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## The Doha Development Dysfunction: Problems of the WTO Multilateral Trading System

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# THE DOHA DEVELOPMENT DYSFUNCTION: PROBLEMS OF THE WTO MULTILATERAL TRADING SYSTEM

ERIK M. DICKINSON<sup>†</sup>

## ABSTRACT:

This Note argues that WTO member nations should use bilateral and regional trade agreements to solve key issues facing the Doha Round negotiations in order to lower trade barriers and foster a climate of free trade necessary to resurrect the stalled Doha Round. Several problems including the WTO's lack of authority to enforce DSU decisions, protectionist trade measures, and the single undertaking have threatened the long term stability of the WTO's multilateral trading system. However, if bilateral and regional trade agreements were used to solve key issues, much like they were used by the United States in the 1970s, WTO member nations would have a legitimate opportunity to end the Doha Round stalemate once and for all.

I.	INTRODUCTION .....	230
II.	BACKGROUND.....	231
	A. <i>GATT 1947</i> .....	232
	B. <i>Tokyo Round &amp; Trade Act of 1974</i> .....	232
	1. Fast Track Approval Process .....	232
	2. Trade Agreements Act of 1979 .....	233
	C. <i>Uruguay Round</i> .....	233
	1. WTO & GATT 1994.....	234
	D. <i>Doha Round</i> .....	235
III.	BENEFITS OF THE WTO MULTILATERAL TRADING SYSTEM.....	236
IV.	PROBLEMS OF THE WTO MULTILATERAL TRADING SYSTEM.....	239
	A. <i>WTO's Lack of Authority to Enforce         DSU Decisions</i> .....	239
	1. URAA Supremacy Clause .....	240
	2. <i>Corus Staal BV v. United States             Department of Commerce</i> .....	240
	B. <i>Problems with Protectionist Measures</i> .....	241
	1. Anti-dumping laws.....	241
	2. Agricultural subsidies .....	242
	C. <i>The Single Undertaking</i> .....	248
V.	CONCLUSION.....	249

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## I. INTRODUCTION

The Doha Development Agenda (DDA), more commonly referred to as the Doha Round, was established in November of 2001 at the fourth World Trade Organization (WTO) Ministerial Conference held in Doha, Qatar.<sup>1</sup> The negotiations are often referred to as the Doha Round because the original “round” of negotiations took place in Doha, Qatar.<sup>2</sup> The objective of the Doha Round is to facilitate an atmosphere of trade liberalization and encourage development by lowering trade barriers around the world.<sup>3</sup> Specifically, as a development round, Doha seeks to “reduce or eliminate agricultural trade barriers”<sup>4</sup> in an effort to open trade and prosperity toward poor countries.<sup>5</sup> These goals came “in response to the urgency of the September 11, 2001 terrorist attacks and the UN Millennium Development Goals (MDGs).”<sup>6</sup> Unfortunately, after a decade of negotiations, the Doha Round has stalled and is now “the longest trade round in GATT/WTO history.”<sup>7</sup>

As a multilateral trade agreement, an agreement between many nations at one time,<sup>8</sup> a benefit of the Doha Round negotiations is that all nations are treated equally.<sup>9</sup> However, multilateral trade agreements are very complicated to negotiate<sup>10</sup> and with 149 member nations of the WTO participating in the Doha Round<sup>11</sup> it is easy to see how disagreements between nations are inevitable. Further complicating the possibility of member nations reaching an agreement is the single undertaking that stipulates that “virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed to separately.”<sup>12</sup> Essentially, “nothing is agreed until everything is agreed.” Therefore, in order to resurrect the stalled Doha Round, this Note recommends that WTO member nations, led by the United States, follow a two-step approach. First, remove the most pressing issues from the impractical single undertaking. Second, focus on solving these issues by reaching bilateral and regional agreements. By following this approach, WTO member nations will create the building blocks necessary to move towards successfully completing the Doha Round.

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<sup>1</sup> Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT’L L.J. 573, 577 (2010).

<sup>2</sup> *See id.* (discussing the history of the Doha Round).

<sup>3</sup> *Id.* at 574-75; *see also* Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China too*, 45 TEX. INT’L L.J. 1, 4 (2009).

<sup>4</sup> Cho, *supra* note 1, at 577.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 574-75.

<sup>7</sup> *Id.* at 574.

<sup>8</sup> *See* BLACK’S LAW DICTIONARY 471 (3d Pocket ed. 2006).

<sup>9</sup> *See* Kimberly Amadeo, *Multilateral Trade Agreements*, ABOUT.COM, <http://useconomy.about.com/od/glossary/g/multilateral.htm> (last visited Nov. 27, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *How the Negotiations are Organized*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm) (last visited Nov. 27, 2011).

Section II of this Note will provide a brief history of several key trade agreements leading up to the creation of the WTO and the Doha Round. Section III will discuss the benefits of the WTO trading system. Section IV highlights key areas where the WTO has failed to effectively facilitate an environment of free trade. One concern is the WTO's lack of authority to enforce panel or Appellate Body decisions<sup>13</sup> under the Dispute Settlement Understanding (DSU). Another concern is the crippling effect the single undertaking has on the negotiations of several highly technical and heavily debated issues. Finally, Section V of this Note concludes that using bilateral<sup>14</sup> and regional<sup>15</sup> agreements to solve key issues will lower trade barriers and foster a climate of free trade necessary to resurrect the Doha Round. This Note will consider several previously published scholarly opinions on the subject of trade liberalization, but will ultimately conclude that bilateral and regional trade agreements provide a workable approach to resolve the key issues that have stalled the Doha Round.

## II. BACKGROUND

At the end of World War II, in an effort to move away from the protectionist measures of the 1930s, 15 countries began talks to reduce and bind customs tariffs in an effort that would eventually produce the General Agreement on Tariffs and Trade (GATT).<sup>16</sup> Meanwhile, a group of 50 countries, including the initial 15, were negotiating to create an International Trade Organization (ITO) which would “extend beyond world trade disciplines, to include rules on employment, commodity agreements, restrictive business practices, international investment, and services.”<sup>17</sup> As negotiations on an ITO were ongoing, the GATT negotiators, now expanded to 23 countries, had reached an agreement that resulted in “a package of trade rules and 45,000 tariff concessions affecting \$10 billion of trade, about one fifth of the world's total.”<sup>18</sup> The GATT was signed on October 30, 1947 and came into effect on

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<sup>13</sup> Casey Reeder, *Zeroing in on Charming Betsy: How an Antidumping Controversy Threatens to Sink the Schooner*, 36 STETSON L. REV. 255, 265 (2006).

<sup>14</sup> Bilateral trade agreements are between two nations at a time. They are relatively easy to negotiate and provide the participating nations with favored trading status between each other. See Kimberly Amadeo *Bilateral Trade Agreement*, ABOUT.COM, <http://useconomy.about.com/od/glossary/g/bilateral.htm> (last visited Mar. 22, 2013).

