⁷³ *Id.* paras. 5–6 (stating that there had been no progress since the 2010 stocktaking and very little, if any at all, since the July 2008 Signaling Conference).

²⁷⁴ *See generally id.*

²⁷⁵ *See generally id.*

²⁷⁶ *Id.* para. 74; Working Party on Domestic Regulation, *Chairman’s Progress Report: Disciplines on Domestic Regulation Pursuant to GATS Article VI:4*, para. 7, Annex I, S/WPDR/W/45 (Apr. 14, 2011) [hereinafter *Chairman’s Progress Report*].

²⁷⁷ *See Chairman’s Progress Report, supra* note 276, paras. 5, 15.

²⁷⁸ April 2011 Services Document, *supra* note 3, para. 75 (emphasis added).

²⁷⁹ *See Chairman’s Progress Report, supra* note 276, paras. 8.1, 9.

ing a possible alternative agreement.²⁸⁰ And, on some points—introductory ones, licensing and qualification, technical standards, and development—there were multiple alternatives set out in bracketed language.²⁸¹

The lack of progress signified that Members could not agree on proposals to elaborate on GATS Article VI:4. This provision essentially calls for disciplines on subjective, non-transparent, burdensome, or unnecessary barriers to services trade, or restrictions on services supplies, which take the form of domestic regulations:

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute *unnecessary barriers to trade in services*, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

- (a) based on *objective* and *transparent* criteria, such as competence and the ability to supply the service;
- (b) *not more burdensome than necessary* to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a *restriction on the supply of the service*.²⁸²

Domestic services regulations that affect the freedom of services trade include definitions of “authorization” for foreign providers to supply a service in an importing country, “necessity” tests for allowing imports of foreign services and ensuring that any regulatory criteria are not “unnecessary barriers to trade in services,”²⁸³ language requirements for foreign service providers, and mutual recognition agreements for foreign service providers.²⁸⁴ Setting disciplines to balance the interests of freer trade in services, on the one hand, with appropriate quantity and quality regulation of services, on the other hand, was part of agenda built into GATS—in Article VI:4—during the Uruguay Round. Consequently, Members had known of their obligation to deal with the matter, and to do so in a manner consistent with the interests of poor countries, since 15 December 1993, when negotiations in that Round ended.

Despite that knowledge, it seemed that Members incompetently balanced the interests of freer trade and appropriate regulation on some top-

²⁸⁰ April 2011 Services Document, *supra* note 3, para. 74; *Chairman’s Progress Report*, *supra* note 276, paras. 8.2, 10.

²⁸¹ April 2011 Services Document, *supra* note 3, para. 74; *Chairman’s Progress Report*, *supra* note 276, paras. 8.3, 11.

²⁸² GATS, *supra* note 235, art. VI:4 (emphasis added).

²⁸³ *See, e.g., Chairman’s Progress Report*, *supra* note 276, paras. 2, 4, 11bis, 12–14, 41.

²⁸⁴ *See id.* paras. 4, 12–14.

ics. Consider a proposed discipline on licensing and qualification procedures. They must be “as simple as possible,” and every Member must ensure they “do not in themselves constitute a restriction on the supply of services.”²⁸⁵ These words cannot mean literally what they say. Every licensing or qualification procedure, even as distinct from substantive licensing and qualification requirements, involves some complexity for a prospective licensee, and every such procedure *ipso facto* restricts supply. At face value, the words invite litigation.

On composing GATS rules for safeguards, subsidies, and government procurement, there was no agreement among Members on the need for any disciplines on these topics.²⁸⁶ The April 2011 Services Document conceded that:

The Working Party has continued to engage in focused discussions on all three GATS Rules subjects: emergency safeguard measures, subsidies, and government procurement in services. . . . Members have constructively engaged and further explored the issues at stake. Nevertheless, in each of the three areas, the respective proponents found it difficult to convince the broader Membership of the need to develop disciplines beyond those currently existing under the GATS. In all three areas, the problems, if any, that would need to be addressed by new disciplines, have not yet been sufficiently identified; neither have the benefits that would accrue from new or additional disciplines. As a result, discussions in the Working Party on GATS Rules have remained non-text-based, and essentially conceptual in nature.²⁸⁷

In particular, on an Emergency Safeguard Mechanism, the Members could not agree on the definition of a “domestic industry” that might receive protection, nor had they identified disaggregated data on services trade that might justify protection.²⁸⁸ On government procurement, they had merely talked about the importance of government procurement in services, the impact of the WTO Agreement on Government Procurement (GPA) on international markets, and the fact that GATS, but not GPA, commitments are scheduled based on Modes of supply.²⁸⁹ Regarding subsidies, following the mandate in GATS Article XV to exchange information, and a definition of “subsidy” proposed in 1996 for the purpose of this exchange, Members

²⁸⁵ See *id.* paras. 17, 31.

²⁸⁶ See April 2011 Services Document, *supra* note 3, paras. 80–81 (“[T]he proponents had found it difficult to convince the Membership of the need for new disciplines in any of the three areas.”).

