Doha Round Schisms: Numerous, Technical, and Deep

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This article assumes familiarity with Chapters 3 and 4 of the International Trade Law: Interdisciplinary Theory and Practice textbook, referenced above, particularly concepts and terms in Doha Round negotiations, and the 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 (NAMA) negotiations, respectively.

I. The Schismatic Environment

Schisms are the unifying theme in Doha Round negotiations. The divisions transcend the traditional and now simplistic one between rich and poor Members of the World Trade Organization (WTO). Disunion exists among the wealthy, among the developing, and among the least developed. Recently acceded Members (RAMs) vie with one another, splintering from each other, and from small, vulnerable economies (SVEs). Fundamentally different views on economic or legal doctrine drive some splits. Self-interest, sometimes naked, sometimes veiled, underlies other rifts. Ephemeral factions and coalitions form episodically, on an *ad hoc* basis, depending on the topic. Nearly all issues on the negotiating table are intrinsically highly technical, and their inter-linkages exacerbate the complexities.

Doha Round Schisms

Nothing in multilateral trade negotiations (MTNs) is easy any more. The years of the Kennedy and Tokyo Rounds, 1964-67 and 1973-79, respectively, look like halcyon periods. Most concepts from the Uruguay Round of 1986-94 seem, in retrospect, relatively simple, though its Grand Bargain remains a marvel. Might it take a miracle to heal the schisms in the Doha Round and unify the WTO Members around a deal that promotes their individual goals and common good?

This article chronicles the schisms in the Doha Round, which was launched in November 2001 in the Qatari capital, with resoluteness to fight back in the international economic arena against terrorism.[1] Yet, many of the schisms existed well before the terrorist attacks of September 11, 2001, dating from the 1986-94 Uruguay Round, and even before. The solidarity in the post-9/11 environment proved short-lived, and was perhaps nothing more than a thin veil. Sections II, III, and IV, respectively, cover the fall 2007 Doha Round talks in agriculture, industrial trade and services, and trade remedy rules. Section V reviews the winter 2007 discussions on agriculture. Section VI summarizes the Draft Modalities Texts of February 2008. Section VII offers concluding observations.

To be sure, much preceded those Draft Texts, and there even was a happy outcome on intellectual property (IP) from the December 2005 WTO Ministerial Conference in Hong Kong. But, that story is chronicled elsewhere.[2] Fall and winter 2007, leading into early spring 2008, was a critical period—perhaps the most crucial one—since the Doha Development Agenda (DDA) was set. The trade negotiating authority of the American President expired at the end of June 2007, and all WTO Members appreciated that as the campaign to succeed President George W. Bush and seat a new Congress shifted into high gear in 2008, the attention of the United States would not be on trade. The talks had evolved by fall 2007, to a highly technical stage, with many deep issues being probed. Positions were clear and, as explained below, the schisms were numerous. Small wonder, then, why the Doha Round has not yet concluded.

[1] For recent books on the Doha Round see Dilip K. Das, The Doha Round of Multilateral Trade Negotiations: Arduous Issues and Strategic Responses (2006); Mike Moore, ed., Doha and Beyond – The Future of the Multilateral Trading System (2004). For recent law journal articles see Seung Wha Chang, *WTO for Trade and Development Post-Doha*, 10 J. INT'L ECON. L. 553 (2007); Sungjoon Cho, *Doha's Development*, 25 BERKELEY J. INT'L L. 165 (2007); Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395 (2007); Marjorie Florestal, *Technical Assistance Post-Doha: Is There Any Hope of Integrating Developing Countries into the Global Trading System?*, 24 ARIZ. J. INT'L & COMP. L. 121, 132 (2007); Alejandro Jara, *The WTO and International Trade Law After Doha: Where Do We Go From Here?*, 25 BERKELEY J. INT'L L. 384 (2007); Rafael Leal-Arcas, *The Resumption of the Doha Round and the Future of Services Trade*, 29 LOY. L.A. INT'L & COMP. L. REV. 339 (2007); Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L L. 165 (2007); Christina R. Sevilla, *The WTO Doha Development Agenda: What is at Stake*, 25 BERKELEY J. INT'L L. 423 (2007). See also the articles published in *Symposium: The United States, The Doha Round and the WTO – Where Do We Go From Here?*, 37(3) INT'L LAW 651, 651-833 (2003).

[2] *See* RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE chs. 3-4 (3d ed. 2008).

II. Fall 2007 Negotiations on Agriculture

A collapse in the Doha Round seemed all the more likely as the fall of 2007 progressed. The atmosphere was foggy. It was unclear whether WTO Members had resigned themselves to defeat, were content with an indefinite postponement (at least beyond the November 2008 American general election), felt that talks had to move to a higher political level for hard choices to be made by senior-most officials, or simply did not care much any more in the outcome (particularly as many pursued free trade agreements (FTAs)). Technically, negotiations became even more complex than before, with new fissures emerging, and existing schisms deepening. The major events—or, non-events—were as follows.

A. The Familiar Agriculture – Industry Trade-Off and Sequencing Problem

Developing and least developed countries demanded progress on agricultural market access and subsidy reductions, before agreeing to hard commitments on non-agricultural market access (NAMA). Developed countries took the opposite line—their internal constituencies demanded real progress in industrial trade before committing to a deal on farm trade.[3] Even if this proverbial chicken-and-egg problem was solved, an accord on services had to be reached. Only thirty of the WTO Members were actively engaged in services negotiations—including Brazil, China, Egypt, India, and South Africa, but excluding many other newly industrialized and developing countries.[4]

B. Special Treatment for Customs Unions?

In October 2007, the *Southern African Customs Union* (*SACU*) requested special treatment for its customs union (CU), namely, an exemption from any agricultural or industrial tariff cuts.[5] SACU consists of South Africa plus four poor countries—Botswana, Lesotho, Namibia, and Swaziland. Of these four countries, how many are least developed?

South Africa seems to regard all four of them as such, given its negotiating position on special treatment for *SACU*. However, the WTO website lists only Lesotho as a least developed country.[6] The United States counts Botswana and Namibia as least developed under the *African Growth and Opportunity Act* (*AGOA*),[7] even though neither has that status in the relevant United Nations in-

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[3] To be sure, and as discussed in more detail *infra* sections V-VI, developed countries were not unified on all farm trade issues. For example, there was uncertainty on yet-to-be-drafted provisions on geographical indications (such as for beer, cheese, ham, and wines and spirits) demanded by the EU and Switzerland, but staunchly opposed by countries in the "new world," such as Australia and the United States, as well as Argentina.

[4] *See* Daniel Pruzin, *Doha Chair de Mateo Gets Green Light from WTO Members to Draft Services Text*, 24 Int'l Trade Rep. (BNA) 1382-83 (Oct. 4, 2007).

[5] *See* Daniel Pruzin, *Agriculture's Shadow Hangs Over NAMA; Special Terms for South Africa Considered*, 24 Int'l Trade Rep. (BNA) 1419 (Oct. 11, 2007).

[6] World Trade Organization [WTO], Understanding the WTO, Least Developed Countries, http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org7_e.htm.

[7] African Growth and Opportunity Act, 19 U.S.C.A. § 3721(c)(3)(B)-(C) (2008).

dex. Notably, in 1994, Botswana became the first country to graduate from the least developed category of that index.[8]

Notwithstanding the problem of counting heads, least developed countries are entitled to an exemption from tariff reduction commitments under the July 2007 Draft Modalities Agreements.[9] The entitlement reflects, by broad agreement under the DDA, what the second "D" ought to mean in practice, development assisted by differentiated treatment. If South Africa—as a developing, not a least developed, country—had to make tariff cuts in line with any Doha Round deal, then the common external tariff (CET) of *SACU*, or progress toward one, would be vitiated.

After all, a hallmark of a CU is a CET, and any difference in external tariffs among members could break up a CU. Yet, an exception to the Doha Round cuts for CUs that combined least developed countries with other countries obviously would create a precedent in WTO negotiations adverse to multilateralism. Notably, *MERCOSUR* picked up the *SACU* argument, urging that perhaps Argentina and Brazil ought to be exempt from tariff cuts, because two of the CU members—Paraguay and Uruguay—were SVEs. The United States and European Union (EU) might be willing to accommodate South Africa in the interests of least-developed countries in Sub-Saharan Africa. Accommodating giants like Argentina and Brazil for SVEs was out of the question.

Indeed, the United States and EU rejected an October 2007 *MERCOSUR* proposal to allow countries in that CU to exempt up to 16 percent of their industrial tariff lines from the full force of an agreed-upon reduction, and subject those lines to just half the agreed cut, with no limit on the value or volume of trade that could be exempted.[10] The United States–EU response was no surprise. *MERCOSUR* was asking for more than the 10/5 flexibility afforded by the July 2007 Draft Modalities Text. With no cap, exempting 16 percent of the lines could mean exempting 20 percent or more of the total volume of trade of a *MERCOSUR* country from a tariff cut.[11]

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8 The Secretary-General, *Ensuring a Smooth Transition of Countries Graduating from Least Developed Country Status,* ¶ 10, U.N. Doc. E/2001/94 (June 20, 2001).

9 WTO, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture,* ¶ 8, TN/AG/W/4 (Aug. 1, 2007) [hereinafter July 2007 *Draft Modalities for Agriculture Text*]; WTO, Negotiating Group on Market Access, *Draft NAMA Modalities*, JOB(07)/126 (July 17, 2007) [hereinafter July 2007 *Draft NAMA Modalities*].

10 *See* Daniel Pruzin & Vir Singh, *U.S., EU Reject Mercosur Proposal for Increased NAMA Flexibilities*, 24 Int'l Trade Rep. (BNA) 1534-35 (Nov. 1, 2007).

11 *See* Daniel Pruzin, *'Middle Ground' Developing Countries Reject Call for More Flexible NAMA Terms*, 24 Int'l Trade Rep. (BNA) 1603-04 (Nov. 15, 2007). The term "flexibility" is not a technical one, but rather encompasses one or more options a WTO Member might have to derogate from an obligation. For example, in the context of agriculture negotiations, flexibilities for developing countries might include (1) a maximum (rather than minimum) average tariff cut, (2) a lesser tariff cut than under an agreed-upon formula, (3) smaller cuts on Sensitive Products, along with tariff-rate quota expansions for those Products to ensure some minimum amount of increased market access, (4) smaller, or no, cuts on Special Products, and (5) extended implementation periods during which to take on obligations. The same, or similar, flexibilities may be relevant for agriculture subsidy reductions.

C. American Agreement to Deeper Farm Subsidy Cuts

In September, the United States ostensibly budged on the depth of cuts it could access to farm subsidies. Twice that month—at an Asia Pacific Economic Forum (APEC) (by the United States Trade Representative (USTR)), and in comments to WTO Members (by America's Chief Agriculture Negotiator)—the United States suggested it could work within the range of figures of the July 2007 Falconer Draft Modalities Text.[12] The following month, the United States confirmed its willingness to stay in that range—if other countries met its negotiating objectives on market access for farm and manufactured goods.

Those figures called for a cap on overall trade-distorting domestic support (OTDS) by the United States of between $13 billion and $16.4 billion, based on a cut of between 66 and 73 percent on maximum permissible spending levels. The EU reacted by saying it would match any American cut, and best it by 10 percent, which if put into practice meant the EU would cut its farm subsidies by between 76 and 83 percent. Many Members doubted whether the United States could or would accept cuts closer to $13 billion than to $16.4 billion. Either end of this spectrum was still above actual farm subsidy expenditures—meaning the Americans could later boost spending. Indeed, the October 2007 United States notification to the WTO of its agricultural support for the 2002-2005 marketing years (MYs), during which its *2002 Farm Bill*[13] was in force, seemed to confirm these doubts.[14]

During these four MYs, the average OTDS of the United States was $15.9 billion, with a low of $10.2 billion in 2003 and a high of $18.9 billion in 2005.[15] Accepting a cap of $13 billion seemed highly unlikely (all the more unlikely given that in five of the previous eight MYs, ending with 2005, OTDS in the United States exceeded $16.4 billion, the upper boundary of the Modalities text.) The American notification also stated that during the 2002-2005 MYs, America's Amber Box spending rose from $6.95 billion in 2003 to $12.9 billion in 2005, and averaged $10.3 billion.[16] Agreeing to a 60 percent cut on the current bound level for that Box of $19.1 billion, yielding a $7.6 billion ceiling, also seemed improbable.[17]

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12 See Gary G. Yerkey, *U.S. Agrees, With Conditions, to Cap OTDS Ag Support at $13 Billion-$16.4 Billion*, 24 Int'l Trade Rep. (BNA) 1418-19 (Oct. 11, 2007); Daniel Pruzin, *U.S. Officials Play Down Significance of Move on Farm Subsidies in WTO Talks*, 24 Int'l Trade Rep. (BNA) 1343-44 (Sept. 27, 2007).

13 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered section of 7, 16, & 21 U.S.C.).

14 See Daniel Pruzin, *U.S. Notifies Farm Support for 2002-2005; Official Confirms Support for Falconer Figure*, 24 Int'l Trade Rep. (BNA) 1417-18 (Oct. 11, 2007).

15 Transcript of Tele-News Conference with USTR Ambassador Joe Glauber, Chief Agricultural Negotiator Regarding Notification of Domestic Agricultural Support Payments to the WTO, Oct. 4, 2007, http://www.usda.gov/wps/portal/usdahome?contentidonly=true&contentid=2007/10/0281.xml.

16 *Id.*

17 At the November 2007 meeting of the WTO Committee on Agriculture, three serious doubts were cast on the veracity of the American notification, specifically the claim of adherence to the bound Amber Box annual cap of $19.1 billion during MYs 2002-2005.

More seriously, however, was whether the EU and other Members were responding to a chimera. The United States insisted there was nothing new in its September statements. All they meant was that the Falconer text, overall, was an acceptable basis on which to continue negotiations. India, for one, questioned whether the United States had budged down at all to a $13-$16.4 billion range. The Indian Commerce Minister disclosed that he put the question directly to the USTR, Ambassador Susan Schwab, who responded "no," the United States would not drop farm subsidies into this range.[18]

D. Green Box and Export Competition

With respect to agriculture, to their credit, WTO Members resolved two Green Box questions – whether a developing country's government purchases of food from poor farmers in its country for stockpiling qualifies for this Box, and whether payments in this Box should be calculated on a base period that is fixed and unchanging to minimize trade distortions.[19] And, in his November 2007 Working Paper on Export Competition circulated to the Members, Chairman Falconer called upon developing countries to eliminate export subsidies by 2016.[20] The suggestion was hardly ambitious—few developing countries were legally

First, the United States classified direct payments as Green Box subsidies, thereby exempting those payments from reduction commitments. That classification directly conflicted with the Appellate Body ruling in the 2004 *Upland Cotton* case. Appellate Body Report, *United State—Subsidies on Upland Cotton,* WT/DS267/AB/R (Mar. 3, 2005) [hereinafter Cotton Appellate Body Report]. The Appellate Body held the particular American direct payments at issue do not qualify for the Green Box, because they are not de-coupled income support, as the WTO *Agreement on Agriculture* requires. *Id.* ¶ 763. The Appellate Body observed that under the *2002 Farm Bill*, farmers had to plant only certain crops–9 eligible commodities, namely, barley, corn, cotton, oats, other oilseeds, sorghum, soybeans, rice, and wheat–to receive direct payments. *Id.* They could not, for instance, obtain income support for planting fruits or vegetables. *Id.*

Second, the United States classified countercyclical payments as non-product specific support in the Amber Box. But, said the United States, these payments were *de minimis* (accounting for less than five percent of the total value of total American farm output). Hence, the United States argued, they are exempt from subsidy reduction commitments. Australia disagreed. The *Agriculture Agreement* requires non-product-specific support to be made available generally, i.e., to all crops. Yet, the American counter-cyclical payments are provided (based on historical production) only to eleven eligible commodities (as the United States Department of Agriculture website posted, contrary to the insistence of the USTR) when their effective price falls below a government-set target price—barley, corn, cotton, grain, peanuts, oats, other oilseeds, sorghum, soybeans, rice, or wheat. Thus, for example, there is no counter-cyclical support for fruits or vegetables. In brief, the American claim counter-cyclical payments fits in the non-product specific support category, and in turn qualifies for a *de minimis* exemption, was fatally flawed by the limited availability of the payments.

Finally, the Americans handed in their notification after the formal expiry of the controversial support programs. There was little WTO Members could do to rectify any past wrongs. Quite possibly, but for the suspect classifications, the United States might have exceeded its $19.1 billion Amber Box cap. But, what could be done, given the expiry of the *2002 Farm Bill*? *See* Daniel Pruzin, *U.S. Rejects Criticisms by Members of WTO Farm Subsidy Notification*, 24 INT'L TRADE REP. (BNA) 1679-80 (Nov. 29, 2007).

18 *Quoted in* Gary G. Yerkey, *U.S. Has Not Agreed to Limit Farm Support to Less than $16.4 billion a Year, India Says*, 24 INT'L TRADE REP. (BNA) 1344-45 (Sept. 27, 2007).

19 *See* Daniel Pruzin, *WTO Ag Chairman Sounds Warning that No New Developments Seen in Talks*, 24 INT'L TRADE REP. (BNA) 1490-91 (Oct. 25, 2007).

20 WTO, Chairperson's Working Document on Export Competition, ¶ 140, Nov. 12, 2007, http://www.wto.org/english/tratop_e/agric_e/workdoc_4-excomp_e.pdf. *See also* Daniel Pruzin, *WTO Chair Proposes 2016 Deadline to End Developing Country Export Subsidies*, 24 INT'L TRADE REP. (BNA) 1606 (Nov. 15, 2007).

authorized to subsidize farm exports, and of those authorized, few actually did so.[21]

E. Special Products

All WTO Members—rich or poor—would be able to make use of "Sensitive" agricultural product designations under the July 2007 Draft Modalities Text.[22] However, provisions on "Special" farm products would apply only to developing (and least developed) countries.[23] Conceptually, a "Special" product is one entirely shielded, or nearly so, from an otherwise applicable agreed-upon tariff cut. The July 2007 Draft Modalities Text accepted in principle the idea of "Special," as distinct from "Sensitive," product designations, but it proposed a numerical limit only on the latter category (namely, the cap of 4-6 percent of total agricultural tariff lines, with Chairman Falconer suggesting in November a revision to 5.3-8 percent).

In November 2007, Chairman Falconer proposed poor countries accept a cap on the number of tariff lines they could designate as "Sensitive"—between 8 and 12 percent of their total farm tariff lines.[24] He further suggested a two-tier structure for protecting Special Products. First, a basic approach would encompass most Special Products. Tariffs on these farm goods would be reduced by an

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21 As of November 2007, twenty-five WTO Members were permitted to subsidize farm exports, subject to product-specific ceilings. The largest such Member, by far, was the EU, with a ceiling of roughly $4.57 billion (as of Marketing Year (MY) 2002/2003), half of which the EU spent on butter, cheese, and other milk product exports. Ten of the twenty-five Members with permission to subsidize farm exports were developing countries:

- Brazil
- Colombia
- Indonesia (limited to rice)
- Israel (spending $3.8 million on farm export subsidies in its October 2002 to September 2003 MY, but reducing that level to $598,000 for the next year)
- Mexico
- Panama (expending $15.75 million in 2000 and $9.57 million in 2003)
- South Africa
- Turkey (spending $27.3 million in 2000 on export subsidies, about half of which went to paste and preserves, and the balance going principally to concentrated fruit juice, chocolates, and olive oil)
- Uruguay
- Venezuela (limited to fruits and vegetables).

However, seven of the ten developing countries reported to the WTO no actual export subsidy expenditures:

- Brazil (as of 1996)
- Colombia (paying $23.3 million in export subsidies in 1998, but none for 1999-2004)
- Mexico (as of 1996)
- Indonesia (between 1995-2000)
- South Africa (paying $3.2 million for sugar export subsidies in 2000, but thereafter ceasing sugar export subsidies)
- Uruguay (between 1998 and 2003)
- Venezuela (as of 1998).

See Pruzin, *supra* note 20.

22 July 2007 *Draft Modalities for Agriculture Text*, *supra* note 9, ¶¶ 54-55.

23 *Id.* ¶ 92.

24 *See* Daniel Pruzin, *Falconer "Encouraged" by Progress in Latest Round of Farm Trade Talks*, 24 INT'L TRADE REP. (BNA) 1721-23 (Dec. 6, 2007).

average of 20 percent of the agreed-upon reductions, with a minimum cut of 15 percent and a maximum cut of 25 percent. Second, "Super Special" products would be subject to reductions far less than 20 percent.

Many developing countries, led by India and Indonesia, were unsatisfied. They (through the Group of 33 (G-33)) sought a considerably higher ceiling—20 percent of all farm tariff lines—on Special Product designations. They did not like the suggestion that tariffs would have to be cut on farm goods covered by the basic approach, and even on the "Super Specials." China, India, and Indonesia, and the rest of the G-33, called for (1) complete exemptions from tariff cuts up to 40 percent of the products designated as "Special," (2) 8 percent tariff cuts on 30 percent of the Special Product tariff lines, and (3) a 12 percent tariff cut on the remaining 30 percent of Special Products.[25]

Conversely, developed countries such as Australia—plus agriculture-exporting developing countries such as Argentina, Brazil, and Thailand—remained uncomfortable with the "Special Product" designations. The United States argued that "Special" connoted a "black box" into which developing countries could put farm products and impede access of these products to their markets.[26] Developed countries also argued that the concept of "Special," was redundant. Developing countries could protect farm products from the full brunt of agreed-upon tariff cuts with "Sensitive" designations, and unlike developed countries, would not have to liberalize trade in them through gradual increases in new or expanded tariff-rate quotas (TRQ). If India and Indonesia succeeded, developing countries could invoke a Special Safeguard (SSG) remedy, through which they could re-impose tariffs on a farm product up to the maximum pre-Doha Round level.[27] The developing countries' rebuttal was predictable: the fact that the tariff on a Sensitive Product might have to be reduced, and its TRQ increased, generating the need for the unadulterated protective device of "Special Product" designations.

III. Fall 2007 Negotiations on NAMA and Services

A. The Indian NAMA Discussion Paper

In mid-October 2007, the Indian Mission to the WTO floated a Discussion Paper calling for the following NAMA compromise deal:

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[25] See Daniel Pruzin, *Developing Nations Insist on Zero Tariff Cuts for Certain Agricultural Goods at Doha Talks*, 25 Int'l Trade Rep. (BNA) 10 (Jan. 3, 2008).

[26] *Quoted in* Daniel Pruzin, *WTO Ag Chair Suggests Figures for Limiting Developing Nation Sensitive, Special Products*, 24 Int'l Trade Rep. (BNA) 1723 (Dec. 6, 2007).

[27] Under Article 5 of the Agreement on Agriculture, an importing WTO Member may impose an SSG on an agricultural product that it has subjected to tariffication. Agreement on Agriculture, art. 5, Apr. 15, 1994, WTO Agreement, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Agreement on Agriculture]. "Tariffication," under Article 4:2 of the Agreement on Agriculture, means conversion of the form of protection from a non-tariff barrier (e.g., discretionary import licensing, import ban, quota, or variable duty) to a tariff. *Id.* art. 4.2. However, several developing countries gave up their right to invoke the SSG, because rather than tariff a product, they set a ceiling bound rate on it.

- Developing countries would accept a NAMA (i.e., Swiss Formula[28]). Coefficient between 28.5 and 30.
- Developed countries would accept a NAMA Coefficient of 5.
- Developing countries would accept a NAMA Coefficient lower than 28.5, if they had additional flexibility to exclude a larger number of tariff lines from agreed-upon cuts.[29]

India defended the proposed deal on the ground that it would ensure less than full reciprocity in cutting industrial tariffs expected of developing countries, i.e., rich countries would have more onerous obligations than poor countries. That, according to India, is consistent with the DDA negotiating mandate, and with GATT Article XXXVI:8. For instance, a Coefficient range of 28.5 to 30 for developing countries would mean that they reduce average bound tariffs by 50 percent, from their 28.5 percent average rate (as of 2007). But, developed countries—under a Coefficient of 5—would have to cut their average bound tariff by more than 50 percent from their average (as of 2007) of 5.9 percent.

While Canada said it could offer a Coefficient of 5, overall the Paper met with little support for obvious reasons.

(1) The range of 28.5-30 for developing countries was well above the 19-23 range in the Stephenson Draft Modalities Text of July 2007, and the figure of 5 for developed countries was far below the 8-9 range in that Text.

(2) Developed countries could not accept such deep tariff cuts in sensitive sectors. One example, of course, was the textiles and apparel (T&A) industry in the United States. Politically, such sectors wielded sufficient lobbying might to scupper a Doha Round deal.

One odd point about the Indian Discussion Paper—odd, except perhaps to those familiar with Indian politics—is the government in New Delhi distanced itself from what its negotiators in Geneva were suggesting. Indeed, in late October 2007, India withdrew the Paper.

Despite its withdrawal, the Indian Paper highlighted an important doctrinal source for schism among WTO Members on NAMA. India extolled its Paper for embodying non-reciprocity. For the same reason, developed countries attacked

[28] The Swiss Formula is expressed mathematically, and explained further, *infra* section VI:F.

[29] *See* Daniel Pruzin, *NAMA Chair Says Next Draft Text Looks Thin, Warns that Doha Talks Could Collapse*, 24 Int'l Trade Rep. 1489-90 (Oct. 25, 2007); Daniel Pruzin, *India Floats Compromise Proposal for NAMA Talks with 28.5-30 Coefficient*, 24 Int'l Trade Rep. (BNA) 1454-55 (Oct. 18, 2007).

In particular, developing countries would apply a coefficient of 24, if the flexibilities were increased to 15 percent (of industrial tariff lines exempt from full cuts, but subject to half of the agreed-upon cuts) and 7.5 percent (of industrial tariff lines entirely exempt from reduction commitments), as opposed to the 10/5 percent formula in the July 2007 Stephenson draft modalities text.

India's Paper offered the following rather confusing example of the flexibilities it had in mind under the 10/5 percent sliding scale from the July 2007 draft modalities text. Suppose the agreed-upon Swiss Formula coefficient for developing countries is 24. If a developing country declines to invoke the 10/5 percent additional flexibility, then it could boost its coefficient to 33. It must cut all industrial tariffs (because it is not protecting any tariff lines with the sliding scale). But, the cuts are less severe, because of the figure of 33, than under the general developing country coefficient of 24. Conversely, suppose a developing country invokes the 10/5 percent scale. Then, the country must impose more severe industrial tariff cuts using the coefficient of 24, not 33. But, that country could exempt 15 percent of its tariff lines (under the 10 percent scale), or 7.5 percent of those lines (using the 5 percent end of the scale).

the proposal—the degree of non-linearity in tariff cuts was insufficient. There is a trade-off between respecting the principle of non- (or less-than-full-) reciprocity and imposing harmonizing tariff cuts. If industrial tariff reductions are truly non-linear, then poor countries make relatively deeper cuts than rich countries, because their tariffs are relatively higher than in rich countries. But, they then are asked to make fully reciprocal tariff cuts (or even more than full, given their higher base levels).

B. Developing Countries, RAMs, and NAMA

Clearly evincing the theme of schism, developing countries and RAMs were split amongst themselves in respect of NAMA commitments. In November 2007, Taiwan submitted a proposal for a 15/10 flexibility for RAMs—RAMs could exempt up to 15 percent of their tariff lines from agreed cuts, and subject those lines to half the agreed cuts, or could exempt 10 percent of their tariff lines from any reduction. China, however, took a tougher stance than Taiwan. China insisted it would "veto" any NAMA proposal with a Swiss Formula Coefficient for developing countries in the 19-23 range as proposed in the July 2007 Draft Modalities Text.[30] China further demanded all additional flexibilities apply equally to all developing countries.

The adversarial Chinese posture was regrettable. It indicated that China seemed to confuse its privileges in the United Nations Security Council with its obligation in the WTO to help forge a consensus. Arguably, China's confrontational posture also was prompted as much by it seeking to align itself politically with developing countries and against the United States and EU, as by its own domestic industrial interests.

The average Chinese industrial product tariff rate—both applied and bound—is 9 percent.[31] That average for developing countries is 28.5 percent. If China accepted a Swiss Formula Coefficient of 19 (and if it invoked the 10/5 option to protect sensitive tariff lines), then its average industrial tariff rate would drop to between 6.1 and 6.3 percent. If it agreed to a Coefficient of 23 (and invoked the 10/5 option), then its average would fall to 6.5-6.6 percent. Clearly, the difference in the repercussions for China of using either end of the range proposed in the Stephenson Draft Text is minimal. That is because China's rates fell significantly owing to its WTO accession commitments: a non-linear cut to China's reduced rates under the Swiss Formula has less of an effect than to developing countries that still have elevated rates. China, then, still viewed itself politically as a developing country. In turn, China urged the correct Coefficient was 30 for developing countries and 5 for developed countries.

Whereas China took a harder line than Taiwan in one direction, Hong Kong—joined by Costa Rica, Colombia, Mexico, Peru, Singapore, and Thailand—took a tougher stance than Taiwan (and China) in the other direction.[32] This so-called

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[30] Daniel Pruzin, *China Threatens Veto of NAMA Draft Text if Doha Tariff Flexibility Demands Not Met*, 24 INT'L TRADE REP. (BNA) 1602-03 (Nov. 15, 2007).

[31] *See id.*

[32] *See* Pruzin, *supra* note 11, at 1603-04.

"Middle Ground," or "Middle Group," of countries, supported by Ecuador, Pakistan, and Turkey, and sometimes joined by Chile, called a halt to any more flexibility to protect sensitive industrial products from tariff cuts. Generally, the Middle Ground countries had benefited from free trade-oriented policies, or were committed to espousing them in the future. They positioned themselves as a counter-weight in NAMA talks by Brazil, India, and China.[33]

The Middle Group went even further in favor of trade liberalization than the July 2007 Draft Modalities Text on the Swiss Formula Coefficient: A range of 19-23 was acceptable for developing countries, but developed countries should have to go below the 8-9 range.[34] That view put the Group at odds with developing countries favoring industrial protection—Argentina, Brazil, India, and South Africa, all of which thought 19-23 would impose excessive cuts to their bound rates. The Group stuck to its position against the EU, rejecting a November 2007 European offer (supported by the United States) to sponsor a joint proposal endorsing the figures in the 2007 Draft Modalities Text, plus permitting limited additional flexibilities to *SACU*. The Group itself, however, was not entirely unified on the topic of flexibilities. Led by Costa Rica, most of the Group (including Colombia, Ecuador, and Pakistan) argued that no flexibilities ought to be allowed beyond the 10/5 formula in that text. Chile and Mexico pressed for further developing and least developed country preferences.

However, there was one point on which all developing countries, including ones in the Middle Group, plus all developed countries except the United States and EU, agreed. They reviled a joint United States–EU proposal, unveiled in December 2007, to limit the exemptions from agreed-upon cuts to industrial tariffs.[35] In addition to the 10/5 formula proposed in the July 2007 Draft Modalities Text, the Americans and Europeans called for two further disciplines. They drew them from the anti-concentration clause of the August 2004 *Framework Agreement*.[36] As the rubric intimates, the purpose of such a clause is to prevent a developing country from concentrating in a single HS product tariff Chapter all the flexibilities it is granted to shield sensitive tariff lines from full, agreed-upon tariff cuts. An anti-concentration clause requires the developing country to spread the benefits of the special and differential treatment (the flexibilities) across multiple product categories and sub-categories. That spreading, in turn, limits the burden (in terms of limiting market access opening) imposed on the developed country's exporters of a particular product.

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33 *See* Pruzin, *"Middle Group" Rejects EU Overture on Concessions in Doha NAMA Talks*, 24 INT'L TRADE REP. (BNA)1678-79 (Nov. 29, 2007).

34 WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Formulas and Flexibilities, Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Mexico; Pakistan; Peru; Singapore and Thailand, ¶ 3, TN/MA/W/98 (Dec. 14, 2007).

35 WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Joint Paper on Revised Draft Modalities for Non Agricultural Market Access (NAMA), TN/MA/W/95 (Dec. 7, 2007) [hereinafter US-EU December 2007 Proposal]. *See* Daniel Pruzin, *Developing Countries Slam U.S., EU Proposal at WTO to Narrow Flexibilities in NAMA Talks*, 24 INT'L TRADE REP. (BNA) 1758-60 (Dec. 13, 2007).

36 WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, Annex B ¶ 8, WT/L/579 (Aug. 2, 2004) [hereinafter August 2004 Framework Agreement].

As for the specific disciplines in the clause, first, the United States and EU argued that no Member should be allowed to exempt from cuts an entire Chapter of any of the 97 HS Chapters. Thus, for example, it should be forbidden to exempt Aircraft, Electrical Machinery, Iron and Steel, Ships, or Vehicles—each of which is a Chapter in the HS—from tariff cuts. Second, no developing country should be allowed to exclude more than 50 percent of the 6-digit sub-headings under a 4-digit HS Chapter heading from agreed cuts (or 6-digit tariff lines accounting for over half of the total value of imports into that country under the 4-digit heading). For instance, in the Glass and Glassware Chapter, Glass Fibers are a 4-digit heading. In the Non-knitted or Crocheted Apparel and Clothing Chapter, Men's or Boy's Overcoats are a 4-digit heading. And, Ethylene Polymers are a 4-digit heading under the Plastics Chapter. A developing country would have to commit to cut duties on half or more of the tariff lines under each of these 4 digit headings. Notably, the United States and EU specifically rejected any additional NAMA flexibility for China, Croatia, Oman, or Taiwan to maintain higher tariffs, exclude more tariff lines from agreed-upon cuts, or have a longer implementation period than established in the Stephenson July Draft Modalities Text.[37]

Developing countries obviously had no interest in seeing their policy space constrained tightly in respect of NAMA beyond what they regarded as onerous tariff cuts. They might seek to promote an entire manufacturing sector, manifest at the HS Chapter or 4-digit level, or protect it as an infant industry. Developing countries were not moved by the argument—made in a December 2007 joint paper by Canada, EU, Iceland, Japan, New Zealand, Norway, and United States—that if the Swiss Formula Coefficients of the July 2007 Draft Modalities Text were accepted, then the special and differential treatment principle of less than full reciprocity would be respected. Averaged applied tariffs in developing countries exceed by two times those in developed countries. But, the ratio would expand to three times if the Coefficient for developed countries were 8-9 and for developing countries 19-23. A similar expansion would occur for bound rates. Significantly, these projections failed to persuade any other developed country to endorse the United States–EU proposal for severe limits on industrial tariff cuts.

C. Environmental Goods

In another infrequent, happy display of unity, the United States and EU offered a joint proposal in November 2007, in the context of NAMA negotiations, to create free trade in environmentally-friendly goods and services, particularly those associated with clean energy that are directly linked to climate change.[38] The two powers called for a plurilateral agreement similar to the *Information*

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[37] *See* Daniel Pruzin, *WTO Members End Week of NAMA Talks with No Progress; Cross-Sector Deals Eyed*, 25 INT'L TRADE REP. (BNA) 119-20 (Jan. 24, 2008).

[38] *See* Daniel Pruzin, U.S., *EU Propose Plan to End Barriers To Trading Climate-Friendly Technology*, 24 INT'L TRADE REP. (BNA) 1720 (Dec. 6, 2007).

Technology Agreement (*ITA*),[39] which eliminated tariffs on nearly 200 high-tech products. Their proposal laid out a two-step methodology.

First, tariffs would be eliminated on forty-three climate-friendly technology products, identified by the World Bank, such as containers for liquid and solid waste, goods concerning energy security, refrigeration equipment directly related to dealing with climate change, solar panels, and wind turbines. Second, an Environmental Goods and Services Agreement (EGSA) would eliminate non-tariff barriers on green products, and make binding tariff elimination commitments on additional merchandise (beyond those covered in the first phase). Critically, the second phase would create enhanced market access for cross-border trade in climate-related services, such as architecture, construction, energy, engineering, and environmental services. In both phases, developing countries—aside from advanced ones—would be required to take on obligations commensurate with their level of development.

The joint proposal hardly made all WTO Members happy. The debate over the United States–EU proposal not only was inconclusive, but also turned nasty. The so-called "Friends Group," consisting not only of the United States and EU, but also Canada, Japan, Korea, Norway, Switzerland, and Taiwan, originally argued tariffs should be eliminated in the first phase on 400 products. They cut the list to 153, and finally to 43. The greener the country in the Friends Group, the less pleased it was with the whittling of the list. Developing countries dubbed the proposal hypocritical, as the sponsors were among the biggest polluters. Some developed countries were unhappy with a perceived divide-and-rule strategy, whereby they would be disqualified for special and differential treatment because of their status as advanced.

Developing countries generally labeled the proposal as self-interested. Surely the rich countries were trying to secure market access for the environmentally-friendly goods and services in which they enjoy a comparative advantage, while at the same time protect their own constituencies. In rejecting the proposal, Brazil pointed out the United States and EU refused to include bio-fuels, on the pretext they are an agricultural good that ought to be discussed not in NAMA negotiations, but rather in farm trade talks.[40] Brazil called for a bilateral request-offer methodology to ensure products in which it and other developing countries had a keen export interest would be covered, and to give due consideration to their domestic producers. For Brazil, ethanol biofuels were a case in point.[41]

Brazil produces ethanol from sugarcane; the United States and EU do so from corn or sugar beet. Yet, sugarcane is the cheaper source. Hence, ethanol from Brazil holds a comparative advantage against American and European biofuels. Yet, Brazilian ethanol faces stiff barriers to entry in the American and European

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[39] WTO, Ministerial Declaration on Trade in Information Technology Products (Dec. 13, 1996).

[40] *See* Daniel Pruzin, *Brazil Rejects U.S.–EU Proposal at WTO on Environment, Citing Biofuels' Absence*, 24 Int'l Trade Rep. (BNA) 1721 (Dec. 6, 2007).

[41] *Id.*

markets, including an American tariff of 54 cents per gallon, or 14.27 cents per liter. The United States justifies the tariff on five grounds.[42]

First, Brazilian producers benefit from a domestic biofuels subsidy and income tax incentives. Second, the United States offers a production tax credit of 51 cents per gallon to all ethanol producers, foreign or domestic. The tariff helps defray the cost of this credit, and eliminating the tariff would amount to subsidizing Brazil. Third, a high tariff is needed to reduce America's dependence on foreign oil and enhance its energy security. Fourth, while not exactly an infant, America's ethanol industry has not matured fully. Fifth, Brazil is already able to take advantage of duty-free access under the Caribbean Basin Initiative for dehydrated ethanol. Specifically, Brazil can ship wet ethanol, i.e., ethanol containing water, to a CBI country, dehydrate that ethanol, i.e., remove the water, and then ship dehydrated ethanol to the United States without paying a tariff. There is a sixth—political—basis for the ethanol tariff. With twenty-two ethanol refineries (as of February 2008), Iowa leads the United States in ethanol production capacity and output. Senator Charles Grassley of Iowa, ranking Republican member of the Senate Finance Committee, is a staunch defender of the tariff.[43]

D. Services

The schism separating most rich from most poor countries in respect of services trade liberalization showed little signs of narrowing, despite two years of negotiations following the December 2005 Hong Kong Ministerial Conference. The United States, in particular, made it clear that binding (1) existing practices in services, and (2) market access commitments already being offered—while welcome as a minimum effort, in part because incorporating these practices and commitments would render them subject to *DSU* proceedings[44]—would be insufficient.[45] After all, services account for 68 percent of world Gross Domestic Product (GDP), and 20 percent of global trade.[46] The latter figure excludes services provided via Mode III Foreign Direct Investment (FDI), and 60 percent of FDI consists of service provision.[47] As just one example, India capped foreign

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[42] 2007 Farm Bill, H.R. 2419, 110th Cong. (2007) (extends the tariff on ethanol imports through 2010.) *See* Adam Snider, *Sustaining Bush Veto of Farm Bill an 'Uphill Battle,' Ag Secretary Schafer Says*, 25 INT'L TRADE REP. (BNA) 719-20 (May 15, 2008).

[43] *See* Lynn Garner & Rossella Brevetti, *Sen. Grassley Says Lifting Tariffs on Ethanol Would Subsidize Brazil*, 25 INT'L TRADE REP. (BNA) 201-02 (Feb. 7, 2008).

[44] DSU proceedings refer to dispute settlement proceedings brought by a WTO Member country against another Member country for taking measures in contravention of , or failure to fulfill an obligation of a WTO agreement. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apt. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

[45] *See* Rossella Brevetti, *Reps. McCrery, Herger Chart Goals for Doha Talks in Letter to Schwab*, 25 INT'L TRADE REP. (BNA) 43 (Jan. 10, 2008).

[46] *See* Daniel Pruzin, U.S., *EU to Insist on Services "Signaling" Conference as Condition for Moving on Doha*, 25 INT'L TRADE REP. (BNA) 219-20 (Feb. 14, 2008).

[47] BHALA, *supra* note 2 (explaining the four Modes by which services are traded across international boundaries). In brief, Mode I is cross-border supply, Mode II is consumption abroad, Mode III is FDI, and Mode IV is temporary movement (immigration) of persons.

ownership of insurance firms at 26 percent, and China forbade foreign insurers from selling auto insurance policies to individuals.[48]

Thus, for the United States, and the EU too, there had to be new, commercially meaningful market access for services, along with balanced outcomes on agriculture, NAMA, and trade remedies. Otherwise, any Doha Round package would be unacceptable. Yet, Brazil, China, and India led developing countries in opposing even the minimum effort supported by the United States.

Accordingly, documents called "Coordinator Papers" were circulated among WTO Members assessing the progress of market access requests that had been made collectively by two or more Members. Collective requests covered nineteen services sectors or commitment topics, as follows (with the Member, if known, coordinating requests, offers, and discussions in parentheses):[49]

- Agriculture-Related Services
- Air Transport (Australia)
- Architectural, Engineering, and Integrated Engineering (Canada)
- Audiovisual Services (Mexico)
- Commercial Presence Commitments (EU)
- Computer and Related Services (Chile)
- Construction (Japan)
- Distribution (EU)
- Energy (EU)
- Environmental (EU)
- Financial (Canada)
- Legal (Australia)
- Logistics (Hong Kong)
- Maritime Transport (Japan)
- MFN Exemptions (Hong Kong)
- Postal and Courier (United States)
- Private Education (New Zealand)
- Telecommunications (United States)
- Tourism and Travel (Colombia)

Yet, the common denominator across all of these sectors was dissatisfaction as to the level of ambition in the proposals.

Essentially, positive responses to requested concessions were coming largely from developed countries. For example, Australia, Canada, EU, Hong Kong, Japan, Norway, Singapore, Korea, Taiwan, and the United States had submitted a collective request on telecommunications to twenty-two other Members. Their collective proposal received hardly any good offers. Similarly, twenty-one Members received a joint request on financial services made by eleven other Members. The request sought enhanced rights to (1) establish new or acquire existing

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[48] *See* Daniel Pruzin, *Services Groups Welcome WTO Move on Signaling Conference to Break Logjam*, 25 INT'L TRADE REP. (BNA) 591-92 (Apr. 24, 2008).

[49] *See* Daniel Pruzin, *WTO Developing Country Members Protest Benchmarks in Doha Round Services Texts*, 24 INT'L TRADE REP. (BNA) 1757-58 (Dec. 13, 2007).

financial services firms, (2) set up branches, joint ventures, and wholly owned subsidiaries, (3) eliminate rules discriminating against foreign firms, including economic needs tests, quotas, or mandatory cessions, and (4) supply aviation, marine, and transport insurance or reinsurance, financial advisory services, and data processing). Yet, only one recipient responded fully, and two said they would not enhance their standing offer.

To be sure, the schism on services did not have all poor countries on one side. India's Minister of Commerce and Industry, Kamal Nath, explained that services trade is important to the likes of India, Pakistan, and China.[50] In India and Pakistan each, 15 million people are moving from consumption of one meal per day to two meals, and millions of Chinese are switching from drinking soya to dairy milk. Hundreds of millions of people across these three countries—including 100-200 million of India's 650 million subsistence farmers—need to transition out of agriculture.[51] Manufacturing and services are their obvious economic destinations (an insight from Labor Surplus Models of economic development, such as the Fei-Ranis Model).[52] Thus, along with a second agricultural revolution (the first being the Green Revolution of the 1950s through 1970s) to stimulate agricultural output through modern technology and capital, many developing countries needed healthy economies with respect to industry and services. Hence, NAMA and services negotiations mattered to them, too.

On the one hand, as an employment outlet for their rising middle classes, developing countries needed to protect their infant services industries from foreign competition. Thus, for instance, the parliament of Brazil never ratified the 1997 *General Agreement on Trade in Services* (*GATS*) commitments on liberalization of trade in financial and telecommunications services.[53] American and European service providers certainly were displeased that the commitments were not binding on a large Latin American market. On the other hand, as an employment outlet for professionals, they sought market access in developed countries through temporary work visas, i.e., Mode IV commitments.[54] Embroiled in a politically contentious debate on immigration, the United States stood by its initial Mode IV offer of 2003, which was to grant temporary entry rights to executives, managers, or employees of a foreign company on the condition that company has a physical presence (specifically, subsidiary, branch, or affiliate) in America, and establish an Internet-based information resource for foreign service suppliers to find out about American laws.[55]

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50 *See* Vir Singh, *India's Nath Says "Agricultural Revolution" Needed for Developing Countries' Trade Gains*, 25 INT'L TRADE REP. (BNA) 49 (Jan. 10, 2008).

51 *Id.*

52 This Model is explained in RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW 181-89 (Lexis-Nexis 2008).

53 *See* Daniel Pruzin, *Mixed Results Seen in WTO Bilateral Talks on Services; U.S. Under Pressure on Mode 4*, 25 INT'L TRADE REP. (BNA) 412-13 (Mar. 20, 2008).

54 *See* Daniel Pruzin, *U.S. Official Gives Mixed Assessment on Senior-Level Doha Services Talks*, 25 INT'L TRADE REP. (BNA) 712 (May 15, 2008). Generally, Mode IV involves the cross-border movement of professionals.

55 *Id.*

Thus, the Coordinator Papers succeeded in highlighting division, but failed to catalyze consensus. In February 2008, the Chairman of the Negotiations on Services, Ambassador Fernando de Mateo of Mexico conceded defeat. Substantively, there had been insufficient progress to justify a draft modalities text on services.[56] Indeed, there were three schismatic groups:[57]

(1) Developed countries led by Australia, EU, Japan, and Australia demanded services trade liberalization at the same level of ambition as trade in agriculture and industrial products. Current levels of services market access would have to be bound, and progressively greater commitments would have to be made. Yet, only about thirty WTO Members were likely to make any new concessions. The United States sought commitments in all services sectors to eliminate barriers on Mode III (commercial presence), especially caps on foreign investment in local services firms. The United States called for full rights of establishment so as to eliminate restrictions on the way in which foreign companies must offer a service (such as a rule that a foreign insurer can provide policies only through a branch, not a subsidiary).[58] Further, the United States sought far better market access offers for Mode III, as well as Mode II (cross-border supply, including electronic delivery), on banking, insurance, distribution, and legal services by countries with major emerging markets in these sectors, principally, Brazil, Argentina, China, Egypt, India, Malaysia, Philippines, Thailand, Turkey, and South Africa.[59]

(2) Developing countries, particularly Argentina, Brazil, China, India, Pakistan, and South Africa, generally resisted the goal of developed countries to make talks on services trade liberalization as ambitious as farm and industrial trade negotiations. Moreover, India rejected EU demands to bind its existing services practices so as to reduce legal uncertainty among foreign service suppliers seeking to tap the Indian market. Instead, India and its allies argued developed countries should make major commitments on the two points of keen interest to developing countries: in services sectors in which they have an export interest; and on the Mode of delivery at which they are best, namely, Mode IV temporary movement of persons. Bolivia, Cuba, and Venezuela saw no need at all for a services text. Procedurally, developing countries insisted that they needed to see what developed countries offered them on agricultural tariff and subsidy cuts before they would make any serious service sector liberalization commitments.

(3) A Middle Ground Group, consisting of Chile, Hong Kong, Peru, Singapore, and Turkey, along with SVEs like Barbados, suggested a text might contain modest commitments. WTO Members ought to try to make full commitments,

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56 *See* Daniel Pruzin, *WTO Services Chairman Admits Defeat in Effort to Produce Text for Advancing Talks*, 25 Int'l Trade Rep. (BNA) 184 (Feb. 7, 2008).

57 *See* Daniel Pruzin, *WTO Services Chair Issues Report Outlining Areas of Agreement, Divergence on Draft Text*, 25 Int'l Trade Rep. (BNA) 258-59 (Feb. 21, 2008); Daniel Pruzin, *Questions, Doubts Linger About Proposed Signaling Conference for WTO Services Talks*, 25 Int'l Trade Rep. (BNA) 259 (Feb. 21, 2008).

58 *See* Pruzin, *supra* note 53, at 412-13.

59 *See* Pruzin, *supra* note 55, at 712.

with no limits, in as many sectors as possible. But, understandably, in some sectors and Modes of supply, their approach would be gradual.

About the only points on which all Members could agree were that the request–offer procedure of negotiating service market liberalization was slow, and that every deadline in the Doha Round to circulate offers had been breached.

IV. The November 2007 Draft Text on Trade Remedy Rules

A. Antidumping and Countervailing Duties

In November 2007, the Chair of the Negotiating Group on Rules, Ambassador Guillermo Valles Galmés of Uruguay circulated to WTO Members a Draft Consolidated Text of new rules to clarify and improve disciplines on antidumping (AD) duties and countervailing duties (CVDs).[60] This Draft, which was the first substantive development on trade remedies since the launch of the Doha Round, was a text-based one. That is, it had line-by-line proposals for amending the Uruguay Round *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*Antidumping*, or *AD*, *Agreement*)[61] and *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*).[62] Yet, the Chair declared the Group had "reached a point of diminishing returns," and "[t]here are no brackets and no blanks. . . because I consider that they are bracketed in their entirety."[63]

Ambassador Galmés' declaration reflected a deep schism in the Doha Round on possible revisions to technical trade remedy rules. Generally, the United States sought to preserve as much flexibility as possible in AD and CVD investigations, and deploying trade remedies. For example, it sought permission to use a controversial methodology in dumping margin calculations known as "zeroing."[64] Joined by the EU, the United States also argued for strengthening anti-circumvention rules to prevent exporters from getting around an AD or CVD order. Typically opposing the Americans was an informal group of WTO Members called "Friends of Antidumping Negotiations."

The Friends Group consisted of Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Korea, Switzerland, Taiwan, Thailand, and Turkey.[65] The Group sought to tighten existing disciplines

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[60] WTO, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreement*, TN/RL/W/213 (Nov. 30, 2007) [hereinafter November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement*].

[61] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Antidumping Agreement].

[62] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SCM Agreement].

[63] 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 1.

[64] For a discussion of this methodology, see BHALA, *supra* note 2, ch. 32.

[65] *See* Daniel Pruzin, *Brazil Criticizes WTO Draft Rules Text As "Major Step Backward" for Global Trade*, 24 INT'L TRADE REP. (BNA) 1718-19 (Dec. 6, 2007).

on AD and CVD remedies. A trade remedy should not be excessive, but instead restricted to the minimal intervention needed to address the injurious effects of dumping or unlawful subsidization. Thus the Friends opposed zeroing as well as a widening of anti-circumvention rules that might block out too many imports. Rather, the Friends lobbied for changes such as automatic termination of trade remedy orders with no possibility of extension, or at worst a 10-year limit on the duration of an order. They also advocated a requirement to take into account consumer interests before imposing an order, and periodic review of the trade remedy policy of each WTO Member. The Friends called for fair, objective methodologies in ascertaining facts, and demanded procedures to increase transparency and due process in, but reduce the costs for investigating authorities and respondents of, trade remedy proceedings.

The schismatic positions reflected static polar self-images. The American self-image, one promoted by many Congressmen and lobbying groups (*e.g.*, the *ad hoc* coalition of manufacturers, workers, and farmers known as the "Committee to Support U.S. Trade Laws" (CSUSTL)), was that of an importer with besieged domestic producers. Thus, the United States needed maximum flexibility to fight unfair trade, and no weakening of disciplines against unfair trade —no sell-out in the Doha Round—could be tolerated. In looking at the mirror, the Americans did not foresee the likelihood savvy foreign governments with increased legal capacity would use that flexibility to whack American exporters with remedial actions. The Friends saw themselves as exporters. Their exporters are targets—indeed, victims—of unfair trade remedies. The Friends discounted the possibility their domestic producers might one day need the remedies to protect themselves.

The 93-page single-spaced November 2007 Draft Rules Text to clarify and improve disciplines on AD duties and CVDs was dramatic in the number and extent of changes proposed, and the controversies that ensued. The key suggestions in the draft (with quotations directly from it, and relevant provisions in the *Antidumping* or *SCM Agreement* in parentheses) were as follows.

B. Proposed AD Rule Changes

(1) Cost of Production –

When calculating cost of production for purposes of Constructed Value (a proxy for Normal Value), "due regard" must be given to "any" cost allocations historically utilized by a respondent producer or exporter, especially as to amortization and depreciation periods and allowances for capital expenditures. That is, a respondent would not face a severe burden of proving long-standing historical utilization of such allocations.[66]

(2) Currency Conversion –

When converting a foreign currency for purposes of the dumping margin calculation, exchange rate data should come "from a source of recognized author-

[66] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 4. The draft text proposed adding "giving due regard to any cost" to Article 2.2.1.1 of the Antidumping Agreement, *supra* note 61, art. 2.2.1.1.

ity," such as a central bank, and that source should be identified in a transparent manner.[67]

(3) Model Zeroing in Original Investigations –

An investigating authority must take into account the amount by which Export Price exceeds Normal Value in any comparisons. In particular, when aggregating results of multiple comparisons of weighted average Normal Value and weighted average Export Price (or Constructed Export Price) to calculate a dumping margin, zeroing in an original investigation is forbidden. Average-to-average comparisons of Normal Value to Export Price, made within individual averaging groups that are established on the basis of the physical characteristics of subject merchandise, is called "Model Zeroing."[68] Thus, consistent with Appellate Body rulings, Model Zeroing would be forbidden.[69]

(4) Simple Zeroing in Original Investigations –

If comparisons in an original investigation are between Normal Value and Export Price on a transaction-by-transaction basis, or on the basis of multiple comparisons of individual Export Prices to a weighted average Normal Value, then the authority may (but is not obligated to) engage in zeroing, i.e., it is free to ignore (it may disregard) the extent to which Export Price exceeds Normal Value. Average-to-individual or individual-to-individual comparisons are called "Simple Zeroing."[70] Thus, Simple Zeroing would be allowed, a departure from, and in effect reversal of, a number of Appellate Body decisions.[71]

(5) Zeroing in Reviews –

In any review of an AD order, whether it be a Sunset Review, Administrative (or other Periodic) Review, or New Shipper Review, the reviewing authority may

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[67] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 5 (amending Article 2.4.1 of the Antidumping Agreement, *supra* note 61, art. 2.4.1).

[68] Essentially, an investigating authority sub-divides subject merchandise (which, overall, is a like product) into separate sub-categories, called "averaging groups," or simply "models." For each model, the authority calculates a dumping margin on the basis of weighted average price data. Ultimately, the authority computes an overall dumping margin for the subject merchandise, summing across the margins of the model groups. But, in so doing, it zeroes out any negative dumping margin in a model category. That is, if the dumping margin for any model is negative (i.e., the weighted average Export Price exceeds the weighted average Normal Value for that product sub-category), then the authority re-sets that margin to zero. Consequently, when the authority adds up all of the margins, across the models, it does not allow non-dumped sales in one model to offset dumped sales in another model – because it has re-set the margin of the non-dumped sale sub-category to zero.

[69] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 6 (amending Article 2.4.3(i) of the Antidumping Agreement, *supra* note 61, art. 2.4.3(i)).