<sup>15</sup> Regional trade agreements are between many nations from a specified area or region. Specifically, regional trade agreements facilitate free trade within a region by lifting trade barriers like export tariffs. See *Regional Trade Agreement*, EHOW, [http://www.ehow.com/facts\\_6850611\\_definition-regional-trade-agreements.html](http://www.ehow.com/facts_6850611_definition-regional-trade-agreements.html) (last visited Mar. 22, 2013).

<sup>16</sup> See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Oct. 23, 2011) [hereinafter GATT].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

January 1, 1948.<sup>19</sup> A short time later, in March of 1948, the ITO charter was agreed to.<sup>20</sup>

#### A. GATT 1947

The original plan was for GATT to operate only provisionally until the ITO could establish more comprehensive institutional agreements.<sup>21</sup> However, in 1950, when the United States government decided not to ratify the ITO charter, the ITO was “effectively dead.”<sup>22</sup> As a result, “the GATT became the only multilateral instrument governing international trade from 1948 until the WTO was established in 1995.”<sup>23</sup>

#### B. Tokyo Round & Trade Act of 1974

In order to continue GATT’s objective of reducing tariffs, 102 countries took part in the Tokyo Round which began in 1973.<sup>24</sup> In addition, some agreements involving non-tariff barriers came out of the negotiations.<sup>25</sup> The United States was authorized to participate in the Tokyo Round through The United States’ Trade Act of 1974 (Trade Act of 1974).<sup>26</sup> The Trade Act of 1974 also created procedures for approving resulting agreements.<sup>27</sup> Specifically, the Trade Act of 1974 “allowed Congress to work closely with the executive branch during the multilateral negotiations”<sup>28</sup> and “required a prompt congressional vote on each MTN [Multilateral Trade Negotiation] agreement without amendments—a key concession vital to Tokyo Round participation by U.S. trading partners, who had been frustrated by past congressional undermining of provisions agreed upon in negotiations.”<sup>29</sup>

##### 1. Fast Track Approval Process

Under section 102 of the Trade Act of 1974, the President was given trade agreement authority that “delegated power to the President to negotiate and enter into trade agreements on non-tariff barriers provided that Congress retained the final

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<sup>19</sup> See General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 5 U.N.T.S. 194.

<sup>20</sup> GATT, *supra* note 16.

<sup>21</sup> Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 NW. J. INT’L L. & BUS. 556, 562-63 (1996-97).

<sup>22</sup> GATT, *supra* note 16.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Peter D. Staple, *Implementing “Tokyo Round” Commitments: The New Injury Standard in Antidumping and Countervailing Duty Laws*, 32 STAN. L. REV. 1183, 1185 (1980).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

authority to approve the implementing legislation for these trade agreements.”<sup>30</sup> In addition, section 151 of the Trade Act of 1974 prevented Congress from amending provisions (of an agreement) separately and forced Congress to either approve or disapprove of the entire agreement as finalized by the participating countries.<sup>31</sup> Moreover, Congress only had 90 days to vote on the trade agreement.<sup>32</sup> This “expedited approval process” is sometimes referred to as the “fast-track approval process.”<sup>33</sup> This “fast-track” process meant that foreign governments could reach agreements with the U.S. without worrying that the U.S. Congress could alter certain aspects of the agreement.<sup>34</sup> Thus, the Trade Act of 1974 helped create greater liberalization of trade by giving foreign governments more confidence to negotiate and reach agreements with the U.S., as evidenced by the several trade agreements reached under “fast-track” authority.<sup>35</sup>

## 2. Trade Agreements Act of 1979

The Tokyo Round was enacted by the Trade Agreements Act of 1979.<sup>36</sup> Also, in an effort to revise U.S. laws according to the Tokyo Round GATT agreements, the Trade Agreements Act of 1979 reenacted the 1921 Antidumping Act as Title VII of the Tariff Act of 1930.<sup>37</sup> In addition, and perhaps more importantly, the Trade Agreements Act of 1979 expressly provides that “if there were any conflict between any trade agreement and any statute of the United States, then U.S. law would prevail.”<sup>38</sup> “An accompanying Senate report stated that “Congress adopted [these] procedures [Trade Act of 1974 and Trade Agreements Act of 1979] as a means to avoid conflict between the Congress and the President such as the dispute which occurred after the Kennedy Round.”<sup>39</sup>

### C. Uruguay Round

The Uruguay Round was launched in September 1986 with a negotiating agenda that covered several trade issues including new areas such as trade in services and

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<sup>30</sup> *The Impact of Trade Agreements: Effect of the Tokyo Round, U.S.-Israel FTA, U.S.-Canada FTA, NAFTA, and the Uruguay Round on the U.S. Economy*, No. TA-2111-1, USITC Pub. 3621 (Aug. 1, 2003) at 15 [hereinafter USITC].

<sup>31</sup> *Id.*

<sup>32</sup> See *Fast Track—Presidential Trade Negotiating Authority*, PUBLIC CITIZEN, <http://www.citizen.org/trade/fasttrack/> (last visited Nov. 27, 2011) [hereinafter *Fast Track*].

<sup>33</sup> USITC, *supra* note 30, at 15.

<sup>34</sup> *Fast Track*, *supra* note 32.

<sup>35</sup> USITC, *supra* note 30, at 15.

<sup>36</sup> *Id.* at 16-17.

<sup>37</sup> Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L & COMP. L. 299, 306 (2009).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

intellectual property as well as attempts to reform trade in agriculture and textiles.<sup>40</sup> In addition, every original GATT article was up for review, which made the Uruguay Round the single largest negotiating mandate on trade ever agreed to.<sup>41</sup> In December 1988, early agreements included a more efficient dispute settlement system, a trade policy review mechanism focused on reviewing “national trade policies and practices of GATT members,”<sup>42</sup> and, in an effort to assist developing countries, concessions were made on market access for tropical products.<sup>43</sup> In December 1991, the first draft of the “final act” was completed and became the basis for the final agreement.<sup>44</sup>

However, over the next two years disagreements arose over issues including “agriculture...services, market access, anti-dumping rules, and the proposed creation of a new institution.”<sup>45</sup> In November 1992, the U.S. and EU came to an agreement on agriculture in what is now referred to the “Blair House accord.”<sup>46</sup> In July 1993, the four major trading partners (U.S., EU, Canada and Japan) came to an agreement on market access in an effort to complete the Uruguay Round.<sup>47</sup> The Uruguay Round was successfully completed on April 15, 1994 when ministers from most of the 123 participating governments signed the Marrakesh Declaration.<sup>48</sup>

#### 1. WTO & GATT 1994

Possibly the most important result of the Uruguay Round was the creation of the World Trade Organization (WTO) which came into existence on January 1, 1995.<sup>49</sup> The new GATT (GATT 1994) was also created under the Uruguay Round and came into effect on January 1, 1995.<sup>50</sup> “The WTO replaced GATT as an international organization, but the General Agreement still exists as the WTO’s umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations.”<sup>51</sup> “Trade lawyers distinguish between GATT 1994, the updated parts of GATT, and GATT 1947, the original agreement which is still the heart of GATT 1994.”<sup>52</sup>

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<sup>40</sup> See *The Uruguay Round*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm) (last visited Oct. 23, 2011) [hereinafter Uruguay Round].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> USITC, *supra* note 30, at 34.