²⁸⁷ Working Party on GATS Rules, *Report by the Chairperson of the Working Party on GATS Rules*, para. 1, Annex II, S/WPGR/21 (Apr. 14, 2011) [hereinafter *Report on GATS Rules*].

²⁸⁸ See *id.* paras. 3–4.

²⁸⁹ See *id.* para. 6.

agreed in February 2010 to submit the requisite information.²⁹⁰ Yet, by April 2011, only 44 Members had done so.²⁹¹ The U.S. and Switzerland opined on the need to avoid export subsidies, as they distort trade in services.²⁹² Chile, India, and Mexico proposed a roadmap for discussions on services subsidies, but were met with three competing objections: no time-lines should attach to any discussions; no negotiations with a view to disciplines should occur; and without more technical work, no negotiations at all on subsidies should take place.²⁹³

This lack of progress was shameful. These topics, too, were part of the built-in agenda from the Uruguay Round. Thus, again, the Members had had even more time to work on them than they had on novel Doha Round matters. Reading the details on these topics in the April 2011 Services Document, critics of international organizations could be forgiven for asking “What do they do all day, month after month, year after year?”

As for S&D treatment, Members could not agree on whether preferences for least developed countries should be covered by a waiver restricted to market access measures, or a waiver that goes beyond such measures.²⁹⁴ They also could not agree on whether greater clarity was needed on rules of origin for services and service suppliers, to identify whether they originate from a least developed country and, therefore, qualify for a preference. They could not even agree on the period in which developing countries would have to phase in disciplines on services trade, or on the obligations from which they might have an exemption: standing in the draft text were prominent “[X],” “[X through XX],” and “[X] [5 to 7] years” notations.²⁹⁵

Here again, the failure was shameful. The link (discussed earlier) between services trade, on the one hand, and improving the lives of hundreds of millions of poor people, on the other hand, is no secret, and little imagination is needed to make the follow on connection to alleviating oppression that breeds extremism. In other words, S&D treatment to enhance services exports from, and imports into, least developed countries would have been a positive contribution to counter-terrorism.

²⁹⁰ *See id.* para. 8.

²⁹¹ *Id.* para. 9.

²⁹² *Id.* para.10.

²⁹³ *Id.* para. 11.

²⁹⁴ April 2011 Services Document, *supra* note 3, para. 83.

²⁹⁵ *Chairman’s Progress Report*, *supra* note 276, paras. 42, 42(a)–(b) (including the sections, Chair’s March 2009 Text and Multiple Alternatives).

VII. IS CHINA HELPFUL?

A. *Seeking "Face"*

There is a plausible argument that "China is really a civilization masquerading as a nation-state."²⁹⁶ International trade negotiators ought never to forget the long-term prospects for China, which cannot possibly be as rosy and glamorous as rabid Sinophiles think. They should not forget that the 60-year monopoly on political power held by the CCP cannot persist in perpetuity. But, trade negotiators must deal with the reality of China, ruled as it is, as a nation state. They must, and typically do, perceive the world of trade negotiations through the lens of realism, or *realpolitik*.²⁹⁷ Nation-states come to the bargaining table to advance their self-interest, as they define it. Regardless of the precepts of Adam Smith and David Ricardo,²⁹⁸ if nation-states do not believe unconditional, unilateral trade liberalization will help them, then they will behave like mercantilists.

Perhaps that is why little attention has been given to evaluating China's performance in the Doha Round of multilateral trade negotiations. If most nation-states, most of the time, follow this pattern of behavior for the most part, then why single out China from among all the nation-states that are WTO Members, for scrutiny in terms of its behavior in the Round? Does China really matter any more than, say, Kenya?

One answer emerges from realism itself. China boasts, at virtually every opportunity and to whoever will listen, that it is a major force in the international arena, and has become a "responsible stakeholder" in the global community.²⁹⁹ No longer the insular, isolated Maoist Middle Kingdom,

²⁹⁶ See Daniel R. Fung, *The Rise of China: Political and Economic Implications*, 6 DEAN RUSK CTR.. OCCASIONAL PAPERS 39, 49 (2008) (discussing the views of famed Sinologist Professor Lucian Pye).

²⁹⁷ See generally KENNETH A. REINERT, AN INTRODUCTION TO INTERNATIONAL ECONOMICS: NEW PERSPECTIVES ON THE WORLD ECONOMY 57–74 (2012) (evaluating the approaches to the political economy of trade through a realist lens, which promotes national strength).

²⁹⁸ See Laura LaHaye, *Mercantilism*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc/Mercantilism.html> (last visited Feb. 19, 2012) (discussing Mercantilism and comparing the viewpoints of Adam Smith and David Ricardo).

