

ARTICLES

Ernst-Ulrich Petersmann, *Human Rights and International Economic Law*

Mavluda Sattorova, *Investment Treaty Breach as Internationally Proscribed Conduct: Shifting Scope, Evolving Objectives, Recalibrated Remedies?*

Surendra Bhandari, *Doha Round Negotiations: Problems, Potential Outcomes and Possible Implications*

NOTES AND
COMMENTS

Daniel Gervais, *Challenges in Intellectual Property Governance: Providing the Right Incentives in the Quest for Global Innovation*

Mitsuo Matsushita, *A Note on the Appellate Body Report in the Chinese Minerals Export Restrictions Case*

Felicity Hammond, *A Balancing Act: Using WTO Dispute Settlement to Resolve Regional Trade Agreement Disputes*

BOOK REVIEW

Nicolas Lamp, *A Review of Sonia E. Rolland, Development at the World Trade Organization (Oxford Univ. Press 2012)*

TL
&D

Trade, Law *and* Development

Vol. 4, No. 2

2012

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS-IN-CHIEF

Meghana Chandra

Shreya Munoth

EDITORS

Lakshmi Neelakantan
(SENIOR MANAGING)

Prianka Mohan
(CONTENT)

Neha Reddy
(CONTENT)

ASSOCIATE EDITORS

Nakul Nayak
(MANAGING)

Ali Amerjee

Prakhar Bharadwaj

Kruthika Prakash

COPY EDITORS

Chinmay Deshmukh

Shivangi Tyagi

Rohan Tigadi

Thomas J. Vallianeth

CONSULTING EDITORS

Shashank P. Kumar
Aman

Gopalakrishnan R.
Prateek Bhattacharya

Meghana Sharafudeen
Jayant Raghu Ram

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

Surendra Bhandari, *Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications*
4(2) TRADE L. & DEV. 353 (2012)

DOHA ROUND NEGOTIATIONS: PROBLEMS, POTENTIAL OUTCOMES, AND POSSIBLE IMPLICATIONS

SURENDRA BHANDARI*

The flawed Doha Round is mired in two fundamental problems. First, it has fallen victim to key players' reluctance to liberalise trade further. Second, the methodology that has been applied is faulty, legitimising the widespread departure from the original purpose and legal framework of the WTO. This has ushered in a fragmented regime in the WTO domain. As a result, there seems to be three possible outcomes for the Doha Round: an unfortunate death, a partial conclusion, or a conclusion with pervasive divergences and fragmentation. All three possibilities may make the WTO yield to protectionist pressures, with sweeping implications for the multilateral trade regime. Against this backdrop, this article analyses the nature of the Doha Round Negotiations; its potential outcomes, and possible implications for the multilateral trading system. The article examines various means to prevent the WTO from losing its credibility as a negotiating forum, and suggests improvements in negotiation methodology to conclude the Doha Round successfully in the future.

TABLE OF CONTENTS

- I. DOHA ROUND AT ELEVEN YEARS
- II. CHALLENGES FACED BY THE DOHA ROUND
 - A. *Key Players' Reluctance to Liberalise Trade*
 - B. *Faulty Methodology*
- III. POTENTIAL OUTCOMES
- IV. POSSIBLE IMPLICATIONS
- V. CONCLUSION

* Associate Professor, Ritsumeikan University, Kyoto, Japan. The author can be contacted at [surendra\[at\]fc.ritsumei.ac.jp](mailto:surendra[at]fc.ritsumei.ac.jp). The usual disclaimer applies.

I. DOHA ROUND AT ELEVEN YEARS

The eleven-year-old Doha Round is not dead, but scrambling on its last legs.¹ The launch of the Doha Round Negotiations of the World Trade Organization [WTO] in November 2001 was inspired by the idea of development. The negotiation agenda was termed the Doha Development Agenda [DDA],² named after the idea of development,³ with a view to enhance market access for developing and least-developing countries [LDCs]. Negotiators seemed jubilant about delivering the expected outcome of the development round. However, before long, the jubilation was overwhelmed by suspicion and contradiction.⁴

¹ See generally Craig Emerson, *Doha is no dodo as it takes off on new flight path*, THE AUST. NAT'L AFFAIRS, Dec. 1, 2012, available at <http://www.theaustralian.com.au/national-affairs/opinion/doha-is-no-dodo-as-it-takes-off-on-new-flight-path/story-e6frgd0x-1226527085089>; See also Diana Popa, *The Collapse of the Doha Round and a Possible Completion of Negotiations*, XV ROMANIAN ECON. J. 165-88 (2012) [hereinafter Popa]; Petros C. Marvroidis, *Doha, Dohalf or Dohaba? The WTO Licks its Wounds*, 3 TRADE L. & DEV. 367-81 (2011); Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573-601 (2010) [hereinafter Cho].

² See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746(2002) [hereinafter Doha Declaration]. The Doha Declaration reaffirms that:

International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration.

³ See generally SIMON J. EVENETT & BERNARD M. HOEKMAN, ECONOMIC DEVELOPMENT & MULTILATERAL TRADE COOPERATION (2006); See also SONIA E. ROLLAND, DEVELOPMENT AT THE WORLD TRADE ORGANIZATION (2012); JOSEPH STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2007); JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK (2006); T. Ademola Oyejide, *Development Dimension of Multilateral Trade*, in DOHA AND BEYOND: THE FUTURE OF MULTILATERAL SYSTEM 68-93 (Mike Moore ed., 2004). Stiglitz argues that there was an agreement at Doha that the Doha Round would focus on the needs of the developing countries. Regretfully, Europe and the United States have largely reneged on the promise made at Doha.

⁴ See B. S. Chimni, *The World Trade Organization, Democracy and Development: A View from the South*, 40 J. WORLD TRADE 5-36 (2006); See also RIS, *Doha Round and Developing Countries: Will the Doha Deal do More Harm than Good?*, 22 RIS POL'Y BRIEF 1-4 (2006), available at <http://www.ase.tufts.edu/gdae/Pubs/rp/DohaRIS2Apr06.pdf>. It argues:

[A]s the Doha negotiations limp toward an ill-defined finish line, it is not surprising that many developing country negotiators are asking

When the Doha Round was launched, it is probable that no one had pondered the challenging nature of the political economy of trade and development negotiations. The challenges overwhelmed the negotiators, especially because negotiations had been driven by domestic political interests over trade issues, and they had been conducted using a weak methodology.

The methodological problem, however, has not been addressed even in the time frame spanning eleven years or possibly more. As a result, the Doha Round has been deemed as one of the most lengthy international trade negotiations, all without a tangible sign of a successful conclusion anytime in the near future.

The Eighth Ministerial Conference of the WTO has also ended without achieving any substantial progress towards the Doha Round. The outgoing Director General Pascal Lamy is going to attempt to conclude a WTO Agreement on Trade Facilitation⁵ at the Ninth Ministerial Conference in Bali, Indonesia in December 2013, despite inadequate preparation for it. Against this backdrop, this article analyses the nature of the Doha Round Negotiations; its potential outcomes, and the possible implications for the multilateral trading system. The article examines various frameworks to prevent the WTO from losing its credibility as a negotiating forum, and suggests improvements in negotiation methodology to conclude the Doha Round successfully in the future.

The birth of the Doha Round⁶ itself reminds us of the deep complexities

themselves if the emerging deal is better than no deal at all. The round began with vows to enable poorer nations to develop their economies. The deal taking shape now offers limited economic gains for the developing world as a whole, and many countries end up worse off according to recent economic projections. Hidden behind those modest benefits are costs that should give negotiators pause.

⁵ See Pascal Lamy, *Better Data for Good Trade Policy*, CHINA DAILY, Jan. 23, 2013 [hereinafter Lamy].

⁶ See Surendra Bhandari & Jay Klaphake, *US Trade Policy and the Doha Round Negotiations*, 10 RITSUMEIKAN ANN. REV. INT'L STUD. 71-93 (2011) [hereinafter Bhandari & Klaphake]; See also Antonio Bouef, *Eight Years of Doha Trade Talks: Where Do We Stand?*, 11 ESTEY CENTER J. INT'L L. & TRADE POL'Y 349-70 (2010); Neo Jingjie Fu, *Impasse in the DDA NAMA Sectoral Negotiations and Possible Solutions*, 44 J. WORLD TRADE 847-76 (2010); Surendra Bhandari, *Making Rules in the WTO: Lessons from Article 6 of the TRIPS Agreement*, 11 ESTEY CENTER J. INT'L L. & TRADE POL'Y 67-77 (2010); Rahul Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, 42 J. WORLD TRADE 347-65 (2008) [hereinafter Singh]; Dilip K. Das, *The Doha Round of Multilateral Trade Negotiations and the Developing Economies*, 6 ESTEY CENTER J. INT'L L. & TRADE POL'Y 115-47 (2005); THE WTO AND DOHA ROUND: THE CHALLENGING FACE OF WORLD TRADE (Ross P. Buckley ed., 2003).

surrounding its existence. The Doha Round cannot be dissociated from the Uruguay Round. Despite eight years of negotiations, the Uruguay Round was concluded prematurely.⁷ It was fraught with conflict between the developing and developed countries on a number of issues.⁸ Additionally, it was also marred by conflict between the US and the EU.⁹ The negotiators had agreed to conclude the WTO Agreements before the then US President Bill Clinton's authority to conduct trade negotiation expired.¹⁰ As a result, the Uruguay Round did not address a

⁷ See MIKE MOORE, *A WORLD WITHOUT WALLS: FREEDOM, DEVELOPMENT, FREE TRADE AND GLOBAL GOVERNANCE* (2007). Moore says the UR was artificially concluded, leaving out a number of issues to be resolved later—the so-called implementation issues. That round was finished because U.S. legislation to facilitate the negotiations was expiring, ministers were exhausted, other options were being pursued, and because then-DG Peter Sutherland's enormous political skills were able to bring the deal together. See also Philip H. Trezise, *The Uruguay Round: High Hopes, Hard Realities, and Unfinished Business*, CATO REV. BUS. & GOV'T, available at <http://www.cato.org/pubs/regulation/regv14n1/v14n1-3.pdf>.