<sup>47</sup> *Id.*

<sup>48</sup> Uruguay Round, *supra* note 40.

<sup>49</sup> Robin Miller, J.D., Annotation, *Effect of World Trade Organization (WTO) Decisions Upon United States*, 17 A.L.R. FED. 2d 1 (2007).

<sup>50</sup> Marie Louise Hurabiell, *Protectionism versus Free Trade: Implementing the GATT Antidumping Agreement in the United States*, 16 U. PA. J. INT’L BUS. L. 567, 577 (1995).

<sup>51</sup> Uruguay Round, *supra* note 40.

<sup>52</sup> *Id.*

After completing the largest negotiating mandate on trade ever agreed to, many did not believe that another negotiation of the same magnitude would ever be possible.<sup>53</sup> “Yet, the Uruguay Round agreements contain timetables for new negotiations on a number of topics. And by 1996, some countries were openly calling for a new round early in the next century.”<sup>54</sup> While the response was mixed, “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 were incorporated into the Doha Development Agenda in late 2001.”<sup>55</sup>

#### D. Doha Round

The initial outlook on greater market access for developing countries was positive in 2001 when the Doha Round began. However, in 2009, due to the collapse of negotiations on agriculture and industrial tariffs between developed and developing countries<sup>56</sup> in 2003,<sup>57</sup> and the start of a global recession in 2008, the volume of global trade fell for the first time since World War II.<sup>58</sup> Due to the current fragile state of the global economy, a failure by the WTO member nations to resurrect the stalled Doha Round “would further discredit the WTO system and supply ample ammunition to politicians leaning toward protectionism.”<sup>59</sup> According to Marcus Wallenberg, “the lack of political will on the part of WTO members to resolve differences on agricultural subsidies and market access has put the entire round and the multilateral trading system in peril.”<sup>60</sup> Therefore, in order to avoid an era of global protectionism, member nations participating in the Doha Round negotiations need to narrow their focus to reaching regional and bilateral trade agreements that address the issues at the heart of the stalled Doha Round. These agreements would have the desired effect of lowering trade barriers and creating greater market access for developing countries.

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Daniel Pruzin, *WTO Chief Lamy Cites Talks’ ‘Paralysis’ as Members Admit Latest Doha Failure*, WTO REP. (July 27, 2011), <http://www.bloomberglaw.com/document/X1JJILR36Q80>.

<sup>57</sup> *Id.*

<sup>58</sup> Cho, *supra* note 1, at 589; *see also Open Markets Would Support Rebound in Trade in 2010*, INTERNATIONAL MONETARY FUND (Jan. 13, 2010), <http://www.imf.org/external/pubs/ft/survey/so/2010/SurveyartB.htm> (indicating that trade volume fell by 18 percent).

<sup>59</sup> Cho, *supra* note 1, at 589.

<sup>60</sup> *In quotes: The Doha deadlock*, BBC NEWS (July 26, 2006), <http://news.bbc.co.uk/2/hi/business/5216080.stm> (statements of Marcus Wallenberg, International Chamber of Commerce).

## III. BENEFITS OF THE WTO MULTILATERAL TRADING SYSTEM

The WTO provides a forum for its 153 member nations<sup>61</sup> to negotiate trade agreements and settle trade disputes.<sup>62</sup> In order to achieve the main objective which is to help “ensure that trade flows as smoothly, predictably and freely as possible,”<sup>63</sup> the WTO attempts to ensure that “individuals, companies and governments know what the trade rules are around the world.”<sup>64</sup> In doing so, the WTO believes that these entities will have the confidence necessary to actively participate in trade agreements that will facilitate “economic development and well-being.”<sup>65</sup>

According to the WTO, there are 10 benefits of the multilateral trading system.<sup>66</sup> First, the system promotes peace among the member nations.<sup>67</sup> The WTO believes that it has contributed to world peace by “helping trade to flow smoothly, and providing countries with a constructive and fair outlet for dealing with disputes over trade issues.”<sup>68</sup> It is commonplace throughout history for trade disputes to cause war.<sup>69</sup> Most notably, a trade war came about in the 1930s when “countries competed to raise trade barriers in order to protect domestic producers and retaliate against each other’s barriers. This worsened the Great Depression and eventually played a part in the outbreak of World War [II].”<sup>70</sup> In response, the GATT and the WTO were created as trading systems that would promote free trade and prevent protectionist measures that had led to war in the past.<sup>71</sup>

The second benefit of the WTO trading system is the dispute settlement understanding (DSU) which provides WTO member nations with a forum to handle disputes constructively.<sup>72</sup> When conflicts arise between member nations, the DSU allows for specially appointed independent experts to determine whether the accused party successfully followed the rules as set forth in the applicable WTO agreement.<sup>73</sup>

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<sup>61</sup> See *Who we are*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Oct. 23, 2011).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See *10 benefits of the WTO trading system*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b00\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b00_e.htm) (last visited Oct. 23, 2011).

<sup>67</sup> See *1. The system helps to keep the peace*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b01\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b01_e.htm) (last visited Oct. 23, 2011).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *2. The system allows disputes to be handled constructively*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b02\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b02_e.htm) (last visited Oct. 23, 2011).

<sup>73</sup> *Who we are*, *supra* note 61.

Third, the rules of the WTO multilateral trading system make life easier for member nations.<sup>74</sup> With the WTO, “a single set of rules applying to all members greatly simplifies the entire trade regime.”<sup>75</sup> In addition, smaller countries have increased bargaining power under multilateral agreements because all parties to the agreement have equal rights.<sup>76</sup> Therefore, when more powerful developed countries fail to follow the rules, smaller developing countries now have the ability to challenge the developed countries under the DSU.<sup>77</sup>

The fourth benefit of the WTO multilateral trading system is that free trade lowers the cost of living.<sup>78</sup> The bottom line is that while “protectionism is expensive,”<sup>79</sup> free trade benefits consumers and “we are all consumers.”<sup>80</sup> With 153 member nations taking part in the WTO system, which promotes free trade, trade barriers have been lowered.<sup>81</sup> The result has been “reduced costs of production...reduced prices of finished goods and services, and ultimately a lower cost of living.”<sup>82</sup> Fifth, the WTO trading system provides a greater variety of products and qualities to choose from.<sup>83</sup> Lower trade barriers provide greater market access to countries that export goods and services.<sup>84</sup> Once they arrive in the U.S., these imports give consumers more options. In addition, “[e]ven the quality of locally-produced goods can improve because of the competition from imports.”<sup>85</sup>

Sixth, the WTO trading system increases trade which leads to increased incomes.<sup>86</sup> “The WTO’s own estimates for the impact of the 1994 Uruguay Round

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<sup>74</sup> See 3. *A system based on rules rather than power makes life easier for all*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b03\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b03_e.htm) (last visited Oct. 23, 2011).