²⁹⁹ While U.S. Deputy Secretary of State, Robert Zoellick coined this appellation in a speech he delivered in New York on Sept. 21, 2005. His remark was that the U.S. should "step up efforts to make China a responsible stakeholder in the international system." Xinhua, *Zoellick: 'Stakeholder' Concept Offers New Direction*, CHINADAILY (Jan. 25, 2006), http://www.chinadaily.com.cn/china/09usofficials/2009-05/22/content_7932826.htm. Thus, in the context of Doha Round talks, Chinese Foreign Ministry spokesman Liu Jianchao declared in December 2008 that "China will continue to play a constructive and active role as a responsible country, and work with all sides to promote the negotiations to achieve a comprehensive and balanced result on the basis of existing achievements." *Foreign Ministry: China To "Actively" Join Doha Round*, XINHUA (Dec. 4, 2008), http://news.xinhuanet.com/english/2008-12/04/content_10456987.htm. Moreover, China's Ambassador to the U.S.,

China is a modern, vibrant nation symbolized by its “Coming Out Party,” the Opening Ceremony of the Olympic Games on 8 August 2008.³⁰⁰ Seeking a “bigger seat at the table,” China puts itself in the highest echelon of nations, with the U.S. and EU, and at least one notch above Brazil and India.³⁰¹ After all, at least before world-wide economic recession struck, the OECD forecast China to be the largest exporter, and the fourth largest economy, in the world by 2010.³⁰²

China does more than demand the rest of the world accept its nationalistic self-promotion. China goes so far as to lecture western leaders about their global economic responsibilities. China castigates them for “inappropriate macroeconomic policies” and an “unsustainable model of development characterized by prolonged low savings and high consumption,” and attacks their financial institutions for the “blind pursuit of profit” and a “lack of self-discipline.”³⁰³

B. *Sobering Facts*

Concomitantly, China insists on its version of reality, no matter what the controversy—for instance, whether China is manipulating its currency to gain an unfair competitive trade advantage.³⁰⁴ It admonishes dark

Zhou Wenzhong, stated publicly his country’s process of reform, and policies of openness, will intensify amidst global economic recession, because of interdependence. China cannot sustain its growth if it closes itself to the world, nor can the world re-ignite its growth without China. See Amy Tsui, *Chinese Ambassador Says China Committed to Openness in Face of Economic Slowdown*, 26 INT’L TRADE REP. (BNA) 100 (Jan. 22, 2009).

³⁰⁰ Peter Walker, *Beijing Olympics Open with Spectacular Ceremony*, GUARDIAN (Aug. 8, 2008), <http://www.guardian.co.uk/sport/2008/aug/08/olympics2008.china1/print> (discussing the “Coming Out Party” for China at the 2008 Olympics).

³⁰¹ Kathleen E. McLaughlin, *World Economic Forum Speakers Suggest Financial Crisis Causing Global Power Shift*, 26 INT’L TRADE REP. (BNA) 1253 (Sept. 17, 2009).

³⁰² See Richard McGregor & Raphael Minder, *China to Lead Exports by 2010, Says OECD*, FIN. TIMES (Sept. 17, 2005), <http://www.ft.com/intl/cms/s/0/3ad8931a-2719-11da-b6fe-00000e2511c8.html#axzz1n3iQT68r>.

³⁰³ Andrew Edgecliffe-Johnson, Gillian Tett & John Thornhill, *Wen and Putin Lecture Western Leaders*, FIN. TIMES (Jan. 29, 2009), <http://www.ft.com/intl/cms/s/0/d0fac984-ed6e-11dd-bd60-0000779fd2ac.html#axzz1n3iQT68r> (quoting Chinese Premier Wen Jiabao at the January 2009 World Economic Forum in Davos, Switzerland).

³⁰⁴ See generally Raj Bhala, *Virtues, the Chinese Yuan, and the American Trade Empire*, 38 HONG KONG L. J. 183, 183–253 (May 2008) (discussing a legal and policy analysis of the value of the Yuan compared to the U.S. dollar); James Bacchus, *What a Trade War with China Would Look Like*, FORBES.COM (Feb. 2, 2009), http://www.forbes.com/2009/01/31/trade-wto-china-opinions-contributors_0202_james_bacchus.html (presenting a commentary on how China is manipulating its currency); Kathleen E. McLaughlin & Amy Tsui, *China’s Central Bank Slaps Back at Geithner’s Remarks on Currency*, 26 INT’L TRADE REP. (BNA) 157 (Jan. 29, 2009) (arguing the possible WTO implications, procedural steps and legal ramifications that can be taken if the Obama Administration decides to deem China a currency manipulator). See Geoff Dyer, *China Hits Back Over Renminbi Comments*, FIN. TIMES

protectionist forces not to launch a trade war (and to clean up their fiscal houses), often tossing in a reminder that it holds a vast amount of American treasury securities. Never mind the following sobering facts:³⁰⁵

- China's population will peak in 2030 at 1.5 billion, and then decline rapidly, causing a demographic burden unprecedented in human history, namely, an inverse pyramid in which one worker must support his or her own family, plus (at least) retired parents and four retired grandparents.³⁰⁶
- China has no pension or health care system.³⁰⁷
- About sixty-five to seventy percent of the Chinese still live in rural areas, and ten million migrate to cities—legally and illegally—every year, suggesting it still is in the midst of a transition from a labor surplus to modern industrial economy, as theorized by the Fei-Ranis model of economic development.³⁰⁸
- China needs to achieve an eight percent growth rate to produce enough new jobs to maintain order.³⁰⁹
- China needs to create twenty million new jobs every year simply to maintain its same level of unemployment, and indeed with the global economic crisis, by January 2009, twenty million internal migrant workers had lost their jobs because of closures or cutbacks at their factories, leading to concern about social instability.³¹⁰
- The Chinese domestic consumption market is just ten percent of that of the U.S.³¹¹
- China accounts for only five to six percent of global imports, which is just one-third the amount of the U.S.³¹²

(Jan. 24, 2009), <http://www.ft.com/intl/cms/s/0/75d83aca-e975-11dd-9535-0000779fd2ac.html#axzz1n3iQT68r> (presenting an account of Chinese and U.S. commentary on the issue of China's alleged currency manipulation).