⁸ At the Uruguay Round, intellectual property, services, investment, and farm trade were some of the contentious issues between the developed and developing countries. Among other developing countries, Brazil and India wanted to keep the issues of services and investment entirely separate from the Uruguay Round. For a detailed discussion, see JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (1998); THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES (Will Martin & L. Alan Winters eds., 1997); ERNEST H. PREEG, *TRADERS IN A BRAVE NEW WORLD: THE URUGUAY ROUND AND THE FUTURE OF THE INTERNATIONAL TRADING SYSTEM* (1995) [hereinafter PREEG]; JEFFREY J. SCHOTT & JOHANNA W. BUURMAN, *THE URUGUAY ROUND: AN ASSESSMENT* (1994); TERENCE STEWART, *COMMENTARY: THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-92* (1993); A. J. Rayner et al., *Agriculture in the Uruguay Round: An Assessment*, 103 *ECON. J.* 1513-27 (1993); Bernard M. Hoekman, *New Issues in the Uruguay Round and Beyond*, 103 *ECON. J.* 1528-39 (1993); William J. Drake & Kalypso Nicolaidis, *Ideas, Interests, and Institutionalization: Trade in Services and the Uruguay Round*, 46 *INT'L ORG.* 37-100 (1992); RAGHAVAN CHAKRAVARTHI, *RECOLONIZATION: GATT, THE URUGUAY ROUND AND THE THIRD WORLD* (1990).

⁹ Among other issues, the U.S. and EU were at loggerheads on agriculture. Finally, the Blair House Accord merged both the US and the EU concepts into Articles 4 and 5 of the AoA, which subtly kept a higher tariff wall in the name of tariffication, coupled with an additional duty to imports below the price and above the volume trigger levels for the farm products having 1986-88 as the price trigger base period. The interesting feature of the AoA is that it did not prohibit NTBs but permitted converting them into tariffs. For a detailed discussion, see JARROD WIENER, *MAKING RULES IN THE URUGUAY ROUND OF THE GATT: A STUDY OF INTERNATIONAL LEADERSHIP* 62 (1995). See also Robert Parlberg, *Agriculture Policy Reform and the Uruguay Round: Synergistic Linkage in a Two-Level Game?*, 51 *INT'L ORG.* 413-44 (1997); Sophie Meunier, *What Single Voice? European Institutions and EU-US Trade Negotiations*, 54 *INT'L ORG.* 103-35 (2000).

¹⁰ See PREEG, *supra* note 8, at 173-77. Preeg mentions that on December 15, 1993 Peter Sutherland with a resounding blow of the gavel solemnly declared that 'the Uruguay Round Negotiations concluded.' December 15, however, was not the end of the Uruguay Round.

number of issues, leaving them in the form of a built-in agenda to be settled later.¹¹ Thus, a trade negotiation round under the aegis of the WTO was foreseeable.

The Third Ministerial conference of the WTO in Seattle was supposed to launch a negotiation round.¹² However, the Seattle Ministerial Conference was doomed to fail due to a widespread feeling of resentment and a backlash on a number of issues, from both developed and developing countries, which were supported by vociferous civil society organizations across the globe.¹³

In addition, the First Ministerial Conference of the WTO, held in Singapore in 1996, added four more issues to the purview of the WTO, viz. Trade and Investment, Trade and Competition Policy, Trade Facilitation, and Transparency in Government Procurement. These were termed the Singapore issues.¹⁴

It was the point of final agreement on all major issues of negotiation, but many loose ends remained. Final offer on market access for goods were left open for additions until February 15, 1994. The positive lists for sectoral inclusion in the services agreement also needed clarification and amplification. In any event, the date for signing the final agreement was set for April 15, 1994, the last day of President Clinton's legal authority to do so.

¹¹ See World Trade Organization, *Understanding the WTO: The Uruguay Round*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm. The GATT trade negotiations at the Uruguay Round took seven and a half years, almost twice the original schedule. The task it had taken was immense, and negotiation-fatigue was felt in trade bureaucracies around the world. The difficulty of reaching agreement on a complete package containing almost the entire range of trade issues led the Uruguay Round agreements contain timetables for new negotiations on a number of topics. As a result, by 1996, some countries were openly calling for a new round early in the next century. The response was mixed; but the Marrakesh agreement did already include commitments to reopen negotiations on agriculture and services at the turn of the century. These began in early 2000 and are incorporated into the DDA.

¹² See White House, White House Fact Sheet: WTO Ministerial in Seattle (Sept. 14, 1999), available at <http://www.scoop.co.nz/stories/BU9909/S00071/white-house-fact-sheet-wto-ministerial-in-seattle.htm>. The US President, Bill Clinton, had urged the WTO Members to launch a new trade negotiations round integrating labor issues with trade.

¹³ See generally US CONG., OUTCOME OF THE WTO MINISTERIAL IN SEATTLE: HEARING BEFORE THE SUBCOMM. ON TRADE OF THE COMM. ON WAYS & MEANS (2011); See also REBECCA SOLNIT & DAVID SOLNIT, THE BATTLE OF THE STORY OF THE BATTLE SEATTLE (2009); See Singh, *supra* note 6, at 348; DILIP K. DAS, GLOBAL TRADING SYSTEM AT THE CROSSROADS: A POST-SEATTLE PERSPECTIVE (2001); JEFFREY J. SCHOTT, THE WTO AFTER SEATTLE (2000); KATHLEEN MACMILLAN & PATRICK GRADY, SEATTLE AND BEYOND: THE WTO MILLENNIUM ROUND (1999).

¹⁴ Four issues incorporated by the Singapore Ministerial Conference of the WTO as part of the WTO negotiation program are known as Singapore Issues. They are: Trade and Investment, Trade and Competition Policy, Trade Facilitation, and Transparency in Government Procurement. See World Trade Organization, Singapore Ministerial

Furthermore, before the twenty-one agenda items for the Doha Round Negotiations were settled on as the development agenda, there were already several issues relating to the ancillary problem of implementation of the WTO Agreements and decisions.¹⁵ There were also more than a dozen groups, lobbying for a variety of agenda items to be included in the Doha Round.¹⁶ Amidst all these competing interests and dynamics, the finalisation of the Doha Round Negotiations agenda was quite a challenge.

The Fourth Ministerial conference of the WTO, held in Doha in November 2001, finally launched the Doha Round Negotiations. With the Doha Round, the WTO was given an opportunity to prove that it was an efficient negotiation forum and capable of concluding the DDA on time.¹⁷ However, the current state of the Doha Round Negotiations points to a completely different prospect.

The backlash ignited by the Seattle Ministerial Conference could not be halted, not even by the launch of the development round. The DDA issues were immediately challenged, especially in some of the leading developing countries.¹⁸

Declaration of 13 December 1996, WT/MIN(96)/DEC, 36 I.L.M. 220, ¶ 20-21 (1997).

¹⁵ See World Trade Organization, *The Doha Declaration Explained*, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm. See also World Trade Organization, *Doha Implementation Decision Explained*, http://www.wto.org/english/tratop_e/dda_e/implemented_e.htm.

¹⁶ There are a number of coalitions formed by Member countries in the WTO. Mostly countries organised under these coalitions jointly work in developing negotiation agenda and positions. Some of these coalitions are: ACP, African Groups, Asian Developing Members, APEC, Cairns Group, Cotton-4, EU, Friends of Ambition, Friends of AD, FOFs, G-90, G-33, G-20, G-10, LDCs, MERCOSUR, RAMs, SVEs, Tropical Products, and W52 Sponsors. See World Trade Organization, *Groups in the Negotiations*, http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm; See also KENT JONES, THE DOHA BLUES: INSTITUTIONAL CRISIS AND REFORM IN THE WTO 85-118 (2010); Oohn S. Odell & Susan K. Sell, *Reaffirming the Issue: the WTO Coalition on Intellectual Property and Public Health*, in *NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA* 85-114 (John S. Odell ed., 2006).

¹⁷ See World Trade Organization, UNDERSTANDING THE WTO 9, http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf; See also Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, ¶269, http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [hereinafter Consultative Board].

¹⁸ Dissatisfaction over DDA was ripe in developing countries, especially in Brazil, India, and South Korea among others. Civil Society Organizations, activists, and farmers had felt disenfranchised by the inclusion of Singapore issues into the DDA. After the launch of the Doha Round, at the Cancun Ministerial Conference of the WTO in Mexico, a South Korean farmer and activist Lee Kyung Hae stabbed himself in a major protest against the WTO. See Jonathan Watts, *Fields of Tears*, THE GUARDIAN, Sept. 16, 2003,

Thus, the Doha Round could not make any progress towards meeting the original deadline of January 1, 2005, as set by paragraph 45 of the Doha Declaration.¹⁹ As the dissatisfaction with the DDA grew amongst WTO Members, the General Council of the WTO resorted to a revision of the original agenda in July 2004, termed the July Package. The July Package initiated a new trend, putting into moratorium three agenda items: trade and investment, trade and competition policy, and transparency in government procurement, as well as issues concerning cotton and commodities to the DDA.²⁰

The Fifth Ministerial Conference of the WTO in Hong Kong in 2005²¹ added further negotiation issues such as the balance between agriculture and non-agriculture market access [NAMA]; non-violation and situation complaints under Trade Related Aspects of Intellectual Property Rights [TRIPS]; coherence; aid for trade; recently acceded members [RAM]; and accession. In the Seventh Ministerial Conference held in December 2009, WTO members decided to put the issue of non-violation complaints and tariffs on electronic commerce into another moratorium. Moratoriums under the July Package 2004 and the moratorium under the Seventh Ministerial Conference 2009 were guided by different ideas. The July Package put a moratorium on the three agenda items (trade and investment, trade and competition policy, and transparency in government procurement) permanently; at least they are not to be a part of the Doha Round Negotiations. The Seventh Ministerial Conference placed the moratorium on the two issues temporarily until the Eighth Ministerial Conference in December 2011 would take further action. The Eighth Ministerial Conference of the WTO, held in Geneva from 15-17 December 2011, has extended the period of the moratorium until the

available at <http://www.guardian.co.uk/world/2003/sep/16/northkorea.wto>. See also DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* (3d ed. 2009); Robert E. Baldwin, *Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies*, 29 *WORLD ECON.* 677-96 (2006); KENT JONES, *WHO'S AFRAID OF THE WTO?* Ch. 7, 8 (2004).

¹⁹ See Doha Declaration, *supra* note 2. Paragraph 45 of the Doha Declaration provides that:

[T]he negotiations to be pursued under the terms of this Declaration shall be concluded not later than 1 January 2005. The Fifth Session of the Ministerial Conference will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary. When the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.