[70] Specifically, in Simple Zeroing, an investigating authority does not divide subject merchandise into different sub-product categories. Rather, it compares price data for the entirety of subject merchandise against price data for the foreign like product, and computes directly a single weighted average dumping margin. Moreover, in Simple Zeroing, the comparison made is between either (1) weighted average price data for a foreign like product (for Normal Value) against individual transaction price data (corresponding to Export Price or Constructed Export Price), or (2) price data on individual sale transactions of the foreign like product (corresponding to Normal Value) and subject merchandise (corresponding to Export Price or Constructed Export Price). In either instance, the investigating authority automatically sets any negative dumping margin to zero. Hence, non-dumped sales cannot offset dumped sales.

[71] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 5 (adding Article 2.4.3(ii) to the Antidumping Agreement, *supra* note 61, art. 2.4.3(ii)).

engage in zeroing, whether Model Zeroing or Simple Zeroing.[72] This authorization also would reverse a number of Appellate Body decisions.

(6) Product Differentiation –

When establishing different models of types within a certain product category of subject merchandise—a tactic associated (*inter alia*) with Model Zeroing—an authority must give respondent producers and exporters the opportunity to express their views on the distinctions. All of the models or types must share the same basic physical characteristics to qualify as being in the same category. Relevant factors such as use, interchangeability, competition in the same market, and distribution in the same channels, shall be considered in evaluating the degree of difference in these characteristics.[73]

(7) Injury –

When proving injury to a domestic industry, an authority must examine any known factor other than dumped imports. Other factors may be not only the volume and price of non-dumped imports, but also relevant variables such as contraction in demand, changes in consumption patterns, trade restrictive practices of foreign or domestic producers, competition between foreign and domestic producers, technological change, productivity of the domestic industry, and export performance of the domestic industry. Moreover, imports from a respondent exporter or producer that are not dumped (i.e., have a zero or *de minimis* dumping margin) must not be considered dumped imports when making an injury determination.[74]

(8) Threat of Injury –

When proving threat of injury to a domestic industry posed by dumped imports, an authority must consider the state of that industry during the period of investigation (POI).[75]

(9) Material Retardation –

An AD petition may allege material retardation of the establishment of a domestic industry. That allegation must not be upheld on conjecture or remote possibility, but rather on facts. An industry is "in establishment" if already there is "a genuine and substantial commitment of resources . . . to domestic production of a like product not previously produced" in the importing country, but production has not yet started or is not yet at commercial levels. (Notably, despite extant domestic producers, an industry could be "in establishment" if the collective capacity of the existing firms were 10 percent or less of domestic demand for the product.) Whether establishment is materially retarded requires not

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72 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 5, 19-22, 25-27 (adding Article 2.4.3(iii) and modifying Articles 9 and 11 of the Antidumping Agreement, *supra* note 61, arts. 9, 11).

73 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 6-7 (adding Articles 2.4.3 and 2.4.4 and amending Article 2.6 of the Antidumping Agreement, *supra* note 61, art. 2.6).

74 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 7-8 (amending Articles 3.1 n.11 and 3.5 of the Antidumping Agreement, *supra* note 61, arts. 3.1, 3.5).

75 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 8 (adding Article 3.7 and amending Article 2.6 of the Antidumping Agreement, *supra* note 61, art. 2.6).

only a check of the volume and price of dumped imports, but also of other relevant factors, such as installed production capacity, actual or planned investments, financing obtained, feasibility or market studies.[76]

(10) Causation –

Demonstrating a causal relationship between dumped imports and injury (or threat thereof) is necessary before imposing an AD duty. However, the express list of factors in the *Antidumping Agreement* that an authority must examine would be eliminated.[77] In its place would be a provision allowing an authority to render a causation determination based on a qualitative analysis of evidence, such as the nature, extent, geographic concentration, and timing of injurious effects. A quantitative analysis, such as an econometric study, is by no means required. To be sure, an authority should separate and distinguish the injurious effects of dumped imports from the injurious effects of other factors, and must not attribute to dumped imports other factors that may be causing injury. But, the authority need not quantify the injurious effects attributable to the various factors, nor need it weigh the injurious effects of the factors.[78]

(11) Standing and Scope –

AD petitions must identify carefully the domestic industry filing a petition, including producers of the like product supporting the petition, and the value and volume of the like product. Exclusion from the definition of a "domestic industry"—including for determinations about standing under the 50 and 25 percent tests—if a producer also is an importer of subject merchandise must be based on established criteria (*e.g.*, the proportion of its imports to total sales of the domestic like product). Investigations, determinations of dumping margins, injury, and causation, and imposition of AD duties, must be limited in scope to the single product under consideration, and merchandise not properly in that scope must be excluded. Investigations must follow a timetable, a single product should not be investigated more than once in the same year (absent changed circumstances), and an investigating authority may request interest parties (including affiliates thereof) to supply relevant information.[79]

(12) Transparency –

An authority must maintain a publicly available file of all non-confidential documents associated with an investigation, must explain the basis for any conclusion that it is impracticable to determine an individual dumping margin for a known exporter or producer that submitted requisite information, and must in-

[76] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 9 (adding Article 3.9 of the Antidumping Agreement, *supra* note 61).

[77] Those factors, set out in Article 3, are: contraction in demand or changes in consumption patterns; export performance of domestic producers; technological developments; trade restrictive practices of, or competition between, foreign and domestic producers; and volume and price of non-dumped imports. Antidumping Agreement, *supra* note 61, art. 3.5.

[78] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 8 (modifying Article 3.5 of the Antidumping Agreement, *supra* note 61, art. 3.5).

[79] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 9-13, nn.17-18 (modifying Articles 4.1, 5.2(i) and 5.4, and adding new Articles 5.6*bis,* 5.1*bis,* and 6.1*bis* to the Antidumping Agreement, *supra* note 61, art. 4.1, 5.2(i) and 5.4).

form respondents of their right to offer a price undertaking. The authority must provide public notice of relevant information and explain its determinations.[80]

(13) Public Input –

Each WTO Member must establish procedures to take due account of representations made by any "domestic interested party" – including industrial users of the subject merchandise and representative consumer organizations – the interests of which may be affected by imposition of an AD duty. In other words, more than the views of the petitioning injury should matter, and notably, whenever a domestic like product is sold commonly at the retail level, consumers must be consulted. Further, this public interest requirement would replace the non-binding Lesser Duty Rule, whereby a WTO Member may impose an AD duty of less than the full amount of the dumping margin, if a lesser duty would be adequate to remedy injury to a domestic industry.[81]

(14) Refunds –

An authority must provide for timely refund (plus reasonable interest) of any AD duty or security collected that exceeds the actual dumping margin.

(15) Zeroing and Imposition of Duty –

An authority may set the amount of liability or entitlement to refund without regard to the amount by which Export Price (or Constructed Export Price) exceeds Normal Value. That is, when calculating the AD duty owed (or refund amount), whether on the basis of individual import transactions, or all import transactions, the authority need not consider non-dumped sales, nor offset them against dumped sales. In effect, the authority can engage in zeroing for purposes of setting the duty liability amount.[82]

(16) Anti-circumvention –

Extending the scope of a trade remedy to cover merchandise shipped by a respondent exporter or producer that is targeted by an AD order, but that seeks to evade AD duties, is permissible. Anti-circumvention rules must be subject to established disciplines, including a strict definition as to what constitutes "circumvention." That definition must state circumvention occurs in one of three ways, namely, when a targeted exporter or producer: (a) ships slightly modified merchandise directly or indirectly into the importing country; (b) ships parts directly into the importing country (i.e., it ships subject merchandise in an unfinished form to the importing country for final assembly there); or (c) ships parts to a third country (i.e., it sends subject merchandise in an unfinished form to a third country for final assembly there, and then ships the finished merchandise to the importing country). In the second and third contexts, two tests must be met before an AD order can be extended: first, the value of parts must be at least 60

[80] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 14, 17-19 (adding new Articles 6.4*bis* and 6.10.3, and modifying Article 8.2 of the Antidumping Agreement, *supra* note 61, art. 8.2).

[81] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 19 (modifying Article 9.1 of the Antidumping Agreement *supra* note 61, art. 9.1).

[82] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 20 (modifying Article 9.3 of the Antidumping Agreement, *supra* note 61, art. 9.3).

percent of the total value of a finished product; and second, the value added to a finished product during final assembly must not exceed 25 percent of the finished product. The first test helps ensure an order is not extended to the unfinished forms of subject merchandise simply because a foreign producer completes production in the importing or a third country. It may do so for reasons of cost. The less the value of parts it assembles in the importing or a third country, the less likely circumvention is the aim of the producer. The second test helps ensure an order is not extended to unfinished forms if a foreign producer adds significant value to its product during the latter stages of production. The greater the value it adds at the final stage, the less likely it seeks to circumvent an AD order. Any circumvention determination must be based on a formal review, triggered by a substantiated request, and the 25 and 50 percent standing tests apply to such a request.[83]

(17) Changed Circumstances Reviews –

Each WTO Member must provide for reviews of AD orders, as to revocation of the order or modification in the level of AD duty, in the event of a change in circumstances of a lasting nature since the original investigation (or last review).[84]

(18) Sunset Reviews –

A Sunset Review is required within 6 months before the end of the 5 year period following imposition of an AD duty (or most recent Review), and must be completed within 6 months of the end of that period (or most recent Review). However, a Sunset Review must be initiated by written application by or on behalf of a domestic industry, which must contain data on the condition of the industry since the AD duty was imposed, and the potential impact any continued or recurred dumping could have if the duty were terminated. An authority must determine whether (1) there is sufficient evidence to warrant the review, and (2) the application is "by or on behalf" of the industry according to the 25 and 50 percent standing tests.[85]

(19) Outer Limits for an Order and Re-imposition –

No AD order can last longer than 10 years. If an AD duty, having been extended after an initial Sunset Review, is terminated within 10 years of its initial imposition, but there is sufficient evidence of renewed dumping, injury, and causation within 2 years of the date of termination, then an authority may impose immediate provisional measures against dumped imports based on the best information available. In addition, it may impose definitive AD duties retroactively, dating to 90 days before application of provisional measures (but after termination of the original order).[86]

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[83] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 22-24 (adding new Article 9.1bis, Circumvention, to the Antidumping Agreement, *supra* note 61).

[84] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 25 (modifying Article 11.2 of the Antidumping Agreement, *supra* note 61, art. 11.2).

[85] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 25-26 (modifying Article 11.3 of the Antidumping Agreement, *supra* note 61, art. 11.3).

[86] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 27 (adding new Article 11.3.6 of the Antidumping Agreement, *supra* note 61).

(20) New Shipper Reviews –

An authority must provide for timely New Shipper Reviews in certain cases, particularly where an exporter or producer makes *bona fide* sales in commercial quantities of a relevant product into the importing country.[87]

(21) Third Country Petitions –

The decision as to whether to initiate an investigation of dumping in a third country rests entirely with the importing country, notwithstanding GATT Article VI:6(b).[88]

(22) Member Reviews –

The AD policies and practices of each WTO member shall be reviewed periodically by the WTO Committee on Antidumping Practices.[89]

C. Proposed CVD Rule Changes

(1) Relevant Corresponding Changes –

Changes made to the *Antidumping Agreement* relevant to the investigation of unlawful subsidies and imposition of CVDs shall be made to the *SCM Agreement.*[90]

(2) Benefit –

A financial contribution confers a "benefit" it its terms are more favorable than otherwise commercially available to the recipient in the relevant market.[91]

(3) Export Subsidies –

Every subsidy itemized in the illustrative list of export subsidies (contained in Annex I to the *SCM Agreement*) shall be deemed to be an illegal export subsidy. But, a negative inference may not be drawn from Annex I, meaning that if a program is not listed in Annex I, it is impermissible to imply from the omission the program is not an export subsidy.[92]

(4) Reinstatement of the Dark Amber Category –

The category of Dark Amber subsidies, which are actionable with the rebuttable presumption that they cause serious prejudice, would be renewed.[93]

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[87] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 21 (amending Article 9.5 of the Antidumping Agreement, *supra* note 61, art. 9.5).

[88] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 31 (amending Article 14.4 of the Antidumping Agreement, *supra* note 61, art. 14.4).

[89] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 39 (adding Annex III, Procedures For The Review Of Members' Anti-Dumping Policy And Practices Pursuant To Article 18.5, to the Antidumping Agreement, *supra* note 61).

[90] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 2.

[91] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 41 n.2 (adding an explanatory footnote to Article 1.1(b) of SCM Agreement, *supra* note 62, art. 1.1(b)).

[92] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 43 n.6 (adding an explanatory footnote to Article 3.1(a) of SCM Agreement, *supra* note 62, art. 3.1(a)).

[93] There are four Dark Amber subsidies: (1) coverage of the operating losses of an industry; (2) non-recurring (i.e., one time) coverage of the operating losses of a firm for the purpose of restructuring; (3) direct debt forgiveness; and (4) support amounting to more than 5 percent *ad valorem* of the total value of subject merchandise. November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement,*

(5) Subsidy Calculation for Goods or Services –

The methodology used to calculate the benefit conferred to the recipient of a subsidy that takes the form of provision or purchase of goods or services by a government must be subject to disciplines in the event the government regulates price levels. The prevailing market conditions for goods or services in the subsidizing country, when goods or services are sold at unregulated prices, must be examined, and the prices adjusted appropriately. If there is no unregulated market, or that market is too distorted by the predominance of the government, then either export or third country prices may be used.[94]

(6) Subsidy Calculation for Inputs –

No benefit may be attributed to the producer of subject merchandise from a subsidy provided to an input, where the producer of the input is unrelated to the producer of the subject merchandise. However, this presumption may be rebutted with proof the producer of subject merchandise obtained the input on terms more favorable than otherwise commercially available.[95]

(7) Attribution of Subsidy Benefits –

When attributing the benefits of a subsidy to a particular time period, such as pre-privatization, an investigating authority must follow strict guidelines. Notably, benefits (other than subsidized loans or debt) must be expensed in full in the year of receipt, or allocated over a period of years. An authority must consider whether a subsidy is non-recurring, along with the purpose and size of a subsidy, to determine whether it is properly expensed or allocated. If allocated, the appropriate period should be the average useful life of depreciable, physical assets of the relevant industry or firm, and the allocated subsidy benefit in a particular point in that period may reflect the time value of money. Certain kinds of subsidies normally must be expensed in full in the year received, particularly tax exemptions, deductions, and rebates, provision of goods or services, price supports, energy discounts, freight subsidies, export promotion assistance, early retirement payments, worker assistance or training, and wage subsidies. Other kinds of subsidies, however, normally shall be allocated over multiple years, namely, equity infusions, grants, plant closure assistance, debt forgiveness, debt-to-equity conversions, coverage of operating losses, and provision of non-general infrastructure, plant, or equipment.[96]

Many of the above proposals were neutral clarifications of existing AD and CVD rules, or probably intended by the Chairman as such. Nevertheless, few if any WTO Members were delighted with all of the suggestions. The Chairman's

supra note 60, at 45-46 (reinstating previously lapsed categories to Article 6.1of SCM Agreement, *supra* note 62, art. 6.1).

94 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 58 (adding provisions regarding goods sold at unregulated prices to Article 14.1(d) of SCM Agreement, *supra* note 62, art. 14.1(d)).

95 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 58 (proposing new Article 14.2 to be added to SCM Agreement, *supra* note 62).

96 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, at 59 (proposing new Article 14.3 providing attribution guidelines to be added to SCM Agreement, *supra* note 62).

draft, then, did as much to identify sharp disagreements as to pave the way for a Doha Round breakthrough on trade remedies.

D. More Hard Bargaining

The November 2007 Text was at best the start of hard bargaining to come. To be sure, the Department of Commerce (DOC) abandoned in February 2007 Model Zeroing in original investigations, so the proposed ban on this methodology in that context should be acceptable to the United States. Other proposals in the Text on zeroing appeared favorable to the Americans—the Text largely overruled most Appellate Body decisions, especially its resounding condemnation in the January 2007 *Japan Zeroing* case.[97] Indeed, one American lawyer noted the Text was so close to the American proposal of July 2007 that he castigated the Chairman as "a stenographer for the United States."[98] Nevertheless, the United States declared it was "very disappointed" in changes that would cut back on trade remedies (including any restraints on zeroing).[99]

Not surprisingly, the United States was the only WTO Member to indicate support for the zeroing proposals. The American line, which no other Member bought, was that the Doha Round mandate was to clarify and improve trade remedy rules, which meant being faithful to what had been agreed to in the Uruguay Round. No one had agreed to ban zoning during that Round, meaning the Appellate Body had exceeded the negotiated outcome from that Round. Hence, the Members should correct illegitimate adjudicatory outcomes.

Seventeen other Members—including most of the Friends group—issued a joint statement condemning the zeroing proposals. Brazil, China, Colombia, Costa Rica, Hong Kong, India, Indonesia, Japan, Korea, Mexico, Norway, Pakistan, Singapore, South Africa, Switzerland, Taiwan, and Thailand all said the proposals, if implemented, would nullify trade liberalization efforts in agriculture and NAMA.[100] Argentina, Canada, Ecuador, and the EU endorsed the collaborative condemnation. Recalling that much (if not most) protectionism occurs through trade remedies, a Brazilian official intoned that increased levels of arbitrariness in rules and discretion for AD and CVD investigators would send the

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97 Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2008) (finding that both the U.S. practices of 'model' zeroing at the initial investigation stage and 'simple' zeroing' at administrative review, were contrary to U.S. WTO obligations).

98 Daniel Pruzin, *WTO Chair Issues Draft Texts for Rules Talks on AD, Subsidies, Reversing Zeroing Rulings*, 24 INT'L TRADE REP. (BNA) 1716-18 (Dec. 6, 2007) (quoting Lewis Leibowitz).

99 Frances Williams, *Fishing Subsidies Face Global Curbs*, FIN. TIMES, Dec. 3, 2007, at 3. Senate Finance Committee Chairman Max Baucus (Democrat-Montana), Committee member Jay Rockefeller (Democrat-West Virginia), House Ways and Means Committee Chairman Charles Rangel (Democrat-New York), and Ways and Means Trade Subcommittee Chairman Sander Levin (Democrat-Michigan) were among several prominent American politicians to lambaste the Text. *See* Rossella Brevetti, *U.S. Industry, Farmers, Workers Pan Draft Rules Text in Letter to Administration*, 25 INT'L TRADE REP. (BNA) 29 (Jan. 3, 2008).

100 WTO, Negotiating Group on Rules, *Statement on "Zeroing" in the Anti-Dumping Negotiations,* TN/RL/W/214/Rev.3 (Jan. 25, 2008) [hereinafter *January 2008 Sixteen Member Joint Statement*].

world trading community "back to pre-Uruguay Round standards."[101] Ujal Singh Bhatia, the Indian Ambassador to the WTO, was equally severe:

> We [India] find it frankly amazing that your [the Chairman Valles'] proposals on zeroing seek to multilateralize the practices of one member (the United States) against the overwhelming view of the membership and contrary to the clear jurisprudence that has emerged on this issue.[102]

Proving Indian trade negotiators can match the brinkmanship of heated rhetoric from American politicians, India's Commerce Secretary, Gopal K. Pillai, later added:

> [If zeroing is allowed to continue, then] there will be no Doha agreement. It is something on which India feels very strongly. . . . The only country that has asked for [zeroing] is the United States.[103]

China's WTO Ambassador, Sun Zhenyu, added reinstatement and proliferation of zeroing not only would be inconsistent with trade promotion aims of the WTO, but also would present a major challenge to, and undermine the credibility of, the dispute settlement system.

In January 2008, sixteen WTO Members—Chile, Colombia, Hong Kong, India, Indonesia, Israel, Japan, Korea, Mexico, Norway, Pakistan, Singapore, South Africa, Switzerland, Taiwan, and Thailand—supported by Brazil, China, Canada, and the EU signed a joint proposal.[104] In February, Brazil, China, Costa Rica, and Vietnam formally signed the joint proposal.[105] The proposal not only criticized the Chairman's concession to the Americans on zeroing, but also called for a complete ban on the practice—a ban the proponents characterized as a "necessity."[106] The joint proposal demanded an explicit prohibition on zeroing be written into the *Agreement on Antidumping*.[107] There would be no exceptions, except possibly for instances of targeting dumping investigations (which the DOC rarely initiates, anyway).[108] Simple and Model Zeroing would be forbidden in all steps of an AD case. Also in February, Japan led sixteen other Mem-

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101 Pruzin, *supra* note 65, at 1718-19 (quoting Roberto Azevedo, Deputy Vice Minister for Economic Affairs, Ministry of Foreign Affairs, Brazil).

102 Daniel Pruzin, *WTO Rules Chairman Under Fire for Zeroing Provisions in Draft Text*, 24 INT'L TRADE REP. (BNA) 1791-93 (Dec. 20, 2007) (quoting Ambassador Ujal Singh Bhatia).

103 Vir Singh, *Top Indian Official Blasts as "Unilateral" Zeroing Action by Chair of WTO Rules Talks*, 25 INT'L TRADE REP. (BNA) 9 (Jan. 3, 2008) (quoting India's Commerce Secretary, Gopal K. Pillai).

104 January 2008 Sixteen Member Anti-Dumping Joint Statement, supra note 100; see also Daniel Pruzin, Dumping: 16 Members Propose Complete Ban of All "Zeroing" in WTO Rules Talks, 25 INT'L TRADE REP. (BNA) 149-50 (Jan. 31, 2008).

105 WTO, Negotiating Group on Rules, *Prohibition on Zeroing*, TN/RL/W/215 (Jan. 31, 2008) [hereinafter Twenty Member Anti-Dumping Joint Statement].

106 Daniel Pruzin, *China, Other WTO Members Add Support to Joint Proposal on Elimination of Zeroing*, 25 INT'L TRADE REP. (BNA) 185 (Feb. 7, 2008) ("[A] group of anti-zeroing advocates told the negotiating group Feb. 1 they considered a revised rules text a 'necessity' if WTO members are to achieve a breakthrough deal in the spring on advancing the Doha Round talks.").

107 Twenty Member Anti-Dumping Joint Statement, *supra* note 105, at 2.

108 *Id.*

bers—Brazil, Canada, EU, Hong Kong, India, Indonesia, Korea, Malaysia, Norway, Pakistan, Singapore, Switzerland, Taiwan, Thailand, Turkey, and Vietnam—in raising the ante. They would cease intensive negotiations on farm or NAMA issues until the Chairman issues a revised Draft Remedies Text that banned zeroing.[109]

Even assuming the Chairman's zeroing proposals could weather the storm of opposition and stay in place, whether their survival would be of sufficient practical importance to overcome other important proposals and win American support was dubious. How could the United States agree to a mandatory 10-year limit on AD orders, when it had some orders in effect (as of December 2007) from the 1970s?[110] It imposed one order, on poly-chloroprene rubber from Japan in June 1973. Another American order, imposing a 68.26 percent AD duty on urea (used in fertilizer) from Russia, originated in July 1987. Brazil and India decried ten years as too long for any order, and said the two-year opportunity in which to re-introduce an AD remedy would dilute any time limit. Further, the United States opposed any requirement to take "due account" of the "public interest" before imposing a trade remedy. The rule would be ambiguous, and intrude on the internal domestic affairs of a Member, namely, the concerns of downstream users of a dumped product.

Additionally, the November 2007 Text failed to include the American proposal to expand the list of industrial subsidies that would be deemed automatically to be illegal. That list—the Dark Amber subsidies in Article 6:1 of the *SCM Agreement* —is one the United States wanted to be shifted to Article 3:1 of the *Agreement*, which contains Red Light (or prohibited) subsidies. Brazil, China, India, and many developing countries all opposed the shift, saying it would favor rich countries, empowering them to impose CVDs on poor countries, because poor countries tended to provide the kinds of subsidies at issue. The Text suggested a compromise: Simply re-ignite the Dark Amber category, which expired in 2000.[111] The Text also neglected to address a long-standing American criticism of multilateral anti-subsidy rules: They treated the American system of direct income taxation unfairly in relation to foreign indirect systems, such as the EU value-added tax (VAT).

For their part, on some issues in addition to zeroing, developing and least developed countries hardly were pleased with the November 2007 Text. India decried the removal—not requested by any Member—of the Lesser Duty Rule, which it (along with the EU and many other Members) applied. Brazil, as well as Japan, opined that the removal from the *Antidumping Agreement* of express variables an investigating authority must research when deciding whether dumped imports, or other factors, cause injury actually would weaken the non-

[109] *See* Daniel Pruzin, *WTO Members Insist on Revised Text for Rules Before Ag, NAMA Talks Begin*, 25 Int'l Trade Rep. (BNA) 253-54 (Feb. 21, 2008).

[110] *See* Pruzin, *supra* note 98, at 1716-18.

[111] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement*, *supra* note 60, at 45-46 (proposing reinstating previously lapsed categories to Article 6.1of SCM Agreement, *supra* note 62, art. 6.1).

attribution test, making it easier to render an affirmative injury determination and impose an AD duty.

Redolent of the battle over zeroing, the United States and EU came in for fierce criticism in respect of their advocacy for anti-circumvention rules. The topic had been contentious during the Uruguay Round, and no such rules were included in the *Antidumping Agreement* from that Round. Countries generally split then, as in the Doha Round, into one of two camps, based partly on their self-image: exporters victimized by trade remedies; or importers with domestic industries hurt by unfair trade. Many Asian exporting countries opposed the American and EU effort to facilitate extensions of AD or CVD orders.[112] The exporting countries feared the United States and EU would enlarge orders in order to sweep into the ambit of an order a wide range of their exports that were not subject merchandise in an original investigation. Those countries protested that they are effectively third countries, not the *bona fide* countries of origin of goods against which the United States or EU enlarged an order. Thus, in February 2008, China, Hong Kong, and Pakistan, demanded removal from the November 2007 Text of the proposed anti-circumvention rules.[113] They argued the legal results of the proposals would be (1) to undermine third party rights, and (2) condone protectionist abuse by the likes of the United States and EU of the *Antidumping Agreement*.[114] The practical results would be (1) increased uncertainty and unpredictability for exporters, and (2) distortion of normal trade flows, including legitimate adjustments to changes in market conditions caused by an AD or CVD order.[115]

Ironically, despite the many proposed textual changes by the Chair, hardly any of them addressed the interests of poor countries. Other than minor clarifications in Annex VII to the *SCM Agreement*,[116] there were no alterations to the special and differential treatment provisions of the *Antidumping Agreement*[117] or the *SCM Agreement*[118] Environmentalists and other advocates for Green Light sub-

112 *See* Daniel Pruzin, *WTO Rules Chair Chides Members for Lack of Convergence on Antidumping Draft Text*, 25 Int'l Trade Rep. (BNA) 150-51 (Jan. 31, 2008). An example of facilitating extensions includes allowing expansion if an exporter, targeted by an order, tries to skirt paying remedial duties by shipping subject merchandise in parts or unfinished forms, to a third country for final assembly, or ships merchandise in a slightly modified good.

113 WTO, Negotiating Group on Rules, *Proposed Provision of Anti-Circumvention*, TN/RL/W/216 (Feb. 12, 2008) [hereinafter *Proposed Provision of Anti-Circumvention*]. *See* Daniel Pruzin, *China Calls on WTO Chair to Omit a Proposal on Anti-Circumvention of Dumping Measures*, 25 Int'l Trade Rep. (BNA) 278-79 (Feb. 21, 2008).

114 *Proposed Provision of Anti-Circumvention, supra* note 113, ¶ 4.

115 *Id.* ¶ 6.

116 November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement*, *supra* note 60, Annex VII at 86 (identifying developing and least developed countries).

117 Article 15 of the Antidumping Agreement, stating that "special regard" must be given to developing countries, remained unchanged in the November 2007 Text. *Compare* November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement*, *supra* note 60, art. 15, at 31, *with* Antidumping Agreement, *supra* note 61, art. 15.

118 Article 27, which extends phase in periods to five and eight years from 1 January 1995 for developing and least developed countries respectively, set the threshold for export competitiveness and raised *de minimis* subsidization and volume levels, remained unchanged in the November 2007 Text. *Compare*

sidies could take little comfort in the fact this category, set out in Article 8, was not slated for renewal.

Certainly, the Chairman anticipated there would be opposition, saying he sought to achieve "balance that takes into account the interests of all" Members, meaning each Member (1) will find some of its demands have been met, (2) will "dislike intensely" certain suggested provisions, and (3) must appreciate the negotiating objectives of the Members "vary widely and are in many cases mutually incompatible."[119] The Chair was correct.

In February 2008, the African, Caribbean, and Pacific (ACP) countries issued a proposal jointly with the African Group alliance.[120] The joint proposal called for asymmetric treatment of poor and rich countries. It would facilitate use of trade remedies by developing countries against developed countries, but impede the use of those remedies by developed countries against developing countries. Specifically, the proposal would:

- Require a developed country to consult with a developing country before imposing an AD duty on products from the latter country, with a view to negotiating a "constructive trade remedy."[121]
- Define "constructive trade remedies" to include (1) abstention by a developed country from imposing an AD duty, if a producer-exporter in a developing country agrees to cease dumping, (2) encouragement of the use of a price undertaking, whereby a respondent producer-exporter in a developing country agrees to boost its prices, and (3) imposition by a developed country, on subject merchandise from a developing country, of an AD duty that is smaller than the actual dumping margin.[122]
- Permit governments of developing countries to help their domestic industries initiate an AD investigation against competitors from developed countries. The assistance would include collecting evidence, and even initiating an investigation if an industry lacked the technical capacity to do so.[123]
- Establish automatic import licensing as a mechanism for surveillance of imports of products dumped by producer-exporters from developed countries

November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement*, *supra* note 60, art. 27, at 70, *with* SCM Agreement, *supra* note 62, art. 27.

119 WTO November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreements*, *supra* note 60, at 2.

120 WTO, Negotiating Group on Rules, *Special and Differential Treatment and Special Assistance in Trade Remedies,* TN/RL/GEN/154 (Feb. 25, 2008) [hereinafter *Special and Differential Treatment and Special Assistance in Trade Remedies*]. *See* Daniel Pruzin, *U.S., EU Cool to ACP/African Proposal for WTO Flexibilities on Antidumping*, 25 INT'L TRADE REP. (BNA) 588 (Apr. 24, 2008).

121 *Special and Differential Treatment and Special Assistance in Trade Remedies, supra* note 120, art. 15 at 1 (amending language to provide that developed country Members shall invite consultations with developing country Members to explore constructive remedies in Article 15 of the Antidumping Agreement, *supra* note 61, art. 15).

122 *Special and Differential Treatment and Special Assistance in Trade Remedies, supra* note 120, art. 15.2 at 2-3 (adding new provisions defining constructive remedies to Article 15 of the Antidumping Agreement, *supra* note 61, art. 15).

123 *Special and Differential Treatment and Special Assistance in Trade Remedies, supra* note 120, art. 15.1.1 at 2 (adding new provisions regarding developing country assistance to Article 15 of the Antidumping Agreement, *supra* note 61, art. 15).

into a developing countries. An importer of subject merchandise would have to provide the importing developing country with data as to volume and price of that merchandise, as well as the price of the like product sold in the exporting country (in effect, Normal Value).[124]

In brief, the joint ACP/African Group proposal was an effort to re-dress what many developing countries regarded as imbalances in the November 2007 Text.

For good reasons, this effort met with opposition from the United States and EU. First, major developing countries would benefit from the proposal. This cohort would include China, and even WTO Members that might describe themselves—as "developing," such as Korea and Singapore. Second, developing countries hardly were having problems using AD law to their favor. In the first half of 2007, six of the top nine WTO Members imposing AD duty orders (in terms of the absolute number of such orders) were developing countries, with India on top, and Argentina, China, Colombia, Pakistan, Turkey in the list. The pattern continued, with six of the top nine WTO Members initiating new AD investigations (measured by the absolute number of new cases) in the first half of 2007 being developing countries—India on top again, with Argentina, Brazil, China, Korea, and South Africa on the list. Third, automatic import licensing would be a logistical nightmare. The onerous information requirements would impede the free movement of goods.

E. Fishing Subsidy Disciplines

The November 2007 Draft Trade Remedy Rules Text revealed yet another schism in the Doha Round. On this divide, however, the United States found itself on the side of the self-described "Friends." Fishing subsidies—particularly programs that contribute to depletion of the world's fisheries stocks—were the issue.

Along with Argentina, Australia, Chile, and New Zealand, the United States sought an Annex to the *SCM Agreement* to ban as many of these subsidies as possible. The approach should be top-down, with a prophylactic ban on them to avoid circumvention, and subject only to a few exceptions. Fishing subsidies were environmentally unfriendly, this "Friends of Fish" group argued. They led to "overcapacity in the fishing fleets that in turn contributed to an alarming decline in global fish stocks."[125] Opposing the Friends of Fish were countries with large fishing industries—notably, the EU, Japan, Korea, and Taiwan.

By and large, the Friends were successful in their advocacy. The Chair proposed in the November 2007 Draft Text the following rule changes, which won plaudits from environmental groups:

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[124] *Special and Differential Treatment and Special Assistance in Trade Remedies, supra* note 120, art. 15.1.2, 15.1.3 at 2 (proposing automatic licensing surveillance measures in Article 15 of the Antidumping Agreement, *supra* note 61, art. 15).

[125] Pruzin, *supra* note 98, at 1716-18*; see also* Daniel Pruzin, *U.S. Welcomes WTO Rules Text on Subsidies for Fisheries; Developing Countries Skeptical*, 24 INT'L TRADE REP. (BNA) 1793-94 (Dec. 20, 2007).

(1) Elimination –

Most subsidies to fishing fleets provided by developed nations must be eliminated. Specifically, in addition to export subsidies and import substitution subsidies, all fisheries subsidies set out in Article I of a new Annex VIII to the *SCM Agreement* will be prohibited.[126] That Article identified a wide array of programs, including the following eight categories: (a) subsidies to buy, build, repair, or renovate fishing or service vessels, (b) subsidies to cover the operating costs of fishing or service vessels, (c) subsidies to transfer to third countries fishing or service vessels; (d) subsidies for port infrastructure, (e) income support for fishermen, (f) price support for fish products, (g) payments to cover access rights that one Member acquires in respect of fisheries in the jurisdiction of another Member; and (h) subsidies to a vessel involved in fishing in over-fished waters or illegal fishing.[127]

(2) Exceptions –

Subsidies for fishing crew or vessel safety, to engage in environmentally-friendly fishing techniques, to comply with conservation management programs, or to decommission or reduce fishing capacity, will not be prohibited.[128]

(3) Countermeasures –

If the prohibition on fishing subsidies is violated, then countermeasures against the offending WTO Member may include suspending the access of fishing or services vessels to port facilities for landing, processing, or transshipping fish.[129]

(4) Special and Differential Treatment –

A developing country will be allowed to sponsor certain kinds of otherwise-prohibited fishing subsidy programs, such as income or price support to fisherman or fish products, respectively, or port infrastructure upgrades, but only to a certain degree. In addition, they may subsidize small, family-run fishing operations within their territorial waters, as long as (a) the catch is consumed principally by the fisherman and their families, and (b) the operations have no major employer-employee relationships and generate only small profits. The exemption will apply only if a developing country sponsored a fish-stock management program that was internationally approved. All least developed countries would be exempt from any restrictions on fishing subsidies.[130]

(5) General Discipline –

No WTO Member will be permitted to deplete or harm, or create over-capacity in respect of (1) migratory fish stocks the range of which extends into the Exclusive Economic Zone (EEZ) of another Member, or (2) stocks in which another Member has "identifiable fishing interests."[131]

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[126] November 2007 *Draft Consolidated Chair Texts of the AD and SCM Agreement, supra* note 60, art. I to Annex VII, at 87.

[127] *Id.* arts. 3.1(c), art. I to Annex VIII.

[128] *Id.* arts. 3.1(c), art. II to Annex VIII.

[129] *Id.* art. 4.10 –.11 nn.10–11.

[130] *Id.* art. III to Annex VIII.

[131] *Id.* art. IV to Annex VIII.

(6) Procedures –

Prompt notification to the WTO Committee on Subsidies and Countervailing Measures will be required of all Members regarding fishing subsidy programs, surveillance schemes that would help ensure compliance with disciplines on fishing subsidies.[132] Any disputes must be resolved under the *DSU*, or if applicable, a mechanism under another international agreement.[133]

While the United States was pleased with the draft fishing subsidies proposals, neither the EU nor Japan—among the world's largest subsidizers of fleets—was happy. The EU lambasted any limits on subsidies for aquaculture or port infrastructure. Japan said any discipline on a fishing subsidy unconnected to overcapacity or over-fishing was outside the Doha Round negotiating mandate.

Some developing countries, led by India, feared how their fishing communities would fare if the proposals became law. For example, 80 percent of India's traditional and artisanal fishermen use small outboard motors on their little fishing boats.[134] Ending all subsidies for mechanized fishing would harm them. Thus, poor countries called for policy space to establish their fishing industries in a manner consistent with their development goals. They also shot back at rich countries for excessive subsidization leading to excess capacity and stock depletion. Brazil added that the special provisions for developing countries were too complex, making compliance burdensome and inconsistent. For instance, to qualify for an exception to a subsidy ban, a developing country would need a complicated fisheries management system, which had been pre-screened by the Food and Agriculture (FAO), regardless of the nature of the fish stocks of that country. If that country qualified for the exception, then fisherman would be restricted to fish within the EEZ of the country—even if the country was party to a regional fisheries agreement that permitted fishing in international waters.

V. The Winter Working Papers on Agriculture

On 21 December 2007, the last Friday before Christmas, Chairman Falconer released four Working Papers on agricultural subsidies.[135] Almost immediately after the New Year, on 4 January 2008, Chairman Falconer issued eight Working Papers on agricultural market access.[136] These twelve Papers summarized the

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132 *Id.* art. VI to Annex VIII.

133 *Id.* art. VIII to Annex VIII.

134 *See* Singh, *supra* note 103, at 9.

135 Working Document No. 5, Overall Reduction of Trade-Distorting Domestic Support: A Tiered Formula, http://www.wto.org/english/tratop_e/agric_e/workdoc_5otds_e.pdf; Working Document No. 6, Final Bound Total AMS: A Tiered Formula, http://www.wto.org/english/tratop_e/agric_e/workdoc_6ams_e.pdf; Working Document No. 7, *De Minimis,* http://www.wto.org/english/tratop_e/agric_e/workdoc_7deminimis_e.pdf; Working Document No. 8, Blue Box, http://www.wto.org/english/tratop_e/agric_e/workdoc_8bluebox_e.pdf. The first four Working Documents concerned export competition and were discussed *supra* sections I-IV. Working Documents Numbers 1, 2, and 3, issued November 6, 2007, covering Export Finance (credit, credit guarantees, and insurance), State Trading Enterprises, and Food Aid. Working Document 4, Main Provisions, focused on export subsidies and competition, and was issued on November 12, 2007.

136 Working Document No. 9, Tiered Formula for Tariff Reductions, http://www.wto.int/english/tratop_e/agric_e/workdoc_9ttf_e.pdf; Working Document No. 10, Sensitive Products, http://www.wto.

state of negotiations, paved the way to his February 2008 Draft Modalities Text, and contained some critical details of a possible Doha Round deal. In so doing, they highlighted the missing pieces, i.e., the material issues on which WTO Members remained divided, if not deadlocked.

A. Non-Linear Reductions to Tariffs and Dealing with Tariff Escalation

The January 2008 Working Paper called for harmonizing cuts on farm tariffs, meaning steeper cuts on higher rates. Table 1 summarizes the four bands of the tiered formula, as well as special and differential treatment accorded to developing countries and RAMs.[137] Significantly, WTO Members would have to convert any non-*ad valorem* tariff (i.e., any duty expressed in a manner other than as a percentage of the appraised value of imported merchandise) to *ad valorem equivalents* (AVEs).[138] The tariff conversion methodology would be the so-called "unit value method" of gauging an AVE, which relies on import data from the three most recent years in which statistics are available.[139] The AVEs would be subject to reductions, according to the same tiered formula.[140] Bound in-quota tariffs in a TRQ also would be subject to reduction, but the exact percentage cuts and implementation periods were yet to be agreed.

Table 2 sets out the Working Paper proposals to deal with tariff escalation.[141] This phenomenon occurs when the tariff rate rises with the degree of processing of a product, so that tariffs on a fully processed farm product are above the tariffs on the primary commodities that are used as inputs into that product. Tariff escalation discriminates against poor countries that seek to establish and expand agricultural processing industries, rather than be dependent perpetually on rich countries to sell crops for processing.

Five points stand out from the Tables. First, after over six years of negotiations, there still was no agreement on the exact percentage reductions to farm tariffs in any band. They are the most important figures in the entire Doha Round, forming the bedrock for any successful outcome.

org/english/tratop_e/agric_e/workdoc_10sensitive_e.pdf; Working Document No. 11, Tariff Escalation, http://www.wto.int/english/tratop_e/agric_e/workdoc_11tariffesc_e.pdf; Working Document No. 12, Tariff Simplification, http://www.wto.org/english/tratop_e/agric_e/workdoc_12tarsim_e.pdf; Working Document No. 13, Tariff Quotas, http://www.wto.org/english/tratop_e/agric_e/workdoc_13quotas_e.pdf; Working Document No. 14, Special Agricultural Safeguard (SSG), http://www.wto.org/english/tratop_e/agric_e/workdoc_14sag_e.pdf; Working Document No. 15, Special Products, http://www.wto.org/english/tratop_e/agric_e/workdoc_15specprods_e.pdf; Working Document No. 16, Market Access –Recently Acceded Members (RAMs), http://www.wto.org/english/tratop_e/agric_e/workdoc_16marams_e.pdf.

137 Working Document No. 9, *supra* note 136, ¶ 3.

138 *Id.* ¶ 2.

139 The conversion methodology is laid out in WTO, Committee on Agriculture, Special Session, *Draft Possible Modalities on Agriculture*, TN/AG/W/3 (July 12, 2006).

140 Working Document No. 9, *supra* note 136, ¶ 3.

141 Working Document No. 11, *supra* note 136.

Table 1:
Reductions in Agricultural Tariffs Proposed in January 2008 Falconer Working Paper

Category of WTO Member → **Tariff Band, Reduction Commitments, and Implementation** ↓	***Developed Countries***	***Developing Countries***	***RAMs***
Tier 1 (Highest Band of Existing Bound Agricultural Tariffs)	Over 75%	Over 130%	Same as developed and developing country band
Cut to Bound Agricultural Tariffs in Tier 1	Between 66% and 73% (to be agreed in negotiations)	2/3 of the cut required of developed countries. SVEs may moderate cuts by a further 10% (if agreed in negotiations)	No cuts required of very recently acceded RAMs (Macedonia, Saudi Arabia, Tonga, and Vietnam) No cuts required of small, low-income RAMs with economies in transition (Albania, Armenia, Georgia, Kyrgyz Republic, and Moldova) All other RAMs may moderate the cuts they would otherwise have to make under the Tiered formula by up to 5 percentage points, and may exempt from cuts any bound duty equal to or below 10%
Tier 2 (Medium Band of Existing Bound Agricultural Tariffs)	50% to 75% (above 50%, but less than or equal to 75%)	80% to 130% (above 80%, but less than or equal to 130%)	Same as developed and developing country band
Cut to Bound Agricultural Tariffs in Tier 2	Between 62% and 65% (to be agreed in negotiations)	2/3 of the cut required of developed countries. SVEs may moderate cuts by a further 10% (if agreed in negotiations)	Same special rules as above
Tier 3 (Next Medium Band of Existing Bound Agricultural Tariffs)	20% to 50% (above 20%, but less than or equal to 50%)	30% to 80% (above 30%, but less than or equal to 80%)	Same as developed and developing country band
Cut to Bound Agricultural Tariffs in Tier 3	Between 55% and 60% (to be agreed in negotiations)	2/3 of the cut required of developed countries. SVEs may moderate cuts by a further 10% (if agreed in negotiations)	Same special rules as above

Tier 4 (Lowest Band of Existing Bound Agricultural Tariffs)	Zero to 20% (above zero, but less than or equal to 20%)	Zero to 30% (above zero, but less than or equal to 30%)	Same as developed and developing country band
Cut to Bound Agricultural Tariffs in Tier 4	Between 48% and 52% (to be agreed in negotiations)	2/3 of the cut required of developed countries SVEs may moderate cuts by a further 10% (if agreed in negotiations)	Same special rules as above
Maximum Overall Average Cut on Bound Tariffs	None	36 or 40% (to be agreed in negotiations)	For RAMs that are developing countries, 36 or 40% (to be agreed in negotiations)
Implementation Period	Equal annual installments over 5 years	Equal annual installments over 8 years	Not applicable to Macedonia, Saudi Arabia, Tonga, and Vietnam (because they have no tariff reduction commitments). For all other RAMs, implementation of tariff reduction commitments begins 1 year after the end of the implementation of their accession commitments. The implementation period for these commitments may be extended for up to 2 years (if agreed in negotiations) beyond the end of the period for developing countries.

Second, there are finer gradations among WTO Members than ever existed in any previous round of multilateral trade negotiations. RAMs, regardless of whether they are developed or developing countries, are treated separately from other WTO Members.[142] Distinctions are made within the RAM category. Even SVEs are distinguished among developing countries.[143] Countries as diverse as Côte d'Ivoire and Nigeria potentially count as SVEs,[144] yet no new sub-category of WTO Members for "SVEs" is intended.

Third, using the minimum versus maximum tariff cuts indicated by the ranges do not produce strikingly different results, especially in the lower Tier.[145] For example, for a developed country, a tariff of 10 percent would be cut to either 4.8 percent or 5.2 percent. For a developing country, a 10 percent tariff would drop to either 6.53 percent or 6.8 percent. In both instances, the difference in the resulting tariffs is less than one-half of one percent.

142 Working Paper No. 16, *supra* note 136, ¶ 4.

143 *Id.* ¶ 5.

144 Working Paper No. 9, *supra* note 136, at 2 n.2.

145 *See* WTO, *Unofficial Guide to the 8 February 2008 'Revised Draft Modalities,'* http://www.wto.org/english/tratop_e/agric_e/ag_modals_feb08_e.htm [hereinafter *Unofficial Guide to February 2008 Draft Modalities*].

Table 2:
Tariff Escalation Treatment Proposed in January 2008 Falconer Working Paper

Category of WTO Member → **Supplementary Tariff Cuts and Implementation** ↓	***Developed Countries***	***Developing Countries***	***RAMs***
Supplementary Cuts to Tariffs on Processed Agricultural Products	Existing bound tariff on a processed product in Tier 1 must be reduced by the cut for Tier 1, increased by a factor of 0.3 (i.e., a 1.3x cut). Existing bound tariff rate on a processed product in all other tiers must be cut by the amount applicable to the next highest tier (*e.g.*, a product in the lowest band would take the cut in Tier 3).	Same special and differential treatment as for tariff cuts	Same special rules as for tariff reduction commitments
Implementation Period	Same rule as for tariff reduction commitments	Same special and differential treatment as for tariff cuts	Same special rules as for tariff reduction commitments

Fourth, special and differential treatment for developing countries follows a similar pattern as the Uruguay Round. They have a reduction commitment equal to two-thirds that incumbent upon developed countries. For example, a developed country would have to cut a 100 percent tariff down to 27-34 percent, whereas a developing country would have to reduce a 100 percent tariff to between 56.7 and 58.7 percent.[146] Further, developing countries get a longer implementation period than for developing countries.

But, unlike the Uruguay Round, where farm tariff cuts were linear, here the cuts depend on the band in which an existing tariff being cut falls. The bands for developing countries stretch more (up to 130 percent) than for developed countries (up to 80 percent), and each band for developing countries is wider than for developed countries.[147] For instance, a 100 percent tariff in a developed country would be in Tier 1, but in a developing country it would be in Tier 2, resulting in a less severe cut. The difference reflects not only special and differential treatment, but also the reality that developing countries tend to have far higher farm tariffs than developed countries. Accordingly, the only products of rich and poor countries alike in the same tiers are (1) a product with a tariff over 130 percent

[146] *See id.*

[147] Working Document No. 9, *supra* note 136, ¶ 4.

(Top Tier), a product with a tariff of 30-50 percent (Tier 3), and (3) a product with a tariff below 20 percent (Lowest Tier).

Fifth, there is no pretence of eradicating tariffs on all farm products in the long run. Zero tariffs may exist, or may result from reductions. However, pure free trade in agriculture, in the sense of ridding the planet of import duties, is neither the aim nor the effect of the technical negotiations. Even harmonization—the express objective of non-linear cuts—is imperfect. In particular, tariff escalation is not eliminated, only smoothed out to some degree by the formula of bumping up a product into the next highest band.

That is because the tiered formula is subject to three major exceptions. Tariff escalation treatment does not apply (1) to Sensitive Products, (2) in any instance in which the difference in the existing bound duty rate between a processed and primary product used to make that processed product is 5 percent *ad valorem* or less (i.e., a *de minimis* exception), and (3) if the result would be to lower the duty on the processed product below that applicable to the primary product (i.e., if the treatment would cause tariff inversion).[148]

B. Exceptions for Sensitive Products with TRQ Expansion, and for Special Products

"Sensitive" and "Special" Products, despite the complexities in defining them and articulating rules about them, are about nothing more than cutting back on adherence to free trade. They shelter farm products from tariff reductions. The larger the number of products (measured by the number of agriculture tariff lines) so sheltered, and the greater the shelter (measured by the extent of the deviation from the tariff reduction that otherwise would apply to the product), the greater the derogation from non-linearity and harmonization. Sensitive Products are a protectionist device afforded to all WTO Members,[149] whereas Special Products are additional, special and differential treatment, in the form of approved protectionism, for developing countries.

Table 3 summarizes the January 2008 Working Paper proposal for Sensitive Products, and also lays out the concomitant requirement of expanding TRQs for those Products.[150] TRQ expansion partly offsets the derogation from free trade caused by Sensitive Products. That is, an increase in the TRQ for a Sensitive Product is supposed to be partial compensation to exporters of that Product for the right of an importing country to impose a lower than agreed-upon tariff cut on that Product. The compensation takes the form of a higher in-quota volume threshold in a TRQ at a lower duty-rate (with above-quota shipments paying a higher duty rate). The smaller the deviation from an agreed upon tariff cut for a particular Sensitive Product, the smaller the mandatory increase in the in-quota volume threshold of the TRQ for that Product. The TRQ expansion, however, obviously does not produce free trade in the Product. While the expansion must

[148] Working Document No. 11, *supra* note 136, ¶¶ 4-6.

[149] *See* Working Document No. 10, *supra* note 136, ¶ 1 ("Each developed country Member shall have the right to designate up to [4] [6] per cent of [dutiable] tariff lines as 'Sensitive Products'.").

[150] *Id.* ¶¶ 5-9.

be on an MFN basis, depending on the Sensitive Product, it may enhance market access only modestly.

Table 3:
Sensitive Products and TRQs Proposed in January 2008 Falconer Working Paper

Category of WTO Member → **Sensitive Product Treatment** ↓	***Developed Countries***	***Developing Countries***	***High-Tariff Countries*** ***(WTO Members with more than 30% of their tariff lines in Tier 1, the top band for tariff reduction commitments)***
Percent of Tariff Lines that May be Designated as "Sensitive"	4% or 6% (to be agreed in negotiations)	Up to 1/3 more tariff lines than for developed countries	6% or 8% (to be agreed in negotiations)
Minimum Permissible Deviation from Tiered Tariff Reduction that Otherwise Would be Applicable to a Product (if it were not "Sensitive")	1/3 of the tariff reduction	1/3 of the tariff reduction (otherwise applicable under Tiered tariff reduction applicable to developing countries)	Same as for developed and developing countries.
Maximum Permissible Deviation from Tiered Tariff Reduction that Otherwise Would be Applicable to a Product (if it were not "Sensitive")	2/3 of the tariff reduction	2/3 of the tariff reduction (otherwise applicable under the Tiered tariff reduction applicable to developing countries)	Same as for developed and developing countries.
Median Permissible Deviation from Tiered Tariff Reduction that Otherwise Would be Applicable to a Product (if it were not "Sensitive")	1/2 of the tariff reduction	1/2 of the tariff reduction (otherwise applicable under the Tiered tariff reduction applicable to developing countries)	Same as for developed and developing countries.
Minimum Required TRQ Expansion for Sensitive Product, if Minimum 1/3 Deviation from Tariff Cut is Used	3% or 5% of domestic consumption (to be agreed in negotiations)	2/3 of the TRQ expansion required of developed countries	Same as for developed and developing countries. But, additional obligations to ensure TRQ expansion for all Sensitive Products is an overall average of 4.5% or 6.5% (to be agreed in negotiations) of domestic consumption. If more than 5% of tariff lines have duties in excess of 100%, then further TRQ expansion (with amount to be negotiated) is necessary.

Maximum Required TRQ Expansion for Sensitive Product, if Maximum 2/3 Deviation from Tariff Cut is used	4% or 6% of domestic consumption (to be agreed in negotiations)	2/3 of the TRQ expansion required of developed countries	Same rule as above
Median Required TRQ Expansion for Sensitive Product, if Median ½ Deviation from Tariff Cut is used	3.5% or 5% of domestic consumption (to be agreed in negotiations)	2/3 of the TRQ expansion required of developed countries	Same rule as above
Exceptions to Required TRQ Expansion	TRQ expansion need not exceed 2.5% or 3.5% (to be agreed in negotiations) of domestic consumption, if existing bound TRQ volume threshold already exceeds 10% or more of that consumption. TRQ expansion need not exceed 2% or 3% (to be agreed in negotiations) of domestic consumption, if existing bound TRQ volume threshold already exceeds 30% of that consumption.	Same rule as for developed countries	Same rule as for developed countries

An Annex to the January 2008 Working Paper addressed the controversy surrounding the methodology for the TRQ expansion by laying out two possibilities.[151] The first and simpler of the two procedures is to rely on domestic consumption data at the HS 6- or 8-digit level.[152]

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151 *Id.* Annex at 3.

152 Working Document No. 10, *supra* note 136, ¶¶ 4, 6 of Annex. Use of the 8-digit level for identifying Sensitive Products by all WTO Members, and TRQ expansion by developed countries, is called "partial designation." The EU proposed this methodology, and it was hotly debated following issuance of the July 2007 Draft Modalities Text by Chairman Falconer. *See* Daniel Pruzin, *Slow Progress, Recalcitrance Cited by Doha Talks Chairman, Participants*, 25 Int'l Trade Rep. (BNA) 289-90 (Feb. 28, 2008) [hereinafter Pruzin, *Slow Progress*].

By way of summary, the key issue is whether the limit on the percentage of total tariff lines that could be designated as "Sensitive" should be at the 6-digit or 8-digit level of the Harmonized System (HS). *Id.* Using the general 6-digit level, the "product approach" methodology favored by agricultural exporting countries such as Australia, the rest of the Cairns Group and the G-20 members, would prevent pinpoint designations of sensitivity. Pruzin, *supra* note 24. All tariff lines under a 6-digit heading would be deemed "Sensitive," including all sub-sector lines at the 8-digit level within a 6-digit sector designated as "Sensitive." Significantly, TRQ expansion (in the amount of 4 to 6 percent of domestic consumption, applied to the in-quota volume threshold of the TRQ) would apply to all products under a 6-digit heading bearing this designation.

But, the EU criticized this product approach as over-inclusive, i.e., as protecting as "Sensitive" some farm goods for which an increase in imports is not problematical. Thus, the EU and other countries such as Canada, Japan, Norway, Switzerland, and the United States, with domestic agricultural interests to protect in sectors like beef, dairy, poultry, sugar, and rice, championed the "partial designation" methodology. Pruzin, *supra* note 24. (These countries, though some of them export certain farm products, occasionally were called the "importer" camp, because of their desire to protect these interests from import

The second option would be used if the 6- or 8-digit level data were unavailable.[153] At the 6-digit level, the volume of world trade for a particular 6-digit level tariff line would be expressed as a percentage of world trade for the overall product category in which the 6-digit line exists.[154] That percentage would be multiplied by total domestic consumption at the 6-digit level to yield a domestic consumption figure at that level, in other words, for an individual WTO Member and Sensitive Product:[155]

competition.) Via partial designation, Sensitive Products could be designated on a detailed, 8-digit line basis, resulting in surgically-precise protection for highly specific categories.