³⁰⁵ Fung, *supra* note 296, at 39–53.

³⁰⁶ *Id.* at 43.

³⁰⁷ *Id.* at 44.

³⁰⁸ Fung, *supra* note 296, at 46. *See generally* RAJ BHALA, TRADE, DEVELOPMENT, AND SOCIAL JUSTICE 87–121 (2003) (providing an overview of the Fei-Ranis labor surplus model); Raj Bhala, *China's WTO Entry in Labour Surplus and Marxist Terms*, in CHINA AND THE WORLD TRADE SYSTEM: ENTERING THE NEW MILLENNIUM 115, 115–32 (Deborah Cass et al. eds., 2003) (discussing the Fei-Ranis model of economic development).

³⁰⁹ *See* Michael Wines, *China's Leader Says He Is 'Worried' Over U.S. Treasuries*, N.Y. TIMES (Mar. 14, 2009), www.nytimes.com/2009/03/14/business/worldbusiness/14china.html.

³¹⁰ *See* Kathleen E. McLaughlin, *China's Exports Down Dramatically Due to Financial Crisis; Government Warns of Unrest*, 26 INT'L TRADE REP. (BNA) 254 (Feb. 19, 2009).

³¹¹ Fung, *supra* note 296, at 44.

³¹² *Id.*

- China contributes only five to six percent of world income and output, far less than the roughly one-quarter provided by the U.S.³¹³

If, at China's behest, such facts are to be put to one side, then it is only logical to use more rigorous metrics for assessing Chinese performance in international trade negotiations than it does for Kenya. "You, China, want to be treated like a grown up? Then here are the standards by which grownups are judged." That is the rational discourse in which to engage China.

C. *A Global Problem Solver?*

The U.S. and EU receive their fair share (maybe more) of criticism for taking their self-interests too seriously in the Doha Round, and in most other international negotiations.³¹⁴ Indisputably, they are global players, and they are faulted for not acting as such. For China, the question ought to be commensurate with China's self-proclamations: "Are you behaving in the Round like the global player you claim to be?"³¹⁵

Global players think globally. Translated into metrics, global players: (1) offer comprehensive solutions to complex trade problems; (2) appreciate the linkages among trade problems; and (3) express flexibility to adapt their internal economic structures. By no means are these three metrics exhaustive. Rather, they are preliminary, tentative, and in need of greater elaboration and precision. Exhaustively explaining these metrics is a task for another project, but for present purposes, they offer a starting point for discussing whether China is thinking globally when it sits down at the WTO negotiating table.

What emerges from the record of Doha Round negotiations, or at least from the critical Draft Agriculture and NAMA Modalities Texts of December 2008, and their predecessors of July, is a bottom-line answer: "no." One prominent *Financial Times* journalist widens the context for this answer to include moral questions:

The price of admission to the club of great powers is set as a foreign policy that looks beyond narrow definitions of national interest to the broader goal of global security. Great powers are expected to provide public goods

³¹³ *Id.*

³¹⁴ See generally Bhala, *supra* note 304; Raj Bhala, *The Limits of American Generosity*, 29 *FORDHAM INT'L L.J.* 299, 299–385 (2006) (providing examples of different critiques on the U.S. and EU's self-interest in the Doha Round).

³¹⁵ Antoaneta Bezlova, *As U.S. Ally, China Projects Self as Global Player*, *INTER PRESS SERVICE NEWS* (Sept. 28, 2001), <http://ipsnews.net/news.asp?idnews=87228> (discussing China's intention to be regarded as a "major global player" directly following the 9/11 attacks).

Foreign policy, in this centuries-old [Westphalian] construct, was *blind to values*. But the idea of inviolable sovereignty has been left behind by interdependence and by acceptance that some human rights transcend those of governments

China does not want to challenge the existing [Westphalian] system, but it hesitates to accept the responsibility that comes with being a global player.³¹⁶

At least, then, it may be urged China has yet to act in the Round like the global player it claims to be.

First, China has offered no comprehensive plans to deal with complex trade problems. In the four key areas of Doha Round discussions—agriculture, NAMA, services, and rules (trade remedies)—China has not put forth any comprehensive plan to bring the Round to a successful conclusion. It has, at best, episodically participated in plans to address specific issues drafted by a grouping with which it seeks to ally itself, such as the RAMs.