²⁰ See World Trade Organization, *Doha Work Programme Decision*, adopted by the General Council on 1 August 2004, WT/L/579 (Aug. 2, 2004).

²¹ See World Trade Organization, *Hong Kong Ministerial Declaration*, WT/MIN(05)/DEC (Dec. 22, 2005).

next Ministerial Conference, to be held in 2013.²² With the temporary moratorium, the chance of bringing the issues of non-violation complaints and tariffs on electronic commerce back to the negotiation table cannot be overlooked.

Notably, before the Eighth Ministerial Conference of the WTO, Pascal Lamy, the WTO Director General, devised a new mechanism called the ‘three-speed search’²³ to get the Doha Round reactivated. Under his mantra, the Doha Round agenda items were to be approached at different speeds: in fast, medium, and slow lanes. Lamy, however, did not put forth a clear definition of fast, medium or slow. Some items related to LDCs were targeted for completion by December 2011. The Eighth Ministerial Conference of the WTO reaffirmed the LDCs accession guidelines adopted in 2002.²⁴ But the accession problem of the LDCs has not been ameliorated, and progress cannot be realized with the mere confirmation of the adoption of the guidelines.²⁵ Secondly, LDCs services and service suppliers shall be

²² See World Trade Organization, TRIPS Non-Violation and Situation Complaints Decision of Dec. 17, 2011, WT/L/842 (Dec. 19, 2011), http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/6_wtl842_e.pdf. The decision reads:

We take note of the work done by the Council for Trade-Related Aspects of Intellectual Property Rights pursuant to our Decision of 2 December 2009 on ‘TRIPS Non-Violation and Situation Complaints’ (WT/L/783), and direct it to continue its examination of the scope and modalities for complaints of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 and make recommendations to our next Session, which we have decided to hold in 2013. It is agreed that, in the meantime, Members will not initiate such complaints under the TRIPS Agreement.

See also WTO, Work Programme on the Electronic Commerce Decisions of 17 Dec. 2011, WT/L/843 (Dec. 19, 2011). The decision reads:

To further instruct the General Council to hold periodic reviews in its sessions of July and December 2012 and July 2013, based on the reports submitted by the WTO bodies entrusted with the implementation of the Work Programme, to assess its progress and consider any recommendations on possible measures related to electronic commerce in the next session of the Ministerial Conference . . . We decide that Members will maintain the current practice of not imposing customs duties on electronic transmissions until our next session, which we have decided to hold in 2013.

²³ See World Trade Organization, *Members support Lamy’s proposed three-speed search for Doha outcome in December* (May 31, 2011), http://www.wto.org/english/news_e/news11_e/tnc_infstat_31may11_e.htm [hereinafter WTO - Three speed search].

²⁴ See World Trade Organization, Accession of Least-Developed Countries, decision of 17 December 2012, WT/L/846 (Dec. 19, 2012), http://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm.

²⁵ Article XI.2 of the WTO Agreement allows the LDCs to make commitments

given preferences in respect of market access liberalisation.²⁶ In reality, LDCs have extremely less services to export. Visibly, most of the LDCs items are still under negotiations and scheduled for completion beyond the Eighth Ministerial Conference in December 2011. Indeed, LDCs interests are associated with all the agenda items of the Doha Round (e. g. NAMA, agricultural issues, rules issues, tariff escalation, and others). Therefore, LDCs issues cannot be simply addressed with an extremely diffident package without a full completion of the Doha Round.

The adoption of the ‘three-speed search’ has not brought any significant difference towards the accomplishment of the Doha Round. Rather it begs the question; does the ‘three-speed search’ help complete the Doha Round successfully? The “Single Undertaking” approach to trade negotiations developed by the Uruguay Round negotiations provides that nothing is agreed to until everything is agreed upon.²⁷ On the contrary, the ‘three-speed search’ has incorporated a fragmented idea of negotiation by introducing a method of negotiation in instalments, which aggravates its incompatibility with paragraph 47 of the Doha Declaration. Paragraph 47 reads as follows, “with the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking”²⁸

Against the legitimacy of paragraph 47, the idea of a ‘three-speed search’ introduces two fundamental risks: the first concerning its validity, and the second, its survival. The ‘three-speed search’ rears its head in defiance of the foundational idea of the single undertaking on which the WTO Agreement as a whole is

consistent with their levels of development and institutional capabilities, but the 2002 Guideline falls short to give effect to the spirit of this provision. During the accession negotiations, the LDCs are practically imposed conditions. See Surendra Bhandari, *LDC's Accession to the WTO: Should Doha Round Negotiations Allow LDCs to Invoke Article XI.2 of the WTO Agreement in Accession Negotiations?*, 11 THE ESTEY CENTER J. INT'L L. & TRADE POL'Y, 403-416 (2010); See also SURENDRA BHANDARI ET AL., NEPAL'S ACCESSION TO THE WTO 218-232 (2005).

²⁶ See World Trade Organization, Preferential Treatment Services and Service Suppliers of Least-Developed Countries, Decision of 17 December 2012, WT/L/847 (Dec. 19, 2012), http://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm.

²⁷ See Sonia E. Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT. ECO. L. 65-110 (2010); See also Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. INT. ECO. L. 835-58 (2000); RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 407 (2007); Jagdish Bhagwati, *Fifty Years: Looking Back, Looking Forward*, Paper prepared for the Symposium on the World Trading System, organised by the WTO and the Graduate Institute of International Studies in Geneva, (April 30, 1998), available at <http://www.columbia.edu/~jb38/WTOsymp.pdf>.

²⁸ See Doha Declaration, *supra* note 2.

founded and strengthened further by paragraph 47 of the Doha Declaration. Nonetheless, the ‘three-speed search’ has diluted the single undertaking by breaking down the completion of the Doha Round in three uncertain stages ignoring its peremptory nature. The survival issue relates to the history of the resumptions and suspensions of the Doha Round Negotiations.²⁹ The Doha Round has missed several deadlines at a speed and frequency never before seen in the negotiation rounds of GATT. It was originally supposed to be concluded by January 1, 2005.³⁰ The deadline could not be met. Then another deadline was set for the end of 2006.³¹ For a second time, the target was missed. The third deadline

²⁹ See World Trade Organization, *Lamy Urges Members to start negotiating to put together a December package* (July 22, 2011), http://www.wto.org/english/news_e/news11_e/tnc_infstat_22jun11_e.htm [hereinafter WTO - December Package]; See also World Trade Organization, *We Have Fully Resumed the Negotiations Across the Board* (Feb. 7, 2007), http://www.wto.org/english/news_e/news07_e/gc_dg_stat_7feb07_e.htm [hereinafter WTO - Resumed the negotiations]. While declaring the resumption of the Doha Round, the WTO Director General Pascal Lamy mentioned that the political conditions across the globe were favourable for the conclusion of the negotiations; WTO, *Capture Progress and Continue Work Members Say* (July 30, 2008), http://www.wto.org/english/news_e/news08_e/meet08_summary_30july_e.htm [hereinafter WTO - Capture progress]. WTO Members in the Meeting of Trade Negotiations Committee emphasised the need to preserve the issues settled and continue to work in the Doha Round. Finally, the Seventh Ministerial conference of the WTO signaled to conclude the Doha Round by the end of 2010; World Trade Organization, *Talks Suspended: Today there are only Losers* (July 24, 2006), http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm [hereinafter WTO - Talks suspended]. Pascal Lamy, the Director General of the WTO, suspended the Doha Round Negotiations giving a reason that the gaps between the key players remained too wide. It was especially followed by inconclusive meeting among Australia, Brazil, the EU, India, Japan, and the US; World Trade Organization, *Talks Collapse Despite Progress on a List of Issues* (July 29, 2008), http://www.wto.org/english/news_e/news08_e/meet08_summary_29july_e.htm [hereinafter WTO - Talks collapse]. Pascal Lamy mentioned that out of a to-do list of 20 topics, 18 had seen positions converge but the gaps could not narrow on the 19th - the specific safeguard mechanism for developing countries; See The Hong-Kong Declaration, *supra* note 21. Para 1 of the Declaration provides:

We reaffirm the Declarations and Decisions we adopted at Doha, as well as the Decision adopted by the General Council on 1 August 2004, and our full commitment to give effect to them. We renew our resolve to complete the Doha Work Program fully and to conclude the negotiations launched at Doha successfully in 2006.

³⁰ See The Hong-Kong Declaration, *supra* note 21, ¶45. Paragraph 45 of the Declaration states “[I]he negotiations to be pursued under the terms of this declaration shall be concluded not later than 1 January 2005.”

³¹ *Id.* Para 1 of the Declaration states:

We reaffirm the Declarations and Decisions we adopted at Doha, as well as the Decision adopted by the General Council on 1 August 2004, and

was set for July 2008.³² Again, the Doha Round failed to meet the deadline. For a fourth time, the deadline was put in for the end of 2010.³³ The negotiators could not meet this deadline either. In between, the Doha Round Negotiations were suspended,³⁴ and then followed by resumptions.³⁵ WTO Director-General Pascal Lamy set another deadline for December 2011,³⁶ which has also been missed. Now, Lamy has given up on fixing deadlines, but is bent on attaining 'credible results' at the Bali Ministerial.³⁷ With the 'three-speed search' the Doha Round does not need to be suspended and resumed. Its survival is modestly secured. But the uncertainty of its completion has deepened.

Visibly, the authority of interpretation and amendment of the negotiation methodology of the Doha Round agenda does not belong to the Director General.³⁸ No authority other than the Ministerial Conference can exercise the power of designating the DDA into different levels and categories. Thus, the 'three-speed search' signifies a usurpation of the power of the Ministerial Conference by the Chair of the Trade Negotiation Committee.³⁹ Along with legitimacy and validity issues, the package for LDCs merely demonstrates the naivety of the 'three-speed search' methodology. For example, unless the practice of tariff escalation is abolished and the farm sector in the developed and developing countries liberalised, most of the LDCs' products (farm products) cannot gain market access. The rigorous rules of origin practiced by both developed and developing countries are also major hurdles to open market access for LDCs. Evidently, it is not feasible for the WTO to liberalise developed and

our full commitment to give effect to them. We renew our resolve to complete the Doha Work Program fully and to conclude the negotiations launched at Doha successfully in 2006.

³² See WTO – Talks collapse, *supra* note 29.