<sup>75</sup> *Id.*

<sup>76</sup> See Kimberly Amadeo, *Multilateral Trade Agreements*, ABOUT.COM, <http://useconomy.about.com/od/glossary/g/multilateral.htm> (last visited Nov. 27, 2011).

<sup>77</sup> *Id.*

<sup>78</sup> See 4. *Freer trade cuts the cost of living*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b04\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b04_e.htm) (last visited Oct. 23, 2011).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See 5. *It gives consumers more choice*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b05\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b05_e.htm) (last visited Oct. 23, 2011).

<sup>84</sup> See *What we stand for*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_stand\\_for\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm) (last visited Oct. 23, 2011).

<sup>85</sup> It gives consumers more choice, *supra* note 83.

<sup>86</sup> See 6. *Trade raises incomes*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b06\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b06_e.htm) (last visited Oct. 23, 2011).

trade deal were between \$109 billion and \$510 billion added to world income (depending on the assumptions of the calculations and allowing for margins of error).<sup>87</sup> Seventh, the WTO trading system creates free trade which in turn creates jobs by stimulating economic growth.<sup>88</sup> According to the WTO, “trade boosts economic growth, and that economic growth means more jobs.”<sup>89</sup> The eighth benefit of the WTO multilateral trading system is efficiency.<sup>90</sup> Through policies of non-discrimination, transparency, increased certainty and trade facilitation, the WTO system increases efficiency and cuts costs.<sup>91</sup>

The ninth benefit is that the WTO system shields governments from the narrow interests of lobbyists.<sup>92</sup> Lobbyists put pressure on the government to protect their respective industries from imports that are more competitively priced.<sup>93</sup> The resulting protection is often achieved by raising tariffs,<sup>94</sup> or providing government subsidies to the domestic industry.<sup>95</sup> However, this behavior “biases the economy against other sectors which shouldn’t be penalized,” for example, “if you protect your clothing industry, everyone else has to pay for more expensive clothes, which puts pressure on wages in all sectors.”<sup>96</sup> Lastly, the WTO trading system encourages governments to follow better policies while discouraging unwise practices such as corruption.<sup>97</sup> “For businesses, [this] means greater certainty and clarity about trading conditions. For governments it can often mean good discipline.”<sup>98</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *See* 7. *Trade stimulates economic growth, and that can be good news for employment* WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b07\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b07_e.htm) (last visited Oct. 23, 2011).

<sup>89</sup> *Id.*

<sup>90</sup> *See* 8. *The basic principles make the system economically more efficient, and they cut costs*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b08\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b08_e.htm) (last visited Oct. 23, 2011).

<sup>91</sup> *Id.*

<sup>92</sup> *See* 9. *The system shields governments from narrow interests*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b09\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b09_e.htm) (last visited Oct. 23, 2011).

<sup>93</sup> *Id.*

<sup>94</sup> *See* *Tariffs*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/tariffs\\_e/tariffs\\_e.htm](http://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm) (last visited Oct. 23, 2011).

<sup>95</sup> *See* *Anti-dumping, subsidies, safeguards: contingencies, etc.*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm8\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm) (last visited Oct. 23, 2011).

<sup>96</sup> The system shields governments from narrow interests, *supra* note 92.

<sup>97</sup> *See* 10. *The system encourages good government*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/10ben\\_e/10b10\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/10ben_e/10b10_e.htm) (last visited Oct. 23, 2011).

<sup>98</sup> *Id.*

Although there are many benefits of the WTO multilateral trading system, this Note will examine certain aspects of the system that appear to hinder the WTO's ability to ensure that "trade flows as smoothly, predictably and freely as possible."<sup>99</sup>

#### IV. PROBLEMS OF THE WTO MULTILATERAL TRADING SYSTEM

While the WTO as a whole provides many benefits to its member nations, the multilateral trading system often creates several problems that make reaching trade agreements very difficult.<sup>100</sup> As evidenced by the stalled Doha Round, two of the most pressing problems are the WTO's lack of authority to enforce DSU decisions and the crippling effect of the single undertaking.

##### A. WTO's Lack of Authority to Enforce DSU Decisions

As one author points out, "perhaps the biggest challenge presented by...dispute settlement structures is the utter lack of enforcement power."<sup>101</sup> The DSU oversees the dispute resolution process for the WTO member nations.<sup>102</sup> First, a three-member panel<sup>103</sup> of specially appointed independent experts is assembled.<sup>104</sup> When hearing a case the panel must make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."<sup>105</sup> Next, after the panel has released their report, the adverse party may appeal to the Appellate Body.<sup>106</sup> The Appellate Body is made up of seven members but only three members hear a particular case.<sup>107</sup> The DSU panels do not interpret or apply the domestic law of any member nation.<sup>108</sup> Instead, DSU panels determine whether a particular agency of a certain WTO member nation acted in a manner that is inconsistent with the applicable trade agreements.<sup>109</sup> Essentially, the DSU panels and Appellate Body decisions are a "non-binding interpretation of an international agreement."<sup>110</sup> As a result, it is not uncommon for "major powers...[to]

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<sup>99</sup> Who we are, *supra* note 61.

<sup>100</sup> Multilateral Trade Agreements, *supra* note 76.

<sup>101</sup> Reeder, *supra* note 13, at 286.

<sup>102</sup> *Id.* at 264.

<sup>103</sup> *Id.* at 265.

<sup>104</sup> See *What we do*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/what\\_we\\_do\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm) (last visited May 13, 2013).

<sup>105</sup> See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm) (last visited Oct. 23, 2011).

<sup>106</sup> Reeder, *supra* note 13, at 265.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Filicia Davenport, *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard with Respect to WTO Agreements*, 15 FED. CIRCUIT B.J. 279, 309 (2005) [hereinafter Davenport]; see also Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen*

ignore...dispute settlement decisions which do not comport with their economic interests.”<sup>111</sup>

### 1. URAA Supremacy Clause

In 1994, when the WTO was formed out of the Uruguay Round Agreements, Congress was reluctant to cede any authority to the WTO in its new capacity as an international law making body.<sup>112</sup> In order to “ensure the primacy of United States law,”<sup>113</sup> the Uruguay Round Agreements Act (URAA) “included as its first provision a section best described as the URAA Supremacy Clause.”<sup>114</sup> While this author understands that DSU decisions are not binding on other countries for reasons other than those explored here, this section focuses on the United States as one example of how a WTO member nation may ensure that DSU decisions are nothing more than non-binding interpretations of an international agreement.<sup>115</sup>

### 2. *Corus Staal BV v. United States Department of Commerce*

In 2005, the United States Court of Appeals for the Federal Circuit in *Corus Staal BV v. United States Department of Commerce*<sup>116</sup> (*Corus Staal II*) recognized the effect of the URAA Supremacy Clause.<sup>117</sup> Specifically, in *Corus Staal II*, the court determined that WTO decisions are “not binding on the United States, much less this Court.”<sup>118</sup> Moreover, “no provision of any of the Uruguay Round Agreements..., nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”<sup>119</sup>

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from *India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *Bed Linen*]; see also *Corus Staal BV v. U.S. Dept. of Com.*, 27 C.I.T. 388 (2003), modified, 27 C.I.T. 1180 (2003), 27 C.I.T. 1469 (2003), and 395 F.3d 1343 (Fed. Cir. 2005).