Second, China shows neither an appreciation of, nor much curiosity about, the ways these four areas are connected in countries other than China itself. It seems satisfied in a nearly mercantilist way with its position as a surplus nation. It shows little interest in whether and for how long structural global imbalances—namely, its massive current account surplus (and that of Germany, Japan, and Korea) and the huge American current account deficit—are sustainable, or for devising mechanisms (such as a re-vamped and updated version of GATT Articles XII and XVIII) for correcting the asymmetries that impose the least adjustment costs not only on China, but also its trading partner.³¹⁷

Third, China has been grudgingly willing to adapt its domestic economy to advance the common good. Until recently, it has relied primarily on exports, not on internal consumption (i.e., domestic demand), to drive its GDP growth.³¹⁸ It has yet to do more to alleviate concerns of average

³¹⁶ Philip Stephens, *India Faces a Choice: Is it a Big Power or Great Power?*, FIN. TIMES, Mar. 20, 2009 (emphasis added) (criticizing India for “unflinching defense of its narrow interest,” as manifest (for example) in being “one of the principal obstacles to the conclusion of the Doha Round.”).

³¹⁷ See Martin Wolf, *Global Imbalances Threaten the Survival of Liberal Trade*, FIN. TIMES, Dec. 3, 2008, at 13 (evaluating the global imbalances through a discussion about the biggest surplus and deficit countries around the world).

³¹⁸ See Daniel Dombey & Michael MacKenzie, *Paulson Calls on Beijing to Bolster Value of Renminbi*, FIN. TIMES, Dec. 3, 2008, at 2; *Shifting Away from Export-Led Growth*, FIN. TIMES, Nov. 18, 2008, at 12. As of June 2011, declines in the Chinese trade surplus were cited as evidence that China is relying less on export-orientation, and more on domestic consumption, for economic growth. See Sharon LaFreniere & Bettina Wassener, *China's Trade Surplus Decline Suggests Less Reliance on Exports*, N.Y. TIMES (Jan. 9, 2011), <http://www.nytimes.com/2011/01/11/business/global/11yuan.html>. However, those declines could be caused by modest appreciation in the Chinese Yuan (which makes Chinese exports

Chinese households that prevent them from boosting consumption expenditures, namely, affordable or free education and health care.

These three criteria suggest China is not behaving in a markedly different manner after seven years of WTO Membership than it did about four years before its accession. Consider what a Senior Fellow at the Council of Foreign Relations observed of China in August 1997:

If Beijing acts as the spokesman for third-world interests in Geneva, the WTO could be transformed from a functional body dealing with the practical commercial concerns of the world's largest trading economies into a talking shop focused on the political interests of small, developing economies.

In other international bodies China has proved to be a follower and not a leader. But followers can be foot-draggers. And if Beijing becomes a foot-dragger in the WTO, it could impede U.S. and European Union efforts further to liberalize service trade and develop international trade norms on worker rights, the environment and competition policy.³¹⁹

China's before-and-after accession contrasts with that of the U.S. and EU

For all their faults, these two powers have put forward comprehensive plans on agriculture, NAMA, services, and rules, or at least taken a lead role in shaping such plans.³²⁰ Both powers have shown a deep understanding of the relationship between trade liberalization in agriculture and NAMA, as well as the importance of maintaining the tradition of adopting agreements as a single-undertaking. Both powers, albeit reluctantly, comprehend their comparative advantages in certain agricultural and industrial sectors has eroded, or is lost, to parts of the developing world. They must reinvigorate their trade adjustment assistance regimes to cope internally with a changed external reality.

Like most arguments in international trade law, the "devil is in the details." China acceded to the WTO on December 11, 2001, just days after the November 9–13, 2001 Ministerial Conference launching the DDA.³²¹ Naturally, it needed time to develop the legal and technical capacity to come to grips with the DDA. It would be quite unfair to expect China to have produced a brilliant, all-encompassing Doha Round package within the first

more expensive, as priced in other currencies like the U.S. dollar; thus, it is relatively less competitive), and increases in labor costs (which drives producer-exporters out of China to other locations, like Cambodia and Vietnam).

³¹⁹ Bruce Stokes, *The Chinese Challenge*, FIN. TIMES, Aug. 29, 1997, at 12 (emphasis added).

³²⁰ RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 59–140 (3rd ed. 2008) (discussing and analyzing comprehensive plans on agriculture, NAMA, services, and rules).

³²¹ *China and the WTO*, WTO, http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Nov. 3, 2011) (annotating the date that China joined the WTO).

few years of its accession. Consider, however, its recent performance in the Round. What have been the major developments in the Round, and what role has China played in these developments?

To any careful observer of the Round, even this question, constricted as it is to a recent time period, is worth book-length treatment. To confine the inquiry further, consider the two topics of greatest global prominence—agriculture and NAMA. What developments have occurred on these topics in the latter half of 2008, and what role has China played in shaping them? In addressing this question, the threads that make up a pattern become fairly clear.

Put simply, China has not—yet, anyway—behaved like a statesman in the WTO. Instead, China has publicly labeled itself a developing country in need of, and indeed entitled to, all the S&D treatment that other poor countries get, or can seize under a final deal.³²² In fact, identifying with the RAMs, China has done little else than demand extra-special S&D treatment. Its negotiating posture has been one of reactive self-interest. When a proposal is put forward, China concentrates on what that proposal means for itself, as a self-styled developing country RAM. That focus is understandable for any WTO Member, including the U.S. and EU. But, when it is an obsession, it belies any legitimate claim to statesmanship.