Arguably, the EU criticism of the product approach was disingenuous, and its advocacy for partial designation was a protectionist strategy. A thick veil of complexity covered that strategy. Other WTO Members tried to lift the veil, and criticized sharply the EU proposal on three broad grounds.

First, some WTO Members, including Brazil (a G-20 member), objected to partial designation, because they do not gather trade or domestic consumption data at the 8-digit level. The EU proposed import value data could be used as a proxy for domestic consumption. However, as Australia, the Cairns Group, and G-20 pointed out, import values are an imperfect substitute for consumption. Import values are unrepresentative of consumption, and they understate consumption if data on product sectors are disaggregated and trade is not concentrated in the specific product lines designated as sensitive.

Second, Australia, the Cairns Group, and the G-20 all retorted partial designation as suggested by the EU would permit a high level of protection for specific products (*e.g.*, protecting baby carrots, instead of all carrots, hard cheese, or even cheddar cheese, rather than all cheese, or red beans, instead of all beans). (Because of their keen export interest in farm products, these countries sometimes were called the "exporter camp.") This surgical targeting of detailed, 8-digit level tariff lines for protection would erode the market access gained from any increase in TRQ volumes. Yet, an increase in the TRQ for a Sensitive Product is supposed to be partial compensation to exporters of that Product for the right of an importing country to impose a lower than agreed-upon tariff cut on that Product. The compensation takes the form of a higher in-quota volume threshold in a TRQ at a lower duty-rate (with above-quota shipments paying a higher duty rate.

Third, critics of the EU proposal urged partial designation would not help expand market access overall in a sector. If the majority of tariff lines (at the 8-digit level) in a sector (at the 6-digit level) are not designated as "Sensitive," then there is no obligation to expand the TRQ for those lines. Rather, the obligation of TRQ expansion applies only for the particular 8-digit line designated as "Sensitive." A shrewd Member employing partial designation might designate as "Sensitive" only a minority of tariff lines (at the 8-digit level) in a sector (the 6-digit level) in which the concentration of trade is low. Expanding the TRQs for those 8-digit lines will have little commercial significance for exporters. Exporters seek guaranteed TRQ expansion for all tariff lines, falling within a sector, in which trade tends to be concentrated. Tariff lines for dairy products are one example of a farm sector susceptible to this kind of strategic manipulation by an importing Member. In brief, Members like Australia, the Cairns Group, and the G-20 advocating the product approach argued partial designation based on import values would lead to less TRQ increases than the 4-6 percent expansion, based on domestic consumption, proposed in the July 2007 text. Such Members suggested minimum expansion of TRQ thresholds to ensure TRQ growth in tariff lines in which trade is low, with the floor level being the level of domestic consumption.

In sum, partial designation was attacked as a methodology to suit the interest of developing countries with domestic agricultural constituencies seeking protection. A critical issue related to the methodology for identifying Sensitive Products concerned TRQ expansion. Should TRQ expansion to compensate for Sensitive Product designations be at the more general 6-digit HS level or the more specific 8-digit level? The United States favored 6-digit level TRQ expansion, because it would mean a wider range of products covered by the expansion. The EU and Japan advocated 8-digit level expansion, as they sought to limit competition posed by foreign farm products.

153 Working Document No. 10, *supra* note 136, ¶¶ 4, 6 of Annex.

154 Working Document No. 10, *supra* note 136, ¶ 4 of Annex.

155 *Id.* at 154.

$$\text{Domestic Consumption of Sensitive Product at 6-digit Level} = \frac{\text{Volume of World Trade of the Sensitive Product at 6-digit Level}}{\text{Volume of Total World Trade in the Whole Product Category within which the 6-digit Sensitive Product Is}} \times \text{Total Domestic Consumption of the Whole Product Category by the Member}$$

If data does not exist on domestic consumption at the 8-digit level, then a similar proxy formula would be used.[156]

World import volume data at the 8-digit level would be used to substitute for missing data. The new formula then would be:[157]

$$\text{Domestic Consumption of Sensitive Product at 8-digit Level} = \frac{\text{Volume of World Trade of the Sensitive Product at 8-digit Level}}{\text{Volume of Total World Trade in the Whole Product Category within which the 8-digit Sensitive Product Is}} \times \text{Total Domestic Consumption of the Whole Product Category by the Member}$$

The first term on the right side contains 8-digit level data. The second term remains the same, because those data are available. Simply put, import volumes would be used as a proxy for missing domestic consumption data, and used to estimate consumption of a particular product.

However, using the 8-digit level data (or a proxy) could understate domestic consumption.[158] The tariff on a particular 8-digit line designated as "Sensitive" could be high, thus dampening the volume of trade in that tariff line, i.e., the numerator of the formula would be reduced because of high tariffs. Data at the 8-digit level also could understate domestic consumption through operation of the denominator of the formula. A high level of global trade in a product heading covering all 8-digit lines would mean a high denominator and low level of estimated domestic consumption.

The point is that the 8-digit level data—the hallmark of the partial designation methodology championed by the EU, along with Canada, Japan, Switzerland, and the United States—would not yield ambitious expansion of TRQ volumes.[159] Accordingly, an adjustment would be made in the mandatory TRQ expansion for that line, including (subject to negotiation) a minimum increase of 1 or 3 percent. Not surprisingly, negotiations in March and April bogged down over minute details as to different variations of partial designation that might provide an acceptable "reconstruction" of numbers using numerical weights of one sort or another.[160]

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[156] *Id.*

[157] Working Document No. 10, *supra* note 136, ¶ 6 of Annex.

[158] Working Document No. 10, *supra* note 136, ¶ 6 of Annex.

[159] "Partial designation" refers to the consideration of sub-categories, or parts of large categories, of products as being Sensitive.

[160] *See* Daniel Pruzin, *Officials See Possible "Critical Mass" Deal in WTO Sensitive Ag TRQ Talks; Japan Balks*, 25 INT'L TRADE REP. (BNA) 406-07 (Mar. 20, 2008).

Under either the 6- or 8-digit methodology for calculating the domestic consumption basis for TRQ expansion, the base period from which data are gathered would be the most recent three years in which they are available. Data from a recognized international source like the FAO or Organization for Economic Co-operation and Development (OECD) would be used.[161] Data from a national source would be used, if they are unavailable from an international body.[162] Likewise, all domestic consumption data would be included in computing the domestic consumption base on which to expand TRQs – whether for direct human consumption, animal feed, or industrial use.[163] However, for developing countries, "domestic consumption" would not be defined to include self-consumption of subsistence production. Thus, their bases would be smaller, resulting in a lesser TRQ expansion obligation – effectively another form of special and differential treatment.

For developing countries only, a limited number of Special Products could be exempt from tariff reduction commitments. This limit would be higher than the number of Sensitive Products, but the January 2008 Working Paper identified a wide range of possibilities.[164] Assuming developing countries could designate between 5.3 and 8 percent (as agreed in negotiations) of their agricultural tariff lines as "Sensitive," they could identify 6 or 9 percent (as agreed) of their lines as "Special," or perhaps 7 to 12 percent of their lines.[165]

Exactly what indicators developing countries would have to use to determine whether a product is "Special" remained uncertain in the Working Paper, with no advancement since the G-33 tabled a proposal in March 2007.[166] Generally speaking, developing countries could self-designate Special Products using the criteria of food security, livelihood security, and rural development.[167] The Working Paper suggested modest preferential treatment for RAMs and SVEs, though the details were – as on many points – subject to negotiations.[168]

Likewise, there was no consensus on the extent to which existing bound tariffs on Special Products eventually would have to be reduced.[169] The January 2008 Working Paper suggested an overall average decrease, with a minimum and maximum. For example, the average cut could be based on the required reduction to the in-quota tariff rate on the TRQ of a Sensitive Product for which Member chose the option of a one-half deviation from the agreed-upon cut that normally would apply to that Product. (In the highest tariff band for developing countries, i.e., rates in excess of 130 percent, two-thirds of the agreed upon cuts (for developed countries) of 66 and 73 percent would be 44 and 48.6 percent (which would

161 Working Document No. 10, *supra* note 136, ¶ 2 of Annex.

162 *Id.*

163 *Id.*

164 Working Document No. 15, *supra* note 136, ¶ 1.

165 *Id.* ¶¶ 1, 8.

166 *Id.* ¶ 3.

167 *Id.* ¶ 15.

168 *Id.* ¶¶ 19-20.

169 *Id.*

apply to developing countries), respectively. A one-half deviation would be 22 and 24 percent respectively, meaning the overall average tariff cut to existing bound rates on Special Products would be in the 22-24 percent range.)[170]

There also was no consensus on whether a category of Special Products, dubbed "Super Specials," might be created.[171] This category would encompass farm tariff lines on which a Member desperately sought to retain its existing bound rates. Super Specials would not be subject to any tariff reduction, or possibly only to a small one.

C. Tariff Simplification and SSGs

The January 2008 Working Paper called upon WTO Members to simplify their tariff schedules.[172] Specifically, they would have to express at least 90 percent (if they agreed on that figure) of their bound agricultural duties as *ad valorem* tariffs within a 3-year implementation period.[173] At least 80 percent of their bound farm tariffs would have to be converted in the second year of this period.[174] Additionally, any compound, mixed, or highly complex tariffs (such as complex matrix tariffs) would have to be expressed as simple *ad valorem* rates (or, if agreed in negotiations, as specific duties) by the end of the second year.[175] Developing countries would have an additional two years to achieve the conversions, for a total of five years.[176] There would be no tariff simplification obligation incumbent on least developed countries.[177] The tariff conversion methodology would be the unit value method of gauging an AVE (noted above).

SSGs would be eliminated, or sharply circumscribed, depending on the outcome of the negotiations.[178] However, there was no agreement on two starkly different options. The January 2008 Working Paper offered two possibilities. First, why not have developed countries eradicate immediately their SSGs, simply by allowing Article 5 of the *Agreement on Agriculture* (the provision creating them) to expire? They could do so through a phased reduction of SSGs, via cutting the number of agricultural tariff lines eligible for an SSG by a percentage to be agreed upon in negotiations. Developing countries, too, could restrict the number of eligible tariff lines to a certain percentage.

Second, there could be partial elimination of SSGs, coupled with disciplines on the quantity and price trigger for invoking an SSG.[179] Under this option, over 4 years, developed countries would cut to no more than 2 or 3 percent, as agreed

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[170] *Id.* ¶ 6.

[171] *Id.* ¶ 9.

[172] Working Document No. 12, *supra* note 136, ¶ 1.

[173] *Id.* ¶ 2.

[174] *Id.* ¶ 3.

[175] *Id.* ¶ 4.

[176] *Id.* ¶ 6.

[177] *Id.*

[178] Working Document No. 14, *supra* note 136, ¶¶ 1-3.

[179] *Id.* ¶ 2.

in negotiations, the farm tariff lines eligible for an SSG.[180] They would cut in half that figure (i.e., 1 or 1.5 percent) in 2 subsequent years, and eliminate fully all tariff lines from SSG eligibility in yet 2 more years.[181] During the entire 8-year phase out period, the quantity trigger would permit an SSG only where imports (1) exceed a minimum 10 percent (if agreed in negotiations) threshold of domestic consumption, (2) have increased by at least 25 percent in absolute terms, and (3) the ratio of imports to domestic consumption has increased by more than 0.35 percent (also if agreed in negotiations).[182] The SSG remedy would be limited to raising the applied rate above the bound duty by no more than one-third of the bound duty (if the applied and bound rates were equal before the SSG), or (if the applied rate were below the bound rate) would be capped at the greater of (1) the gap between the applied and bound rates, and (2) an addition to the applied rate of one third of the bound rate.

Critically, under the second option, developing countries would be entitled to keep the right to deploy an SSG. That is, they would get special and differential treatment, in that Article 5 of the *Agriculture Agreement*[183] would remain the same for them.

D. Non-Linear Reductions to OTDS

On OTDS (which is the sum of support in the Amber Box, formally called "AMS," defined below, plus *De Minimis* support, and support in the Blue Box), the December 2007 Working Paper defined the "Base Level" for OTDS.[184] That Level is critical, because reduction coefficients are applied to it, and the Working Paper set out those coefficients.[185] That is, the Base Level is the starting point for making cuts, and the higher that Level, then for any given percentage cut, the less ambitious the end result (in terms of trade-liberalizing decreases in farm subsidies). The formula in the Working Paper defined Base Level as the sum of three figures:[186]

Base Level for OTDS	=	Final Bound Total AMS
	+	10% (Average Total Value of Production in 1995-2000)
	+	the higher of either 5% (Average Total Value of Agricultural Production in 1995-2000) or Blue Box payments
where:		
AMS	=	Aggregate Measure of Support, as calculated under the WTO Agreement on Agriculture

180 *Id.*

181 *Id.*

182 *Id.*

183 Agreement on Agriculture, *supra* note 27, art. 5.

184 Working Document No. 5, *supra* note 135, ¶ 1.

185 *Id.* ¶¶ 2-3.

186 *Id.* ¶ 1.

The first figure on the right-hand side of the equation, "Final Bound Total AMS" is the Aggregate Measure of Support a WTO Member sets out and binds in its Schedule associated with the *Agreement on Agriculture*, and consists of all Amber Box Support, meaning subsidies not in the Blue Box and not *De Minimis*.[187] That is, it is the Amber Box commitment ceiling.

The second right-hand side figure, 10 percent of the Average Total Value of Production in 1995-2000, consists of 5 percent of the Average Total Value of Production for Product-Specific support that is in the Amber Box, plus 5 percent of the Average Value of Production for Non-Product Specific that is in the Amber Box.[188] These domestic subsidies are called, respectively, "Product-Specific AMS" and "Non-Product Specific AMS."[189] Of course, a certain percentage of these subsidies qualify as *De Minimis*, and that percentage is not classified in the Amber Box as Total AMS subject to reduction commitments.) In other words, the term for the second figure—"Average Total Value of Production"—is a generic one encompassing both Product- and Non-Product Specific subsidies.[190] Also with respect to the second figure, developing countries receive special and differential treatment in the form of a 20 percent threshold (consisting of 10 percent each on Product-and Non-Product Specific AMS).[191] This treatment means poor countries are entitled to include a higher percentage of this support in their OTDS, thus increasing their Base Level from which they are to make funding cuts.

As for the third right-hand side figure, the Working Paper offered an alternative. If WTO Members agreed, then there could be a choice between the higher of (1) 5 percent of the Average Total Value of Farm Production in 1995-2000, or (2) existing average Blue Box Payments.[192]

Manifestly, the proposed Base Level OTDS formula was intricate. Operationally, it would have to rely on accurate agricultural output and subsidy data from each Member. Conceptually, defining "OTDS" ought to be unnecessary. The first figure, AMS, is supposed to capture the sum total of subsidies a Member provides to its farm sector. This figure does not do so, however, because (via the *Agreement on Agriculture*, treated in a later Chapter), it excludes *De Minimis* and Blue Box payments. Hence, OTDS is closer to the truly aggregate measure of support that AMS ought to be, but for legally-permissible exemptions from AMS.

This is closer, yes, but not perfectly all-inclusive. Under the Working Papers, *De Minimis* and Blue Box subsidies still would be largely exempt from cuts.[193] Including the second variable in OTDS reflected an effort to discipline, to a limited extent, the extent to which a WTO Member could exempt Product- and Non-

187 Working Document No. 5, *supra* note 135, ¶ 8.

188 *Id.* ¶ 1.

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.* ¶ 8.

Product Specific subsidies from cuts by dubbing them "*De Minimis*."[194] Similarly, under either alternative for the third figure (but most obviously under the second one), including the third figure in the calculation of OTDS bespoke an effort to subject at least a portion of Blue Box Payments to cuts. Of course, Blue Box advocates like the EU and United States might not accept the second alternative. In brief, the essence of the Working Paper strategy in defining a Base Level was to cap OTDS. At no point in the Doha Round did negotiators believe it was economically viable, much less politically feasible, to eliminate all farm subsidies.

As for reduction coefficients to make operational the capping strategy, the Working Paper adhered to the key figures in the July 2007 Draft Modalities Text in respect of caps on American and European spending. Both documents called for tiered reduction, and Table 4 sets out the Working Paper approach. This approach meant non-linear cuts to the Base Level of OTDS. WTO Members would bind their cuts in its Schedule, and would have to reduce Total AMS, *De Minimis* Support, and/or Blue Box programs to stay within their agreed-upon cap to OTDS. But, cuts would not be required of all WTO Members. And, the implementation phases would not be uniform across Members. Special and differential treatment distinguished among poor countries to a far greater degree than in the Uruguay Round. Beyond the "developed," developing," and "least developed" cohorts used in the legal texts of that Round, there were new, particularized rules for Net Food Importing Developing Countries (NFIDCs) and RAMs, and even for different types of RAMs.

Table 4:
Reduction Commitments on OTDS Proposed in December 2007 Falconer Working Paper

Base Level for OTDS (all figures in U.S. dollars)	**Top Tier Reduction Commitments** (percentage cut required to Base Level OTDS) OTDS is over $60 billion	**Second Tier Reduction Commitments** (percentage cut required to Base Level OTDS) OTDS is over $10 billion up to 60 billion	**Third Tier Reduction Commitments** (percentage cut required to Base Level OTDS) OTDS is $10 billion or less
Reduction Coefficients for Developed Countries	75% or 85% (to be agreed in negotiations) The EU would be in this tier, and its new annual spending cap would be either €16.5 ($22.7) billion or €27.6 ($38) billion. Japan, also, would be in this tier.	66% or 73% (to be agreed in negotiations) The United States and Japan would be in this tier, and its new annual spending cap would be either $13 billion or $16.4 billion.	50% or 60% (to be agreed in negotiations)

[194] Working Document No. 7, *supra* note 135, ¶¶ 1-2.

Implementation Phases for Developed Countries	1/3 of cut must be made on the 1st day of the implementation period of any Doha Round agreement, with remaining cuts in equal annual installments over 5 years.	Same as Top Tier.	25% of cut must be made on the 1st day of implementation, with remaining cuts in equal annual installments over 5 years.
Additional Reduction Commitments for Developed Countries?	No	Yes A developed country in the Second Tier with a high Base Level OTDS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production, must make an additional cut to its Base Level of OTDS. The additional cut must be ½ of the difference between the Top and Second Tier reduction percentages (e.g., if the difference is 85% and 73%, then additional cut of 6% is required). Japan is in this category.	No
Reduction Coefficients for Developing Countries	No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Top Tier.	No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Second Tier.	No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Third Tier.
Implementation Phases for Developing Countries	As first installment, a 20% cut. At all times thereafter, actual OTDS must be less than 80% of Base Level OTDS. Remaining cuts to OTDS made in equal annual installments over 8 years.	Same as Top Tier.	Same as Top Tier.
Reduction Coefficients NFIDCs	No cuts required.	No cuts required.	No cuts required.
Reduction Coefficients for RAMs	None if RAM has not made a bound AMS commitment. Otherwise, essentially same as for developing countries (i.e., 2/3 commitment in relation to developed countries, other than United States, EU, and Japan).	Same as Top Tier.	Same as Top Tier.

Implementation Phase for RAMs	Same as for developing countries.	Same as for developing countries.	Same as for developing countries.
Reduction Coefficients for Very Recently Acceded RAMs – Macedonia, Saudi Arabia, and Vietnam	No cuts required.	No cuts required.	No cuts required.
Reduction Coefficients for Small, Low-Income RAMs with Transition Economies – Albania, Armenia, Georgia, Kyrgyz Republic, and Moldova	No cuts required.	No cuts required.	No cuts required.

E. Non-Linear Reductions to Total AMS

Second, on Total AMS, the December 2007 Working Paper called for a tiered approach—again, non-linear cuts, meaning steeper cuts imposed on WTO Members with higher levels of Amber Box spending to harmonize trade-distorting expenditures across Members.[195] The Working Paper stuck with figures laid out in the July 2007 Draft Modalities Text.[196] Table 5 below sets out the proposals which would amend Article 6:3 of the *Agreement on Agriculture*.[197] Notably, as with caps on Base Level OTDS, there was no consensus as to the exact reduction coefficients, and there was considerable differentiation among WTO Members, with special rules for NFIDCs, RAMs, and certain types of RAMs.[198]

Table 5:
Reduction Commitments on Total AMS (The Amber Box) Proposed in December 2007 Falconer Working Paper

Bound Total AMS (all figures in U.S. dollars)	**Top Tier Reduction Commitments** (percentage cut required to Bound Total AMS) Total AMS is over $40 billion	**Second Tier Reduction Commitments** (percentage cut required to Bound Total AMS) Total AMS is over $15 billion up to $40 billion	**Third Tier Reduction Commitments** (percentage cut required to Bound Total AMS) Total AMS is $15 billion or less
Reduction Coefficients for Developed Countries	70% (if agreed in negotiations) The EU would be in this Tier.	60% (if agreed in negotiations) The United States and Japan would be in this Tier.	45% (if agreed in negotiations)

[195] Working Document No. 6, *supra* note 135, ¶ 1.

[196] *Id.*

[197] Agreement on Agriculture, *supra* note 27, art. 5.

[198] Working Document No. 6, *supra* note 135, ¶¶ 4-7.

Implementation Phases for Developed Countries	First installment cut of 30%, followed by equal annual cuts over 4 years.	Same as Top Tier.	Cuts made in equal annual installments over 5 years.
Additional Reduction Commitments for Developed Countries?	No	Yes A developed country in the Second Tier with a high Bound Total AMS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production, must make an additional cut to its Total AMS. The additional cut must be the difference between the Top and Second Tier reduction percentages (e.g., if the difference is 70% and 60%, then additional cut of 10% is required). Japan is in this category.	Yes A developed country in the Third Tier with a high Bound Total AMS, meaning one equal to or above 40% of the Average Total Value of its Agricultural Production, must make an additional cut to its Total AMS. The additional cut must be ½ the difference between the Top and Second Tier reduction percentages (e.g., if the difference is 70% and 60%, then additional cut of 5% is required).
Reduction Coefficients for Developing Countries	No cuts to required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Top Tier.	No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Second Tier.	No cuts required for a developing country that has not made a bound AMS commitment. Otherwise, the percentage reduction is 2/3 the commitment that applies to developed countries in Third Tier.
Implementation Phases for Developing Countries	Cuts made in equal annual installments over 8 years.	Same as Top Tier.	Same as Top Tier.
Reduction Coefficients for NFIDCs	No cuts required.	No cuts required.	No cuts required.
Reduction Coefficients for RAMs	None if RAM has not made a bound AMS commitment. Otherwise, essentially same as for developing countries (i.e., 2/3 the commitment as for developed countries, other than United States, EU, and Japan).	Same as Top Tier.	Same as Top Tier.
Implementation Phase for RAMs	Same as for developing countries.	Same as for developing countries.	Same as for developing countries.
Reduction Coefficients for Very Recently Acceded RAMs – Macedonia, Saudi Arabia, and Vietnam	No cuts required.	No cuts required.	No cuts required.

Reduction Coefficients for Small, Low-Income RAMs with Transition Economies – Albania, Armenia, Georgia, Kyrgyz Republic, and Moldova	No cuts required of Moldova, which is the only such RAM to have bound its Total AMS. No cuts required of Albania, Armenia, Georgia, and Kyrgyz Republic, because they have not bound their Total AMS. In addition, this group of RAMs can exclude from their calculation of current Total AMS any (1) investment subsidy generally available to agriculture, (2) agricultural input subsidy, (3) interest subsidy to reduce financing costs, or (4) grant to cover debt repayment.	Same as Top Tier.	Same as Top Tier.

Beyond mandatory cuts to Total AMS, the Working Paper called for limits on Product-Specific subsidies, i.e., on the amount of funds a WTO Member could channel to the direct support of a particular crop.[199] The G-20 pointed out such limits should be fixed for individual products, not broad sectoral categories or definitions like "cereals" or "oilseeds," so as to prevent a Member from spreading Product-Specific support across multiple products, or shifting it among them.) The basic limit for all developed countries other than the United States was Product-Specific support should not exceed the average of that kind of support during the base period of 1995-2000, known as the Uruguay Round implementation period.[200]

The United States, however, received special dispensation as to the base period and calculation methodology.[201] Its Product-Specific support should not exceed the proportionate average of its (1) average actual Product-Specific AMS during 1995-2004 and (2) average actual Total AMS for 1995-2000.[202] In other words, the United States alone could include more years in its base period to establish the ceiling on its Product-Specific support. Doing so would help raise the ceiling, because during the additional years (2001-2004), the United States had high Product-Specific expenditures.

For all developed countries, the implementation date by which the limits on Product-Specific support must be reached has yet to be decided through negotiations.[203] The Working Paper offered two choices: (1) immediate full implementation, i.e., all cuts by the first day on which any Doha Round accord takes effect; or (2) phasing, with cuts to reach the applicable limit in 3 equal annual install-

199 Working Document No. 6, *supra* note 135, ¶ 9.

200 *Id,* ¶ 10.

201 *Id.* ¶ 11.

202 *Id,* ¶ 12.

203 *Id.* ¶ 14.

ments (with the starting point for implementation being 130 percent of the Product-Specific average in the relevant base period.[204]

Developing countries, too, would be obligated to establish limits on any Product-Specific support they provided.[205] But, they would receive special and differential treatment in doing so, specifically in the manner in which they could calculate the cap on their Product-Specific AMS.[206] They would have a choice among three alternatives in setting their limit: (1) average actual expenditures during 1995-2000 or 1995-2004, (2) twice the Product-Specific support limit established in the Uruguay Round and set out in Article 6:4 of the *Agreement on Agriculture*,[207] or (3) 20 percent of the bound Total AMS for the relevant developing country.[208] Obviously, a developed country would be inclined to choose the alternative offering the highest ceiling on subsidies it could channel to a specific crop.

Significantly, the Working Paper allowed flexibility in these limits.[209] First, suppose actual Product-Specific support of a WTO Member during the relevant base period was below the *De Minimis* level.[210] Then, the limit would be set at that level.[211] This flexibility meant the *status quo ante* of the Uruguay Round limit set in Article 6:4 of the Agriculture Agreement would be ratified, and could become the new cap. Second, suppose actual support provided by a Member, after the relevant base period, rose above the *De Minimis* level.[212] Then, the limit for that Member would be the average amount of Product-Specific subsidization by the Member in the 2 most recent years before adoption of the Doha Round agreements.[213] Here again, the *status quo ante* would be ratified, effectively rewarding large spenders – ones that had spent, following the Uruguay Round, above their *De Minimis* thresholds. They got an entitlement to offer Product-Specific support in the future at past high levels (subject only to their overall bound OTDS and Total AMS levels). The key point is they would not have to worry about including Product-Specific expenditures above the *De Minimis* threshold in Total AMS, and subjecting the overage to reduction commitments. For past excessive spending, they got a "pass."

F. Reductions to *De Minimis* Subsidies

On *De Minimis* Support, the December 2007 Working Paper essentially endeavored to cut the thresholds in half, to 2.5 percent (or, if agreed, 2 percent), of

204 Working Document No. 6, *supra* note 135, ¶ 14.

205 *Id.* ¶ 15.

206 *Id.*

207 Agreement on Agriculture, *supra* note 27, art 6.4.

208 Working Document No. 6, *supra* note 135, ¶ 15.

209 *Id.* ¶¶ 12-13, 15.

210 *Id.* ¶ 13. The *de minimis* level is as it is set out in Article 6.4 of the Agreement on Agriculture, *supra* note 27, art. 6.4.

211 Working Document No. 6, *supra* note 135, ¶ 13.

212 *Id.* ¶ 12.

213 *Id.*

the value of domestic agricultural production (down from 5 percent), and thus reduce both the theoretical level and actual expenditure amount considered insignificant.[214] From the Uruguay Round, those thresholds were defined in terms of Product-Specific and Non-Product-Specific Support, with different limits for developed and developing countries (and none for least developed countries).

As intimated, for developed countries the *De Minimis* level of Product-Specific support was 5 percent of the total value of output of the basic agricultural product in question.[215] Their *De Minimis* level for Non-Product Specific support also was 5 percent, but of the total value of agricultural production of all commodities.[216] The Working Paper called for these 5 percent limits to be lowered by at least 50 percent, and possibly 60 percent if negotiators agreed, through five equal annual installments (using 1995-2000 as the base period).[217]

For developing countries, the *De Minimis* levels were double that of developed countries.[218] For Product-Specific support, the level was 10 percent of the total value of output of the basic agricultural product in question, and for Non-Product Specific support, 10 percent of the total value of agricultural production of all commodities.[219] The Working Paper called for these 10 percent limits to be lowered by at least two-thirds of the cuts agreed upon for developed countries (using the 1995-2000 base period).[220] Developing countries would have an extra eight years (i.e., at least eight years) to reduce their *De Minimis* support.[221]

Three categories of developing countries would not have to make any reductions in *De Minimis* support levels or spending: (1) developing countries that had not bound their Total AMS; (2) developing countries that allocated almost all of their subsidies to subsistence and resource-poor farmers; and (3) NFIDCs.[222] For

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214 Working Document No. 7, *supra* note 135. *De Minimis* thresholds matter because expenditures up to them need not be included in the calculation of Total AMS, and thus are not subject to the cuts required of AMS. Lowering the thresholds meant reducing expenditures previously considered "*de minimis*" and thereby exempt from cuts.

215 Working Document No. 7, *supra* note 135, ¶ 1. The *de minimis* level for developed countries is set out in Article 6.4(a) of the Agreement on Agriculture, *supra* note 27, art. 6.4(a).

216 Working Document No. 7, *supra* note 135, ¶ 1.

217 *Id.* The additional flexibility afforded in respect of Product-Specific AMS limits created a modest problem for reducing Product-Specific *De Minimis* thresholds. As explained above, if a WTO Member exceeded (after the 1995-2000 Uruguay Round implementation period) its *De Minimis* level of Product-Specific spending, as set out in Article 6.4 of the *Agreement on Agriculture*, then the actual average amount of its spending in the two years prior to adoption of a Doha Round agreement would be its limit on future Product-Specific AMS support. In effect, the Member gets an entitlement to Product-Specific spending it would not otherwise have secured through the usual *De Minimis* level and base period. In cutting *De Minimis* thresholds and spending, what is the correct *De Minimis* base figure to which to apply reduction coefficients—(1) the base figure that would have existed, absent any entitlement, or (2) the base figure plus the entitlement? In confusing footnotes, the Working Paper appeared to mandate an adjustment to avoid double counting, namely, an exclusion of the entitlement from the base figure. *Id.* at 1 nn.1, 3.

218 *Id.* ¶ 2. The *de minimis* level for developing countries is set out in Article 6.4(b) of the Agreement on Agriculture, *supra* note 27, art. 6.4(b).

219 Working Document No. 7, *supra* note 135, ¶ 2.

220 *Id.*

221 *Id.*

222 *Id.* ¶ 3.

these developing countries, the existing Uruguay Round *De Minimis* levels would continue to apply. Likewise, the very-recently acceded RAMs—Macedonia, Saudi Arabia, and Vietnam—would have no obligations to cut *De Minimis* thresholds or spending.[223] Small, low-income RAMs—Albania, Armenia, Georgia, Kyrgyz, and Moldova—also would be free from any obligations in respect of *De Minimis* cuts.[224] A final category of RAMs—those new WTO Members that had bound Total AMS commitments and existing *De Minimis* Levels of 5 percent (for Product- and Non-Product Specific Support)—would have a modest obligation, namely, to cut their thresholds by one-third of reduction figure for developed countries, with an extra five years in which to implement the cut.[225]

G. Expanding the Blue Box and Cutting Blue Box Subsidies

On Blue Box support, the critical proposals in the December 2007 Working Paper were to expand the definition of this Box, and also to impose disciplines on it in the form of an overall cap and Product-Specific limits.[226] Uruguay Round negotiators (in Article 6:5 of the *Agreement on Agriculture*) defined the Blue Box only in terms of product-limiting support, i.e., payments to farmers to set aside acreage (or livestock) from cultivation.[227] The Working Paper proposed to include counter-cyclical payments (defined as direct payments to farmers that did not require limits on production, but which were based on fixed bases and yields (or for livestock, fixed head).[228] Thus, the United States – a champion of the expanded definition – and other Members could move counter-cyclical payments from the Amber Box to the Blue Box, and thereby immunize these payments from reduction commitments to Total AMS (which includes Amber Box, but not Blue Box, spending).[229] However, a WTO Member could not take advantage of both sides of the Box, meaning it could put either set-aside payments or counter-cyclical support in the Box, but not both.

As for disciplines on Blue Box expenditures, the maximum amount of such spending a WTO Member could exclude from its calculation of Total AMS would be 2.5 percent of the average total value of its agricultural production (with 1995-2000 as the base period).[230] In essence, no more than 2.5 percent of the value of its farm output could be excluded from AMS reduction commitments.[231] A further restraint would be demanded of Members (such as Norway) that put an exceptionally large percentage—namely, 40 percent or more during

[223] *Id.* ¶ 4.

[224] *Id.*

[225] *Id.*

[226] Working Document No. 8, *supra* note 135.

[227] Agreement on Agriculture, *supra* note 27, art 6.5.

[228] Working Document No. 8, *supra* note 135, ¶ 1.

[229] *Id.* ¶ 2.

[230] *Id.* ¶ 3.

[231] *Id.* ¶ 4.

the 1995-2000 base period—of their trade-distorting support in the Blue Box.[232] Their limit would not be 2.5 percent of the total value of their farm output.[233] Rather, it would be a relatively lower threshold, computed by applying the same percentage reduction commitment they use for Total AMS (70, 60, or 45 percent) to their base-period Blue Box spending.[234] They would have to reach this limit within two years.[235]

Developing countries and RAMs would receive special and differential treatment.[236] The limit on their overall Blue Box support would be 5 percent of the average total value of agricultural production (using the 1995-2000 base period).[237] If a developing country or RAM elected to transfer subsidies into the Blue Box from a component of AMS (*e.g.*, the Amber Box), then it could select as its base period the most recent 5-year period for which data are available.[238]

Notably, the Working Paper also called for limits on the Blue Box on a product-by-product basis. That is, the Paper said WTO Members must constrain their Product-Specific Blue Box spending.[239] Here, as with Total AMS, the United States got preferred treatment. For all Members other than the United States, the Paper suggested a Product-Specific limit equal to the average value of support to the product in question during 1995-2000.[240] In other words, past should be prologue – whatever had been spent in the Blue Box on a particular crop during the Uruguay Round implementation period should be the future cap. The United States, however, would not be constrained by the same past period as the rest of the world.[241]

The United States could set its Product-Specific Blue Box limit at 110 percent (or, possibly, 120 percent) of the average Product-Specific amount for the crop in question.[242] The United States could compute its Product-Specific amount for a crop as a proportionate average of (1) the maximum permissible expenditures allowed in its *2002 Farm Bill* and (2) 2.5 percent of the average total value of its farm production. Put simply, if a bit simplistically, the limits the United States had set for itself in a high spending period, 2002-2007, under the *2002 Farm Bill*, would strongly influence its international legal caps.

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232 Working Document No. 8, *supra* note 135, ¶ 4.

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.* ¶¶ 12, 14.

237 *Id.*

238 *Id.*

239 *Id.*

240 *Id.* ¶ 5. Suppose a WTO Member had not made payments specifically to a particular crop, and its Blue Box programs consisted only of set aside payments. The Working Paper intimated a special, one-time only, method of calculating its Product-Specific Blue Box limit.

241 Working Document No. 8, *supra* note 135, ¶ 7.

242 *Id.*

To create yet more flexibility, any Member could exceed its Product-Specific Blue Box spending limit.[243] If it did so, then it would have to reduce irreversibly its Product Specific AMS cap on a one-for-one basis.[244] That is, for every dollar a Member it spent in the Blue Box on a crop that exceeded its Product-Specific Blue Box cap, the Member would have to reduce its Product-Specific AMS limit.[245] The penalty for excess would be more stringent if the crop were cotton.[246] Then, the ratio would be two-to-one, i.e., for every $1 of excess Blue Box support to cotton, the Product-Specific AMS on cotton would have to fall by $2.[247] In effect, a Member can shift spending on specific commodities from the Amber to Blue Box, and exceed Product-Specific Blue Box caps, but not without lowering Amber Box caps. And, of course, the overall Blue Box limit must be respected.

On Product-Specific Blue Box limits, developing countries would get special and differential treatment for important crops.[248] Important crops would be defined as ones accounting for more than (1) 25 percent of the average total value of farm production and (2) 80 percent of the average bound Total AMS during the base period.[249] For such crops, a developing country could shift irreversibly Product-Specific support into the Blue Box, even if the shift caused it to exceed its overall Blue Box cap.[250] Presumably, the shift would occur from the Amber Box, and result in immunizing the subsidy from cuts to Total AMS.

Rising above the technical details, and looking for an overall balance of rights and obligations, the Working Papers failed to achieve concinnity in support of multilateralism. That failure seemed due to the long-standing single-minded pursuit of national self-interest by powerful, vocal WTO Members, most notably the United States, plus certain developing countries and RAMs. For poor and, ironically, for rich, the Working Paper proposed considerably more special and differential treatment, with finer gradations, than the Uruguay Round texts had allowed. Not only did the Papers create multiple categories of developing countries by delineating RAMs from each other, it even differentiated among developed countries in the same Base Level OTDS and Total AMS tier – effectively creating a band within a band in the Second Tier. It would be equally true to characterize this treatment as reflecting the larger number, and deeper nature, of schisms in the Doha Round than in its predecessor.

Accordingly, the United States received much of what it had sought all along in the Doha Round, including:

- A base period during which to calculate OTDS and Blue Box support, which indeed applied only to the United States.

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243 Working Document No. 8, *supra* note 135, ¶ 8.

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.*

248 *Id.* ¶ 13.

249 *Id.*

250 *Id.*

- Reasonably deep cuts that would apply to EU and Japanese OTDS, and significant reduction commitments that would apply to Total AMS domestic support in the EU and Japan.
- Additional flexibilities on Product-Specific and Non-Product Specific Support.
- A broader definition of the "Blue Box" to include counter-cyclical payments.
- Incorporation by reference into Product-Specific Blue Box caps of spending limits in the *2002 Farm Bill*.

To be sure, the Working Papers were more than a mere transcription of the American negotiating position. They did not give to the United States all it had sought. The United States had opposed, for example, any Product-Specific limits in the Blue Box. Nonetheless, poor countries hardly could be pleased.

Provisions written explicitly for the United States ought to have proved embarrassing. They were not justified for all rich countries, which might have made them modestly more defensible. They were just for the richest one. They raised the question why American farmers ought to get better treatment than their counterparts in Australia, Canada, the EU, or New Zealand, to which the United States provided no answer—other than it had to get what it wanted or there would be no Doha Round deal.

VI. Crawling Toward a Conclusion

On 8 February 2008, Chairmen Falconer and Stephenson circulated new draft modalities documents on agriculture and NAMA, respectively, the *Revised Draft Modalities Text for Agriculture*[251] and *Draft Modalities Text for Non-Agricultural Market Access*.[252] As with the July 2007 texts, the February 2008 Draft Modalities Texts were issued contemporaneously, because WTO Members continued to link farm and industrial trade liberalization, and had sought to negotiate an acceptable balance among the level of ambition (i.e., the depths of cuts) in agricultural tariffs and subsidies, and industrial tariffs, ever since they launched the Doha Round in November 2001.

Yet, there was little new in the February 2008 Texts.[253] The headline numbers, figures for the big issues—cutting tariffs on farm and manufactured goods, and reducing agricultural subsidies—were the same as in the July 2007 Texts. Neither of the February Texts was a proposal in the sense of an opinion from either Chairman as to what might be good for world trade in farm or manufactured products. Rather, both Texts were amalgams of proposals made and de-

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[251] WTO, Committee on Agriculture, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.1 (Feb. 8, 2008) [hereinafter February 2008 *Draft Modalities for Agriculture*].

[252] WTO, Negotiating Group on Market Access, *Draft Modalities for Non-Agricultural Market Access*, TN/MA/W/103 (Feb. 8, 2008) [hereinafter February 2008 *Draft Modalities for NAMA*].

[253] *See Unofficial Guide to February 2008 Draft Modalities*, *supra* note 145; Daniel Pruzin, *WTO Ag, NAMA Chairs Issue Revised Negotiating Texts with Few Surprises*, 25 Int'l Trade Rep. (BNA) 216-18 (Feb. 14, 2008) [hereinafter Pruzin, *Chairs Issue Revised Negotiating Texts*]; Daniel Pruzin, *U.S., EU Win Extra Flexibility on Textile Tariff Cuts Under Revised NAMA Text*, 25 Int'l Trade Rep. (BNA) 218 (Feb. 14, 2008) [hereinafter Pruzin, *U.S., EU Win*].

bated in the seven years of the Round, with an overlay of judgment from the respective Chairmen as to the areas on which Members might, at long last, converge.

Unsurprisingly, just two days after the Texts were issued, Argentina rejected them, saying they failed to depart substantially from the July Texts, which developing countries had rejected as insufficiently accounting for their interests.[254] Brazil argued the February Texts went too far in pleasing developed countries.[255] The G-10 opposed the Texts, particularly on agriculture, for the opposite reason of Argentina and Brazil. The G-10 argued the Texts went too far in cutting farm tariffs and subsidies and imposing tariff caps.[256] Perhaps most ominously, ten days after the Texts came out, French Agriculture Minister Michel Barnier announced twenty of the twenty-seven EU farm ministers agreed the Texts were unacceptable.[257] Developing countries had given the EU virtually nothing in respect of NAMA, in return for major EU compromises on farm trade. Hence, the EU would make no further concessions.

A. Synopsis of the February 2008 Draft Agriculture Modalities Text

Thus, the 59-page Draft Text on farm trade essentially embodied substantive points discussed in detail above, but endeavored to fill in as many key missing details as possible. By way of synopsis, the Text provided the following:

• Domestic Support – OTDS

As set out in the December 2007 Working Paper, *Overall Reduction of Trade-Distorting Domestic Support: A Tiered Formula*, OTDS would be reduced by a tiered formula, with a defined base level of OTDS.[258] Cuts to OTDS would be implemented and staged over time, with special and differential treatment for developing and least developed countries, and certain RAMs.

The United States would have to accept an annual cap on OTDS expenditures of between $13 and $16.4 billion per year, down from its ceiling of $48.2 billion.[259] The EU would have to agree to an annual OTDS spending limit of $25.7-$43 billion (€16.5-€27.6 billion), down from its ceiling of $171.8 billion (€110.3 billion).[260] These headline figures, of course, were familiar from past negotiating texts. In other words, little progress had been made. The United

[254] *See* David Haskel, *Revised Agriculture, NAMA Texts Unacceptable, Argentina Tells WTO*, 25 Int'l Trade Rep. (BNA) 223-24 (Feb. 14, 2008).

[255] *See* Daniel Pruzin, *WTO Members React to Revised Text on Agriculture; Alliances Reiterate Stances*, 25 Int'l Trade Rep. (BNA) 256-57 (Feb. 21, 2008).

[256] *See* Daniel Pruzin, *WTO Ag Chair Admits Frustrations as EU Takes Hard Line in Farm Trade Talks*, 25 Int'l Trade Rep. (BNA) 255-56 (Feb. 21, 2008).

[257] *See France Again Leads Effort by EU States to Oppose Latest Doha Round Draft Texts*, 25 Int'l Trade Rep. (BNA) 257-58 (Feb. 21, 2008) (officials from Denmark, Estonia, Latvia, Malta, Sweden, and the United Kingdom, and an unnamed EU state, in the minority).

[258] Working Document No. 5, *supra* note 135.

[259] Pruzin, *Chairs Issue Revised Negotiating Texts, supra* note 253 (European figures converted into U.S. dollars as of mid-July 2008).

[260] *Id.*

States insisted it would have difficulty accepting a figure less than $17 billion.[261] The EU said it could offer no more than a 70 percent cut to its trade-distorting subsidies, and its chief agriculture negotiator affirmed the EU had reached its limit.[262] But, India and many other developed countries demanded the Americans accept a far lower cap, one that was below actual United States spending (estimated in 2006 was $10.8 billion), rather than one that would allow them to boost OTDS.[263]

• Domestic Support – AMS

As set out in the December 2007 Working Paper on *Final Bound Total AMS: A Tiered Formula*, under the February 2008 Text, final bound total AMS would be reduced through a tiered formula, with special and differential treatment for developing and least developed countries, and certain RAMs.[264] Effectively, the EU would have to bring its Amber Box ceiling down from €67.16 billion to €20.1 billion, and the United States would be obliged to drop its ceiling from $19.1 to $7.6 billion.[265] The February 2008 Text made a minor adjustment on the implementation period.[266] On Product-Specific AMS limits, the February 2008 Text was nearly a *verbatim* repetition of the relevant paragraphs from the December 2007 Working Paper on *Final Bound Total AMS*,[267] notably including the *sui generis* dispensation for the United States on the base period for calculating these limits.

• Domestic Support – Blue Box and *De Minimis*

Likewise, the February 2008 Text followed nearly identically the December 2007 Working Papers in most material respects as to proposals for the Blue Box[268] and *De Minimis*[269] Support. The Text contained modestly tougher language in respect of barring a Member from providing more than one type of Blue Box support (i.e., a Member would have to choose between production-limiting support and counter-cyclical support), and forbidding a Member from flipping back and forth between the two types of Blue Box support.[270] The Text also decreased the Blue Box product-specific limits for Members that have not set a product-specific entitlement to a Blue Box limit, and have no AMS support in the

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261 *Id.*

262 *See* Gary G. Yerkey, *EU Trade Chief Says WTO Talks Now Face "High Risk" of Failure*, 25 Int'l Trade Rep. (BNA) 330 (Mar. 6, 2008); Daniel Pruzin, *Falconer Expresses Doubt on Timetable for Breakthrough on Doha Agriculture Talks*, 25 Int'l Trade Rep. (BNA) 331-32 (Mar. 6, 2008).

263 Pruzin, *Chairs Issue Revised Negotiating Texts, supra* note 253.

264 Working Document No. 6, *supra* note 135.

265 *Unofficial Guide to February 2008 Draft Modalities, supra* note 145.

266 For developed countries, the February Text reduced the first installment of the cut from 30 to 25 percent, and further spread the cuts over five years. February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 5. For developing countries, the Text specified the reductions would occur in equal installment over five years. *Id.* ¶ 8.

267 *Compare* February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶¶ 21-29, *with* Working Document No. 6, *supra* note 135, ¶¶ 9-16.

268 Working Document No. 8, *supra* note 135.

269 Working Document No. 7, *supra* note 135.

270 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶¶ 36-37.

base period for a particular product.[271] For developing countries that have no entitlement to a product-specific Blue Box limit, and no support for a particular product, the Text established 7.5 percent of the overall Blue Box limit, and a single product maximum of 5 percent, as the caps.[272] The Text also permitted developing countries to choose either 1995-2000 or 1995-2004 as the base period for the maximum permitted Product-Specific limits in the Blue Box.[273]

• Domestic Support – Cotton Subsidies

Significantly, the February 2008 Text contained a formula for reductions to cotton subsidies:[274]

$$R_c = R_g + \frac{(100 - R_g) \times 100}{3 \times R_g}$$

where:

R_c = Reduction percentage specifically applicable to cotton
R_g = Reduction percentage generally applicable to AMS
1995-2000 = base period during which to measure cotton subsidies, and form which to cut

For example, suppose the Amber Box reduction percentage, R_g, for the United States is 60 percent. Using this formula, the percentage cut the United States would have to apply to its cotton subsidies would be 82.2 percent:

$$82.2 = 60 + \frac{(100 - 60) \times 100}{3 \times 60}$$

Of course, the exact value for R_c had yet to be agreed, and the values for R_g to be finalized. The Text also stated the limit on cotton subsidies in the Blue Box would be one-third of the Product Specific Limit, and that cotton subsidies would have to be slashed in a period one-third as long as the implementation period.[275] Developing countries would have an obligation to reduce cotton subsidies equal to two-thirds that for developed countries, and would get a longer (albeit unspecified) time for implementing the cuts.[276]

• Market Access – Tiered Tariff Reductions

In respect of market access, the February 2008 Text largely followed the July 2007 Text and January 2008 Working Papers titled *Tiered Formula for Tariff Reductions*[277] and *Market Access–Recently Acceded Members (RAMs)*.[278] There were few significant changes to the earlier proposals for a tiered formula for tariff reductions, the details of the bands and tiers, and special and differential treatment for developing and least developed countries, and RAMs. Thus, the February Text called on developed countries to apply a cut of 48-52 percent on

[271] The limits decreased from 10 to 5 percent of the overall Blue Box limit, and from 5 to 2.5 percent for any single product. *Id.* ¶ 46

[272] *Id.* ¶ 51. The Working Document No. 8, *supra* note 135, was silent on this matter.

[273] The Working Document did not permit developing countries to choose a base period. *Compare* February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 27(a), *with* Working Document No. 8, *supra* note 135, ¶ 12.

[274] February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 55.

[275] *Id.* ¶¶ 56-57.

[276] *Id.* ¶ 58.

[277] Working Document No. 9, *supra* note 136.

[278] Working Document No. 16, *supra* note 136.

farm tariffs in the lowest band (20 percent or less)[279], and 66-73 percent on duties in the highest band (over 75 percent).[280] Developing countries would incur an obligation that would be two-thirds as onerous as developed countries, meaning cuts of 32-34 percent (on a wider, lowest tariff band of 30 percent or less) and 44-48 percent (on a wider, higher tariff band of over 130 percent).[281]

Notably, the G-10 and EU specifically rejected a proposal from the Chairman to forge the obvious compromise—split the difference down the middle in respect of tiered tariff cuts and bands.[282] The Text also included the suggestion, advocated by the G-20, but firmly rejected by the G-10, that developed countries cut their overall average farm tariffs rates by 54 percent.[283] The EU said its best offer was a one-half cut to its average agricultural import tariffs.[284] It also demanded major developing countries, such as Brazil, China, and India, bind their remaining unbound farm tariffs, consolidate bound rates to the actually applied levels, and cut peak tariffs.

- Market Access – Sensitive Products and TRQ Expansion

The February 2008 Text largely embodied the January 2008 Working Paper on *Sensitive Products*,[285] including rules on their designation. Developed and developing countries could avail themselves of this protective flexibility to shield a limited number of products from the full force of any agreed-upon tariff cuts. But, developed countries would have to increase market access on any product they designated as "Sensitive" through an increase in the in-quota volume threshold on a TRQ applicable to that product.

The Text also resembled the January 2008 Working Paper on *Tariff Quotas*.[286] However, it had new, precise specifications on binding in-quota tariffs for any new Doha Round TRQ access opportunity associated with a Sensitive Product, and on TRQ expansion on Sensitive Products.[287]

Some WTO Members accused the EU and some G-10 countries, particularly Japan and Switzerland, of withholding data on import values necessary to determine the additional market access for Sensitive Products under various scenarios for expanding TRQ volumes.[288] They alleged the EU and G-10 were doing so to coax out a more favorable bargain to them on agriculture and NAMA issues. Notwithstanding the missing data, the fundamental problem of choosing a methodology for TRQ expansion had not been solved, putting in doubt whether the Doha Round mandate for "substantial" improvements in market access would be

279 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 62(a).

280 *Id.* ¶ 62(d).

281 *Id.* ¶¶ 64(a), (d).

282 *See* Pruzin, *Slow Progress, supra* note 152.

283 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 63.

284 *See* Yerkey, *supra* note 262, at 330.

285 Working Document No. 10, *supra* note 136.

286 Working Document No. 13, *supra* note 136.

287 February 2008 *Draft Modalities for Agriculture, supra* note 251, Annex C (providing a basis for calculating TRQ expansion for Sensitive Products, at the 6- or 8-digit HS level).

288 *See* Pruzin, *Slow Progress, supra* note 152.

realized.[289] Indeed, in mid-March 2008, when the EU, along with developed countries such as Canada, Japan, Switzerland, and the United States, finally provided data on import volumes for over fifty primary and processed agricultural goods they were likely to designate as "Sensitive," and applied the partial designation methodology to these data, exporting countries were disappointed. The expansion of the in-quota volume thresholds of the TRQs was modest at best.

For example, Uruguay—the sixth largest exporter of rice in the world—said partial designation with the data provided by the EU would yield an increase in its prospective market in the EU by just 43,000 to 63,000 metric tons, which was the equivalent of 3 or 4 boatloads of rice at most (as each ship carries between 25,000 and 30,000 metric tons of rice).[290] In the Japanese market, Uruguay rice exporters would gain next to nothing. Japan would maintain its level of protection against rice imports at or near extant level, meaning an in-quota TRQ volume threshold of 682,000 metric tons annually, and a tariff in excess of 500 percent on over-quota shipments.[291] Uruguay explained that if the 6-digit product approach methodology were used, then the increase of in-quota exports of its rice to the EU would be 127,000 metric tons each year.[292]

Brazil said the result of using partial designation and the import volume data from the EU would cut TRQ expansion by an average across all Sensitive Products of just 3 to 4 percent.[293] One instance in which Brazil had a keen export interest is sugar. The import volume data provided by the EU would give Brazil an in-quota TRQ expansion of 10,000 tons annually, far less than the 17,000 ton expansion the EU pledged in earlier negotiations.[294] The data from the United States also fell short of what Brazil expected. Brazil thought the United States would expand the American TRQ for Brazilian sugar by 8,700 tons annually, but the data indicated an increase in the in-quota TRQ threshold of 5,000 tons.[295] The result on sugar was not surprising, as one journalist observed:

> On the definition issue [i.e., defining "Sensitive Products" at the 8-digit level under the partial designation methodology championed by the EU, and using figures on import value as a proxy for domestic consumption data, which tend to be unavailable] . . . some countries have presented many more tariff lines for some products. The EU . . . presented data for around 100 sugar-related tariff lines compared to 11 originally proposed by Brussels. *The effect of increasing the number of tariff lines is to allow*

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[289] *See* Daniel Pruzin, *Farm Exporters Warn Doha Talks Threatened by Meager Increase in Sensitive Ag Imports*, 25 INT'L TRADE REP. (BNA) 374-76 (Mar. 13, 2008) [hereinafter Pruzin, *Farm Exporters Warn*]; Daniel Pruzin, *Exporters Say Import Data Show Few Gains for Key Agricultural Goods Under Designation*, 25 INT'L TRADE REP. (BNA) 377 (Mar. 13, 2008) [hereinafter Pruzin, *Exporters Say Import Data Show Few Gains*].

[290] Pruzin, *Farm Exporters Warn, supra* note 289.

[291] Pruzin, *Exporters Say Import Data Show Few Gains, supra* note 289.

[292] *Id.*

[293] Pruzin, *Farm Exporters Warn, supra* note 289.

[294] *Id.*

[295] *Id.*

> *those like the EU to target sensitive protection for very specific tariff lines of keen interest to exporters*.[296]

In other words, the champions of partial designation, by using 8-digit level designations, were boosting the number of tariff lines under a product heading designated as "Sensitive." They also used figures on consumption of raw materials used to determine consumption of processed products. Both stratagems reduced the base on which TRQ expansion was calculated, and in turn cut the extent to which in-quota TRQ volumes would be expanded. One Latin American trade representative concluded partial designation was "like using imports of iron ore to determine domestic consumption of automobiles, or using cows to determine consumption of leather shoes. It's completely wrong."[297]

New Zealand, too, complained of sub-par TRQ volume expansion on Sensitive Products that were lucrative for it, namely, beef, dairy products, and sheep meat. Still other countries made this argument in respect of their poultry exports, observing the EU identified eighty tariff lines at the 8-digit level under the poultry heading. The EU cleverly divided the TRQ volume increase for this heading across the eighty lines, allocating large increases to lines in which exporters had little interest, and being miserly with allocations to lines in which exporters had a keen interest. Australia made similar arguments regarding rice and sugar.