<sup>111</sup> Michael Patrick Tkacik, *Post-Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weaknesses, and Causes for Concern*, 9 INT’L. LEGAL PERSP. 169, 169 (1997).

<sup>112</sup> Senator Robert Dole, advocating in Congressional hearings for the passage of the URAA stated: “Our sovereignty is not threatened by the WTO. The WTO has no power to force the United States to do anything. They cannot make us do anything. It is not a world power. If the WTO finds that U.S. law does not square with the obligations we have assumed under the agreement, we remain totally free to disregard that finding. It does not change U.S. law.” Kevin P. Cummins, *Trade Secrets: How the Charming Betsy Canon may do more to Weaken U.S. Environmental Laws than the WTO’s Trade Rules*, 12 Fordham Envtl. L.J. 141 (2000) [hereinafter *Trade Secrets*].

<sup>113</sup> See Davenport, *supra* note 110, at 288.

<sup>114</sup> *Id.* (citing 19 U.S.C. § 3512 (2000)). Section 3512 is the third provision in the URAA, following § 3501 (“Definitions” and § 3511 (“Approval and entry into force of Uruguay Round Agreements”). 19 U.S.C. §§ 3501, 3511.

<sup>115</sup> See Reeder, *supra* note 13, at 282-83.

<sup>116</sup> See *Corus Staal II*, 395 F.3d at 1347-49.

<sup>117</sup> See 19 U.S.C. § 3512(a)(1).

<sup>118</sup> See *Corus Staal II*, 395 F.3d at 1348 (internal citation omitted).

<sup>119</sup> *Id.* (quoting 19 U.S.C. § 3512(a)(1)).

As a result, when WTO agreements or DSU decisions are inconsistent with United States law, it is the responsibility of Congress, not the courts to either ignore the DSU decisions as inconsistent with the interests of the United States or honor our trade agreements by incorporating the DSU decisions into the applicable statutes.<sup>120</sup> However, with constant turnover of members and party majorities in Congress, incorporating DSU decisions into United States law may be a difficult feat to accomplish. As Senator Robert Dole stated, “If the WTO finds that U.S. law does not square with the obligations we have assumed under the agreement, we remain totally free to disregard that finding. It does not change U.S. law.”<sup>121</sup> Moreover, external pressure from lobbyists and special interest groups, that may oppose opening their markets to foreign competition, may make deferring to international pressures even less appealing.

### B. Problems with Protectionist Measures

While the “URAA Supremacy Clause” provides Congress with the ability to “veto” any unintended implications of an agreement, many negative consequences of the clause remain. One such consequence is the inability of the DSU to effectively curtail protectionist measures like anti-dumping laws, agricultural subsidies and zeroing.

#### 1. Anti-dumping laws

The source of domestic anti-dumping laws in the United States is the Tariff Act of 1930.<sup>122</sup> Ultimately, dumping is “the sale or likely sale of goods at less than fair value.”<sup>123</sup> The United States Department of Commerce (DOC) calculates a dumping margin in order to determine whether a product is being dumped on the U.S. market.<sup>124</sup> The dumping margin is “the difference between the prices for the merchandise in the exporter’s home market and the importing country.”<sup>125</sup> Therefore, under U.S. law, “dumping occurs when a product is sold in the U.S. for less than it is sold for in its home market, or if it has no home market, for less than it’s otherwise determined ‘normal value.’”<sup>126</sup>

One argument for using anti-dumping laws is that they are necessary to prevent predatory dumping. For example, by selling a product at a very low price in a market, a foreign producer can drive out its domestic competition and then raise its originally low price to a much higher price with impunity.<sup>127</sup> Under U.S. law, the government may take action against dumping if: “(1) it causes or threatens to cause

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<sup>120</sup> See *id.* at 1348-49.

<sup>121</sup> See Trade Secrets, *supra* note 112, at 141.

<sup>122</sup> 19 U.S.C. §§ 1202-1683g (2000).

<sup>123</sup> 19 U.S.C. § 1677(34).

<sup>124</sup> Reeder, *supra* note 13, at 256.

<sup>125</sup> Raj Bhala, *Rethinking Antidumping Law*, 29 GEO. WASH. J. INT’L L. & ECON. 1, 10 (1995).

<sup>126</sup> Reeder, *supra* note 13, at 256-57.

<sup>127</sup> See Frances Chang, *Arguing Both Sides: Positional Conflicts of Interest in Antidumping Proceedings*, 19 GEO. J. LEG. ETHICS 583, 584-85 (2006).

material injury to an established industry in the importing country; or (2) it materially retards the establishment of an industry in that country.”<sup>128</sup> As a result, the country harmed by the dumping “may react to dumping by imposing an antidumping duty on the dumped merchandise in the amount of the dumping margin.”<sup>129</sup>

Although anti-dumping laws may seem necessary to facilitate an environment of fair trade, in application, anti-dumping laws can rarely distinguish between predatory and other forms of dumping, leading some commentators to argue that anti-dumping laws are “economically inefficient.”<sup>130</sup>

## 2. Agricultural subsidies

In 2008, the Doha Round seemed to be heading toward successful compromise on several key issues when talks led by WTO Director-General Pascal Lamy created a proposal focusing on the most recent draft modalities on agriculture and non-agricultural market access (NAMA).<sup>131</sup> Yet, in 2009, a major stumbling block occurred when perceptions arose that the U.S. was unwilling to commit to the December 2008 agricultural and (NAMA) draft texts.<sup>132</sup> As a result, the goal to lower trade barriers around the world has been stalled due to differences between the developed world (U.S., EU and Japan) and emerging economies such as India, Brazil and China.<sup>133</sup> The main disagreement is on the extent of liberalization of trade in industrial goods, agriculture, and services.<sup>134</sup> Specifically, developing countries want future negotiations to proceed from the agriculture and NAMA texts of 2008.<sup>135</sup> However, U.S. industry strongly opposes proceeding from those texts.<sup>136</sup>

Nowhere is the tension between the critics and the proponents of the existing multilateral trading system more evident than in matters of agricultural policy. Indeed, agriculture was one of the most contentious issues in the recent WTO Ministerial meeting in Qatar and has been one of the most controversial issues in the multilateral trade negotiations for the past fifty years. The controversy stems from the fact that the rules governing agricultural trade, as embodied in the WTO Agreement on Agriculture, are perceived as allowing the United States and the European

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<sup>128</sup> Bhala, *supra* note 125, at 9-10.

<sup>129</sup> *Id.* at 10.