Two illustrations of the aforementioned points are China's first two proposals on countervailing duty disciplines, which it put forth in December 2009 in the context of Doha Round rules negotiations:³²³

- Insertion of New Language in Article 11 of the *WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)*:

A governmental authority in an importing country should be prohibited from launching a CVD investigation of a subsidy program that is not included in the notice of initiation in the application of a petitioning domestic industry. The only exception would be where a petitioner applies for an investigation of a new subsidy program (at least forty days before the scheduled date of a preliminary subsidization determination), and explains why it could not obtain any information about it in connection with the original application. In all other instances, the authority would have to issue a public notice listing the alleged subsidies it is investigating, before it actually commences the investigation. Thereafter, any other alleged subsidies would have to be the topic of a new, separate investigation.

³²² See Richard Dobson, *U.S., China See Doha Round Completed This Year*, *USDA Chief Says*, BLOOMBERG (Dec. 6, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqr2inP7KqB4&refer=home> (observing “China hoped for more focus on concerns of developing countries”).

³²³ See Daniel Pruzin, *China Seeks Tightening of WTO Rules on Notification Requirements in CVD Probes*, 26 INT'L TRADE REP. (BNA) 1702 (Dec. 10, 2009) (discussing China's two new proposals on the Doha Round negotiations).

- Additional Obligations under Article 13:1 of the *SCM Agreement*:

Any invitation for consultations must identify the names and legal bases for alleging a subsidy program is unlawful. The request for consultations also must transmit to the target country any documentary evidence in support of the allegations that is in possession of the investigating governmental authority in the importing country. The request should be transmitted in a timely fashion.

The first proposal is based on China's view that foreign governments—such as the U.S., EU, and Canada—often investigate new allegations of subsidies during the course of an ongoing investigation, rather than launching a new case. China argues this habit ignores the requirements for consultation under Article 13:1 of the *SCM Agreement*, does not give the Chinese respondents and the Chinese government sufficient time to obtain information about the new subsidies being investigated, or to answer questionnaires from the investigating authorities about those subsidies. Thus, China seeks to confine the scope of a subsidy investigation to programs specifically itemized in the original petition.

The second proposal stems from China's perception that notifications for consultations typically are incomplete or inaccurate, and investigating authorities routinely fail to share information with China. China feels it cannot adequately address the consultation requests, because the names of alleged subsidy programs are not highlighted, and evidence in support of the allegations is not disclosed. China also complains it receives requests for consultations just two weeks before a governmental authority in an importing country launches an investigation, and the invitation is for consultations within one week. Consequently, China would like greater precision, disclosure, and advance notice in respect of new subsidy cases against it.

Both of these proposals are reasonable, and China is to be credited for making constructive suggestions. Thus, the point is not to lambast China for attending to its own interests any more than the U.S. or EU do. Rather, the point simply is China does only that. These two proposals bespeak the mentality behind its Doha Round proposals: no grand vision, just the defense of its self-interest through suggestions on minor or mid-level technical points. Such proposals promise, at best, marginal improvements to a rules-based world trading system. Full-scale reform on foundational issues, much less questions of justice, are beyond their scope—and apparently outside the vision of the CCP as revealed to the world trade community.

D. Thinking Locally, Acting Globally?

To be fair to China, an *in vacuo* examination of Doha Round negotiation positions of the CCP is incomplete. The CCP forges those positions in the wider context of threats it perceives to its power. Indeed, it may be said China does not have a trade policy at all. It has an internal security pol-

icy, the essence of which is maintaining the pre-eminent position of the CCP. That position is secure—ostensibly, at least—as long as the Party delivers impressive economic performance for average citizens, and continues to lift millions out of poverty. Trade, and export-oriented growth, is a subset in the CCP internal security calculus.

The challenge for China is to rise above what it has been, and become what it says it is—a global player. For that ascension to occur, China must address peacefully an even more basic internal political question: for how much longer is the CCP going to insist on authoritarian monopoly rule, and view every issue—from the “3Ts” of Taiwan, Tiananmen, and Tibet to Doha Round negotiations—through the prism of power?³²⁴ Consider one such “threat”: Tibet.

“Silly” is not a word normally hurled at the CCP. After all, Party officials have adroitly engineered an economic transition that has produced impressive growth. Moreover, many senior party officials are well educated and well-traveled, and if not exactly cosmopolitan in their outlook, at least have been exposed to alternative perspectives about China and the world. Accordingly, criticisms of the Party focus on the costs of that growth, most notably in terms of social inequality (which is high) and human rights (especially religious freedom), on whether it will be followed—sooner or later—with genuine democratic development. But the censorship regime of China masks a deep insecurity of Party officials about any matter it perceives as a threat to its monopoly on political power.