- Market Access – Tariff Escalation and Simplification

The February 2008 Text provided greater specifications on how to reduce tariff escalation than the January 2008 Working Paper on *Tariff Escalation*,[298] including special provisions for commodity-dependent producing Members in the event the adverse effects of tariff escalation were not mitigated by the formula, and a provisional list of products in Annex D vulnerable to tariff escalation. Specifically, if a processed product has a tariff that is significantly above the unprocessed product (with "significance" being defined as an escalation of 5 percentage points or more), then the escalated processed product would be subject to the cut of the next highest tier from the tier it is in.[299] If the escalated processed product is in the Top Tier, and thus there is no higher Tier into which to bump it, then an additional 30 percent tariff cut would be applied to it.[300]

The Text also went further than the January 2008 Working Paper on Tariff Simplification,[301] containing details of how to achieve tariff simplification. A high minimum number of tariffs, such as 90 percent of all tariffs, would be simplified, and no other tariffs could be made more complex. The gist of simplification would be to work towards establishing all tariffs as *ad valorem* or specific duties.[302]

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[296] Daniel Pruzin, *WTO Nations Face "Crunch Time" on Dealing with Quota Expansion on Sensitive Ag Items*, 25 Int'l Trade Rep. (BNA) 376-77 (Mar. 13, 2008) (emphasis added).

[297] Pruzin, *Farm Exporters Warn, supra* note 289.

[298] Working Document No. 11, *supra* note 136.

[299] February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶¶ 80-86.

[300] *Id.* ¶ 82.

[301] Working Document No. 12, *supra* note 136.

[302] February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶¶ 98-104.

• Market Access – SSGs

The February 2008 Text copied the essential points of the January 2008 Working Paper on *Special Agricultural Safeguard* (SSG),[303] and thereby embodied a remedy developing countries could use. Thus, the Text proposed two basic options.

First, SSGs would be eliminated for all developed countries as of the first day of the implementation period for any Doha Round deal.[304] This option included a stipulation that developed countries would limit the number of tariff lines eligible for an SSG to 1.5 percent, and developing countries would limit eligible tariff lines to a certain but undefined percent.[305] Second, developed countries would phase out the SSG remedy within four years of the start of Doha Round implementation.[306] By that start date, they would cut the number of tariff lines eligible for an SSG to 1.5 percent, with full elimination in the next four years. The quantity and price triggers would be streamlined.

For developing countries, however, there would be special and differential treatment. For them, the terms and conditions of the SSG as set out in Article 5 of the *Agreement on Agriculture* would remain unchanged.[307]

• Market Access – Special Products

On special products, the February 2008 Text offered a little greater precision than the January 2008 Working Paper on Special Products,[308] but embodied the tremendous divide among Members on this topic. The Text called for a minimum entitlement to self-designate as special products 8 percent, and a maximum entitlement of 12 or 20 percent, of total tariff lines.[309] A tariff cut of 8 or 15 percent would have to be applied to 6 percent of tariff lines, an additional 6 percent of the lines would be cut by 12 or 25 percent, and 8 percent of tariff lines—or none at all—would be free from cuts.[310] The Text also listed twelve indicators Members would have to use in designating special products.[311] That list appeared to reflect the views of the G-33, but there was no agreement on this point, either.

A few weeks after Chairman Falconer issued the Text, the United States circulated a proposal with Australia, Canada, Costa Rica, Malaysia, New Zealand, Paraguay, Thailand, and Uruguay.[312] The hallmarks of the joint proposal were

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303 Working Document No. 14, *supra* note 136.

304 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 119.

305 *Id.*

306 *Id.* ¶ 120.

307 *Id.* ¶ 121.

308 Working Document No. 15, *supra* note 136.

309 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 123.

310 *Id.*

311 *Id.* Annex F.

312 WTO, Committee on Agriculture, Special Session, *Elements of Special Product Modalities,* JOB(08)/24 (Apr. 8, 2008) [hereinafter April 2008 *Elements of Special Product Modalities*]. For commentary on this joint proposal, see Daniel Pruzin, *WTO Chair Warns Farm Talks Lagging, May Leave Too Many Issues for Ministerial*, 25 INT'L TRADE REP. (BNA) 551-52 (Apr. 17, 2008) [hereinafter Pruzin, *Farm Talks Lagging*], and Pruzin, *supra* note 262, at 331-32.

(1) developing countries could designate no more than 8 percent of their farm tariff lines as "Special," (2) half of the Special lines would be subject to a 25 percent tariff cut, an the other half to a 15 percent cut, (3) a "Super Special" category of lines (within the 8 percent of Special lines) could be subject to a minimum, non-zero tariff cut of less than 15 percent, and (4) a developing country would be forbidden from designating as "Super Special" any agricultural product that accounted for more than 0.5 percent of its total agricultural imports.[313] In effect, the joint proposal adopted the minimum entitlement from the Text, and stretched tariff cuts to the maximum. Predictably, most developing countries, led by India, Indonesia, and the Philippines, rejected the joint proposal. They insisted on the right to designate as "Super Special" up to 25 percent of their agriculture tariff lines.[314]

In other words, neither the Text nor the joint proposal changed hearts and minds. Exempting any products whatsoever from tariff cuts remained anathema to the United States and other farm exporting countries. But, the G-33 continued to assert it as a near entitlement. A common sense compromise—albeit not pursued—would be to allow a limited number of products to enjoy a full exemption, but only for a specified number of years, after which tariffs protecting them would be reduced.

- Market Access – SSMs

Picking up on the April and May 2007 Challenges Papers, the February 2008 Text specified the volume and price triggers, and remedies, for a protectionist device that would be available only to developing and least developed countries—the Special Safeguard Mechanism (SSM). The Text called for a tiered formula as regards the volume trigger, with higher tariffs authorized linked to the extent to which import volumes exceed a base level.

Specifically, the import volume of subject merchandise would have to exceed between 105 and 155 percent of the average import volume of that merchandise in the previous three years.[315] The extra tariff (on top of the MFN rate) would vary from 20-50 percent, at the low end, to 30-100 percent, depending on the extent to which the import volume trigger is surpassed[316]. The Text set out a price trigger of 70 percent or below of a reference price.[317] The reference price would be the average monthly c.i.f. unit value of the product concerned.[318] If the relevant import price (c.i.f. terms) fell below this reference price, then an additional duty of up to 50 percent could be imposed.

To prevent frequent or frivolous use of the remedy, the Text proposed limitations on the scope of an SSM. First, the number of farm products a poor country could protect under an SSM should be limited to 3-8 in any given year.[319] The 3-

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313 April 2008 *Elements of Special Product Modalities, supra* note 312, ¶¶ 1-5.

314 Pruzin, *Farm Talks Lagging, supra* note 312.

315 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 128(a)-(c).

316 *Id.*

317 *Id.* ¶ 130.

318 *Id.* ¶ 130 n.21.

319 *Id.* ¶ 126.

8 products would be defined in terms of 4-8 tariff lines at the 6-digit HS level.[320] However, there would be no *a priori* limitations on the availability of the SSM, i.e., in principle it could be used against any agricultural product. Second, an SSM could not be deployed against any farm product that already was the subject of an SSG, general safeguard relief under GATT Article XIX, or an AD or CVD measure.[321] Third, the volume-based SSM could be maintained either until the end of the year in which it is imposed, or for a maximum period of six to twelve months.[322] Fourth, developing countries would not be able to use the price-based SSM if the volume of imports of the product at issue were declining.[323] Fifth, if trade under a preferential agreement is included in calculating the volume or price trigger, then merchandise from partner countries in that arrangement must be subject to the SSM.[324] Sixth, the remedy would be an increase in the tariff up to the present bound ceiling—no more. Finally, if the WTO Members agreed, the SSM would expire at the end of the implementation period for any Doha Round agreement.[325]

• Market Access – Least Developed Countries

For least developed countries, the February 2008 Text essentially embodied the terms of the April and May 2007 Challenges Papers. The Text called for better market access for cotton from these countries,[326] plus special consideration for agricultural exports from SVEs.[327] No tariff cut obligations would be put on least developed countries.[328]

• Market Access – Tropical Products and Preference Erosion

Following the earlier Working Papers, the February 2008 Text laid out strategies for the fullest possible, and accelerated, liberalization in the trade in tropical and diversification products.[329] One strategy would be to confer duty-free treatment on all tropical and diversification products if the current tariff on them were 25 percent or less.[330] For remaining tariff lines covering tropical products, the tariff cut would be 85 percent.[331] Producers and exporters of tropical products advocated this strategy. To accommodate the interests of countries dependent on preferential schemes, tariffs on these products (*e.g.*, bananas) that benefit from a preference could be phased out over time, via delayed implementation, meaning

320 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 126, n.16.

321 *Id.* ¶ 127.

322 *Id.* ¶ 136.

323 *Id.* ¶ 132.

324 *Id.* ¶ 134.

325 *Id.* ¶ 138.

326 *Id.* ¶¶ 148-49.

327 *Id.* ¶ 151.

328 *Id.* ¶ 145.

329 February 2008 *Draft Modalities for Agriculture, supra* note 251, Annex G (listing the tropical and alternative products subject to the fullest liberalization of trade).

330 *Id.* ¶ 140. *See also* Daniel Pruzin, *Pressure Builds on Doha Ag Chair to Issue Revised Text; Mandelson Pushes for Mid-May*, 25 INT'L TRADE REP. (BNA) 673 (May 8, 2008).

331 February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 140.

the preference would not be eroded in one swift go. However, a key problem existed for products that qualified both as "tropical" and "Sensitive," such as sugar. What market access rules would apply to them?

• Export Competition

On export competition, including the elimination of export subsidies, and disciplines on export credits, export credit guarantees or insurance programs, agricultural exporting STEs, and international food aid, the Draft Text borrowed heavily from the November 2007 Working Papers covering these topics.

• Export Restrictions

As for restrictions on food exports, the February 2008 Text proposed strengthening Article 12 of the *Agreement on Agriculture*, the only provision in the GATT–WTO regime containing direct disciplines on measures to limit farm product exports.[332] Article 12, which is inapplicable to developing and least developed countries, contains two loose requirements: A WTO Member (1) should give due consideration to the effects of any such limits on net food importing countries, as well as (2) provide notice of the nature an duration of any restrictions as far in advance as practicable to the WTO Committee on Agriculture.[333] Chairman Falconer proposed three further disciplines: (1) extant food export restrictions be eliminated within the first year of implementation of any Doha Round deal;[334] (2) the duration of any new limits be capped at twelve months (or eighteen months, if affected importing Members agreed);[335] and (3) notice of export restrictions be required within ninety days of their entry into force.[336]

Naturally, as commodity prices rose in 2007-2008, these proposals pleased net food importing Members, such as rice importers like Bangladesh, Indonesia, and the Philippines. But, it caused consternation among exporting Members such as Argentina, Brazil, China, Egypt, India, Indonesia, Thailand, and Vietnam, as well as Kazakhstan and Russia. In early- and mid-2008, all of these countries imposed export tariffs, outright export bans, or other export restrictions on basic staples and foodstuffs such as barley, edible oils, rice, soybeans, and wheat.[337] They took these measures to promote their own food security. Consequently, they fer-

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[332] Agreement on Agriculture, *supra* note 27, art. 12. However, contracting parties to the General Agreement on Tariffs and Trade condoned such limits on farm product exports in certain circumstances: (1) to prevent or relieve critical shortages of products essential to the exporting party, General Agreement on Tariffs and Trade art. XI ,§ 2(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; (2) to "ensure essential quantities of [domestic materials] to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan," *id.* art. XX(i); and (3) when such temporary limits were "essential tot he acquisition or distribution of products in general or local short supply." *Id.* art XX(j). *See also* Daniel Pruzin, *French Trade Minister Sees No Action in Doha Round on Food Export Restrictions*, 25 INT'L TRADE REP. (BNA) 637-38 (May 1, 2008); Daniel Pruzin, *WTO Members in Ag Talks Fail to Tackle Growing Problem of Food Export Restrictions*, 25 INT'L TRADE REP. (BNA) 479-80 (Apr. 3, 2008).

[333] Agreement on Agriculture, *supra* note 27, art. 12.

[334] February 2008 *Draft Modalities for Agriculture, supra* note 251, ¶ 168.

[335] *Id.* ¶ 169.

[336] *Id.* ¶ 164.

[337] *See* Daniel Pruzin, *Developing Countries Cool to Ag Proposal by Japanese, Swiss on Export Restrictions*, 25 INT'L TRADE REP. (BNA) 673-74 (May 8, 2008).

vently opposed an April 2008 joint proposal by Japan and Switzerland—each of which is a net food importer—to strengthen Article 12 of the *Agriculture Agreement*. That proposal was to require advance notice to the WTO Committee on Agriculture of any impending export restriction, especially as to the duration and reasons for the measure, and consultations in the event of a dispute. The proposal also called for establishment of a standing committee of experts, to be used if consultations failed, and which would render a binding judgment as to whether the disputed restriction is necessary. Its implementation would be prohibited pending outcome of the case.

• Amendments to the *Agriculture Agreement*

On all topics in which a change would be needed to the *Agreement on Agriculture*, the Annex B of the February 2008 Text provided suggested language.[338]

B. Synopsis of February 2008 Draft NAMA Modalities Text

The 61-page Draft Text on NAMA also largely embodied substantive points discussed earlier. Chairman Stephenson's Text, aside from Annexes on a variety of topics, was essentially a two-column Tabular summary of the negotiations and his comments of what had yet to be resolved. Judging from those comments, there appeared to be even less progress on NAMA embodied in this Text than on agriculture as reflected in the Falconer Draft. For instance, there had been no real progress in sectoral negotiations since the December 2005 Hong Kong Ministerial Conference, nor had talks moved much on eliminating tariff and non-tariff barriers on non-agricultural environmental goods.

The highlights of the February 2008 NAMA Draft Modalities Text were:

• Product Coverage Unresolved

Paragraph 16 of the Doha Ministerial Declaration called for comprehensive product coverage with no *a priori* exclusions, but also stated that negotiations must take full account of the special needs and interests of developing and least developed countries.[339] That is an obvious built-in tension. The February 2008 Text stated bluntly the long impasse over product coverage remained unresolved.[340]

• Swiss Formula Coefficients Not Decided

There was a clear consensus the Swiss Formula should be used to produce non-linear, harmonizing cuts to bound tariff rates on industrial products. It also was agreed all non-*ad valorem* duties would be converted to *ad valorem* equivalents (AVEs), and bound in *ad valorem* terms, using methodology agreed upon and laid out in a separate document,[341] and using import data from the

338 February 2008 *Draft Modalities for Agriculture, supra* note 251, Annex B (suggesting amendments to Annex 2 of the Agreement on Agriculture).

339 WTO, Ministerial Declaration of 14 November 2001, ¶ 16, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Ministerial Declaration].

340 February 2008 *Draft Modalities for NAMA, supra* note 252, at 3 (comments by the Chairman).

341 WTO, Negotiating Group on Market Access, *Draft Guidelines for the Conversion of Non-Ad Valorem Duties of Non-Agricultural Products into Ad Valorem*, TN/MA/20 (Jan. 16, 2007).

reference period 1999-2001. But, the major controversy over Coefficients in that Formula remained.

The ranges from the July 2007 Draft NAMA Modalities Text—8-9 for developed countries, and 19-23 for developing countries[342]—still were on the table, with no convergence among WTO Members. The Members were split into three camps:[343]

(1) One group essentially accepted the Coefficients in the July 2007 Draft NAMA Text, or values close to them. If these Coefficients were used, then developed countries would have an average bound tariff rate of 3 percent. Their tariff peaks, even on their most sensitive items, would be below 8 or 9 percent. For developed countries to which the Swiss Formula applied (i.e., Members not benefiting from special and differential treatment of one form or another), bound tariffs would drop to 11-12 percent on average, with only a few of them having an average over 15 percent.

(2) A second group sought higher tariff reductions for developing countries, and a smaller differential between the Coefficients for developed and developing countries (*e.g.*, Coefficients of 10 and 15 for developed and developing countries, respectively, yielding just a 5 point difference). The second group accepted the July 2007 figures as a basis for negotiation, but only if other Members do so, too. Obviously, the United States and EU headed this group. The United States insisted it would not accept a developed country Coefficient below 8, observing that a Coefficient of 8 or 9 would obligate the United States to impose tariff cuts of 36-40 percent on all of its industrial tariff lines.[344] The United States also said developing countries should agree to a Coefficient no greater than 15. Along with the EU and Japan, the United States argued the Coefficients in the July 2007 Text already were overly generous toward developing countries.[345]

(3) A third group took the mirror-image position of that of the second group, arguing for smaller tariff cuts for developing countries, larger cuts by developed countries, and a greater differential in the Coefficients. This group called for a difference of at least 25 points, with developing and developed country Coefficients of 30-35 and 5-10, respectively. Only then would they be comforted a NAMA deal would not spell the death of their emerging domestic industries. The third group did not accept the July 2007 figures as a basis for negotiation. Notable Members in this group included Argentina, Brazil, China, India, and South Africa.[346] Their interests were palpable. Congress of South African Trade Unions observed that since 1994, when the Uruguay Round concluded and T&A tariffs in the country dropped by 60 percent, the country had lost 200,000 jobs in

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342 July 2007 *Draft NAMA Modalities, supra* note 9, ¶ 5 at 10.

343 February 2008 *Draft Modalities for NAMA, supra* note 252, at 4 (outlining the positions of the three camps).

344 *See* Daniel Pruzin, *NAMA Chair Cites "Encouraging" Talks on Developing Country Tariff Flexibilities*, 25 Int'l Trade Rep. (BNA) 407-08 (Mar. 20, 2008).

345 *See* Daniel Pruzin, *NAMA Chair Outlines Eight Options to Handle Formula/Flexibility Quandary*, 25 Int'l Trade Rep. (BNA) 333-34 (Mar. 6, 2008).

346 *See* Pruzin, *supra* note 344, at 407-08 (noting that this group of countries constitutes the self-proclaimed NAMA-11 alliance).

the T&A sector alone.[347] For South Africa, a Coefficient of 20 would mean large reductions to applied tariffs in two other sensitive sectors: cuts on 34-50 percent of the tariff lines on autos and auto parts; and cuts to nearly half of the chemical and furniture tariff line.[348]

Notably, China was singled out for criticism by the United States National Association of Manufacturers (NAM).[349] Not only did China fail to exercise statesman-like leadership in the Doha Round generally, but also it refused to budge from positions that could help forge a compromise.

Specifically, China insisted on being treated as a developing country for NAMA purposes, even though it is the largest exporter of manufactured products in the world. Worse, perhaps, China did not offer an obvious concession to developing countries that would allay their anxiety about being flooded with Chinese industrial products if a Doha Round deal occurred. China could agree to be subject until 2023 to a special safeguard remedy, available to poor countries facing an import surge for Chinese wares. If those countries knew they had the benefit of this escape clause-style remedy, then they might be willing to agree to significant industrial tariff reductions.

- Implementation Period Unresolved

The exact period during which cuts to industrial tariffs would be applied remained unclear. The July 2007 NAMA Text suggested implementation in five equal annual rate reductions for developed countries, and nine cuts for developing countries.[350] However, some WTO Members advocate an even more dilated time frame, of five years (with six equal annual rate reductions) and ten years (with eleven equal rate reductions), for developed and developing countries, respectively.[351]

- The Mark Up Rate Not Decided

The base level for any Doha Round tariff reductions would be bound, not actually applied, rates. Yet, for some WTO Members and product categories, one or more tariff lines are unbound. What should be the base rate for commencing tariff reductions in these cases? Members agreed there should be a constant, non-linear mark up to the unbound tariff lines, specifically to the relevant applied MFN rate, and reductions would start from the consequent bumped-up rate.[352] They also agreed the base year for applied MFN tariff rates would be 2001.[353] However, they had not yet agreed on the degree of mark up.

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[347] *Id.*

[348] *Id.* (citing comments made by Rudi Dicks, policy coordinator with the Congress of South African Trade Unions).

[349] *See* Gary G. Yerkey, *U.S. Manufacturers Say China Could Spur WTO Talks by Acting Boldly in NAMA Talks*, 25 INT'L TRADE REP. (BNA) 223 (Feb. 14, 2008).

[350] July 2007 *Draft NAMA Modalities*, *supra* note 9, ¶ 6(f) at 11.

[351] February 2008 *Draft Modalities for NAMA*, *supra* note 252, at 5 (Chairman's comments).

[352] *Id.* ¶ 6(b), at 5.

[353] Specifically, the MFN rate prevailing on the last day of the Doha Ministerial Conference, November, 14 2001, would be the relevant figure to which to apply the mark-up. *Id.* ¶6(c), at 5.

Should it be 20, or perhaps 30, percentage points? That is, if the relevant MFN rate were 100 percent, then should the mark-up, from which to commence cuts, result in a rate of 120 or 130 percent? One suggestion, made by the Philippines, was that the mark up should be 20, i.e., 20 percentage points should be added to the applied MFN rate if the unbound rate were greater than one-half of the Swiss Formula Coefficient.[354] If the unbound rate were equal to or less than one-half the Swiss Formula Coefficient, then the mark up should be 30 percentage points.

• Flexibilities for Developing Countries Undecided

The August 2004 *Framework Agreement*, and the July 2007 Draft Modalities Text, contemplated flexibility for developing countries to deviate from agreed-upon industrial tariff cuts, and thereby apply less than the formulaic cut to a non-agriculture tariff line. The flexibility the *Framework Agreement* and July 2007 Text proposed was a sliding scale, which would reflect a trade-off between (1) some developing countries that would accept deeper tariff cuts through a lower Swiss Formula Coefficient, if they had plenty of flexibility to deviate from those cuts for sensitive products, and (2) some developed countries that would agree to a lesser cuts through a higher Coefficient, if there were no flexibility for deviation.[355] The *Framework Agreement* and July 2007 Text called specifically for a 10/5 percent sliding scale meaning 10 percent of industrial tariff lines would be subject to half of the agreed upon tariff cuts, or 5 percent of the lines would be excluded from any cuts.[356] While this proposal remained on the table throughout 2007, no consensus emerged around it. Thus, the February 2008 Text deleted exact figures—which essentially had been stable since 2004—on flexibilities for poor countries.[357] Demands from them for better flexibilities than the 10/5 percent figures, as a pre-condition for a bargain on Swiss Formula Coefficients, drove Chairman Stephenson to this deletion.

In other words, sheltering sensitive industrial products from the full brunt of tariff cuts was generally agreed, but none of the critical operational details concerning how to do so were. Very quickly, the EU, United States, Japan, Korea, and even India criticized the removal of the 10/5 scale as a backward step in the NAMA negotiations.[358] By mid-March, almost all WTO Members called on Chairman Stephenson to reinstate the flexibilities from the July 2007 Draft Text.[359] They all agreed a sliding scale needed to address (1) the Coefficients by which developed and developing countries would cut industrial tariffs and (2) flexibility for developing countries to shield certain sensitive industrial sectors

[354] *Id.* at 5 (Chairman commenting that the Philippine proposal may be the compromise on this issue).

[355] August 2004 Framework Agreement, *supra* note 36, Annex B; July 2007 *Draft NAMA Modalities*, *supra* note 9, at 1-9 (discussing the elements of the July 2007 Text).

[356] The Framework Agreement outlines this flexibility in Annex B. August 2004 Framework Agreement, *supra* note 36, Annex B, ¶ 8(a)-(b). The July 2007 Text provided for the sliding scale in paragraph 7. July 2007 *Draft NAMA Modalities*, *supra* note 9, ¶ 7(a), at 11.

[357] February 2008 *Draft Modalities for NAMA*, *supra* note 252, ¶¶ 7(a)(i)-(ii), at 6.

[358] *See* Daniel Pruzin, *WTO NAMA Chair Defends Draft Text Against Charges of Backsliding in Talks*, 25 Int'l Trade Rep. (BNA) 288-89 (Feb. 28, 2008).

[359] *See* Pruzin, *supra* note 344.

from the full force of agreed-upon reductions.[360] Yet, practically speaking, there were at least four divisions among the Members on the details of a scale.

One group proposed an expansion in the percentage of tariff lines that could be sheltered from the full brunt of agreed-upon cuts, so as to accommodate the needs of developing countries. There would be no trade volume limitation on this flexibility (or any such limit would be substantially relaxed).[361] For instance, 30 percent of India's industrial tariff lines were unbound. If the percentage of lines that could be exempt from the full brunt of any Doha Round cuts were 10 percent, then India would be able to protect 40 percent of its lines from any tariff reduction commitments. Thus, India called for an expansion of flexibilities.

A second group, clustered around a proposal by *SACU*, focused on the impact of industrial tariff cuts on least developed countries and SVEs that are members of a CU. They sought increased flexibilities, a higher Swiss Formula Coefficient, and an implementation period of at least ten years.[362] Similarly, a third group coalesced around a *MERCOSUR* proposal for additional flexibilities for members of CU. *MERCOSUR* argued that because the CET is the *sine qua non* of a CU, and countries in a union are not supposed to deviate from it, those countries cannot take advantage individually of the full benefit of the 10/5 sliding scale. Thus, *MERCOSUR* urged CU members ought to have the flexibility to apply half of the formula cuts to 16 percent of their tariff lines, with no trade value or volume restrictions.[363]

In April 2008, *MERCOSUR* moderated its demand slightly, saying it could accept a limit on the value of trade that would be subject to one-half of the agreed upon reductions.[364] That limit would be set as a percentage of the overall value of trade, specifically

$$\text{Cap} = \frac{\text{Value of industrialized imports into } \textit{MERCOSUR} \text{ covered under the additional flexibilities for CU trade}}{\text{Value of all industrialized imports into } \textit{MERCOSUR}} \times 100$$

The revised *MERCOSUR* offer did not convert any Members opposing a special deal for CUs. Along with the EU, Japan, Korea, and Mexico, the United States rejected the offer, convinced *MERCOSUR* would be able to shield important industrial products from tariff cuts.[365] They pointed out that the suggested formula for establishing a cap was biased, because it would exclude trade in industrial goods among *MERCOSUR* parties.[366]

360 *Id.*

361 February 2008 *Draft Modalities for NAMA*, *supra* note 252, at 6 (comments by the Chairman on the different positions).

362 *Id.*

363 *Id.*

364 *See* Daniel Pruzin, *NAMA Chair Hints No Shift in Tariff Cuts for Developing Countries in Revised Text*, 25 INT'L TRADE REP. (BNA) 553-55 (Apr. 17, 2008).

365 *Id.*

366 *Id.*

Finally, the Philippines made a proposal, attractive to many developing countries, for more generous flexibilities than the 10/5 scale.[367] The maximum value of non-agricultural imports for developing countries that could be shielded from the full brunt of a tariff cut, for any given tariff line, would be 20, 30, or 50 percent. (The exact figure would depend on the extent of the deviation from the formula cuts, *e.g.*, a one-third or one-half cut, and the resulting bound average tariff). Developing countries that choose not to use the flexibility could apply a higher Swiss Formula Coefficient (such as 3 points higher on 30 percent of the tariff lines, of 6 points higher on 15 percent of the lines).

There also was considerable controversy as to whether any additional flexibility, once agreed upon, should be available to all developing countries equally, or whether some developing countries should get a further preference of some sort, such as a higher Swiss Formula Coefficient (*e.g.*, of 3 to 5 points).[368] The division between the United States and EU, on the one hand, and most other Members, on the other hand, over the anti-concentration clause persisted.[369]

Developing countries argued that the WTO Members stated in their August 2004 *Framework Agreement*, and re-affirmed in their December 2005 Hong Kong Ministerial Declaration, that an entire HS Chapter should not be excluded from agreed cuts – but that was the only restriction.[370] These countries, led by India, Thailand, and Malaysia, saw American and European efforts as designed to expand the earlier statements to permit another constraint, namely, that an acceptable number of tariff lines under a particular product heading would be subject to an agreed cut. The United States and EU countered that an anti-concentration clause needed both kinds of constraint, because flexibilities for developing countries to depart from agreed-upon tariff cuts were multiplying as the Doha Round progressed. In other words, rich countries said the constraints were needed to ensure a balanced outcome, with meaningful market access for industrial products. Whether a compromise on a possible second constraint, as intimated by Brazil, of a *de minimis* number of industrial tariff lines, below 20 percent,[371] would be agreeable was uncertain.

These controversies, at bottom, were about the relationship between the Coefficient and flexibilities to deviate from cuts that would be mandated by a particular Coefficient value. They also highlighted the complexity of what ostensibly is a simple exercise that had been completed successfully by GATT contracting parties in all previous negotiating rounds—cutting tariffs on industrial products. On the one hand, if there is agreement on a Coefficient, and the value differs for poor countries, why is there a need for additional flexibilities? On the other hand,

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[367] February 2008 *Draft Modalities for NAMA*, *supra* note 252, at 6 (comments by the Chairman on the different positions).

[368] *Id.* at 8.

[369] *Id.* An anti-concentration clause is a requirement that no Member could use a flexibility to exclude from full formula cuts an entire HS Chapter, or from any 4-digit HS heading more than half of the 6-digit tariff lines under that heading.

[370] *See* Daniel Pruzin, *U.S. Firm on NAMA Sectoral Commitments, As Chair Issues Warning on Unresolved Items*, 25 Int'l Trade Rep. (BNA) 1013-15 (July 10, 2008).

[371] *Id.*

if there are additional flexibilities, then why bump up the Coefficient for a Member that freely chooses not to avail itself of them?

Chairman Stephenson was accused by many WTO Members of making an unnecessary proposal "over-engineered" these controversial issues.[372] That is because, on 28 February 2008, he issued an initiative on developing country flexibilities in which he identified 8 possible outcomes. The mere synopsis of them, below, is evidence for the accuracy of the accusation.[373]

(1) Elaboration of the Original Sliding Scale

The simple 10/5 sliding scale from the July 2007 Modalities Text could be revised to allow for a higher Swiss Formula Coefficient, and thus lesser tariff cuts, associated with a smaller number of exemptions for sensitive tariff lines. Conversely, a lower Coefficient would be required, thereby imposing deeper tariff cuts, if a larger number of tariff lines were exempted as sensitive. In other words, flexibility and the Coefficient would be linked explicitly. There would be a basic trade-off between flexibility and the Coefficient: greater flexibility would trigger a lower Coefficient, while less flexibility would permit a higher Coefficient.

Using the 10/5 scale, and a Coefficient of 21 as pivots, the flexibility figures of 10 and 5 could be reduced, if a developing country agreed to a NAMA Coefficient higher than 21 (i.e., less flexibility to deviate from agreed upon cuts in exchange for less dramatic tariff cuts under the Swiss Formula). Or, the figures could be raised, if the country agreed to a lower Coefficient (i.e., more flexibility to deviate from agreed-upon cuts in exchange for deeper tariff cuts under the Swiss Formula). Broadly, the Chairman summarized the different options to modify the 10/5 sliding scale as "10 + x/5 +y," where x and y are figures, subject to negotiation, to provide additional flexibility.

As an example,[374] suppose a developing country exempts just 4 percent of its industrial tariff lines from the full tariff reductions, and imposes on them half of the agreed-upon cuts, and excludes only 3 percent of the lines from any cuts. That country could apply a high Coefficient, namely, 24. This country would be at the 4/3 point on the scale, with a Coefficient of 24. But, a developing country would have to use a Coefficient of 19, if it sought exemption of 14 percent of its industrial tariff lines from the full cuts (imposing on them only half of the agreed-upon cut), or if it wanted to shield entirely from reductions 7 percent of the lines. For that country, the scale would be 14/7, with a Coefficient of 19. At the original 10/5 point on the scale, the Coefficient would be 21.

Chairman Stephenson indicated the modified sliding scale could be varied in two ways.[375] One possibility would be to have seven different flexibility figures associated with Swiss Formula Coefficients between 15 and 19.[376] That is, there

[372] *See* Daniel Pruzin, *NAMA Chair Stephenson Faces Criticisms on Latest Initiative as Doha Doubts Increase*, 25 Int'l Trade Rep. (BNA) 332-33 (Mar. 6, 2008)

[373] *See id.*; Pruzin, *supra* note 345, at 333-34.

[374] Pruzin, *supra* note 345, at 333-34 (citing Chairman's Stephenson's illustrative example).

[375] *Id.*

[376] *Id.*

could be seven different sets of figures on partial or full exemptions of sensitive industrial products, depending on the Coefficient. The second variant the Chairman offered was to modify the sliding scale using the Coefficients of 19, 21, and 24 – in effect, a low, medium, and high Coefficient.[377] There could be three different sets of flexibility figures, one for each of these Coefficients.

(2) Flexibilities within Flexibilities

The percentage of industrial tariff lines that could be exempt from agreed-upon cuts would be fixed in relation to the degree of protection for the lines. The larger the number of tariff lines a developing country exempted as sensitive, then the higher the cut that country would have to apply to those lines.[378] Table 6 summarizes examples Chairman Stephenson offered:

Table 6:
Flexibilities within Flexibilities

Percentage of Industrial Tariff Lines Exempted from Agreed-Upon Cuts under the Swiss Formula **(i.e.,** ***Number of Sheltered Tariff Lines*****)**	***Obligatory Tariff Reduction on the Industrial Tariff Lines Exempted as Sensitive***
5 percent	0 (no tariff cut imposed on exempted lines)
7.5	25 percent of the agreed-upon cut
10	50 percent of the agreed-upon cut
12.5	75 percent of the agreed-upon cut

(3) Variant of Flexibilities within Flexibilities

Chairman Stephenson proposed a variation of the Flexibilities within Flexibilities approach. Under it, there would be no tariff reduction on up to 5 percent of exempted industrial tariff lines.[379] The scale would slide up to a 95 percent cut imposed on exempted lines if a developing country decided to protect 15 percent of its lines as sensitive.[380]

(4) Combining Flexibilities

A developing country could impose half-the agreed upon tariff reductions to 5 percent (instead of 10 percent) of its industrial tariff lines.[381] It could exempt a further 2.5 percent of lines (instead of 5 percent) from any reductions.[382]

(5) Alternative Combination of Flexibilities

A developing country could exempt a high percentage—possibly 12 percent—of industrial tariff lines from the full brunt of cuts.[383] Then, it could choose to

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377 *See* Daniel Pruzin, *NAMA Chair Sees Sliding Scale Option for Developing Country Flexibility Demands*, 25 Int'l Trade Rep. (BNA) 517-18 (Apr. 10, 2008).

378 Pruzin, *supra* note 345, at 333-34.

379 *Id.*

380 *Id.*

381 *Id.*

382 *Id.*

383 *Id.*

apply to these lines no cut (zero percent), 50 percent of the agreed-upon cut, or 75 percent of the agreed-upon cut.[384] However, the country could not apply any of these options to more than 5 percent of its tariff lines.[385] Thus, the zero percent option would be curtailed, because a country could not exempt more than 5 percent of its sensitive lines from a tariff reduction.

(6) Participation in Sectoral Negotiations

A developing country that participated in sectoral negotiations would be allowed to use a higher Swiss Formula Coefficient than one that eschewed these talks.

(7) Uruguay Round Approach

The approach used in the Uruguay Round for agriculture would be used for NAMA. That is, there would be a fixed average cut for sensitive industrial tariff lines, coupled with a minimum line-by-line reduction.

(8) An Additional Percentage Cut

In addition to any agreed-upon cuts under the Swiss Formula, an average percentage reduction would be required.[386] For example, suppose the Coefficient applicable to a developing country is 30, and using this number leads to a cut in the average industrial tariff rate from 30 to 15 percent. The country would have to apply an additional 20 percent average reduction (calculated from the 15 percent level). That is, it would have to bring down its final average tariff rate by 3 percentage points, from 15 to 12 percent.

To be sure, all of the outcomes shared the same goal—substantial industrial tariff cuts by all WTO Members, with special and differential treatment through flexibilities for developing countries. But, the sheer complexity of the proposal intimated the difficulty of its acceptance. Members had to play an 8-dimensional chess game with each other in which "exempt" hardly ever meant a complete lifting of an obligation to cut tariffs. In this game, there still was no agreement as to the value for the Coefficients. The NAMA-11 countries maintained their demand for high values, and no caps on the trade volume that could benefit from flexibilities. Finally, there was considerable irony in the flexibilities proposals. They appeared redolent of the pivot approach the EU had championed in 2005 for its sensitive agricultural products, but supposedly abandoned—at least in that context.[387]

• Flexibilities for Members with Low Binding Coverage Not Finalized

To make matters more complex, twelve developing countries had bound less than 35 percent of their non-agricultural tariff lines. These Members were Cameroon, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macao, Mauritius, Nigeria, Sri Lanka, Suriname, and Zimbabwe.[388] How to deal with them was an unresolved matter.

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[384] *Id.*

[385] *Id.*

[386] *Id.*

[387] *See* BHALA, *supra* note 2, at 81-86.

[388] As of the publication of the February 2008 Draft Text, the twelve listed countries were the relevant developing countries. February 2008 *Draft Modalities for NAMA*, *supra* note 252, ¶ 8 n.2 at 8.

The February 2008 Text stated these twelve Members would be exempt from making tariff reductions through the Swiss Formula.[389] Instead, they would have to bind (on an *ad valorem* basis) between 70 and 90 percent of their non-farm tariff lines at an average rate not exceeding 28.5 percent. But, on any particular good, it would be up to each of the twelve Members to decide the exact bound rate for a previously unbound duty. Obviously, an existing bound duty would be used, if it existed. To meet the overall target average, cuts would be applied in possibly nine equal annual rate reductions.[390] The bindings would apply on 1 January in the year following the entry into force of any Doha Round agreement, and cuts would commence on 1 January of the second year.[391]

• Market Access – Preference Erosion

A refrain voiced by developing and least developed countries throughout the Doha Round was that cuts to MFN tariff rates on agricultural products would erode the margin of preference they enjoyed through preferential trading arrangements (PTAs) such as the Generalized System of Preferences (GSP) or via FTAs and CU.[392] This refrain is a mathematical fact. For example, if the agreed-upon Doha Round Swiss Formula Coefficient for developed countries were 8, then the maximum ad valorem tariff rate a developed country could impose would be 8 percent. As against duty-free treatment under a PTA, the margin of preference on any product that had a pre-Round MFN tariff over 8 percent would be eroded.[393]

As a policy matter, most poor countries seemed to acquiesce to it as a long run, ineluctable concomitant of the greater good, namely, multilateral trade liberalization. However, on particular products, certain poor countries hoped to slow the speed of erosion. They sought an itemized list of products on which major rich countries—especially the United States and EU—would take plenty of time to phase in tariff cuts. To be sure, while the list was championed as a way to help poor countries combat preference erosion, altruism surely was not the only, or even primary, motive for the United States and EU. There were constituencies in those countries, particularly makers of T&A and fisheries products, that were like, directly competitive, or substitutable with merchandise from poor countries. For these domestic producers, a slower rate of erosion meant a dilated period of protection.

Thus, the February 2008 Text contained a list of what, in effect, was yet another kind of special product.[394] The itemization of tariff-lines subject to preference erosion was longer than in any previous Doha Round document circulated

389 *Id.* ¶ 8(a)

390 *Id.* ¶ 8(d) at 8.

391 *Id.*

392 *See generally* Antoine Bouët, *Is Erosion of Tariff Preferences a Serious Concern?*, *in* Agricultural Trade Reform and the Doha Development Agenda, 174, 161-194 (Kym Anderson & Will Martin eds., 2006) (noting that when MFN tariffs are reduced, preferential margins for developing countries may also be reduced).

393 For example, a pre-Round tariff of 20 percent meant a preference margin of that figure, but a decline of 12 percentage points, to 8 percent, under a Coefficient of 8.

394 *See* Pruzin, *U.S., EU Win*, *supra* note 253, at 218.

to the WTO Members, including the July 2007 Text. The 2007 Text listed sixteen tariff lines for the United States, and twenty-three for the EU, on which these countries would apply tariff reductions gradually so as to slow the rate of preference erosion.[395] In the February 2008 Text, the number of products expanded to twenty-five for the United States and forty for the EU.[396] Accordingly, to the United States list in the July 2007 Text, which included including sweaters, t-shirts, track suits, and underwear, the February 2008 Text added tariff lines such as: HS 6102.20.00 (women's/girls cotton overcoats); 6103.42.10 (men's/boy's synthetic trousers); 6104.63.20 (women's/girl's synthetic trousers); 6106.10.00 (women's/girl's cotton blouses); 6205.30.20 (men's/boy's shirts); and 6212.10.90 (bras).[397] For the EU, the February 2008 Text expanded the list to include aluminum alloys, cotton skirts, fish fillets (fresh water and frozen tuna), plain cotton weave, men's/boy's synthetic shirts, men's/women's wool, cashmere and cotton jerseys and pullovers, women's/girl's cotton blouses, and wool carpets.[398]

The February 2008 Text also set out a longer phase in period for implementing tariff cuts on products covered by a PTA than the July Text. The earlier Text said reductions would start in the first year of implementation of any final Doha Round accord.[399] The February 2008 Text postponed the start date to 1 January of the second year in which a Doha Round deal entered into force.[400] The period in which to phase in tariff cuts on each itemized product would be 8 years, with 7 equal annual rate reductions.[401]

• Outstanding Issues on SVEs

While Members agreed that SVEs (in effect, those with a share of less than 0.1 percent of world NAMA trade during the 1999-2001 reference period) ought to benefit from special and differential treatment, how this special treatment was to be implemented remains partly unresolved. That indulgence would take the form of a higher target *ad valorem* tariff average on industrial products for SVEs than applied to other Members, through a three-tier system. In the highest tier, SVEs would have to ensure, in respect of their non-agricultural tariff lines currently with a bound rate at or above 50 percent, an overall average of 22-32 percent.[402] In the middle tier, the bound duty rates on non-agricultural tariffs lines currently between 30 and 50 percent would have to be brought down to an average of 18-22 percent.[403] In the lowest tier, industrial products currently with a bound aver-

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[395] July 2007 *Draft NAMA Modalities*, *supra* note 9, Annexes 2-3 at 18-19.

[396] February 2008 *Draft Modalities for NAMA*, *supra* note 252, Annexes 2-3 at 22-25.

[397] *Compare* July 2007 *Draft NAMA Modalities*, *supra* note 9, Annex 3 at 19, *with* February 2008 *Draft Modalities for NAMA*, *supra* note 252, Annex 3 at 24.

[398] *Compare* July 2007 *Draft NAMA Modalities*, *supra* note 9, Annex 2 at 18, *with* February 2008 *Draft Modalities for NAMA*, *supra* note 252, Annex 2, at 22-23.

[399] July 2007 *Draft NAMA Modalities*, *supra* note 9, ¶ 28, at 15.

[400] February 2008 *Draft Modalities for NAMA*, *supra* note 252, ¶ 27, at 17.

[401] *Id.*

[402] *Id.* ¶ 13(a)(i), at 11.

[403] *Id.* ¶ 13(a)(ii), at 11.

age of below 30 percent would be subject to rate cuts to bring the average binding to 14-20 percent.[404]

However, five issues remained unresolved. First, what exactly should be the average target rates? Second, should capping be required? SVEs sought a yet higher average target tariff, if they were to withdraw their request for a cap on the average percentage reduction from bound rates.[405] Third, should minimum line-by-line cuts be obligatory? For instance, the February 2008 Text indicated a minimum line-by-line cut of 5-10 percent on 90-95 percent of all non-agricultural tariff lines currently with bound duties below 30 percent. Fourth, Bolivia urged that—owing to its special economic circumstances—it should be treated as an SVE and be granted the flexibility to preserve its current bound rates.[406] While there appeared to be some consensus that Fiji might be allowed to maintain 10 percent of its non-agricultural tariff lines as unbound, there was no agreement as to Bolivia getting the same concession. Fifth, the implementation period during which cuts were made to bound duties to meet the overall target average was unclear. The Text suggested nine equal annual installments beginning on 1 January in the year following the entry into force of any Doha Round accord. Whether RAMs might get a further three year grace period also was unclear.

• Least Developed Countries

There was consensus least developed countries need secure, beneficial, and meaningful integration into the multilateral trading system.[407] Toward that end, they should benefit from enhanced trade capacity-building measures and aid-for-trade initiatives. Such programs can help least developed countries take advantage of increased market access opportunities through diversifying their exports and satisfying technical standards for merchandise, address supply side capacity constraints, and meet increased competition resulting from reductions in MFN tariff rates (which, of course, erodes non-reciprocal preferences on tariff lines of vital export interest to these countries).

There also was consensus least developed countries should be exempt from tariff reductions, though they should increase substantially the coverage of their tariff lines subject to bound, *ad valorem* duties, and convert any non-*ad valorem* tariffs to AVEs.[408] Following the *Decision on Measures in Favor of Least Developed Countries* reached in the December 2005 Hong Kong Ministerial Conference, it also was agreed least developed countries should be accorded by all developed countries and by developing countries in a position to do so, duty-free, quota-free (DFQF) treatment on 97 percent of their products.[409] That preference should be in place by the start of the implementation period for any Doha Round agreement.

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404 *Id.* ¶ 13(a)(iii), at 11.

405 SVEs sought a limit of 30 or 40 percent on the average cut.

406 February 2008 *Draft Modalities for NAMA*, *supra* note 252, at 11 (Chairman's comments).

407 *Id.* ¶ 15, at 13 ("We reaffirm the need to help LDCs secure beneficial and meaningful integration into the multilateral trading system.").

408 *Id.* ¶ 14, at 12.

409 *Id.* ¶ 16(a), at 13.

However, there was no consensus on how to monitor implementation.[410] What procedures should be used by the WTO Committee on Trade and Development to ensure developed (and some developing) Member are, in fact, granting duty-free quota-free treatment on 97 percent of the tariff lines? Critically, what preferential rules of origin would be used to ascertain whether merchandise comes from a least developed country?

Similarly, there was no agreement on how to deal with the erosion of tariff preferences wrought by MFN rate reductions. The February 2008 Text suggested that these rates should be cut on a limited number of tariff lines that are of keen interest to least developed countries over a protracted period. For instance, if a preference-granting country cut the rates in seven equal annual installments, the gradual reduction might ease the adjustment for the beneficiary of the preferences to a global, level-playing field for the product in question.

- Additional Flexibilities for RAMs

There was no consensus on whether RAMs should be accorded any additional flexibilities on cutting industrial tariffs. RAMs sought a grace period of two to three years following the start of the implementation of any Doha Round accord, before which they would have to apply line-by-line cuts, plus an extended implementation period to make the cuts of perhaps two to five years. Under the July 2007 Draft Modalities Text, four RAMs—China, Croatia, Oman, and Taiwan—would have to implement all NAMA commitments. But, they would get two years beyond the standard eight-year period in which to make the tariff cuts. The February 2008 Text offered two proposals for them.

First, China, Croatia, Oman, and Taiwan would receive a grace period of two to three years to complete implementation of tariff cuts associated with their WTO accession commitments.[411] During that grace period, they would not have to implant any new Doha Round cuts. Second, for their Doha Round commitments, they would have an extra phase-in period of two to five years.[412] In consequence, these four RAMs might have thirteen to fifteen years to make Doha Round NAMA tariff reductions.

In developed countries, business lobbies such as US-based NAM and EU-based BusinessEurope vehemently opposed any increase in implementation periods for RAMs, especially China.[413] How could a fourteen-year implementation period in which to make tariff cuts be justified for China, the world's second largest industrial product exporter, particularly if developed countries with suffering manufacturing sectors had to make 50 percent of their cuts in a short time? As a practical matter, by February 2008, China had implemented most of its tariff

[410] The February 2008 Text only indicated that "the Committee on Trade and Development shall monitor progress made in its implementation, including in respect of preferential rules of origin." *Id.* ¶ 17, at 14.

[411] *Id.* ¶ 19(a) at 14. Notably, however, China had previously called for a three to five year grace period. See Pruzin, *supra* note 364.

[412] February 2008 *Draft Modalities for NAMA*, *supra* note 252, ¶ 19(b), at 14.

[413] *See* Daniel Pruzin, *U.S., EU Business Groups Denounce "Erosion of Ambition" in NAMA Chair Text*, 25 Int'l Trade Rep. (BNA) 478-79 (Apr. 3, 2008).

reductions required of under its terms of entry.[414] Still, the prospect that these RAMs would benefit from Doha Round tariff cuts made by other WTO Members, yet have over a decade to implement their obligations, drew strong criticism from the EU and United States.

There also was no final agreement as to whether certain RAMs might get extra-special special and differential treatment. Certain RAMs—Albania, Armenia, Kyrgyz Republic, Macedonia, Moldova, Saudi Arabia, Tonga, and Vietnam—sought complete exemption from tariff reductions beyond their accession agreement obligations.[415] Certain other RAMs, such as China, Croatia, Oman, and Taiwan, hoped to be included in that group. Additionally, RAMs that would be subject to Swiss Formula cuts argued for a higher Coefficient (a figure 1.5 times greater than the Coefficient for developing countries).

Perhaps the most telling statistic about the February 2008 Draft Modalities Text concerned the scope of application of the Swiss Formula. If the proposals in the Text were accepted, and all the special and differential treatment indicated were granted—for developing countries, least developed countries, SVEs, and various categories of RAMs—then how many WTO Members would be obligated to apply the Formula? The WTO admitted the answer was forty – only about 25 percent of the entire Membership.[416] To be sure, these forty Members accounted for nearly 90 percent of world trade in industrial products.[417] Yet, the number forty raised key questions about modern multilateral trade negotiations. Were the days in which legal obligations (at least as to market access) were embraced across-the-board, in a collective and rather egalitarian spirit, over or nearly so? To obtain a NAMA agreement, was creating and condoning schisms among Members the price? Would the schisms metastasize into other areas of GATT–WTO regime?

To be sure, not all the news in the Stephenson Text was bad. Progress had been made on the identification, examination, and categorization of non-tariff barriers.[418] In particular, WTO Members had discussed how to define "non-tariff barriers," identify the scope of products subject to them, and discipline those impediments. Generally, they agreed to a draft Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers, though they had not decided the scope of merchandise to which the methodologies should apply. They also entertained several proposals to recognize international standards and

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414 *See* Pruzin, *supra* note 358, at 288-89.

415 The February 2008 Draft Text reflected these limited obligations. February 2008 *Draft Modalities for NAMA*, *supra* note 252, ¶ 20, at 14 ("Albania, Armenia, Former Yugoslav Republic of Macedonia, Kyrgyz Republic, Moldova, Saudi Arabia, Tonga and Viet Nam shall not be required to undertake tariff reductions beyond their accession commitments.").

416 *See* WTO, Chairperson's Texts 2007, The February 2008 NAMA Modalities Text Made Simple, http://www.wto.org/english/tratop_e/markacc_e/nama_10july08_e.htm. See also Chair Believes Non-Agriculture Negotiating Group is Now Ready for Real Negotiations, 16 April 2008, http://www.wto.org/english/tratop_e/markacc_e/nama_10july08_e.htm.

417 *Id.*

418 February 2008 *Draft Modalities for NAMA*, *supra* note 252, at 15 (Chairman's comments).

conformity assessment procedures, via new Understandings and Decisions.[419] They also engaged in limited discussion on remanufactured goods, export taxes, and transparency in export restrictions. Interestingly, the Members were unwilling to negotiate over a proposed *Agreement on Eliminating Non-Tariff Barriers related to Non-Trade Issues*.[420]

C. An April 2008 Breakthrough on TRQ Expansion for Sensitive Agricultural Products?

By mid-Spring 2008, for all their haggling about TRQ expansion for "Sensitive" farm products, few if any WTO Members were willing to reveal publicly its "Sensitivities." However, the suspects were well known: beef, cocoa and chocolate powder, cooking oils, corn, dairy (such as better), fresh fruits (including bananas), pasta, poultry, rice, sugar (both beet and cane sugar), sweeteners, and wheat. Indeed, at the 6-digit HS level, there were over 450 potential "Sensitive" items.[421] It was apparent that a breakthrough in the entire Doha Round hinged on perhaps the most technical, intricate topic in the agricultural market access talks – the expansion of TRQs for "Sensitive" farm products. Around 4:30 a.m. on 3 April, negotiators from six WTO Members—Australia, Brazil, Canada, EU, Japan, and the United States—agreed on a so-called "Consensus Approach," or "Common Approach," to TRQ expansion.[422]

The Consensus Approach, which was based in part on the partial designation methodology the EU championed, was monstrously complex. A brief (but assuredly incomplete and not entirely accurate) synopsis is as follows:

• The basic outline, which had evolved to date, remained intact. "Sensitive" agricultural products would be subject to between one-third and two-thirds of the tariff reduction obligations imposed on non-Sensitive products. To compensate, in part, for the lesser tariff cuts to Sensitive Products and consequent lesser market access for exporters of these products, developed countries would have to increase the in-quota thresholds for TRQs for products it designated as "Sensitive." Low or no duties would apply to in-quota shipments of the Sensitive Products. If no TRQ existed, then one would have to be established. The increase in

[419] Proposals include a new Understanding on the Interpretation of the Agreement on Technical Barriers to Trade as Applied to Trade in Electronics, a new Understanding on the Interpretation of the Agreement on Technical Barriers to Trade with respect to Labeling of Textiles, Clothing, Footwear, and Travel Goods, and a new Decision on Non-tariff Barriers Affecting Forestry Products used in Building Construction. *Id.* at 15-16.

[420] *Id.* at 16-17.

[421] The resulting paper from the deliberations of these six countries is entitled, Possible Partial Designation Modalities for Sensitive Products, and was distributed to Friends of the Chairman on April 3, 3008. *See* Daniel Pruzin, *WTO Chair Calls Progress by Key Members on Sensitive Ag Products "Big Step Forward,"* 25 INT'L TRADE REP. (BNA) 516-17 (Apr. 10, 2008) [hereinafter Pruzin, *Progress by Key Members on Sensitive Ag Products*].

[422] *See* Daniel Pruzin, *Hitch Emerges in WTO Agriculture Deal Among Key Members on Sensitive Products*, 25 INT'L TRADE REP. (BNA) 550-51 (Apr. 17, 2008); Daniel Pruzin, *Key WTO Members Reach Consensus on Improved Access for Sensitive Ag Goods*, 25 INT'L TRADE REP. (BNA) 515-16 (Apr. 10, 2008) [hereinafter Pruzin, *Key WTO Members Reach Consensus*]; Pruzin, *Progress by Key Members on Sensitive Ag Products*, *supra* note 421, at 516-17.

TRQ volumes would be 4-6 percent of domestic consumption in the importing country of the Sensitive Product. Domestic consumption of a sensitive product would be measured at the 8-digit HTS level. If no such data existed, then a two-step partial designation methodology would be used, whereby import volumes would be used as a proxy for domestic consumption.

• Agricultural products that could potentially be designated as "Sensitive" would be divided into "Core" and "Non-Core" tariff lines at the 6-digit HS level. "Core" products are raw or basic traded goods, and tend to be the most heavily traded items. They account for 90 percent or more of consumption within the relevant category. "Non-Core" products fall into two groups, goods with a lower degree of processing (*e.g.*, wheat flour) and goods with a higher degree of processing (*e.g.*, bread and pasta).

• There would be no single formula for TRQ expansion for all Sensitive Products. Different Sensitive Products would be subject to one or another variation of an agreed-upon methodology.

• Dairy products, and fruits and vegetables, would be subject to special – highly intricate – formulas for TRQ expansion.

• For all other Sensitive Products (i.e., other than dairy, fruits, and vegetables), TRQ expansion would be established at the 8-digit HS level. They would be subject to a two-step partial designation method for calculating TRQ expansion. This method would rely on domestic consumption data (or a suitable proxy) at the 8-digit HS level.

• Certain processed agricultural products would be excluded from the calculation of domestic consumption (where data are available, at the 8 digit level). In particular, for all HS Chapters starting with 18 and higher, all non-core tariff lines would be given a zero coefficient. The zero coefficient for non-core tariff lines in Chapter 18 and higher essentially would mean processed farm products would not be included in ascertaining domestic consumption of a Sensitive Product. In turn, this exclusion would mitigate a problem concerning farm exporting countries, namely, dilution. By "dilution," the exporting countries meant a smaller expansion in TRQ volumes (and thus reduced market access) for a basic commodity, which they exported, but which an importing country designated as "Sensitive." Dilution otherwise would occur if both processed and basic goods were included in the denominator of the fraction for calculating domestic consumption of that Sensitive commodity as a percentage of a larger category into which that commodity fell in the HS. For example, domestic consumption data for HS Chapter 18, which covers cocoa and chocolate powder, would not be included in establishing the TRQ expansion for sugar (the Sensitive Product). That exclusion will help exporting nations, which have an interest in a large TRQ expansion for sugar, but have little or no export interest in cocoa or chocolate powder. Likewise, domestic consumption data for breakfast cereals would not be included when calculating the TRQ expansion for wheat (the Sensitive Product).