³³ *Id.*

³⁴ See WTO - Talks suspended, *supra* note 29; See also WTO - Talks Collapse, *supra* note 29.

³⁵ See WTO - Resumed the negotiations, *supra* note 29; See also WTO - Capture progress, *supra* note 29. WTO Members in the Meeting of Trade Negotiations Committee emphasised the need to preserve the issues settled and continue to work in the Doha Round.

³⁶ See WTO - December Package, *supra* note 29; See also WTO - Three speed search, *supra* note 23.

³⁷ See World Trade Organization, *Lamy Urges Credible Results at Bali Ministerial* (Dec. 7, 2012), http://www.wto.org/english/news_e/news12_e/tnc_stat_07dec12_e.htm.

³⁸ See Marakesh Agreement Establishing the World Trade Organization art IV, Apr. 15, 1994, 1867 U.N.T.S. 154. It provides that the Ministerial Conference not the Director General shall have the authority to take decisions on matters under the Multilateral Trade Agreements.

³⁹ See Bhandari & Klaphake, *supra* note 6.

developing countries' farm sectors, abolish tariff escalation practices, and change the rigorous rules of origin alone via the LDCs package. Thus, the ill-designed 'three-speed search' is no more than a desperately thrown together package precariously held together for the Doha Round.

In addition to the 'three-speed search' mantra, the Eighth Ministerial Conference adopted a waiver decision under Article XIX.3 of the General Agreement on Trade in Services [GATS] to permit preferential treatment of LDCs service suppliers. This waiver decision, however, does not create a right for the LDCs, instead authorises developed and developing countries to offer preferential treatment at their discretion under GATS Article XIX.3 in the course of future market access liberalisation. The decision reads as follows, "this waiver, which will last for 15 years from the date of adoption, releases developing and developed-country Members from their legal obligation to provide non-discriminatory treatment to all trading partners (GATS Article II: Most-Favoured-Nation Treatment), so as to give them legal cover when they give preferential treatment to LDCs."⁴⁰

In short, the Eighth Ministerial Conference achieved nothing substantial on the Doha Agenda besides adopting some demagogic measures. With the present level of readiness of the negotiators, it seems as if the 2013 Ministerial Conference will also end with more demagogic measures at best. If not dead, the Doha Round is faltering. Nonetheless, the abortion of the Doha Round is not in the interests of the WTO members.⁴¹ Yet the commitment to see trade liberalisation through to

⁴⁰ See World Trade Organization, *WTO Ministers Adopt Waiver to Permit Preferential Treatment of LDC Service Suppliers* (Dec. 17, 2011), http://www.wto.org/english/news_e/news11_e/serv_17dec11_e.htm. Para 1 of the Decision reads,

Notwithstanding the provisions of Article II:1 of the GATS, Members may provide preferential treatment to services and service suppliers of least-developed countries with respect to the application of measures described in Article XVI and any other measures as may be annexed to this waiver, than to like services and service suppliers of other Members. Any such treatment shall be granted immediately and unconditionally to like services and service suppliers of all least-developed country Members. Preferential treatment with respect to the application of measures other than those described in Article XVI, is subject to approval by the Council for Trade in Services in accordance with its procedures and will be annexed to this waiver.

⁴¹ See generally Faizel Ismail, *Is the Doha Round Dead? What is the Way Forward?*, 13 *WORLD ECONOMICS* 143-169 (2012)[hereinafter Ismail]; See also Popa, *supra* note 1; Raj Bhala, *Poverty, Islamist Extremism and the Debacle of Doha Round Counter Terrorism: Part One of a Trilogy – Agricultural Tariffs and Subsidies*, 9 *UNIV. ST. THOMAS L. J.* 5-160 (2011)[hereinafter Bhala-*Poverty*]; Surendra Bhandari & Jay Klaphake, *supra* note 6, at 71-93.

the end has not been undertaken seriously since the present level of achievements are primarily designed to legitimise concessions and derogations from the existing commitments and rules.⁴² In short, it is widely felt that the Doha Round has been a victim of the indecision, stubbornness, and clash of interests of the G7 countries' governments (Australia, Brazil, China, EU, India, Japan, and the USA).⁴³

II. CHALLENGES FACING THE DOHA ROUND

The negotiations are markedly prolonged not because of the Doha Round's continuous inability to make breakthroughs in the direction of trade liberalisation, but because of its inability to address two main obstacles:

- Key players' reluctance to liberalise trade, and
- Faulty methodology.

These two central problems threatening the Doha Round Negotiations are subtler than those faced by previous international trade negotiations, but they are not entirely new. The Uruguay Round also faced similar problems. However, they were less intense then, as compared to the Doha Round. They are manifestations of diverse domestic trade concepts that offer contradictory perspectives on what the overall course of international trade should be.⁴⁴ This is, in any case primarily guided by the political economy of protectionism. A failure to address these problems will pose immense challenges to the successful conclusion of the Doha Round.

A. Key Players' Reluctance to Liberalise Trade

Reluctance of the key players to liberalise their markets is the primary reason for the doomed state of the Doha Round, which is widely acknowledged by the negotiators themselves.⁴⁵ On one occasion, the Chinese Commerce Minister, Chen Deming, stated that the mini-ministerial Doha Round talks in July 2008 failed due

⁴² See SURENDRA BHANDARI, MAKING RULES IN THE WTO: FREE OR MANAGED TRADE? (2012) [hereinafter BHANDARI]; See also Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 TEX. INT'L L. J. 1-125, 17-18 (2009) [hereinafter Bhala - *Resurrecting the Doha*].

⁴³ See generally ARLO POLETTI, THE EUROPEAN UNION & MULTILATERAL GOVERNANCE: THE POLITICS OF THE DOHA ROUND (2012); See also SUPARNA KARMAKAR ET AL., INDIA'S LIBERALIZATION EXPERIENCE: HOSTAGE TO THE WTO? (2008); STEFAN GRILLER, AT THE CROSSROADS: THE WORLD TRADING SYSTEM & THE DOHA ROUND (2007).

⁴⁴ See generally Cho, *supra* note 1; See also BHANDARI, *supra* note 42.

⁴⁵ See generally Bhala - *Poverty*, *supra* note 41, at 238-321.

to the inability of the US and India to bridge gaps between their positions on special safeguard triggering levels.⁴⁶ The US has instead blamed China, Brazil, and India for the stalemate in the Doha Round negotiations. The US considers the unwillingness of China, India, and other emerging economies to shoulder responsibilities as the reason for the disappointment in the Doha Round.⁴⁷ Susan Schwab, former US Trade Representative and the chief United States negotiator in the Doha Round, remarked that Brazil, China, India, and South Africa are not interested in opening their markets and instead, demand market openings in developed countries.⁴⁸ For example, India wanted to shield 90 per cent of its farm products from tariff cuts.⁴⁹ In addition, countries, both developed and developing, are fearful of the increased imports from China. This is one of the unacknowledged reasons behind Doha's frequent failures.⁵⁰

Such statements indicate the nature of uneasy co-operation, especially among the G7 countries, in the Doha Round Negotiations. In addition, on the eve of another Geneva mini-ministerial in August 2010, Kamal Nath, the former Indian Commerce Minister and chief negotiator, claimed that the Doha Round could not displace subsistence farmers and cause deindustrialisation of developing countries, and thus the livelihood security and subsistence of the poor could not be negotiated upon.⁵¹ He also cautioned that an over-ambitious program of tariff liberalisation in the Doha Round could permanently foreclose the possibility of industrial development in many developing countries.⁵² During his visit to India in 2008, Pascal Lamy had observed how the US and India were weakening the prospects of the Doha Round; he remarked that Kamal Nath and Susan Schwab were 'pregnant' and his role as a 'midwife' was to salvage the Doha Round to fruition.⁵³ However, he has not been able to play that role successfully till date.

⁴⁶ See D. Chen, Statement at the Mini-ministerial Meeting by H. E. Chen Deming, Minister of Commerce, PRC, July 29, 2008, in C. L. Lim & Jiang Yu Wang, *China and the Doha Development Agenda*, 44 J. WORLD TRADE 1309, 1318 (2010).

⁴⁷ See *India, China Responsible for Deadlock in Doha Talks: US Official*, INDIA TODAY, Sept. 13, 2011.

⁴⁸ See Susan C. Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, 90(3) FOREIGN AFF. 104-14 (May/June 2011)[hereinafter Schwab].

⁴⁹ *Id.* at 110.

⁵⁰ *Id.* at 108.

⁵¹ See Kamal Nath, *Address the Development Challenge of Doha*, <http://news.alibaba.com/article/detail/international-trade-special/100376769-1-address-development-challenge-doha/%253A-kamal.html>.

⁵² *Id.*

⁵³ See Seema Sapra, *India in the WTO: Lamy as Doha Round 'midwife' for a 'pregnant' Kamal Nath and Susan Schwab*, <http://indiainthewto.wordpress.com/2008/08/19/lamy-as-doha-round-midwife-for-a-pregnant-kamal-nath-and-susan-schwab>.

The United States claims that since the beginning of the Doha Round it played the role of a leader and engaged with Brazil, the EU, and India in a G4 process, aimed at moving the Doha Round Negotiations to a logical conclusion; but this broke down due to the reluctance of the emerging economies – primarily over industrial tariff cuts.⁵⁴ Thus, reaching a consensus on the negotiating agenda in the Doha Round has proven to be elusive.⁵⁵ In spite of this, the US expressed its commitment to the idea that both developed and developing members could best achieve true development gains through further real market liberalisation.⁵⁶ Against this background, an examination of the role played by the US would be useful for a better understanding of the nature of its leadership role, and the implications of this for the Doha Round.

The US explains the fact that the efforts stymied by the Doha Round resulted from other leading countries' failure to reciprocate US proposals to liberalise markets, including cutting farm subsidies. The President's 2007 Trade Policy Agenda stated, '[t]he United States pursued every opportunity available in 2006 to break the apparent deadlock in the Doha Round, but to no avail. Major WTO Members continued to resist matching US ambitions, and the formal talks were suspended in July 2006.'⁵⁷

The picture presented by the United States reflects only one side of the story. Developed countries have refused to liberalise their farm sector, pretended to end the problem of tariff escalation, and blocked the process of reforming trade-distorting effects of trade measures, including the pervasively used anti-dumping measures.⁵⁸ Consequently, the Doha Round has not moved forward. Rather, it is impeded by the leading negotiating countries' reluctance on liberalizing their markets. Now it is widely felt that finding a consensus on the negotiating agenda in the Doha Round has proved indefinable.⁵⁹

Since the Doha Round Negotiations have almost fallen into a Catch-22 situation, Free Trade Area Agreements [FTAs] are gaining popularity as tools for trade with policy for integration of labour and environmental issues into trade

⁵⁴ See USTR, The President's 2008 Trade Policy Agenda, at 6, http://www.ustr.gov/sites/default/files/uploads/reports/2008/asset_upload_file490_14556.pdf.