As to Tibet, China’s censorship regime suggests the censors are scared to the point of silliness. The censorship regime China defended in the case actually includes—supposedly to protect public morality—the control of the reincarnation of His Holiness the 14th Dalai Lama (1935–present), leader of Tibetan Buddhism and winner of the 1989 Nobel Peace Prize.³²⁵

In 2007, the Chinese government promulgated a regulation called *Management Rules for Reincarnation of Living Buddhas*.³²⁶ This regulation prohibits any person living outside of China from influencing the reincarnation process for the Dalai Lama. Such a person of course, would include the Dalai Lama, who was forced during the 1959 Tibet uprising to flee to exile in Dharamsala, India. As the *Financial Times* explains:

³²⁴ See *China’s Charter ’08*, N.Y. REV. BOOKS (Jan. 15, 2008), available at www.nybooks.com/articles/22210 (providing a stirring and eloquent call for non-violent reform despite CCP efforts at suppression of the document).

³²⁵ *Dalai Lama*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/d/_dalai_lama/index.html (last updated Apr. 28, 2011) (providing background on the 13th Dalai Lama’s history and accomplishments).

³²⁶ See Jamil Anderlini, *Dalai Lama Divines Succession Path*, FIN. TIMES, Mar. 11, 2011, at 3, available at <http://www.ft.com/intl/cms/s/0/367c28f6-4b38-11e0-b2c2-00144feab49a.html#axzz1eHmCFtoK>.

The rules stipulate that reincarnations must be approved by a government authority above the municipal level, conjuring up images of old monks' spirits hovering in limbo while they await approval from the interminable Chinese bureaucracy before they can be reborn.³²⁷

In other words, the officially atheist Communist Party has a measure to control an unmistakably religious matter. The Party alone takes the final decision on who is reincarnated as the next Dalai Lama.³²⁸

Not surprisingly, therefore, the reality of what the CCP spends on internal security is stark. As the *Financial Times* reported:

China's spending on internal security overtook national defense for the first time last year [2010], underlining Beijing's growing concern about public unrest

[S]pending on public security grew 15.6 percent to Rmb [Renminbi, meaning "People's money"] 549bn [billion] (\$84bn) last year, compared with defense spending that grew 7.8 percent to Rmb533.4bn. Public security spending was Rmb34.6bn, or 6.7 percent, over budget.

Security spending, budgeted at Rmb624bn [or \$94.9 billion, at the 15 March 2011 exchange rate of 6.578 Rmb per dollar], is this year [2011] scheduled to outpace defense, at Rmb602bn., and will be more than the combined budgets for healthcare, diplomacy, and financial oversight.

This reprioritization underscores Beijing's nervousness at escalating public unrest. Violent riots in Xinjiang and Tibet in recent years have prompted more spending on public security forces, including paramilitary forces known as the people's armed police.

It comes as calls for a Middle East inspired "Jasmine revolution" have gone largely unanswered in China

[T]he calls for protests in China have sent security forces into overdrive. Dissidents have been rounded up or placed under heightened surveillance, and several foreign journalists were beaten by security officers as they visited potential protest sites last Sunday

China's internal security apparatus has grown more powerful in recent years, with the rise of Zhou Yongkan, security chief, a member of the politburo standing committee.

³²⁷ *Id.*; see also James Lamont & Jamil Anderlini, *Dalai Lama to Retire from Politics*, FIN. TIMES, Mar. 11, 2011, at 3, available at <http://www.ft.com/intl/cms/s/0/67d145ac-4ae4-11e0-911b-00144feab49a.html#axzz1eHmCFtoK> (reporting that the Dalai Lama decided to step down as the political leader of the Tibetan government in exile (but will remain as the spiritual head), which "potentially confound[s] the Chinese government's efforts to control the succession process after his death," because it will make it more difficult for the government to argue the temporal power of the Dalai Lama passes to his reincarnated successor whom the government chooses, in other words, because the decision divorces religious and political authority and thus makes it harder for the government to control the politics of Tibet through a reincarnated religious leader of the governments liking).

³²⁸ Anderlini, *supra* note 326.

In one reminder of the scale of the internal security apparatus, official media reported that 739,000 security guards were dispatched to ensure order and direct traffic as China's annual congresses began in Beijing over the weekend

China's security budget includes funding for courts, jails, police, paramilitary, and even *internet monitoring*. Analysts say spending on both public security and national defense is *higher* than reported.³²⁹

Indeed, China's internal security budget, which includes internet censorship, to a level higher than its military forces. That level is astounding, even on a *per capita* basis.³³⁰ In 2010, China spent U.S. \$ 62.84 to monitor each Chinese person.³³¹ In 2011, it spent \$70.99 to keep its citizens in line.³³²