• Following a concession offered by the EU, certain core products, which are under general HS Chapter headings, would be guaranteed a large percentage of TRQ expansion. (The guarantee would occur by allocating a fixed percentage of domestic consumption to tariff lines for Core products.) Conversely, TRQ expansion for processed products under the same heading would be limited. For example, in relation to the heading for sugar, the TRQ allocation for processed goods could not be expanded by more than 10 percent. Conversely, 90 percent of the TRQ expansion (technically, domestic consumption) would benefit beet sugar and cane sugar. That way, sugar-exporting countries could be assured they would benefit from TRQ expansion, i.e., they need not fear an importing country would allocate all the expansion to a processed good in which the exporters have no interest. Similarly, under the cereals heading, 90 percent of the TRQ expansion would be guaranteed to corn, rice, and wheat – all Core products in which exporters had a keen interest, and which importers might designate as "Sensitive."

• Sensitive Products could be divided into sub-categories, and domestic consumption figures could be split across these sub-categories.

• Concomitantly, whether expansion in TRQ volumes for the sub-categories could be allocated—that is, sub-allocated—to each sub-category was unsettled. For example, under the general category of fruits and vegetables, could a sub-category be created for fruit juice? If so, then the TRQ expansion for fruits and vegetables could be divided across the sub-categories, with a sub-allocation for fruit juice. The EU initially proposed the idea of sub-dividing TRQ allocations with a view to protecting certain sub-categories of pork. Canada, too, advocated sub-allocation of TRQ volumes. Canada hoped to maintain its high out-of-quota tariffs on dairy products, especially cheese. However, the EU and Canada encountered opposition from Australia and other farm exporters. They insisted that a single TRQ ought to apply to all products under a particular tariff heading. Sub-dividing TRQ allocations would have the effect the EU originally sought – protecting narrow classes of farm goods, thereby rubbing out any market access benefit of a TRQ expansion.

• To prevent an importing country from abusing sub-categorization and sub-allocation, there would be three restrictions. First, there would be a limit to the total number of sub-categories that could be created. As between any two Sensitive Product categories, no more than two sub-categories could be set up. Second, there would be a required minimum (or floor) TRQ increase for each sub-category. The minimum TRQ expansion would be the greater of (1) 2 percent of domestic consumption for the sub-category in question, or (2) 1 percent of the domestic consumption of the product category before it was divided. Third, the expansion of certain sub-categories would be calibrated to take into account the interest of exporters in seeing real market access gains. Each Sensitive Product category or sub-category would be subject to a single TRQ expansion figure (which may differ across the categories and sub-categories), with exceptions restricted to no more than 2 TRQs for up to 3 categories. TRQ expansion resulting from sub-allocation could not be less than the expansion that would occur without sub-allocation.

Because of the initial response, the rubric "Consensus Approach" seemed to be a misnomer.

Several major agricultural exporting countries, including Argentina and Uruguay, opposed the Approach.[423] Argentina was particularly vocal in saying the Approach still would allow importing countries to shield their Sensitive Products from any meaningful increase in TRQ expansion.[424] Argentina argued that sub-categorization and sub-allocation would scupper any market access gains, and insisted on TRQ expansion at the general 6-digit HS tariff heading.[425] Several Latin American banana-exporting countries opposed the Approach because it allowed importing countries to designate bananas as "Sensitive."[426] They expected (particularly in light of repeated judgments in their favor in the *Bananas* cases by GATT and WTO panels, and the Appellate Body) a deal in which tariffs on all tropical products—notably, bananas—were eliminated. Still other significant exporters, such as Malaysia, Thailand, and Vietnam, tepidly reserved judgment.[427]

A number of prominent farm importing countries, such as Norway and Switzerland, objected to the Approach.[428] Joining the skeptics were South Korea, and Taiwan, which have heavily protected farm markets and maintain many TRQs.[429] New Zealand declined to endorse the Approach.[430] Until it did, and the concerns of opponents were addressed, talks on other agricultural issues—notably, subsidies—not to mention NAMA, trade remedies, and services, were stalled. In an effort to bring about true consensus on the Approach, in late April the following fine points emerged:

- To placate Latin American banana exporting countries, bananas were removed from the indicative list of over 450 products that might be designated as "Sensitive."[431]
- Canada accepted that, as a general rule, sub-categorization (i.e., sub-allocation of TRQ increases among product sub-categories, so as to permit smaller TRQ volume increases to the most sensitive of products) would be forbidden.[432] In return for this acceptance, Canada obtained new provisions on minimum TRQ expansion.[433] A WTO Member could have the option of giving special TRQ expansion treatment to two product categories. This option would be restricted, in that any special expansion must be at least equal to, or greater than, one percent of domestic consumption for the highly sensitive product category (or a figure equal to the TRQ expansion that would result from using the agreed-upon

423 Pruzin, *Key WTO Members Reach Consensus*, *supra* note 422.

424 *Id.*

425 Pruzin, *Progress by Key Members on Sensitive Ag Products*, *supra* note 421, at 516-17

426 *Id.*

427 Pruzin, *Key WTO Members Reach Consensus*, *supra* note 422.

428 *Id.*

429 Pruzin, *Progress by Key Members on Sensitive Ag Products*, *supra* note 421, at 516-17

430 *Id.*

431 *See* Daniel Pruzin, *WTO Ag Chair Promises Revised Doha Text Soon, Even if Gaps Remain*, 25 Int'l Trade Rep. (BNA) 713 (May 15, 2008) (Pruzin commenting that the strategic removal was a "move intended to provide comfort to Latin American banana exporters uneasy with an earlier version of the agreement").

432 *Id.*

433 *Id.*

partial designation method). But, for any product category in which the volume of exports is at least fifteen times the volume of imports, there would be additional flexibility associated with the option (as long as those exports did not benefit from export subsidies in the 2003-2005 base period).[434]

- To encourage Norway to join the Approach, a special annex was devised to permit it to protect its beef sector. The protection would take the form of sub-allocation, subject to restrictions, of TRQs across two product categories.[435]
- To give New Zealand and Uruguay a reason to endorse the Approach, another special annex was established. That annex said for certain products (listed in yet another, separate, attachment to the Approach), 6 (not 8) digit tariff lines would be relevant under the partial designation methodology.[436] That is, domestic consumption allocation percentages would be used to allocate domestic consumption at the 6-digit level.[437]

Ominously, these technical points were insufficient to win the support of Norway, nor the support of Argentina, Cuba, Korea, Taiwan, or Venezuela.[438] Taiwan, for example, resisted calls by adherents to the Common Approach that the list of approximately 450 "Sensitive" Products be closed.[439] It sought policy space, meaning the right to add further products in the future as needed.

D. The May 2008 Draft Agriculture Modalities Text: Synopsis and Reactions

In mid-May, WTO Members made another push toward finishing the Doha Round by the end of 2008, before a new American President, who might not think its conclusion a high priority, or even be hostile to new trade deals, entered the White House in January 2009. Further risks from any more dithering would arise for at least two more reasons: in the new year, general elections in India would be held in May 2009, and a new European Commission would take office following European Parliament elections in early June 2009. Thus, Chairman Falconer, under enormous pressure to issue a revised text on agriculture, did so on 19 May 2008.[440] The 77-page text reflected the state of agriculture negotiations, not the opinion of the Chairman (or any other single individual, including the WTO Director-General), as to what should or would happen. The text reflected roughly 225 hours of intensive negotiations between September 2007 and

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434 *Id.*

435 *Id.*

436 *Id.*

437 *Id.*

438 Daniel Pruzin, *Officials Hopeful for Deal on Sensitive Products in Doha Farm Trade Negotiations*, 25 Int'l Trade Rep. (BNA) 670 (May 8, 2008).

439 Pruzin, *supra* note 431.

440 *See* WTO, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.2 (May 19, 2008) [hereinafter May 2008 *Revised Draft Modalities for Agriculture*]; Pruzin, *supra* note 439, at 713.

May 2008.[441] Likewise, on the same date, Chairman Stephenson circulated a 61-page revised draft modalities text on NAMA, again embodying the state-of-play in, not his personal views on, industrial tariff talks.[442]

Simultaneous publication of the two new texts was not an accident. It was calculated to reflect the long-standing, adamantine link forged by Members between agriculture and NAMA issues. The texts were supposed to lay the basis for horizontal negotiations, i.e., trade-offs Members could bargain for across agricultural and manufacturing sectors. Whether the Members would view the texts as providing the necessary foundation, however, was uncertain at best.

On the one hand, the May 2008 Draft Agriculture Modalities Text was a simpler document than its February 2008 predecessor. Chairman Falconer elected to use clean text, rather than classic, square brackets if real convergence had occurred on an issue to the degree that any remaining differences were fine ones. The number of instances of square brackets plunged from 130 in the February Text to 30 in the May Text.[443] In other instances, the Chairman re-worded paragraphs, sentences, or footnotes to clarify options available for Members. Additionally, in appropriate spots, Chairman Falconer inserted language to give Members flexibility to deal with the extraordinary food price rises that occurred in the spring 2008, and to nudge Members to be transparent in providing relevant agricultural data to make any final accord operational.

On the other hand, Chairman Stephenson tried to render similar simplifying or clarifying adjustments to the May 2008 Draft NAMA Modalities Text. Yet, in his Text the number of square brackets skyrocketed from 15 to 97.[444] Moreover, neither of the new documents broke much new ground. Both embodied substantive points already covered—to one degree or another—in the February 2008 drafts. Each contained what were, for the most part, minor updates since that previous iteration. In effect, the documents papered over many schisms. Square brackets remained on several "hot spots" and "big ticket political choices."[445]

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441 *See* WTO, Agriculture Chairperson's Texts 2008, http://www.wto.org/english/tratop_e/agric_e/chair_texts08_e.htm ("[T]he Negotiations represent] the most intensive and productive phase in the Doha Round since it began in 2001 and since the agriculture negotiations began in March 2000.").

442 *See* WTO, Negotiating Group on Market Access, *Draft Modalities for Non-Agricultural Market Access—Second Revision*, TN/MA/W/103/Rev.1 (May 19, 2008) [hereinafter May 2008 *Draft Modalities for NAMA*].

443 *See India: Sharp Duty Cuts in Industrial Goods, Less Protection to Farmers, is No Deal*, INDIAN EXPRESS, May 21, 2008, www.indianexpress.com [hereinafter *India: Sharp Duty Cuts in Industrial Goods*] (follow "Archives" hyperlink; then follow "May 21, 2008" hyperlink). A different source computed the change in square brackets as 235 in the February Text and 32 in the May Text. See International Centre for Trade and Sustainable Development, *WTO Ag Chair's Revised Text Charts Slow Progress on Sensitive Products*, 12(18) BRIDGES WKLY TRADE NEWS DIG., May 21, 2008, http://ictsd.net/i/news/bridgesweekly/10987/ [hereinafter ICTSD, *WTO Ag Chair's Revised Text Chart Slow Progress*].

444 *See India: Sharp Duty Cuts in Industrial Goods*, *supra* note 443.

445 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440 (containing the Communication from the Chairman of the Special Session, Crawford Falconer).

The May 2008 Draft Agriculture Modalities Text laid out highly detailed points of agreement, and division, on a dizzying array of topics.[446]

• Domestic Support – OTDS

There was no change to the provisions on OTDS (the sum of Amber Box, Blue Box, and *De Minimis* support) between the February and May Texts. Essentially, the later iteration was a *verbatim* repetition of the earlier document on all key points—computation of the base level, tiered reduction formula, implementation period and staging, special and differential treatment, RAMs, and other commitments.[447] As the February Text was drawn from the December 2007 Working Paper on *Overall Reduction of Trade-Distorting Domestic Support: A Tiered Formula*, the implication was no new developments on OTDS had occurred in over six months.

Critically, then, the same figures for farm subsidy cuts, measured by OTDS—75 or 85 percent by the EU (in the Top Tier, i.e., $60 billion and above), 66 or 73 percent by Japan and the United States (in the Middle Tier, i.e., between $10 and $60 billion), and 50 or 60 percent by the rest of the developed countries (in the Bottom Tier, i.e., below $10 billion) – remained on the bargaining table. Two radically different inferences were possible from this stability. Either the positions of Members had converged on essential elements of a deal on OTDS, or their positions had hardened. The remark of Indian Commerce and Industry Minister Kamal Nath suggested the latter inference was accurate:

> All of us at the [WTO] Hong Kong Ministerial [Conference in December 2005] settled for steep and effective cuts in OTDS. Even this goal is vanishing. For the U.S., the proposed lower range of $13 billion [in OTDS] was nearly double the current applied levels of domestic support. Where is the need for 100 percent headroom as a cushion?[448]

Likewise, also remaining unchanged was a proposed down payment (i.e., an immediate cut) to OTDS of 33.3 percent by the top three subsidizers, the EU, Japan, and United States, and 25 percent by all other developed countries.[449] Remaining OTDS cuts would be phased in equal annual installments over five years for developed countries. Larger cuts would be expected of developed countries—namely, Japan—the OTDS in which is over 40 percent of the value of agricultural output.[450]

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446 This synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, and the February 2008 *Draft Modalities for Agriculture*, *supra* note 251. *See also* WTO, Unofficial Guide to the 19 May 2008 'Revised Draft Modalities,' http://www.wto.org/english/tratop_e/agric_e/ag_modals_may08_e.htm [hereinafter *Unofficial Guide to May 2008 Draft Modalities*]; Daniel Pruzin, *WTO Agriculture, NAMA Chairmen Issue Revised Draft Texts, New NAMA Coefficients*, 25 INT'L TRADE REP. (BNA) 740-41 (May 22, 2008); ICTSD, *WTO Ag Chair's Revised Text Chart Slow Progress*, *supra* note 443 (reviewing the May Text).

447 *Compare* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶¶ 1-12, *with* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶¶ 1-12.

448 *Kamal Nath Questions Both Draft Texts*, BUSINESS STANDARD, May 23, 2008, www.business-standard.com (search "Kamal Nath Questions"; then follow hyperlink).

449 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶¶ 5(a)-(b).

450 *Id.* ¶ 4.

Only developing countries with Amber Box reduction commitments (i.e., ones with a ceiling above the *De Minimis* level, and thus obligated to cut Amber Box support) would have to make cuts to OTDS. But, the cuts would be two-thirds the amount for developed countries, and could be phased out over eight years.[451] All other developing countries would commit to staying within their base levels of support.[452] Net food importing developing countries—such as Jordon, Morocco, Tunisia, and Venezuela—would not have to reduce their OTDS, though they would not be permitted to go above their base OTDS level.[453] The same rules for developed countries would apply to RAMs, except those RAMs that had acceded to the WTO very recently or had low incomes.

• Domestic Support – AMS

On AMS, specifically, cuts to Amber Box subsidies, there was little evolution in the May Text from its predecessor. The EU (in the highest tier of Amber Box support over $40 billion) would cut these subsidies by 70 percent, Japan and the United States (in the middle tier, of Amber Box support between $15 and $40 billion) by 60 percent, and the rest of the developed countries (in the lowest tier, of Amber Box support below $15 billion) by 45 percent.[454] They would make a down payment, and larger cuts would be expected of developed countries, namely, Japan, in which the AMS is over 40 percent of the value of agricultural production.[455]

That is to say, the tiered reduction formula remained the same as the predecessor Text, as did rules on down payment (a 25 percent cut immediately by the EU, Japan, and United States),[456] implementation period and staging (equal annual installments over five years),[457] developing countries (two-thirds reduction obligation and eight year phase-out period),[458] RAMs (no obligations for very new or low income RAMs, and exclusion of investment subsidies from computing the Amber Box),[459] and product-specific AMS limits (based on amounts in the 1995-2000 prescribed base period, with a *sui generis* period for the United States).[460] Consequently, as with OTDS, for AMS little had changed since December 2007, when the Working Paper on *Final Bound Total AMS: A Tiered Formula* was issued.

• Domestic Support – Blue Box and *De Minimis*

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451 *Id.* ¶¶ 7-8.

452 *Id.* ¶¶ 6, 10.

453 *Id.* ¶ 7 (noting that *WTO, Committee on Agriculture, WTO List of Net Food-Importing Developing Countries*, G/AG/5/Rev.8 (Mar. 22, 2005), lists Jordon, Morocco, Tunisia, and Venezuela as net food-importing countries).

454 *Id.* ¶ 13.

455 *Unofficial Guide to May 2008 Draft Modalities*, *supra* note 446.

456 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 15.

457 *Id.*

458 *Id.* ¶¶ 16-18.

459 *Id.* ¶ 19.

460 *Id.* ¶¶ 21-29.

Likewise, May 2008 Text followed nearly *verbatim* the February Text as to proposals for the Blue Box and *De Minimis* Support. In turn, the February Text adopted nearly fully the relevant December 2007 Working Papers in most material respects. Thus, the same proposals were up for consideration as had been for many months.

That is, the Blue Box would expand to include counter-cyclical payments, along with production-limiting support, but WTO Members would have to choose whether to utilize one, or the other, kind of Blue Box payment.[461] Blue Box support would be capped at 2.5 percent of the value of agricultural production for developed countries,[462] and 5 percent for developing countries, with further per product limitations.[463]

De Minimis support (product-specific and non-product specific programs) would be capped at 2.5, or 2 percent of the value of agricultural production for developed countries (down from 5 percent).[464] They would cut *De Minimis* support by 50 or 60 percent. Developing countries (with Amber Box reduction commitments) would have a *De Minimis* support cap of 5 percent of the value of farm production. They would make two-thirds of the cut to *De Minimis* support (from their existing *De Minimis* level of 10 percent of the value of agricultural production) as developed countries.[465] They would not, however, have to cut *De Minimis* support aimed mainly at resource-poor or subsistence farmers.[466] Very new RAMs, and RAMs with low incomes, as well as NFIDCs, would be exempt from these cuts.[467]

Helpfully, the May 2008 Text made clear Blue Box payments count in OTDS and thereby are subject to reduction obligations. But, the Text altered the percentage ceilings for developing countries that have no entitlement to a product-specific Blue Box limit, and no support for a particular product. As caps, the new Text established a 25 (up from 7.5) percent of the overall Blue Box limit, and a single product maximum of 7.5 (up from 5) percent.[468] By increasing these thresholds, the May Text authorized developing countries to stuff a larger amount of subsidies into the Blue Box—hardly a free-trade outcome.

- Domestic Support – Cotton Subsidies

The May 2008 Text contained a new sentence reminding WTO Members about the importance of cotton to economic development of poor countries, as set out in the December 2005 Hong Kong Ministerial Declaration.[469] That aside, the

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461 *Id.* ¶¶ 35-36.

462 *Id.* ¶ 38.

463 *Id.* ¶ 48-50.

464 *Id.* ¶ 30.

465 *Id.* ¶ 31.

466 *Id.* ¶ 32.

467 *Id.* ¶ 33.

468 *Id.* ¶ 50.

469 *Id.* ¶ 54. The May 2008 Text adds the sentence, "[t]he development aspects of cotton shall be addressed as provided for in paragraph 12 of the Hong Kong Ministerial Declaration." *Id.* Paragraph 12 of the Declaration stresses the importance of cotton: "Noting the importance of achieving enhanced

formula for reductions in cotton support, implementation period, and special and differential treatment provisions, were the same as in the February Text.

• Domestic Support – Green Box Subsidies

The May 2008 Text contained no new insights concerning disciplines on Green Box support. The Text contained the familiar idea about amending the WTO *Agreement on Agriculture* to tighten criteria for developed countries (*e.g.*, ensure their income support payments, to qualify for the Green Box, are de-coupled and based on a fixed and unchanging base period of production), albeit with refinements (*e.g.*, conditions for structural adjustment and regional assistance programs, and food stockpiling purchases at above-market prices by developing countries from farmers with low incomes or few resources). Green Box programs would remain exempt from reduction commitments, because they are not (or are only minimally) trade distorting, as per the WTO *Agreement on Agriculture*.

Yet, disciplines for monitoring and surveillance of these programs, needed to prevent abuse, remained undefined. For example, what fixed base period should be used to calculate decoupled income support? What assurances should be required of developed countries that they transfer only non-distorting subsidies into the Green Box, and that their Green Box programs are budget neutral (to prevent an overall increase in farm subsidies)? These questions were of particular concern to developing countries such as Argentina and India, concerned about abusive box-shifting by developed countries.[470]

• Market Access – Tiered Tariff Reductions

In respect of market access, the May 2008 Text largely followed the February Text. In turn, the February Text drew closely from the July 2007 Text and January 2008 Working Papers on *Tiered Formula for Tariff Reductions* and *Market Access – Recently Acceded Members (RAMs)*. There were few significant changes to the earlier proposals for (1) grouping products into tiers (or bands), with each product slotted into a tier based on the height of the starting bound tariff for that product in the prescribed base period, (2) specific parameters (i.e., top and bottom duty rates) to demarcate each tiers, (3) tiered tariff reductions from legally bound rates, with non-linear cuts, meaning steeper cuts on duty rates in higher tiers, and (4) special and differential treatment, including additional flexibilities, for developing and least developed countries, and RAMs.

However, the February Text called on developed countries to apply a cut of 48-52 percent on farm tariffs in the lowest band (the bottom tier, 20 percent or less).[471] The May 2008 Text split the difference at 50 percent. The May Text split the difference on the next two higher bands.[472] On the next highest band

efficiency and competitiveness in the cotton producing process, we urge the development community to further scale up its cotton-specific assistance . . . ." WTO, Doha Work Programme, Hong Kong Ministerial Declaration, ¶ 12, WT/MIN(05)/DEC (Dec. 22, 2005) [hereinafter Hong Kong Ministerial Declaration].

470 *See* David Haskel, *Argentina, India Call for Green Box "Budget-Neutrality" Assurances*, 25 Int'l Trade Rep. (BNA) 922 (June 19, 2008).

471 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 62(a).

472 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 61(a).

(the lower middle tier, tariffs greater than 20 percent but less than or equal to 50 percent), the May Text called for a 57 percent cut, thus eliminating the 55-60 percent option in the February Text.[473] For the band one above that (the upper middle tier, tariffs greater than 50 percent but less than or equal to 75 percent), the May Text articulated 64 percent as the obligatory cut, not 62-65 percent, as in the February Text.[474] These compromises apparently reflected a shift in position of the G-10 and EU, which previously rejected a middle ground.

Critically, the May 2008 Text left unchanged the possibilities of a 66 or 73 percent cut on duties in the highest band (over 75 percent).[475] The Members had not agreed to split that difference. Because developing countries would incur an obligation two-thirds as onerous as developed countries, the May Text proposals meant cuts of 33.3 percent applied to tariffs in the bottom tier (duty rates of 30 percent or less), 38 percent to tariffs in the lower middle tier (duty rates above 30 and below 80 percent), and 42.7 percent to tariffs in the upper middle tier (tariffs over 80 and below 130 percent).[476] Duty rates in the top tier (above 130 percent) would be reduced by 44-48.7 percent.[477]

Square brackets were removed from the minimum overall average tariff cut obligation incumbent on developed countries—54 percent, a figure advocated by the G-20.[478] That removal suggested the G-10 and EU had softened on this matter, too. Square brackets also were removed on the figure for developing countries, 36 percent.[479] The 36 percent figure would operate as a maximum average cut incumbent on developing countries.

A further change—from excluding in the overall average calculation any tariff cuts on tropical products and cuts made to deal with tariff escalation, to including them in this calculation—indicated a bit more ambition in the market access proposals. Yet, for RAMs, the increase in flexibility to moderate cuts under the tiered formula signaled a diminution in ambition. The February Text permitted RAMs to apply cuts in each band of up to 7.5 percentage points less than otherwise required for non-RAMs.[480] The May Text stated RAMs could moderate their cuts in the top two bands by up to 10 percentage points, and by up to 5 percent in the bottom two bands.[481] In other words, in exchange for less freedom to deviate from cuts in lower tariff tiers, RAMs could deviate more significantly in the highest tariff tiers.

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473 *Compare id.* ¶ 61(b), *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 62(b).

474 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 61(c), *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 62(c).

475 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 61(d).

476 Figures from *Unofficial Guide to May 2008 Draft Modalities*, *supra* note 446.

477 *Id.*

478 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 62, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 63.

479 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 64, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 65.

480 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 67.

481 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 66.

• Market Access – Sensitive Products, Tariff Caps, and TRQ Expansion

Reflecting intensive negotiations on Sensitive Products in April 2008, the May Text contained some genuinely new provisions on the topic, in comparison with its predecessor. As before, any developed Member would have the right to designate up to 4, or 6, percent of tariff lines as "Sensitive."[482] The obligation to cut tariffs on Sensitive Products would be only one-third, one-half, or two-thirds that of the normal cut. But, a minimum imported quantity, defined in terms of an in-quota TRQ volume threshold, would be required for Sensitive Products.

As for new provisions, the May Text indicated that if a Member had more than 30 percent of its tariff lines in the top tier of bands used for tariff reductions, then it could increase the number of "Sensitive Product" designations by 2 percent (a decrease from the February specification of 6 or 8 percent).[483] The 2 percent flexibility also applied to another category of developed countries: If they were disproportionately constrained in making "Sensitive" designations (specifically, in respect of the number of tariff lines they could select, because they were scheduling them at the 6-digit level), then they could increase their entitlement by 2 percent.[484]

The same special and differential treatment rule for developing countries was set out in the May Text as in its predecessor. These Members could designate up to one-third *more* tariff lines as "Sensitive" as could developed countries.[485] Expansion of their in-quota TRQ volumes would be two-thirds as great as developed countries, and the domestic consumption data on which that expansion would be based would exclude consumption by subsistence farmers of their own produce.[486] And, longer phase-in periods would apply to developing countries.

The focused negotiations in April 2008 led to alterations on TRQ expansion in the May Text. Both the February and May Texts contained an direct relationship between deviation from agreed-upon tariff reductions and in-quota TRQ volume expansion for Sensitive Products, namely, the greater the deviation, the greater the expansion. That is, the greater the deviation from the agreed-upon tariff cut, the greater the obligation to expand access opportunity (in terms of the in-quota TRQ volume threshold).

Likewise, both Texts said developed countries would have to expand market access opportunities on Sensitive Products by no less than 4, or 6, percent of domestic consumption (expressed in terms of physical units), where they opted to deviate from agreed-upon tariff cuts by two-thirds (i.e., only a tariff cut of only one-third of the agreed amount).[487] All in-quota TRQ volume expansions would have to be on an MFN basis. No changes would be expected as to out-of-quota

482 *Id.* ¶ 71.

483 *Id.*

484 *Id.*

485 *Id.* ¶ 72.

486 *Id.* ¶ 77.

487 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 74, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 75 (containing identical provisions regarding domestic consumption with two-thirds deviation).

duty rates, other than the application of the normally applicable tiered tariff cut. Both Texts also contained the same flexibilities for developing countries. They would have to expand TRQs by two-thirds the amount as developed countries, and the data on which expansion would be measured, domestic consumption, would exclude consumption by subsistence farmers of their own produce. Developing countries even could specify a good as "Sensitive" without granting any TRQ access, so long as they imposed the full tariff cut on it over an implementation period three years longer than normal (or make one-quarter of the normal tariff cut, but in a period two years shorter than normal).

However, the May Text cast the rules in more difficult phraseology than the February Text. The May Text said TRQ expansion would have to be no less than 1 percent less than 4, or 6, percent of domestic consumption, if the one-third deviation were used.[488] The February Text used different, and arguably simpler, wording. It linked a one-third deviation from an agreed-upon cut to a TRQ expansion of 3, or 5, percent of domestic consumption.[489] If a developed country deviated from the agreed-upon formula cut by one-half, then the TRQ expansion would have to be at least one-half percent less than 4, or 6, percent of domestic consumption.[490] Here again, the February Text employed different, and seemingly simpler, phraseology. It linked a one-half deviation to TRQ expansion of 3.5, or 5.5, percent of domestic consumption.[491] If a developed country deviated from the agreed-upon formula by just one-third (i.e., it imposed two-thirds of the cut called for under the formula), then it would have to increase the TRQ volume threshold by the least amount—3 to 5 percent of domestic consumption.

The May Text contained three substantive modifications from its predecessor. The first change concerned a tariff cap on high-tariff developed countries. They would have to make a so-called extra payment. If, after applying its Doha Round tariff cut obligations, a developed country still sought to keep more than 4 percent of its tariff lines at *ad valorem* rates of over 100 percent, then it would have to apply to all Sensitive Products an additional TRQ expansion of 0.5 percent of domestic consumption.[492] The February Text had left the expansion figure blank.

The second change concerned expansion rules for developing countries with TRQs on Sensitive Products. Under both the February and May Texts, these obligations would be two-thirds of the domestic consumption increase required of developed countries.[493] But, the May Text laid out alternatives for developing countries, including three possibilities for implementing tariff cuts if they accept

[488] May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 74.

[489] February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 75.

[490] May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 74.

[491] February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 75.

[492] May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 75.

[493] *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 77, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 78 (containing identical expansion provisions for developing countries).

general formula cuts.[494] One of the options would allow them not to expand TRQs, if they deviated from the formula by just 25 percent.

The third change was of critical importance. A new version of Annex C, accompanied by a 4 ½ paged "Attachment Ai" called "Partial Designation Modalities for Sensitive Products," contained the monstrously complexities of TRQ expansion calculations. Those details, of course, represented the Common Approach worked out in April 2008.

Reading Attachment Ai shows how trade negotiations devolve from high-minded, well-intentioned free trade aspirations to stunningly abstruse, product-by-product protectionism. The Attachment speaks of a "partial designation two step approach," yet nowhere is "Step One" or "Step Two" clearly indicated.[495] It continues with special rules for TRQ expansion for dairy products that are all but unfathomable, except (perhaps) to their drafter.

• Market Access – TRQs Generally (Reduction of Duties and Administration)

On TRQs generally (whether or not they apply to a Sensitive Product), the May 2008 Text contained two distinct options on rules to reduce the level of in-quota and out-of-quota tariff rates. Each option tracked the standard tiered-tariff reduction formula, with appropriate modifications (for example, of 2.5 to 10 percentage points) depending on (1) the exact tier in which the tariff associated with a TRQ is in, and (2) whether the product to which a TRQ applies is designated "Sensitive."[496] Low in-quota tariff rates (such as 5 or 10 percent) would be cut to zero. Obligations to cut in-quota and above-quota TRQ duties incumbent on developing countries would be less stringent (by a factor of one-third) than for developing countries. The May Text also contained rules on TRQ administration (as had the February version), with special provisions on re-allocating unused TRQ allotments among private sector operators.[497]

• Market Access – Tariff Escalation and Simplification

The May Text contained the same specifications on how to reduce tariff escalation as did the February Text. That earlier Text, of course, provided greater elaborations than the January 2008 Working Paper on *Tariff Escalation*, including special provisions for commodity-dependent producing Members in the event the adverse effects of tariff escalation were not mitigated by the agreed-upon tiered tariff cutting formula, and a provisional list of products (in Annex D) vulnerable to tariff escalation. Essentially the same provisions and list were embodied in the May Text. Thus, if a processed product has a tariff that is significantly above the unprocessed product (with "significance" being defined as an escalation of 5 percentage points or more), then the escalated processed product would be subject to the cut of the next highest tier from the tier it is in.[498]

[494] May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 77 (setting forth two alternatives for developing countries).

[495] *Id.* app. at 92 (Attachment Ai).

[496] *Id.* ¶ 103.

[497] *Id.* ¶¶ 104-14.

[498] *Id.* ¶¶ 80-81.

However, in one respect, the May Text appeared less ambitious, from a free trade perspective, than its predecessor. The February Text stated that if an escalated processed product is in the Top Tier, and thus there is no higher Tier into which to bump it, then an additional 30 percent tariff cut would be applied to it.[499] The May Text deleted the requirement of a 1.3 times tariff cut to such a product. The new Text replaced the old requirement with a rule that the tariff on an escalated processed product in the top band be cut by the normal tiered formula, plus 6 percentage points.[500]

Conversely, on tariff simplification, the May Text outdid its predecessor in free-trade ambition. The February Text called for a high minimum number of tariffs, such as 90 percent of all tariffs, to be simplified, and said no other tariffs ought to be rendered more complex.[501] The May Text stated all bound tariffs should be expressed as simple, *ad valorem* percentages.[502] It forbade binding any tariff in a manner more complex than its current bound form. Finally, it mandated all simplified bound tariffs must not increase the level of protection over their original complex form.[503]

• Market Access – SSGs

The May Text laid out stark options concerning SSGs, which built on terms in the February Text.[504] First, developed countries would eliminate all SSGs. Alternatively, they would reduce to 1.5 percent of their tariff lines the number of lines eligible for an SSG. Developing countries would limit SSG coverage to no more than 3 percent of tariff lines (the February Text had not identified a percentage). The SSG rules in Article 5 of the *Agreement on Agriculture* would remain the same, with appropriate amendments. How the options for developed and developing countries would relate to one another was unclear from the May Text. Moreover, notably absent from the May Text were the implementation rules set out in the predecessor document.

• Market Access – Special Products

Serious divergences remained on "Special Product" designations. The May Text listed twelve indicators developing countries would have to use in designating "Special" goods[505]—the same criteria set out in the February iteration, which centered on food security, livelihood, and rural development. Compared to the February Text, the May Text eliminated subtle distinctions among options, and simplified the basic policy choice. How, or whether, this choice would advance the cause of free trade was mystifying.

Developing countries would be entitled to a maximum of 20 percent of tariff lines to designate as "Special." Their minimum entitlement would be 8 percent. Thus, the May Text upped the maximum entitlement from a possible 12 to 20

499 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 82.

500 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 81.

501 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 99.

502 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 99.

503 *Id.* ¶ 102.

504 The May 2008 Text lays out SSG treatment in ¶¶ 115-117. *Id.*

505 *Id.* app. F.

percent to a definite 20 percent. Within this entitlement, either 40 percent, or none, of the tariff lines could be immunized from any tariff cut.[506] As for the remaining "Special Product" lines, the overall average tariff reduction would be 15 percent, spread across six to eight years.[507] For each such line, there would be a minimum 12 percent and maximum 20 percent cut. Notably, the May Text contained no definitive implementation rules.

• Market Access – SSMs

Serious divergences remained on SSMs. The May Text eliminated subtle distinctions among options, and essentially re-wrote in clearer form the policy options laid out in the February Text (particularly in respect of the volume trigger).[508] The May Text retained the 30 percent price trigger from its predecessor, implicitly rejecting the call by India and many developing countries for a trigger of between 5 and 10 percent. Thus, only if the world market price of a product fell below the domestic price of that product in an importing county by over 30 percent could that country impose a SSM. It also adhered to a limit on the total number of products a country could protect with a safeguard—between 3 and 8.

Further, in comparison with the earlier version, the May Text relaxed two disciplines on SSMs, suggesting a less free-trade outcome than before. First, the May Text contained no sunset clause by which the SSM remedy would expire. The February Text had stated that if the WTO Members agreed, the SSM would expire at the end of the implementation period for any Doha Round agreement.[509] Evidently, they did not so agree. Second, the volume-based SSM could last for a maximum period of twelve months (with a consecutive twelve-month renewal), or six months for seasonal products (which tends to encompass most farm products).[510] The February Text had identified six months (with one renewal) as a possible limit.[511]

• Market Access – Least Developed Countries

The May Text essentially incorporated by reference the preferential treatment for least developed countries set out in the new NAMA Text.[512] The May Text contained the same provisions as the previous iteration on cotton market access and SVEs.

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506 Under the 40 percent alternative, RAMs could shield an additional 1 percent of tariff lines from a cut.

507 Here, too, RAMs would get differentiated treatment. Their obligatory tariff reductions would be 2 percentage points less than applicable to developing countries. SVEs also would benefit from distinctive treatment.

508 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, intro. (Communication from the Chairman of the Special Session, Crawford). "This is an area where the changes I have made have been to simplify the choices: there were too many fine distinctions in the previous version and they could be discarded in my view without prejudicing the big choices that remain." *Id.*

509 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 138.

510 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 131.

511 February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶ 136.

512 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 138 ("The provisions in the revised NAMA text are applicable here also.").

• Market Access – Tropical Products and Preference Erosion

On tropical products and preference erosion, no progress in negotiations had been made since issuance of the February Text. The February and May Texts contained substantively nearly identical language. The options included duty-free treatment for tropical products subject to a tariff of 25, or perhaps 10, percent, and staged tariff cuts to tropical products subject to higher duty rates.[513] If the product also were subject to a long-standing preference, then the liberalization (i.e., lowering of the duty rates) would be particularly slow, and possibly would not commence for two, and as many as ten, years. Provisions to liberalize trade in tropical products, and eliminate tariff escalation on them, generally would override rules to protect long-standing preferences, except for a list of certain products. Of course, negotiators had yet to agree on that list.

But, the new Text laid out the options in a relatively clearer manner. In other words, the battle continued between (1) farm exporting countries, especially banana and sugar exporters in Latin America, led by Costa Rica, which sought the fullest liberalization of trade in tropical products, in keeping with the DDA negotiating mandate, and (2) the ACP, led by Jamaica and Mauritius, and the EU, which hoped to protect their historic favorable trade arrangements.[514]

Deeper, faster tariff cuts would favor the first group, but would concomitantly eliminate the margin of preference enjoyed by the latter group.[515] Obviously, the overlap in the lists of tropical and preferential products created the tension, and the fact some developed countries likely would designate one or more tropical goods as "Sensitive" exacerbated uncertainties for both groups. Arguably, in the Doha Round any resolution of the tension depended on product-by-product negotiation of reasonable transition periods to give appropriate market access to exporters, during which preference beneficiaries could adjust to the erosion in their margins of preference. But, the long-term solution went beyond the parameters of the Round. Beneficiary countries would have to wean themselves off preferences by overhauling their economic policies, and in some cases tackle corrupt elites living off the fat of special trade arrangements. EU companies that historically predominated in ACP markets and enjoyed duty-free treatment for products they grew on their plantations their and exported back to the EU would need to change their business model. They would have to face level-playing field competition, based on MFN tariff rates, in their home country markets from American and Latin businesses exporting like products from Central and South America.

• Export Competition

On export competition, the May and February Texts were identical. Disciplines on export credits,[516] and on export credit guarantees or insurance pro-

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[513] *Id.* ¶¶ 134-35.

[514] *See* Pruzin, *supra* note 439, at 713.

[515] *See* Martin Khor, *Agriculture Talks Bogged Down, Chair's New Text by This or Next Week*, Third World Network, May 19, 2008, http://www.twnside.org.sg/title2/wto.info/twninfo20080518.htm.

[516] For example, limiting a repayment period to 180 days, or between 360 and 540 days for least developed countries and NFIDCs, and ensuring programs are self-financing, in the sense of not making

grams, were unchanged.[517] International food aid could be subject to loose disciplines—in effect, qualify for a Safe Box—if the emergency in question is declared by an international organization such as the United Nations, World Food Program, or Red Cross.[518] Non-emergency food aid would be subject to a needs assessment conducted by an appropriate United Nations agency, to ensure that aid does not displace commercial trade.

In both Texts, it remained unclear how monetization of food assistance (i.e., selling donated products to raise funds for aid) might be disciplined.[519] Also left ambiguous was whether monopoly power associated with agricultural exporting STEs would be prohibited, or simply restricted in some way.[520]

• Export Subsidies

Likewise, the Texts were identical on rules to eliminate export subsidies. Developed countries would have until 2013 to do so (with half of them eliminated by the end of 2010), and the obligation would include eliminating subsidies disguised as non-emergency food aid, or via credit programs.[521] They would have to eliminate cotton export subsidies at the start of the implementation period of any Doha Round agreement. Developing countries would have until 2016 to eliminate their export subsidies.

• Export Restrictions

As for restrictions on food exports, the May Text embodied the same proposals as the February version.[522]

• Amendments to the *Agriculture Agreement*

On all topics in which a change would be needed to the *Agreement on Agriculture*, the May Text provided suggested language, as had the February version.

The above synopsis makes clear the May Text cannot rightly be dubbed either a "breakthrough" or "revolutionary." If those labels could be applied to any documents in the Doha Round negotiations, then perhaps the leading candidates would be the October 2005 Portman Proposal, which kick-started serious negotiations with its meaty offers on significant issues, or the Winter Working Papers of December 2007 and January 2008, which adroitly synthesized a confusing landscape and clarified divergences among Members.

At best, the May Text was a small positive evolution, particularly on splitting the difference on tiered tariff reductions, devising a method (albeit non-transpar-

losses over a period and recovering costs according to a commercially viable standard over a rolling four or five year period.

517 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, app. J, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, app. J.

518 May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, app. L.

519 *Unofficial Guide to May 2008 Draft Modalities*, *supra* note 446 (noting that "Members' continuing differences over monetization (i.e., selling donated products to raise funds for aid) is reflected in options for disciplining the practice.").

520 *Id.* ("A key question remains whether monopoly power would be outlawed or just disciplined.").

521 *Id.* ¶¶ 145-147.

522 *Compare* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶¶ 154-160, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶¶ 163-169 (identical language regarding transparency and monitoring).

ent) for TRQ expansion for Sensitive Products, reducing tariff rates for TRQs generally, and demanding tariff simplification. On a few matters, such as Blue Box subsidy caps for developing countries, tariff escalation, Special Products, SSMs, and perhaps SSGs, the new Text seemed to step backwards from a free trade outcome. On still other issues, like OTDS, AMS, *De Minimis* support, cotton, tropical products, long-standing preferences, preference erosion, least developed countries, export competition, and export restrictions, the Text adduced the stand-still position of the Members.

The initial reaction of the United States and EU was lukewarm. While seeing the Text as a basis for further discussions, neither trading power felt it went far enough in imposing obligations on developing countries. For instance, the United States called for tighter disciplines on export prohibitions and restrictions, such as differential export taxes (*e.g.*, the imposition of a higher tax on exports of raw materials than on processed products).[523] Argentina staunchly resisted that call. The United States also demanded developing countries identify in advance the agricultural products they would designate as "Sensitive." But, Indian Commerce and Industry Minister Kamal Nath rejected that demand.[524]

Interestingly, the EU seemed to brace itself for drastic subsidy cuts, by announcing plans in Strasbourg, France nearly simultaneously with issuance of the May Text, to reform further the CAP by eliminating all Blue Box and most Amber Box support, and shifting funds to the Green Box.[525] Ever concerned about its supply-management programs (i.e., quotas) for dairy products, eggs, and poul-

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523 *See id.*

524 *See* Pruzin, *supra* note 446, at 740-41.

525 In November 2008, the EU states, through the Council of Agriculture Ministers, approved another set of substantial CAP reforms, which they first unveiled in Strasbourg, France, in May of that year. The reforms, a so-called "CAP Health Check," were a compromise between advocates for a stronger CAP, and critics seeking the dismantling of the CAP. As the EU Agriculture Commissioner, Mariann Fischer Boel explained:

> On the one hand, it is not the time to start micromanaging European farm production pushing and pulling levers of policy week by week to hit targets set in Brussels, as even the best administrators cannot second-guess the world's need for farm products. On the other hand, nor is it the time to simply [*sic*] abolish the CAP. The market has a very important role to play, but left to itself it will not care for our landscapes or respond to other public demands. And if we strip farming of all defenses against occasional crisis, we gamble with our food supply.

Joe Kirwin, *Amid Debate Over EU Farm Subsidies, European Commission Outlines Reforms*, 25 Int'l Trade Rep. (BNA) 797-98 (May 29, 2008) (quoting EU Agriculture Commissioner, Mariann Fischer Boel).

Specifically, the key elements of the program were:

- Complete De-Coupling –

  Nearly all payments to farmers would be linked to land area, not production. That is, set-aside payments – the essence of the Blue Box from the Uruguay Round – would be ceased. First, the requirement that they leave 10 percent of their arable land fallow, to avoid over-production, would be eliminated. Second, all other coupled (i.e., production-linked) payments would be eliminated. These subsidies would be transferred into the single payment scheme. (There would be a narrow exception for goats, sheep, and suckler cows, the support for which would remain coupled.) Third, milk quotas would be eliminated entirely in April 2015. To ease the transition toward a free market in milk, the quotas would be boosted gradually through five annual increases of one percent between 2009-2010 and 2013-2014.

- Ending Intervention Buying –

try, Canada said it could not accept any expansion of the in-quota TRQ volume thresholds for those sensitive products, nor any reductions on their over-quota tariff rates.[526]

State intervention buying of all crops – including durum wheat, pig meat, and rice – that farmers cannot sell would be ended. For feed grains, the intervention price would be set at zero. For bread wheat, butter, and skimmed milk powder, tendering would be used. In essence, overall, the EU no longer would bulk buy unsold stocks at high intervention prices.

• Cutting Direct Payments Disproportionately –

Subsidies to large farms would be reduced more than to small farms. Direct payments would be reduced, with disproportionately large cuts imposed on farms earning more than €100,000 annually (a 7 percent cut) and €300,000 annually (a 16 percent cut).

• Rationalizing Administration –

However, the minimum land plot size necessary to receive CAP support would increase from 0.3 hectares (which is less than a football pitch). This change would alleviate the economically untenable situation in which the administrative cost to the EU to provide aid to tiny farms exceeds the amount of subsidy bestowed.

• Support for Rural Development –

Farmers would receive support payments for taking good care of the countryside, through environmentally-friendly practices, such as investing in renewable energy sources and water management. They also would obtain support for developing rural areas via (for example) agri-tourism. Between May 2008 and 2013, the amount of support for such projects would increase from 5 to 13 percent. The EU would fund these shifts favoring rural development by cutting direct payments to farmers, especially large, wealthy landowners, and channel payments to traditional family farms.

• Assistance –

Each EU state would be entitled to allocate 10 percent of its portion of the CAP budget for specific programs, namely, marketing, crop insurance, and compensation for losses from disease. These programs would offset the losses imposed on farmers from the end to intervention buying, and enable help poor farmers, including by allowing certain unprofitable farming endeavors (like mountain sheep farming) to continue.

• Ending the Biofuels Subsidy –

The production subsidy of € 45 per hectare, paid to farmers who grow crops for biofuels, would be eliminated in 2010.

See Andrew Bounds, *Brussels Plans to Give Poor Farmers Subsidy*, FIN. TIMES, May 21, 2008, at 4; *EU Unveils Plan to Overhaul Farm Subsidies*, EAGLE WORLD NEWS, May 21, 2008, www.eagleworldnews.com; *EU Shake-Up on Farming Subsidies*, BBC NEWS, May 20, 2008.

As intimated, the three-pronged policy thrust of the reforms was clear. First, EU farmers should make decisions in response to market price signals, particularly when world food prices rise dramatically (as they did in spring and summer 2008). Second, government support should change from paying farmers to produce (the effect of intervention buying) or not to produce (the effect of set-asides) to promoting the environment and rural development. That is, domestic support should shift from the Amber and Blue Boxes to the Green Box. Third, and in consequence of the second policy intention, the EU should be in a strong position to meet any new Doha Round requirements that call for cuts to trade-distorting farm subsidies.

As also intimated, the 2008 reforms had their champions and detractors among the EU states. Sweden and the United Kingdom strongly pushed for eliminating nearly all state support for agriculture, even calling for the dismantling of the CAP, because it is one reason for elevated food prices both within the EU and overseas. Kirwin, *supra*. France, in contrast, called for retention of intervention purchases. *Id.* Germany objected that its large farmers would be the hardest hit by the subsidy cuts. *Id.* These two states also reminded the rest of the EU of a critical historic purpose of the CAP – food security for the European public – and urged other countries to adopt a CAP-like model for that reason.

526 *See Canada Fights Tariff Plan at Trade Talks*, THESTAR.COM, May 21, 2008, http://www.thestar.com/article/427994.

Conversely, Brazil complained the May Text failed to set hard limits on either agriculture subsidies or tariffs in the developed world.[527] Argentina argued the May Text violated Paragraph 24 of the December 2005 Hong Kong Ministerial Declaration.[528] Via that Paragraph, the Members agreed market access commitments for agricultural and industrial products should be at a "comparably high level of ambition," and obligations for developing countries ought to be "balanced and proportionate . . . [and] consistent with the principle of special and differential treatment."[529] However, the proposals tabled in May were skewed in favor of developed countries, and the level of ambition was higher for non-farm than farm products. A major player in global agricultural markets, Argentina had good reason to take a tough line. Among producers of sunflower, corn, soybean, and wheat, Argentina ranks, as of May 2008, number 1, 2, 3, and 4 in the world, respectively.[530] It is one of the top five beef exporters in the world,[531] and, as of August 2008, the top exporter of soymeal and soy oil.[532]

India rejected the agriculture and NAMA drafts within two days of their publication. Indian Commerce Secretary G.K. Pillai explained both documents were "totally unacceptable."[533] As for the agriculture proposals, with more than half of India's 1.1 billion people subsisting on less than U.S. $2 per day, protecting agricultural interests was not merely a commercial matter.[534] The Secretary explained that "it is very important that the final [Doha Round] deal . . . protect[s] the livelihood of our poor farmers, [and] ensure[s] . . . food security and rural development."[535]

The May Text ignored the concerns of subsistence farmers in poor countries, for at least five reasons. First, the 30 percent price trigger for an SSM "is completely unacceptable to us,"[536] said Pillai, because by the time prices of a farm product plunge by that amount, "local [Indian] markets would be in jeopardy."[537]

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527 *See* Associated Press, *Brazil Minister Expresses Confidence in Doha Round of WTO Talks*, TAIWAN NEWS, May 22, 2008.

528 Hong Kong Ministerial Declaration, *supra* note 469.

529 *Id.* ¶ 24.

530 *See* Ed Taylor & David Haskel, *Brazil Sees Progress in Revised Drafts for Doha, Argentina Takes Harder Line*, 25 INT'L TRADE REP. (BNA) 789-90 (May 29, 2008).

531 *Id.*

532 *See* David Haskel, *Brazil, Argentina Seek to Reconcile After Doha Disagreements in Geneva*, 25 INT'L TRADE REP. (BNA) 1169-70 (Aug. 7, 2008).

533 *India Rejects WTO Draft Text on Agriculture, Industrial Goods*, TIMES OF INDIA, May 22, 2008, http://timesofindia.indiatimes.com.

534 *See* Vir Singh, *India's Nath Says Critical Need to Protect Marginal Farmers Trumped Doha Ambitions*, 25 INT'L TRADE REP. (BNA) 1155-56 (Aug. 7, 2008).

535 *India Fumes Over Revised WTO Draft*, FIN. EXPRESS, May 21, 2008, http://www.financialexpress.com.

536 *WTO's Draft on Agriculture Disappointing*, HINDUSTAN TIMES, May 20, 2008, http://www.hindustantimes.com.

537 *New Delhi to Talk Concerns on New WTO Draft Text in Geneva*, ECON.TIMES, May 22, 2008, http://economictimes.indiatimes.com (search "New Delhi to Talk Concerns"; then follow hyperlink) (quoting an unnamed official) [hereinafter *New Delhi to Talk Concerns on New WTO Draft Text in Geneva*].

Pillai asked rhetorically, "[i]f we accept this condition, how will we face Parliament?"[538] The trigger ought to be in the range of 5-10 percent, as many other developing countries, alongside India, had long insisted, to give them needed policy space to increase import duties and thereby protect their farmers from import floods at slightly reduced prices. Second, also concerning the SSM remedy, it was too restrictive in scope. Only between three and eight products could be subject to the safeguard. Yet, India has approximately twenty-one agro-climatic zones, meaning that it may well need to protect a larger number of products from price volatility or import surges.[539] The scope also was unbalanced in favor of developed countries, which could invoke an SSM on up to forty-four products.[540]

Third, the number of products developing countries could designate as "Special," and shield completely from tariff reductions, was too low. Along with the G-33, India sought eligibility for that designation for 20 percent—not 8 percent—of tariff lines. Fourth, along with Turkey, India spotlighted the asymmetric criteria for "Special" versus "Sensitive" Product designations.[541] Developing countries had to adhere to strict criteria in making a "Special" Product election. But, there were no criteria whatsoever for developing countries to apply to "Sensitive" Product choices.

Finally, nothing in the May Text obligated countries to cap their maximum agricultural tariff at a certain level. Thus, for instance, Japan could maintain a duty of 1,700 percent on rice, if it chose to do so. In contrast, the NAMA proposals put a cap on industrial product tariffs (namely, the maximum allowable tariff would equal the value of the Swiss Formula Coefficient). The asymmetry on tariff capping appeared to favor, yet again, developed countries.[542] Developed countries have a strong position in manufactured goods, and developing countries are supposed to limit their tariff on imports of such goods. Conversely, developing countries are competitive in farm products, but there would be no limit on developed country tariffs for such imports.

E. The May 2008 Draft NAMA Modalities Text: Synopsis and Reactions

The May 2008 Draft NAMA Modalities Text looked rather different from its predecessor. The February 2008 edition was formatted in two columns. The left-hand column embodied points that either had been, or had yet to be, agreed. The right-hand column set out comments by Chairman Stephenson. Gone from

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538 *India Rejects WTO Proposal on Tariff Cuts on Industrial Goods*, Islamic Republic News Agency (IRNA), May 21, 2008, http://www2.irna.ir/en/news/view/menu-259/0805213069150810.htm [hereinafter *India Rejects WTO Proposal on Tariff Cuts on Industrial Goods*]. Indeed, by at least one account, India argued the volume trigger also ought to be a 5-10 percent surge, not the higher 30 percent figure advocated by some developed countries. *See India: Sharp Duty Cuts in Industrial Goods, supra* note 443.

539 *See Id.* (discussing remarks by Indian Commerce Secretary G.K. Pillai).

540 *See India: Sharp Duty Cuts in Industrial Goods, supra* note 443.

541 *See* Khor, *supra* note 515.

542 *See India Rejects WTO Proposal on Tariff Cuts on Industrial Goods, supra* note 538 (paraphrasing Indian Commerce Secretary G.K. Pillai).

the May Text was the right-hand column, regrettably so in that the comments contained valuable perspectives to contemplate. Substantively, the highlights of the May Text were as follows.[543]

- Product Coverage Still Unresolved

The same problem of what products would be covered by a final NAMA deal that the February Text identified also was indicated in the May Text. The Preamble in the later document was the *verbatim* equivalent to that of the earlier document.

- Swiss Formula Coefficients Still Not Decided

Failure to reach consensus on Swiss Formula Coefficients continued. Indeed, the divergence widened. The ranges from the February Text, and July 2007 Draft Modalities Text were 8-9 for developed countries, and 19-23 for developing countries. The May Text said the range was 7-9 for developed countries, and 19-26 for developing countries.[544] Worse still, the May Text made the Swiss Formula more complicated than before. The earlier text articulated the Formula as:

$$t_1 = \frac{(a \text{ or } b) \times t_0}{(a \text{ or } b) + t_0}$$

where

t_1 = final bound rate of duty

t_0 = base rate of duty

a = Coefficient of 8-9 for developed countries

b = Coefficient of 19-23 for developing countries

The May text re-expressed the Formula as:

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

where

t_1 = final bound rate of duty

t_0 = base rate of duty

a = Coefficient of 7-9 for developed countries

x = Coefficient of 19-21 for certain developing countries

y = Coefficient of 21-23 for other developing countries

z = Coefficient of 23-26 for still other developing countries.