⁵⁵ See USTR, The President's 2007 Trade Policy Agenda, at 2, http://www.ustr.gov/sites/default/files/uploads/reports/2007/asset_upload_file629_10624.pdf.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.* at 2.

⁵⁸ See generally Ismail, *supra* note 41, at 143-68; See also Chen-Kuo Lee, *World Trade Negotiation Between Developing and Developed Countries: An Evolutionary Game Theory Approach*, 28 INT'L J. MGMT. 867-79 (2011).

⁵⁹ *Id.*

regime, especially for the United States. Against this background, the Obama administration's trade policies remind us that in many respects they are not a major departure from the Bush era trade policies but a shift in trends, though enough to have a cascading effect on the Doha Round Negotiations.

However, a well-defined move in American trade policy was reflected in the President's 2010 Trade Policy Agenda which, unlike earlier policies, was primarily focused on export-led growth. It ambitiously targeted a doubling of US exports by 2014, discouraging other countries not to rely on export-led growth.⁶⁰ From the very beginning, the Obama administration, inheriting an unprecedented economic crisis from the previous administration, began adopting protectionist trade policies.⁶¹ A month into his presidency, President Obama signed the American Recovery and Reinvestment Act of 2009 [ARRA]. The ARRA simultaneously introduced a \$787 billion economic stimulus and a 'buy American' policy. Section 1605 of the ARRA provides that none of the funds appropriated or otherwise made available by the Act can fund a project for the construction, alteration, maintenance, or repair of a public building or public work, unless all iron, steel, and manufactured goods to be used in the project are produced in the United States. This 'buy American products' or 'buy American' provision is contrary to the national treatment principle of the WTO. However, because of this policy, many stimulus packages around the world, not the least of which are those in China,⁶² adopted similar measures. These measures have had a chilling effect on the Doha Round. However, Pascal Lamy has asserted that such measures are compatible with the WTO rules.⁶³ Despite Lamy's attempt to justify 'buy domestic products'

⁶⁰ See USTR, The President's 2010's Trade Policy Agenda, http://www.ustr.gov/webfm_send/1673[hereinafter USTR - President's 2010 Agenda]. On average, a 20 per cent increase in exports per year for the period would achieve the target. The export-import data from 1960–2009 shows that to achieve this goal, the United States needs to take bold steps; it especially needs to change its pattern of trade. For example, the US exports of goods from 1960–1970 were positive, i.e., there were more exports than imports. During the same period, exports of services were negative, i.e., there were more imports than exports. With the exception of 1973 and 1975, between 1971–2009 US exports of goods were negative. During the same period, exports of services were positive. In 1960, the total value of US exports was 25.9 billion dollars. Since then, US exports have increased tremendously. In 2000, it crossed the trillion-dollar mark. In 2008, it was 1.8 trillion dollars and decreased slightly to 1.6 trillion dollars in 2009. In fact, during the period of 2000–2008, U.S. exports almost doubled.

⁶¹ See generally Bhandari & Klaphake, *supra* note 6.

⁶² See *Official Rules Out 'Buy China' Policy*, SOUTH CHINA MORNING POST, Feb. 10, 2009 in C. L. Lim & Jiang Yu Wang, *China and the Doha Development Agenda*, 44 J. WORLD TRADE 1309, 1311 (2010).

⁶³ See Pascal Lamy, *Current Challenges for Global Trade*, Lecture delivered at Erasmus University, the Netherlands (May 18, 2009), http://www.wto.org/english/news_e/

measures, it is clear from the GATT Panel Report in the *Canadian Investment case*⁶⁴ that trade policies regarding 'buy domestic products' are considered inconsistent with the national treatment rule of the WTO.

In February 2009, the Office of the United States Trade Representative [USTR] presented the President's 2009 Trade Policy Agenda.⁶⁵ The Trade Policy 2009 centred on reorienting the US economy to meet the challenges of global competitiveness.⁶⁶ To this end, it was fundamentally concerned with economic consequences on American workers.⁶⁷ It expressed its reluctance to eliminate barriers to trade. It reasoned that liberalising trade at the time would be too challenging in the face of serious turmoil in the US economy and financial markets and chose to make improvements in trade adjustment assistance [TAA] programs to help the economy recover.⁶⁸ The US Trade Policy 2012 gives the indication that the US is ready to negotiate on trade liberalisation, but limited to those sectors where the US producers are highly competitive.⁶⁹

spl_e/spl125_e.htm. Lamy says,

We are witnessing increased instances of countries raising their tariffs on certain imports, instituting new non-tariff measures and initiating anti-dumping actions. We are also seeing bail-out packages and other rescue measures being adopted to help specific industries. The rationale behind these measures is to favor domestic goods and service suppliers at the expense of imports. Many of these measures fall within WTO rules and so far they have not triggered a tit-for-tat chain retaliation. But it is clear that these measures have a chilling effect on trade flows in general.

See also American Recovery and Reinvestment Act of 2009, 26 U.S.C. §1605 (2009).

⁶⁴ See Panel Report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/R (March 14, 1997). The United States had complained and challenged that the Canadian Foreign Investment Review Act had given preferences to those investors who would make a commitment to purchase Canadian goods over imported goods and the Act had also required meeting certain export performance requirements. The GATT Panel found that the 'buy Canadian goods' policy was inconsistent with the GATT Article III, which ensures equal treatment of domestic and foreign nationals and products at the domestic market.

⁶⁵ See USTR, 2009 Trade Policy Agenda and 2008 Annual Report of the President of the United States on the Trade Agreements Program, <http://www.ustr.gov/about-us/press-office/reports-and-publications/2009/2009-trade-policy-agenda-and-2008-annual-report>.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See President's 2012 Trade Policy Agenda, at 6, 10, <http://www.ustr.gov/about-us/press-office/reports-and-publications/2012-0>. The TPA claims that

Insistence on America's rights in the global trading system produces real, job-supporting results for American firms and working families. For this

The Obama administration made a striking departure from the concept of promoting global welfare by choosing protectionist measures with a vision to become focused on domestic welfare. The retreat from the concept of mutual reinforcement of global and domestic welfare is clearly reflected in the President's 2010 Trade Policy Agenda. It asserts that the United States should be able to exercise rights to bend the rules-based global trading system in order to promote job creation and economic opportunities in the United States, through fighting for market access abroad, regulating foreign competition at home,⁷⁰ and making global trade policies more reflective of American values⁷¹ as its priority targets in the Doha Round.

Nevertheless, like President Bush's Trade Policy Agendas, the Obama administration also acknowledges the Doha Round Negotiations as a series of opportunities to open international markets aggressively. The compelling reason is that 10 million jobs in merchandise sectors are supported by exports activities alone.⁷² Beyond the merchandise sector, exports are the lifeblood of many American farmers. Agriculture exports support 800,000 jobs in the United States.⁷³ The logical conclusion of the Doha Round would therefore not only provide better market access at the international level, but could also create jobs domestically.

India, on the other hand, is seeking some policy space to protect its domestic producers in the areas of services and non-agricultural market access [NAMA] negotiations, and maintains concerns regarding the protection of farmers from imports.⁷⁴ India has used 'special-safeguard measures' to protect its farmers.⁷⁵ Whether these would protect the interests of the poor farmers remains open to

reason, robust trade enforcement across the spectrum of goods and services is a central pillar of the Obama Administration's trade policy. As evidenced by our work in intellectual property rights, we use a variety of tools including monitoring and reporting, dialogue, and direct negotiation, to break down tariff and non-tariff barriers to U.S. exports. And we do not hesitate to act when direct enforcement action is appropriate to eliminate trade irritants.

⁷⁰ See USTR, President's 2010 Agenda, *supra* note 60, at 1.

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Bhala- *Resurrecting the Doha*, *supra* note 42. See also C. L. Lim & Jiang Yu Wang, *China and the Doha Development Agenda*, 44 J. WORLD TRADE 1309, 1318 (2010); Robert Wolfe, *Sprinting During a Marathon: Why the WTO Ministerial Failed in July 2008*, 44 J. WORLD TRADE 81-126 (2010) [hereinafter Wolfe]; Committee on Agriculture, *Revised Draft Modality for Agriculture*, ¶¶126-28, TN/AG/W/4/Rev.4 (Dec. 6, 2008).

⁷⁵ *Id.*

question, both academically and politically. In the Doha Round, beyond the overture of the Indian proposal, controversy has surfaced concerning the methodology for determining the baseline regarding the use of these protective tools. There has been growing disagreement about the trigger level methodology for the binding of tariffs (pre-Uruguay Round or pre-Doha Round), and the coverage of product lines.⁷⁶ Local political interests rather than factual trade and economic analysis have perhaps aggravated the controversy.⁷⁷

Overall, despite the potential benefits of success, the Doha Round is presently on the verge of failure. The reasons are clear. First, in the process of international rule-making at Doha, the leading G7 countries are actually engaged in legitimising their own domestic values and policy goals. Second, countries are reluctant to open and liberalise trade at the domestic level, and are instead futilely trying to open markets at the international level. This self-contradictory concept will not aid in the successful completion of the Doha Round. Third, each negotiating country is trying to legitimise exceptions, concessions, derogations, and fragmentation of the existing rules and standards of the WTO,⁷⁸ which will be antithetical to strengthening the multilateral trading system.

B. Faulty Methodology

Pascal Lamy calls the Doha Round methodology a ‘cocktail’ approach.⁷⁹ One of the features highlighted by Lamy consists of a ‘give and take’ between the negotiating members. It is understandable that each negotiating country proposes

⁷⁶ See BHANDARI, *supra* note 42. The Uruguay Round had stroked a compromise between the US and EU by converting the farm sector’s NTBs into tariffs by establishing new quotas for each product with a special safeguard (SSG) symbol. Market access would be allowed to the SSG products at tariffication levels, but for imports below the price or above the volume trigger levels, an additional duty would be levied. At the insistence of the EU a favourable base year of 1986-88 was agreed as the price trigger base period. Under Article 4 and 5 of the AoA, those WTO Members with the SSG symbol in their tariffs schedule would be able to use the tools of price trigger and volume trigger and those who did not use the SSG during the Uruguay Round (e. g. China and India) could not use the SSG, which they like to introduce through the Doha Round but the US is resisting calling it a pre-Uruguay Round coverage.