<sup>130</sup> See Alice Vacek-Aranda, *Sugar Wars: Dispute Settlement under NAFTA and the WTO as Seen through the Lens of the HFCS Case, and its effects on U.S.-Mexican Relations*, 12 TEX. HISPANIC J.L. & POL’Y 121, 128 (2006).

<sup>131</sup> Cho, *supra* note 1, at 581.

<sup>132</sup> Pablo M. Bentes et al., *International Trade*, 44 INT’L LAW. 93, 94 (2010).

<sup>133</sup> Amrit Dhillon, *WTO Chief Lamy Visits India in Bid to Jump-Start Stalled Doha Round*, INT’L TRADE REP. (Sept. 8, 2011), <http://www.bloomberglaw.com/document/XAN3MFG5GVG0>.

<sup>134</sup> *Id.*

<sup>135</sup> Bentes, *supra* note 132, at 94.

<sup>136</sup> *Id.*

Union to continue to subsidize agricultural production and to dump surpluses on world markets at artificially depressed prices while requiring developing countries to open up their markets to ruinous and unfair competition from industrialized country producers.<sup>137</sup>

While the central theme of the Doha Round is to use free trade in an effort to promote economic development and alleviate poverty,<sup>138</sup> several problems stemming from the WTO agreement on agriculture (WAA),<sup>139</sup> which came about during the Uruguay Round negotiations,<sup>140</sup> have led to the Doha Round's most difficult impasse to date. Many problems came directly out of the WAA's negotiation process. Specifically, the negotiation process was greatly influenced by the intense rivalry between the United States and the European Union for world agricultural markets.<sup>141</sup> As a result of this rivalry, several developing countries were essentially left out of the negotiating process.<sup>142</sup> In addition, while the WAA was intended to create greater market access for developing countries, the developed countries commandeered the negotiations in an effort to further stack the deck in their favor. Therefore, while the WAA on its face appears to create greater market access for developing countries, the WAA allows developed countries to use several loopholes in order to maintain the status quo.

There are three major provisions of the WAA that "obligate" WTO members to liberalize agricultural trade.<sup>143</sup> First, the WAA attempts to achieve greater market access by requiring that all non-tariff barriers be converted into tariffs and then requiring the binding and reduction of those tariffs.<sup>144</sup> Second, the WAA requires that both the volume of subsidized exports and the expenditures on subsidized

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<sup>137</sup> Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 437-38 (2002) [hereinafter Gonzalez].

<sup>138</sup> *Id.* at 435.

<sup>139</sup> While the provisions of the WTO Agreement on Agriculture being discussed in this note have already run their course and additional legislation has been passed by the United States congress, these provisions remain important because they have created many of the problems currently plaguing the Doha Round.

<sup>140</sup> Gonzalez, *supra* note 137, at 449.

<sup>141</sup> Thomas J. Schoenbaum, *Agricultural Trade Wars: A Threat to the GATT and Global Free Trade*, in GATT AND TRADE LIBERALIZATION IN AGRICULTURE 72 (Masayosi Homna et al. eds., 1993).

<sup>142</sup> Gonzalez, *supra* note 137, at 449.

<sup>143</sup> *Id.* at 452.

<sup>144</sup> See Dale E. McNeil, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41, 61 (2000); see also Kevin J. Brosch, *The Uruguay Round Agreement on Agriculture in the GATT*, in THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT 875-76 (H. Applebaum & L. Schlitt eds., 1995). The tariff reduction and other market access obligations are spelled out in individual country schedules rather than in the body of the Agreement. See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 (available at [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag.pdf](http://www.wto.org/english/docs_e/legal_e/14-ag.pdf)).

exports be reduced.<sup>145</sup> Third, the WAA “requires the reduction of trade-distorting domestic subsidies.”<sup>146</sup> However, as previously mentioned, due to the negotiations of the WAA being a one sided affair, greatly favoring developed countries maintaining the status-quo, many of these provisions have failed to create economic development and alleviate poverty in developing and least developed countries.<sup>147</sup>

Under the first WAA provision, over a period of several years, the tariffs must be bound and reduced to below 1986-88 base levels.<sup>148</sup> The exact amount of tariff reduction for each member to the agreement is specified in each country’s individual tariff schedule.<sup>149</sup> However, developed countries must reduce bound tariffs by an average of 36 percent over 6 years (1995-2000), at a minimum rate of 15 percent for each product line.<sup>150</sup> In addition, developing countries only need to reduce bound tariffs by an average of 24 percent over 10 years (1995-2004), at a minimum rate of 10 percent for each product line.<sup>151</sup> Moreover, while least developed countries are also subject to converting non-tariffs into tariffs and then binding those tariffs, “[l]east developed countries...are not subject to tariff reduction.”<sup>152</sup> Lastly, the WAA does not allow WTO members to maintain or revert back to the non-tariff barriers that were required to be converted into tariffs.<sup>153</sup>

While the aforementioned market access provision of the WAA appears to level the playing field for developing countries, developed countries, at the insistence of the European Union, were able to insert a safeguard provision into the agreement.<sup>154</sup> This special safeguard provision allows for the imposition of an additional duty on a product. However, that additional duty is subject to conversion from a non-tariff into a tariff if there is an import surge or in the event of particularly low prices, as compared with 1986-88 levels.<sup>155</sup> An example is, “if the world market price for a particular commodity drops by more than 10 percent below the 1986-88 reference price (the trigger price), an additional duty may be applied to maintain price

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<sup>145</sup> Gonzalez, *supra* note 137, at 452-53.

<sup>146</sup> *Id.* at 453.

<sup>147</sup> *Id.* at 459-60.

<sup>148</sup> See Ian Sturgess, *The Liberalisation Process in International Agricultural Trade: Market Access and Export Subsidies*, in NEGOTIATING THE FUTURE OF AGRICULTURAL POLICIES: AGRICULTURAL TRADE AND THE MILLENNIUM WTO ROUND 135, 144-47 (Sanoussi Bilal & Pavlos Pezaros eds., 2000).

<sup>149</sup> See Jeffrey J. Steinle, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 346 (1995).

<sup>150</sup> Sturgess, *supra* note 148, at 147; see also Steinle, *supra* note 149, at 346.

<sup>151</sup> Gonzalez, *supra* note 137, at 453-54; see also Agreement on Agriculture, *supra* note 144, at art. 15:2.

<sup>152</sup> Gonzalez, *supra* note 137, at 454; see also Agreement on Agriculture, *supra* note 144, at art. 15:2.

<sup>153</sup> See Agreement on Agriculture, *supra* note 144, at art. 4.

<sup>154</sup> Gonzalez, *supra* note 137, at 454; see also Sturgess, *supra* note 148, at 147.