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543 This synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the May 2008 *Draft Modalities for NAMA*, *supra* note 442, and the February 2008 *Draft Modalities for NAMA*, *supra* note 252. *See also* Daniel Pruzin, *Chairman Slams Lack of Progress in NAMA Negotiations, Says Talks Moving Backward*, 25 Int'l Trade Rep. (BNA) 823-24 (June 5, 2008) [hereinafter Pruzin, *Chairman Slams Lack of Progress*]; Daniel Pruzin, *Developed, Developing Country Divide Grows Over NAMA Text; Chair Calls for Serious Talks*, 25 Int'l Trade Rep. (BNA) 780-81 (May 29, 2008); Pruzin, *supra* note 446, at 740-41; International Centre for Trade and Sustainable Development, *New NAMA Text Would Grant Greater Flexibilities to Developing Countries*, 12(18) Bridges Wkly Trade News Dig., May 21, 2008, http://ictsd.net/i/news/bridgesweekly/10988/ (reviewing the May Text).

544 May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 5.

The May Text defined three developing country categories, to which Coefficient x, y, or z would apply.[545] The Text permitted developing countries to self-designate their category, and thereby choose the category-specific rules on flexibilities (discussed below) that would apply to them.[546]

- Implementation Period Still Unresolved

As in the February Text, in the May Text the exact period during which cuts to industrial tariffs would be applied remained unclear. Options ranged from 4-5 years (meaning 5-6 equal annual rate reductions) for developed countries, to 8-10 years (entailing 9-11 equal annual rate reductions) for developing countries.[547] Subsequent negotiations, in June 2008, suggested a possible consensus in favor of five years for developed countries and a decade for developing countries.[548]

- The Mark Up Rate Still Not Decided

As did the February Text, the May Text presumed the base level for any Doha Round tariff reductions would be bound, not actually applied, rates, as of 14 November 2001.[549] Yet, the problem of assigning a mark-up rate to WTO Members—typically, developing countries—with one or more tariff lines unbound remained unresolved. Essentially as before, the options of a non-linear mark up to the relevant MFN rate of 20 or 30 percentage points (with reductions to start from the bumped-up rate) were articulated. The new Text appeared to embody the Philippine proposal, made before the February Text had been issued. Under that proposal, the mark up should be 20, i.e., 20 percentage points should be added to the applied MFN rate if the unbound rate were greater than one-half of the Swiss Formula Coefficient. If the unbound rate were equal to or less than one-half the Swiss Formula Coefficient, then the mark up should be 30 percentage points.

Interestingly, in subsequent negotiations, in June 2008, negotiators appeared to gravitate toward a slightly different approach. The option of a mark-up rate of between 25 and 30 percent of the applied MFN rate on the tariff line in question attracted support from roughly a dozen WTO Members.[550] They included Brazil, Canada, China, EU, India, Japan, Malaysia, Mexico, and the United States.

- Flexibilities for Developing Countries Still Undecided

The May Text reinserted a sliding-scale methodology for flexibilities for developing countries. It did so by use of the variables x, y, and z in the above Swiss Formula. As a result, the new Text appeared more complicated, in respect of flexibilities, than the August 2004 *Framework Agreement*, and the July 2007

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545 *Id.* ¶ 7(a)-(c).

546 *Id.*

547 *Id.* ¶ 6(f).

548 *See* Daniel Pruzin, *Trade Negotiators Cite Minor Progress in NAMA Talks Among Key WTO Members*, 25 INT'L TRADE REP. (BNA) 902 (June 19, 2008).

549 May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 6(b)-(c).

550 *See* Daniel Pruzin, *NAMA Talks Continue, But Differences Remain on Developing Country Flexibilities*, 25 INT'L TRADE REP. (BNA) 866 (June 12, 2008).

Draft Modalities Text, which had a relatively simple 10/5 sliding scale.[551] That *Agreement* and Text called specifically for a 10/5 percent sliding scale, meaning 10 percent of industrial tariff lines would be subject to half of the agreed upon tariff cuts, or 5 percent of the lines would be excluded from any cuts.

In the May Text, coefficient z, which would require the least tariff reductions and permit the highest maximum tariff, afforded no flexibility to developing countries.[552] Coefficient x, which would obligate a developing country to make stringent tariff cuts, afforded the greatest swing away from agreed-upon cuts. There would be two deviation options: (1) less than formula cuts on up to 12-14 percent of non-agricultural tariff lines, provided the cuts are no less than half the formula cuts, and the tariff lines do not exceed 12-19 percent of the total value of the country's non-agricultural imports; or (2) keeping 6-7 percent of tariff lines unbound, and not applying any cuts to up to 6-7 percent of non-farm tariff lines, as long as these lines do not exceed 6-9 percent of the total value of non-farm imports.[553] Coefficient y would be linked to a middle-degree of flexibility, again with two options: (1) permitting less than agreed-upon cuts to up to 10 percent of non-agricultural tariff lines, provide the cuts are no less than half the formula cuts, and these lines do not exceed 10 percent of the total value of the country's non-agricultural imports; or (2) keeping 5 percent of tariff lines unbound, and not applying any cuts for up to 5 percent of non-farm tariff lines, as long as they do not exceed 5 percent of the total value of non-farm imports.[554]

In brief, as before, sheltering sensitive industrial products from the full brunt of tariff cuts was generally agreed, but none of the critical operational details concerning how to do so were. A sliding scale would have to address (1) the Coefficients by which developed and developing countries would cut industrial tariffs, (2) flexibility for developing countries to shield certain sensitive industrial sectors from the full force of agreed-upon reductions, and (3) restrictions on that flexibility. Practically speaking, whether the x-y-z articulation of the Swiss Formula, and its three attendant flexibilities categories, was the winning methodology was uncertain.

- The Anti-Concentration Clause Unresolved

As for which industrial goods a developing country could designate as eligible for treatment as "sensitive," the May Text laid out a version of the anti-concentration clause, embodying two constraints, championed by the United States and EU. First, there would be prohibition against excluding an entire HS customs classification Chapter from the full force of agreed-upon cuts under the Swiss Formula.[555] Second, with respect to any 4-digit heading of an HS Chapter in the tariff schedule of a developing country, there would be a prohibition on exclud-

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551 The *Framework Agreement* outlines this flexibility in Annex B. August 2004 *Framework Agreement, supra* note 36, Annex B, ¶ 8(a)-(b). The July 2007 Text provided for the sliding scale in paragraph 7. July 2007 *Draft NAMA Modalities, supra* note 9, ¶ 7(a), at 11.

552 May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 6(c) ("Coefficient z in the formula without recourse to flexibilities.").

553 *Id.* ¶ 6(a)(i)-(ii).

554 *Id.* ¶ 6(b)(i)-(ii).

555 *Id.* ¶ 6(f).

ing more than half of the 6-digit sub-headings or national tariff lines within that particular Chapter heading from the full tariff reductions.[556] However, there was no consensus in favor of these prohibitions, with India particularly objecting to the clause. Indeed, developing countries such as Argentina, Brazil, and India rejected them, arguing they have a sovereign right to determine which of their tariff lines ought to benefit from flexibilities.[557]

• Further Flexibilities for Certain Members and CUs

To complicate matters yet more, the May Text articulated special rules, to product industrial products, originating in South Africa, Venezuela, and SVEs. For instance, South Africa would be able to subject between 11 and 16 percent of its industrial tariff lines to one-half of any agreed upon tariff reduction, whereas developing countries normally would be limited to 10 percent.[558] Regarding CUs, the May Text included the revised April 2008 *MERCOSUR* proposal to impose a limit on the value of trade that would be permitted flexibility to deviate from agreed-upon tariff reductions. That limit would be set as a percentage of the overall value of trade, specifically:

$$\text{Cap} = \frac{\text{Sum of Total Customs Union NAMA Imports Under the Additional flexibilities for CU trade}}{\text{Sum of Total Customs Union NAMA Imports}} \times 100$$

Notably, however, the EU, Japan, Korea, Mexico, and United States already had rejected the *MERCOSUR* proposal, arguing *MERCOSUR* would be able to shield important industrial products from tariff cuts.[559] They pointed out the suggested formula for establishing a cap was biased, because it would exclude trade in industrial goods among parties to a CU. The May Text affirmed intra-CU trade values would be excluded from the computation of the value of trade that a CU Member could immunize from the full force of agreed-upon cuts.

• Further Flexibilities for Members Engaged in Sectoral Negotiations

Developing countries that participated in sectoral negotiations to reduce industrial tariffs beyond the extent of the Swiss Formula, and possibly even create duty-free treatment in certain areas, would get flexibility above and beyond that afforded by other proposals. In particular, they could earn additional points on the value of their Swiss Formula Coefficient, as a credit, if they engaged in the sectoral talks and thereby agreed to NAMA on products of keen export interest to developed countries.[560] It was unclear whether there might be carve outs, which

[556] *Id*. Likewise, as part of the second constraint, there would be a prohibition on excluding from full tariff cuts any combination of 6-digit sub-headings and tariff lines in a Chapter heading that account for more than 50 percent of the value of imports of that country in that heading. *Id. See also* Pruzin, *supra* note 548, at 901 (noting that subsequent June 2008 discussions generally agreed to work with anti-concentration provisions as set out in the May 2008 Draft Modalities for NAMA).

[557] *See* Daniel Pruzin, *NAMA Anti-Concentration Offer Still Stalled, Despite Fresh Initiative, But Talks Continue*, 25 INT'L TRADE REP. (BNA) 974-75 (July 3, 2008).

[558] May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 7(d); *see also* Pruzin, *supra* note 550, at 866 (noting continued discussions regarding South Africa's tariff lines in June 2008).

[559] Pruzin, *supra* note 364.

[560] May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 7(i).

also would induce developing countries to participate in the negotiations by allowing them to exempt certain tariff lines from any sectoral agreement.

• Flexibilities for Members with Low Binding Coverage Still Not Finalized

How to deal with the twelve developing countries—Cameroon, Congo, Côte d'Ivoire, Cuba, Ghana, Kenya, Macao, Mauritius, Nigeria, Sri Lanka, Suriname, and Zimbabwe—that had bound less than 35 percent of their non-agricultural tariff lines was unresolved. The May Text embodied largely the same suggestions as the February Text, albeit giving greater specificity on tariff cuts, by offering a three-tiered reduction proposal. All countries in each tier would have to bind the majority of their lines at an average 28.5 percent MFN rate.[561] Countries in the lowest tier could leave unbound the highest percentage of lines.

• Market Access – Preference Erosion

The May Text contained the same ideas, and indeed nearly identical proposals, on non-reciprocal preferences, as the February Text. The key difference was that whereas the February 2008 Text specified seven equal reductions over an eight year elimination phase, the new Text entertained the possibility of a different implementation period, namely, a reduction of MFN tariffs on tariff lines in 7-9 equal rate reductions by preference granting developed countries.[562] Specifically, these developed countries would begin implementing their Doha Round tariff reductions two years after conclusion of the Round, and then take between seven and nine years to implement fully the cuts. The result would be a phased withdrawal across ten years of cuts to duty rates on tariff lines that are the subject of a preference.

Critically, in an Annex to the Text, the United States listed twenty-five tariff lines, all covering textiles and apparel (T&A) items under the *African Growth and Opportunity Act* or FTAs, like the *Central American Free Trade Agreement—Dominican Republic* (*CAFTA–DR*), to which it would apply the phased reduction.[563] The EU, in a separate Annex, listed 40 tariff lines, in the areas of fish products, steel, and T&A items, which are subject to preferences it grants to ACP countries.[564] In other words, to the chagrin of developing countries, neither of the two major preference granting developed countries appeared to include in their Annex all of the products on which they grant preferences. For any product not listed, the preference would be eroded immediately, that is, upon normal implementation of agreed-upon Doha Round cuts.

• SVEs, Least Developed Countries, and RAMs

The May Text contained nearly *verbatim* provisions as the February Text on three groupings of Members—SVEs, least developed countries, and RAMs. A sentence on RAMs, albeit in square brackets, proposing that a 2-3 year grace period begin running for tariff lines still subject to accession commitment imple-

561 *Id.* ¶ 8(a).

562 *Compare id.* ¶ 28, *with* February 2008 *Draft Modalities for NAMA, supra* note 252, ¶ 28.

563 May 2008 *Draft Modalities for NAMA, supra* note 442, Annex 3.

564 *Id.* Annex 2.

mentation on the date of entry into force of any Doha Round results, was added[565]—surely not at the behest of the RAMs.

- Supplementary Modalities, Elimination of Low Duties, Non-tariff Barriers, Capacity Building Measures, and Non-Agricultural Environmental Goods

The May Text contained substantially the same, if not identical, provisions as the February iteration on Supplementary Modalities,[566] Elimination of Low Duties,[567] Non-tariff Barriers,[568] Capacity Building Measures,[569] and Non-Agricultural Environmental Goods.[570]

Overall, while the single-column format of the May Text gave it a different look from its predecessor, the new document was a singular disappointment. Certainly, it heralded no breakthrough on market access for manufactured products, and perhaps took a backward step from a free (or freer) trade outcome in respect of Swiss Formula Coefficients and developing country flexibilities. As to product coverage, implementation periods, mark-ups, flexibilities for Members with low binding coverage, preference erosion, SVEs, least developed countries, and RAMs, the May Text largely restated what had been in the left-hand column in February.

The United States and EU were manifestly unhappy. For them and other like-minded WTO Members, the May 2008 NAMA Draft Text took three steps backwards with dreadful consequences. First, the Swiss Formula Coefficients would allow too many developing countries to retain high tariffs generally, and tariff peaks (i.e., duty rates in excess of 15 percent) specifically, on too many industrial products. In other words, the Text was unbalanced in their favor. For example, the Deputy USTR and WTO Ambassador, Peter Allgeier, chafed at the incongruity between obligations that would be incurred by the United States vis-à-vis Brazil.[571] The United States would have to cut by 50 percent its average applied tariff on industrial goods of 3.9 percent. It would have to reduce all of its tariff peaks—i.e., rates above 15 percent on over 200 tariff lines, mostly on T&A products—to less than 10 percent.[572] Yet, Brazil could keep its average bound rate of 30 percent, which is well above its average applied rate of 11 percent.[573] Further, Brazil could retain its tariff peaks, including its 35 percent duty on auto imports.[574]

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565 *Id.* ¶ 19(a).

566 *Id.* ¶ 21 (i.e., allowing Members to use for the request–offer approach to negotiating tariff cuts).

567 *Id.* ¶ 22 (i.e., requesting Members to get rid of nuisance tariffs).

568 *Id.* ¶¶ 23-26 (i.e., encouraging Members to negotiate cuts to, and better yet elimination of, non-tariff barriers).

569 *Id.* ¶ 27 (i.e., calling on developed countries to assist least developed countries address their supply-side constraints in respect of trade expertise).

570 *Id.* ¶ 31 (i.e., supporting Members in their quest for global free trade in manufactured environmental products).

571 *See* Daniel Pruzin, *WTO Chief Lamy Says Ministerial "Premature" as Members Prepare for Critical NAMA Week*, 25 Int'l Trade Rep. (BNA) 904-05 (June 19, 2008).

572 *Id.* (comments by Deputy U.S. Trade Representative and WTO Ambassador Peter Allgeier).

573 *Id.*

574 *Id.*

Second, the United States and EU rejected any Coefficient for developed countries below 8. The Senators from Maine, Olympia Snowe, and Susan Collins, both Republican, remarked that the May 2008 Text would oblige the United States to cut tariffs on certain categories of rubber footwear.[575] Shoe companies in Maine, like New Balance, which employs 1,000 people, would face a challenge they could not meet—low wage competition from China. They would be forced to relocate production overseas.

Third, the United States and EU reiterated their objection to special dispensation for CUs.[576] The formula laid out in the May Text would allow countries in CUs to increase the percentage of industrial tariff lines they could shield from tariff cuts, or subject to less than the full force of the cuts.[577] Argentina, for example, could keep up to nearly one-third of its non-*MERCOSUR* trade in industrial products from the cuts.[578] Specifically, suppose Argentina selected a Swiss Formula Coefficient of 19-21, and took the 12/12 option of shielding 12 percent of its tariff lines from the agreed cut worth no more than 12 percent of imports. Then, with the special rules for CU, the value of non-*MERCOSUR* trade that Argentina would have to subject to one-half of the agreed-upon cuts would be just 32 percent.[579] The United States and EU also worried that the Association of Southeast Asian Nations (ASEAN) (at least the nine ASEAN nations, other than Laos, which are WTO Members) might enjoy the special benefits of the proposed CU provision.

Speaking for the NAMA-11, Argentina said the entire architecture of the May 2008 Text was misguided.[580] As one illustration, the United States and EU insisted on an anti-concentration clause for industrial products. Why should they not, then, accept an anti-concentration clause for agricultural products, to ensure developed countries do not focus all of their tariff protection and subsidies on a handful of farm products?[581] As another illustration, the Text failed to deal properly with preference erosion, according to the NAMA-11.[582] On the one hand, a ten-year period in which to make agreed-upon Doha Round cuts would mean the United States and EU have a decade to protect their self-listed tariff lines from competition from countries that do not benefit from a tariff preference. On the other hand, certain countries, like Pakistan and Sri Lanka, do not benefit from a

575 *See* Amy Tsui, *Maine Senators Write USTR for Shoe Firms Expressing Concerns with WTO Negotiations*, 25 Int'l Trade Rep. (BNA) 827 (June 5, 2008).

576 *See* Daniel Pruzin, *U.S., EU Voice Grave Concerns About NAMA Revised Text's Customs Union Exemptions*, 25 Int'l Trade Rep. (BNA) 787-88 (May 29, 2008).

577 *Id.*

578 *Id.* The United States and EU content that NAMA negotiating chairman Don Stephenson's draft text would "allow developing countries that are part of customs unions to exclude intra-customs union trade from the calculation of the value of trade that may be shielded from the agreed tariff cuts" to the benefit of Argentina. *Id.*

579 *Id.* (noting that Argentina, much more dependent in inter-Mercosur trade, is an extreme example).

580 *See* Pruzin, *Chairman Slams Lack of Progress*, *supra* note 543, at 823-24.

581 *See* Daniel Pruzin, *Officials Cite Progress in Latest Talks on Doha Non-Agricultural Market Access*, 25 Int'l Trade Rep. (BNA) 944-46 (June 26, 2008).

582 *Id.*

preference on any of the products listed by the United States and EU that would be subject to extended tariff elimination periods.[583] Consequently, the market share in the United States and EU held by Pakistani and Sri Lankan exports would erode as soon as the regular industrial product tariff cuts took effect in those importing countries. The architecture failed because it did not create a structure of (1) protecting the special and differential treatment enjoyed by certain developing countries by phasing out gradually their preferences, while simultaneously (2) imposing disciplines on developed countries against protecting their favorite sensitive industrial sectors.

The reaction from India to the new NAMA Draft was even more strongly negative than to the Agriculture Draft. Commerce Secretary Pillai said "[t]he text on industrial goods is a *complete mess*, and reflects *confused thinking* and [it] attempts to break the unity of [the] NAMA-11 by adopting *divide and rule tactics*."[584]

The Indian Secretary indubitably spoke for many developing countries in explaining that the new NAMA Text should allow them to "protect our infant and small industries from cheaper imports."[585] Yet, along with Brazil, China, and South Africa, India was being unduly pressured by the United States, EU, Australia, and Canada to yield its market.[586]

Five points were particularly objectionable.[587] First, developed countries should take on higher reduction commitments than indicated by the May Text, and thereby open their markets to industrial products from emerging industries in developing countries seeking to ascend the chain of value-added manufacturing. The May Text neglected a guiding principle of the DDA—less than full reciprocity. That is, developing countries were to have lesser obligations on them than developed countries. Yet, the Swiss Formula Coefficients suggested in the Text would impose steeper real cuts to industrial tariffs on India than on the United States or EU. Consequently, it would compel the likes of India to liberalize trade in re-manufactured goods, a move they were ill-prepared to make.[588] Overall, the Text would obligate the NAMA-11 developing countries to cut their bound industrial tariffs by 45-50 percent, a far larger amount (observed Argentina's Deputy Secretary for International Trade, Nestor Edgardo Stancanelli) than ever agreed in any previous GATT round.[589] Argentina itself would have to cut its average applied tariff rates by 40 percent.

Second, three different sets of coefficients for developing countries—the x, y, and z categories—ran afoul of another DDA mandate. The negotiating parame-

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583 *See* Pruzin, *Chairman Slams Lack of Progress*, *supra* note 543, at 823-24.

584 *India Fumes Over Revised WTO Draft, supra* note 535 (emphasis added).

585 *Id.*

586 *See Forcing the Issue*, Bus. Standard, May 21, 2008, http://www.business-standard.com (search "Forcing the Issue"; then follow hyperlink).

587 *See New Delhi to Talk Concerns on New WTO Draft Text in Geneva, supra* note 537.

588 *See India: Sharp Duty Cuts in Industrial Goods, supra* note 443.

589 *See* Rick Mitchell & Daniel Pruzin, *Mandelson Says Crucial NAMA Talks "Litmus Test" for Survival of Doha Round*, 25 Int'l Trade Rep. (BNA) 869-70 (June 12, 2008).

ters were for two Swiss Formula Coefficients. One was to be for developed countries, and the other for developing countries. Instead, they had metastasized.

Third, flexibilities for developing countries should be de-linked from their reduction commitments. The three categories thrust a devil's trade-off on them between a Swiss Formula Coefficient and derogating from tariff cuts under the Formula. That trade-off was incongruous with the mandate, as India and Argentina jointly intoned during a June 2008 visit by Secretary Pillai to Buenos Aires.[590]

Fourth, by creating three sets, and special carve out rules for specific countries, the May Text reflected a divide and conquer strategy. The incentive of earning a credit on the value of the Coefficient, in exchange for participating in sectoral negotiations, was just one divide-and-rule idea in May Text. In fairness, all developing countries ought to be treated alike.

Fifth, the anti-concentration clause went too far. At best, India, along with Brazil, might be willing to consider a prohibition on excluding a whole HS Chapter from agreed-upon tariff cuts.[591] Otherwise, there ought to be no limits on their freedom to choose which of their industrial tariff lines were sensitive.[592] Interestingly, it was uncertain whether India and other developing countries might consider a proposed restriction that would limit designation of sensitive lines to a fixed percentage. That idea would allow poor countries to target sensitive tariff lines at the 8-digit, rather than the more general 6-digit level.[593]

To be sure, the United States, EU, and other developed countries had their concerns, which—unsurprisingly—tended to be diametrically opposite. Developing countries were not going far enough in opening their markets to manufactured products from developed countries. They also were being offered ridiculously long periods in which to phase out tariffs. How could American businesses possibly wait for eighteen years for China to implement fully industrial tariff cuts?[594] Referring to the NAMA and agriculture texts, and apparently to Brazil and India, the USTR, Ambassador Susan Schwab, intoned a "handful" of advanced developing countries continued to refuse to make meaningful market access concessions. She accused them of:

> [M]ask[ing] their narrow interests behind claims of speaking for the rest of the developing world when, in fact, there are developing countries that are very much pro-ambition in this round and their voices are being drowned out. . . . It's basically a case of elephants hiding behind the mice.
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> . . . .

590 *See* Haskell, *supra* note 470, at 922-23.

591 *See* Pruzin, *supra* note 557, at 974-75.

592 *Id.* (statement by an anonymous official at a June 30, 2008 WTO meeting).

593 *Id.*

594 *See* Jonathan Lynn, *Key Proposals Issued for WTO Doha Deal*, Reuters, May 19, 2008, http://www.reuters.com.

> The United States has really taken a leadership role in trying to get this Doha Round off center and trying to achieve a breakthrough.[595]

Not to be bested by his boss, Deputy USTR Peter Allgeier fired a shot at China, saying:

> [I]t is now incumbent upon China to become fully engaged in WTO processes. . . . Regrettably, however, China has yet to step up fully to the level of responsibility for achieving a successful conclusion to the round that is commensurate with its role in the trading system.[596]

Undoubtedly, some truth rang in their points. So, too, was it true—as Ambassador Schwab intoned—that 70 percent of the tariffs paid by developing countries are paid to other developing countries.[597] Moreover, these points resonated strongly in many developed countries. EU states such as France, Ireland, and Poland, decried the concessions they would make on agricultural topics in return for little NAMA gains.[598]

But, all of these points were dwarfed by five key facts. First, the economic benefits of a successful Doha Round outcome were projected to be little more than a rounding error in comparison to the size of the world economy ($54 trillion as of July 2008).[599] A widely reported 2005 World Bank study modeled the net welfare gains to developing countries from a hypothetical Doha Round agreement.[600] Projected global gains by 2015 from a NAMA deal could be $96 billion, which would be about one-tenth of one percent to world economic output.[601] Stacked against this prognostication, the considerable legal benefit of success—namely, binding agricultural and industrial tariffs at lower rates, and

595 Gary G. Yerkey, *United States Concerned About Prospects for Breakthrough in WTO Talks, Schwab Says*, 25 Int'l Trade Rep. (BNA) 795-96 (May 29, 2008) (quoting comments made by U.S. Trade Representative Susan C. Schwab).

596 Daniel Pruzin, *U.S. Reiterates Call for China to Show Leadership in Doha Talks*, 25 Int'l Trade Rep. (BNA) 801 (May 25, 2008) (quoting comments made by Deputy U.S. Trade Representative Peter Allgeier at a May 21, 2008 meeting to review a WTO secretariat trade policy report on China). In the July 2008 Ministerial Meeting, discussed *infra* section VII, China did take a strong stand – joining India's position on the SSM remedy. Shortly thereafter, in a speech to the American Enterprise Institute (AEI), the USTR General Counsel, Warren Maruyama, "had harsh words for China, calling its positions 'awkward and clumsy at times' [because] it seemed to have accepted a framework proposed by Mr. Lamy in the middle of the talks, but later sided with India in opposition to it." *See, e.g.*, James Politi, *Top U.S. Trade Official Sees "No Plausible Alternative" to Doha*, Fin. Times, Aug. 7, 2008, at 4 (quoting USTR General Counsel, Warren Maruyama). Apparently, what the United States meant by full engagement and responsibility by China was invariable support.

597 *See* Lucien O. Chauvin, *Doha Round at Crossroads; Advancing talks A Major Topic at APEC Meeting, Schwab Says*, 25 Int'l Trade Rep. (BNA) 826 (June 5, 2008).

598 *See* Joe Kirwin, *WTO Chief Lamy Says U.S. Farm Bill Presents Obstacle in Doha Round Talks*, 25 Int'l Trade Rep. (BNA) 826-27 (June 5, 2008).

599 *See* Mark Drajem & Jennifer M. Freedman, *World Trade Likely to Grow Even as WTO Talks Sputter (Update 3)*, Bloomberg.com, July 30, 2008, http://www.bloomberg.com.

600 *See* Timothy Wise & Kevin Gallagher, *The WTO Wants to Talk – But Who's Listening?*, June 27, 2008, http://www.guardian.co.uk.

601 *See* Philip Stevens, *The Blindfolds that Wrecked a Deal to Boost Global Trade*, Fin. Times, Aug. 1, 2008, at 9.

OTDS at lower levels, to reduce the small risk of backsliding into 1930s-style protectionism—simply seemed not to matter.[602]

Second, most poor countries stood to gain little of this benefit. Of the $96 billion, only $16 billion would go to developing countries. That gain would amount to just 0.16 percent of the national income of developing countries.[603] In *per capita* terms for all developing countries, the $16 billion gain would be a "boost" of $3.13 per day, or less than one cent per person per day living in a poor country. As for developed country denizens, their anticipated *per capita* gains would be twenty-five times that of their counterparts in developing countries.

Third, not only would the distribution of gains be asymmetric as between rich and poor countries, but also it would be skewed among poor countries. Half of the $16 billion in benefits that would go to developing countries would go to only eight of them– Argentina, Brazil (which would capture 23 percent of the developing country benefit), China, India, Mexico, Thailand, Turkey, and Vietnam. WTO Members in Africa and the Middle East generally would be worse off from the deal.[604] And, industrial tariff losses would total $63 billion—meaning costs outweighed gains by nearly four times.

Fourth, tariffs paid by one developing country are government revenues for another developing country. Tariff revenues on the Doha Round chopping block are all the more precious when—as is typically the case in the Third World—the income and sales tax systems are inchoate, dysfunctional, or corrupt. Absent reform of tax regimes to allow for greater relative dependence on income or sales taxes for revenue, addiction to customs duties is ineluctable. These countries generally appreciate how the law of comparative advantage works, and do not need incessant lecturing about economics from the USTR. What they do need is help expanding their tax bases and enhancing the integrity of their tax collection systems. That help, while integrally connected to their freedom to give market access concessions, strays far beyond the DDA mandate.

Fifth, Brazil, India, and many smaller developing countries had large and growing trade imbalances with China. They feared that major market access concessions applied on an MFN basis would mean their local producers (espe-

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[602] This benefit sometimes is called the "option value" of the Doha Round. Lower bound tariff and subsidy levels would limit the options of WTO Members to resort to protectionist policies. *See So Near and Yet So Far*, ECONOMIST, Aug. 2, 2008, at 14 [hereinafter *So Near and Yet So Far*].

Wall Street certainly was unimpressed by the potential economic gain from a successful Doha Round. When negotiations collapsed on July 29, 2008, discussed *infra* section VII.E, financial markets actually rose. The Standard & Poors (S&P) Index added 2.3 percent (on July 29, 2008), the MSCI World Index increased by 0.6 percent (as of 11:34 in London on July 30), and the MSCI Asia Pacific Index advanced 1.7 percent (as of 17:30 in Tokyo on July 30). Even the WTO reported in April 2008 that trade grew by about 6 percent per year in the past decade, exceeding world output by 2 percentage points, and admitted that if the rate of growth of trade fell in 2008, the reason would be turbulence in financial markets, not a Doha Round collapse. *See* Drajem & Freedman, *supra* note 599.

[603] Research and Information System for Developing Countries (RIS), RIS Policy Brief Number 36, *Back to the Drawing Board: No Basis for Concluding the Doha Round of Negotiations* (April 2008)http://, www.ase.tufts.edu/gdae/Pubs/rp/RISPolicyBrief36DohaMay08.pdf.

[604] *See* Wise & Gallagher, *supra* note 600.

cially industries) would succumb to the prowess of China's exporters.[605] Moreover, seven years into the Round, the accusatory rhetoric was tiresome, self-congratulatory, and a bit self-delusional. Most obviously, the USTR rhetoric was calculated to pin blame for a Doha Round collapse on others.

F. Services Talks Sputter and Trade Remedy Rules Remain Divisive

A small and nearly inconsequential emission came from the Chairman of the Services Negotiation on 26 May 2008. It was a new Report entitled "Elements Required for the Completion of the Services Negotiations," coupled with an Annex titled "Elements Required for the Completion of the Services Negotiation."[606] The curt document was a synopsis of events since the last informal presentation from the Chairman, dated 13 February 2008.[607] Nothing suggested a dramatic breakthrough had occurred or was in the offing. Two puffs emitted by the new Report, summarizing statements in the accompanying Annex, were ominous: first, the dates for submission of revised offers, and final draft schedules of commitments, had yet to be agreed, and second, no accord on how to account for the special situation of RAMs had been reached.[608] In other words, when the negotiations would occur and wrap up, and how ambitious they would be, were entirely left unresolved.

As for the Annex itself, of its thirteen paragraphs, five of them commenced with the word "recall," "reaffirm," or "recall and reaffirm," an obvious signal of sputtering negotiations.[609] A sixth paragraph reminded Members of their commitment from the Hong Kong Ministerial Conference to develop disciplines on domestic regulation of services pursuant to *GATS* Article V:4, and exhorted them to intensify their work in this area.[610] Yet another paragraph was a reminder of the commitment from that Conference to give "special priority" to establishing "appropriate mechanisms" for least developed countries (*e.g.*, perhaps a waiver from the MFN rule in respect of preferential trade agreements), with both critical quoted terms still undefined.[611] In other words, half of the Annex disappointedly regurgitated the past.

To be fair, the Annex had one mildly noteworthy paragraph, on the level of ambition of services talks. In square brackets, of course, the Annex reflected the position favored by the United States, EU, and other developed countries, and the approach championed by India and other developing countries, *in seriatim*:

605 *See* Daniel Pruzin, *Doha Allies Brazil, India Cite Concerns with Growth of Trade Deficits with China*, 25 INT'L TRADE REP. (BNA) 801-02 (May 29, 2008).

606 WTO, Council for Trade in Service, Special Session, *Elements Required for the Completion of the Services Negotiations*, TN/S/33 (May 26, 2008) (containing both a report of the Chairman and the Annex) [hereinafter May 26, 2008 Chairman's Report on Completion of the Services Negotiations].

607 WTO, Council for Trade in Services, Special Session, *Elements Required for the Completion of the Services Negotiations*, JOB(08)/5 (Feb. 13, 2008).

608 May 26, 2008 Chairman's Report on Completion of the Services Negotiations, *supra* note 606, Annex.

609 *Id.* Annex, ¶¶ 1, 2, 4, 6, 13.

610 *Id.* Annex, ¶ 5.

611 *Id.* Annex, ¶ 9.

> [Negotiations must be driven by the same level of ambition and political will as reflected in the agriculture and NAMA modalities. . . . Members shall respond to bilateral and plurilateral requests by offering commitments that substantially reflect current levels of market access and national treatment and provide new market access and national treatment in cases where significant trade impediments exist.] . . . [Members reiterate that the next offers shall provide market access in sectors and modes of supply of export interest to developing countries, such as Modes 1 and 4 . . . .][612]

Yet, with no hard deadlines for new offers or draft schedules, when—or whether—consensus would be reached on these positions, or a new one forged, was uncertain.

Negotiations on trade remedy rules fared no better than discussions on services. On 28 May 2008, the Chairman of the Negotiations on Rules, Guillermo Valles Galmés, Ambassador to the WTO from Uruguay, issued a "Comfort Paper."[613] Its effects belied its rubric. The Comfort Paper was not a new Draft Text on AD, CVD, or fishing subsidy disciplines, and thus by no means an effort to narrow the large schisms among Members over rules. The Chairman had nothing with which to work. There had been no substantive progress on rules negotiations between November 2007 and May 2008.

Instead, the new publication was an attempt to assuage delegations angry with his November 2007 Text. The Comfort Paper, however, did little to mollify their sharp criticisms of that Text. All the Paper did was compile the proposals put forth in the negotiations, and identify the state of play of the talks. What was innovative was stylistic. Instead of a conventional single column report, the Paper used a triple column format[614] for AD[615] and fishing subsidy matters,[616] and a dual column format for CVD issues.[617]

On AD, the Comfort Paper embodied the proposal of the November 2007 Text, championed by American negotiators, to reverse WTO Appellate Body decisions. That is, Simple Zeroing (i.e., calculating a dumping margin for an individual product by comparing average-to-transaction or transaction-to-transaction figures for Export Price, or Constructed Export Price, and Normal Value) would be allowed in original investigations. Both Simple and Model Zeroing (i.e., cal-

612 *Id.* Annex, ¶ 4. Mode 1, of course, refers to the cross-border supply of services by firms not present physically in the country importing the service. Mode 4, which is linked to the politically charged topic of immigration, covers the temporary movement of natural persons.

613 WTO, Negotiating Group on Rules, *Working Document from the Chairman,* TN/RL/W/232 (May 28, 2008) [hereinafter, *May 2008 Comfort Paper*]. *See also* Daniel Pruzin, *WTO Rules Chair Issues "Comfort" Paper Outlining Positions in Dumping/Subsidy Talks*, 25 INT'L TRADE REP. (BNA) 825-26 (June 5, 2008).

614 The three columns are Textual Proposals from Delegations, Chairman's November 2007 Text, and Comments from Delegations on Chairman's Text.

615 *May 2008 Comfort Paper, supra* note 613, Annex A.

616 *Id.* Annex C.

617 *Id.* Annex B. The dual columns were Chairman's November 2007 Draft Text, and Comments from Delegations on Chairman's Text.

culating a dumping margin by dividing a product into sub-categories, and comparing price data on a weighted average basis) would be allowed in Administrative, Periodic, and Sunset Reviews. Both Zeroing methodologies would be permissible when a governmental authority sets final liability for an AD duty, or when ascertaining if duties in excess of the margin have been paid and are refundable. Unchanged from the November 2007 Text, the zeroing provisions of the Comfort Paper naturally continued to pit the United States against the rest of the world.

The United States demanded on a restoration of the *status quo ante*. There ought to be complete freedom to apply any kind of zeroing methodology, in any context, as existed the day after the Uruguay Round negotiations were completed. Twenty Members, indubitably representing dozens of others, took the opposite view. They lodged an attack (formally, a Working Paper) against the zeroing provisions of the Paper, and the Paper duly took note of their arguments.[618] Zeroing of any kind is unacceptable because it is biased, inflates AD duties, and can nullify the benefits of trade liberalization. Their attack also included proposals for rules that were exactly orthogonal to the provisions of the Paper. The only shred of common ground between the Americans and their foreign counterparts was that a few Members agreed zeroing (specifically, comparing weighted average Normal Value to individual Export or Constructed Export Price) might be appropriate to deal with targeted dumping.[619]

Fishing subsidy disciplines incited fierce debate, with developed countries all but calling a proposal by developing countries meretricious. The November 2007 Text called for a new Annex to the WTO *SCM Agreement* that would prohibit eight categories of fishing subsidies. Also to combat over-fishing, the Text obliged each WTO Member to establish a fisheries management system, based on internationally recognized best practices for conservation, which would regulate marine wild capture fishing within its territorial waters. A joint proposal from China, India, and Indonesia requested three carve-outs from the prohibition that would benefit developing countries: for (1) fishing vessels that are up to twenty-four meters (seventy-four feet) in length; (2) small-scale artisanal fishing, and (3) fishing boats on the high seas (i.e., outside of the territorial waters of a developing country).[620] Additionally, their proposal requested that developing countries be relieved from the obligation to establish fisheries management sys-

[618] *Id.* Annex A, Delegations Comments on Chairman's Text accompanying Article 2.4.2. *See also Twenty Member Anti-Dumping Joint Statement*, *supra* note 105 (Working Paper co-sponsored by twenty delegations proposing alternative language that would prohibit a Member from disregarding the amount by which the export price exceeds the normal value for any comparisons).

[619] *May 2008 Comfort Paper, supra* note 613, Annex A, Delegations Comments on Chairman's Text accompanying Article 2.4.2 ("Some of the[ ] delegations believed that while the draft text went too far, zeroing might be permitted in some contexts. In particular, a number of delegations expressed the view that zeroing should be permitted in the context of the weighted average-transaction comparison methodology ('targeted dumping').").

[620] WTO, Negotiating Group on Rules, *Need for Effective Special & Differential Treatment for Developing Country Members in the Proposed Fisheries Subsidies Text*, TN/RL/GEN/155/Rev.1 (May 19, 2008) [hereinafter Fisheries S &D Treatment]. *See* Daniel Pruzin, *U.S., Others Slam Doha Round Proposal of Developing Countries on Fishery Subsidies*, 25 INT'L TRADE REP. (BNA) 745-46 (May 22, 2008).

tems.[621] They urged that a flat-out prohibition on all fishing subsidies was too stringent in theory, and too difficult in practice to implement, for poor countries.

Developed countries—particularly Australia, Canada, Chile, EU, Japan, Mexico, and the United States—castigated the joint proposal. So capacious were the carve-outs that they would swallow the basic prohibition against fishing subsidies. So parlous was the state of many fishing stocks that failure to manage them properly would doom them. The presence of Japan and Norway among the critics of the joint proposal led great credibility to the attack on it, because they are major fishing nations generally predisposed to oppose disciplines on fishing subsidies.

Developed countries pointed out many developing countries—including China, India, and Indonesia—are themselves major commercial fishing nations. The joint proposal would allow these developing countries to exploit until depletion the stocks in waters of developing and developed countries alike. By measuring Chinese and Indian boat lengths, and inquiring into the status of fishing stocks near these countries, the self-serving nature of the joint proposal was evident.[622] Of China's fishing fleet, 87 percent consisted of vessels twenty meters (sixty-six feet) long, and many of those vessels fish in waters distant from China. Of India's fleet, at least 75 percent, which accounts for 50 of total Indian fish production, would benefit from the exemptions in the joint proposal. Moreover, both China and India boast an execrable record on managing their fishing stocks. Of the stocks fished by India, the status of nearly 60 percent is unknown. In the seas off China, especially in the Northwest Pacific Ocean, most stocks cannot accommodate any more fishing.

VII. The Decisive July 2008 Ministerial Meeting

By the end of June 2008, WTO Director-General Pascal Lamy had run out of time, and surely patience. No longer could he dither about a meeting of trade ministers from the thirty-five or forty key Members engaged in Doha Round negotiations, at least not if he was to orchestrate a finale to the Round by the end of the calendar year.[623] Thus, on 25 June, he announced to WTO Ambassadors that the trade ministers from the United States, EU, G-20, G-33, and countries leading major alliances would be summoned back on 21 July for roughly a week. At that July Ministerial Meeting, they could make horizontal trade-offs on agricultural and NAMA issues, thereby laying the foundation to finish deals on services and trade remedies in the fall.[624]

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[621] Fisheries S &D Treatment, *supra* note 620, pt. IV.

[622] Pruzin, *supra* note 620 (quoting statistics from Oceana, a non-governmental organization (NGO) based in Washington, D.C., advocating in favor of strict multilateral fishing disciplines).

[623] *See* Laura MacInnis, *WTO Summons Trade Powers for Doha Push in July*, REUTERS, June 25, 2008, *available at* http://www.reuters.com/article/idUSL2515431920080625.

[624] The Chair of the Negotiating Group on Rules, Ambassador Guillermo Valles Galmés, faxed all participants in the rules negotiations on July 14, 2008 setting out plans to hold further talks in Fall 2008, with a view to issuing a revised text on AD and CVD remedies, and a paper on fisheries subsidy disciplines. *See also* WTO, Negotiating Group on Rules, *Report by the Chairman to the Trade Negotiations Committee*, ¶ 2, TN/RL/22 (July 17, 2008) (stating an intention to issue a revised text on trade remedies

The Director-General well-appreciated the bold risk. If the Meeting flopped, the Round would die right then or flounder for years. Added to that risk was tremendous pressure to hold the Meeting put on him by the United States, which was nearly desperate to clinch a deal before the Presidency of George W. Bush ended.[625] But, not to hold the Meeting, went the conventional wisdom, would cast the Round into oblivion until after 2009, at which time a new American administration would take power, the European Commission would change, and India would hold a general election. The obvious rebuttal to the conventional wisdom was that previous GATT Rounds had traversed election cycles. For example, the 1974-79 Tokyo Round, launched in the wake of the Watergate scandal, involved the Ford and Carter administrations, and spanned the 1975-77 Indian State of Emergency declared by Prime Minister Indira Gandhi, which was followed by the unprecedented general election defeat of the Indian Congress Party in 1977 by the Janata Party.[626] Similarly, the Uruguay Round was largely negotiated by the first Bush administration, through 1992, but completed by the Clinton administration in December 1993. Certainly, through both the Tokyo and Uruguay Rounds, governments changed in various European capitals as well.

In any event, the run-up to the July 2008 Ministerial Meeting was a predictable admixture of posturing and informal negotiations. Quick to the draw, EU Trade Commissioner Peter Mandelson, through his spokesman, Peter Power, was self-congratulatory and put the onus for a deal on other Members: "The European Union has shown *leadership*. We have been *forward* in showing *flexibility* and we will *maintain our offers*. But it is really now down to *others* to show similar flexibility."[627]

Commissioner Mandelson faced an internal attack on two flanks, from France and Germany. With France holding the rotating EU Presidency, French President Nicholas Sarkozy accused the Commissioner of "trying to force a trade deal on the EU that would destroy European jobs and sell out European farmers in the name of free trade."[628] The Commissioner shot back, dubbing the accusation "protectionist rhetoric."[629] Echoing the French President was German Economy Minister Michal Glos: "We need a balanced result for all areas of negotiation. That also means that developing nations such as Brazil, India and China need to

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and fishing subsidies, once modalities on agriculture and NAMA are achieved, in advance of anticipated September 2008 meetings).

625 *India to Find Convergence on Doha with Big Players*, ECON. TIMES, June 26 2008, http://economictimes.indiatimes.com.articleshow/msid-3169278.prtpage-1.cms.

626 *See generally* PRANAY GUPTE, MOTHER INDIA—A POLITICAL BIOGRAPHY OF INDIRA GANDHI (1992) (recounting and analyzing the momentous events of Prime Minister Gandhi's long reign).

627 Sandra O'Malley & Laura Macinnis, *WTO Summons Trade Powers for Doha Push*, REUTERS, June 25, 2008, *available at* http://news.ninemsn.com.au/article.aspx?id=586872 (Quoting comments made to reporters by Peter Power) (emphasis added).

628 *Mandelson Raps Sarkozy Over Trade*, BBC NEWS, July 6, 2008, *available at* http://news.bbc.co.uk/2/hi/business/7492065.stm.

629 *Id.*

make concessions. A conclusion of the Doha Round at any price is out of the question."[630]

Similarly, Padraig Walshe, President of the Irish Farmers Association (IFA), intoned: "President Sarkozy has said the French people will not hand their food security away and become dependent on unreliable and unpredictable South American countries to feed the French nation."[631]

Walshe continued by predicting the ominous result of the July 208 Draft Agriculture Text: It would mean the loss of 50,000 jobs in the food industry and services, and a further 50.000 farmers being put out of business.[632]

Of course, if the key Members and their powerful constituencies pointed the finger elsewhere, then they would doom the July Ministerial Meeting to nothing more than a restatement of entrenched positions. In a nutshell, that is what happened. Brazil's President, Luiz Inácio Lula da Silva, said the stall in the Doha Round was over whether developed countries—especially the United States and EU—would offer substantive concessions on agricultural market access and subsidies: "That is the fight. We are willing to be more flexible, as long as that does not mean forcing the stagnation of a country that is only now starting to grow, because we do not want to block the develop of our industry."[633]

The Chief Brazilian trade negotiator, Roberto Azevedo, added: "The [revised July 2008] WTO papers [discussed below] will only produce a deal if the rich countries improve their offer, showing leadership and reducing trade barriers."[634] The United States countered by arguing: "[I]t was time leading developing countries made market-opening offers 'commensurate with their increasing participation and role in the world economy.' "[635]

This reply seemed to trigger a most unfortunate and ugly incident. Brazil's Foreign Minister, Celso Amorim, accusing the United States and other developed countries of deception in trade negotiations that reminded him of Nazi tactics employed by Hitler's chief propagandist, Joseph Goebbels, commented to reporters at the WTO, "Goebbels used to say if you repeat a lie several times, it becomes a truth."[636]

The alleged "lie" was rich countries made dramatic agricultural concessions whereas poor countries had yet to offer meaningful NAMA concessions. As the

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630 Laura Macinnis, *Courage Needed to Clinch Doha Round—WTO's Lamy*, Reuters, July 4, 2008, *available at* www.alertnet.org/thenews/newsdeck/L04228426.htm.

631 *Revised WTO Texts Are Circulated*, Irish Examiner, July 12, 2008, http://archives.tcm.ie/irishexaminer/2008/07/12/story67132.asp (quoting Mr. Walshe).

632 *Id.*

633 *Lula Confident of Deal in Doha Round during July*, The Earth Times, July 2, 2008, www.earthtimes.org (follow "News Archives" hyperlink; search by article title).

634 *Developing Countries, EU Seek Changes to New WTO Negotiating Draft*, Domain-B.Com (India), July 12, 2008, http://www.domain-b.com/organisation/wto/20080712_wto.html (quoting Roberto Azevedo).

635 *WTO Issues New Farm, Industry Texts for Doha Round*, Econ. Times (India), July 11, 2008, http://www1.economictimes.indiatimes.com/articleshow/msid-3220454.prtpage-1.cms (quoting USTR Spokeswoman Gretchen Hamel).

636 Bradley S. Klapper, *Brazil Official's Nazi Reference Rocks WTO Talks*, Associated Press, July 20, 2008, http://abcnews.go.com/print?id+5410456 (quoting Celso Amorim, Brazilian Foreign Minister).

daughter of Jewish survivors of the Nazi Holocaust, the USTR, Ambassador Susan Schwab, rightly rebuked the analogy to Nazi propaganda, saying (through her spokesman) it was "incredibly wrong" and "insulting."[637] An apology, but not a retraction, came from Foreign Minister Amorim (albeit through a spokesman): "[The Minister] regrets if Susan Schwab or anyone else was upset by his comments on a historical fact. He certainly did not intend to hurt anyone's feelings, which he deeply respects."[638]

With charges, counter-charges, and personal venom flying, unsurprisingly, Chairman Stephenson announced he would leave his post in August as NAMA Chairman, coincident with the end of his term as Canada's WTO Ambassador.[639] He was succeeded, effective 2 October 2008, by Luzius Wasescha, the Swiss Ambassador to the WTO.[640]

In the critical weeks leading up to the Ministerial Meeting, virtually no substantive progress was made. Twelve WTO Members—Australia, Brazil, Canada, China, EU, India, Japan, Malaysia, Mexico, Pakistan, South Africa, and the United States —discussed minimum additional flexibilities for CUs to assist them in maintaining their CET.[641] The twelve Members agreed to the idea South Africa would get special flexibility (beyond that provided to other developing countries), by virtue of its participation in *SACU*. They also accepted the idea that other *SACU* states would be excluded from any Doha Round tariff cut requirements, because they are least developed countries. But, there was no agreement among the twelve Members, however, on precisely what percentage of tariff lines South Africa would be permitted to protect from those requirements.

Additionally, on special flexibilities for CUs, the twelve Members coalesced around a new option that would establish flexibilities for Brazil in reference to its diverse external trade, which is more diverse than the other *MERCOSUR* members. The other *MERCOSUR* countries, particularly Argentina, would have relatively greater ability than Brazil to shield their sensitive sectors. As SVEs, Paraguay and Uruguay would receive even special flexibility to shield industrial product tariff lines from tariff cuts, and benefit from lower tariff reduction obligations, than either Argentina or Brazil. Though the option was a modest concession by the United States and EU, Argentina dismissed it. Argentina explained that if it selected the Swiss Formula Coefficient option for developing countries of 19-21, then the supposed concession would make it worse off.[642] Under that Coefficient option, Argentina would be able to shield 14 percent of its industrial tariff lines from agreed-upon tariff reductions (subjecting them to half of the agreed cuts), or shield tariff lines accounting for 19 percent of its trade

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637 *Id.* (quoting Sean Spicer, USTR spokesman).

638 *Id.* (quoting Ricardo Neiva Tavares, spokesman for Celso Amorim, Brazilian Foreign Minister).

639 *See* Laura MacInnis, *WTO Mediator to Leave, Doha Round Under Pressure*, Reuters (London), June 20, 2008, http://www.reuters.com/article/GCA-Agflation/idUSL209095420080620.

640 *See* WTO, 2008 News Items, *Swiss Ambassador is New Chair of Non-Agricultural Negotiating Group* (Oct. 2, 2008), http:// http://www.wto.org/english/news_e/news08_e/nama_2oct08_e.htm.

641 *See* Pruzin, *supra* note 581, at 944-46.

642 *See* Daniel Pruzin, *Argentina Dismisses NAMA Compromise On Sensitive Industries in Customs Unions*, 25 Int'l Trade Rep. (BNA) 979-80 (July 3, 2008).

volume from the full cuts. Applying the CU proposal, Argentina would have to share the designation of sensitive lines with the other *MERCOSUR* countries. Consequently, it would end up getting to shield roughly 10 percent of its own lines from the full cuts. Thus, Argentina argued the option would leave it with less favorable treatment than other developing countries not in a CU.

A. Synopsis of the July 2008 Draft Agriculture Text

In an effort to provide WTO Members with a cleaner, simpler document, laying out stark choices, Chairman Falconer issued on 10 July 2008 yet another Draft Agriculture Modalities Text.[643] The 113-page July 2008 Text incorporated all of the progress made during the last two months on the basis of the May Text. The problem, obviously, was the Chairman had little substantive material on which to base a revised Text, as there had been scarcely any progress. Yet, with Ministers from the Members converging on Geneva in days, each requiring time to study the new Text, he had no choice but to make a best effort.

Accordingly, the July 2008 Draft Agriculture Text in all material respects is the same as its May predecessor.[644] The new Text covered the familiar topics, and identified the choices facing the Members. Specifically, on the following subjects, there was no change between the May and July 2008 Texts, with the latter document (aside from episodic formatting or stylistic improvements) being a verbatim repetition of the former document:[645]

- Domestic Support – OTDS
- Domestic Support – Green Box
- Domestic Support – Cotton Subsidies
- Market Access – Tariff Escalation and Simplification[646]
- Export Restrictions
- Amendments to the *Agriculture Agreement*[647]

As with the stability between the February and May 2008 Texts, the lack of change on these important topics between the May and July 2008 Texts did not

643 *See* WTO, Committee on Agriculture, Special Session, *Revised Draft Modalities for Agriculture*, TN/AG/W/4/Rev.3 (July 10, 2008) [hereinafter July 2008 *Revised Draft Modalities for Agriculture*].

644 This Synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the July and May Texts, *Compare id.*, *with* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440. *See also* WTO, *Unofficial Guide to the 10 July 2008 'Revised Draft Modalities,'* http://www.wto.org/english/tratop_e/agric_e/ag_modals_july08_e.htm.

645 Generally speaking, the Annexes in the two documents (except as noted below) are identical or closely resemble one another. *Compare* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, *with* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440.

646 The Tariff Escalation List in Annex D to the July 2008 Draft Agriculture Modalities Agreement contained a new primary product category (Wheat Other, HS 1001.90), with eight corresponding processed product categories (*e.g.*, gingerbread, HS1905.20, and waffles and wafers, HS 1905.32). July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, at 46.

647 Annex B to the July 2008 Draft Agriculture Modalities Text contained a technical elaboration to ensure that decoupled income support, and structural adjustment assistance provided through investment aids, may be transferred between producers or landowners, and still qualify as exempt from reduction commitments. *Id.* at 35.

mean the WTO Members had healed their schisms. To the contrary, it could reasonably be inferred that they had not budged.

On the following topics the July 2008 Draft Text introduced changes. With a few exceptions, virtually all of them were minor refinements in detail. None adduced an important breakthrough – a healing of a schism – on any issue.

• Domestic Support – AMS

Concerning special and differential treatment in respect of cuts to total AMS, the July 2008 Text stated developing countries with a total AMS level bound at or below $100 million would be exempt from any reduction commitments.[648] In effect, the Text created a *de minimis* rule for poor countries with low levels of Amber Box support, excepting them from the obligation to cut this support.

• Domestic Support – Blue Box and *De Minimis* Support

The July 2008 Text left nearly all Blue Box provisions unchanged.[649] Only on special and differential treatment for developing countries did it alter two benchmarks. The changes affected WTO Members in that group that have no product-specific entitlement to a Blue Box limit for a particular product, and no support in the Amber Box for that product.

Such Members could schedule a Blue Box limit for an individual agricultural product, but only if the total support for that product does not exceed 30% of the overall Blue Box limit.[650] The May Text had set the threshold at 25%.[651] The July Text also changed the maximum Blue Box subsidy for any single product from 7.5%, in the May Text, to 10% of the overall Blue Box limit.[652] In essence, these two changes reflected a less pro-free trade outcome. The first change raised the threshold for a developing country to schedule a product-specific Blue Box limit. The second change increased the amount of Blue Box funding the product in question could get.

The July 2008 Text altered from its predecessor the reduction commitment on *De Minimis* Support. The May Text called on WTO Members to cut their *De Minimis* Support by 50 or 60%. The July Text eliminated the latter possibility.[653] Members would be obliged to commit to a 50% cut on that support. Obviously, a 50% cut is a relatively less ambitious rule, from a free-trade perspective. Hence, the change evinced back-sliding by Members on their willingness to cut this category of farm subsidies. As before, developing countries with Amber Box com-

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648 *Compare id.* ¶ 16 at 4, *with* May 2008 *Revised Draft Modalities for Agriculture, supra* note 440, ¶ 16 at 5. The July 2008 Text notably included a provision previously absent from the May 2008 Text: "However, developing country Members with Final Bound Total AMS levels at or below $US 100 million shall not be required to undertake reductions." July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶ 16.