⁷⁷ See BHANDARI, *supra* note 42. See also Wolfe, *supra* note 74; Valentiz Zahrnt, *Domestic Constituents and the Formulation of WTO Negotiating Positions: What the Delegates Say?*, 7 WORLD TRADE REV. 393, 394 (2008).

⁷⁸ See generally BHANDARI, *supra* note 42.

⁷⁹ See World Trade Organization, *Lamy outlines ‘cocktail approach’ in moving Doha Forward* (May 04, 2010), http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm.

its concepts on the agenda. However, in many cases, the domestic trade policies and political interests of member countries guide these concepts. Each member country wants to legitimise its own domestic policies through the WTO regime in the form of international rules. Thus, trade negotiations are complex and protracted. Pragmatically, an itemised negotiation among a few or, more conveniently, between two countries might introduce a 'give and take' method of negotiation, which is practically arduous among 157 WTO Members. The success of multilateral negotiations is almost untenable unless it is founded on a principle-based methodology. Regrettably, it is not possible to see how the methodology of 'give and take' applicable in bilateral negotiations could be coherently applied in multilateral trade negotiations to harmonise and address the problem of intense conceptual dissonance and divergences at the multilateral level.

International trade negotiations can either be drawn up on compromise plans or principles of global welfare. The primary job of trade negotiations, including the Doha Round, ought to be the harmonisation of conflicting negotiating concepts (both processes and contents) in order to draw positive and principle-based outcomes for the expansion of global welfare. By contrast, when negotiators espouse their own interests, ignoring positive and principled welfare outcomes, they choose a path of unprincipled compromise, which is habitually short-sighted and erroneous. Compromises often fail to harmonise conflicting negotiating concepts. Instead, they allow derogations,⁸⁰ divergences,⁸¹ and fragmentation.⁸² In

⁸⁰ Derogation is a situation in which WTO Members are allowed to depart from the basic rules. Historically, through institutional mechanisms, derogation legitimises trade barriers and resists their removal. The tendency of derogation from making rules in the WTO seeks to give leeway to artificial barriers. Unfortunately, this tendency has been firmly rooted since the very beginning of the GATT. Almost all GATT Articles and WTO Agreements allow derogation in different forms, including expressed exceptions. Classification of countries into different categories, even the developed countries, and treating them with different types of proposed concessions and exceptions is an example of derogation in the Doha Round.

⁸¹ WTO Members who propose concepts in the WTO negotiations and work to transmute them into constructs or rules are heavily influenced by their own normative fixations. These normative fixations are basically shaped by political, economic, social, cultural, and developmental factors at the domestic level of the Members, among other factors. The greater the degree of normative divergence, the less would be the harmony. In turn, the less the harmony, the greater would be the divergence in transmuting concepts into constructs. As there are more stakeholders with distinctly diverse normative milieus (i.e., a wide specter of beliefs or "belief pluralism"), the dynamics of harmonisation of concepts has become more contested and rigorous in the Doha Round negotiations.

⁸² Fragmentation is a mechanism to protect the interests of domestic producers at the cost of domestic consumers and global producers. It is often expressed in the form of constructed advantage, which is different from a comparative advantage in two respects.

many cases, especially when negotiating concepts are quite normative, striking a compromise is not possible. This renders the cocktail approach incalculably faulty. As a result, the Doha Round is a victim of its shortcomings.

The outcomes of the Doha Round Negotiations achieved thus far indicate that the cocktail approach is faulty and has failed miserably on three counts.⁸³ First, WTO members are moving away from the idea of global welfare, as negotiators are introducing a scheme of derogations from the concept of trade liberalisation. Secondly, the WTO negotiating groups are overwhelmed by compromised formulas with a set of divergent modalities. These proposed divergent modalities will produce divergent rules differently applicable to different categories of WTO members. For the legitimization of derogations and divergences, sophisticated exemptions and exceptions are also proposed. Third, where the tools of derogations and divergences do not work out, negotiating agenda items are put into moratorium.

The Doha Round, seduced into legitimising the idea of derogation and divergences, has introduced localised policy qualifications as defining tools for pervasive exceptions and exemptions into the WTO regime. For example, on the issue of cutting overall trade distorting domestic support [OTDS] to the agricultural sector, WTO members are negotiating for a higher base level so that at the end of the day the cut would be meaningless. Rather, the OTDS will be elevated. It is also proposed to provide developing countries with a special and differential treatment [S&D] in the form of a 20 per cent threshold consisting of

First, a constructed advantage is a created or manufactured advantage. Generally, a comparative advantage is naturally endowed as the factors of production. Second, a constructed advantage is a by-product of social institutions involving deliberate policy choices. The existence of a comparative advantage is often independent of policy choices, especially economic institutions; whereas, the constructed advantage is a conscious policy maneuver over a comparative advantage to control market. Zeroing, Anti-dumping, non-production subsidies are some of the examples of fragmentation.

⁸³ Except the two decisions (reaffirmation of accession guidelines 2002, and market access to services of LDCs) taken by the Eighth Ministerial on the LDCs, nothing tangible has been achieved yet. Member countries have tabled their proposals and negotiation positions, which could be considered an achievement. A number of concessions and derogations are proposed but not agreed yet. The disagreement is intense in almost all negotiating areas. The Chairperson of the Agriculture Negotiation Committee, Mr. David Walker, acknowledges that, "In my assessment this judgment has been borne out in practice albeit, to this point, Members have not been in a position to substantively resolve matters nor is there any discernable progress on these issues that can be captured in text." See Negotiating Group on Agriculture, *Report by the Chairman, H. E. Mr. David Walker, to the Trade Negotiation Committee*, TN/AG/26 (Apr. 21, 2011); See also Bhala-Poverty, *supra* note 41, at 31-45.

10 per cent on each product and non-product specific aggregate measure of support [AMS]. In addition, among the developed countries, it is proposed that the top three subsidisers (the EU, Japan, and the United States) will cut 33.3 percent of the OTDS, and that other developed countries will cut it by 25 per cent. Developing countries are expected to cut two-thirds of the amount of that for developed countries. Among the developing countries, Jordan, Morocco, Tunisia, and Venezuela are waived from the OTDS cut. Recently Acceded Members [RAMs] are also exempted from cutting OTDS. To any powerful country, the pattern would be satisfying. From a systemic perspective, the ever-finer gradations of anointment seem a ludicrous distortion of the collective objectives of the Doha Round, explainable only by the pursuit of self-interest.⁸⁴

Another example can be found on the issue of ‘sensitive products’ that the Doha Round is negotiating. The Doha Round proposes that developed countries be allowed to have 4-6 per cent of farm products tariff lines protected as sensitive products. Canada and Japan are not satisfied with this 4-6 percent waiver. Thus, a special treatment is proposed for Canada and Japan, to provide them a greater two percent margin on sensitive products. With this proposal, the developing countries will have one-third more sensitive products than developed countries. However, a remarkable point in this context is that the existing rules of the WTO—more specifically the Agreement on Agriculture [AoA]—does not allow any such specific category of sensitive products. Therefore, the concept of ‘sensitive products’ allows derogation from the existing rules of the WTO and the idea of trade liberalisation.

Developed countries, led by the United States, are arguing for designation of the sensitive products only to those tariff lines that were already subject to tariffs-rate-quotas [TRQs] before the Doha Round. This argument aims especially to protect the interests of those developed countries that are applying GATT Article XI on farm products. On this basis, many countries, especially the new members of the WTO such as China and other developing countries including India, would be denied any designation of farm products as sensitive products. In addition, China and India are arguing for an authority to designate any farm product as a sensitive product.

Observing the pattern of negotiation on ‘sensitive products’, one can conclude that trade negotiations have evolved from being high-minded, well-intentioned free trade aspirations to becoming stunningly abstruse, product-by-product, and protectionist in nature.⁸⁵

⁸⁴ See Bhala-*Resurrecting the Doha*, *supra* note 42, at 22.

⁸⁵ *Id.*

Valentine Rugwabiza, the current Deputy Director-General of the WTO, warns “to turn to protectionist trade measures in the current circumstances would be a huge mistake, triggering a game of lowest common denominator where the loser will ultimately be global growth.”⁸⁶

III. POTENTIAL OUTCOMES

Three conspicuous developments are emerging in the international trade regime. First, the United States and the EU are no longer the only dominating forces in international trade negotiations. As a result, a paradigm shift has occurred whereby leadership roles are now shared by new trading powers such as China, Brazil, and India, along with the United States and the EU. A vision for joint leadership is currently lacking, and one needs to be urgently created if the Doha Round is to lead successfully to a reinforced multilateral trading regime.⁸⁷Second, the negotiations are extensively influenced by a number of coalition groups. There are more than two-dozen coalitions often having a single voice and negotiating strategy. Perhaps the smallest group, but nevertheless a powerless one, is the Cotton-4. The organised efforts of the Cotton-4 have successfully brought the issue of cotton to the Doha Round Negotiations. Third, the traditional rule-making process at the international trade regime is no longer acceptable.

The fact that a hegemonic rule-making process is no more acceptable to other negotiating countries has also brought immense challenges. The first challenge is associated with the theoretical and methodological frameworks for harmonizing conflicting concepts, and for transmuting them into universally acceptable rules of international trade law. The second challenge is addressing the incompetence of the G7 countries in playing their roles. It has already proved erroneous and insufficient. Their roles need to be focused on development or agreeing on theoretical and methodological frameworks that would help achieve harmony between global and domestic welfare. Policy change and focus on the line of global welfare would offer better opportunities to harmonize the conflicting concepts on devising trade rules at the global level.

⁸⁶ See Valentine Rugwabiza, *Protectionism will Hurt Global Growth* (Nov. 4, 2011), http://www.wto.org/english/news_e/news11_e/ddg_04nov11_e.htm. She emphasises that inward looking postures and isolationist tendencies can be the gut reaction to the turbulent period we are experiencing. In a food crisis, countries may look to ensure that only their population is fed. In a labour crisis the first priority may be to ensure limited job losses at home. These are understandable reactions but they are not always the best reactions, both from an economic perspective and from a global partnership perspective.