<sup>155</sup> Gonzalez, *supra* note 137, at 454; see also Agreement on Agriculture, *supra* note 144, at art. 5.

stability.”<sup>156</sup> Therefore, because the additional duty rises as the world market price for that commodity drops, this provision is similar to the variable levy system used by the European Union because it protects domestic markets from cheaper foreign imports.<sup>157</sup>

Another practice used by developed countries to evade the underlying purpose of the WAA’s requirements is referred to as “dirty tariffication.”<sup>158</sup> Dirty tariffication is often used by “setting of tariff equivalents for non-tariff barriers at an excessively high level.”<sup>159</sup> Moreover, “[d]irty tariffication nullified the benefits of tariff bindings and tariff reduction by creating tariff equivalents, to which subsequent reductions apply, that were at times more import-restrictive than the non-tariff barriers they replaced.”<sup>160</sup> Worse still, in the situations where dirty tariffication resulted in greater levels of protectionist behavior than the old system allowed, the highest tariffs were for exactly the types of products that are of particular interest to developing countries.<sup>161</sup> Thus, the safeguard provision and the use of “dirty tariffication” allow many developed countries to continue using the very same protectionist practices that the WAA intended to prevent.

Under the second WAA provision, both the volume of subsidized exports and the expenditures on subsidized exports must be reduced.<sup>162</sup> Specifically, developed countries are required to lower their expenditures for export subsidies by 36 percent and lower their volume of subsidized exports by 21 percent over 6 years (1995-2000) based on the 1986-88 base period.<sup>163</sup> In addition, developing countries are required to cut spending on export subsidies by 24 percent and lower their amount of subsidized exports by 14 percent over 10 years (1995-2004).<sup>164</sup> Moreover, while least developed countries are not allowed to increase subsidized exports, least developed countries do not have to reduce export subsidies.<sup>165</sup> Lastly, a key distinction between the first and second WAA provisions is that the second WAA provision applies on a

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<sup>156</sup> Gonzalez, *supra* note 137, at 454; *see also* Sturgess, *supra* note 148, at 147.

<sup>157</sup> Gonzalez, *supra* note 137, at 454.

<sup>158</sup> *Id.* at 460.

<sup>159</sup> *Id.*; *see also* Sturgess, *supra* note 148, at 148-49.

<sup>160</sup> Gonzalez, *supra* note 137, at 460.

<sup>161</sup> *Id.* at 461; *see also* United Nations Conference on Trade & Development, *The Post-Uruguay Round Tariff Environment For Developing Country Exports: Tariff Peaks and Tariff Escalation*, UN. Doc. TD/B/COM.1/14/Rev. 1, 4-6 (Jan. 29, 2000) (explaining that developed countries maintained tariff peaks as high as 350-900 percent ad valorem on certain developing country food exports).

<sup>162</sup> Gonzalez, *supra* note 137, at 452-53.

<sup>163</sup> *Id.* at 455.

<sup>164</sup> *Id.* at 455; *see also* Sturgess, *supra* note 148, at 148; Agreement on Agriculture, *supra* note 144, at art. 15:2. The Agreement also exempts developing countries from the obligation to reduce marketing subsidies, such as international and internal transport and freight charges, provided that these are not used to circumvent subsidy reduction obligations. Agreement on Agriculture, *supra* note 144, at art. 9:4.

<sup>165</sup> *See* Sturgess, *supra* note 148, at 148; *see also* Agreement on Agriculture, *supra* note 144, at art. 15:2.

commodity-by-commodity basis, unlike the first WAA provision which applied on the basis of an industry average.<sup>166</sup>

Once again, much like the first WAA provision, there is a loophole under the second WAA provision. Under the second WAA provision, countries are allowed to combine commodities in order to comply with the export subsidy reduction requirements.<sup>167</sup> Basically, a country could treat wheat, wheat flour and other wheat based commodities as a single group.<sup>168</sup> As a result, a country which subsidized wheat and wheat based products during the base period would be able to shift subsidies among the wheat based products so long as the country meets the required export reduction with regards to wheat based commodities in the aggregate.<sup>169</sup> Essentially, the country would create an unfair advantage.

The unfair advantage is gained because the wheat producing country could, by combining several like commodities into one group and then shifting the export subsidies among some but not all wheat commodities, continue to be overly protectionist as to their most profitable and competitive wheat export while at the same time only reducing export subsidies on their menial/uncompetitive wheat exports. In addition, using export subsidies, like the example above, is “heavily concentrated in a handful of countries.”<sup>170</sup> For example, “only 25 out of 135 countries have the right under the Agreement to subsidize exports, and three exporting countries account for 93 percent of wheat subsidies, 80 percent of beef subsidies, and 94 percent of butter subsidies.”<sup>171</sup> As supported throughout this section, the second WAA provision, like the first, has failed to level the playing field for developing and least developed countries in a meaningful way.

Finally, under the third WAA provision, WTO member nations must reduce domestic subsidies based on an Aggregate Measure of Support (AMS).<sup>172</sup> For each WTO member, the Base Total AMS is a “quantification” of all domestic agricultural subsidies during the time period of 1986-1988.<sup>173</sup> Developed countries were to reduce their Base Total AMS by 20 percent over 6 years (1995-2000) while developing countries were to reduce their Base Total AMS by 13.3 percent over 10 years.<sup>174</sup> Whether or not a member nation complies is measured by the Current Total AMS, which is the level of support actually provided in a given year.<sup>175</sup> An important distinction between the Base Total AMS and the Current Total AMS is that “[w]hile the Base Total AMS (the benchmark from which reductions are made)

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<sup>166</sup> See Agreement on Agriculture, *supra* note 144, at art. 9; see also Sturgess, *supra* note 148, at 147-48.

<sup>167</sup> Gonzalez, *supra* note 137, at 455.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 455-56.

<sup>170</sup> *Id.* at 464.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 456; see also Agreement on Agriculture, *supra* note 144, at art. 6:1.

<sup>173</sup> Gonzalez, *supra* note 137, at 456-57; see also Agreement on Agriculture, *supra* note 144, at art. 1(h)(i), Annex 3.

<sup>174</sup> Gonzalez, *supra* note 137, at 457.

<sup>175</sup> See Agreement on Agriculture, *supra* note 144, at arts. 1(h)(ii), 6:3.

is a comprehensive quantification of domestic subsidies during the base period, the Current Total AMS (the standard used to measure compliance) only includes the subsidies deemed to be most trade-distorting (so-called “amber box” policies).<sup>176</sup>

There are two important categories of domestic support that are excluded from the Current Total AMS.<sup>177</sup> First, for developed countries, “the Current Total AMS excludes products where the amount of support is less than 5 percent of the total annual value of production.”<sup>178</sup> However, for developing countries, the Current Total AMS excludes products where the amount of support is less than 10 percent of the total annual value of production.<sup>179</sup> Second, “the Current Total AMS excludes direct payments under production limiting programs (“blue box” exemption).”<sup>180</sup> Examples include U.S. deficiency payments and E.U. compensation payments. Both of these payments, which go to farmers, give farmers the difference between a government target price for agricultural commodities and the corresponding market price.<sup>181</sup> These “blue box” exemptions are extremely unfair to developing and least developed countries because including U.S. deficiency payments and E.U. compensation payments in the calculation of the Base Total AMS while failing to exclude them from the Current Total AMS basically gives the U.S. and the E.U. credit for domestic subsidy reductions they never made.<sup>182</sup>

Moreover, “The exclusion of “blue box” subsidies from the Current Total AMS undermined the effectiveness of the [WAA’s] subsidy reduction obligations by excluding precisely the types of domestic support most utilized by developed countries, namely U.S. deficiency payments and E.U. compensation payments.”<sup>183</sup> For example, in the United States, during 2002, congress passed a law that was projected to increase subsidy payments by 74 percent over 10 years.<sup>184</sup> Lastly, under the WAA, certain “green box” support measures, such as income support to farmers decoupled from production, income safety-net programs, and crop insurance programs, are not required to be reduced.<sup>185</sup>

Under the WAA, which required countries to reduce domestic subsidies in order to level the playing field, developed countries were able to use several trade-

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<sup>176</sup> See Gonzalez, *supra* note 137, at 457; see also McNiel, *supra* note 144, at 57; Agreement on Agriculture, *supra* note 144, at art. 6:5.