649 July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶¶ 35-51.

650 *Id.* ¶ 50, at 10.

651 *Compare* May *2008 Revised Draft Modalities for Agricultur*e, *supra* note 440, ¶ 50, at 11, *with* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶ 50, at 10.

652 *Compare* May 2008 *Revised Draft Modalities for Agriculture, supra* note 440, ¶ 50, at 11, *with* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶ 50, at 10.

653 *Compare* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 30, at 6, *with* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 30, at 7.

mitments would have to make two-thirds of the cuts as developed countries, meaning they would cut their *De Minimis* Support level from 10% of the value of production to about 6.7% of the value of production.

But, on a related matter, the July Text was more ambitious than its predecessor. It eliminated the phase-out rule in the May Text that Members make the *De Minimis* Support reductions through five equal annual installments. The new July Text said the reductions would have to be made effective on the first day of the implementation period of any Doha Round accord.[654] In brief, the July Text committed Members to make less drastic cuts to *De Minimis* Support, but to make those cuts right away.

- Market Access – Tiered Tariff Reductions

In all substantive respects on market access, the July 2008 Text was an exact reincarnation of its predecessor. There were two minor differences. First, in a footnote, the new Text identified Bolivia as an SVE.[655] Second, the July 2008 Text reduced the flexibility RAMs would have to moderate the cuts to farm tariffs they otherwise would be obliged to make under the tiered-formula. They would be treated like developing countries, but could deviate from the cuts incumbent on those countries by up to eight percentage points.[656] As the May Text permitted up to a ten percentage point deviation,[657] thus the change of two points suggested a slight movement in favor of trade liberalization obligations for RAMs.

- Market Access – Sensitive Products, Tariff Caps, and TRQ Expansion

The July 2008 Text offered an notable clarification to TRQ expansion rules for developed countries that might, after application of all their tariff reduction commitments, still have duty rates on some tariff lines in excess of 100 percent *ad valorem*.[658] The affected WTO Members included Iceland, Japan, Norway, and Switzerland.[659]

The general thrust of the clarification, in keeping with the aspirations of poor countries, was a tariff cap: No developed country should have an agricultural duty rate above 100% duty rate. However, the cap was subject to a complex exception. A developed country could maintain a duty rate above 100% on a good it designated as "Sensitive," if it applied to that good a TRQ expansion of 0.5 percent greater than the expansion requirement for Sensitive Products with in-quota duty rates below 100%. In other words, a rich country could exceed a 100% tariff rate, albeit with a supra-generous increase in quota volume. Precisely whether that generosity would matter, when the in-quota rate was stuck above 100%, was uncertain.

As for a duty rate over 100 percent on a non-Sensitive Product, the general rule proposed was such instances would be limited to one or two percent of tariff

[654] July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 30, at 6.

[655] *Id.* ¶ 65, at 13 n.9.

[656] *Id.* ¶ 66, at 13.

[657] *May 2008 Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 66.

[658] July 2008 Revised Draft Modalities for Agriculture, *supra* note 643 ¶ 76, at 14-15 n.13.

[659] *Id.* ¶ 76, at 15 n.14.

lines. WTO Members affected—namely, Iceland, Japan, Norway, and Switzerland—would have to pay compensation to the rest of the Membership for the privilege of maintaining a tariff rate above 100 percent on a non-Sensitive Product. They would have to have to: (1) expand the TRQs on all their Sensitive Products by an additional 0.5 percent of domestic consumption; (2) accelerate tariff reductions by two years faster than the normal implementation; or (3) add five percentage points to the tariff cuts they are obliged to make. In other words, the July 2008 text strengthened the incentive to eliminate tariffs above 100 percent, by distinguishing "Sensitive" from "non-Sensitive" Products, and imposing a heavy cost on the latter group.

Equally important, the July 2008 Text also set out a new rule as to what products Members might designate as "Sensitive."[660] Either no tariff line could be designated "Sensitive" unless it already was subject to a TRQ before the Doha Round, or any tariff line could be designated as such, regardless of its pre-Doha Round statues. The two alternatives, of course, were radically different. The first would incline Members toward free trade, by drastically restricting farm goods they could designate as "Sensitive." The second would create much more policy space for protection. Either way, for all WTO Members, the permissible range of deviations from the standard cut remained the same as in the May Text—one-third, one-half, or two-thirds of the agreed-upon reduction.

Finally, and perhaps most notably, Attachment A, concerning Sensitive Product categories, and Attachment A(i), concerning partial designation modalities for Sensitive Products, contained a number of technical enhancements. Helpfully, the categories Members intended to designate as "Sensitive" were identified in Attachment A.[661] Unhelpfully, however, Attachment A(i)—occupying sixteen pages—was barely more comprehensible than the version of it in the May Text.[662] As before, domestic consumption would be the yardstick to determine the extent to which quota sizes for Sensitive Products would need to be expanded.[663] Generally, for a good declared "Sensitive" at the detailed HS 8-digit level, the expansion would depend on the estimated consumption of the broader, HS 6-digit level category in which that Sensitive Product is classified. The thrust of Attachment A and A(i) was to explain how domestic consumption would be calculated for Sensitive Products, particularly in light of the fact that consumption would have to be estimated using a proxy, namely, trade figures.

Attachment A laid out, at the 6-digit level, the product categories (Core and Non-Core) that could be designated as Sensitive. Two other Attachments (B and D) explained precisely how to calculate domestic consumption for each Sensitive Product category. The methodology consisted of two steps.

In Step 1, consumption would be estimated at the HS 6-digit level. That is, for each detailed Sensitive Product type, consumption would be a percentage of consumption in the relevant broad product category. The percentage would de-

[660] *Id.* ¶ 80, at 15.

[661] *Id.* Attachment A, at 74-93.

[662] *Id.* Attachment Ai, at 99-115.

[663] *Id.* at 99.

pend on the share of trade of the detailed product in the broad category. That percentage would be adjusted to give a higher weighting to Core Products (*e.g.*, 67 percent) than to Non-Core Products (*e.g.*, 23 percent). This adjustment would ensure Core Products, which are more heavily traded than Non-Core Products, would account for at least 90 percent of each HS 6 category. In Step 2, consumption would be estimated at the HS 8-digit level. The percentage of consumption at the 6-digit level would be adjusted, using the import data of the Member in question, at the 8 digit level. The end result would be a percentage figure for domestic consumption of a detailed Sensitive Product, which would be used to set the expansion of the in-quota threshold of a TRQ for that Product. To make matters yet more complicated, special variations on these two Steps would apply to certain Sensitive Products, particularly dairy (eggs and milk), fruit, and vegetables.

• Market Access – TRQs Generally (Reduction of Duties and Administration)

On TRQs generally (whether or not they apply to a Sensitive Product), the July 2008 Text contained the same ideas on administration as its predecessor.[664] However, it streamlined the two options for reducing bound in-quota tariff rates from May Text into a single proposal.[665] Developed countries would be obliged to cut all in-quota tariffs either (1) by between 50 and 70%, or (2) to rates between zero and 15%, whichever yields the lower tariff. The implementation period for developed countries would be the same as the time frame for their tiered tariff cuts, except they would have to cut immediately to zero any in-quota MFN rate of 5 percent or less.[666]

Developing countries would have a less stringent obligation, in terms of cutting their in-quota duty rates, by a factor of one half (and not be compelled to choose the lower of the aforementioned two options). These countries also would not have to eliminate an in-quota rate of 5% or less. RAMs would get enhanced special and differential treatment. Generally, they would take on only one-third the obligation to cut in-quota duties imposed on developed countries, and would not need to cut in-quota rates under 10 percent. Newly acceded RAMs[667] the SVEs[668] not need to make any reductions to their in-quota duty rates.

Notably, Brazil argued the TRQ provisions in the July 2008 Text were a step backward from previous ideas in the May Text. That was because the new Text opened up the possibility that WTO Members could establish new TRQs on farm products that they had not protected during the Uruguay Round. This opportu-

[664] Annex E to the July 2008 Draft Agriculture Modalities Text contained modest changes on details about a proposed TRQ under fill mechanism. *See* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, at 48-49.

[665] *Compare id.* ¶ 105, at 18, *with* May *2008 Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 103.

[666] July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 105, at 18.

[667] Newly acceded RAMS include Macedonia, Saudi Arabia, Tonga, Ukraine, and Vietnam. *Id.*

[668] SVEs include Albania, Armenia, Georgia, Kyrgyz Republic, and Moldova. *Id.* ¶ 105, at 18 n.17.

nity could be a "black box in which any product could get in, with serious consequences for our interests in the markets of the rich nations."[669]

Brazil was particularly concerned developed countries might create TRQs for ethanol, of which it is the world's largest exporter.[670]

• Market Access – Special Products

The July 2008 Text modified three key figures affecting Special Products: how many goods could receive the "Special Product" designation; how many of them could be exempt from any tariff cut; and what the average tariff cut would be.[671] The changes appeared to balance a free trade outcome in which Special Product designations would be tightly restricted, none would be shielded entirely from tariff cuts, cuts, and the average cuts would be steep, and a protectionist result in which developing countries would have plenty of policy space in these areas.

Like its predecessor, the July 2008 Text embodied a two-tier system for "Special Products." For Special Products in the first tier, or category, the May Text said the minimum and maximum entitlement for "Special Product" designations would be 8 and 20% of tariff lines, respectively.[672] The July Text narrowed the gap to between 10 and 18 %.[673] For these products, the May Text called for an overall average cut on duty rates protecting Special Products of 15%, with a minimum cut of 12%, and a maximum cut of 20%, on each such Product.[674] The July Text simply said the overall average cut would be between 10 and 14%, but deleted any minimum or maximum figures.[675]

Special Products in the second tier, or category, would get additional protection. The May Text stated that up to 40% of these "Super-Special Products" could be shielded from any tariff reduction.[676] The July Text said up to 6 percent of tariff lines could be immunized from a cut.[677]

• Market Access – Tropical Products and Preference Erosion[678]

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669 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) (quoting Brazilian Foreign Minister Celsio Amorim).

670 *Id.*

671 *Compare* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 120, at 20, *with* May *2008 Revised Draft Modalities for Agriculture, supra* note 440 ¶ 118, at 20-21. The July Text also slightly changed the overall average tariff cut on Special Products of RAMs. *Compare* July *2008 Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 122, at 20 (giving them a one-tenth flexibility) *with* May 2008 *Revised Draft Modalities for Agriculture, supra* note 440 ¶ 120, at 21 (giving RAMs the flexibility to derogate from cuts by two percentage points *ad valorem*).

672 *May 2008 Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 118, at 20-21.

673 *July 2008 Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 120, at 20.

674 *May 2008 Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 118, at 20-21.

675 *July 2008 Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 120, at 20.

676 May 2008 *Revised Draft Modalities for Agriculture, supra* note 440 ¶ 118, at 20-21 (noting that an additional 1 per cent of tariff lines without tariff cuts shall be available to RAMs).

677 July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 120, at 20.

678 Annex G to the July 2008 Draft Agriculture Modalities Text expanded the list of tropical products to include a wide array of fruit and vegetable items, coffee and tea, cigarettes and cigars, and rum. July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, at 53-56. It may be observed that the

The July 2008 Text was like its predecessor on tropical products and preference erosion, but the likeness did not intimate consensus. One problem was agreeing to the list of products that would count as "tropical" and, therefore, be subject to tariff cuts that would (depending on the steepness of the reduction) erode a preference. Negotiations based on the Text focused on a list of forty two products. This problem appeared resolved via an agreement to defer to the ACP interest in preserving preferential access to the EU market on bananas, pineapples, rum, and sugar by excluding these products from the list.[679]

A second—but unresolved—problem was a difficulty that had plagued the world trading system since before the creation of the WTO. The EU battled several Latin American countries over bananas. Following losses in eleven GATT and WTO cases, the EU promised to implement a single-tariff (i.e., tariff-only) regime by 1 January 2006, and grant at least the same level of market access to third country exporters as to its preferred ACP trading partners.[680] Indeed, without such a promise, the third country producers had threatened in November 2001 to block the launch of the Doha Round.

Initially, the EU set the tariff at €230 per ton. Latin American countries challenged that rate successfully in two WTO arbitration proceedings, as the €230 level failed to maintain equivalent market access for their banana exports to the EU. The EU responded by dropping the tariff to €176 per ton, but also set up an annual duty-free quota of 775,000 for ACP exporters. Ecuador (the world's largest banana exporter) and the United States (headquarters of two major banana distributors, Chiquita and Dole) prevailed against the EU in WTO proceedings, obtaining rulings that the EU quota was illegal because it unfairly discriminated among WTO Members. To avoid further adjudicatory proceedings, WTO Director-General Pascal Lamy agreed to mediate a solution. His report, delivered on 12 July 2008, suggested a compromise whereby the EU would make an immediate down payment to Latin American exporters of a large cut to its €176 per ton tariff (effective 1 January 2009), and make further cuts across a defined transition period.

The Lamy compromise pleased no one. The EU—particularly its two major banana producers, France and Spain—insisted that if it cuts its banana tariff via the compromise, then the compromise must unambiguously permit it to exclude bananas (along with melons, rum, and sugar) from the list of tropical products

inclusion for any trade liberalization benefits of tobacco and tobacco-related products, as tropical products, is ludicrous, in light of their well-known health risks.

679 *See Progress on EU–Latin American Banana Deal Made Before Collapse of Doha Round Talks*, 25 INT'L TRADE REP. (BNA) 1160-61 (Aug. 7, 2008) [hereinafter *Progress on EU–Latin American Banana Deal Made Before Collapse of Doha Round Talks*]. In respect of preference erosion, pineapples appear not to have been a source of great controversy between ACP and Latin American exporters of the fruit, because the latter group enjoys preferential access to the EU market through the EU Generalized System of Preferences (GSP). *Id.*

680 *See* Raj Bhala, *The Bananas War*, 31 MCGEORGE LAW REV. 839, 951-52 (2000); Alan Beattie, *Expectations Low as Doha Trade Talks Commence*, FIN. TIMES (London), July 22, 2008, at 4; Daniel Pruzin, *WTO's Lamy Delivers Compromise Text Aimed at Resolving Banana Dispute*, 25 INT'L TRADE REP. (BNA) 1048-49 (July 17, 2008) [hereinafter Pruzin, *WTO's Lamy Delivers Compromise Text Aimed at Resolving Banana Dispute*] (quoting an unnamed Latin American official).

slated for Doha Round tariff reductions[681]. That is, the EU should be allowed to declare bananas as a "Sensitive Product," so that it does not have two legal obligations to slash banana tariffs. The ACP countries feared for their historical preferences. On the one hand, if a banana tariff cut through the Lamy compromise were too steep, then their access to the EU market would be jeopardized. On the other hand, if bananas were not designated as "Sensitive" and subject to the July 2008 Text proposal of an 85 percent tariff reduction, the new tariff would be €26.4 per ton, effectively eroding the ACP margin of preference. Latin American countries attacked the Lamy compromise as "very much biased" in favor of the EU, which they said already had agreed in negotiations to an immediate 20 percent cut in the €176 figure.[682] The implementation period, too, was a battlefront, with the EU arguing for a transition period of fifteen years, and the Latin American exporting countries insisting on four or five years.[683] In brief, the Bananas War heated up and threatened the entire Doha Round.

- Market Access – SSGs

The July 2008 Text left unchanged from the May Text the SSG proposals for developed countries. They would have to cease using the SSG, or reduce the number of products to which they could apply this remedy to 1.5 percent of tariff lines. However, the July 2008 Text clarified that developing countries have two stark options in respect of SSGs.[684] First, the new Text said developing countries could apply the SSG on the same terms and conditions as under the *Agriculture Agreement*. Second, the scope of coverage of products to which the SSG remedy would apply would be limited to no more than 3 percent of tariff lines.

Neither option dealt with the problem many developing countries face, namely, in the Uruguay Round they gave up their right to use the SSG remedy under Article 5 of the WTO *Agriculture Agreement*.[685] They are ineligible for use of the SSG, because the remedy applies only to products that have been tarrified, i.e., farm goods that before the Uruguay Round had been protected by non-tariff barriers (*e.g.*, discretionary import licensing, import bans, quotas, or variable duties), but subsequently by tariffs (because of conversion from non-tariff barriers to duty rates). On several products, many developing countries elected to establish ceiling bindings on their levels of non-tariff barrier protection, but not convert that protection to tariffs. For such products, the SSG technically was inapplicable.

- Market Access – SSMs

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[681] Pruzin, *WTO's Lamy Delivers Compromise Text Aimed at Resolving Banana Dispute*, *supra* note 680

[682] *Id.* (quoting an unnamed Latin American official).

[683] *Id.*

[684] The two options for developing countries are found in Paragraph 118 of the July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643 ¶ 118.

[685] Agreement on Agriculture, *supra* note 27, art. 5.

The July 2008 Text removed an important limitation from the May 2008 Text concerning the scope of SSMs by developing countries.[686] The earlier Text restricted the use of an SSM to no more than between three and eight products in any twelve month period. The July Text said the SSM, in principle, could be invoked on all tariff lines. Manifestly, that statement vastly expanded the scope of the remedy, though the twelvemonth limit remained in the new text.

The July 2008 Text simplified the two options laid out in the May Text for a developing country to apply a volume-based SSM trigger. The new proposed trigger essentially was an amalgamation of the earlier two, and is summarized in Table 7.[687] The essential idea, of course, is the greater the import volume surge over a defined threshold, the more severe the protective remedy allowed.

Table 7:
Volume-Based Trigger for SSM Remedy in July 2008 Draft Agriculture Modalities Agreement

Tier	Import Volume – Actual Imports in Any Year Measured Against Base Imports (rolling average of imports in preceding 3-year period)	SSM Remedy – Maximum Permissible Additional Duty (on top of Applied Rate)
Lowest	Actual import volume exceeds 110 percent, but not 115 percent, of Base Imports	25 percent of the current bound MFN tariff, or 25 percentage points, whichever is higher
Middle	Actual import volume exceeds 115 percent, but not 135 percent, of Base Imports	40 percent of the current bound MFN tariff, or 40 percentage points, whichever is higher
Highest	Actual import volume exceeds 135 percent of Base Imports	50 percent of the current bound MFN tariff, or 50 percentage points, whichever is higher

The import volume triggers appeared to synthesize calls by the G-33, which proposed allowing an SSM when imports are as little as 5 percent over the average of the preceding three years, and *MERCOSUR*, which sought to limit the remedy to a maximum additional duty of between 20 and 30%.

The July Text also changed the key figure for triggering a price-based SSM. The May Text required a 30 percent drop in the price of the product in question before a developing country could apply an SSM.[688] The July Text eased the requirement, mandating only a 15 percent decline.[689]

686 *Compare* July 2008 *Revised Draft Modalities for Agriculture, supra* note 643 ¶ 123, at 21, *with* May *2008 Revised Draft Modalities for Agriculture*, *supra* note 440 ¶ 121, at 21.

687 *Compare* May 2008 *Revised Draft Modalities for Agr*iculture, *supra* note 440 ¶ 124, at 22, *with* July 2008 *Revised Draft Modalities for Agriculture, supra* note 643 ¶ 124, at 21.

688 *See* May 2008 *Revised Draft Modalities for Agriculture*, *supra* note 440, ¶ 126, at 22-23 (specifying a trigger price equal to 70 percent of the average monthly MFN-sourced price).

689 *See* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶ 126, at 21 (specifying a trigger price equal to 85 percent of the average monthly MFN-sourced price).

The July Text contained a new constraint on both the volume- and price-based SSM remedy.[690] As a general rule, the upper-limit of a tariff (that is, the bound MFN rate plus the remedial duty) would be the pre-Doha Round (i.e., Uruguay Round) bound tariff. However, this constraint would not affect least developed countries (as long as they did not go over the pre-Doha Round bound rate by more than 40%), SVEs (as long as they did not exceed the pre-Doha Round bound rate by more than 20 percent for a maximum of 10-15% of tariff lines), or developing countries (as long as they did not exceed the pre-Doha Round bound rate by 15% on a maximum of two to six products). In other words, the constraint aimed to ensure that a post-Doha Round binding, plus an SSM remedy, would not put affected exporting countries worse off than they had been before the Doha Round. The flexibility, however, afforded to least developed and developing countries, and SVEs, meant that exporters indeed could be worse off than before.

• Market Access – Least Developed Countries

The May Text essentially reverted to the February 2008 Text on the subject of least developed countries.[691] That is, the May Text incorporated the language from the Decision on Measures in Favor of Least Developed Countries, taken at the December 2005 Hong Kong Ministerial Conference, with minor updating adjustments. Effectively, then, the May Text affirmed least developed countries are not obligated to cut their agricultural tariffs, and developed countries—plus developing countries able to do so—must give immediate and lasting duty-free, quota-free access to 97 percent of all products originating in least developed countries.

• Export Competition

The July 2008 Text added a provision for food crises, ensuring that commitments made to NFIDCs during the Uruguay Round and the DDA are undiminished by any other provision of the Text.[692] Indubitably, this provision reflected the global economic context in which it was drafted, namely, one of sharp food price increases threatening tens of millions of people, especially in poor countries.

The above synopsis makes clear the July 2008 Text was no more of a watershed than its predecessor. Aside from narrowing gaps on a few details, the status of the agriculture negotiations, remained in the summer of 2008 where they had been in the winter of 2007.

Also manifestly apparent is that the WTO Members were engaged in an exercise not so much of agricultural trade liberalization, and hardly of free trade in farm products, but of managed trade. Flexibilities contemplated for many RAMs, approximately forty-five SVEs, and various other countries that managed to plead successfully their case for gentle treatment would permit over one-third of the Membership to deviate from agreed upon liberalization obligations. Even

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690 *See id.* ¶¶ 133-136, at 22-23.

691 *Compare* July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶¶ 142-144, *with* February 2008 *Draft Modalities for Agriculture*, *supra* note 251, ¶¶ 140-142.

692 July 2008 *Revised Draft Modalities for Agriculture*, *supra* note 643, ¶ 32, at 7.

those obligations, if fully implemented, did not add up to free trade. To be sure, the argument that no one size can or ought to fit all Members is compelling, most obviously for least developed countries. But, the July 2008 Text confirmed a subtle but important shift in presumption, from one size is designed for all, with truly exceptional cases of special tailoring, to custom tailoring for each Member, except Members unlucky enough to prove they deserve it.

B. Synopsis of the July 2008 Draft NAMA Modalities Text

An effort in the NAMA negotiations parallel to that in the farm talks took place. Chairman Stephenson issued a revised document, on 10 July 2008, endeavoring to give Members an improved text on which to base negotiations.[693] That text, like its counterpart on agriculture, laid out stark choices. It included developments in the early summer, yet as in the farm talks, little headway had been made. The 112-page July 2008 Draft NAMA Modalities Text was the Chairman's best effort to give Ministers what they needed. Yet, there was nothing novel in it.

Essentially equivalent to its May predecessor, the new Text covered familiar topics, and spotlighted the choices facing the Members.[694] There were no changes whatsoever, meaning WTO Members had not narrowed, much less healed, existing schisms on the following matters:

- Product Coverage[695]
- Swiss Formula Coefficients
- Supplementary Modalities, Elimination of Low Duties, Non-tariff Barriers, Capacity Building Measures, and Non-Agricultural Environmental Goods[696]

On the following topics, the July Text provided modest alterations to its predecessor, indicating a modicum of consensus among the Members:

- Implementation Period

[693] WTO, 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 Modalities for NAMA*].

[694] This Synopsis is based on a paragraph-by-paragraph, line-by-line comparison of the July 2008 *Draft Modalities for NAMA, id.,* and May 2008 *Draft Modalities for NAMA*, supra note 442. *See also* WTO, Chairperson's Texts 2007, *The July 2008 NAMA Modalities Text Made Simple*, http://www.wto.org/english/tratop_e/markacc_e/nama_10july08_e.htm [hereinafter *July 2008 NAMA Modalities Text Made Simple*].

[695] Notably, the July 2008 *Draft Modalities for NAMA*, *supra* note 693, at 13 n.11, eliminated all goods previously listed by the EC and Mexico in the May 2008 *Draft Modalities for NAMA, supra* note 442, at 12 n.7. The change meant the EC and Mexico apparently agreed to include products (two for the EC, HS 1603.00 and 3302.10, and one for Mexico, 1603.00) in the NAMA tariff cutting modalities that they previously had sought to schedule as agricultural goods. Whether that agreement would result in slower trade liberalization depended on a comparison between the applicable NAMA and agriculture tariff cutting modality for the goods in question.

Additionally, the EC removed square parentheses around the figure 40 in Annex 2, concerning the number of tariff lines in its indicative product description, July 2008 *Draft Modalities for NAMA*, *supra* note 693, Annex 2 at 16, and the United States did likewise in Annex 3 around the figure 25, *id.* Annex 3 at 17. Pakistan and Sri Lanka made similar changes in Annex 4.

[696] The July 2008 Draft NAMA Modalities Text offered cleaner formatting and updated timetables for negotiations on removing non-tariff barriers, which also were reflected in Annex 5 (concerning textual proposals on non-tariff barriers). *Compare* May 2008 *Draft Modalities for NAMA*, *supra* note 442, Annex 5, *with* July 2008 *Draft Modalities for NAMA*, *supra* note 693, Annex 5.

The July 2008 Text picked the longest implementation options from the May Text.[697] That is, the May Text said period during which cuts to industrial tariffs would be applied would be four or five years (in five or six equal annual rate reductions, respectively) for developed countries, and eight or ten years (in nine or eleven equal annual rate reductions, respectively) for developing countries. The July Text identified five years (in six installments) for developed countries, and ten years (in eleven installments) for developing countries, effective 1 January following the entry into force of any Doha Round agreements. Certainly, by deferring tariff cuts by one extra year, from the perspective of trade liberalization, the July Text was less ambitious than its predecessor.

- The Mark Up Rate

The July 2008 Text called for a mark up rate of twenty-five percentage points to applied MFN rates as a base level (as of 14 November 2001, when the Doha Round was launched) for unbound tariff lines from which to make any Doha Round tariff reductions. In so doing, it split the difference between the twenty and thirty percentage points suggested in the May Text.[698]

- Flexibilities for Developing Countries

The July 2008 Text made no changes to the Swiss Formula as it would affect developing and least developed countries, i.e., in respect of Coefficients x (19-21), y (21-23), or z (23-26). In contrast to its predecessor, the new Text contained no square parentheses around the figures for y.[699]

- Further Flexibilities for Certain Members and CUs

The new Text elaborated on details of *sui generis* flexibilities for certain poor countries and CU. First, all countries in the *SACU*—Botswana, Lesotho, Namibia, and Swaziland, as well as South Africa—would have recourse to a common list of flexibilities in their tariff schedules.[700] Plus, they would be permitted to add percentage points to the percent of non-agricultural tariff lines they could shield from the full force of formula cuts.[701] The Text slated *SACU* countries for Coefficient y, under which a normal developing country could apply less than formula cuts to up to 10 percent of industrial tariff lines (as long as those lines did not exceed 10 percent of the total value of that country's non-agricultural imports).[702] With the special flexibility, *SACU* countries could apply less than formula cuts to between 11 and 16 percent of their industrial tariff lines. In

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[697] *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 6(f) (tariff reductions for developed Members shall be implemented in 5 years), *with* May 2008 *Draft Modalities for NAMA, supra* note 442, ¶ 6(f) (tariff reductions for developed Members shall be implemented in [4 - 5] years).

[698] *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 6(b), *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 6(b).

[699] *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(a)-(c), *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 7(a)-(c).

[700] July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(e).

[701] *Id.*

[702] *Id.* ¶ 7(b)(i).

brief, the May Text afforded special treatment only to South Africa, whereas the July Text extended it to all of *SACU*.[703]

Second, the July 2008 Text singled out *MERCOSUR* countries by name for favoritism.[704] 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.

Significantly, Argentina adamantly rejected this approach.[705] It argued that because of the CET associated with *MERCOSUR*, the individual countries in *MERCOSUR* are compelled to divide up among themselves the total number of tariff lines they are allowed to protect.[706] Indeed, that would be true in respect of any CU. One country within *MERCOSUR*, but not another, might consider a line to be sensitive. Thus, the total number of lines they can shield must be large enough to accommodate the varying individual country interests. From Argentina's perspective, the July 2008 Text was wanting in this regard.

Third, the new Text explained Venezuela would be treated as an SVE.[707] Venezuela succeeded in arguing that it deserved unique treatment because of the highly concentrated pattern of its imports, and its particular development needs. Thus, the Text slated Bolivia for Coefficient x, 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.[708] That is, a normal developing country applying Coefficient x would be able to apply less than formula cuts on up to 12 to 14 percent of industrial tariff lines, as long as those lines do not exceed 12 to 19 percent of the total value of its non-agricultural trade.[709] Venezuela would have a trade limitation higher than 12 to 19 percent of its non-farm trade. That success, however, did not persuade the United States, which said there were twenty other developing countries that met the SVE criteria better than Venezuela.[710]

• The Anti-Concentration Clause

The new Text contained an anti-concentration clause, with two sharp rules.[711] Developing countries would be forbidden from excluding an entire HS Chapter from tariff reductions.[712] Moreover, in each HS Chapter, these countries would

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703 *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(e) *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 7(d).

704 *See* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(f).

705 *See* Haskel & Taylor, *supra* note 669, at 1047.

706 *Id.*

707 *See* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(g).

708 *Id.*

709 *Id.* ¶ 7(a)(i).

710 *See* Pruzin, *supra* note 370, at 1013-15.

711 *See* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 7(d).

712 *Id.*

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).[713] Significantly, the Text did not indicate what the minimum figures would be—and for good reason. India and other developed countries remained fiercely opposed to the clause.[714]

• Further Flexibilities for Members Engaged in Sectoral Negotiations

The thrust of the July 2008 Text on possible sectoral agreements was the same as that of its predecessor. Developed countries would eliminate duties on all specified tariff lines, over a phase-out period. Developing countries would do the same, but over a longer period, or on some lines have the right to maintain low duty rates.[715] Aside from cosmetic changes in the July Text concerning sectoral negotiations, the new Text laid out a revised schedule for conducting these negotiations.[716] It also set explicitly mentioned the possibility of special and differential treatment for developing countries on zero-for-x tariff cuts (i.e., more generous treatment under this formula for them than for developed countries), implementation periods (i.e., giving them more time than developed countries to cut tariffs in a sector), and partial product coverage (i.e., permitting them to exempt from tariff cuts certain goods).[717] A new Annex (Annex 6) to the July Text consisted of a forty seven page summary of sectoral proposals and the draft modalities for liberalizing tariffs in automotives and related parts, bicycles and related parts, chemicals, electronics and electrical products, fish and fish products, forest products, gems and jewelry, hand tools, enhanced health care, industrial machinery, sports equipment, and toys.[718]

Notably, to the chagrin of the United States, the July 2008 Text did not tightly link participation in sectoral negotiations with outcomes on major figures for overall cuts in industrial tariffs. The United States, along with Canada and EU, pushed for such a link, demanding developing countries, including Brazil, China, India, and Mexico, participate in and accept the outcomes of sectoral talks.[719] Yet, the July 2008 Text deleted a proposal from its predecessor advocated by the United States that developing countries be given credit for participating in sectoral agreements, namely, the right to apply a higher Swiss Formula Coefficient than otherwise would be applicable.[720] The United States argued a critical

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713 *Id.*

714 *See Countries, EU Seek Changes to New Negotiating Draft, supra* note 634 (quoting an unnamed Indian official saying "India will not accept a deal that includes an anti-concentration clause," and reporting "Indian officials have also called for an increase in the level of protection proposed in the farm text for small and marginal farmers").

715 *See* Daniel Pruzin, *Doha Chairs Issue Final Revised Draft Texts on NAMA and Agriculture with Few Changes*, 25 INT'L TRADE REP. (BNA) 1044-45 (July 17, 2008).

716 *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 12, *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 12.

717 *See* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 11 (last sentence).

718 *Id.* Annex 6, at 65-110.

719 *See* Pruzin, *supra* note 370, at 1013-15.

720 May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 7(i). The May 2008 Text, "[A]dditional points in the coefficient in the formula shall be provided as a "credit" to developing countries participating in sectoral agreements as follows: [ ].]" was notably absent from the July 2008 Text.

mass of developing countries in these negotiations would eliminate tariffs on products of keen export interest to many developed countries (*e.g.*, chemicals, medical goods, and pharmaceuticals).[721] That was necessary to balance the special and differential treatment under the Swiss Formula, and the many flexibilities to derogate from full tariff cuts, envisioned for poor countries.

Developing countries countered that not only does is the DDA negotiating mandate clear that involvement in sectoral negotiations is voluntary, but also even one sectoral agreement could have dramatic effects on them. For example, Mexico said if it accepted a zero-for-zero proposal in the chemical sector, thereby providing duty-free treatment to all chemical products if other Members did so, too, then overall tariff cuts by Mexico would fall by one-third more than called for under the Swiss Formula.[722] Brazil pointed out that in some sectors—such as automobiles, chemicals, electronics, and machinery—the tariff lines for which the United States sought duty reductions were the same lines Brazil sought to protect, i.e., there was no coincidence of interests.[723]

• Flexibilities for Members with Low Binding Coverage

The July 2008 Text simplified the formula for tariff cuts among developing countries with low binding coverage. Its predecessor set out a three-tiered formula, which the new Text cut to two tiers: (1) a developing country with a binding coverage of non-agricultural tariff lines below 15 percent would be obligated to bind between 70 and 90 percent of those lines; and (2) a developing country with a binding coverage at or above 15 percent would have to bind between 75 and 90 percent of its industrial tariff lines.[724] As for the period in which to implement the new bindings, the May Text identified equal annual installments spanning between nine and eleven years.[725] The July Text took the less ambitious option, eleven years.[726]

• SVEs

Concerning special and differential treatment for SVEs, the July 2008 Text made four changes. First, the new Text altered the overall average bound tariff level on non-agricultural products SVEs would have to reach.[727] For the top tier of tariffs, namely, at or above 50 percent, the May Text said SVEs would be obliged to bind duties at an average of between 22 and 32 percent, or reduce the average bound tariff by 40%, whichever imposed the lesser burden on them.[728] The new Text eliminated the second option. SVEs simply would have to cut

721 *See* Pruzin, *supra* note 370, at 1013-15.

722 *Id.*

723 *See* Haskel & Taylor, *supra* note 669, at 1047.

724 *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 8(a), *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 8(a).

725 May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 8(d).

726 July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 8(d).

727 *Compare* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(a)(i)-(ii), *with* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a)(i)-(ii).

728 May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(a)(i).

tariffs in the top tier to an average of between 28 and 32 percent.[729] Likewise, the May Text identified two options for the middle tier of tariffs, namely, duty rates at or above 30 percent, but below 50 percent: SVEs would have to cut the overall average rate to between 18 and 28 percent, or cut the average bound rate by 30 percent, whichever imposed the least reduction.[730] The new Text eliminated the latter option, stating SVEs must drop the average tariff rate in the middle tier to between 24 and 28 percent.[731]

Second, the July 2008 Text increased the number of tariff tiers from three to four.[732] The bottom tier in the May Text consisted of industrial tariff lines with duties below 30 percent. The new Text created a lower middle tier of duties at or above 20 percent, but below 30 percent, and set the bottom tier at duties below 20 percent. For tariffs in the lower middle tier, SVEs would have to cut duty rates to an average of 18 percent, and for bottom-tier tariffs, they would have to apply a minimum, line-by-line reduction (on 95 percent of all lines in the lowest tier) of 5 percent. The SVE apparently affected by this change was Gabon, as the new Text spotlighted it as falling into the lower middle tier.[733] In other words, the new tariff tier seemed to lessen the tariff-cutting obligation for Gabon.

Third, the new Text altered the *sui generis* treatment for Bolivia.[734] The May Text imposed an undefined percentage cut on Bolivia that would enable it to preserve substantially its bound tariff rates. The new Text ambiguously said Bolivia would not be subject to the tiered tariff reductions applicable to SVEs, but ought to try to follow that modality.

Fourth, the July 2008 Text provided SVEs with a more generous implementation period than the May Text.[735] The earlier document obliged SVEs to implement the target overall bound average duty rate within between nine and eleven equal annual installments. The new Text opted for the eleven year phase-in period.

• Least Developed Countries

The July 2008 Text made no changes to NAMA provisions affecting least developed countries, other than to tighten the commitment of developed countries to provide them with duty free, quota free treatment on 97 percent of products originating in least developed countries, and setting out procedural details to implement this commitment.[736]

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[729] July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a)(i).

[730] May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(a)(ii).

[731] July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a)(ii).

[732] *Compare* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(a)(iii), *with* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a)(iii)-(iv).

[733] July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a) ("As an exception, Gabon shall be deemed to fall under (a)(iii) and shall engage in GATT Article XXVIII negotiations to reach the overall target average of 18 percent.").

[734] *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(a), *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(a).

[735] *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 13(d), *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 13(d).

[736] *See* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶¶ 16-17.

• RAMs

Similarly, the new Text left the provisions affecting RAMs unchanged, with two exceptions. First, the May Text gave RAMs a grace period before which they would have to begin implementing Swiss Formula cuts of two to three years.[737] The new Text eliminated this grace period. Second, the new Text changed the period during which RAMs would be obliged to implement the cuts. The May Text said between two and five years, and the July Text narrowed the choice to between three and four years.[738] Consequently, the new Text called for faster trade liberalization among RAMs than its predecessor. Yet, faster hardly meant speedy: China would have up to fourteen years to complete its industrial product tariff reductions.[739]

• Preference Erosion

The July 2008 Text altered slightly the implementation periods (to nine years, instead of between seven and nine years, and to six years, instead of between five and six years) for reducing duties on products that are the subject of non-reciprocal preferences.[740] This period would be tacked onto a two-year grace period starting with the conclusion of the Doha Round. Thus, here again, in selecting the longest of the options, the new Text adduced lesser ambition, from the perspective of free trade, than its predecessor. Under the new Text, the United States and EU would have eleven years (the two year grace period plus nine years of implementation) to phase in reductions to tariffs on industrial products that are subject to preferences.

For the United States, there were twenty five affected tariff lines (up from sixteen lines the United States identified in association with an earlier draft NAMA modalities text), all of which were T&A products given special treatment under the *African Growth and Opportunity Act* (*AGOA*), or an FTA such as *CAFTA–DR*.[741] 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.[742] ACP countries are the beneficiaries of the EU preferences on these items. 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? The likes of China, India, and Argentina voiced opposition to the proposal, condemning it as protracted protectionism for sensitive rust belt industries in America and Europe. China demanded—and was rebuffed—adequate compensation, possibly through larger, quicker market access on other tariff lines in which it had an export interest.

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737 May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶ 19(a).

738 *Compare id*. ¶19(b), *with* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶ 19.

739 *See WTO Issues New Farm, Industry Texts for Doha Round, supra* note 635.

740 *Compare* July 2008 *Draft Modalities for NAMA*, *supra* note 693, ¶¶ 28, 30, *with* May 2008 *Draft Modalities for NAMA*, *supra* note 442, ¶¶ 28, 30.

741 *See* Daniel Pruzin, *Allgeier Hits Out at Chinese Demand for Tariff Compensation at NAMA Talks*, 25 Int'l Trade Rep. (BNA) 1094-95 (July 24, 2008).

742 *See id.*

In sum, it is difficult to see the July 2008 Draft NAMA Text as an improvement over the May iteration. The July Text failed to bridge major gaps among WTO Members. It left untouched the problem that tariff reductions would be from bound rates, which would mean no real cuts for some WTO Members. Chile was an example.[743] Its overall applied MFN rate was 6 percent, so a cut (implied by the Text) from 25 to 12 percent would give other Members no substantive market access gains. And, the new Text did not eradicate the problem of tariff escalation. The EU and coffee provided a case in point.[744] If it is unroasted and not decaffeinated, then coffee enters the EU duty-free. But, if it is roasted and caffeinated, the EU imposes a 7.5 percent levy. The new Text would cut that duty in half—a notable decline, but still some tariff escalation in a sector of importance to many poor countries.

Perhaps the strongest, indeed only strong, pro-free trade innovation in the new Text was the controversial anti-concentration clause. Yet, the July Text stepped further back from other free trade outcomes. That retreat is obvious from the choice of implementation periods in the July Text—longer, not shorter. It also is evident from the treatment of *SACU*, *MERCOSUR*, and SVEs. The separate identification of CUs, and individual Members, bespoke a document lacking in underlying principle or over-arching vision.

Ironically, the WTO's own explanation of the July Text confirms the perception that the July 2008 Text is a document hacked up by schismatic interests within the WTO Membership. That document—tellingly entitled *The July 2008 NAMA Modalities Text Made Simple*—observes that only about forty Members (albeit accounting for nearly 90 percent of world trade) would apply the Swiss Formula.[745] That is because the rest of the Membership—about 112 countries—would enjoy hand-crafted tailoring. For instance, as the newest Members among the RAMs, Albania, Armenia, Kyrgyz Republic, Macedonia, Moldova, Saudi Arabia, Tonga, Vietnam, and Ukraine, would have no industrial tariff reduction commitments beyond their accession commitments. Older RAMs, China, Croatia, Oman, and Taiwan, would apply the Swiss Formula, but on a dilated implementation schedule. All other RAMs would qualify as SVEs. There would be special treatment for forty SVEs, as well as for the twelve developing countries with low binding coverage, and the particularized cases of Bolivia and Fiji. Least developed countries—thirty-two of the Members—would be exempt from NAMA commitments.

C. The Fractious Meeting Begins

Nine days of negotiations – the longest Ministerial meeting in WTO history[746] – started with an ostensibly dramatic offer from the EU. The EU would cut its agriculture tariffs by an overall average of 60 percent, besting its previous offer

[743] *See World Trade: Defrosting Doha*, Economist, July 19, 2008, at 12

[744] *Id.*

[745] *July 2008 NAMA Modalities Text Made Simple, supra* note 694.

[746] *See So Near and Yet So Far*, *supra* note 602, at 14.

of 54 percent, and developing countries would increase their maximum average farm tariff cut from 36 to 40 percent.[747] The EU urged developing countries to reciprocate by slashing their duty rates on industrial goods. In fact, the offer was not even better than the October 2005 Portman Proposal from the United States, and a similar offer then from Australia, which called for an overall average farm tariff reduction of 75 percent.[748] Brazil scoffed at the EU proposal, reminding the developed world that Brazil, along with China, India, and other developing countries already had made substantial concessions, and adding that "there is this kind of self-righteousness that is very common among the rich countries, because they not only want to have the best deal, they also want to be in the high moral ground."[749]

Subsequently, the EU backed away from its offer, indicating that it had not fundamentally changed its position, but simply included steep tariff cuts on tropical products in the 54 percent figure, yielding the new 60 percent overall average cut.[750]

For its part, the United States initially offered to cut its bound OTDS level to $15 billion, and quickly dropped this ceiling to $14.5 billion.[751] Like the European offer, however, there was not much to the American proposal. The $15 billion figure already was in the current range on the negotiating table (an OTDS cap of $13 to $16.4 billion). In any event, the American offer was contingent on improved contributions from developing countries, specifically (1) enhanced market access for American farm exports, and (2) an agreement they would surrender their right to launch WTO litigation against United States farm subsidies.[752] Notwithstanding the American argument that a $15 billion cap would have required real cuts to farm support in seven of the last ten years, Brazil and India immediately dismissed the move as "a nice try but . . . not enough."[753]

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747 *See* Daniel Pruzin, *French Dispute Mandelson's "Offer" of New Cuts in Agriculture Goods Tariffs*, 25 Int'l Trade Rep. (BNA) 1087-88 (July 24, 2008); *EU Offers 60% Cut in Farm Tariffs*, BBC News, July 21, 2008 [hereinafter *EU Offers 60% Cut in Farm Tariffs*].

748 *See* Bhala, *supra* note 2, at 79.

749 *See EU Offers 60% Cut in Farm Tariffs*, *supra* note 747 (quoting Brazilian Foreign Minister Celso Amorim).

750 *See* International Centre for Trade and Sustainable Development, *Political Positioning Dominates Opening Day of WTO Talks*, 2 Bridges Daily Update, July 22, 2008, ictsd.net/downloads/2008/07/bridges-daily-update-22-july.pdf (discussing the remarks of a spokesperson for the European Commission).

751 *See Bid to Salvage World Trade Talks*, BBC News, July 29, 2008; WTO, *Day 3: Moderate and Uneven Progress Leads To "Geometry" Tweak,* WTO News, July 23, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_23july_e.htm [hereinafter *See Bid to Salvage World Trade Talks*]; Audio Recording: WTO Direct-General Pascal Lamy, Opening Statement at the Informal Trade Negotiations Committee Meeting (July 23, 2008), *available at* http://www.wto.org/english/news_e/news08_e/news08_e.htm.

752 *See* Alan Beattie, *U.S. Offers to Cut Farm Aid Limit to $15 Billion*, Fin. Times, July 23, 2008, at 3.

753 *Id*. at 3 (quoting a spokesman for the Brazilian Foreign Minister, Celso Amorim).

D. The Friday Night Proposal

The first five days of negotiations (Monday, 21 July through Friday, 25 July) in a meeting originally planned to end on the sixth day (Saturday, 26 July) amounted to nothing. India was singled out for blame by the United States and EU for insisting rich countries make real cuts to their farm subsidies yet tolerate protection by poor countries of their infant industries, with one trade official saying of the Indian Minister of Commerce and Industry, Kamal Nath: "He just sat there and said "No" for 12 straight hours [ending at 3:30 a.m. on Thursday, 24 July]."[754]

Escaping American and European ire (but surely no less blameworthy, if fingers must be pointed) was Japan. It declared the proposal on Sensitive Product designations in the July 2008 Draft Agricultural Modalities Text to be insufficiently generous toward rich countries. Japan should not be limited to identifying 4-6 percent of its products as "Sensitive." Rather, said Vice Minister of Agriculture Toshiro Shirasu, it and other developed countries should be able to protect 8 percent of tariff lines from duty reductions.[755]

The risk of a collapse in the talks—which, as all WTO Members were aware, had occurred in Cancún in September 2003, Hong Kong in December 2005, and Potsdam in July 2007—was imminent. In a last-ditch effort to avoid history repeating itself, Director-General Pascal Lamy concocted a one-page proposal late on the fifth day, and extended the talks for an additional four days (through Wednesday, 30 July). While not circulated widely to the general public, the Friday Night Proposal—a compromise paper, or elements package, for a possible breakthrough—dealt with agricultural and NAMA issues, as follows:[756]

Agriculture –

• The EU and United States, respectively, would cut OTDS by 80 and 70 percent, capping OTDS at €22.06 ($34.6 billion) and U.S. $14.46 billion.

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[754] John W. Miller, *Indian Minister Frustrates West at Trade Talks*, Wall St. J., July 25, 2008, at A6 (quoting an unnamed trade official).

[755] Miho Yoshikawa, *Japan Wants Smaller Farm Tariff Cuts in WTO Talks*, Thomson Fin. News, July 24, 2008, http://www.forbes.com/afxnewslimited/feeds/afx/2008/07/24/afx5248870.html.

[756] *See* WTO, Negotiating Group on Market Access, *Market Access for Non-Agricultural Products–Report by the Chairman, Ambassador Don Stephenson, to the Trade Negotiations Committee*, JOB(08)/96 (Aug. 12, 2008) [hereinafter *Market Access for Non-Agricultural Products*]; WTO, Committee on Agriculture, Special Session, *Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, Ambassador Crawford Falconer*, JOB(08)/95 (Aug. 11, 2008) [hereinafter *Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture*]. For journalistic accounts, see Singh, *supra* note 534, at 1155-56; Daniel Pruzin, *Key WTO Members Made Progress on NAMA, Sectorals Before Latest Doha Talks' Collapse*, 25 Int'l Trade Rep. (BNA) 1159-60 (Aug. 7, 2008) [hereinafter Pruzin, *Key WTO Members Made Progress on NAMA, Sectorals Before Latest Doha Talks' Collapse*]; Haskel, *supra* note 532, at 1169-71; Daniel Pruzin, *Chair Outlines "Package" for NAMA Deal, But Refrains from Suggesting Way Forward*, 25 Int'l Trade Rep. (BNA) 1186-87 (Aug. 14, 2008) [hereinafter Pruzin, *Chair Outlines "Package" for NAMA Deal, But Refrains from Suggesting Way Forward*]; Daniel Pruzin & Eric J. Lyman, *Doha Talks Collapse Over U.S.–India Dispute on Ag Safeguards; Future of Round in Doubt*, 25 Int'l Trade Rep. (BNA) 1124-28 (July 31, 2008); John W. Miller, *U.S.–Brazil Tariff Deal May Aid Doha Talks*, Wall St. J., July 26-27, 2008, at A4; *Hope of Deal in World Trade Talks*, BBC News, July 26, 2008; *Hopes of Reaching World Trade Deal Revive at WTO*, Reuters, July 25, 2008; *Doha Round Talks Brought Back from Brink of Collapse*, Xinhua News, July 26, 2008. .

• Agriculture tariffs in the highest band (bound rates above 75 percent) would be reduced by 70 percent.

• Developed countries would cap their tariffs on farm goods at 100 percent, except for products they designate as "Sensitive." They could exceed this cap if they paid some compensation.

• Following the concept of "4 + 2" for Sensitive Product designations, developed countries could designate between 4 and 6 percent of their farm products as "Sensitive." They would have to expand TRQs for such products concomitantly as a percentage of domestic consumption (*i.e.*, if 4 percent of the tariff lines are "Sensitive," then TRQs would expand by 4 percent, and likewise for 6 percent).

• As for Sensitive Products designated by developing countries, a revised tripartite formula could apply. They could impose one-third, one-half, or two-thirds of the agreed-upon tiered tariff cut to a limited number of their Sensitive Products. The greater the deviation from the agreed upon tariff cut, the fewer products to which the deviation would apply, and the shorter the implementation period for making the cuts.

• There would be a two-tier system for "Special Product" designations. In the first tier, developing countries could select up to 12 percent of their overall tariff lines as "Special" and impose on them an average cut of 11 percent. No tariff cut would apply to the second-tier Special Products, which would amount to up to 5 percent of tariff lines (within the designated 12 percent).

• RAMs would be obliged to reduce their agricultural tariffs by an overall average of 10 percent across 13 percent of their tariff lines. They could opt not to cut duties on up to 5 percent of those lines.

• A SSM would be available to developing countries with a volume trigger of 140 percent of base imports, as long as prices are not falling. That is, reflecting an American proposal for the volume trigger, only if the quantity of imports jumped by at least 40 percent (based on a rolling 3-year average) could the SSM be used. The remedy would be a tariff increase, but with a ceiling that would be the higher of (1) 15 percent of the current bound tariff, or 15 percentage points. Further, in any given year, the remedy could not be used on more than 2.5 percent of tariff lines.

• Developed countries would phase out the SSG remedy over no more than 7 years. Initially in the phase-out period, they would limit its deployment to no more than 1 percent of their tariff lines, and at no point in the period would the remedy result in a tariff in excess of the bound Uruguay Round MFN duty rate.

NAMA –

• Developed countries would use a Swiss Formula Coefficient of 8. Developing countries would have a choice of 20, 22, or 25, with progressively less flexibility, respectively.

• If a developing country selected 25, then it would have no flexibility. If it opted for 20, then it would have the maximum flexibility. That would mean it could shield 14 percent of its industrial product tariff lines form the full force of the agreed-upon Formula cuts, subjecting these lines to half the agreed cuts (as long as the value of industrial trade represented by these lines does not exceed

16.5 percent of the total value of the industrial product imports of the country in question). Or, a developing country could keep 6.5 percent of its industrial product tariff lines unbound, or not apply the full cuts to 6.5 percent of its lines (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). If a developing country opted for the middle Coefficient, 22, then it could immunize 10 percent of its industrial product tariff lines from the full cuts (up to 10 percent of the total value of its industrial product imports). Or, that country could keep 5 percent of its industrial product tariff lines unbound, or not apply the full Formula cuts to 5 percent of its lines (up to 5 percent of the total value of its industrial product imports).

• There would be an anti-concentration clause. The clause would bar exclusion from Swiss Formula Cuts of an entire HS Chapter. To ensure use of the Formula in every Chapter, each Member would be required to apply full Formula reductions to a minimum of either 20 percent of total tariff lines under any HS product heading (*e.g.*, automobiles, chemicals, and textiles and clothing), or 9 percent of the total value of imports in each HS Chapter.

• Engaging in negotiations to reach agreement for duty-free (or low-duty) treatment under any of the 14 sectoral initiatives would remain voluntary. But, every developed and developing country would commit to participating in at least two initiatives aimed at duty-free treatment in a particular sector. 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 would be commensurate with the level of participation by a developing country in the sectoral negotiations. Presumably, the more negotiations in which it engaged, the greater a developing country could boost its Coefficient.

Initially, the Proposal generated optimism. Members accepted it as a basis to continue discussions.

Moreover, a sound basis for a deal seemed to exist on a number of topics, generally along the lines of the July 2008 Draft Agriculture and NAMA Modalities Texts, with which the Proposal did not directly deal. For example, in agriculture, in-quota tariffs on all tariff lines covered by a TRQ could be reduced by applying to them the lower o a threshold or a formula cut, TRQs could be administered using a fill mechanism, and SSGs could be disciplined by cutting the number of maximum eligible products, and eliminating the SSG mechanism entirely within 7 years (with allowance for a small percentage of tariff lines for developing countries and a slightly higher percentage for SVEs). The list of tropical and diversification products essentially had stabilized, and that least-developed countries would be treated on an essentially equivalent basis as they would under a NAMA deal. It also seemed there was general satisfaction with proposed rules about export competition (disciplining export credits, food aid, and STEs, and phasing out export subsidies), and export restrictions (allowing temporary export restrictions to deal with food crises).[757] Similarly, substantial convergence

[757] *See Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture*, *supra* note 756, at 2-4.

seemed to exist on a few NAMA topics, namely, low binding coverage, the treatment of Bolivia, the inclusion of Mongolia for certain special benefits, duty-free, quota free treatment on at least 97 percent of the products originating from least developed countries, and preference erosion.[758]

But, appearances were deceiving. Within a day doubts surfaced about the Proposal. Members found six causes it was wanting.[759]

E. Six Causes for Another Collapse

#1: The Proximate Cause – SSM

First, India, the G-33, and the ACP rejected the SSM remedy in the Friday Night Proposal,[760] and thereafter WTO Members could not agree on this topic. Their disagreement was the "proximate cause" of the collapse of the July 2008 negotiations.[761] Underlying their arguments over the details of the SSM was a profound division of principle. Here, India, joined by China, battled the United States, though the EU, Australia, Canada, and Brazil were key combatants, too, and countries in the G-33, plus developing countries with major exporting interests, had a stake in the fight.[762] No Member doubted poor countries ought to be able to protect, via a temporary higher tariff, their farmers from fair, foreign competition characterized by price declines or import surges. Every Member understood that this safety net would be a targeted remedy triggered by the occurrence of an unusual circumstance, not a generic kind of special and differential treatment on the order of Special Product designations, nor a particularized privilege afforded to a category of Members like least developed countries, RAMs, SVEs, or special countries such as Bolivia. What divided the Members was how free and easy the SSM ought to be for non-privileged developing countries, i.e., the (1) degree and duration of any remedial tariff increase, for the majority of poor countries, and (2) precise import surge needed to trigger the remedy.

On each of these two ostensibly technical SSM issues, the negotiations devolved into a zero-sum game. As Chairman Falconer stated bluntly:

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758 *See Market Access for Non-Agricultural Products*, *supra* note 756, at 2, 7.

759 *See, e.g.*, *EU States Split Over Proposed World Trade Plan*, Austr. Broadcasting Corp. News, July 26, 2008 (noting objections of India, Ireland, and Italy to the compromise paper).

760 *See* Pruzin & Lyman, *supra* note 756, at 1124-28.