⁸⁷ See BHANDARI, *supra* note 42.

This reluctance on the part of WTO members reminds us of the observation of Smith and Ricardo that if nation-states (WTO members) do not believe unconditional trade liberalisation will help them, they will behave like mercantilists. In the Doha Round, negotiators have often behaved like mercantilists, regurgitating their domestic positions whilst ignoring their implications for global welfare. Professor Bhala powerfully argues,

[I]t was obvious, as was the burgeoning middle classes in the likes of Brazil, China, and India, to which American manufacturers looked for customers and salvation from the forces of long-term de-industrialization. In turn, for American negotiators in the Doha Round, the temptation of short-term mercantilism became irresistible, at the expense of identifying NAMA strategies.⁸⁸

The mercantilist negotiating strategy of the leading countries in the Doha Round is likely to result in three outcomes: an unfortunate death, a partial conclusion, or a conclusion with pervasive derogations and divergences. From the era of the GATT to the Doha Round, serious statements were made about the death of trade negotiations. Lester Thurow, a prominent economist, declared at the World Economic Forum in 1988 that the 'GATT is dead'; however, GATT managed the success of the Uruguay Round despite deep troubles. Similarly, in 2008, Nobel-winning economist Paul Krugman's New York Times Op-Ed column headline trumpeted 'Dead Doha'.⁸⁹ Like many scholars, Susan Schwab says, 'the Doha is doomed'.⁹⁰ At the World Economic Forum in 2011, political leaders such as David Cameron, Angela Merkel, and Susilo Bambang Yudhoyono issued cautions on the possible failure of the Doha Round and on the grave negative effects this would have on the global economy.⁹¹ Notwithstanding the gloomy predictions, if history is any indication, like the Uruguay Round, the Doha Round could still emerge from its deep troubles.

⁸⁸ See Bhala-*Poverty*, *supra* note 41, at 1-81.

⁸⁹ See Paul Krugman, *Dead Doha*, THE NEW YORK TIMES, July 20, 2008. Krugman writes:

It's over — which is neither a surprise nor a catastrophe. Trade negotiations aren't driven by economists' calculations of welfare gains; they're driven by enlightened mercantilism, what has come to be known as GATT-think. If trade negotiators want to take on well-entrenched interest groups, they have to find countervailing interest groups with an interest in liberalization. That never happened in this round; instead, we had a rather pathetic attempt to cast trade negotiations as, yes, part of the Global War on Terror (TM). No surprise, then, that the thing didn't work.

⁹⁰ See Schwab, *supra* note 48.

⁹¹ See *Doha Round: Dead Parrot Talks*, THE ECONOMIC TIMES, Mar. 28, 2011.

The 'three-speed search' program of Pascal Lamy has designated issues related to LDCs as priorities to be completed by December 2011. Issues such as agriculture, NAMA, services, trade remedies, and intellectual property are put into the 'unlikely to achieve by 2011' category. Now, the achievement of all these issues including the LDCs issues seem unlikely, even by the Ninth Ministerial of the WTO in December 2013, since the WTO Director General has given indication that the Bali Ministerial would primarily focus on limited agenda items such as concluding a WTO Agreement on Trade Facilitation.⁹² This three-speed search will probably rescue the Doha Round from being dead but not from being a lame duck.

Obviously, the continuation of the Doha Round is more beneficial than the prospect of its death. Furthermore, drawing lessons from the patterns of negotiations up until this point, some potential gains are projected from the conclusion of the Doha Round. A number of studies conclude the same. For example, the Peterson Institution's study of twenty-two countries suggests that the gains will be about 311.6 billion US Dollars in imports and 229.2 billion US Dollars in exports. However, almost half of the gain comes from trade facilitation alone. The World Bank estimates the welfare gains at roughly 287 billion US dollars. However, the Peterson Institute acknowledges that there is a large gap between Doha gains that are 'on the table' and those that would be derived from an admittedly very optimistic negotiating scenario. It recognises that negotiators are unlikely to harvest the full yield from the Doha Round.⁹³

However, these projections have two serious limitations. First, the models used to estimate these gains are based on a series of unrealistic assumptions.⁹⁴ Second, these projections have not taken into consideration the effects of the proposed derogations and divergences. They will significantly distort the projected gains.

Most of the leading countries tend to limit the ability of the WTO from any further policy prescriptions that would affect the domestic trade measures. The underlying idea of the Doha Round Negotiations is to encourage and support comparative advantage of its actors. Unlike the fundamental rationale of creating

⁹² See Lamy, *supra* note 5.

⁹³ See GARY CLYDE HUFBAUER ET AL., FIGURING OUT THE DOHA ROUND 7 (2010).

⁹⁴ The estimates are based on an assumed set of Doha Round rules. The different levels of liberalisation might cause impact on the degrees of gain from liberalisation. Yet, no one knows what will be the nature of trade liberalisation under the Doha Round. Further, those figures are based on possible future trends of trade and not on the actual pattern of trade.

global welfare, the Doha Round proposals are built on subtle ideas that tend to penalize comparative advantage. These proposed derogations are not only unhelpful for trade liberalisation but also harmful to any effort to push the international trading regime beyond the Uruguay Round achievement.

In conclusion, all these potential but unwanted outcomes of the Doha Round—an unfortunate death, a partial conclusion, or a conclusion with derogations and divergences, will unleash three possible implications. First, the credibility of the WTO will be questioned. Second, protectionist pressure across the globe will increase. Third, the multilateral system will be weakened, but at the same time pressure will increase in defence of multilateralism. These possible implications are briefly discussed below.

IV. POSSIBLE IMPLICATIONS

The above-mentioned implications of the potential unwanted outcomes of the Doha Round are as follows:

- Questions about the credibility of the WTO
- Increase in discriminatory trade
- Demands for defence of multilateralism

The credibility of the WTO as a negotiating machine or forum will probably be called into serious question, unless it adopts an effective alternative negotiation methodology. Insistence on adopting the existing methodologies might also impede the ability of the WTO to organize international trade negotiations under its auspices in the near future. Among other aspects, the credibility of the WTO is largely based on three important pillars. The first is that it is founded on the idea of the rules-based trading system,⁹⁵ which could be strengthened by faithfully implementing the WTO Agreements and resolving trade disputes. There are some problems on the implementation side, and these have already been a part of the Doha Round Negotiations.⁹⁶ Nevertheless, the dispute settlement mechanism

⁹⁵ See WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO (2011).

⁹⁶ See World Trade Organization, The Implementation Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17 (Nov. 20, 2001), http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm. The WTO observes:

Around 100 implementation issues were raised in the lead-up to the Doha Ministerial Conference. The implementation decision, combined with paragraph 12 of the main Doha Declaration, provides a two-track solution. More than 40 items under 12 headings were settled at or before the Doha conference, for immediate delivery; and the vast majority of the remaining items are immediately the subject of negotiations.

under the WTO has been the most important saviour of WTO credibility, through its efficient resolution of complex trade disputes between members. The second pillar of WTO credibility lies in its efficiency as a negotiation machine.⁹⁷ Thus, the Doha Round is the litmus test of WTO credibility, which is currently at risk. If the Doha Round fails or is concluded with derogations and divergences, there is no doubt that the WTO's credibility will be seriously questioned. Third, multilateralism, the core of the WTO's credibility, is faltering. With the rise of free trade area agreements,⁹⁸ continuous marginalization of the LDCs, and lack of effective negotiation methodology, the virtue of multilateralism is on the point of falling into a penumbra.

Now, the question is, can the WTO save its credibility from being shattered? Perhaps the dawn is far away, but it is not impossible to attain for the WTO if it seriously engages in principles-based trade negotiations. The 'cocktail' approach, the 'three-speed search' and other cosmetically designed ideas will not help save its credibility. It would be natural to expect the upcoming Director-General of the WTO give vivacity to the Doha Round to make it a truly development round by adopting an effective methodology by placing the core principles of the WTO at the centre of the negotiations.

The legitimisation of vested interests by the selective opening of markets i.e., the 'give and take' is the name of a reciprocal trading model, which is the primary rationale of FTAs and RTAs. Negotiations for the protection of trade interests on

⁹⁷ The WTO as a negotiating machine resembles its trade negotiations history since the GATT period. See Consultative Board, *supra* note 17, at 61.

⁹⁸ The controversy that whether the FTAs/RTAs are building blocks or stumbling blocks is not a new one. The GATT itself has legitimized FTAs/RTAs under Article XXIV as an exception to multilateralism. The expectation was that by permitting FTAs/RTAs, they would enhance liberal trading regime among the members. The expectation was founded on the idea that the more FTAs/RTAs would come into force, the more countries could engage in liberalising their markets. Of course, even after the establishment of the WTO, the FTAs/RTAs are on the rise but there exists limited evidence that FTAs/RTAs have ever promoted multilateralism. The rise of FTAs/RTAs when the multilateral trade negotiations at the Doha Round are in crisis indicates a situation of switching interests of states from a multilateral to bilateral engagement. For a detailed discussion, see THE ECONOMICS OF PREFERENTIAL TRADE AGREEMENTS (Jagdish Bhagwati & Arvind Panagariya eds., 1996); See also PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011); RISE OF BILATERALISM: COMPARING AMERICAN EUROPEAN AND ASIAN APPROACHES TO PREFERENTIAL TRADE AGREEMENTS (Kenneth Heydon & Stephen Woolcock eds., 2009); Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON. L. 571-83 (2007); Nuno Limao, *Preferential vs. Multilateral Trade Liberalization: Evidence and Open Questions*, 5 WORLD TRADE REV. 155-76 (2006).

a selective basis at the multilateral level is an unprincipled endeavour that has been employed in the Doha Round, and one of the known reasons for the frequent crashes of the negotiations. It is much easier for countries to embark on bilateral or reciprocal trade modalities than multilateral ones. Against this background, Pascal Lamy rightly observes that the experience of the Doha Round during the last decade has raised questions about the ability and willingness of Members to advance the multilateral trade agenda. It has also raised the need to connect the multilateral and bilateral 'brains' of trade policy drivers and actors.⁹⁹

In the twenty years following 1990, the number of preferential trade agreements [PTAs] has increased fourfold, with 352 FTAs in active existence.¹⁰⁰ A microcosmic example of this increased propensity towards FTAs can be seen in US trade policy. Until 2001, the United States had entered into only three FTAs. During President Bush's administration, the number increased from 3 to 17, and in 2011 alone, the US Senate ratified 3 more FTAs.¹⁰¹ The EU has already entered into, concluded, and is negotiating more than two-dozen FTAs.¹⁰² Between 2002 and 2011, Japan entered into 13 FTAs, and more are in the pipeline.¹⁰³ The recent one is with India, which came into force on August 1, 2011. China has entered into 9 FTAs, negotiating with India, Japan, South Korea, and Switzerland.¹⁰⁴

If major trading nations keep expanding their entry into FTAs, perhaps, sooner or later, the multilateral system will lose its attraction. Yet, the main question is whether the successful conclusion of the Doha Round will put a brake on the growth and prominence of FTAs. Perhaps this is unlikely. The reasons are clear. First, many FTAs have already been created and are operational. Second,

⁹⁹ See WTO Secretariat, *World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011).