³²⁹ Leslie Hook, *Nervous Beijing Raises Security Spending*, *Fin. Times*, Mar. 6, 2011, at 5 (emphasis added). Hours before the first planned Jasmine revolution protest, Mr. Zhou Yongkang, referenced above, told his colleagues in the security services to “[s]trive to defuse conflicts and disputes while they are embryonic.” Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, *FIN. TIMES*, Mar. 3, 2011, at 3, available at <http://www.ft.com/cms/s/0/4f728396-45b6-11e0-acd8-00144feab49a.html#axzz1e5OnOPs1>; see also *As Protests Spread Across the Middle East, China Keeps a Firm Hand on Protests at Home*, *CHRISTIAN SCI. MONITOR* (Feb. 24, 2011), <http://www.csmonitor.com/World/Asia-Pacific/2011/0224/As-protests-spread-across-the-Middle-East-China-keeps-a-firm-hand-on-protests-at-home>; Geoff Dyer, *Nervous China Puts Security Apparatus into Overdrive*, *FIN. TIMES* (Feb. 23, 2011), <http://www.ft.com/intl/cms/s/0/d4fcf4e6-3f6d-11e0-a1ba-00144feabdc0.html#axzz1e5OnOPs1> (discussing the crackdown on the Jasmine Revolution and other such incidents). At the same time, there are signs of possible shifts by, or at least differing opinions within, the Chinese government. As Bill Emmott, former editor of *The Economist* wrote, “China has just voted [on February 26 at the United Nations Security Council on Resolution 1970] to refer [Libyan] Colonel Qaddafi to the ICC [International Criminal Court] for having acted against his opponents in pretty much the same way as it did in 1989 with the Tiananmen Square revolt.” David Pilling, *Lying Low is No Longer an Option for Beijing*, *FIN. TIMES* (Mar. 3, 2011), <http://www.ft.com/intl/cms/s/0/40ee5c2a-450a-11e0-80e7-00144feab49a.html#axzz1e5OnOPs1>; see also Hu Ping, *China's Paradoxical Vote to Sanction the Gadhafi Regime*, *THE EPOCH TIMES* (Mar. 3, 2011), <http://www.theepochtimes.com/n2/opinion/chinas-paradoxical-un-vote-to-sanction-the-gadhafi-regime-52329.html> (discussing this vote).

³³⁰ The Central Intelligence Agency estimates China's population as of July 2011 at 1,336,718,015. *East and Southeast Asia: China*, *CIA WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated Nov. 8, 2011).

³³¹ This result is obtained by dividing the 2010 security budget of \$84 billion by the CIA estimate of the Chinese population as of July 2011. See Hook, *supra* note 329 (stating that China had a budget of \$84 billion in public security spending in 2010); *CIA WORLD FACTBOOK*, *supra* note 330 (providing the Chinese population as of July 2011). As China's population would have grown between 2010 and 2011, using the July 2011 figure actually understates the true 2010 per capita result.

³³² This result is obtained by dividing the 2011 security budget of \$94.9 billion by the CIA estimate of the Chinese population as of July 2011. See Chris Buckley, *Update 2 – China Internal Security Spending Jumps Past Army Budget*, *REUTERS* (Mar. 5, 2011), <http://www>.

E. *Can a Security State Make the Necessary Compromises?*

There is, of course, a deeper point about freedom of conscience and its relation to free trade.³³³ It could rightly be asked whether the deeper integration of China into the world trading system since its WTO accession over a decade ago has had a positive effect on the human rights climate in that country. For now, that inquiry is not the point. Rather, the question is whether a Member as important to the multilateral trade regime as China, but one governed with an unrivalled obsession about internal security to preserve political power, can make the compromises necessary to forge a grand Doha Round bargain.

Of course, Chinese trade policy is not an immovable object under siege from irresistible foreign forces. Reality can change, if the political will exists to do so. China can lead other countries to use the WTO as a forum to advance the common good. Rather than expressing delight when the common good advances as a by-product, an externality, of its own self-interest, China can see advancement of the common good as its prime directive. Indeed, arguably China—simply because of its size, trajectory, and aspirations—has a responsibility to the international community to look at Doha Round negotiations in this way. In sum, opportunities for China to exhibit great statesmanship in the Round remain.

reuters.com/article/2011/03/05/china-unrest-idUSTOE72400920110305 (stating that China budgeted \$95 billion in public security spending for 2011); CIA WORLD FACTBOOK, *supra* note 330 (providing the Chinese population as of July 2011).

³³³ Notably, the sovereign state with the largest number of diplomatic relations is the Vatican, which has them with 188 countries. The second highest number of diplomatic relations is enjoyed by the U.S., with 177. See John Thavis, *Vatican Emerges from WikiLeaks as a Key Player on Global Scene*, CATH. NEWS SERVICE (Dec. 23, 2010), <http://www.catholicnews.com/data/stories/cns/1005234.htm>. Yet, the Vatican does not officially recognize China (or Afghanistan or Saudi Arabia), in part because of a disagreement with China over the selection of Bishops and Cardinals. See *Shijiazhuang, The Party Versus the Pope*, ECONOMIST, Dec. 11, 2010, at 53. As George Weigel's monumental biography of Pope John Paul II shows, having encountered this issue in the former Soviet Bloc during the Cold War era, the Vatican is no stranger to Communist authorities claiming the right to make decisions about ordination of Catholic clergy. See generally GEORGE WEIGEL, WITNESS TO HOPE, THE BIOGRAPHY OF POPE JOHN PAUL II (1999). On this topic, and others, the Catholic Church and Tibetan Buddhist officials share much in common.