761 *Multilateralism Not Dead as a Doha*, Fin. Times, July 30, 2008. For additional accounts of this cause of the collapse, see David J. Lynch, *Global Trade Talks Fall Apart*, USA Today, July 30, 2008, at 1B; WTO, *Day 9: Talks Collapse Despite Progress on a List of Issues*, WTO News, July 29, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_29july_e.htm [hereinafter, *Day 9: Talks Collapse Despite Progress on a List of Issues*]; *World Trade Talks End in Collapse*, BBC News, July 29, 2008.

762 *See* WTO, *Day 10: Capture Progress and Continue Work, Members Say*, WTO News, July 30, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_30july_e.htm [hereinafter *Day 10: Capture Progress and Continue Work, Members Say*] (section on "The 'SSM' Problem"); *World Trade Talks to Resume Later Tuesday*, Channel News Asia, July 29, 2008, http://www.channelnewsasia.com

> On the SSM . . . [w]ithin the G7 [Australia, Brazil, China, EU, India, Japan, and United States] itself there simply proved to be *unbridgeable differences* regarding the triggers for breaching the pre-Doha bound rate.
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> . . . [S]uch differences were not some purely "technical" matter. Of course, like all fundamental political differences, there are consequent technical differences, but the impasse was not technical. It was political. The fundamental issues were, on the one hand, whether you can breach pre-Doha bound rates and, if so, on what terms and conditions and, on the other hand, how you can make a SSM mechanism genuinely operational for developing country Members if there is an a priori ceiling constraint of such a kind.[763]

In other words, as for the SSM remedy, could it lead to a protracted tariff in excess of the pre-Doha Round duty rate? Or, would commitments a country made during the Uruguay Round (or, in the case of a RAM, during its WTO accession negotiations) be the ceiling for any remedy, which would be limited to a short period? Developing and least developed countries called for policy space to impose a rate that might exceed the Uruguay Round bound duties. Depending on the product and Member, this space would determine whether a meaningful remedy accompanied the legal right to an SSM.

On the one hand, a Member with a bound rate on a particular product of 100 percent, but an applied duty of 20 percent, had plenty of room to maneuver. India is in this category, with an average bound tariff rate (set during the 1986-94 Uruguay Round) on agricultural imports of approximately 114 percent, but an average applied MFN rate (as of August 2008) of roughly 38 percent.[764] On the other hand, a Member with bound and applied rates of 25 and 20 percent, respectively, could impose a remedy of just 5 percentage points before breaching its pre-Doha binding. China is in this category. Its average bound rate on farm imports (set during its 11 December 2001 WTO accession) is 15.8 percent, and its average applied MFN rate (as of August 2008) is 15.7 percent.[765]

Developed countries countered that the Uruguay Round (and RAM accession) commitments were a carefully crafted negotiated compromise. No SSM (other than one deployed by a least developed country, certain RAMs, or SVEs, as the July 2008 Draft Agriculture Modalities Text allowed) should unsettle it. More generally, they urged, unwinding multilateral trade deals was contrary to basic GATT–WTO principles and precedent.

The second critical SSM issue was exactly what volume threshold should be exceeded before a poor country could slap a SSM tariff on an imported agricul-

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[763] *Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, supra* 756, at 3 (emphasis added).

[764] *See* Daniel Pruzin, *G-7 Fail to Strike Deal to Move Doha Talks as India Again Balks on Special Safeguards*, 25 Int'l Trade Rep. (BNA) 1370-72 (Sept. 25, 2008) [hereinafter Pruzin, *G-7 Fail to Strike Deal*]; Daniel Pruzin, *WTO Members Vow to Regroup After Collapse of Talks; USTR Proposes "Early Harvest" Deals*, 25 Int'l Trade Rep. (BNA) 1121-23 (July 31, 2008) [hereinafter Pruzin, *WTO Members Vow to Regroup*].

[765] Pruzin, *WTO Members Vow to Regroup, supra* note 764.

ture product. Members concerned about protecting impoverished or vulnerable farmers, such as China, India, and the G-33, sought a low threshold – not much above normal trade growth – to make recourse to the remedy easy. These Members, amounting to over 100 countries with keen agriculture import interests (including Indonesia and the Philippines), intoned that rich-country farm subsidies depressed prices, exacerbating their need for protection. Thus, for example, the G-33 advocated for an SSM with a 10 percent volume trigger (meaning a remedy could be imposed if imports surged 10 percent above the previous 3-year average level) and a permissible remedy of an increase of 30 percent above the relevant existing bound tariff rate.[766]

Conversely, Members concerned about abuse of the SSM amidst trade volumes expanding at normal rates, or amidst normal volume fluctuations, sought stringent conditions. For these Members, such as the United States, the Cairns Group, and certain Latin American and Southeast Asian exporting countries (*e.g.*, Uruguay and Thailand, respectively), only a genuine surge ought to trigger an SSM. Likewise, for them, it would be ludicrous for an SSM remedy, designed for a short-term problem, to go on for a dilated period. (A case in point was Hungary, which had used SSG duties for nearly five years.[767]) Accordingly, the United States championed a 40% volume trigger. Otherwise, the Americans and their allies said, the best long-term method for poor country farmer to escape poverty is to export more, not trade less. And, the best short-term remedy for high food prices is not agricultural autarky, but freer trade.[768]

The United States defended the 40 percent trigger as a compromise, as its initial position was an import surge of 60 percent over the three preceding years.[769] With a 40 percent trigger, the United States pointed out China would have been able to impose SSM duties on soybeans imports above its bound tariff rate in eight of the previous ten years, and SSM duties on poultry imports above its bound rate in six of the last nine years.[770] India could have imposed SSM duties above its bound rate on palm oil imports in three of the last six years. Uruguay, supported by Paraguay, claimed that under a 10 percent volume trigger threshold (using 1999-2001 data as the base period of comparison), huge percentages of imports would be susceptible to the SSM remedy: 83 percent of China's farm imports, 69 percent of India's and 49 percent of Korea's would be vulnerable.[771] Thus, argued the American Trade Representative, any trigger volume below 40 percent would be a "free-for-all where developing countries were raising barriers every day."[772]

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766 *See* Haskel, *supra* note 532, at 1169-71; Pruzin & Lyman, *supra* note 756, at 1124-28.

767 *See The Doha Round . . . And Round . . . And Round*, ECONOMIST, Aug. 2, 2008, at 71 [hereinafter *The Doha Round . . . And Round . . . And Round*].

768 *Id.*

769 *See* Pruzin & Lyman, *supra* note 756, at 1124-28.

770 *See* Pruzin, *WTO Members Vow to Regroup, supra* note 764, at 1121-23.

771 *See* Pruzin & Lyman, *supra* note 756, at 1124-28.

772 Pruzin, *WTO Members Vow to Regroup, supra* note 764, at 1121-23 (quoting USTR Ambassador Susan Schwab).

A "free-for-all" was exactly what the Americans were engaged in, retorted India. India's Minister of Commerce and Industry, recalled that "the United States has imposed safeguards on textiles twenty eight times in the last three years."[773]

Moreover, it was India, not the United States, that was flexible on the SSM issue. India's reply was it could accept a 15 percent trigger, maybe even a 20 percent threshold, but, no higher. When America refused to budge, India agreed to either of two other alternatives.[774]

First, India accepted an SSM for developing countries that would be triggered not by quantitative metrics, but by a qualitative test – proof that farm imports caused "demonstrable harm" to livelihood security or rural development needs. The remedy would be a tariff increase on the surging imports proportionate to the harm, but could last no longer than one year. Within twenty days of applying the SSM, a developing country would have to notify the WTO Committee on Agriculture, which could ask a Permanent Committee of Experts to review whether the invocation of the SSM and the tariff remedy satisfied the qualitative criteria and proportionality test, respectively. The Experts would have sixty days to issue a binding decision. Yet, the United States rejected the qualitative approach to resolving the SSM matter.

Second, India accepted an alternative quantitative suggestion, the Demarty proposal, the namesake of its drafter, the EU's chief agricultural negotiator for the EU, Jean-Luc Demarty. Its essence was to set different triggers and remedies depending on the import volume surge. Specifically,

- If the import surge is between 15 and 35% compared to the previous 3-year average, then a developing country could impose an SSM remedy of either (1) an additional tariff on top of the applied rate of up to 33%of the bound rate, or (2) 8 percentage points, whichever is higher.
- If the import surge exceeds 35% compared to the previous 3-year average, then a developing country can impose an SSM remedy of either (1) an additional tariff on top of the applied rate of 50% of the bound rate, or (2) 12 percentage points, whichever is higher.

In essence, the higher the range of increased imports, the higher the tariff cap on the imports. Notably, there would be a markup for natural growth in imports that results from increased domestic demand. That way, exporting countries could be sure their products would not be considered to surge into a country (and thereby slapped with a safeguard by that country) in which higher imports occurs because of increased consumer demand.[775]

The Demarty proposal forbade use of the SSM remedy if the domestic price of the product in question is not falling. Moreover, it subjected invocation of the SSM to review by experts within the WTO Committee on Agriculture, who would issue a binding ruling within sixty days as to whether any remedy imposed

[773] *Id.* (quoting Indian Minister of Commerce and Industry Kamal Nath).

[774] *Id.*.

[775] *See* Pruzin, *G-7 Fail to Strike Deal*, *supra* note 764, at 1370-72.

is proportionate to the import surge. Yet, the United States rejected the Demarty proposal.

Here, then, was the proximate cause of collapse. The United States could not reach a compromise with India and China on the SSM. The July Text suggested a limit on how high an SSM tariff could exceed the pre-Doha rate (the higher of 15 percent of that rate, or 15 percentage points). That limit was insufficient for one side, and unacceptable for the other side. So entrenched were the two sides that they could not think imaginatively on an additional trigger as a discipline, nor agree on any suggested alternatives. Why not accept a requirement that a pre-Doha Round bound tariff not be exceeded unless a volume threshold, such as 15 percent, or 40 percent, is breached? The answer lies in the existence of five additional causal factors that split WTO Members.

#2: No Paradigm Shift

Notably, and second, the Friday Night Proposal failed to offer any paradigm shift in the overall horizontal trade-offs between agriculture and NAMA. Dwelling in the same substantive bargaining ranges, it lacked vision. Critically, for example, the 70percent % OTDS cut for the United States would mean a ceiling of $14.5 billion, a figure already offered by the United States, and rejected by Brazil and India as insufficient. Similarly, the suggestions on a farm tariff cap, Sensitive Product designations and TRQ expansions, Special Products, and RAMs all seemed directly lifted from, or closely founded on, the July 2008 Draft Agriculture Modalities Text.

For industrial products, too, that pattern held. Albeit narrowing of options on a few topics, the Proposal largely paraphrased the July 2008 Draft NAMA Modalities Text. As on agricultural trade, the Proposal failed on NAMA, because it either mirrored or echoed ideas that Members had kicked around for many months. Accordingly, there was nothing imaginative in the Proposal about sectoral negotiations, with the predictable result that China and India bitterly opposed the American and European position, and developing countries such as Brazil and Thailand were uninspired to broker a deal.

Specifically, the United States was not expected to participate in sectoral negotiations on automobiles (which Japan had proposed), nor on textiles and clothing (which the EU proposed).[776] To China, that exemption indicated sectoral negotiations were disguised mercantilism designed to benefit the export interests of developed, not developing, countries. China, then, embraced a mercantilist position. It would not engage in sectoral negotiations in three sectors in which it maintains above-average tariff rates to protect its industries—chemicals, electronics, and industrial machinery. Likewise, Brazil and Thailand considered their narrow interests, which meant, respectively, participation in the chemicals and gems and jewelry initiatives. Overall, both China and India protested against the reward in the Proposal of a higher Swiss Formula Coefficient for a developing country participation in sectoral intiatives. China reasoned the reward violated the MFN principle, simply because it would be a conditional concession granted

[776] *See* Pruzin, *Key WTO Members Made Progress on NAMA, Sectorals Before Latest Doha Talks' Collapse*, *supra* note 756, at 1159-60.

in the context of a multilateral trade round to a subset of WTO Members agreeing to what would amount to a plurilateral deal. India said the reward really was punishment to pressure poor countries into participation so as to force a deal that would be as multilateral as possible.

#3: Development Slighted

Third, the Friday Night Proposal blatantly neglected to address a large number of issues that mattered to many Members. Indubitably, the Indian Minister of Commerce and Industry, Kamal Nath, spoke for the vast majority of WTO Members when he intoned "this Round is not about increasing prosperity. It is about reducing poverty."[777] Yet, the Proposal simultaneously failed to contain certain elements of keen interest to poor countries, and to link explicitly each of its elements to poverty reduction.

Specifically, for example, on NAMA the Proposal did not bridge radically divergent perspectives on rules about infant industry protection. There was little if any convergence on additional flexibilities for CUs, hence South Africa withheld support for the Proposal.[778] Likewise, there was no consensus on special and differential treatment for RAMs (especially in respect of a three or four year implementation period for tariff cuts, and on a new demand from Oman, namely, that it should not be obliged to cut any bound rate below 5 percent), SVEs, and Venezuela.[779] Product coverage remained unresolved. Most ominously, Argentina expressly rejected the Swiss Formula Coefficients. Argentina argued these Coefficients spelled the inverse of less-than-full reciprocity expected of poor countries, as set out in GATT Article XXXVI:8 and the DDA mandate. That was because the Coefficients would impose a greater proportion of tariff cuts on developing countries than on developed countries.[780]

Worse yet, perhaps, the Proposal did not resolve quarrels over many development issues centered on agriculture. While agriculture accounts for only 8% of world merchandise trade, it factors much more importantly in the economies of developing and least developed countries.[781] Accordingly, disagreements over Blue Box subsidies, product-specific limitations within that Box, the appropriate starting point for making product-specific Amber Box (AMS) commitments, tariff simplification methodology, and the permissibility of creating new TRQs – left unresolved by the Proposal – may seem somniferous matters, but they are non-trivial to poor countries.[782]

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[777] Vir Singh, *Nath Criticizes Developed Nations' Stance in Doha Talks; Lamy Cites Progress in Talks*, 25 INT'L TRADE REP. (BNA) 1188-89 (Aug. 14, 2008) (quoting Kamal Nath, Indian Minister of Commerce and Industry, speech to the Federation of Indian Chambers of Commerce and Industry (FICCI) and Consumer Unity & Trust Society (CUTS) International, August 12, 2008).

[778] *See* Pruzin, *Chair Outlines "Package" for NAMA Deal, But Refrains from Suggesting Way Forward, supra* note 756, at 1186-1189.

[779] *See Market Access for Non-Agricultural Products, supra* note 756, at 2-3.

[780] *See* Haskel, *supra* note 532, at 1169-71; *See* Pruzin, *Chair Outlines "Package" for NAMA Deal, But Refrains from Suggesting Way Forward*, *supra* note 756, at 1186-87.

[781] *See The Doha Round . . . And Round . . . And Round, supra* note 767, at 71.

[782] *See Report to the Trade Negotiations Committee by the Chairman of the Special Session of the Committee on Agriculture, supra* note 756, at 2-4 (emphasis added).

Similarly, the Proposal did not resolve the contentious second tier of Special Product designations, could a developing country shield from any duty rate reductions a certain percentage of its farm tariff lines, or not? If they had this right, then how far did it go? These questions pertained to major countries and products. For example, during the July 2008 talks, China indicated it might designate cotton, corn, rice, sugar, and wheat as "Special." If it did, then China's stiff protective regimes – depicted in Table 8 – for these products would remain wholly or largely intact.

Table 8:
China's Protective Regimes for Possible Special Products[783]

Protective Regime	Tariff (Percent, Bound and Applied Rate)	In-Quota TRQ Tariff (Percent)
Cotton	40	1
Corn	65	10
Rice	65	9
Sugar	50	15
Wheat	65	10

Another gaping shortcoming was the failure of the Proposal to settle the Bananas War. The EU and Latin America (specifically, Colombia, Costa Rica, Ecuador, Guatemala, and Panama) agreed to a 35 percent cut – from €176 (U.S. $277) per metric ton to €114 ($179) per metric ton in the European banana duty rate applicable to third country (non-ACP) bananas (including, of course, bananas exporting from Latin countries). The EU would phase in the cut over eight years, with an immediate slash of €28 effective 1 January 2009. The deal also specified that no further reductions to the EU tariff would be made, i.e., bananas would be excluded from proposed Doha Round tariff reductions on tropical products of 85 percent (with tariffs at 25 percent or below reduced to zero). Nevertheless, the nearly 80 ACP countries rejected the settlement deal.[784] They were convinced a 35 percent decrease was sufficiently steep to erode the duty-free preference they had enjoyed since the 1950s, and unmoved by the exclusion of bananas from the Doha Round list of tropical products.[785]

[783] The data in this Table are drawn from Pruzin & Lyman, *supra* note 756. Imports into China of these goods, except for cotton, generally have been within the in-quota TRQ thresholds, but for cotton, have exceeded the 1.945 million ton annual cap. *Id.*

[784] *Progress on EU–Latin American Banana Deal Made Before Collapse of Doha Round Talks*, *supra* note 679, at 1160-61.

[785] *See Bid to Salvage World Trade Talks, supra* note 751.

Still another example of neglect concerned trade facilitation, on which nothing had happened.[786] That inertial position is nearly unforgiveable, given the following facts:[787]

• Transportation costs are higher than tariff costs in 168 of the 216 trading partners (many of them poor countries) of the United States.

• Customs procedures can be reformed to accelerate clearance procedures on entry and exit for the low cost of U.S. $5 million per country.

• The lack of trade facilitation – not food supply – is a key reason for the 2007-2008 world food crisis. In Chad, for example, excluding transport time, the paperwork to ship goods takes up to 75 days to complete.

Yet, nothing in the Proposal addressed the self-evident need to accelerate the pace at which (1) developing country exports, which generate earnings, clear customs in developed and developing countries, and (2) developed country goods, especially capital goods for industrialization, cross developing country borders.

Most ironically, given all the attention given since the November 2001 launch of the Doha Round to the adverse effects of cotton subsidies, the Proposal did not address them at all. How could least developed countries join a consensus with no final deal on this topic? Indeed, the matter was of importance not only to the Cotton 4 countries (Benin, Burkina Faso, Chad, and Mali), in which about 10 million people depend on cotton for their livelihood,[788] but also to India. It is India that dedicates more farmland than any other country to growing cotton.[789] In sum, perhaps had the Proposal emphasized the developmental aspects of the Doha Round, rather than apparently seek to placate the major trading nations, it might have attracted sustained, widespread interest.

#4: The Wrong Protagonists

Fourth, as just intimated, the Friday Night Proposal championed the engagement of seven WTO Members above all others, the United States and EU, along with Australia, Canada, Brazil, China, and India. Indeed, negotiations immediately following its circulation involved those Members, leaving smart delegates

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786 That nothing happened is clear from the Report about the topic, which speaks only about on-going work in a variety of configurations and references technical assistance for capacity building to poor countries so they can participate more effectively in the negotiations. *See* WTO, Negotiating Group on Trade Facilitation, *Report by the Chairman of the Negotiating Group*, TN/TF/6 (July 18, 2008). Trade facilitation is of keen interest to rich countries, too. The CATO Institute reports that:

• On average, it takes 5 days for a shipping container to clear the customs process for entry into the United States, and 6 days for a container to leave the United States.

• Cutting 1 day from the entry and exit process would increase the value of trade for the United States by $31 billion annually, which is 50 percent greater than the expected gain from the *Korea – United States Free Trade Agreement* (*KORUS*).

See CATO Expert Says Trade Facilitation More Important Than Tariff Reductions, 25 INT'L TRADE REP. (BNA) 1193 (Aug. 14, 2008) (referring to a 16 July 2008 CATO Institute Policy Brief, *While Doha Sleeps, Securing Economic Growth Through Trade Facilitation*).

787 *See CATO Expert Says Trade Facilitation More Important Than Tariff Reductions*, *supra* note 786.

788 *See* Frances Williams, *Poorest Nations Stand to be Big Losers*, FIN. TIMES, July 31, 2008, at 6.

789 *See* Singh, *supra* note 534, at 1155-56.

from other Members on the sidelines with plenty of time to shop and tour around Geneva. The Director-General argued the blunt reality was that without thrashing first by the major powers, no deal was possible.[790]

The opposite could well have been true. No deal was possible without poor countries as the protagonists. Conversely, any deal originating with the seven major trading nations, even including China and India, was doomed to condemnation by most other Members as procedurally illegitimate and substantively unbalanced. Indeed, perhaps that was the lesson of the previous collapses, namely, that the Doha Round needed to be constructed from the outside in, by and for the Third World first, divided as that World is. Regrettably, but perhaps predictably, thinking outside the box of power politics, and inside the far more commodious box of compassion and generosity, never took place.

#5: The Outmaneuvered Americans

Fifth, with the United States as either a willing or bumbling participant, major developing countries outmaneuvered the United States. Since the inception of the Doha Round, the United States defined most of its interests alongside the EU, thereby putting itself if an adversarial position vis-à-vis most of the Third World. To be sure, the United States and EU battled over important agricultural issues. But, for most observers throughout the Third World, the key schism was characterized by the two hegemonic powers on one side. On the other side, focused on the use of trade as a weapon in the global War on Poverty, was most of the rest of the WTO Membership.

Many of these observers, and, for that matter, many inside the Washington, D.C. Beltway—might not have appreciated the serious rupture with the past that had occurred in American foreign policy generally. Memories of the Eisenhower Administration taking the Arab side in the 1956 Suez Crisis, or the Kennedy Administration creating a Peace Corps, had faded. If there were any residuum in American foreign policy to identify with developing and least developed countries left after the Uruguay Round, then it was gone by the Doha Round.

Cotton, yet again, is a case in point. After declaring in the December 2005 Hong Kong Ministerial Conference it would provide duty-free access to the American market for West African cotton, the United States told the Cotton 4 countries in July 2008 it could not commit to any specific figures on reducing trade-distorting cotton subsidies until it learned from China, the world's largest cotton consumer,[791] whether and how much China would cut its cotton tariffs. Never mind that those tariffs are high, or that West Africa could benefit from America's success in prying open the Chinese cotton market. The link by the

[790] *See* WTO, *Day 4: Ministers Talk Numbers Till Late But Breakthrough Remains Elusive,* WTO News, July 24, 2008, http://www.wto.org/english/news_e/news08_e/meet08_summary_24july_e.htm; WTO, *Lamy Calls for Political Will to Rapidly Bridge Differences*, WTO News, July 24, 2008, http://www.wto.org/english/news_e/news08_e/meet08_chair_24july08_e.htm (Talking Points for the Director-General).

[791] *See* Alan Beattie, *Clash of Interests Generates Great Heat But Little Light*, Fin. Times, July 29, 2008, at 4.

United States between cutting American cotton tariffs, on the one hand, and Chinese cotton concessions, on the other hand, struck the Cotton 4 as laughable.[792]

Put bluntly, the link was heartless triangulation. Unconditional generosity even on this limited topic had become inconceivable.[793] Notwithstanding its major defeat in WTO litigation over cotton subsidies, America seemed addicted to cotton subsidies, which (under the five-year 2007 farm bill) tallied $1 billion annually, for the benefit of just 12,000 farmers (most of whom were large-scale).[794] Forging the link also was nakedly self-interested, as 75 percent of American cotton is exported, and half of those exports go to China.[795] That self-interest ran counter to China's, which accused the United States of hypocrisy and pointed out that:

> Extremely high cotton subsidies by the U.S. have caused serious damage to cotton farmers in developing countries, *including . . . 150 m[illion] in China*. The U.S. is not in a position to discuss cotton tariffs with developing members until they eliminate their cotton subsidies.[796]

In brief, no longer the champion of poor countries, or even the fair arbiter between them and Old Europe, America – amidst a global War on Terror that it declared, and obsessed by post-September 11, 2001 security concerns that it defined—was the beacon for commercial neo-colonialists seeking special deals in cherished sectors.

At least, that is how much of the WTO Membership saw things. No matter how hard American trade negotiators huffed and puffed that free trade would make poor countries rich by stimulating economic growth and reducing income poverty, they could not overcome a litany of self-inflicted wounds to their credibility. Vocal opposition (in the early years of the Doha Round) to relaxing compulsory licensing rules to help poor countries that lacked capacity to manufacture pharmaceuticals, consistent failure to eliminate cotton subsidies, implacable defense of an OTDS cap that was twice actual spending, stringent demands for a NAMA anti-concentration clause, intransigent insistence that zeroing be permitted in dumping margin calculations, the list was long. While India and China may have been asking too much, as *The Economist* poignantly observed:

> America has some answering to do, too. It seems to have misread the big story: in the WTO, rich countries no longer call the shots, as they did in

[792] *See* Pruzin & Lyman, *supra* note 756 (quoting Abdoulaye Sanoko, an official with Mali's to the WTO, as saying the American position "makes me laugh, because this was never on the table. They never talked about that [the linkage] before.").

[793] *See generally* Raj Bhala, *The Limits of American Generosity*, 29 FORDHAM INT'L L. J. 299-385 (Jan. 2006) (applying the Parable of the Good Samaritan to American trade policy toward Sub-Saharan Africa).

[794] *See* Williams, *supra* note 788, at 6. For a discussion and excerpts from the 2005 *Upland Cotton* case, see BHALA, *supra* note 2, chs. 36, 46.

[795] *See* Daniel Pruzin, *U.S. Conditions on Cotton Deal in Doha Round on Lower Chinese Tariffs*, 25 INT'L TRADE REP. (BNA) 1086-87 (July 24, 2008).

[796] Beattie, *supra* note 791, at 4. (quoting senior Chinese trade official Zhang Xiangchen) (emphasis added).

> its predecessor, the General Agreement on Tariffs and Trade. China and India, infuriating though they may be, are as powerful as America and the EU. The United States also fumbled with details. It might have tied up a deal on cotton, and left the Chinese and Indians isolated on safeguards [that is, SSM]. And, the ultimate stumbling-block [SSM], though a mountain to India, was surely a molehill to a country of America's wealth. America has 1 m[illion] farmers, India over 200 m[illion].[797]

Never mind that any one item in the litany actually might serve the long-term interests of one or more poor countries.

That is, the sheer length of the list, without a single ballyhooed concession for those countries, meant Brazil, China, and India were closer than America to the hearts and minds of Argentina, Indonesia, and South Africa. The United States hardly helped its case when, after eight days of talks, it castigated two governments representing over two billion people: by being overly-protective of their farmers and manufacturers, "[China's and India's] actions have thrown the entire Doha Round into the gravest jeopardy of its nearly seven-year life."[798] One poignant reply came from the fourth most populous country in the world, Indonesia. Redolent of multi-functionality arguments made by some EU member states, especially France, during the Uruguay Round, Indonesian Trade Minister Mari Pangestu explained that farming (especially in developing countries) is "not like manufacturing. It's not a machine you can just turn on or off."[799]

#6: Unexciting Services Signals

Sixth, and finally, the long awaited services signaling meeting (which took place after two delays on the Saturday, 26 July) failed to generate enduring enthusiasm. The thirty one participating WTO Members agreed services were centrally important for economic and social development, but they could not achieve consensus on the issuance of a new modalities text on services. Indeed, they remained divided as to whether the degree of ambition for services trade liberalization should be at "the highest possible level."[800] On Mode IV, the United States offered to broaden the number of sectors in which it would permit foreigners to work via non-immigrant H-1B skilled work visas, and the EU said it would grant an additional 80,000 temporary visas annually for overseas professional service providers without imposing an economic means test (EMT).[801] Developing countries, notably in South Asia, with burgeoning, literate, English-speaking

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797 *So Near and Yet So Far*, *supra* note 602, at 14.

798 *See Bid to Salvage World Trade Talks, supra* note 751 (quoting United States trade official David Shark).

799 Bradley S. Klapper, *WTO Talks Risk Collapse as U.S. Battles China, India*, Associated Press, July 31, 2008. At the risk of making too fine a point, the ill-considered remark of Mr. Shark, quoted above, alienated the world's first, second, and fourth most populous countries (the United States being the third such country).

800 WTO, Council for Trade in Services, Special Session, *Elements Required for the Completion of the Services Negotiations*, 2 n.1, TN/S/34 (July 28, 2008).

801 *See* Daniel Pruzin, *U.S., EU Cite Moves in "Signaling" Talks on Services; India Likes "Mode 4" Openings*, 25 Int'l Trade Rep. (BNA) 1128-29 (July 31, 2008); *Bid to Salvage World Trade Talks, supra* note 751.

populations regarded both offers as unimpressive. For some developed country service sector employers, too, these offers probably were disappointing.

Certainly, the official "Report"—penned by the WTO Director-General in his capacity as Chairman of the Trade Negotiations Committee (TNC)—about the signaling meeting references interest by various Members in new, improved market access across a variety of sectors (and sub- or sub-sub-sectors), and via all four Modes of supply.[802] In specific, the Report discusses the interest of Members in:

• Audiovisual Services – including broadcasting, distribution, film projection and production, promotion and marketing, and sound recording.

• Business Services – including Modes I, II, and IV commitments on professional services (such as accounting, legal, medical and dental, midwifery, nursing, and veterinary), computer and related services (such as back-office operations and call centers), research and development services, rental and leasing services, and other services (such as advertising, management consulting, market research and opinion polling, printing and publishing, and translation and interpretation).

• Construction Services – including engineering services related to construction.

• Distribution Services – including commission agency services, franchising, and wholesale and retail trade (especially in goods such as cars and farm products), with attention to liberalizing cross-border electronic supply under Mode I and allowing high foreign equity participation, up to 100 percent, under Mode III.

• Education Services – including private primary, secondary, and tertiary education, plus corporate, language, and vocational training, including provision through Modes I and III higher education with no restrictions on national treatment.

• Energy Services – including improving supply through Mode III of natural gas and petroleum distribution, pipeline construction, technical testing and analysis, and services incidental to energy distribution, and removing Mode III restrictions on mining and drilling services (such as site preparation, scientific and technical consulting, and technical testing and analysis).

• Environmental Services – including air pollution control, environmental laboratories, noise abatement, refuge and solid waste disposal, sewage, sanitation, soil remediation and clean up, waste and water management.

• Financial Services – including liberalizing the cross-border supply of banking services via Mode I, reducing or removing Mode III restrictions on foreign equity participation in banking to allow for at least 51%ownership, eliminating depositary requirements for foreign branches and limitations on the number of such branches, and expanding the range of permissible banking activities to include advisory services, asset management, data transfer, derivative products, leasing, securities dealing and underwriting, plus liberalizing insurance agency

802 *See* WTO, *Services Signaling Conference – Report by the Chairman of the TNC*, JOB(08)/93 (July 30, 2008) [hereinafter *Services Signaling Conference—Report by the Chairman of the TNC*].

and brokerage services, and lifting Mode III limits (such as joint venture and prior authorization restrictions) on the commercial presence of non-life insurance and insurance intermediation companies and their branches.

• Health Services – including new commitments on Modes III and IV for hospital and health care services, and the expansion of permissible spa and wellness activities to cover traditional Asian medicine and Thai massage.

• Postal and Courier Services – including Mode III commitments to remove or raise foreign equity limitations at least to 51% ownership, with special attention to express delivery services.

• Telecommunications Services – including Mode III commitments to allow higher, even 100 percent, foreign equity participation in both basic and value added services encompassing fixed line and mobile telephony, and possibly satellite services.

• Tourism and Travel-related Services – including hotel and restaurant services, travel agencies, tour operators, and tour guides, with enhanced commitments on geographic coverage and elimination of national treatment restrictions.

• Transport Services – including removing restrictions and MFN exemptions on air transport services (such as air passenger and freight transportation, aircraft maintenance and repair, computer reservation systems, selling and marketing, and rental of aircraft with crew), lifting or withdrawing limitations on foreign equity participation, licenses, national treatment and MFN exemptions on maritime transport services (such as cargo handling, freight transport and international passenger transport, maintenance and repair, port services, pushing and towing, rental of vessels with crew), and eliminating various restrictions on infrastructure development, logistics, and even rail, road, and space transport.

However, a careful reading of the Report suggests four points of caution. First, it is easy to proffer a concession that is non-binding. India, for example, said it would increase the cap on foreign ownership of asset management companies from zero to 51 percent, and the limit on foreign ownership in the telecommunications sector from 49-51 to 74 percent, plus bind the limit on foreign ownership of courier services at 51 percent.[803] But, such expressions by a Member may be diplomatically calculated verbal ejaculations that never blossom into a dramatic market access offers.

Second, few if any expressions to free up services trade are uni-directional. They are as much about what each Member expects from other Members as they are about possible concessions. That is especially true of Mode III. Developing and least developed countries have high expectations for improved business mobility of their peoples to developed countries, without recourse by developed countries to economic needs or labor market tests, or to stringent numerical ceilings or licensing and qualification requirements.[804]

Third, the value of any expression, if implemented, in terms of substantive services trade liberalization, depends on the *status quo*. In a sector such as Tour-

[803] *See* Pruzin, *supra* note 801, at 1128-29.

[804] *See Services Signaling Conference—Report by the Chairman of the TNC*, *supra* note 802, at 7.

ism, which already "has drawn the highest number of commitments in current schedules," the gains from a deal short of nearly pure free trade may be marginal.[805] In a sector where *de facto* market access is noteworthy, but unbound, the mere binding of existing practices is not as valuable as venturing ambitiously beyond the *status quo*.

Fourth, expressions of interest are by no means the first step on the path to global free trade in services. Virtually every WTO Member is sure to shield from foreign competition one or more sensitive service sectors. For instance, even before the signaling meeting, and in spite of pleas from Canada, the EU, Korea, and Japan, the United States reiterated it would make no commitments on maritime services.[806] It would defend the 1920 *Jones Act*, which mandates that commercial vessels navigating American waters be constructed in the United States. National security is the obvious purpose of the *Act*, in particular, the protection of America's domestic shipbuilding industry. The American defense in the Doha Round was neither new nor surprising. It took this position in the Uruguay Round, and secured exemptions in relevant GATT–WTO texts from that Round. Negotiations on maritime services and *GATS*, which were left unfinished from that Round, continued until June 1996, at which point the United States simply walked out.

VIII. Four Questions Plus Faith in a Resurrection

Thus, the numerous, technical, and deep schisms so familiar in the Doha Round were exposed again in the July Ministerial Conference. The United States and EU insisted on better NAMA offers from developing countries. Developing countries demanded better offers from developed countries to cuts in farm tariffs and subsidies, as well as on NAMA. RAMs, SVEs, and least developed countries all lobbied for special privileges best suited to them. The WTO Members had begun the Conference with negotiating texts that left wide open their schisms on many key issues – numbers for reducing agricultural tariffs and subsidies, Swiss Formula Coefficients, and figures on the number of tariff lines and value or volume of trade developing countries could exclude from agreed upon agricultural and industrial product tariff cuts. As for AD, CVD, and fishing subsidies, the Chairman of the Rules Negotiations, Guillermo Valles Galmés, said on the eve of the Conference "little if any progress has been made" since issuance of the draft text in November 2007, and that any new draft would have no "magic solutions," given that Members are "very far apart."[807] His remark was equally true after the Conference. In sum, the Conference accomplished little in healing any schisms.

At an OECD meeting in Paris on 5 June 2008, WTO Director-General Pascal Lamy accurately characterized the Doha Round negotiations as having reached

[805] *Id.* at 5.

[806] *See* Daniel Pruzin, *U.S. Signals Possible Movement on Mode 4 in WTO Services Talks*, 25 INT'L TRADE REP. (BNA) 1090-91 (July 24, 2008).

[807] *See* Daniel Pruzin, *Doha Rules Chair Warns WTO Members No "Magic Solutions" in Revised Rules Text*, 25 INT'L TRADE REP. (BNA) 1049-50 (July 17, 2008).

"technical maturity."[808] That was true, in that WTO Members had made most of the detailed and modest trade-offs they could to inch forward the negotiations. But, technical maturity is not necessarily equivalent to widespread agreement on fundamental substantive points. Indeed, it could create or reify schisms on basic issues. Could the WTO Members boast of any progress on those issues in the fall and winter of 2007, and spring and summer of 2008?

America's Trade Representative, Ambassador Susan Schwab, thought so, declaring in November 2007 the Doha Round could be concluded by January 2009, when George W. Bush finished his Presidency. "The Doha Round is not dead," she asserted, "[i]t continues to move ahead."[809] Yet, in a December 2007 front-page interview with the *Financial Times*, a prominent presidential candidate, Senator Hilary Rodham Clinton (Democrat-New York), not only poured scorn on Bush Administration trade policy and said there was little point in reviving the Doha Round, but also cast doubt on Ricardo's Law of Comparative Advantage.[810] She argued the whole theory of free trade as practiced in the modern era of globalization needed a re-think, especially to account for skewed income distribution, environmental and labor rights, and economic sovereignty. Several others in the 2008 bid for the White House held similar views.

The WTO Director-General tried to be optimistic. Perhaps year-end 2008 was a reasonable target, and (in late May 2008) he rated the chance of a successful outcome at 60 percent.[811] On balance, considerable progress had been made, and had yet to occur. On several agricultural topics, gaps in positions and numbers had narrowed since October 2005, when the Portman, EU, G-20, and G-10 Proposals were tabled. On NAMA, the bargaining range had narrowed somewhat, though as regards flexibilities, and the 10/5 sliding scale, the numbers batted about were nearly the same as those in the August 2004 *Framework Agreement*. The differences on critical farm and non-farm trade topics were stark, even stunning given that negotiators had been at work since November 2001. Effectively no progress had been made on services, and a gulf existed on trade remedies. Whether the Doha Round had progressed as far as it could, at least without direct personal intervention from senior-most political figures, was dubious.

A. A Premature Round?

In retrospect, four questions are worth considering. First, was the Doha Round premature? Launched in November 2001, the Round commenced before the WTO agreements (notably, those allowing for 10 year phase in periods for least developed countries) had been implemented fully. The Round started before or while many Members had digested in their law and legal culture, and adjusted in

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808 Pascal Lamy, WTO Director-General, Presentation at the OECD Ministerial Council Meeting: We Are Getting to the Moment of Truth (June 5, 2008).

809 Jason Gutierrez, *USTR Schwab Says WTO Talks Not Dead, Doha Deal Possible by End of Bush's Term*, 24 Int'l Trade Rep. (BNA) 1643-44 (Nov. 22, 2007).

810 *See* Edward Luce, *Clinton Doubts Benefits of Doha Round Revival*, Fin. Times, Dec. 3, 2007, at 1.

811 *See* Kirwin, *supra* note 598, at 826-27; Daniel Pruzin, *WTO Chief Outlines Agenda for Doha Talks in Early 2008, but Mum on Next Ministerial*, 24 Int'l Trade Rep. (BNA) 1723 (Dec. 6, 2007).

their economies to, the texts from the 1986-94 Uruguay Round. Negotiations proceeded while many of their senior-most political leaders professed interest in a successful Doha Round outcome as a counter-punch in the War on Terror, but showed neither the time nor inclination to engage in the Round, or to use their bully pulpits to advance the Round rather than to accuse each other of blocking progress.

B. The Middle "D"?

Second, did developed countries, especially the United States and EU, really appreciate the importance of the second "D" in the "DDA" acronym?[812] They made a great deal about the importance of industrial market access, especially because their manufacturers faced increasing competition from China. Setting aside the obvious fact that many of their manufacturers are located in and exporting from China, consider the perspective of the leading lobbying group from industrial firms in the United States, the Washington, D.C.-based National Association of Manufacturers (NAM).

The NAM advocates on behalf of the trade interests of American manufacturers, which tend to focus on the removal of foreign barriers to trade in industrial products and reversal of the large deficit in manufactured goods trade (as of August 2008, and annualized figure of U.S. $440 billion in 2008, down by $120 billion from the record peak).[813] In turn, those interests reflect the understandable goals of the NAM. The NAM seeks to maintain a robust, vibrant manufacturing sector that is a technological underpinning for economic growth in the United States, and helps provide for America national security needs. It also is keen to see improved standards of living and security for American industrial workers. Removing foreign barriers to American industrial goods is a vital element in advancing the trade interests of NAM member firms.

Yet, while it is commonplace to read and hear about the hollowing out of the American industrial base, and the shift in the locus of manufacturing power to China, the NAM itself reported in August 2008 some remarkable and less well known facts:[814]

- There are three million fewer American manufacturing jobs in 2007 than in 2000. But, the productivity of American industrial workers has grown so dramatically that in 2007 it took 75 workers to produce what it took 100 workers to produce in 2000. By inference, job loss is due not so much, or not exclusively, to foreign competition as to American productivity gains.
- The usual way of measuring manufacturing prowess is in U.S. dollars, which tends to inflate China's position because of the strength of the Chinese

812 *See generally* John W. Head, Losing the Global Development War—A Contemporary Critique of the IMF, the World Bank, and the WTO (2008) (arguing there is no genuine, fundamental commitment to human development on the part of political leaders, and many of their constituencies, in rich countries).

813 *See* John Engler, *American Industry Can Still Stay Ahead of China*, Fin. Times, Aug. 18, 2008, at 7.

814 *See id.*

currency (the *yuan*) relative to the dollar. But, even by that yardstick, China produced only about 60 percent as much as the United States in 2008.

• A way to measure industrial prowess that helps correct for foreign exchange and other distortions is real manufacturing value added. This gauge is price-adjusted, to reflect the quantity of output (i.e., the amount of industrial goods produced). Judged by real manufacturing value added, the United States, European Union (EU), and Japan, respectively, are the world's first, second, and third manufacturing nations, with China fourth.

• Using real manufacturing value added, the United States is the world's largest manufacturer, accounting for almost 25 percent of global industrial output. Moreover, as of 2008, American industrial output is double that of fourth-place China.

• China's torrid real annual rate of manufacturing growth of 10 percent is not sustainable, and has tremendous environmental and social externalities. But, even if China sustained that pace, its industrial output would not equal that of the United States until roughly 2020.

The point is not the United States and EU "cried wolf" in the Doha Round in respect of industrial goods trade. The foreign trade barriers of which they complain are real, serious, and deleterious to their interests. Rather, the point is to inquire whether they perhaps pushed too hard, in view of their considerable lead over China and, *a fortiori*, other developing countries.

In light of this inquiry, consider the assessment of the Institute for Agriculture and Trade Policy (IATP), based in Minneapolis, Minnesota, following its review of the July 2008 Draft Agriculture and NAMA Modalities Texts:

> The latest negotiating texts [of July 2008] on agriculture and manufactured goods are a *complicated mess, reflecting a narrow set of commercial interests* rather than a vision for how to reform the WTO.
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> . . .
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> *The compromises required to reach agreement on the Doha Agenda have effectively killed the Agenda itself*. It has been clear for several years that the development angles were gone: *the commercial imperatives trumped any interest in rectifying important mistakes made under the Uruguay Round, or in developing better rules from the perspective of developing countries, particularly the perspectives of least developed countries*. Now the Agenda is *a mess from any perspective, including that of free traders*.[815]

To be sure, decades of globalization generally, and trade liberalization specifically, had brought great gains in world economic output. The positive link between an open economy and growth, measured by *per capita* GDP, was unassailable. But, to all but diehard free trade economists, the relationship be-

[815] Carin Smaller & Anne-Laure Constantin, *The Absurdity of Doha: How Can Ministers Accept This Deal?*, http://lists.iatp.org/listarchive/archive.cfm?id=124440 (July 17. 2008, 12:49:02 EST) (emphasis added).

tween openness and poverty alleviation was far less certain.[816] A bevy of statistics (including rising Gini coefficients) indicated increased income inequality had occurred in many countries in the years following the Uruguay Round.[817] Governments can and do fall, amidst mass social unrest, in consequence.[818] Power

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[816] For example, the link among international trade, food prices, farm subsidies, and poverty reduction is complex. As *The Economist* aptly summarized

> For years reformers have advocated freer trade on the grounds that market distortions, particularly the rich world's subsidies, depress prices and hurt rural areas in poor countries, where three-quarters of the world's indigent live. The Doha Round of trade talks is dubbed the "development round" in large part because of its focus on farms. But now [May 2008], high food prices are being blamed for hurting the poor . . . .
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> . . . .
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> . . . Different types of reform have diverse effects on prices. When countries cut their tariffs on farm goods, their consumers pay lower prices. In contrast, when farm subsidies are slashed, world food prices rise. The lavishness of farm subsidies means that the net effect of fully freeing trade would be to raise prices, by an average of 5.5% for primary products and 1.3% for processed goods, according to the World Bank.
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> . . . In crude terms, food-exporting countries gain in the short term, whereas net importers lose. Farmers are better off; those who buy their food fare worse. Although most of the world's poor live in rural areas, they are not, by and large, net food sellers. [According to a 2008 study of nine poor countries by two World Bank economists, M. Ataman Aksoy and Aylin Isik-Dikmelik] . . . even in very rural countries, such as Bangladesh and Zambia, only one-fifth of households sell more food than they buy. That suggests the losers may outnumber the winners.
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> But things are not so simple. [N]et food buyers tend to be richer than net sellers, so high food prices on average, transfer income from richer to poorer households. And prices are not the only route through which poverty is affected. Higher farm income boosts demand for rural labour, increasing wages for landless peasants and others who buy rather than grow their food. [T]his income effect can outweigh the initial price effect. Finally, the farm sector itself can grow. Decades of under investment in agriculture have left many poor countries reliant on imports: over time that can change.
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> The World Bank has often argued that the balance of all these factors is likely to be positive. Although freer farm trade – and higher prices – may raise poverty rates in some countries, it will reduce them in more.

The Doha Dilemma, ECONOMIST, May 31, 2008, at 82. Evidently, it is difficult to generalize about the effects of freer farm trade on poverty in a global sense. The nature of reforms, how and when trade barriers are dismantled and farm subsidies reduced, along with the distinction between NFIDCs and food-exporting countries, and the milieu in specific countries, matter greatly.

[817] Bhala, *supra* note 52 (defining and explaining Gini coefficients, and other measures of income poverty and inequality).

[818] Consider the example of China:

> In China . . . trade-fueled growth has more than tripled average real per capita income since 1990, accounting for over 75% of poverty reduction in the developing world. But, while celebrating this extraordinary achievement, China's President Hu Jintao's address to China's 17th Party Congress in October 2007 . . . raised the alarm about rising gaps between rich and poor.
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> . . . .
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> America's Gini coefficient climbed to 0.44 from 0.39 between 1985 and 2005 . . . . China's coefficient rose to 0.47 from 0.35 in the past five years [2003-2007] . . . .
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> . . . [T]he concern about inequality expressed by President Hu reflects the truth of an old Chinese proverb that "inequality, rather than want, is the cause of trouble." Many an oligarch has lost his head after ignoring this point.

Arthur C. Brooks & Charles Wolf, Jr., *All Inequality is Not Equal*, FAR E. ECON. REV. June 6, 2008, at 32 (June 2008). Other data reinforce the worrisome movement in China's Gini coefficient. As of May 2008, the poorest 10 percent of people in China control only 1.4 percent of total income. Dorothy J. Solinger, *Inequality's Specter Haunts China*, June 6, 2008, FAR E. ECON. REV. at 19. In contrast, the top 10 percent own 45 percent of all assets. *Id.* On the absolute poverty scale of U.S. $1 per day, between 130 politics aside, it was morally unacceptable to accept a multilateral trade bargain that might – for all the opportunities it would offer the well-off in a poor society able to capitalize on them – stratify yet further that society. Thus, in the admixture of motives behind positions advocated by developing and least developed countries, one of them was that the middle "D" really mattered.

C. An Unwieldy Body?

Third, is the WTO too Member-driven and at risk of becoming a zoo run by the animals? Special care must be taken with this inquiry. American officials are wont to claim the WTO has become "extremely unwieldy."[819] This claim may be a veiled whine: "we, that is, the United States and EU, no longer can dominate the process and determine outcomes." Democratic participation in the process by which an international organization operates ought to matter, not just for the sake of legitimacy in results, but also as an end in itself. An elementary (albeit oft violated) religious principle that evil means ought not to be used to secure good ends, no matter how good those ends might (in a utilitarian calculus) be. Major trading powers, then, ought to cherish widespread participation of countries in trade negotiations. It is a sign of maturity, specifically in human capital and legal capacity in developing and least developed countries, not a symptom of breakdown. The question is how to ensure the process is efficient while remaining inclusive.

One way is to give special respect, and perhaps even powers, to the leaders of negotiating groups is particularly important. Much of the progress in the agriculture and NAMA talks in 2007-2008 was due to the heroic efforts of the Chairmen of those negotiations. Their efforts to shepherd Members toward a common goal, manifest in Draft Modalities Texts and Working Papers, were extraordinary. Their successes in bridging or reducing differences among Members suggest a strong, central, and hierarchical approach within the negotiating groups might be in order. Leaving requests and offers to Members in the hope of a new grand bargain across agriculture, industry, services, and trade remedy rules may well be as much an opportunity for gridlock and acrimony as it an invitation for an eventual bottom-up consensus.

D. Crumbling Under Complexity?

Fourth, would multilateral trade law crumble under the weight of its own complexity? The breadth of the matters treated, and the technical way in which they were treated, in the Doha Round were a far cry from the Kennedy or even Tokyo Rounds. Even the WTO Director-General admitted the problem via an analogy of the Doha Round to a cathedral: "First you have the vague idea for a cathedral, then plans for the cathedral, and then you have to start adding chapels every-

and 200 million (according to different World Bank estimates) fall below the threshold. *Id.* Notably, as of late 2006, nineteen of China's top 100 business tycoons (gauged by a Chinese publication akin to *Forbes*) are deputies to the National People's Congress, double that number in one year. *Id.*

[819] *See, e.g.*, Politi, *supra* note 596, at 4 (quoting Warren Maruyama, General Counsel, USTR).

where. The fundamental reality is that it [the Doha Round] has become too complex."[820]

The American Trade Representative echoed the analogy "it may be that . . . the complexity of the cathedral that was built for the Doha Round was its own worst enemy, its own source of demise."[821]

In truth, the analogy, from highly experienced, technically skilled trade diplomats, understates the reality of the Doha Round. A cathedral is magnificent and beautiful, but the Round had spoiled into a dreary, ugly morass.

All pretence of free trade was abandoned, not by a grand pronouncement, but by intricate exceptions to that principle. An exception to market access for Sensitive Products, with an exception-to-the-exception for TRQ expansion, and another exception for Special (and possibly Super Special) Products, was just one example. All pretence of equality among Members also was abandoned. Again, there was no grand pronouncement declaring differentiation among types of developing countries or RAMs. Rather, new categories, not seen in the Uruguay Round, cropped up at the insistence of Members that would be in them.

Finally, lost amidst the dreary, ugly morass of complex proposals was all pretence that trade liberalization on an equal competitive playing field would promote development in poor countries and thereby reduce the vulnerability of people in them to radical Islamic extremism. After all, just two months after 11 September 2001, fighting terrorism through freer trade was the non-violent ballyhooed response of WTO Members meeting in the Qatari capital. Seven years later, the future of they charted for the Doha Round seemed as uncertain as that of Afghanistan and Iraq.

At the January 2008 World Economic Forum in Davos, Switzerland trade ministers from rich and poor countries alike agreed they would meet again, at a mini-ministerial conference around Easter 2008, to negotiate. They failed to resurrect the Doha Round then. After Easter, despite (or perhaps because of) ongoing technical negotiations, they repeatedly deferred any major revival efforts.[822] Unsurprisingly, the EU Trade Commissioner, Peter Mandelson, declared at a meeting in Lesotho of trade ministers from least developed countries the Doha Round faced a "high risk" of failure, "the first ever for a multilateral trade round."[823] Following the unsuccessful July 2008 Ministerial Conference came public protestations by the WTO Director-General and various Members that "[n]o one is throwing in the towel"[824] and they would "capture progress and continue

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[820] Alan Beattie, *Hangovers But No Anger On the Morning After*, Fin. Times, July 31, 2008, at 6 (quoting WTO Director-General Pascal Lamy).

[821] Pruzin, *supra* note 764, at 1121-23 (quoting USTR Ambassador Susan Schwab).

[822] See Gary G. Yerkey, *Ministerial Being Planned for Week of May 19 to Advance WTO Talks*, 25 Int'l Trade Rep. (BNA) 518-19 (Apr. 10, 2008); Daniel Pruzin, *Timetable Slips for Doha Round's Horizontal Talks Until After Easter*, 25 Int'l Trade Rep. (BNA) 330-31 (Mar. 6, 2008).

[823] Yerkey, *supra* note 262.

[824] Audio Recording: WTO Director-General Pascal Lamy, Report to the General Council (July 31, 2008), *available at* http://www.wto.org/english/news_e/news08_e/news08_e.htm [hereinafter Lamy, No One is Throwing in the Towel].

work,"[825] because "looking at what is on the table now . . . the Doha Round is still worth fighting for."[826]

The G-7 negotiators tried again, in four days of intensive talks in late September 2008, to break the deadlock on an agriculture SSM for developing countries.[827] They floated compromise proposals, such as guaranteeing an exporting country a certain amount of exports if an SSM is used against it, and a holiday rule barring sequential application of an SSM on the same product to ensure the remedy is not abused. They failed, with disagreement over how to ensure natural growth in domestic demand in an importing country does not get confused with a surge of imports and trigger an SSM.

In the late September 2008 meeting, three ideas were mooted to measure "natural growth": an average over three years; an average over a ten year base period; or a so-called five-year "Olympic average" that would calculate an average over five years but exclude the years in which trade growth was lowest or highest.[828] The proposals were rejected, particularly by China. Further, both China and India had reservations about other aspects of the SSM proposal. Likewise, the EU's effort to forge a compromise, based on the unsuccessful Demarty proposal of July 2008, did not work. The EU suggested a two-tier SSM trigger mechanism:

- If the import surge is between 20 and 40 percent compared to the previous three-year average, then a developing country could impose an SSM remedy of either (1) an additional tariff on top of the applied rate of up to 33 percent of the bound rate, or (2) 8 percentage points, whichever is higher.
- If the import surge exceeds 40 percent compared to the previous three-year average, then a developing country can impose an SSM remedy of either (1) an additional tariff on top of the applied rate of 50 percent of the bound rate, or (2) 12 percentage points, whichever is higher.[829]

In contrast to the Demarty proposal, the EU suggestion omitted a price check whereby the price of a farm product must fall before the SSM remedy could be used, and thereby a higher tariff imposed. The EU proposal also distinguished itself by containing a limit on any SSM remedy of one year, with a "holiday" rule whereby re-imposition of the remedy on the same product was forbidden in the subsequent year. The United States did not embrace the EU proposal, insisting on a price check, at least for the first trigger. India opposed any price check, as well as the holiday rule.[830] Both sides, along with China, disputed the exact triggers thresholds and remedies. Amidst all this quarreling, only truly optimistic trade souls could keep faith in the resurrection of the Round.

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[825] *Day 10: Capture Progress and Continue Work, Members Say*, *supra* note 762.

[826] Lamy, No One is Throwing in the Towel, *supra* note 824.

[827] See Pruzin, *G-7 Fail to Strike Deal*, *supra* note 764, at 1370-72.

[828] See Daniel Pruzin, *India's Nath Denies Responsibility for G-7's Breakdown on SSM Issue*, 25 INT'L TRADE REP. (BNA) 1410-11 (Oct. 2, 2008)

[829] *Id.*

[830] *Id.*

Author's Note: Following the final preparation of this article for publication, on 6 December 2008, the Chairman of the respective negotiating groups circulated to the WTO Members new draft modalities texts on agriculture and services. These texts were uninspiring, containing only modest changes to their July 2008 predecessors, and certainly no breakthrough solutions. On 19 December 2008, the chairman of the negotiating group on rules issued a new text on AD, CVD, and fishing subsidy issues. That text actually took a step backward from its November 2007 predecessor. It removed compromise language proposed earlier on number of issues, because of ferocious disagreements among Members. Thus, despite the three "new" texts, the WTO Director-General elected not to call a Ministerial meeting, knowing the chances such a convocation would produce consensus on the basis of those texts was near zero. Alas, December 2008 appeared to be when yet another, perhaps final, nail was driven into the Doha Round coffin. Could, would, and should the Round be resurrected during the administration of a new American President, Barack H. Obama? This question, plus an analysis of the December 2008 texts and their aftermath, is treated in Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L.J. (forthcoming 2009).