¹⁰⁰ See World Trade Organization, *Some Figures on Regional Trade Agreements Notified to the GATT/WTO and in Force*, <http://rtais.wto.org/UI/publicsummarytable.aspx>.

¹⁰¹ See USTR, *Free Trade Agreements*, <http://www.ustr.gov/trade-agreements/free-trade-agreements>. The US has FTAs with 20 countries: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.

¹⁰² See European Commission, *The EU's Free Trade Agreements: Where Are We?*, http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf.

¹⁰³ See Ministry of Foreign Affairs of Japan, *Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA)*, <http://www.mofa.go.jp/policy/economy/fta/index.html>. Japan's FTAs are with ASEAN, Brunei, Chile, India, Indonesia, Malaysia, Mexico, Peru, Philippines, Singapore, Switzerland, Thailand, and Vietnam.

¹⁰⁴ See China FTA Network, *China Free Trade Agreements*, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml. China FTAs are with ASEAN, Chile, Costa Rica, Hong Kong, Macau, Pakistan, Peru, New-Zealand, and Singapore.

most of the leading trading nations have designed FTAs to secure their trading interests and are aggressively mainstreaming their FTAs ambitions. Third, if Australia, Brazil, Canada, China, EU, India, Japan, Russia, and the United States pursue FTAs as their kindred trading tools, it will ultimately derail the multilateral system itself.

FTAs pose limitations to multilateralism in a number of ways. First, they are discriminatory and cannot create global welfare. Second, they are more liberal than the multilateral system, though only selectively, and to limited sectors. No FTA is based on the principle of dismantling all trade barriers; so far, the EU is an exception. Often, in contradiction to the GATT Article XXIV, FTAs legitimise subtle trade restrictions even between the parties. Third, trade is one of the best means of addressing social, political, and economic issues, including poverty, growth, development, employment, investment, and international co-operation.¹⁰⁵ However, these issues cannot be fully addressed by the FTA modality of discriminatory trade. For these reasons, for a rules-based multilateral trading system, FTAs offer less than multilateralism. However, on the positive side, the very weaknesses of the FTAs might be reason enough to encourage countries to keep engaging in the multilateral mechanism under the WTO.

The failure of the Doha Round will call the credibility of the WTO into question. The multilateral trading system might be chipped away along with the misgivings of trade liberalisation and global welfare. Nevertheless, the existing rules of the WTO, inspired by the rules-based trading system, keep governing the international trade regime. Perhaps demand for the services of the Dispute Settlement Body will mount sharply. To regain credibility, the accession process might be relaxed, so that new members will join the WTO with less stringent conditions. Conceivably, the process of trade policies review by member countries will play a more important role in encouraging member countries to harmonize their domestic trade policies with the existing rules of the WTO in a way that will further trade liberalisation at a steady pace. After recovering from the financial crisis, countries will realize the need for promoting a multilateral system to a new extent.

On the whole, the WTO will learn lessons. Future negotiations will have to be reinforced by sufficient preparation, a clear working modality, effective methodology, and universally accepted guiding principles. Perhaps less ambitious,

¹⁰⁵See generally JAGDISH BHAGWATI ET AL., LECTURES ON INTERNATIONAL TRADE (2d ed. 1998); See also JAGDISH BHAGWATI, FREE TRADE TODAY (2001); TRADE AND DEVELOPMENT: ESSAYS IN HONOR OF JAGDISH BHAGWATI (V. N. Balasurbamramyam & David Greenway eds., 1996).

more practical and well-prepared negotiations will bring positive results in the future.

V. CONCLUSION

The EU occupies a central position in international trade negotiations and rules-making processes. With a share of 37.9 per cent of merchandise exports and 23.2 per cent of commercial service exports in the world, it holds a leading position in international trade. With 65 per cent of intra-regional merchandise trade, it also offers an important example of deeper regional integration.¹⁰⁶ Despite its leading position almost since the beginning of the GATT period, it has invariably taken a conservative position in terms of trade liberalisation, especially with regard to farm products. During the Uruguay Round the United States and the EU were at loggerheads, especially due to the EU's recalcitrant position on farm products. Finally, the pivotal Blair House accord opened the door for the conclusion of the UR; nevertheless, many important issues relating to farm trade liberalisation, including tariffs, export subsidy and domestic support were left unanswered.

The Doha Round was launched, in part, to address the issues unanswered by the UR. Despite being a development round, the Doha Round has been a victim of a lack of clear negotiation concepts and consensus building measures among the G7 countries, especially on the part of the EU. For example, early in 2005, the G20 countries had expressed their willingness to cut agricultural tariffs by 75 per cent. The United States had proposed to cut them by 90 percent. However, the EU perceived the American proposal to be implausible, as cutting tariffs by 90 per cent for its highly protected farm sector would be devastating. The EU observed "[e]ven the 75% cut proposed by the G20 would have a hugely damaging effect on preferential access and farm livelihoods in Europe and elsewhere."¹⁰⁷ Instead, the EU proposed a 60 per cent cut only to the highest tariff lines, which was not acceptable to other members of the WTO, especially to the developing countries. Since then, no significant progress has taken place. Instead, rather intensive exercises have been carried out to introduce more protectionist measures through the archaic modalities of exceptions.

As discussed earlier, the agriculture negotiations have been the major stumbling block in the Doha Round. For eleven years, on the issues of tariff reduction, domestic support, and export subsidy, the G7 countries have failed to

¹⁰⁶ See World Trade Organization, International Trade Statistics 2011, http://www.wto.org/english/res_e/statis_e/its2011_e/its11_toc_e.htm.

¹⁰⁷ See EU, Doha Round: EU Offer in Agricultural Negotiations, http://www.deljpn.ec.europa.eu/home/news_en_newsobj1432.php.

play a leadership role in effectively coming up with a clear and agreeable proposition. More specifically, because of the EU's recalcitrant position, the farm products negotiations have failed to address the expectations of developing countries, and in turn the developing countries are becoming reluctant to liberalise their merchandise sector. This is despite the fact that the negotiations are primarily aimed at reducing bound level, and not the tariffs that apply at the moment.

The Doha Round is the key litmus test of the WTO. However, from the earliest stages of selecting agenda items to the formation of modalities for negotiations, the Doha Round has been constantly contested with innumerable negotiation concepts chiefly aimed at driving the negotiations through the imposition of a number of derogations and divergences that have caused frequent derailments. With regular disappointing failures, including the mini-ministerial meetings, many critics, commentators and analysts have become sceptical about the success of the Doha Round. In the meantime, a number of different methodologies proposed by the Director General of the WTO have failed to provide a mantra to rescue the Doha Round. Politicians often lead international trade negotiations. Political regimes instruct negotiators to protect domestic political interests first. Either way, at the centre, politics motivates international trade negotiations. William Kerr rightly observes that while most politicians believe that open international markets are generally beneficial, they do not believe this would be true in all circumstances, and they certainly understand that politically important constituents could be harmed by international competition.¹⁰⁸ Ideally, politicians would like the flexibility to extend protection easily to their constituents when it is politically expedient. Readiness of the political leadership for global welfare and its determination for a common political will must constitute a foundation for any successful international trade negotiations. This is primarily lacking in the Doha Round.

Addressing the UN in September 2005, President George Bush, whose terms in office will mostly be remembered for their unilateralism and American exceptionalism in international affairs, became an unlikely poster boy for global welfare, when he declared that the United States was ready to eliminate all tariffs, subsidies and other trade barriers, if other nations were also ready to do so. President Bush claimed:

[T]he tariffs and subsidies and barriers [sic] isolate people of developing nations from the great opportunities of the 21st century. Today, I reiterate the challenge I have made before: We must work together in the Doha

¹⁰⁸ See William A. Kerr, *Is it Time to Re-think the WTO? A Return to the Basics*, 1 ESTEY CENTRE J. INT'L L. & TRADE POL'Y 100 (2000).

negotiations to eliminate agricultural subsidies that distort trade and stunt development, and to eliminate tariffs and other barriers to open markets for farmers around the world. Today I broaden the challenge by making this pledge: The United States is ready to eliminate all tariffs, subsidies and other barriers to the free flow of goods and services as other nations do the same. This is a key to overcoming poverty in the world's poorest nations. It's essential we promote prosperity and opportunity for all nations.¹⁰⁹

If the WTO member nations would agree to act in accordance with President Bush's lofty rhetoric, eliminate all tariff and non-tariff barriers and open their markets in a non-discriminatory basis, almost all trade problems would be addressed efficiently. Perhaps also there would be no need for thousands of pages of WTO Agreements. Possibly, the WTO Agreements could be squeezed into a simple agreement of a few pages. It would also end the need for decades-long trade negotiations. In a real sense, the international trade rules would be predictable, and promoting international trade for genuinely global welfare would strengthen a rules-based multilateral trading system.

All WTO members are responsible for the Doha Round, whether it succeeds or fails. No matter what direction the Doha Round goes in, the G7 countries should bear more responsibility as global trade leaders than other WTO members. Let us hope that by adopting measures for global welfare, the Doha Round, with new invigoration, will offer the fruits of trade liberalisation along with credible results at the Bali Ministerial in 2013,¹¹⁰ to the whole world.

¹⁰⁹ See George W. Bush, Address at a United Nations Plenary Meeting, New York (Sept. 14, 2005), <http://www.presidentialrhetoric.com/speeches/09.14.05.html>.

¹¹⁰ See *supra* note 37.