<sup>177</sup> Gonzalez, *supra* note 137, at 457.

<sup>178</sup> *Id.*, see also Agreement on Agriculture, *supra* note 144, at art. 6:4.

<sup>179</sup> Gonzalez, *supra* note 137, at 457.

<sup>180</sup> *Id.* at 457; see also McNiel, *supra* note 144, at 57; Agreement on Agriculture, *supra* note 144, at art. 6:5 (this exception applies if the payments are based on fixed area and yields and are made on 85 percent or less of the base level of production or are livestock payments based on a fixed number of head).

<sup>181</sup> Gonzalez, *supra* note 137, at 457; see also McNiel, *supra* note 144, at 56-57.

<sup>182</sup> Gonzalez, *supra* note 137, at 457.

<sup>183</sup> *Id.*

<sup>184</sup> OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006 61 (2005).

<sup>185</sup> Gonzalez, *supra* note 137, at 458; see also Agreement on Agriculture, *supra* note 144, at Annex 2.

distorting domestic subsidies (through the use of several exemptions) while developing countries were prevented from using similar practices.<sup>186</sup> As a result, for developing countries, the WAA has been a wolf in sheep's clothing causing a great deal of the distrust that has led to the Doha Round stalemate.<sup>187</sup>

With many anti-dumping laws failing to accurately target predatory dumping<sup>188</sup> and agricultural subsidies that create a greater rift between developed and developing countries, resulting in the increase of trade disputes dealing with protectionist trade measures,<sup>189</sup> the WTO has been unable to solve these disputes because it lacks the authority to enforce the relevant DSU decisions.<sup>190</sup>

Despite the proliferation of international trade agreements and the accompanying development of sophisticated structures of international dispute resolution, if nations have no intention of being bound by the terms of these agreements, the language of 'free and fair trade' is no more than lofty rhetoric.<sup>191</sup>

### C. The Single Undertaking

In the midst of a world recession, developed countries like the United States have little incentive to provide greater market access to developing countries. Moreover, without reciprocal concessions by emerging economies like China, Brazil and India, developed countries become even more resistant to the idea of providing developing countries with greater market access. Further complicating the possibility of greater market access to developing countries is the single undertaking. To many, the single undertaking is "a key element" to negotiations under the WTO multilateral trading system.<sup>192</sup> Under the single undertaking, "[v]irtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed [to] separately."<sup>193</sup> Essentially, "[n]othing is agreed until everything is agreed."<sup>194</sup>

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<sup>186</sup> Gonzalez, *supra* note 137, at 465-66.

<sup>187</sup> Dhillon, *supra* note 133.

<sup>188</sup> *Id.*

<sup>189</sup> See *Current status of disputes*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) (last visited Oct. 23, 2011) (showing that 20 disputes involving protectionist trade measures are currently pending); see also *Index of dispute issues, Zeroing*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm) (last visited Oct. 23, 2011) (showing the increase of trade disputes dealing with protectionist measures since 1998).

<sup>190</sup> See Chad P. Brown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEG. STUD. 515, 551-52 (2005).

<sup>191</sup> Reeder, *supra* note 13, at 290.

<sup>192</sup> Sonia E. Rolland, *Redesigning the Negotiation Process at the WTO*, 13 J. INT'L ECON. L. 65, 65 (2010), available at <http://infojustice.org/download/positive%20proposals/academic/rolland%202010.pdf>.

<sup>193</sup> See *How the negotiations are organized*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dda\\_e/work\\_organ\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm) (last visited Oct. 23, 2011).

<sup>194</sup> *Id.*

Those in favor of the WTO multilateral trading system believe the single undertaking gives developing countries increased bargaining power because, under the multilateral system, all parties to an agreement have equal rights.<sup>195</sup> However, due to the “diametrically opposed perceptions of the Round between developed and developing countries,”<sup>196</sup> the single undertaking has failed to bring WTO member nations together. Instead, as one commentator opines, “[i]t may well be that the core underpinning of the negotiations, the single undertaking, has become an obstructing, rather than facilitating, factor.”<sup>197</sup>

## V. CONCLUSION

As evidenced by the stalled Doha Round, certain aspects of the WTO multilateral trading system are problematic. With the Doha Round entering its eleventh year of negotiations it is time for WTO member nations to ditch the status quo. In order to make meaningful progress towards an agreement, the member nations involved in the Doha Round negotiations should abandon the impractical single undertaking and focus on solving the most pressing issues by reaching bilateral and regional agreements. In 1980, several nations attempted to open a round of multilateral trade negotiations.<sup>198</sup> However, in 1982, much like present day, many nations were reluctant to engage in trade liberalization due to a world recession, high unemployment and debt problems.<sup>199</sup> As a result, the United States shifted its focus to reaching bilateral and regional trade agreements in order to achieve trade liberalization.<sup>200</sup>

Recently, the European Council announced that it would be moving towards more bilateral and regional agreements.<sup>201</sup> Specifically, the European Council stated:

Whilst strengthening and widening the multilateral system and concluding the WTO Doha Round remain crucial objectives given their expected benefits in terms of growth and job creation, renewed emphasis should be given to bilateral and regional agreements, particularly with strategic partners and those whose markets are expanding at a significant pace. Such efforts should in particular be geared to the removal of trade barriers, better market access, [etc.]<sup>202</sup>

While the commitment by the European Council is a step in the right direction, in order to resolve the key issues that have stalled the Doha Round, the United States and other key members of the WTO should remove the most pressing issues from the impractical single undertaking and attempt to solve them by using bilateral and regional agreements. In doing so, developed countries may finally deliver on their

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<sup>195</sup> Multilateral Trade Agreements, *supra* note 76.

<sup>196</sup> Cho, *supra* note 1, at 573.

<sup>197</sup> Rolland, *supra* note 192, at 67.

<sup>198</sup> USITC, *supra* note 30, at 17.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Conclusions (EC) EUCO 52/1/11 (Nov. 30, 2011).

<sup>202</sup> *Id.* at 6.

eleven-year-old promise to lower trade barriers and create greater market access for developing and least developed countries.